No. 13-1261

In the Supreme Court of the United States

F. H.-T., PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
STUART F. DELERY
Assistant Attorney General
MICHAEL P. LINDEMANN
ETHAN B. KANTER
DANIEL I. SMULOW
BRYAN S. BEIER
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTIONS PRESENTED

An alien who has provided material support to a terrorist organization is barred from receiving a variety of immigration benefits, including asylum and withholding of removal. Under 8 U.S.C. 1182(d)(3)(B)(i), the Secretary of Homeland Security "may determine in such Secretary's sole unreviewable discretion" to exempt certain aliens from this material-support bar. Section 1182(d)(3)(B)(i) provides that "no court shall have jurisdiction to review such a determination * * * except in a proceeding for review of a final order of removal," and that "review shall be limited to the extent provided in [8 U.S.C.] 1252(a)(2)(D)." Section 1252(a)(2)(D), in turn, permits review of "constitutional claims or questions of law raised upon a petition for review" of a final order of removal.

The questions presented are as follows:

1. Whether the Board of Immigration Appeals (BIA) erred in dismissing petitioner's appeal of his removal order when the Department of Homeland Security had not considered him for an exemption from the material-support bar.

2. Whether the BIA was required to address all of the grounds of ineligibility for asylum identified by the immigration judge in order to facilitate petitioner's potential consideration for a discretionary exemption from the material-support bar.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Treaties, statutes and regulations: Page

Statutes and regulations—Continued: Page

Miscellaneous:

In the Supreme Court of the United States

No. 13-1261

F. H.-T., PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-33a) is reported at 723 F.3d 833. The court of appeals' order denying rehearing en banc (Pet. App. 82a-95a) is reported at 743 F.3d 1077. The decisions of the Board of Immigration Appeals (Pet. App. 34a-40a) and the immigration judge (Pet. App. 43a-81a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 23, 2013. A petition for rehearing was denied on January 15, 2014 (Pet. App. 82a-83a). The petition for a writ of certiorari was filed on April 15, 2014. 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 Secretary of Homeland Security or the Attorney General "may" grant asylum to an alien who demonstrates that he qualifies as a "refugee." 8 U.S.C. 1158(b)(1)(A). The INA defines a "refugee" as an alien who is unable or unwilling to return to his country of nationality "because of persecution or a well-founded fear of persecution on account of" one of five protected grounds: "race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. 1101(a)(42)(A). If an alien makes a further showing that his life or freedom "would be threatened" on account of one of those protected grounds in a particular country, then he cannot be removed to that country even if he has been denied asylum—a form of protection known as withholding of removal. 8 U.S.C. 1231(b)(3)(A); see *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 441 (1987) (distinguishing between asylum and withholding of removal).

An alien who would otherwise qualify as a refugee is ineligible for asylum or withholding of removal if he "commit[ed] an act that the actor knows, or reasonably should know, affords material support" to a "terrorist organization." 8 U.S.C. 1182(a)(3)(B)(iv)(VI); see 8 U.S.C. 1158(b)(2)(A)(v), 1227(a)(4)(B), 1231(b)(3)(B). A "terrorist organization" is defined to include groups designated under specified procedures, as well as any other "group of two or more individuals" that engages in terrorist activity—a category referred to as "Tier III" terrorist organizations. 8 U.S.C. 1182(a)(3)(B)(vi)(III). "[M]aterial support" is defined broadly to include most contributions to a terrorist organization, wheth-

er in the form of property or the use of property, funds, or services. 8 U.S.C. 1182(a)(3)(B)(iv)(VI).

b. The Secretary of Homeland Security is authorized to "determine," after consultation with the Secretary of State and the Attorney General, that the material-support bar shall not apply with respect to certain aliens or with respect to aliens who have provided material support to certain groups. 8 U.S.C. 1182(d)(3)(B)(i).[1] The statute provides that a determination made pursuant to this authority is in the "sole unreviewable discretion" of the Secretary, and that such a determination does not "create any substantive or procedural right or benefit for a beneficiary of such a determination or any other person." *Ibid.* The statute further provides that "no court shall have jurisdiction to review such a determination or revocation [of a determination] except in a proceeding for review of a final order of removal pursuant to [8 U.S.C. 1252], and review shall be limited to the extent provided in [8 U.S.C.] 1252(a)(2)(D)." *Ibid.* Section 1252(a)(2)(D), in turn, states that no provision limiting or eliminating judicial review "shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review" of a final order of removal.

The Secretary of Homeland Security has exercised his authority under Section 1182(d)(3)(B)(i) with respect to discrete classes of aliens. One such exercise concerns material support provided under duress. 72 Fed. Reg. 9958 (Mar. 6, 2007) (reprinted at Pet. App. 106a-109a). The notice for that exercise of authority

---

[1] The Secretary of State has authority to make the same determination after consultation with the Secretary of Homeland Security and the Attorney General. 8 U.S.C. 1182(d)(3)(B)(i).

provides that, "if warranted by the totality of the circumstances," the material-support bar "shall not apply with respect to material support provided under duress" to a Tier III terrorist organization. 72 Fed. Reg. at 9958 (Pet. App. 106a). The notice delegates the authority to implement this determination in particular cases to U.S. Citizenship and Immigration Services (USCIS), and grants USCIS discretion to decide whether an alien provided material support under duress and whether, if so, the totality of the circumstances warrant an exemption. *Ibid.* (Pet. App. 107a-108a).

As in other determinations made pursuant to Section 1182(d)(3)(B)(i), the notice for the exercise of authority establishing the duress exemption provides that it applies to an alien who is "seeking a benefit or protection * * * and has been determined to be otherwise eligible for the benefit or protection." 72 Fed. Reg. at 9958 (Pet. App. 107a). The notice also reiterates the statutory admonition that the Secretary's exercise of discretion does not "create any substantive or procedural right or benefit that is legally enforceable by any party." *Ibid.* (Pet. App. 108a); see 8 U.S.C. 1182(d)(3)(B)(i).

c. In 2008, USCIS published a fact sheet describing its practices for implementing the Secretary's determinations under Section 1182(d)(3)(B)(i) with respect to aliens in removal proceedings. Pet. App. 110a-113a.[2] The fact sheet states that aliens in removal proceedings will be considered for an exemption

---

[2] The fact sheet is also available at http://www.uscis.gov/sites/default/files/USCIS/News/Pre-2010%20-%20Archives/2008%20Press%20Releases/Oct%2008/DHS_implements_exempt_auth_certain_terrorist_inadmissibility.pdf.

"only after an order of removal is administratively final." *Id.* at 110a. Consistent with the Secretary's statements that the exemption applies only when an individual "has been determined to be otherwise eligible for the benefit or protection" at issue, 72 Fed. Reg. at 9958 (Pet. App. 107a), the fact sheet states that a case will be considered by USCIS for an exemption only if "relief or protection was denied *solely* on the basis of one of the grounds * * * for which exemption authority has been exercised by the Secretary." Pet. App. 111a. The fact sheet explains that these policies enable USCIS "to focus its resources on cases where the possible exemption is the only issue remaining in the individual's case." *Ibid.*

Referrals to USCIS for exemption consideration are made by U.S. Immigration and Customs Enforcement (ICE), the component of DHS responsible for representing the United States in removal proceedings. Pet. App. 111a-112a. Aliens are notified if their case has been identified for referral to USCIS and of the result of USCIS's consideration. *Ibid.* The fact sheet advises that USCIS's determination is "final and within the sole discretion of the Secretary of Homeland Security." *Id.* at 112a. When USCIS determines that a case merits an exemption, it notifies the relevant ICE office, which implements the determination by filing, with the alien, a joint motion to reopen the alien's administrative removal proceedings in light of the grant of an exemption. *Id.* at 112a-113a.

2. Petitioner is a native and citizen of Eritrea. Pet. App. 44a. In 2007, DHS initiated removal proceedings charging petitioner as removable under 8 U.S.C. 1182(a)(7)(A)(i) for entering the United States without valid entry documents. Pet. App. 43a.

a. Petitioner appeared before an immigration judge (IJ) and conceded removability, but applied for asylum, withholding of removal under Section 1231(b)(3), and protection 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. See Pet. App. 5a, 45a.

Petitioner claimed that he had worked as a supervisor at a government-owned transportation company in Eritrea and that many of the workers he supervised had been conscripted into government service under Eritrea's compulsory "National Service" program. Pet. App. 3a-4a, 65a. Petitioner asserted that in 2005 and 2006 he expressed concerns about the poor treatment of National Service workers to his superiors and to government officials, and that as a result he was imprisoned for five months in deplorable conditions. *Id.* at 4a-5a, 65a. Petitioner claimed that during his imprisonment he was interrogated three times and accused of being a member of an unspecified anti-government group. *Id.* at 4a-5a, 65a-66a. Petitioner further alleged that after his release he remained subject to surveillance and interrogations, and that he fled Eritrea after he became convinced that government authorities were going to kill him. *Id.* at 5a, 66a.

After a hearing, the IJ denied petitioner's applications for asylum under Section 1158(a) and withholding of removal under Section 1231(b)(3), but granted him deferral of removal consistent with the CAT. Pet. App. 41a-81a. The IJ denied asylum on four separate grounds. First, the IJ found that petitioner lacked credibility based on inconsistencies and equivocations in his testimony. *Id.* at 5a, 61a-63a; see 8 U.S.C.

1158(b)(1)(B)(ii) (providing that an asylum applicant's uncorroborated testimony is sufficient to establish eligibility for asylum "only if the applicant satisfies the trier of fact that the applicant's testimony is credible"). Second, apart from credibility issues, the IJ found that petitioner failed to establish that he qualified as a refugee. Pet. App. 64a-70a. The IJ explained that petitioner's imprisonment under harsh conditions constituted persecution and that petitioner had a well-founded fear of future persecution if he returned to Eritrea because his father and sister had been arrested after he fled the country. *Id.* at 66a, 69a-70a. But the IJ found that under Seventh Circuit precedent, persecution on account of petitioner's internal complaints to his government superiors did not qualify as persecution on the basis of "political opinion" within the meaning of 8 U.S.C. 1101(a)(42)(A). Pet. App. 66a-67a; see, *e.g.*, *Musabelliu* v. *Gonzalez*, 442 F.3d 991, 995-996 (7th Cir. 2006). Third, the IJ held that even if petitioner were otherwise eligible for asylum, his request should be denied "as a matter of discretion." Pet. App. 71a.

Fourth, the IJ held that petitioner could not be granted asylum because he had provided material support to a terrorist organization, the Eritrean People's Liberation Front (EPLF). Pet. App. 71a-77a. Petitioner joined the EPLF in 1982, when he was approximately 15 years old, and was a member for the next nine years. *Id.* at 3a. At that time, the EPLF was engaged in a 30-year war to win Eritrea's independence from Ethiopia. *Ibid.* The IJ found that the EPLF "clearly" qualified as a terrorist organization because of its actions during the war, which included "sabotage," "assassinations," and attacks against civil-

ians. *Id.* at 71a-72a. Petitioner admitted working for the EPLF in a variety of capacities, including as a radio operator and a truck driver. *Id.* at 56a. The IJ found that this conduct constituted material support, and further found that petitioner had failed to establish that he neither knew nor should have known about the EPLF's terrorist activities while he was a member of the organization. *Id.* at 76a-77a. The IJ explained that petitioner's own expert acknowledged the EPLF's "well-known atrocities," and that petitioner had attended monthly "political indoctrination meeting[s]" where he received "updates on EPLF military and political actions, including the number of soldiers killed." *Id.* at 76a.

The IJ also denied petitioner's application for withholding of removal under Section 1231(b)(3). Pet. App. 77a-78a. The IJ explained that because petitioner had failed to satisfy the lower burden required for asylum, he could not establish that he "would be subject to persecution" based on political opinion if he were removed to Eritrea. *Id.* at 77a. The IJ also found that the material-support bar independently precluded a grant of withholding of removal. *Id.* at 77a-78a.

The IJ therefore ordered petitioner removed from the United States to Eritrea. Pet. App. 80a. But the IJ also granted petitioner deferral of removal consistent with the CAT. *Id.* at 78a-80a; see 8 C.F.R. 1208.17. Based on the testimony of petitioner's expert and the U.S. Department of State's Country Report on Eritrea, the IJ found that petitioner had established that it was more likely than not that he would be tortured if he were removed to Eritrea, and that he

was therefore entitled to protection under the CAT. Pet. App. 78a-80a

b. The BIA affirmed the denial of asylum and withholding of removal based on the material-support bar. Pet. App. 34a-40a. Petitioner did not challenge the IJ's finding that the EPLF was a terrorist organization, and the BIA upheld the IJ's determinations that petitioner's contributions constituted "material support" and that he had failed to establish that he neither knew nor should have known that the EPLF was engaged in terrorist activities. *Id.* at 36a. Given those rulings, the BIA stated that it "need not address the other arguments on appeal" regarding the IJ's alternative grounds for denying relief. *Id.* at 40a. In a footnote, the Board acknowledged that petitioner had argued that he might be eligible for a discretionary exemption from the material-support bar under Section 1182(d)(3)(B)(i), but stated that the BIA lacked authority to grant such an exemption and that the possibility of relief from another agency did not "affect the disposition of the [case]" before the Board. *Id.* at 40a n.1.[3]

The BIA's decision did not disturb the IJ's grant of deferral of removal consistent with the CAT. Pet. App. 34a-35a. That protection remains in place and prevents petitioner from being removed to Eritrea

---

[3] The Board incorrectly stated that only the Secretary of State is empowered to grant an exemption from the material-support bar. Pet. App. 40a n.1. The Secretaries of State and Homeland Security ordinarily have concurrent authority to grant exemptions, and the statute provides that the Secretary of State may not exercise discretion with respect to an alien "at any time during which the alien is the subject of pending removal proceedings." 8 U.S.C. 1182(d)(3)(B)(i).

unless it is terminated based on petitioner's request or based on a finding by an IJ that circumstances have changed such that he no longer faces a likelihood of torture in the event of removal. 8 C.F.R. 1208.17(d)-(f).

c. The BIA's decision rendered petitioner's removal order administratively final, see 8 U.S.C. 1101(a)(47)(B), but this Office has been informed by DHS that USCIS did not consider petitioner for a discretionary exemption from the material-support bar under Section 1182(d)(3)(B)(i). The record does not indicate the reason why petitioner was not considered, but that result is consistent with USCIS procedures because the decisions in petitioner's administrative removal proceedings did not contain a determination that he would have been eligible for protection but for the material-support bar. See 72 Fed. Reg. at 9958 (Pet. App. 107a) (requiring that an alien have been "determined to be otherwise eligible for the benefit or protection" at issue in order to receive an exemption). To the contrary, the IJ had concluded (as ICE had advocated) that petitioner was ineligible for protection on independent grounds, Pet. App. 61a-71a, and the BIA did not disturb that conclusion, noting that it was unnecessary to resolve those issues in light of its disposition of the case, *id.* at 40a.

3. The court of appeals denied a petition for review. Pet. App. 1a-33a.

a. As relevant here, the court of appeals first rejected petitioner's claim that the BIA erred by relying on the material-support bar alone, and that it was required to address all of the grounds on which the IJ relied in order to facilitate petitioner's potential consideration for a discretionary exemption under Sec-

tion 1182(d)(3)(B)(i). Pet. App. 19a-28a. Petitioner invoked a line of Seventh Circuit cases holding that, in certain circumstances, an IJ or the BIA is required to reopen or continue removal proceedings in order to allow the alien an opportunity to pursue relief from another agency. *Id.* at 21a-23a; see, *e.g.*, *Ceta* v. *Mukasey*, 535 F.3d 639, 646-647 (7th Cir. 2008).

The court of appeals distinguished those cases, explaining that they involved "statutory rights to apply for" particular immigration benefits. Pet. App. 23a. But, the court explained, Section 1182(d)(3)(B)(i) does not confer any comparable right, "instead simply empowering the Secretar[y] with 'sole unreviewable discretion' to grant a waiver." *Id.* at 24a. In addition to that "textual distinction[]," the court of appeals also relied on "pragmatic considerations," which "counsel in favor of abstaining from encroachment upon agency expertise in this context." *Id.* at 25a-26a. The court explained that "exemption grants from the terrorism bars are exceedingly rare" in the removal context, and that "a decree requiring a specific method of [BIA] adjudication in every case in which a petitioner holds himself out as eligible for a waiver * * * may serve only to prolong the resolution of cases in an already strained system." *Ibid.* Therefore, although the court believed that this case reflected a "disconcerting lack of harmonization among executive agencies," it concluded that the BIA had not "'legally erred' in declining to reach the merits of [petitioner's] asylum claim." *Id.* at 28a.[4]

---

[4] Although it made clear that any uncertainty on this point did not affect its decision, the court of appeals suggested that it was possible that petitioner could be considered for a discretionary exemption from the material-support bar, notwithstanding the

b. The court of appeals next rejected petitioner's claim that the BIA erred in dismissing his appeal when DHS had not rendered a determination regarding his possible eligibility for an exemption. Pet. App. 29a-33a. Petitioner asserted that the BIA should have "abstain[ed] from issuing a final removal order until after DHS issue[d] an exemption determination." *Id.* at 31a. Petitioner argued that Section 1182(d)(3)(B)(i) grants an alien in his situation a right to judicial review of an exemption determination in the course of a petition for review of a final order of removal, and that the agencies' current practices frustrate that asserted right because USCIS will not consider an alien for an exemption until after a removal order has become final and the 30-day period for seeking judicial review has started to run. *Id.* at 30a.

The court of appeals rejected petitioner's argument, agreeing with the government that Section 1182(d)(3)(B)(i) "guarantee[s] no such right" to judicial review, and instead merely preserves the ability of an alien who has previously received an exemption determination to raise any relevant legal or constitutional claims in a petition for review of a removal order. Pet. App. 31a-32a. The court added that in other contexts, Congress has enacted legislation automatically staying removal proceedings pending the disposition of applications for immigration benefits

---

BIA's failure to pass upon the IJ's finding that petitioner was ineligible for protection on additional grounds, because DHS itself could determine that petitioner was otherwise eligible for protection. Pet. App. 28a. In fact, as explained above (see p. 10, *supra*), USCIS does not consider an alien for an exemption if the decisions in the administrative removal proceedings do not contain a determination that the alien would have been eligible for protection but for the material-support bar.

that are reviewable on a petition for review of a final order of removal, but that are granted by agencies other than the BIA. *Id.* at 31a (citing 8 U.S.C. 1160(d)(2), 1255a(e)(2)). Given Congress's failure to establish a comparable system in this context, the court concluded that to order the BIA "to automatically stall the issuance of its opinions * * * while awaiting exemption determinations from DHS which may or may not ever issue would not only grind the levers of the immigration system to a near halt, but would constitute an impermissible judicial encroachment upon agency authority." *Id.* at 32a-33a. The court also noted that in this case, petitioner had failed to request a continuance from the Board pending an exemption determination by DHS. *Id.* at 32a.

4. The court of appeals denied rehearing and rehearing en banc. Pet. App. 82a-83a. Chief Judge Wood, joined by Judges Posner, Rovner, and Hamilton, dissented from the denial of rehearing en banc. *Id.* at 83a-95a. Chief Judge Wood stated her view that Section 1182(d)(3)(B)(i) grants aliens such as petitioner "a statutory right to seek a waiver of the terrorism bar," and concluded that DHS and the BIA must coordinate their procedures to ensure that aliens can exercise that right. *Id.* at 94a-95a. She would have left the selection of a proper remedy to the agencies, but stated that one possibility "would be to insist that the BIA adjudicate all issues that might stand in the way of an exemption from the terrorism bar" in every case in which the bar is implicated. *Id.* at 95a.

ARGUMENT

Petitioner renews his contentions (Pet. 15-32) that the BIA should have abstained from deciding his case until after DHS made an exemption determination

under Section 1182(d)(3)(B)(i) and that the BIA should have addressed all of the grounds for ineligibility identified by the IJ in order to facilitate his consideration for an exemption. The court of appeals correctly rejected those arguments, and its decision does not conflict with any decision of this Court or another court of appeals—indeed, it appears that no other court has addressed the questions presented here. Moreover, this case would be a poor vehicle in which to consider those issues because petitioner did not adequately present his claims to the BIA and because he would be unlikely to obtain relief even if he prevailed on the questions presented. No further review is warranted.

1. The court of appeals correctly rejected petitioner's contentions, and its decision does not conflict with any decision of this Court.

a. Petitioner argues (Pet. 19-20) that the BIA's decision "nullifie[d] statutory provisions permitting judicial review" by dismissing his appeal—and thereby rendering his order of removal final—even though DHS had not made an exemption determination. Petitioner appears to contend, as he did below, that in cases like this one, the BIA is required to "abstain from issuing a final removal order until after DHS issues an exemption determination" so that the exemption determination can be reviewed in a petition for review of the removal order. Pet. App. 31a. That argument lacks merit.

First, as the court of appeals observed, petitioner did not request a continuance from the BIA or otherwise ask the Board to abstain from issuing a decision pending an exemption determination by DHS. Pet. App. 32a. That failure provides an independently

sufficient reason to reject petitioner's claim: An alien seeking review of a removal order must have "exhausted all administrative remedies available," 8 U.S.C. 1252(d)(1), and "[t]he duty to exhaust includes the obligation to first present to the BIA any argument against the removal order as to which the Board is empowered to grant the alien meaningful relief." *Ghaffar* v. *Mukasey*, 551 F.3d 651, 655 (7th Cir. 2008).

Second, it would have served no purpose for the BIA to defer a decision as petitioner now urges it should have done. USCIS has stated in its public fact sheet that it "will consider a case for an exemption only after an order of removal is administratively final." Pet. App. 110a. Accordingly, deferring the finality of a removal order would only serve to delay indefinitely an alien's potential consideration for an exemption by USCIS.

Third, and in any event, petitioner is wrong to contend that Section 1182(d)(3)(B)(i) grants a right to judicial review of exemption determinations. As the court of appeals explained, the statute "guarantee[s] no such right." Pet. App. 31a-32a. To the contrary, the statute expressly provides that such determinations lie in the "sole *unreviewable* discretion" of the Secretary of Homeland Security. 8 U.S.C. 1182(d)(3)(B)(i) (emphasis added). The statute then provides that "no court shall have jurisdiction to review such a determination or revocation except in a proceeding for review of a final order of removal pursuant to [8 U.S.C. 1252], and review shall be limited to the extent provided in [8 U.S.C. 1252(a)(2)(D)]." 8 U.S.C. 1182(d)(3)(B)(i). Section 1252(a)(2)(D), in turn, provides that no provision limiting or eliminating judicial review "shall be construed as precluding re-

view of constitutional claims or questions of law raised upon a petition for review" of a final removal order. Those provisions operate as savings clauses, making clear that Section 1182(d)(3)(B)(i)'s general preclusion of judicial review does not eliminate an alien's right to raise any legal or constitutional claims related to an exemption determination in a petition for review of a final removal order—to the extent that such claims could ever arise in connection with a determination that the Act expressly commits to the Secretary's "sole unreviewable discretion." But those savings clauses do not direct that exemption decisions must be made at a particular time or in a particular manner that would facilitate judicial review, and it "would constitute an impermissible judicial encroachment upon agency authority" for a court to impose such requirements without a statutory basis. Pet. App. 32a-33a.

As the court of appeals explained, this conclusion is confirmed by the existence of automatic-stay provisions in other contexts in which a determination by another agency is made reviewable in a petition for review of a final order of removal. Pet. App. 30a-31a. For example, 8 U.S.C. 1255a permits certain aliens to adjust their status to that of an alien lawfully admitted for temporary residence. Such legalization determinations are made by DHS and are not reviewable by the BIA, but they are subject to judicial review in a petition for review of a final removal order. Pet. App. 31a (citing 8 U.S.C. 1255a(f)(4)). Congress provided an automatic stay of removal for aliens in removal proceedings who establish a prima facie case of eligibility for legalization. 8 U.S.C. 1255a(e); see also 8 U.S.C. 1160(d)(2) (parallel provision for other aliens

seeking adjustment of status). Congress's omission of a similar provision for an automatic stay in this context confirms that it did not intend to ensure judicial review for all exemption determinations under Section 1182(d)(3)(B)(i).[5]

Fourth, petitioner is wrong to contend (Pet. 6-7) that the legislative history of the 2007 amendments to Section 1182(d)(3)(B)(i) adding the language referring to judicial review supports his position. Petitioner relies on generalized concerns about the scope of the material-support bar expressed at a hearing that took place months before the amendment was passed. In a floor statement made shortly before passage, however, Senator Kyl specifically addressed judicial review, explaining that the amendment was the result of a "negotiated compromise" between him and Senator Leahy and that it "clarifies that the decision to extend

---

[5] That conclusion is further confirmed by the fact that Congress provided that the amendment adopting the current version of 8 U.S.C. 1182(d)(3)(B)(i)—which added the judicial-review provision on which petitioner relies—would be immediately effective and would apply to all cases, including those in which an order of removal had already become final. Consolidated Appropriations Act, 2008, Pub. L. No. 110-161, § 691(f), 121 Stat. 2366. Exemption determinations in such cases generally could not be subject to judicial review in a petition for review of a final removal order. See 8 U.S.C. 1252(b)(1) (providing that a petition "must be filed not later than 30 days after the date of the final order of removal"). Judicial review could conceivably lie only if the final order were reopened and a new removal order entered after DHS made its determination, but reopening is discretionary with the Board. 8 C.F.R. 1003.2(a). Congress's application of the statute to cases in which a final order had already been entered thus underscores that it did not intend through the amended statute to guarantee that all aliens would have opportunities to obtain judicial review of exemption determinations.

or to not extend a non-applicability determination to a particular group or individual is not subject to judicial review." 153 Cong. Rec. 36,022, 36,107-36,108 (2007). He noted that such determinations are "inherently executive in nature" and often involve "consideration of classified information" and other "sensitive judgments." *Id.* at 36,108. He therefore explained that the amendment makes clear that "it is the executive alone that will decide whether a bar should be inapplicable" and that the amendment "does not allow judicial relief from an executive determination." *Ibid.*

Finally, petitioner is wrong to contend (Pet. 19-20) that the court of appeals' decision is contrary to *Kucana* v. *Holder*, 558 U.S. 233 (2010). In that case, this Court addressed a statutory provision eliminating judicial review of decisions "the authority for which is specified under [the INA] to be in the discretion of the Attorney General." 8 U.S.C. 1252(a)(2)(B). The Court held that this provision applies only to "determinations made discretionary by statute" and not to those "declared discretionary by the Attorney General himself through regulation." 558 U.S. at 237. The Court noted that a contrary interpretation would have given the Executive "a free hand to shelter its own decisions from * * * review simply by issuing a regulation declaring those decisions 'discretionary.'" *Id.* at 252. But the Court did not hold that an administrative decision is impermissible whenever it has the practical effect of reducing the availability of judicial review. To the contrary, this Court long ago observed that there is "nothing anomalous about the fact that a change in * * * administrative regulations may effectively broaden *or narrow* the scope of review available in the Courts of Appeals." *Foti* v. *INS*, 375

U.S. 217, 229-230 (1963) (emphasis added). And petitioner's reliance on *Kucana* is particularly misplaced in this context, where the statute itself expressly provides that exemption determinations are in the "sole unreviewable discretion" of the Secretary of Homeland Security. 8 U.S.C. 1182(d)(3)(B)(i).

b. The court of appeals also correctly rejected petitioner's contention (Pet. 16-20) that the BIA erred in declining to adjudicate all of the issues presented in his case in order to facilitate his potential consideration for an exemption from the material-support bar. Like courts, administrative agencies generally need not address "issues the decision of which is unnecessary to the results they reach." *INS* v. *Bagamasbad*, 429 U.S. 24, 25 (1976) (per curiam). Petitioner does not contend that a statute or regulation expressly required the Board to decide whether he would have been entitled to asylum but for the application of the material-support bar, or that the reason given by the Board was inadequate to dispose of the only issues before the BIA—petitioner's eligibility for asylum and withholding of removal. Instead, petitioner contends that 8 U.S.C. 1182(d)(3)(B)(i) affords him a right to be considered for a discretionary exemption to the material-support bar, and that the BIA was therefore required to decide his case in a manner that facilitated his consideration for an exemption by USCIS.

Petitioner's contention lacks merit. It rests on the premise that 8 U.S.C. 1182(d)(3)(B)(i) affords him a right to be considered for an exemption from the material-support bar. Chief Judge Wood's dissent from the denial of rehearing en banc likewise presumed that petitioner had a "statutory right to seek a waiver of the terrorism bar." Pet. App. 94a. But that prem-

ise is incorrect. As the court of appeals observed, "no part of" 8 U.S.C. 1182(d)(3)(B)(i) "affords the petitioner the opportunity to 'apply' for an exemption." Pet. App. 25a-26a. Instead, the statute provides that the Secretary of Homeland Security "may determine" to grant an exemption in his "sole unreviewable discretion." 8 U.S.C. 1182(d)(3)(B)(i). This provision "empower[s] the Secretar[y] * * * to grant a waiver," but does not "invite[] individuals to 'apply'" for that exemption or give them a right to do so. Pet. App. 24a. And the fact sheet released by USCIS in 2008 explains that after a final removal order is entered, a case is considered by USCIS for possible exemption if it is referred to USCIS by ICE, which represents the United States in the removal proceedings, not as the result of an application by the alien himself. *Id.* at 111a-112a. With no right to *request* an exemption, an alien may not claim an entitlement to a determination concerning a possible exemption in a particular case.

Indeed, petitioner's claimed right to be considered for an exemption is refuted by the statute itself, which provides that a determination by the Secretary not to apply the material-support bar to an alien or class of aliens shall not "create any substantive or procedural right or benefit for a beneficiary of such a determination or any other person." 8 U.S.C. 1182(d)(3)(B)(i). Petitioner appears to believe that he could have been considered for relief under the Secretary's provision for an exemption for certain aliens who provided material support to Tier III terrorist organizations under duress, if warranted by the circumstances of a particular case. See Pet. App. 106a-109a (reproducing this determination). But the notice of the duress ex-

emption repeats the statutory admonition that the exercise of the Secretary's authority does not create any "substantive or procedural right or benefit," 72 Fed. Reg. at 9958 (Pet. App. 108a), such as a right to be considered for an application of the duress exemption in the circumstances of a particular alien's case.

As Chief Judge Wood observed, USCIS's practices allow it to focus its resources on those cases in which the grant of an exemption will be outcome determinative and avoids the "waste [of] resources" that would occur in determining whether to grant a discretionary exemption while the alien "could still be removed on independent grounds." Pet. App. 89a. Those practices are a reasonable exercise of the broad discretion granted under Section 1182(d)(3)(B)(i). Cf. *Lopez* v. *Davis*, 531 U.S. 230, 242 (2001) (an agency granted discretionary authority may implement that discretion by means of "categorical exclusions"). And as the court of appeals explained, there is no statutory basis for requiring the BIA to structure its decisions to ensure that an alien receives consideration for such a purely discretionary determination.

Finally, petitioner is wrong to contend (Pet. 17-19) that the court of appeals' decision is inconsistent with *Costello* v. *INS*, 376 U.S. 120 (1964), and *Dada* v. *Mukasey*, 554 U.S. 1 (2008). *Costello* held that a statute providing for the deportation of aliens who had been convicted of certain offenses did not apply to aliens who were citizens at the time of the relevant convictions, but were later denaturalized. 376 U.S. at 127-128. The Court relied in part on the fact that the statute provided that a conviction would not be a ground for deportation if the sentencing court recommended, at the time of sentencing or shortly thereaf-

ter, "that such alien not be deported." *Id.* at 126. The Court explained that the ability to seek such a recommendation from the sentencing judge was "an important part of the legislative scheme," but that it would be a "dead letter" as to an alien who was a naturalized citizen at the time of his conviction, because the judge would have had no reason to make a nondeportation recommendation for a citizen. *Id.* at 127.

Dada addressed "the interaction of two statutory schemes—the statutory right to file a motion to reopen in removal proceedings and the rules governing voluntary departure." 554 U.S. at 8. The Court held that an alien who agrees to depart voluntarily following removal proceedings must be allowed to withdraw the request for voluntary departure in order to pursue a motion to reopen. *Id.* at 20. The Court reasoned that this step was necessary to "preserve the alien's right to pursue reopening," which would otherwise be effectively eliminated for aliens who agree to voluntary departure. *Id.* at 18-19.

Costello and *Dada* thus rejected statutory interpretations or regulatory schemes that would have effectively nullified a right to seek relief—in *Dada*, the "statutory right" to file a motion to reopen, 554 U.S. at 8, and in *Costello* the right to seek a recommendation against deportation from the sentencing judge, 376 U.S. at 126; see *Padilla* v. *Kentucky*, 559 U.S. 356, 363 (2010) (explaining that courts treated the recommendation procedure at issue in *Costello* as "'part of the sentencing' process" and subject to "the Sixth Amendment right to effective assistance of counsel" (quoting *Janvier* v. *United States*, 793 F.2d 449, 452 (2d Cir. 1986)). Section 1182(d)(3)(B)(i), in contrast, provides a purely discretionary authority to be exer-

cised by the Secretary and does not afford aliens any comparable right to be considered for an exemption from the material-support bar.

2. The court of appeals' decision does not conflict with any decision of another court of appeals. Petitioner does not cite any other decision addressing the questions presented here, and it appears that no such decisions exist. Cf. *Benitez* v. *Attorney Gen.*, 543 Fed. Appx. 913, 917-918 (11th Cir. 2013) (per curiam) (noting but declining to resolve the second question presented). Instead, petitioner contends (Pet. 20-24) that this case implicates what he characterizes as a more generalized disagreement over the BIA's obligations in circumstances in which "a sister agency has jurisdiction over potential relief from removal, while the Board has authority to enter a removal order."

That alleged conflict is not implicated here. All of the cases on which petitioner relies held that the BIA erred in refusing to continue or reopen removal proceedings pending USCIS's adjudication of applications for adjustment of status under 8 U.S.C. 1255, a provision understood to give aliens a statutory right to apply for such an adjustment. See *Freire* v. *Holder*, 647 F.3d 67, 69-70 (2d Cir. 2011) (per curiam) (alien requested a continuance "while he sought adjustment of status before the USCIS"); *Clifton* v. *Holder*, 598 F.3d 486, 492-494 (8th Cir. 2010) (alien asked the BIA to remand and reopen removal proceedings in light of "an application for adjustment of status"); *Ni* v. *BIA*, 520 F.3d 125, 130 (2d Cir. 2008) (aliens moved to reopen removal proceedings so they could "press their adjustment applications before the USCIS"); *Kalilu* v. *Mukasey*, 516 F.3d 777, 780 (9th Cir. 2008) (per curiam) (alien sought a remand and reopening "in order

to provide time for USCIS to adjudicate a pending application" for adjustment of status); see also Pet. App. 23a.[6]

There is no conflict between those decisions and the decision below. Indeed, as petitioner acknowledges (Pet. 23-24), the Seventh Circuit has agreed with the Second, Eighth, and Ninth Circuits that in some circumstances the BIA commits error when it refuses to grant a continuance to allow an alien to "pursue [an] adjustment application with the USCIS." *Ceta* v. *Mukasey*, 535 F.3d 639, 647 (2008) (citing *Kalilu* and *Ni*); see also *Benslimane* v. *Gonzales*, 430 F.3d 828, 832-833 (2005); *Subhan* v. *Ashcroft*, 383 F.3d 591, 595-596 (2004). But the decision below distinguished those precedents because they concerned "statutory rights to apply for adjustment of status" rather than "a purported right to a waiver determination in the context of the material support for terrorism bar." Pet. App. 23a.[7]

There is thus no merit to petitioner's claim of a circuit conflict. The absence of any other decisions addressing the issues petitioner raises also belies petitioner's assertion (Pet. 26-29) that the questions presented in this case are "important and recurring." Petitioner may be correct that the material-support

---

[6] The case on the other side of petitioner's claimed split, *Scheerer* v. *Attorney Gen.*, 513 F.3d 1244 (11th Cir.), cert. denied, 555 U.S. 825 (2008), likewise involved an alien's contention that the BIA should have granted a motion to reopen "and continued his case until USCIS had an opportunity to pass on his adjustment application." *Id.* at 1254.

[7] Chief Judge Wood would have extended the reasoning of *Ceta*, *Benslimane*, and *Subhan* to this case, but she, too, recognized that those decisions involved different "statutory language" and a different "procedural posture." Pet. App. 94a.

bar and exemptions to it are frequently implicated in matters before USCIS, but the particular procedural questions presented here, relating to the interaction between removal proceedings and the exercise of USCIS's exemption authority, have apparently arisen only rarely.

3. Even if the questions presented otherwise warranted this Court's review, this case would be a poor vehicle in which to consider them, for several reasons.

First, petitioner failed to present his claims to the BIA in any detail. He forfeited his first claim entirely by failing to request a continuance or other stay of the BIA's proceedings pending an exemption determination by DHS. Pet. App. 32a. And although the court of appeals held that petitioner's reply brief was sufficient to preserve his request that the BIA decide all of the issues in his case in order to facilitate his potential consideration for an exemption, see *id.* at 24a n.8, petitioner did not develop that request in any detail. He did not, for example, refer to the USCIS fact sheet, and he did not explain why he believed he was eligible for an exemption, stating only that he "may be eligible for a discretionary waiver." Administrative Record 24. Because the BIA did not have the opportunity to consider the arguments that petitioner now raises or to address the interaction between its decision and DHS's practices in any detail, this case would be a poor vehicle in which to take up the questions presented.

Second, petitioner would be ineligible for asylum even if he were granted an exemption from the material-support bar. In addition to the material-support bar, the IJ also relied on three independent grounds, finding that petitioner lacked credibility, that he did

not face persecution on account of political opinion, and that asylum should be denied as a matter of discretion. Pet. App. 61a-71a. The BIA had no occasion to reach these issues, but it is unlikely that it would have reversed all three of them. In particular, the IJ's credibility determination was subject to review only for clear error and was supported by numerous inconsistencies and equivocations in petitioner's testimony. 8 C.F.R. 1003.1(d)(3)(i); see Pet. App. 61a-63a.

Third, even if USCIS were to consider petitioner for an exemption from the material-support bar under Section 1182(d)(3)(B)(i), it appears likely that he would be denied relief. Although petitioner has not specifically explained the ground on which he believes a discretionary exemption might have been available, he appears to be relying on the Secretary's discretionary determination regarding an exemption for individuals who provided material support under duress. See Pet. App. 106a-109a (reproducing the Federal Register notice setting forth this exemption). But petitioner voluntarily joined EPLF. *Id.* at 55a. And although he claimed that he wanted to leave two days after he joined and that he was forced to stay by threats that he would be killed if he left, he continued to work for the EPLF for the next nine years. *Id.* at 55a-57a. During that time, he often drove a truck without supervision, yet he "never attempted to escape." *Id.* at 56a. Indeed, he stated that he "never contemplated escaping during the nine years he was with the EPLF." *Id.* at 57a. Particularly given the IJ's finding that petitioner lacked credibility, USCIS would be unlikely to find that his material support for the EPLF was provided under duress.

Moreover, even if petitioner could establish that he acted under duress, he appears to be ineligible for an exemption on another ground. An alien who has provided material support under duress is eligible for an exemption only if he "[h]as fully disclosed, in all relevant applications and interviews with U.S. Government representatives and agents, the nature and circumstances of each provision of such material support." 72 Fed. Reg. at 9958 (Pet. App. 107a). Petitioner could not make that showing in light of the IJ's finding that there are "serious concerns about [petitioner's] credibility on key parts of his testimony" in removal proceedings, including concerns that he falsely minimized his awareness of the EPLF's terrorist activities. Pet. App. 62a.[8]

---

[8] Petitioner suggests (Pet. 26) that he would likely be granted relief if he were considered for an exemption because the "overwhelming majority of individuals considered for an exemption by DHS actually end up receiving one." But the statistics on which petitioner relies include only cases in which USCIS has either granted or finally denied an exemption. Those statistics do not accurately reflect the likelihood that a particular alien will receive an exemption because, under USCIS policy, most cases within USCIS's jurisdiction that do not meet the qualifications of an available exemption remain on hold, without a final denial, in the event of a future exercise of the exemption authority that would benefit the alien in question. See USCIS, *Revised Guidance on the Adjudication of Cases Involving Terrorism-Related Inadmissibility Grounds (TRIG) and Further Amendment to the Hold Policy for Such Cases* (Nov. 20, 2011), http://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/Static_Files_Memoranda/TRI-%20Hold-pm-602-0051.pdf. In addition, petitioner's general statistics do not account for the specific barriers to relief present in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General
STUART F. DELERY
Assistant Attorney General
MICHAEL P. LINDEMANN
ETHAN B. KANTER
DANIEL I. SMULOW
BRYAN S. BEIER
Attorneys

AUGUST 2014