No. 09-992

In the Supreme Court of the United States

IBRAHIM PARLAK, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals erred by not remanding to the Board of Immigration Appeals when the Board correctly applied the proper legal standard in finding petitioner ineligible for withholding of removal because of the "persecutor bar," 8 U.S.C. 1231(b)(3)(B)(i), but, at one point in its order, articulated that standard in a "vague and unhelpful" way.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes and regulations:

Statutes and regulations—Continued: Page

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-46a) is reported at 578 F.3d 457. The decisions of the Board of Immigration Appeals (Pet. App. 55a-84a) and the immigration judge (Pet. App. 85a-175a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 24, 2009. A petition for rehearing was denied on November 24, 2009 (Pet. App. 47a-54a). The petition for a writ of certiorari was filed on February 22, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. The Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, provides that the Attorney Gener-

al may, in his discretion, grant asylum to an alien who demonstrates that he is a "refugee." 8 U.S.C. 1158(b)(1)(A). A "refugee" is an alien who is unwilling or unable to return to his country of origin "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). An applicant bears the burden of demonstrating he is eligible for asylum. 8 U.S.C. 1158(b)(1)(B)(i); 8 C.F.R. 1208.13(a), 1240.8(d).

An alien is statutorily ineligible for asylum if the Attorney General determines that "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." 8 U.S.C. 1158(b)(2)(A)(i); see 8 U.S.C. 1101(a)(42)(B) ("[A]ny 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" cannot be a "refugee.").

b. An alien may also apply for withholding of removal. See 8 U.S.C. 1231(b)(3). Withholding of removal is required 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). As with asylum, an alien is not eligible for withholding of removal if the Attorney General determines that 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." 8 U.S.C. 1231(b)(3)(B)(i). Like its

asylum counterpart, this provision is referred to as a "persecutor bar."

2. a. Petitioner, a native and citizen of Turkey, is an ethnic Kurd. Pet. App. 3a. He became involved in Kurdish separatist activities in Turkey in the 1970s. *Ibid.* In 1980, he moved to Germany, where he continued his involvement in such activities. *Ibid.* In particular, he organized events on behalf of the National Liberation Front of Kurdistan (ERNK) and solicited funds for it. *Id.* at 59a-60a.

As petitioner later acknowledged, ERNK "had close ties to the PKK [Kurdistan Workers Party]," and "[h]e was aware that some of the money raised for the ERNK would go to the PKK." Pet. App. 3a, 60a. The PKK was founded in the 1970s to establish an independent Kurdish state. Administrative Record 538, 540 (A.R.). It is a "guerrilla separatist movement" that "frequently kidnaped and killed teachers," "conducted * * * attacks against civilians * * * , includ[ing] * * * women and children," launched "terrorist attacks of tourist sites such as hotels and even beaches," and "used suicide bombing as a tactic." A.R. 846-847. The Secretary of State designated the PKK a foreign terrorist organization in 1997. See 62 Fed. Reg. 52,650-52,651 (1997); see also 8 U.S.C. 1189 (governing designation of foreign terrorist organizations).

In 1987, petitioner went to Lebanon to join the PKK. Pet. App. 3a. He stayed in a PKK training camp in Lebanon for eight months, where he received "'military' and 'guerilla' training." *Id.* at 3a, 60a. While at the camp, petitioner met with Abdullah Ocalan, the leader of the PKK. *Id.* at 61a.

In May 1988, petitioner (armed with a pistol, an AK-47, and a grenade) led a group from the PKK camp in an

attempt to cross from Syria into Turkey. Pet. App. 3a, 61a. A gun battle ensued between petitioner's group and Turkish border guards, leaving two Turkish soldiers dead. *Id.* at 3a. Petitioner and the other Kurds escaped, returning to Syria. *Id*. at 61a-62a, 63a.

Later in 1988, petitioner "and some of his men crossed into Turkey without incident." Pet. App. 62a. Petitioner then "traveled to various villages to make connections * * * and began to bury extra weaponry and to construct underground shelters." *Ibid.* Nearly four months after petitioner's surreptitious entry into Turkey, he was arrested by Turkish soldiers and charged with "advocating for the separation of Turkey." *Ibid.* He was convicted and served 18 months in prison. *Ibid.* According to petitioner, he was tortured while detained by the Turkish authorities. *Id.* at 63a.

In 1991, petitioner used a fraudulent passport to be admitted to the United States. Pet. App. 4a, 63a. Petitioner applied for asylum, alleging that Turkish officials had persecuted him because of the "leading role" he had played in the ERNK. *Id.* at 65a; see *id.* at 3a. In his asylum application, he disclosed some aspects of the May 1988 incident at the Turkish-Syrian border, but failed to disclose that two Turkish soldiers had died. *Id.* at 63a. He submitted a translation of a newspaper article about his arrest in Turkey, but the translation omitted a passage from the original article that disclosed the deaths of the two Turkish soldiers. *Id.* at 96a-97a & n.8; see *id.* at 65a. Petitioner received asylum in the United States in 1992. *Id.* at 57a.

In 1994, petitioner applied for and received lawful permanent resident status. Pet. App. 57a. In 1998, petitioner applied to become a United States citizen. *Id.* at 4a. In neither his application for lawful permanent resi-

dent status nor in his naturalization application did petitioner mention his 1988 arrest and conviction in Turkey. *Ibid.* For example, on his application for adjustment of status, petitioner was asked "Have you ever, in or outside the U.S., been arrested, cited, charged, indicted, fined or imprisoned for breaking or violating any law or ordinance, excluding traffic violations?" *Id.* at 111a. Petitioner answered "No." *Ibid.*

Petitioner's naturalization application was denied. Pet. App. 4a. He was then charged with being removable because of the false statements on his application for permanent resident status. *Ibid.*; see 8 U.S.C. 1227(a)(1)(A). Petitioner was later charged with being removable on the additional basis that he had engaged in terrorist activity. Pet. App 4a.

b. After a hearing, an immigration judge (IJ) found petitioner removable, both for making false statements and for having engaged in terrorist activity. Pet. App. 85a-168a, 175a. The IJ also found petitioner ineligible for withholding of removal because he had assisted or otherwise participated in persecution. *Id.* at 118a-125a.

The Board of Immigration Appeals (BIA) dismissed petitioner's administrative appeal. Pet. App. 55a-84a. The BIA affirmed the IJ's finding that petitioner was removable because he made willful misrepresentations on his applications for adjustment of status and naturalization by falsely stating that he had never been arrested. *Id.* at 67a-69a. The BIA also affirmed the IJ's determination that petitioner was removable on terrorism grounds under 8 U.S.C. 1227(a)(4)(B). Pet. App. 75a-80a.

The BIA also affirmed the IJ's conclusion that petitioner was ineligible for withholding of removal because he had assisted in the persecution of others. Pet. App.

69a-73a. After stating that "[a] person assists in the persecution of others when he furthers the persecution in some way," the BIA found that petitioner was ineligible for withholding of removal because he had knowingly taken "significant" actions that "furthered the persecution of those Turks who opposed a separate Kurdistan." *Id.* at 70a. In particular, the BIA noted that petitioner had "transport[ed] weapons into Turkey for use by the PKK." *Ibid.* He acknowledged having disclosed to Turkish authorities "the location of stores of buried weapons, including rockets, after being arrested in 1988," and this knowledge was "inconsistent with [petitioner's] explanation that he carried only a small cache of weapons across the border for his own protection." *Ibid.* Indeed, this knowledge supported the conclusion that petitioner was in fact "a fighter for the armed wing of the PKK." *Ibid.* The BIA also concluded that petitioner had advanced the persecution of Turks who opposed the PKK by raising funds destined for the organization. *Id.* at 70a, 71a.

The BIA concluded that petitioner took these actions with knowledge that they would further the PKK's persecution of its opponents. Pet. App. 71a-72a. Petitioner acknowledged knowing that some of the money he raised for the ERNK in Germany would actually go to the PKK. *Id.* at 71a. He also admitted knowing that the PKK attacked civilian "village guards" opposed to it and the group "advocated 'revolutionary terror.'" *Ibid.* In sum, the BIA found that "[t]he record * * * supports the conclusion that [petitioner] knowingly assisted the PKK in its mission, which included the persecution of others who would oppose the creation of an independent Kurdish state." *Id.* at 72a; see *id.* at 76a ("The record reflects that even before the PKK was designated as a

terrorist organization in 1997, [petitioner] understood the organization to be conducting terrorist activity.").

c. Petitioner filed a petition for review in the court of appeals, which denied it. Pet. App. 1a-46a. The court found that substantial evidence supported the BIA's conclusion that petitioner was removable because he had made willful misrepresentations in his applications for adjustment of status and naturalization. *Id.* at 10a-13a. In particular, the court concluded that the BIA's finding that petitioner's misrepresentations about his prior arrest and conviction were deliberate was supported by substantial evidence, given how "unambiguous" the questions to which he gave false answers were and given the earlier misrepresentations in petitioner's asylum application. *Id.* at 11a (noting that petitioner had "submitted a falsely translated newspaper article" with his asylum application).[1]

The court of appeals also affirmed the BIA's conclusion that petitioner was not eligible for withholding of removal because of the persecutor bar. Pet. App. 13a-23a. Like the BIA, the court of appeals assumed for the sake of its decision that petitioner's statements to the Turkish authorities (which he said were procured by torture) were unreliable. *Id.* at 15a n.8. Even without those statements, the court found there was substantial evidence supporting the BIA's conclusion that petitioner "assisted in the persecution of others by providing funding for the PKK and transporting weapons into Turkey for use by the PKK." *Id.* at 16a.

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[1] Given its conclusion that substantial evidence supported the BIA's finding that petitioner was removable for making willful misrepresentations, the court found it unnecessary to review the BIA's separate conclusion that "he was also removable for terrorist activity." Pet. App. 12a-13a, 14a n.6.

The court of appeals noted that "every circuit court to have substantively addressed the issue" had agreed that the scope of the persecutor bar was informed by this Court's decision in *Fedorenko* v. *United States*, 449 U.S. 490 (1981). Pet. App. 20a n.9; see *ibid.* (noting that both petitioner and the government agreed that the *Fedorenko* standard governed). The court of appeals concluded that "the BIA's analysis was consistent with *Fedorenko*." *Id.* at 21a. As the court noted, the BIA found that petitioner had provided money and weapons to the PKK and had done so "voluntarily and knowingly." *Id.* at 21a-22a. Accordingly, the BIA's findings demonstrate that "a nexus exists between [petitioner's] actions and the persecution of others and [petitioner] acted knowingly." *Id.* at 22a. Although the court deemed one sentence from the BIA's opinion (that "[a] person assists in persecution of others when he furthers the persecution in *some* way") "vague and unhelpful on its own," the court concluded that the BIA had in fact applied the correct standard. *Id.* at 21a; see *id.* at 21a-23a.

Judge Martin dissented. Pet. App. 25a-46a. In the dissenting judge's view, the court of appeals should have remanded the case to the BIA for reconsideration of whether the persecutor bar applied. *Id.* at 28a-29a. Judge Martin also contended that the BIA erred by "attempt[ing] to uphold the IJ's various conclusions without regard to the tainted evidence" obtained in the Turkish court, *id.* at 37a, and that the BIA had applied an erroneous standard when it concluded that petitioner had made willful misrepresentations on his naturalization and adjustment of status applications, *id.* at 38a-44a.

The court of appeals subsequently denied rehearing. Pet. App. 47a-48a; see *id.* at 48a-54a (Martin, J., dissenting from denial of rehearing en banc).

ARGUMENT

Petitioner is correct that the "ordinary remand rule," as articulated in *Gonzales* v. *Thomas*, 547 U.S. 183 (2006) (per curiam), and *INS* v. *Orlando Ventura*, 537 U.S. 12 (2002) (per curiam), typically requires courts of appeals to remand to the BIA once they conclude that it applied the incorrect legal standard. That rule has no application here, however, because the court of appeals found that the BIA applied the correct legal standard. For the same reason, the court of appeals' decision does not present the question—which petitioner mistakenly claims has divided the circuits—whether remand is required "where the BIA's error is of a legal, as opposed to factual, nature." Pet. 22. In this case, the BIA made neither kind of error, so the court of appeals did not have to decide whether to remand.

1. The court of appeals correctly held that "the BIA did not err in its legal analysis," so no remand was necessary. Pet. App. 23a. As the court of appeals noted (and as both parties agreed below), application of the persecutor bar to an alien's voluntary actions is illuminated by this Court's decision in *Fedorenko* v. *United States*, 449 U.S. 490 (1981). Pet. App. 18a-21a. In that case, the Court found that a World War II concentration camp guard who had shot at fleeing inmates had "assisted in the persecution of civilians" within the meaning of the Displaced Persons Act of 1948, ch. 647, 62 Stat. 1009, notwithstanding his claim that he had done so involuntarily. *Fedorenko*, 449 U.S. at 495, 500, 512. The Court concluded that the statute included no voluntari-

ness requirement, but did require "focus[] on whether particular conduct can be considered assisting in the *persecution* of civilians." *Id.* at 512 n.34. The Court went on to explain:

> [A]n individual who did no more than cut the hair of female inmates before they were executed cannot be found to have assisted in the persecution of civilians. On the other hand, there can be no question that a guard who was issued a uniform and armed with a rifle and a pistol, who was paid a stipend and was regularly allowed to leave the concentration camp to visit a nearby village, and who admitted to shooting at escaping inmates on orders from the commandant of the camp, fits within the statutory language about persons who assisted in the persecution of civilians. Other cases may present more difficult line-drawing problems but we need decide only this case.

Ibid.

In a case decided five months before this one, the Sixth Circuit explained that *Fedorenko*'s understanding of the persecutor bar included "two distinct requirements"—nexus and knowledge. *Diaz-Zanatta* v. *Holder*, 558 F.3d 450, 455 (2009). "First, the alien must have done more than simply associate with persecutors; there must have been some nexus between the alien's actions and the persecution of others, such that the alien can fairly be characterized as having actually assisted or otherwise participated in that persecution." *Ibid.* Second, "if such a nexus is shown, the alien must have acted with scienter; the alien must have had some level of prior or contemporaneous knowledge that the persecution was being conducted." *Ibid.*

The court of appeals in this case concluded that the BIA had applied the correct legal standard from *Fedorenko* and *Diaz-Zanatta*. Pet. App. 21a-23a. The court read those cases to mean that the persecutor bar applies to aliens who provide "genuine assistance in persecution" and not to those with a merely "inconsequential association with persecutors." *Id.* at 21a. As the court of appeals explained, the BIA in this case applied that "nexus" standard when it analogized petitioner's "provision of weapons for PKK fighters" to another alien's "coordination of arms shipments for the Provisional Irish Republican Army," which the BIA in an earlier decision had concluded constituted "assisting in persecution." *Ibid.* (citing *In re McMullen*, 19 I. & N. Dec. 90, 97 (B.I.A. 1984)); see *id.* at 71a (BIA concludes that petitioner's actions were "'virtually identical' to the conduct of the alien involved in the *McMullen* case."). As both the BIA and the court of appeals recognized, providing weapons to a group known to use weapons "to *target*[] civilians and not just government soldiers" constitutes genuine assistance in persecution. *Id.* at 21a, 71a, 73a. It is not mere association.

The BIA likewise understood there was a scienter requirement and found it satisfied in this case. The BIA found that petitioner "*knowingly* assisted the PKK in its mission, which included the persecution of others who would oppose the creation of an independent Kurdish state." Pet. App. 72a (emphasis added). The BIA expressly found that petitioner "admitted knowing that at least part of the money he raised would go to support the PKK" and "admitted knowing that the PKK engaged in attacks on the village guards and that they, in general, advocated 'revolutionary terror.'" *Id.* at 71a; see *id.* at 76a ("The record reflects that even before the

PKK was designated as a terrorist organization in 1997, [petitioner] understood the organization to be conducting terrorist activity."). Thus, when the court of appeals noted that petitioner "voluntarily and knowingly provided money, which he knew could be used by the PKK for anything, * * * and weapons, which directly supported the PKK's persecution of others," *id.* at 22a, it was not engaged in its own "independent analysis" of the record, see Pet. 22. Rather, it was merely affirming findings expressly made by the BIA. See Pet. App. 17a ("Substantial evidence * * * supports the BIA's factual determinations.").

The BIA's application of the proper standard in this case is further illustrated by its reliance on *In re A-H-*, 23 I. & N. Dec. 774, 784 (A.G. 2005). The court of appeals in *Diaz-Zanatta* noted that its distillation of the "nexus" and "scienter" requirements from *Fedorenko* was "consistent with" the BIA's "leading * * * adjudication on this issue," which it identified as *In re A-H-*. *Diaz-Zanatta*, 558 F.3d at 455 & n.2. In the BIA's decision in this case, it expressly relied on *In re A-H-* when it concluded that petitioner's "provision of the weapons to PKK fighters qualifies as 'assisting in' the persecution of others." Pet. App. 70a (citing *In re A-H-*, 23 I. & N. Dec. at 784).

Petitioner's argument that the BIA applied the wrong standard in finding him ineligible for withholding of removal rests on the BIA's statement that "[a] person assists in the persecution of others when he furthers the persecution in some way." Pet. App. 70a; see, *e.g.*, Pet. 16. The court of appeals characterized that shorthand description of the standard as "vague and unhelpful *on its own*." Pet. App. 21a (emphasis added). As the court of appeals recognized, however, a proper determination

of what legal standard the BIA applied must be based on the BIA's order as a whole, not on one summary sentence read "on its own." *Ibid.* As noted previously, the order as a whole demonstrates that the BIA applied the correct standard, and did so in a way consistent with the court of appeals' earlier decision in *Diaz-Zanatta*. Moreover, the court of appeals' particular concern with the shorthand statement was that, when read "on its own," it could suggest that "inconsequential association with persecutors" was sufficient to trigger the bar. *Ibid.* As the court immediately went on to note, however, that is not the standard the BIA applied here—it demanded evidence of genuine assistance and found it in petitioner's provision of weapons to the PKK. *Ibid.*[2]

This case thus does not present the remand question posed in *Ventura* and *Thomas*. In *Ventura*, the Ninth Circuit had reversed the BIA's finding that an alien was ineligible for asylum because the persecution he alleged before he left Guatemala was "not 'on account of' a 'political opinion.'" 537 U.S. at 13 (citation and emphases omitted). The government had argued before the IJ that the alien was independently ineligible for relief because conditions had improved in Guatemala since his departure. *Ibid.* The BIA had not considered that argument, "[a]nd both sides asked that the Ninth Circuit

[2] Amicus National Immigrant Justice Center contends (Br. 11) that the court of appeals "took the impermissible step of establishing immigration policy" by relying on petitioner's fundraising for the PKK. The court of appeals broke no ground on this issue; it merely affirmed the BIA's conclusion that petitioner "furthered the persecution of those Turks who opposed a separate Kurdistan by providing funding for the PKK." Pet. App. 70a. Moreover, Amicus ignores the separate finding by the BIA (affirmed by the court of appeals) that petitioner provided the PKK with weapons, with knowledge that the PKK attacked civilian village guards. *Id.* at 16a-17a, 21a, 70a-71a.

remand the case to the BIA so that it might do so." *Ibid.* Instead, the Ninth Circuit decided the question for itself, "holding that the evidence in the record failed to show sufficient change." *Id.* at 14. This Court held that the Ninth Circuit erred by reaching out to decide a question that had not been decided by the BIA; the court of appeals should have "remand[ed] [the] case to [the] agency for decision of a matter that statutes place primarily in agency hands." *Id.* at 16.

Thomas presented a similar situation. The aliens there sought asylum because they said they feared persecution based on their race and on their membership in a particular "social group"—their family. 547 U.S. at 184. The BIA found them ineligible for asylum, "responding to [their] primarily race-related arguments." *Ibid.* The Ninth Circuit held that the BIA had not adequately considered the aliens' alternative basis for asylum, *i.e.*, their family ties. *Ibid.* The court of appeals then went on to decide that question on its own, holding that "the particular family at issue * * * fell within the scope of the statutory term 'particular social group' and that the '[aliens] were attacked and threatened because they belong to [that] particular social group." *Id.* at 184-185. This Court held that the Ninth Circuit had erred by not remanding that question to the agency, which "ha[d] not yet considered whether [the] family present[ed] the kind of 'kinship ties' that constitute a 'particular social group'" under the immigration laws. *Id.* at 186.

In both *Ventura* and *Thomas*, the Ninth Circuit erred by deciding a question that had not been previously addressed by the BIA. Here, by contrast, the court of appeals reviewed a decision that the BIA had actually made—that petitioner was ineligible for with-

holding of removal because of the persecutor bar. Moreover, the court of appeals here found that the BIA had correctly applied the proper legal standard in making that decision. Nothing in *Ventura* or *Thomas* required the court to nonetheless remand because one sentence in the BIA's order, when read in isolation, was "vague and unhelpful." Pet. App. 21a.

Nor does the court of appeals' analysis conflict with this Court's decision in *Negusie* v. *Holder*, 129 S. Ct. 1159 (2009). See National Immigrant Justice Center Amicus Br. 4-10. In *Negusie*, the Court held that the BIA had incorrectly viewed *Fedorenko*'s interpretation of the persecutor bar provision in the Displaced Persons Act as "controlling" the BIA's interpretation of the INA's distinct persecutor bar provisions. 129 S. Ct. at 1162. *Fedorenko* had held that there was no "voluntariness requirement" in the Displaced Persons Act's persecutor bar, making it applicable to the concentration camp guard regardless whether his actions were voluntary or compelled. See *id.* at 1165 (citing *Fedorenko*, 449 U.S. at 512). The BIA in *Negusie* had concluded that this aspect of *Fedorenko* required it to reject an alien's claim that his actions had been compelled and were thus not covered by the INA's persecutor bars. *Id.* at 1163. Noting that *Fedorenko* involved a different statute, this Court held that the BIA erred in believing that *Fedorenko*'s rejection of a voluntariness requirement in the earlier statute compelled rejection of such a requirement in the INA. *Id.* at 1165. Instead, the Court held that the INA was ambiguous on this point, and concluded that the BIA should resolve the ambiguity in the first instance. *Id.* at 1164.

As the court of appeals explained in this case, nothing in "*Negusie*'s holding * * * prevent[s] all analog-

izing between *Fedorenko* and INA cases." Pet. App. 20a. "Given that *Negusie* analyzed *Fedorenko*'s application only in the context of allegedly involuntary actions," the court found that "*Fedorenko*'s analysis of what constitutes persecution remains instructive where voluntariness is not at issue." *Ibid.* Given that petitioner, unlike the alien in *Negusie*, made no claim that his actions were compelled or involuntary, the error identified by this Court in *Negusie* is not relevant to this case. *Ibid.* Indeed, petitioner conceded before the court of appeals that "*Negusie* 'does not impact this appeal' and 'is not inconsistent with application of *Fedorenko*.'" *Id.* at 20a n.9.

2. Petitioner contends that the "courts of appeals are sharply divided over whether the ordinary remand rule applies where the BIA has not yet employed the correct legal standard to resolve an issue within the agency's field of expertise." Pet. 21. He contends that in the decision below, the court of appeals joined those courts that hold that "the ordinary remand rule does not apply where the BIA's error is of a legal, as opposed to factual, nature." Pet. 22.

Even if there were a conflict in the circuits on this question, this case would not present a vehicle for its resolution because the court of appeals held that the BIA committed no error—legal or factual. Accordingly, the court was not required to determine what kind of error requires a remand. See pp. 9-16, *supra*.

In any event, petitioner's claim that there is a division in the circuits ignores the fact that "whether remand is necessary in a case is dependent on the facts and legal posture of that particular case." *Lin* v. *Mukasey*, 517 F.3d 685, 694 n.12 (4th Cir. 2008). It is largely these differences in circumstances, rather than

a disagreement over whether remand is required "only when additional fact-finding is necessary," Pet. 22, that led to the different outcomes discussed by petitioner.

For example, petitioner identifies the Fourth Circuit as subscribing to the view that "the ordinary remand rule does not apply where the BIA's error is of a legal, as opposed to factual, nature." Pet. 22. He discusses *Hussain* v. *Gonzales*, 477 F.3d 153 (2007), in which that court held that a remand was unnecessary "[b]ecause the result of a remand to the [BIA] is a foregone conclusion such that remand would amount to nothing more than a mere formality." *Id.* at 158; see Pet. 22-23. In a later case, however, the Fourth Circuit remanded a legal question to the BIA—"what constitutes 'other resistance to a coercive population control program.'" *Lin*, 517 F.3d at 694 n.12 (quoting 8 U.S.C. 1101(a)(42)(B)). In doing so, it said the remand requirement is broad in scope. See *ibid.* ("Given that the Supreme Court in *Ventura* and *Thomas* has stated in no uncertain terms that remand is *ordinarily required* when the BIA has not addressed an issue in the first instance, we tread on dangerous ground when we decide an issue that the BIA has not yet considered."). Likewise, the Sixth Circuit, which petitioner claims adopted the view in this case that a remand is required only following a finding of factual error, has remanded to the BIA to apply a (corrected) legal standard to the facts of a case. See *Amir* v. *Gonzales*, 467 F.3d 921, 927 (2006) (remanding to the BIA for application of proper legal standard to alien's claim for withholding of removal under the Convention Against Torture).

At the same time, courts that petitioner identifies as automatically remanding upon a finding of legal error, see Pet. 24-26, do not in reality follow such an unbending

rule. See, *e.g.*, *Retuta* v. *Holder*, 591 F.3d 1181, 1189 n.4 (9th Cir. 2010) (remand under *Ventura* required when BIA did not reach "a fact-dependent matter of first impression," but not necessary when the BIA addressed a legal question "and its opinion is reversed").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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