No. 05-1401

In the Supreme Court of the United States

ALBERTO R. GONZALES, ATTORNEY GENERAL,
PETITIONER

v.

VICTORIA TCHOUKHROVA, ET AL.

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

REPLY BRIEF FOR THE PETITIONER

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The Immigration and Nationality Act is explicit: withholding of removal is available only to an alien if "*the alien's* life or freedom would be threatened." 8 U.S.C. 1231(b)(3)(A) (emphasis added). "[T]he applicant" thus must prove that "*his or her* life or freedom would be threatened," in that "*he or she* would be persecuted." 8 C.F.R. 1208.16(b)(1) and (2) (emphases added). There is no exception.

Similarly, an alien is eligible for asylum only if "such person" faces "persecution or a well-founded fear of persecution." 8 U.S.C. 1101(a)(42)(A); see REAL ID Act, Pub. L. No. 109-13, Div. B, § 101(a), 119 Stat 302 (to be codified at 8 U.S.C. 1158(b)(1)(A)); see generally 8 U.S.C. 1158(b)(1)(A). The applicant must prove that "*he or she* has suffered past persecution or * * * has a well-founded fear of future persecution." 8 C.F.R. 1208.13(b) (emphasis added); see 8 C.F.R. 1208.13(b)(1) and (b)(2)(i)(A). Congress carved out only one narrow exception to the rule that asylum claims must be justi-

fied with reference to the individual seeking asylum. A "spouse or child" of an alien may obtain asylum derivatively. 8 U.S.C. 1158(b)(3)(A) (Supp. IV 2004); see 8 C.F.R. 1208.21(a)-(g). A "parent" may not. 8 C.F.R. 208.21; cf. 8 C.F.R. 207.7(b)(6).

The Ninth Circuit significantly departed from that clear statutory and regulatory framework by announcing a new rule of derivative asylum and withholding of removal. The court did so by adopting a doctrine of derivative persecution—a doctrine that allows an alien to become eligible for asylum and withholding without personally suffering any persecution, as long as *someone else* faces persecution. As seven judges of the Ninth Circuit explained in dissenting from the denial of rehearing en banc, "[t]his is all very new law," Pet. App. 47a, on a matter of "exceptional importance with profound implications for our nation's immigration laws," *id.* at 42a. This Court's recent decision in *Gonzales* v. *Thomas*, 126 S. Ct. 1613 (2006) (per curiam), and its predecessor, *INS* v. *Ventura*, 537 U.S. 12 (2002) (per curiam), make clear that such "basic asylum eligibility decision[s]" 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.

1. Rather than defend the Ninth Circuit's latest departure from established principles of administrative and immigration law, respondents devote substantial effort to arguing that the court of appeals simply affirmed a "decision the agency actually made," Br. in Opp. 14, and "simply followed the agency's own analysis," *id.* at 18. That argument defies the very opinion it attempts to defend. The court of appeals acknowledged that the agency had never "discuss[ed] the question expressly" of whether "the harms suffered by a disabled child [could] be taken into account when determining whether to grant his parent's asylum application." Pet. App.

16a. And that absence of any consideration of the issue by the agency was one point of agreement between the panel and the judges who dissented from the denial of rehearing en banc. As the seven dissenting judges pointed out: "This exotic reading of the immigration statute was never discussed by the IJ, the BIA or even the parties—rather, it is something the panel comes up with on its own." *Id.* at 42a.

Indeed, if the court of appeals' adoption of a new pathway to derivative asylum or withholding by means of derivative persecution were as "unremarkable" and dictated by prior Board precedent as respondents contend (Br. in Opp. 21), one would have expected some reference to that argument by respondents before the immigration judge (IJ), the Board, or the court of appeals. But respondents never mentioned it. They argued to the IJ that the parent, Victoria Tchoukhrova, was the sole applicant for asylum, Admin. Rec. 73-74, as well as that she "experienced many acts of persecution" herself, and "attempts by the government to shut Respondent up in her attempts to politicize and publicize the deplorable conditions and treatment of children with disabilities in Russia." *Id.* at 174; see *id.* at 176, 180-181. They argued to the Board that Mrs. Tchoukhrova is eligible for asylum because "[s]he" has a well founded fear of persecution on account of "her" political opinion, membership in a particular social group, and religion. *Id.* at 21, 26, 29, 46; see *id.* at 29.

In the court of appeals, respondents' brief addressed at length the discrimination against the child, Resp. C.A. Br. 7-17, but that argument was expressly limited to establishing that "Evgueni Tchoukhrov belongs to a social group" and that "Evgueni Tchoukhrov"—not his parent—"has suffered past persecution and has a well-founded fear of future persecution," *id.* at 7, 10. Although Mrs. Tchouknrova was the sole applicant for asylum, Admin. Rec. 73-74, respondents devoted only a few pages at the end of the brief to arguing that she was persecuted, relying on the argument that "she was placed under constant pressure to give up their child." Resp. C.A.

Br. 18; see *id.* at 19. Nowhere did respondents argue that "the harms suffered by" Evgueni (Pet. App. 16a) could, in themselves, qualify his mother for asylum or withholding.[1]

Respondents' argument (Br. in Opp. 21) that the Board endorsed derivative asylum and withholding of removal through a rule of derivative persecution in *In re C-Y-Z-*, 21 I. & N. Dec. 915 (BIA 1997), is also wrong. In *C-Y-Z-*, the Board held that the husband of a woman who was involuntarily sterilized had been subjected to persecution. But the Board did so not by holding that the persecution of the wife could be extended derivatively to her husband. Rather, because the sterilization of a wife "in effect sterilizes her husband," Pet. App. 48a n.2 (Kozinski, J., dissenting from denial of rehearing en banc), the Board concluded that the "forced sterilization of one spouse * * * is an act of persecution against the other spouse" in his own right. 21 I. & N. Dec. at 919.[2]

Finally, respondents' argument that the Sixth Circuit has applied derivative persecution misreads *Abay* v. *Ashcroft*, 368 F.3d 634 (2004). That decision found that the potential genital mutilation of a child would result in persecution of the mother

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[1] It is equally hard to reconcile respondents' argument that the court endorsed the Board's own supposedly "unremarkable" and already established rule of derivative persecution (Br. in Opp. 21) with respondents' other argument that the court did not decide anything at all about the issue. *Id.* at 19 (citing *Abebe* v. *Gonzales*, 432 F.3d 1037, 1043 (9th Cir. 2005) (en banc). In fact, five judges (including four who dissented from the denial of rehearing en banc in this case) explained in *Abebe* that, "by sleight of hand," the court had wrongfully "assume[d] that parents of a United States citizen child are nonetheless entitled to claim derivative asylum relief based on the possibility that their citizen child would be subjected to [female genital mutilation]," even though the law does not permit "parents [to] claim an unrecognized form of derivative relief when they themselves cannot establish entitlement to asylum." *Id.* at 1048 (Tallman, Kozinski, Rymer, Bybee, & Callahan, JJ., dissenting).

[2] See *In re Y-T-L-*, 23 I. & N. Dec. 601, 607 (BIA 2003) ("Coerced sterilization is better viewed as a permanent and continuing act of persecution that has deprived a *couple* of the natural fruits of conjugal life," and has denied the husband as much as the wife "the society and comfort of the child or children that might eventually have been born to *them*.") (emphases added).

directly because being "forced to allow the [genital] mutilation of her daughter * * * would cause [the mother] mental suffering sufficient to constitute persecution." *Id.* at 642; see *id.* at 645-646 (Sutton, J., concurring). The *Abay* court thus did not hold, as the Ninth Circuit did here, that persecution of a child alone was sufficient. The parent had to demonstrate that she personally would suffer persecution. Whatever the soundness of the Sixth Circuit's resolution of that distinct question in *Abay*, it does not support the Ninth Circuit's ruling here.[3]

The Seventh Circuit, moreover, has rejected the argument that a parent can "attach derivatively to the right" of her children to remain in the United States, holding that "there is no statutory or regulatory authority for [a parent] to have her own deportation suspended because she fears for her children if they return * * * with her." *Oforji* v. *Ashcroft*, 354 F.3d 609, 617 (2003).[4]

2. The court of appeals (Pet. App. 16a), echoed by respondents (Br. in Opp. 18-19), considered it permissible to adopt a new doctrine of derivative persecution because the IJ's oral decision had "treated the harms inflicted on the fam-

[3] Nor would it be sufficient to demonstrate mental anguish alone. The applicant would also have to demonstrate that the infliction of mental distress *on her* was "on account of" a protected characteristic—that is, her "race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. 1101(a)(42)(A).

[4] Persecution of family members can corroborate an individual's own claims of persecution, see, *e.g.*, *Mashiri.* v. *Ashcroft*, 383 F.3d 1112, 1120-1121 (9th Cir. 2004), and is also relevant if the persecution both caused serious mental anguish to the applicant and was undertaken because of the persecutor's motive to punish or persecute the applicant himself. Cf. *In re Villalta*, 20 I. & N. Dec. 142, 147 (BIA 1990). Further, once an alien has established eligibility for asylum—by demonstrating personal persecution—the Attorney General can weigh the treatment of family members in exercising his discretion to grant asylum. *In re Chen*, 20 I. & N. Dec. 16, 21 (BIA 1989). But those propositions are quite different from the Ninth Circuit's holding in this case that an alien who has not endured any persecution can become eligible for relief simply by substituting in the persecution of another. See Pet. App. 48a n.2.

ily members cumulatively" (Pet. App. 16a). That provides no justification for the court's disregard of the established principles of administrative primacy reflected in *Thomas* and *Ventura*.

First, the court "rips" the IJ's references "out of context." Pet. App. 49a. As the seven dissenting judges explained (*ibid.*), "it is clear that [the IJ] treated the harms to the family cumulatively only for purposes of determining whether the social group in question—here, the family of a disabled child—was persecuted" and was, in fact, a cohesive social group. Once the IJ found that the social group's defining characteristic had not been a basis for "persecution," there was no reason for the IJ to go further and address whether Mrs. Tchoukhrova herself had been persecuted on account of her membership in that group. See *ibid.*

Indeed, respondents had argued to the IJ that, under controlling Ninth Circuit precedent, the question whether "the group [has] been targeted because of [its] characteristic[s]" is one of the "criteria" for establishing Mrs. Tchoukhrova's membership in a protected social group. Admin. Rec. 180 (citing *Sanchez-Trujillo* v. *INS*, 801 F.2d 1571, 1574-1575 (9th Cir. 1986)). That is the context in which the IJ's oral decision discussed the harm suffered not only by Mrs. Tchoukhrova, but also her husband and child. See Pet. App. 37a, 39a. Because respondents advocated that framework for decision, they are now ill-positioned to portray the IJ's response as the *sub rosa* resolution of an entirely different legal question. Nor did the Board adopt that broad new rule of immigration law by summarily affirming the IJ's decision.

More fundamentally, the rule that courts should permit the Board to resolve sensitive questions of immigration law in the first instance is not some mere technical hurdle or procedural nuisance to be pushed aside because a court wishes—as the Ninth Circuit openly acknowledged here—to avoid the consequences of the statutorily "limited scope of derivative asylum applications." Pet. App. 17a-18a. *Ventura*'s and

Thomas's requirement of judicial restraint and deference are rooted in fundamental principles of separated powers and Executive Branch primacy in making the "highly complex and sensitive" foreign and domestic policy judgments that pervade immigration law. *Ventura*, 537 U.S. at 17. As a consequence, an agency's arguable allusion to one issue in the context of resolving a distinct issue is not a basis for ignoring *Ventura* and *Thomas*.

After the court found fault in the Board's determination that the past conduct and acts of discrimination were not "persecution"—a ruling that was also erroneous, see Pet. 17-18 & nn. 4, 5—"the proper course * * * [was] to remand to the agency for additional investigation or explanation." *Thomas*, 126 S. Ct. at 1615 (quoting *Ventura*, 537 U.S. at 16).[5] The

[5] Respondents' attempt to defend of the court of appeals' outright reversal of the Board on the past persecution issue (Br. in Opp. 28-29) is without merit, for the record by no means compels a finding of "persecution." See *INS* v. *Elias-Zacarias*, 502 U.S. 478, 481-482 & n.1 (1992); 8 U.S.C. 1252(b)(4)(B). That is especially true given the IJ's express determination that Mrs. Tchoukhrova "exaggerated facts" and stated "broad opinions about possible past persecution" that "were not supported by fact." Pet. App. 33a. Although respondents repeatedly assert that Evgueni was discarded as medical waste after he was born (see Br. in Opp. 2 & n.1, 20, 28-29), they do not acknowledge Mrs. Tchoukhrova's explanation for that incident—namely, that the personnel who delivered the baby "assumed he was dead." Admin. Rec. 201. It presumably is for that reason that Mrs. Tchoukhrova did not mention the incident in her oral testimony before the IJ, and that respondents did not rely upon it in their submissions to the IJ or the Board. See Pet. 17 n.4. Accordingly, neither the IJ nor the Board had any occasion to comment upon it. Similarly, respondents' characterization of the two physical incidents (see Br. in Opp. 4, 28) goes significantly beyond Mrs. Tchoukhrova's testimony, which plainly does not compel respondents' evident assertion (*ibid.*) that either the young men in the park or the woman hanging her laundry intended to injure Evgueni, much less that they intended to do so because of his disability. See Pet. 7-8, 17 n.4; Pet. App. 36a. Respondents' reliance (Br. in Opp. 4) on allegedly inadequate medical treatment and education is also misplaced: Evgueni continued to receive medical treatment while in Russia, his parents were permitted to leave on three occasions to obtain treatment abroad, and he was given home instruction. See Pet. 7, 18 n.5; Pet. App. 35a, 39a. If the court

agency should be afforded the opportunity to "bring its expertise to bear upon the matter" and to "make [the] initial determination" for which Congress tasked it. *Ibid.* (quoting *Ventura*, 537 U.S. at 17). As in *Ventura* and *Thomas*, the court of appeals ignored those well-established limits on its role. As in *Ventura* and *Thomas*, the consequence of the agency's disregard was the adoption of a far-reaching rule "of exceptional importance with profound implications for our nation's immigration laws." Pet. App. 42a. And, as in *Ventura* and *Thomas*, that usurpation of agency authority should be summarily reversed.

3. As noted in the petition, the court of appeals multiplied its violation of the "ordinary 'remand' rule," *Thomas*, 126 S. Ct. at 1615; *Ventura*, 537 U.S. at 18, by not only adopting a doctrine of derivative persecution, but also holding that a finding of such derivative persecution gives rise to a presumption that the individual herself faces a well-founded fear of future persecution (despite never personally being persecuted in the past), and precluding the government from rebutting that newly triggered presumption with evidence of changed circumstances for the mother or child, changed country conditions, or the viability of internal relocation. Pet. App. 25a-26a.

Respondents' only answer is to argue that the government waived those issues by not raising them before the agency or the court of appeals. But, as the petition explained (at 19), the government did not rebut the presumption of a well-founded fear of persecution because that presumption (and the process of rebutting it) only arises after persecution of the *applicant* "has been found" by the IJ. 8 C.F.R. 1208.13(b)(1). No such finding was ever made, so there was never any presumption to rebut. The IJ, moreover, directed the parties to focus on

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of appeals nonetheless believed that the foregoing factual issues warranted additional consideration, the proper course was to remand to the Board for that purpose, not to provide supplemental factual findings on appeal.

the persecution question. Admin. Rec. 80.[6] Respondents cite no Board authority at all, nor is the government aware of any, for their proposed rule that the agency's failure to make an offer of proof in an administrative proceeding on issues that never arose and did not need to be decided forfeits those arguments. Nor do respondents explain how such a rule would be workable in the already overburdened immigration administrative process.[7]

Beyond that, respondents overlook the distinct *legal error* committed by the Ninth Circuit in holding that derivative persecution triggers the same presumption of future persecution that arises when an applicant demonstrates individualized persecution. The operative regulation requires the individual applicant to establish that "*he or she* has suffered persecution in the past," and the presumption only arises after the alien has established "*such* past persecution." 8 C.F.R. 1208.13(b)(1) (emphases added). Whether that presumption should apply (or even makes sense) and how it should be rebutted when the persecution is purely derivative are questions that the Board has never considered, and that the government could not have anticipated.

Respondents note (Br. in Opp. 22) that the government discussed *Ventura* in its brief to the panel in terms of the question whether persecution was "on account of" a protected status, and fault the government for not also listing all of the follow-on issues. But the "on account of" question for which the government sought remand stood at the gateway to all of those other questions. Issues concerning the presumption

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[6] Before the Board, the government represented only that the IJ's decision was dispositive "of all issues *regarding the respondent's appeal*." Admin. Rec. 17 (emphasis added). The government did not waive argument on or rebuttal of issues never decided by the IJ or argued by respondents to the Board.

[7] In any event, the decision whether to adopt the cumbersome rule of agency procedure that respondents urge is a policy determination for the Attorney General or the Board, not the courts, to make. *Vermont Yankee Nuclear Power Corp.* v. *Natural Res. Def. Council, Inc.*, 435 U.S. 519, 524-525 (1978).

and its rebuttal could not arise, if at all, until *after* the "on account of" question was decided *by the Board on remand*. The request for a *Ventura* remand on the question of whether any persecution was "on account of" a protected ground thus necessarily subsumed a remand of any and all questions that could arise only after resolution of that issue *on remand*.

4. Finally, respondents emphasize throughout their brief the extraordinary challenges that respondent and her child have faced and overcome. But the unfortunate reality is that heart-wrenching cases of aliens whose lives would be significantly improved by living in this Country arise by the thousands every year. Of necessity, hard choices must be made, and difficult lines must be drawn. Congress has chosen to limit relief from removal, with a very narrow exception, to individuals who have personally suffered or fear persecution. Furthermore, alternative avenues are available to permit the family members of children who have suffered persecution to remain in the Country. See Pet. 21-22. Congress has tasked the Executive Branch, not the courts, with interpreting that law and making the basic eligibility decisions within that statutory framework in the first instance in both sympathetic and unsympathetic cases.

* * * * *

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

Respectfully submitted.

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AUGUST 2006