No. 07-499

In the Supreme Court of the United States

DANIEL GIRMAI NEGUSIE, PETITIONER

v.

MICHAEL B. MUKASEY, ATTORNEY GENERAL

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Under the Immigration and Nationality Act, a person who assisted in the persecution of any other person on account of race, religion, nationality, membership in a particular social group, or political opinion is not entitled to asylum or withholding of removal. The question is whether that rule applies to persons who involuntarily assisted in the persecution of others.

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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. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Section 208 of the Immigration and Nationality Act (INA or Act), 8 U.S.C. 1158 (2000 & Supp. V 2005),

provides that the Secretary of Homeland Security or the Attorney General may, in his discretion, grant asylum to an alien who demonstrates that he is a refugee within the meaning of the Act. 8 U.S.C. 1158(b)(1). The statutory definition of "refugee" excludes "any person who ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. 1101(a)(42)(B). The INA therefore precludes the Attorney General or the Secretary of Homeland Security from granting asylum to such persons. 8 U.S.C. 1158(b)(2)(A)(i); see 8 C.F.R. 1208.13(c)(1). If the evidence indicates that an asylum applicant persecuted any person, he bears the burden of proving that he did not. See, *e.g.*, 8 U.S.C. 1158(b)(1)(B)(i) (indicating that the alien bears the burden of proving that he is a "refugee"); see also 8 C.F.R. 1208.13(a); 8 C.F.R. 1240.8(d).

An identically worded provision precludes the Attorney General from granting withholding of removal to persecutors. 8 U.S.C. 1231(b)(3)(B)(i); see 8 C.F.R. 1208.16(d)(2). Likewise, the INA's implementing regulations provide that an application for withholding of removal under the 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, shall be denied if the applicant is found to be a persecutor. 8 C.F.R. 1208.16(d)(2). If there is evidence that an applicant for withholding of removal under the INA or CAT engaged in persecution, the alien bears the burden of demonstrating by a preponderance of the evidence that he did not. *Ibid*.

2. Petitioner is an Eritrean citizen with dual Eritrean and Ethiopian heritage. See Pet. App. 9a. In 1994, petitioner was forcibly conscripted into military service. *Id*. at 10a. Petitioner was discharged from military service after a short time, but was recalled to service in 1998, when hostilities between Eritrea and Ethiopia escalated. *Id.* at 10a-11a. Because petitioner objected to being recalled to duty and "declined to go to the front and fight," he was assigned to a naval base. *Id.* at 11a. After several months, petitioner was arrested and taken to a prison camp. *Ibid*.

After two years of incarceration, petitioner was released from prison and returned to military service as a prison guard. Pet. App. 12a. For approximately four years, petitioner served as a prison guard "on a rotating basis." *Ibid*. As a guard, petitioner carried a gun and was generally responsible for keeping control over prisoners and preventing their escape. *Ibid.* He caught prisoners who attempted to escape, and he stood guard over such prisoners while they were kept in the sun as a form of punishment or execution. *Id.* at 15a-16a. Petitioner was aware that prisoners died when left in the sun for more than two hours. *Id.* at 13a. Petitioner was also responsible for "keep[ing] the prisoners from taking showers and obtaining ventilation and fresh air." *Ibid*.

Petitioner objected to and occasionally disobeyed orders to inflict punishment on prisoners. Pet. App. 13a. He also did some favors for prisoners, such as providing them with water or allowing them to take showers and get fresh air, and was reprimanded for doing so. *Ibid.* After approximately four years as a guard, petitioner abandoned his military service and hid himself inside a shipping container aboard a vessel bound for the United States. *Id.* at 12a, 19a.

3. An immigration judge (IJ) denied petitioner's applications for asylum and withholding of removal. Pet. App. 9a-20a. The IJ concluded that petitioner was barred from relief because he had "assisted or otherwise participated in the persecution of others" in his role as an armed prison guard. *Id.* at 15a, 16a. Although the IJ found "no evidence to establish that [petitioner] is a malicious person or that he * * * [directly] mistreated the prisoners," 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 [petitioner] from relief." *Id.* at 16a-17a.

The IJ found, however, that petitioner was eligible for deferral of removal under CAT, which (unlike asylum and withholding of removal) is available to persecutors. Pet. App. 17a-20a; see 8 C.F.R. 1208.17(a). The IJ concluded that it is more likely than not that, as a deserter from the Eritrean military, petitioner would be tortured if returned to Eritrea. Pet. App. 20a.

4. Petitioner appealed the IJ's denial of his asylum and withholding claims to the Board of Immigration Appeals (BIA or Board). The Department of Homeland Security appealed the IJ's grant of deferral of removal under CAT. The BIA dismissed both appeals. 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 finding that petitioner was barred from asylum and withholding of removal because he had assisted in the persecution of others on account of a protected ground. Pet. App. 6a. Relying on its own precedent, the BIA noted that "[t]he fact that [petitioner] was compelled to participate as a

prison guard, and may not have actively tortured or mistreated anyone, is immaterial." *Ibid.* (citing *In re Fedorenko*, 19 I. & N. Dec. 57 (1984)). The BIA also upheld the IJ's decision to grant deferral of removal because the IJ had "found reliable evidence in the record that the Eritrean government, which has a terrible overall human rights record, specifically engaged in mistreatment and torture against army deserters." *Id.* at 8a.

5. In an unpublished, per curiam opinion, the court of appeals denied petitioner's petition for review. Pet. App. 1a-3a. Petitioner conceded on appeal that his subjective intent was not relevant, but he argued that the IJ should have considered involuntariness as one of multiple factors relevant to whether he assisted in persecution. See pp. 8, 10, *infra*.

The court of appeals rejected that contention. Pet. App. 2a-3a. After noting that petitioner "conceded that the prisoners were persecuted on protected grounds," the court held that "[t]he question whether an alien was compelled to assist authorities is irrelevant, as is the question whether the alien shared the authorities' intentions." *Id.* at 2a. Instead, the court explained, "the inquiry should focus 'on whether particular conduct can be considered assisting in the persecution of civilians.'" *Ibid.* (quoting *Fedorenko* v. *United States*, 449 U.S. 490, 512 n.34 (1981)).

Applying that standard, the court of appeals held that the record evidence did not compel reversal of the agency's finding that petitioner had assisted in the persecution of prisoners. Pet. App. 3a. The court emphasized that petitioner "worked as an armed 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 "acknowl-

edged that his job description included depriving prisoners of access to showers and fresh air." *Ibid.*

ARGUMENT

Petitioner contends (Pet. 11-29) that the statutory bar against granting asylum or withholding of removal to persecutors is categorically inapplicable to people who acted involuntarily. That contention, which petitioner did not raise in the court of appeals, has not been accepted by any court of appeals. The unpublished decision of the court of appeals is correct and does not warrant further review.

1. The persecutor bar applies to "any person who ordered, incited, assisted, or otherwise participated in the persecution of any person on account of" certain factors. 8 U.S.C. 1101(a)(42); see 8 U.S.C. 1231(b)(3)(B)(i). That broadly worded provision applies to "any" person who "assisted, or otherwise participated in" persecution, *ibid.*; it contains no exception for persons who acted involuntarily.

That conclusion is strongly supported by this Court's decision in *Fedorenko* v. *United States*, 449 U.S. 490 (1981), which held that the Displaced Persons Act of 1948 (DPA), ch. 647, 62 Stat. 1009, precluded *all* persons who had assisted in the persecution of others from obtaining immigration benefits, including persons who had acted involuntarily in doing so. 449 U.S. at 512-513. The DPA extended immigration benefits to certain "displaced persons," and excluded from its definition of that term persons who had, among other things, "assisted the enemy in persecuting civil[ians]." *Id.* at 495 (quoting DPA § 2, 62 Stat. 1009).

This Court was "unable to find any basis for an 'involuntary assistance' exception in the language of" that

statute. *Fedorenko*, 449 U.S. at 512. To the contrary, "[t]he plain language of the [DPA] mandates * * * [that] an individual's service as a concentration camp armed guard—whether voluntary or involuntary—made him ineligible for" relief under the DPA. *Ibid.* The Court concluded that, instead of "'interpreting' the [DPA] to include a voluntariness requirement that the statute itself does not impose," the focus should be on "whether particular conduct can be considered assisting in the persecution of civilians." *Id.* at 514 n.34 (emphasis omitted). The Court therefore concluded that Fedorenko's service as an armed guard at a concentration camp constituted assistance in persecution, whether his service was voluntary or involuntary. *Id.* at 512.

Fedorenko is on point because it interpreted a comparable statutory provision: the DPA referred to persons who had "assisted the enemy in persecuting" civilians, DPA § 2(a), 62 Stat. 1009, while the statutes at issue here cover persons who "assisted, or otherwise participated in the persecution of any person," 8 U.S.C. 1101(a)(42); see 8 U.S.C. 1231(b)(3)(B)(i). Petitioner is correct (Pet. 28) 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, and the *Fedorenko* Court noted that its decision was supported by Congress's use of the term "voluntarily" in that provision but not in the one concerning assistance in persecution. 449 U.S. at 512. But the INA, like the DPA, also contains provisions that rely on voluntariness. See, *e.g.*, 8 U.S.C. 1182(a)(3)(D)(ii) (providing that the bar to admission to the United States of any alien who was a member of a totalitarian party does not apply if such membership was "involuntary"); 8 U.S.C. 1424(d) (similar). In the

INA as in the DPA, "Congress [is] perfectly capable of adopting a 'voluntariness' limitation where it [feels] that one [is] necessary." *Fedorenko*, 449 U.S. at 512.

While petitioner now argues (Pet. 24) that the terms "assistance" and "persecution" inherently require consideration of "intent," he repeatedly conceded below that "the applicant's subjective intent is *not relevant* to whether a person assisted in persecution." Pet. C.A. Br. 31 (emphasis added); accord *id.* at 20, 40. Thus, petitioner waived that point, which appears to be central to his current position. See Pet. 24 (relying principally on petitioner's intent). In any event, petitioner has conceded that persecution occurred here, see Pet. App. 2a, and *Fedorenko* makes clear that whether a person assisted in persecution depends on the nature of his "conduct," not voluntariness. 449 U.S. at 512 n.34.[1]

Nor can petitioner (Pet. 25-26) distinguish *Fedorenko* by noting that the INA's persecutor bar provisions were enacted as part of the Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102, which Congress passed, in part, "to bring United States refugee law into conformance with the 1967 United Nations Protocol Relating to the Status of Refugees [(Protocol)]." *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 436 (1987). Significantly, "[t]he origin of the Protocol's definition of 'refugee' is found in

[1] Petitioner's contention (Pet. 23-25) that statutes are presumed to incorporate a duress defense cannot be reconciled with *Fedorenko*. Duress is sometimes, but not always, a defense to *criminal* liability. See, *e.g.*, *United States* v. *Bailey*, 444 U.S. 394, 415 n.11 (1980) (stating that Congress "may well" have intended a duress defense). As *Federenko*'s holding reflects, however, that does not mean that statutes in other contexts, such as immigration, necessarily contain implicit duress exceptions. Cf. *Dixon* v. *United States*, 126 S. Ct. 2437, 2441-2442 (2006) (noting that duress normally does *not* negate intent, but instead provides a defense to criminal liability).

the 1946 Constitution of the International Refugee Organization"—the same source as the definition Congress used in the DPA. *Cardoza-Fonseca*, 480 U.S. at 437-438 & n.20; see *Fedorenko*, 449 U.S. at 495 & nn.3-4.

Moreover, petitioner's international-law argument rests (Pet. 25-26), not on the text of any treaty, but on the *Office of the United Nations High Commissioner for Refugees' Handbook on Procedures and Criteria for Determining Refugee Status* (Geneva, 1979). That handbook does not "ha[ve] the force of law or in any way bind[] the [government] with reference to the asylum provisions of [the INA]. Indeed, the Handbook itself disclaims such force." *Cardoza-Fonseca*, 480 U.S. at 439 n.22; see *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 427 (1999). In any event, the handbook does not purport to answer the question presented here; instead, petitioner relies (Pet. 25-26) on general statements that do not specifically address involuntariness.

Not surprisingly, thus, the courts of appeals—including the Eighth and Ninth Circuits, on which petitioner relies (Pet. 13-16)—have followed *Fedorenko* in construing the INA provisions at issue here. See, *e.g.*, *Chen* v. *United States Att'y Gen.*, No. 07-11562, 2008 WL 150205, at *3 (11th Cir. Jan. 17, 2008) ("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."); *Alvarado* v. *Gonzales*, 449 F.3d 915, 925 (9th Cir.) ("In the opinions that interpret and give shape to the persecution-of-others exceptions under the INA, this court and other circuit courts have turned for guidance to [*Fedorenko*]."), cert. denied, 127 S. Ct. 505 (2006); *Xie* v. *INS*, 434 F.3d 136, 140 (2d Cir. 2006); *Hernandez* v. *Reno*, 258 F.3d 806, 812 (8th Cir. 2001).

2. This case would not provide an appropriate vehicle for considering the question whether involuntariness provides a categorical defense to the persecutor bar. Petitioner did not advance that contention below. Instead, like the Eighth Circuit's decision in *Hernandez*, petitioner argued that compulsion is one "relevant" "factor[]" to be considered. *E.g.*, Pet. C.A. Br. 19. In this Court, however, petitioner takes the different position that compulsion is dispositive. *E.g.*, Pet. 26. Moreover, as noted, petitioner conceded in the court of appeals that subjective intent is "irrelevant," while his primary textual argument in this Court relies on intent. See p. 8, *supra*.

3. In any event, there is no circuit split on the question whether the persecutor bar is categorically inapplicable to persons who acted involuntarily. While petitioner claims (Pet. 29) that "asylum-seekers receive dramatically different outcomes based on the circuit in which they reside," he has not identified any case in which a court of appeals held that an alien who was compelled to commit acts of persecution was exempt from the persecutor bar for that reason.

a. Petitioner asserts (Pet. 13-14) a conflict with *Hernandez*, *supra*. In that case, a Guatemalan man who had been impressed into the service of a guerilla organization for 20 days argued that he had not assisted or participated in persecution because his involvement with the guerilla group had been involuntary. See 258 F.3d at 814. In finding that Hernandez had assisted in the persecution of others, the BIA relied on an incident in which a unit of the guerilla organization had rounded up and shot 15 villagers. Hernandez testified that he had aimed away from the villagers and tried to avoid hitting any of them. *Id.* at 809, 811-812, 814, 815. Hernandez's

testimony that his involvement with the guerilla group was involuntary was "uncontroverted." *Id.* at 814. The Eighth Circuit held that the BIA erred under *Fedorenko* by not considering that fact, along with "all the pertinent evidence," as part of a "particularized," multi-factor inquiry into whether Hernandez's "behavior was culpable to such a degree that he could fairly be deemed to have assisted or participated in persecution." *Id.* at 813, 814.

Because the Eighth Circuit interpreted *Fedorenko* as establishing a facts-and-circumstances test, it did not hold, as petitioner claims (Pet. 12; see Pet. 14), that "individuals coerced by threat of death or torture into participating in atrocities are eligible for asylum in the United States." Instead, the court remanded for further consideration, stating that, "[i]f the record is analyzed in accordance with the *Fedorenko* legal standard, Hernandez *may* be seen to have met his burden of proving that he did not assist or participate in the persecution of others." *Hernandez*, 258 F.3d at 815 (emphasis added); see *ibid.* ("[W]e vacate the order of the [BIA] and remand to the Board for it to conduct a full *Fedorenko* analysis.").

The Eighth Circuit's analysis in *Hernandez* differs from the Fifth Circuit's analysis in this case because the Eighth Circuit held that involuntariness is one of many relevant factors, while the Fifth Circuit held that it is irrelevant. But that does not present a conflict warranting review in this case for multiple reasons. First, petitioner's position in this Court differs markedly from *Hernandez*'s holding. Petitioner argues (Pet. 26-29) that *Fedorenko* does not provide the relevant framework for analysis, and that involuntariness alone defeats the persecutor bar. In contrast, *Hernandez* held that *Fedorenko* does provide the controlling legal standard, and

that involuntariness is only one factor to be considered along with all of the other facts and circumstances. 258 F.3d at 812-814. The Eighth Circuit's interpretation of *Fedorenko* is clearly wrong, because, as explained above, *Fedorenko* held that involuntariness is irrelevant, and that the focus instead must be on the alien's conduct. See p. 7, *supra*. Nonetheless, *Hernandez* does not go nearly as far as petitioner suggests.

The petition briefly alludes (Pet. 29) to a fallback theory consistent with *Hernandez*'s facts-and-circumstances test. Petitioner does not, however, advance any principled basis for that alternative, and the difference between *Hernandez*'s approach and the legal standard applied by the court of appeals below would not warrant this Court's review in any event. Indeed, it is far from clear that the difference between those approaches would make a difference in this case, or in many others.

The Eighth Circuit emphasized, for example, that Hernandez had remained in the guerilla organization for "only 20 days," and—in the only incident on which the BIA based its finding that he had assisted in persecution of others—he had "disobey[ed] his commander's orders to shoot directly at the villagers." *Hernandez*, 258 F.3d at 814. Even so, the court of appeals did not hold that Hernandez was necessarily exempt from the persecutor bar, but instead remanded for the Board to exercise its discretion in considering all of the facts and circumstances. *Id.* at 815. In contrast, petitioner admitted that he served as an armed prison guard for four years, and that he personally stood guard over prisoners left in the sun as a form of punishment or execution. See p. 3, *supra*. Even looking beyond the differing facts of this case and *Hernandez*, petitioner cites *no* case in which a court of appeals held that a person was exempt from the per-

secutor bar because his assistance in persecution was involuntary. Cf. *Alvarado*, 449 F.3d at 929 ("[W]ere we to assume that, as *Hernandez* posits, there are, after *Fedorenko*, some extreme situations so coercive that, on a totality of circumstances analysis, an individual cannot be said to have 'assisted or otherwise participated in' persecution he was forced to inflict, we would conclude that this case does not present such an extraordinary situation.").

b. Petitioner also contends (Pet. 14-17) that the decision below is in tension (though not in conflict) with decisions of the First and Ninth Circuits. Petitioner is mistaken, because those cases addressed significantly different issues. In *Castañeda-Castillo* v. *Gonzales*, 488 F.3d 17 (2007), the First Circuit recognized that *Fedorenko* held that "one can 'assist' in persecution even if his assistance is involuntary." *Id.* at 21. The First Circuit then distinguished *Fedorenko* on the ground that *Castañeda-Castillo* (unlike this case) did *not* involve involuntariness. *Ibid.* Castañeda-Castillo did not dispute that he had voluntarily joined an anti-terrorist unit and voluntarily participated in a mission in which others committed atrocities; instead, he argued that he was unaware that other participants intended to commit, or did commit, atrocities during the mission. See *id.* at 20. Here, in contrast, there is no question that petitioner knew that he was assisting in persecution. See Pet. App. 2a-3a, 13a, 16a-17a.

Nor did the Ninth Circuit decisions cited by petitioner (Pet. 15-16) involve questions of voluntariness. In *Vukmirovic* v. *Ashcroft*, 362 F.3d 1247 (2004), the court held that the alien had not persecuted people on account of their ethnicity; instead, he had merely defended his town from attack. *Id.* at 1252-1253. As the court ex-

plained, "resist[ing] persecution by fighting back" is not persecution. *Id.* at 1252. Here, petitioner concedes that he took part in persecutory acts. See Pet. App. 2a.

Finally, the Ninth Circuit held in *Im* v. *Gonzales*, 497 F.3d 990 (2007), that a prison guard had not assisted in persecuting others because his actions were not "essential or integral to the persecutory acts" of others, but instead contributed in only a "trivial" way to those acts. *Id.* at 997; cf. *Fedorenko*, 449 U.S. at 512 n.34 (explaining that peripheral acts such as cutting the hair of inmates to be executed do not amount to assistance in persecution).[2] Here, in contrast, there is no dispute that petitioner's actions as an armed prison guard were integral to persecution; instead, the only question relates to the voluntariness of those actions.

4. Petitioner incorrectly claims (Pet. 20) that the question presented recurs so frequently that, in the past two years, "the federal courts of appeals have decided nearly one dozen asylum appeals that turn on the resolution of the question presented." As explained above, the published cases on which petitioner relies generally presented different questions. While the additional unpublished decisions on which petitioner relies (*ibid.*) do not describe their reasoning in detail, most of those decisions appear to have turned on whether conduct was sufficiently integral to persecution, as opposed to whether it was voluntary. See, *e.g.*, *Ghazaryan* v. *Gonzales*, 172 Fed. Appx. 139, 140 (9th Cir. 2006) (noting that, as a factual matter, the alien "was under no compulsion to

[2] The government filed a petition for rehearing en banc of the Ninth Circuit panel's ruling in *Im* that the alien's actions did not amount to assistance in persecution. No. 05-70027 (filed Nov. 13, 2007). The court requested a response to the government's petition, which was filed on January 15, 2008. The petition for rehearing en banc remains pending.

continue her employment as a prison guard"). Thus, while the courts of appeals have considered a number of cases concerning the persecutor bar, cases turning on the question presented here are not so numerous as to warrant further review in this case, especially considering the other considerations weighing against review.

The practical significance of the issue is also reduced in this case by petitioner's CAT deferral. Deferral of removal under the CAT is not as valuable to petitioner as asylum, primarily because the CAT deferral could, in theory, be lifted if conditions changed in Eritrea to such an extent that it was no longer more likely than not that petitioner would be tortured if returned to that country. As a practical matter, however, petitioner's CAT deferral gave him much of the relief he requested.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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