No. 06-1346

In the Supreme Court of the United States

AHMED ALI,

Petitioner,

v.

DEBORAH ACHIM, MICHAEL CHERTOFF, SECRETARY OF THE DEPARTMENT OF HOMELAND SECURITY, AND ALBERTO GONZALES, UNITED STATES ATTORNEY GENERAL,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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The Government concedes that circuit splits exist as to both questions raised by the Petitioner. It nevertheless urges this Court not to hear this case on the ground that the conflicts may dissolve after further consideration of the issues in the lower courts. While it is always the case that delay may permit additional circuits to stake out views on an issue, the two questions presented have been considered thoroughly by multiple circuits, which have reached conflicting and seemingly irreconcilable results. This Court's urgent attention therefore is needed to resolve the split in authority on these important issues that affect our country's immigration laws.

ARGUMENT

I. THIS COURT SHOULD RESOLVE THE SPLIT IN THE CIRCUITS ON THE CONSTRUCTION OF 8 U.S.C. § 1231(b)(3)(B).

1. The Government's response is striking for its failure to answer the Petitioner's argument concerning the "'associated group or series'" in 8 U.S.C. § 1231(b)(3)(B). *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 168 (2003). In consecutive sentences, Section 1231(b)(3)(B) both (i) conclusively determines that an aggravated felony (or felonies) carrying a five year term of imprisonment constitutes a particularly serious crime ("PSC") and (ii) gives the Agency discretion to find a crime a PSC notwithstanding the length of the jail sentence. The first sentence clearly associates the terms "aggravated felony" and "term of imprisonment"; the second sentence references only the latter.

The Government contends that the structure of the statute inherently requires discretionary application by the Agency on a case-by-case basis. Brief in Opposition ("Opp.") at 12-13. But it is black-letter law that withholding of removal is mandatory – not discretionary – whenever the

evidence indicates that persecution is more likely than not. See generally *INS v. Cardoza-Fonseca*, 480 U.S. 421, 436-437 (1987); *INS v. Stevic*, 467 U.S. 407, 418, 421 (1984).

The Government's effort to avoid the statutory text and the applicable canons of construction by stressing purported ambiguities in the term "particularly serious" is misplaced. The use of that term reflected Congress' manifest intent to use the withholding statute to bring the country into compliance with our treaty obligations. *Cardoza-Fonseca*, 480 U.S. at 436 ("If one thing is clear from the legislative history of the new definition of 'refugee,' and indeed the entire 1980 Act, it is that one of Congress' primary purposes was to bring United States refugee law into conformance with the [Protocol]"). The term "particularly serious crime" is imported directly from international law.

Moreover, after initially deferring to the Agency on the meaning of that key term, Congress now has limited that discretion by defining the term, rather than leaving it for case-by-case adjudication. See 8 U.S.C. § 1231(b)(3)(B). Even a cursory study of the statutory text in light of well settled rules of interpretation reveals Petitioner's proposed construction as the most natural reading of the language used by Congress. See E. Crawford, CONSTRUCTION OF STATUTES 337 (1940) (*expressio unius* "'properly applies only when in the natural association of ideas in the mind of the reader that which is expressed is so set over by way of strong contrast to that which is omitted that the contrast enforces the affirmative inference'") (cited in *Chevron, U.S.A,. Inc. v. Echazabal*, 536 U.S. 73, 81 (2002)). Under that construction, Congress created a category of crimes (aggravated felonies with a five year sentence) which are *per se* particularly serious; a category of crimes (aggravated felonies with less than a five year sentence) for which the decision is put in the hands of the Agency; and a category of crimes (non-aggravated felonies) which are not covered by the PSC definition.

The Government's reliance on a snippet from a Conference Report also is misplaced. To begin with, legislative history may not be used to trump clear statutory language. *Whitfield v. United States*, 543 U.S. 209, 215 (2005) ("Because the meaning of [the statute at issue] is plain and unambiguous, we need not accept petitioners' invitation to consider the legislative history"); *Dep't of Housing and Urban Dev. v. Rucker*, 535 U.S. 125, 132 (2002). Moreover, even if the views expressed in a Conference Report might be pertinent in the abstract, the mere mention of "'other circumstances'" on which the Government relies cannot be accepted as a clear expression of an intent that unambiguous statutory terms be interpreted in a counter-intuitive way.

In any event, to the extent that statutory history may be relevant in this case, Congress amended the PSC bar language three times in six years. First, in 1990, Congress enacted a *per se* rule that all aggravated felonies were PSCs (simultaneously adopting the same rule for Asylum cases). Immigration Act of 1990, Pub. L. No. 101-649, § 515(a)(2), 104 Stat. 4978, 5053. Then, in April 1996, in response to the expansion of the definition of "aggravated felony," Congress added 8 U.S.C. § 1253(h)(3)(B), which provided an exception to the *per se* bar for withholding cases, where an exception was "necessary to ensure compliance with the 1967 United Nations Protocol Relating to the Status of Refugees." Antiterrorism and Effective Death Penalty Act of 1996, § 413(f), Pub. L. No. 104-132, 110 Stat. 1214, 1269; for legislative history, see *Matter of Q-T-M-T-*, 21 I. & N. Dec. 639, 641-642, 645-649 (BIA 1996). Finally, in September 1996, Congress enacted the current statute, leaving in place a *per se* rule in asylum cases that aggravated felonies are automatically PSCs, Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, § 604(a), 110 Stat. 3009-546, 3009-692 (1996) (codified at 8 U.S.C. § 1158(b)(2)(B)(i)), while simultaneously providing that aggravated felonies are not *per se* PSCs in the withhold-

ing context unless accompanied by a five year term of imprisonment. *Id.* at § 305(a)(3), 110 Stat. at 3009-598. Congress's frequent involvement in this area of law strongly suggests that Congress acted carefully and deliberately in choosing the specific language through which it altered the definition of "particularly serious crime" in Section 1231(b)(3). And the language itself confirms Congress's intent to loosen the *per se* PSC bars relating to withholding of removal under 8 U.S.C. § 1231(b)(3), while maintaining the *per se* bar in the asylum context.

2. In view of Petitioner's demonstration that Section 1231(b)(3)(B) is susceptible to a clear and unambiguous construction, the Government's request that this Court defer to the Agency's construction misses the mark. This Court has stated unequivocally that "[w]e only defer * * * to agency interpretations of statutes that, applying the normal 'tools of statutory construction,' are ambiguous." *INS v. St. Cyr*, 533 U.S. 289, 320 n.45 (2001) (citing *Chevron, U.S.A. Inc. v. Natural Resources Defense Council*, Inc., 467 U.S. 837, 843 n. 9 (1984); *Cardoza-Fonseca*, 480 U.S. at 446-448. The Government's argument cannot be squared with that principle, for a straightforward application of the *expressio unius* principle renders the statute unambiguous.

In any event, assuming that *Chevron* deference would be given to a reasonable agency interpretation of Section 1231(b)(3)(B), in this instance the Board of Immigration Appeals never even purported to analyze the statute using *expressio unius* principles. Such an interpretation cannot be considered reasonable as a matter of law. See *Bell v. Reno*, 218 F.3d 86, 94 (2d Cir. 2000) ("An agency's interpretation of a statutory provision is not reasonable when it ignores an established rule of statutory construction set forth by the Supreme Court").

3. While it is true that only two circuits have addressed the Section 1231(b)(3)(B) issue in this case, the Government's suggestion that those circuits may alter their respec-

tive approaches is pure speculation. The Third Circuit has declared the statute to have a clear meaning, after applying *expressio unius* principles. Having found a clear meaning in the statute, it is exceedingly difficult to imagine that the court would turn around and defer to a contrary reading under deference principles. *St. Cyr*, 533 U.S. at 320 n.45 ("We only defer * * * to agency interpretations of statutes that, applying the normal 'tools of statutory construction,' are ambiguous. * * * [T]here is, for *Chevron* purposes, no ambiguity in such a statute for an agency to resolve"); *Clark v. Martinez*, 543 U.S. 371, 382-383 (2005) (once a court has interpreted a statute, that interpretation will be applied without deference). Nor does a change of course appear at all likely in the Seventh Circuit, particularly in view of that court's denial of Petitioner's request for panel rehearing with suggestion of rehearing *en banc* in this case.[1] Finally, the Government has not suggested – nor can Petitioner envision -- an alternative to the approaches of the circuits in conflict. Either the Third Circuit is correct on the language of the statute or the Seventh Circuit is correct that the Agency's construction of a statutory ambiguity is entitled to deference.

II. THIS COURT SHOULD RESOLVE THE SPLIT IN THE CIRCUITS ON THE SCOPE OF THE COURTS' JURISDICTION UNDER 8 U.S.C. § 1252(a)(2)(B)&(D).

1. As to the second question presented, the Government cannot deny that a significant circuit split exists, but nevertheless opposes certiorari as "premature" because it contends

[1] The Government suggests that the Ninth Circuit might address this issue in *Desire v. Gonzales*, No. 03-16178. The briefing in that case suggests otherwise. Desire was convicted of selling crack cocaine, an offense determined to be an aggravated felony. That finding seems likely to be affirmed; but if it were overturned, the Ninth Circuit would likely remand the matter to the Board for further proceedings, pursuant to the ordinary remand rule of *INS v. Orlando Ventura*, 537 U.S. 12, 16-18 (2002) (per curiam).

that a "square" conflict has not yet developed. Opp. at 19. The Government's attempts to minimize the division and confusion in the circuits is unavailing.

To begin with, a split exists on the question of whether the jurisdictional bar in 8 U.S.C. § 1252(a)(2)(B) applies to "particularly serious crime" determinations. The Ninth Circuit holds that the bar categorically does apply in the context of withholding and categorically does not apply in the context of asylum. The Third Circuit holds that Section 1252(a)(2)(B) categorically does not apply to any PSC determinations. The Seventh Circuit holds that Section 1252(a)(2)(B) categorically applies to every PSC determination.

The circuits also are divided on the application of the exemption from the other jurisdictional bars in 8 U.S.C. § 1252(a)(2)(D). The Ninth and Tenth Circuits interpret the "particularly serious crime" determination as a legal one, such that the ultimate determination is a "question[] of law" over which judicial review is permitted by Section 1252(a)(2)(D). The Seventh Circuit holds precisely to the contrary.

In short, the Seventh Circuit is completely out of step with the other circuits on these important jurisdictional issues. The splits are clear and acknowledged, and the matter is ripe for decision by this Court. And this Court's urgent attention is warranted for the further reason that the jurisdictional statutes at issue are applied so frequently by the lower courts – literally hundreds of times per year – that clear interpretive guidance from this Court is vital to the effective functioning of the federal courts.

2. In addition to attempting to downplay the split of authority in the courts of appeals, the Government contends that Ali is unlikely to prevail on his appeal, even if the federal courts have jurisdiction to consider it. That contention is both premature and incorrect.

Ali consistently has maintained that the Board failed to properly assess whether his crime was particularly serious. For example, Ali submits that the Board did not consider that Ali himself was wounded during the fight, that the fight was part of an ongoing series of confrontations in which he was not the primary aggressor, or that he attempted without success to resolve the problem by recourse to the police. Most importantly, the Board refused to take into account Ali's then-undiagnosed Post-Traumatic Stress Disorder, which arose as a result of witnessing horrible events in Somalia, such as the rape and murder of his sister. Cf. App. 58a; App. 39a. In short, although the Board's own decisions require it to consider the "type and circumstances" of the crime, it did not do so in this instance. Furthermore, in the court of appeals, Ali argued that the Board's analysis was flawed, not only because it failed to consider mitigating evidence, but also because it applied obsolete case law which treated some offenses as *per se* particularly serious, notwithstanding the several changes to the governing statute.

The Government's argument that even if the Board erred below, the result would be the same on appeal presumes too much. If Ali were to prevail in this Court, the case ordinarily would be remanded to the Agency for further proceedings, regardless of whether the crime appears particularly serious to the federal courts. See *INS v. Orlando Ventura*, 537 U.S. 12, 18 (2002) (per curiam). While there might be exceptions for error that clearly is harmless, it can hardly be said that the Agency's refusal to consider mitigating evidence is harmless – and all the more so where, as here, the initial adjudicator would have granted the requested relief[2] and compelling evi-

[2] Although the Government is correct when it notes that every decisionmaker has found Ali's crime serious (which he does not dispute), not all decisionmakers have found it "particularly serious" so as to bar relief. The initial Immigration Judge decision granted withholding of removal, with no finding that the crime was a PSC. See App. 60a-68a.

dence demonstrates both the unique circumstances that led to these unfortunate events and the slim likelihood of their recurrence.

3. Finally, the Government argues that the harm to Ali is not particularly significant, because protection under the Convention Against Torture ("CAT") is basically equivalent to protection under 8 U.S.C. § 1231(b)(3), and Ali may obtain relief under the CAT on remand. Opp. at 26. That argument, too, is unconvincing.

As an initial matter, Ali's application for relief under the CAT is far from resolved at the Agency level. While the court of appeals rejected the Board's analysis of Ali's CAT claim, the court expressly did not resolve the threshold question of whether torture by an opposing clan in Somalia could qualify for protection under the CAT. App. at 19a. The Government argues that only governmental action can constitute torture, and that because Somalia lacks a functioning government, no CAT relief is available as to Somalia. While some courts of appeals have rejected the Agency's interpretation of the CAT, *Ornelas-Chavez v. Gonzales*, 458 F.3d 1052, 1059 (9th Cir. 2006); *Silva-Rengifo v. Attorney Gen. of United States.*, 473 F.3d 58, 65 n.6 (3rd Cir. 2007); *Amir v. Gonzales*, 467 F.3d 921, 927 (6th Cir. 2006), the Seventh Circuit has yet to address that question, and the governing agency interpretation, *Matter of S-V-*, 22 I. & N. Dec. 1306, 1311-1312 (BIA 2000) may well preclude relief under the CAT.

In fact, that Government's core argument against the application of the CAT in this case highlights one of the primary differences between the CAT and withholding of removal under 8 U.S.C. § 1231(b)(3). Withholding applies whenever the "alien's life or freedom would be threatened." 8 U.S.C. § 1231(b)(3)(A). That language has been interpreted by the Agency as permitting protection against non-state actors who would seek to persecute the alien. See *Matter of McMullen*, 17 I. & N. Dec. 542, 545 (BIA 1980), rev'd

on other grounds, 658 F.2d 1312 (9th Cir. 1981); cf. 8 C.F.R. § 1208.16(b)(3)(ii). Thus, the only remaining issue currently pending before the Agency below is one that would not exist if Ali were applying for withholding of removal.

Finally, it would be ironic if review of Ali's protection claim were refused because the gravity of the threat of harm is substantial enough to merit remand under CAT. The court of appeals' remand to the Board on that issue is evidence of the strength of Ali's claim, which should militate in favor of review, not against it.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted.

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