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UNITED STATES DEPARTMENT OF JUSTICE
OFFICE OF THE ATTORNEY GENERAL
WASHINGTON, DC

In the Matter of

Negusie,

Respondent.

REQUEST TO APPEAR AS AMICUS CURIAE AND SUPPLEMENTAL BRIEF OF IMMIGRATION REFORM LAW INSTITUTE

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INTEREST OF *AMICUS CURIAE*

The Immigration Reform Law Institute ("IRLI") is a non-profit 501(c)(3) public interest law firm dedicated to litigating immigration-related cases on behalf of, and in the interests of, United States citizens and legal permanent residents, and also to assisting courts in understanding and accurately applying federal immigration law. IRLI has litigated or filed *amicus curiae* briefs in a wide variety of cases, including *Wash. All. of Tech. Workers v. U.S. Dep't of Homeland Sec.*, 74 F. Supp. 3d 247 (D.D.C. 2014); *Save Jobs USA v. U.S. Dep't of Homeland Sec.*, No. 16-5287 (D.C. Cir. filed Sept. 28, 2016); *Matter of Silva-Trevino*, 26 I. & N. Dec. 826 (B.I.A. 2016); *Matter of C-T-L-*, 25 I. & N. Dec. 341 (B.I.A. 2010); *In re Q- T- -- M- T-*, 21 I. & N. Dec. 639 (B.I.A. 1996);

ISSUES PRESENTED

Whether coercion and duress are relevant to the application of the Immigration and Nationality Act's persecution bar. *See* 8 U.S.C. §§ 1101(a)(42), 1158(b)(2)(A)(i), 1231(b)(3)(B)(i).

SUMMARY OF THE FACTS

Respondent is a dual national of Ethiopia and Eritrea. *Negusie v. Holder*, 555 U.S. 511, 514 (2009). While Respondent was in Eritrea, he was conscripted into the military on two separate occasions. *Id.* When Respondent refused to fight against Ethiopia, the government incarcerated him. *Id.* at 515. After he was released, he worked as a guard in a prison where prisoners were persecuted. *Id.* As part of his work, Respondent carried a gun, kept prisoners from taking showers and getting fresh air, and made sure prisoners stayed in the sun as punishment. *Id.* At least once, he saw a man die after being in the sun for an extended period of

time. *Id.* Respondent eventually stowed away aboard a ship headed for the United States. *Id.* He applied for asylum once reaching the United States. *Id.*

The immigration judge (IJ) found that Respondent had persecuted others while working as an armed guard and therefore was ineligible for asylum or withholding of removal. *Id.* The Board affirmed the IJ's findings that Respondent tortured others by leaving them out in the sun to die and that his motivations for doing so were irrelevant. *Id.* at 516. On review, the United States Court of Appeals for the Fifth Circuit agreed with the Board's finding that whether an alien was compelled to persecute another is immaterial to whether the persecution bar applies. *Id.* Respondent then appealed to the United States Supreme Court. *Id.*

The Court found that the Board had improperly treated *Fedorenko v. United States*, 449 U.S. 490 (1981), as controlling on whether there is a duress exception to the persecutor bar to asylum, and thus had failed to make its own determination on the issue. *Id.* at 518-20. The Court accordingly remanded the case back to the Board to determine, in the first instance, whether there is such a duress exception. *Id.* at 523-24.

On remand, the Board, relying heavily on international sources, read an implied duress exception into 8 U.S.C. § 1101(a)(42). *Matter of Negusie*, 27 I. & N. Dec. 347, 353-60 (B.I.A. 2018).

SUMMARY OF THE ARGUMENT

According to the Immigration and Nationality Act ("INA"), an alien is barred from seeking asylum in the United States if he or she "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." This provision is known as the persecution bar to asylum. 8 U.S.C. §§ 1101(a)(42), 1158 (b)(2)(A)(i). Similarly, 8 U.S.C. § 1231(b)(3)(B)(i) mandates that

the withholding of an alien's removal to a country in which the alien's life or freedom could be threatened be denied if the alien has persecuted another.

The statutory scheme of the INA cannot support the creation of an implicit duress exception to the persecution bar. The language itself gives no indication that any such exception was intended. Nor does the INA as a whole provide support for such an exception. On the contrary, other sections of the INA include explicit duress exceptions, and thus the absence of an explicit duress exception to the persecution bar indicates that Congress did not intend there to be any duress exception to it, express or implied. Furthermore, persecutors, even those who acted under some degree of duress, though they remain eligible for and entitled to temporary deferral of removal, should not receive the generous benefits that accompany asylum and withholding of removal. Lastly, because Congress acted many years before the interpretations in the international sources the Board relied upon were made, the latter have no persuasive value in showing congressional intent.

ARGUMENT

In *Negusie*, the Supreme Court held that the INA's persecution bar was "ambiguous as to whether coercion or duress was relevant in determining if an alien had participated in persecution." *Negusie v. Holder*, 555 U.S. 511, 517-18, 539 (2009). In determining, after this decision, that an implicit duress exception did exist, the Board did not focus on the statutory language of the persecution bar, its placement within the INA, or statutory cannons of construction often considered when determining the application of ambiguous statutory language. Instead, the Board cited international treaties and sources to support its finding. *Matter of Negusie*, 27 I. & N. Dec. 356-60 (B.I.A. 2018). The Attorney General should determine that the Board improperly relied upon these international sources, and, on the bases of

statutory language, congressional intent, and equity, find that the persecution bar is a mandatory bar that without exception prevents former persecutors from being granted asylum or withholding of removal in the United States.

I. The Text Of The Persecution Bar Does Not Include A Duress Exception.

As the Fifth Circuit has noted, "[t]he syntax of the [asylum] statute suggests that the alien's personal motivation is not relevant." *Bah v. Ashcroft*, 341 F.3d 348, 351 (5th Cir. 2003) (finding that an involuntary recruit in Sierra Leone who did not personally share the viewpoint of the group but still committed acts of persecution was not eligible for asylum based on the persecution bar). Indeed, the statutory language focuses strictly on defining what action is necessary to be a persecutor for the purposes of the bar to asylum and withholding of removal, and gives no hint that motivation matters.

"To gather evidence of statutory meaning, a judge may turn to the rest of the provision, to the act as a whole, or to similar provisions elsewhere in the law." Valerie C. Brannon, Cong. Research Serv., *Statutory Interpretation: Theories, Tools and Trends*, R45153 (2018). These interpretive tools further reveal that no duress exception can be gleaned from the text.

The language of the persecution bar is found in three sections of the INA: not only the asylum and removal sections, but also the definition section, as part of the definition of a refugee in 8 U.S.C. § 1101(a)(42). This placement is crucial here, for a definition necessarily excludes any meaning not expressly stated, and requires a court to construe the language as written. *Colautti v. Franklin*, 439 U.S. 379, 392 n.10 (1979); *Meese v. Keene*, 481 U.S. 465, 484-85 (1987); *see also Stenberg v. Carhart*, 530 U.S. 914, 942 (2000) (holding that when an explicit definition is included, a court must follow that definition even if it would otherwise assign the word another meaning).

As for the persecution bars to asylum and withholding of removal in 8 U.S.C. §§ 1158(b)(1) and 1231(b)(3), while Respondent believes there *ought* to be a duress exception to them, such an exception simply is not what Congress passed in these two sections. "[W]here Congress has intended to provide regulatory exceptions . . ., it has done so clearly and expressly, rather than . . . subtl[y]." *FCC v. NextWave Pers. Communs. Inc.*, 537 U.S. 293, 302 (2003) (discussing proposed exceptions to the bankruptcy code).

When looking at the construction of the INA, courts should examine "the language and design of the statute as a whole." *See Matter of M-H-Z-*, 26 I. & N. Dec. 757 (B.I.A. 2016) (finding that when interpreting an ambiguous provision of a statute, courts should look at the entire statute). According to the Supreme Court, "[i]t is a 'fundamental canon of statutory construction that words of a statute must be read in their context and with a view to their place in the overall statutory scheme.'" *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132-33 (2000) (quoting *Davis v. Michigan Dep't. of Treasury*, 489 U.S. 803, 809 (1989)).

Where Congress has created explicit exceptions, "additional exceptions are not to be implied." *Andrus v. Glover Constr. Co.*, 446 U.S. 608, 617-18 (1980) (citing *Continental Casualty Co. v. United States*, 314 U.S. 527, 533 (1974). "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposefully in the disparate inclusion or exclusion." *Matter of M-H-Z-*, 26 I. & N. Dec. at 761 (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)); *see also Annachamy v. Holder*, 733 F.3d 254, 261 (9th Cir. 2013) *overruled on other grounds in Abdisalan v. Holder*, 774 F.3d 517 (9th Cir. 2014) (finding that no implied duress exception existed for the terrorist bar). The Supreme Court upheld this reasoning in

finding that "Congress generally acts intentionally when it uses particular language in one section of a statute but omits it in another." *Dep't of Homeland Sec. v. Maclean*, 135 S. Ct. 913, 919 (2015).

Congress created explicit exceptions to multiple provisions of the INA. For example, in 8 U.S.C. § 1182(a)(2)(A)(ii), Congress provided an exception to the provision that bars aliens who have been convicted of certain crimes from admission into the United States. *See* 8 U.S.C. §§ 1182(a)(2)(A)(i-ii) (creating exceptions to the inadmissibility bar for crimes that occurred when the applicant was a minor or when the punishment for the conviction is less than a year and the applicant served six months or less in confinement). Congress also provided an exception to the provision that bars the entrance of aliens who are affiliated with terrorists or involved in terrorist activities. *See* 8 U.S.C. §§ 1182(a)(3)(B)(i-ii) (creating an exception to the terrorist bar for spouses and children in a very limited number of cases). Another example of an explicit exception provided by Congress in the INA is the involuntariness exception to the bar against aliens involved in a totalitarian party. *See* 8 U.S.C. §§ 1182(a)(3)(D)(i-ii) (creating and exception for involuntary membership).

From these examples, it is evident that Congress knows how to create an explicit involuntariness exception to certain types of prohibited activity. That it did not do so in the persecution bar, therefore, speaks volumes about its intent not to make an implicit exception there.

Equity also counsels against reading a duress exception into the persecution bar. To begin with, it is not as though aliens who committed persecution under some degree of duress are without recourse. Committing acts of persecution against another person, with whatever degree of voluntariness or involuntariness, does not disqualify an alien from seeking temporary deferral

of removal under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT"), Dec. 10, 1984, S. Treaty Doc. No. 100-20, 1465 U.N.T.S. 85, which embodies the United States's "non-refoulment" principle that an alien who will be tortured cannot be returned to his home country. *Negusie v. Holder*, 555 U.S. at 514; 8 C.F.R. § 208.17. Also, asylum carries with it generous benefits, which it would be inappropriate to extend to persecutors, even those whose acts of persecution were committed under some degree of duress. For example, asylees can add family members to their application, or petition for eligible family members to join them. Most importantly, asylees can eventually become lawful permanent residents and United States citizens. 8 C.F.R. § 208.13. Likewise, withholding of removal can provide the generous benefit of permitting an alien to stay in the United States with the ability to apply for work authorization. 8 C.F.R. § 208.16(b)(2). Appropriately, these benefits of asylum and withholding of removal are not available to those granted deferral of removal under CAT.

II. The Board's Use Of International Sources Is Not Persuasive Because The Sources Postdate Both The Signing Of The Protocol By The United States And The Enactment Of The Refugee Act Of 1980.

The majority in *Matter of Negusie*, 27 I. & N. Dec. at 360, argued that the inclusion of a duress exception in the United Nations Convention and Protocol Relating to the Status of Refugees, art. 1F, Jan. 31, 1967 19 UST 6223, TIAS No. 6577 ("Article 1F") should guide the United States's interpretation of its domestic law. Actually, though, the timing of that inclusion robs it of any persuasive power in the discernment of Congress's intent. The United States signed the Protocol in 1967. At that time, no interpretation that Article 1F included an implicit duress exception existed. Even when the United States enacted the Refugee Act of 1980, Article 1F had not been interpreted to include an implicit duress exception. Indeed, the United Nations

High Commissioner for Refugee (UNHCR) Handbook stated that Article 1F should have a narrow, "restrictive" interpretation. *Matter of Negusie*, 27 I. & N. Dec. at 374 (Malphrus, J., dissenting). It was not until 2003 that the UNHCR considered a duress exception. *Id.*

The majority's appeal in *Matter of Negusie* to other international tribunals suffers from the same glaring problem. *Id.* at 357-58*; see also* Brief of the Office of the United Nations High Commissioner for Refugees as Amicus Curiae Supporting Petitioners, 555 U.S. 511 (2009) (No. 07-499). The earliest of the international tribunal decisions cited came almost 20 years after the United Stated enacted the Refugee Act of 1980. In enacting that law, Congress's intent obviously could not have been shaped by interpretations by international bodies that took place much later.

CONCLUSION

The finding by the Board reading a duress exception into the persecution bar should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on November 30, 2018, I electronically submitted the foregoing *amicus curiae* brief to the United States Department of Justice via email, and, via first class mail, sent three copies to the Office of the Attorney General at the United States Department of Justice for distribution to the parties.

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