Supreme Court, U.S.
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No.

# In the Supreme Court of the United States

IBRAHIM PARLAK,

PETITIONER,

v.

ERIC H. HOLDER, JR.,

RESPONDENT.

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

## PETITION FOR A WRIT OF CERTIORARI

DAVID S. FOSTER
*Counsel of Record*
KYLE R. RABKIN
MICHAEL A. RABKIN
LATHAM & WATKINS LLP
233 S. WACKER DRIVE
SUITE 5800
CHICAGO, IL 60606
(312) 876-7700
David.Foster@lw.com
*Counsel for Petitioner*

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## QUESTION PRESENTED

In *INS v. Ventura*, 537 U.S. 12 (2002), and *Gonzales v. Thomas*, 547 U.S. 183 (2006), this Court affirmed that the "ordinary 'remand' rule," which governs courts of appeals' review of agency decisions, applies with full force to the courts' review of Board of Immigration Appeals ("BIA") decisions. In *Ventura*, and again in *Thomas*, this Court held that when a court of appeals finds error, absent rare circumstances it must remand to the agency for further consideration. Following *Ventura* and *Thomas*, however, the courts of appeals have fractured. Consistent with the Sixth Circuit's decision here, three other circuits have held that *Ventura* and *Thomas* require a remand only when further factfinding is necessary. Seven circuits, however, have held that a remand is required when the BIA applies the wrong legal standard, so that the agency may evaluate the evidence under the proper standard. The question presented in this case is:

Whether the "ordinary remand rule" required the court of appeals to remand this case to the BIA, once the court found that the agency had applied an incorrect legal standard in determining whether the "persecutor bar" of 8 U.S.C. § 1231(b)(3)(B)(i) precluded withholding of removal.

## TABLE OF CONTENTS



## APPENDIX

## TABLE OF CONTENTS—Continued

# TABLE OF AUTHORITIES

Page(s)

## CASES

## TABLE OF AUTHORITIES—Continued

**Page(s)**

## TABLE OF AUTHORITIES—Continued

## TABLE OF AUTHORITIES—Continued

Page(s)

## TABLE OF AUTHORITIES—Continued

Page(s)



## STATUTES



## OTHER AUTHORITY

## OPINIONS BELOW

The Sixth Circuit's opinion is reported at 578 F.3d 457. App.1a-46a. The court's order denying rehearing and rehearing *en banc* is reported at 589 F.3d 818. App.47a-54a. The decisions of the Board of Immigration Appeals (App.55a-84a) and the immigration judge (App.85a-175a) are unreported.

## JURISDICTION

The Sixth Circuit's judgment was entered on August 24, 2009. Petitioner's timely filed petition for rehearing or rehearing en banc was denied on November 24, 2009. This Court has jurisdiction under 28 U.S.C. § 1254(1).

## STATUTORY PROVISIONS INVOLVED

The appendix reproduces the relevant statutory provisions.

## INTRODUCTION

For over half a century, it has been an incontrovertible principle of administrative law that "the function of the reviewing court ends when an error of law is laid bare." *Fed. Power Comm'n v. Idaho Power Co.*, 344 U.S. 17, 20 (1952). Once such an error is identified, a court of appeals must—absent rare circumstances—remand to the agency for further consideration. In two decisions, this Court made clear that this "ordinary 'remand' rule" applies with full force to the courts of appeals' review of decisions of the Board of Immigration Appeals ("BIA"). Accordingly, when the BIA errs, "[a] court of appeals 'is not generally empowered to conduct a *de novo* inquiry into the matter being reviewed and to reach its own conclusions based on such an inquiry.'" *INS v. Ventura*, 537 U.S. 12, 18 (2002) (per curiam) (quoting *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 744

(1985)); *accord Gonzales v. Thomas*, 547 U.S. 183, 186 (2006) (per curiam). "Rather, 'the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation.'" *Thomas*, 547 U.S. at 186 (quoting *Ventura*, 537 U.S. at 16 (quoting *Fla. Power & Light Co.*, 470 U.S. at 744; citing *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947))).

Following *Ventura* and *Gonzales*, however, the courts of appeals have split. A majority of the circuits—including the First, Second, Third, Seventh, Eighth, Ninth, and Tenth—have correctly understood this Court's decisions to hold that a court of appeals is required to remand for further proceedings where either additional factfinding is warranted or the BIA applied an incorrect legal standard. These courts rightly appreciate that it is the agency in the first instance that must apply the correct legal standard to the facts.

By contrast, consistent with the Sixth Circuit's decision here, the Fourth, Fifth, and Eleventh Circuits have held that the "ordinary remand rule" does not require remand where the BIA has not yet applied the correct legal standard. In those courts' view, a remand is only required where additional factfinding is necessary. When the error is a legal one, this minority of circuits holds that the courts themselves may apply the correct legal standard to the facts of the case in the first instance.

The Sixth Circuit held here that the BIA had applied a "vague and unhelpful" legal standard to determine whether the "persecutor bar" of 8 U.S.C. § 1231(b)(3)(B)(i) precluded withholding of petitioner's removal; but, after reviewing what it believed were the pertinent facts in the record, the majority went ahead

and applied the appropriate legal standard to those facts itself, resolving the case against petitioner without remanding to the BIA. The Sixth Circuit's decision conflicts with this Court's decisions in *Ventura* and *Thomas*, the decisions of seven circuits, and with the long held position of the Solicitor General. Its decision raises serious separation of power concerns by usurping for the judiciary a sensitive decision-making role delegated by Congress, and reserved by the Constitution, to the Executive Branch. This Court's review is necessary to bring much-needed consistency to the courts of appeals' treatment of BIA decisions that rest on incorrect legal standards and to ensure that sensitive judgments about immigration law and policy are made by the Executive Branch. At a minimum, this Court should summarily reverse the decision of the Sixth Circuit, as it has done on several other occasions where courts of appeals have made the same error.

## STATEMENT OF THE CASE

### Factual Background

1. Born a Kurd in Turkey, Ibrahim Parlak grew up being persecuted by a regime that systematically suppressed all expressions of Kurdish culture. In grade school, his teachers beat him for speaking Kurdish and forbade students from even learning the language. J.A.579-80.[1] During his teen years, he was beaten and tortured at the hands of the Turkish government for his participation in protests supporting Kurdish rights. J.A.581-91.

2. As a young adult in the mid-1980s, Parlak fled Turkey's oppression, moving to Germany as part of the

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[1] J.A. refers to the joint appendix in the Sixth Circuit.

Kurdish diaspora there. He organized Kurdish folk festivals for displaced Kurds, featuring Kurdish line-dancing and folk songs—activities which were suppressed in Turkey, J.A.602—as well as a shared sense of community. App.32a. Most of the festival revenues went toward entertainers' expenses. App.32a-33a. If any profits remained, they were sent to the Kurdish political action organization ERNK. *Id.* Parlak had no further involvement with the funds; though he surmised that "some of his fundraising efforts 'might' have found their way" from ERNK to the PKK, a Kurdish separatist group designated a terrorist organization by the United States Department of State in 1997 (more than a decade after Parlak's folk festivals), he had no way of knowing. App.32a-35a, 89a.

3. In 1987, Parlak decided to return to his hometown of Gaziantep, Turkey, to advocate Kurdish rights and reunite with his family. J.A.603-04. Because Turkey had revoked his passport on account of his Kurdish activism, Parlak believed he could only enter the country surreptitiously, and like many other displaced Kurds, he accepted help from the PKK in doing so. J.A.605-14. After six months at Helve camp, run by the PKK in Lebanon as a refugee and political organizing center in addition to serving military training functions, J.A.608-09, 775-76, Parlak and several others tried to cross into Turkey. App.3a. A firefight broke out when the group was spotted by Turkish *gendarma*, two of whom died. App.3a, 26a; J.A.276-84. There is no evidence Parlak shot at them or caused their deaths. App.28a. Two months later, the group crossed the border and walked to Gaziantep, where they hid from Turkish authorities. J.A.629-33.

They buried books, weapons, and clothes that they did not want to carry. J.A.295.

4. In October 1988, Turkish soldiers arrested and detained Parlak for 26 days until the now-defunct Turkish Security Court indicted him for the crime of Kurdish "separatism." App.26a; J.A.639-42. During his 26-day interrogation, Parlak was tortured by the Turkish *gendarma*, who blindfolded him, hung him by the arms, shocked him with electrodes, beat his genitalia, deprived him of sleep, food, water, and clothing, and anally raped him with a truncheon. App.26a.

5. In March 1990, following his torture-induced "confessions," he was convicted of "separatism" and released, having served 17 months. App.26a. The Security Court that indicted and convicted Parlak was no ordinary court. The European Union later forced Turkey, if it wished to join the Union, to close the Turkish Security Courts that convicted Parlak, due to their "deserved infamy as havens of torture and injustice." App.27a n.1, 36a n.5.

6. Parlak came to the United States in 1991 and promptly applied for asylum, which was granted the following year based on his "well-founded fear of persecution." App.26a. In his asylum application, Parlak made extensive disclosure of his arrest, conviction, and incarceration in Turkey, his presence at a 1988 border firefight with Turkish security forces, his time at Helve camp, and his involvement with ERNK. J.A.1190-97, 1210. His application also included a Turkish newspaper article reporting the death of two Turkish *gendarma*. J.A.1217. The article was mistranslated; Parlak spoke no English at the time. J.A.1216-17, 1239-41.

7. Parlak adjusted his status to lawful permanent resident in 1994 and in 1998 applied for naturalization, which the government denied in November 2001. App.26a-27a. These applications did not separately reflect the 1988 arrest in Turkey that had formed the basis of his successful asylum application. App.27a. In 2002, the INS initiated removal proceedings, charging Parlak with having made a willful misrepresentation of a material fact for not disclosing his 1988 arrest on the adjustment of status application (even though he had made full disclosure of that fact in his previously-filed asylum application) and with persecution of others. App.27a.

8. In July 2004, DHS submitted documents from a March 2004 *in absentia* proceeding of the recently-abolished Turkish Security Court, indicating that Parlak's term of incarceration for the crime of "separatism" was now *reduced* to 14 months, notwithstanding the fact that he had already served 17 months *nearly 15 years earlier*. App.5a, 36a-37a n.5; *Parlak v. Baker*, 374 F. Supp. 2d 551, 554 (E.D. Mich. 2005), *vacated as moot sub nom. Parlak v. U.S. Immigration & Customs Enforcement*, No. 05-2003, 2006 U.S. App. LEXIS 32285 (6th Cir. Apr. 27, 2006). "These documents were part of these courts' final, midnight actions, on the eve of their extinction. They were produced *in absentia*, a solid sixteen years after the events in question." App.36a-37a n.5 (citing U.S. Department of State, *2004 Country Report on Human Rights Practices: Turkey* (Feb. 28, 2005), *available at* http://www.state.gov/g/drl/rls/hrrpt/2004/41713.htm).

On the basis that Parlak's 1990 "conviction" did not become "final" until 2004 when his term of incarceration was *reduced* in these midnight orders,

DHS took Parlak into custody on July 29, 2004, alleging that he had been "convicted" of a crime *after* entering the United States. App.125a-27a. In other words, DHS's position was that although Parlak had been convicted of separatism, served 17 months, and was released in 1990, his conviction did not become "final" until 2004 when it was modified—and thus, the conviction occurred "after" Parlak entered the United States. The immigration judge (IJ) deemed him ineligible for release on bond, and DHS filed aggravated felony charges, which were later dismissed by the BIA. *Parlak*, 374 F. Supp. 2d at 554-55; App.5a. On October 14, 2004, after a group of supporters from Parlak's southwestern Michigan community began to attract national media attention, DHS responded by filing three additional charges of removal against him. J.A.1257.

9. Parlak remained in custody for over 300 days, until June 3, 2005, when the district court granted his habeas writ, finding him a "model immigrant" who "is not a threat to anyone" and has "lived an exemplary life in the United States." *Parlak*, 374 F. Supp. 2d at 561. The district court also observed that DHS's behavior in this case "raises suspicion." *Id.* at 560.

10. Parlak has resided in the town of Harbert, Michigan since 1994, when he founded the restaurant, specializing in Kurdish cuisine, that he owns and operates to this day. As the district court found, Parlak "is both well-established and well-liked in the Harbert community and has substantial support among his neighbors." *Id.* at 554 n.5. Harbert is also where he raises his daughter, who was born there in 1997.

**Procedural History**

1. In December 2004, the IJ ruled that Parlak was removable on all counts, including the sole remaining charge on which he is now being held removable: "willful misrepresentation" for failing to disclose his 1988 arrest and "conviction" in his adjustment of status and naturalization applications, notwithstanding his extensive disclosure of these events in his earlier-filed asylum application. App.5a, 12a-13a. The IJ further ruled that Parlak was ineligible for withholding of removal as a persecutor of others. App.2a. The IJ's opinion copied and pasted entire sections from the government's pretrial briefs—citation errors included—and featured approximately 80 citations to the Turkish Security Court documents, all without addressing Parlak's unrebutted evidence that the substance of these documents resulted from torture. App.27a, 35a-36a & nn.4 & 5.

2. The BIA dismissed Parlak's timely appeal in November 2005. Recognizing the unseemliness of relying so heavily on evidence obtained by torture, the BIA purported to review the case "without resort to the Turkish conviction documents," and concluded that the remainder of the record supported "most" of the IJ's removability findings. App.14a, 50a, 64a. The BIA affirmed the IJ's willful misrepresentation finding relating to Parlak's adjustment of status application. The BIA also agreed with the IJ that Parlak was not entitled to withholding of removal because of the persecutor bar. The BIA reasoned that one "assists in persecution of others when he furthers the persecution in some way," and affirmed the IJ's finding that "through his work with the ERNK, he assisted in the persecution of others." App.21a, 69a. In particular, the

BIA cited the IJ's findings that Parlak had assisted in fundraising for ERNK through his organization of Kurdish folk festivals in Germany, which in turn supplied funds to the PKK, and that the weapons he buried after entering Turkey in 1988 were "for use by the PKK." App.13a.

3. Parlak timely filed a petition for review with the Sixth Circuit on November 23, 2005. On August 24, 2009, a divided panel denied the petition, upholding the BIA's willful misrepresentation and persecutor bar rulings.

The majority found that the persecutor bar standard that the BIA had articulated and applied was "vague and unhelpful." App.21a. The majority explained that, contrary to the less-demanding standard employed by the BIA, "the issue is not whether the person assists in *some* way; rather the analysis requires distinguishing between 'genuine assistance in persecution and inconsequential association with persecutors.'" App.21a (emphasis in original) (quoting *Singh v. Gonzales*, 417 F.3d 736, 739 (7th Cir. 2005)).

The court also quoted this Court's footnote 34 in *Fedorenko v. United States*, 449 U.S. 490, 512 n.34 (1981), which spawned a long line of cases interpreting the persecutor bar.[2] App.18a-20a. While describing

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[2] The relevant portion of *Fedorenko* is a short footnote in which this Court commented that, while an individual who merely cut inmates' hair prior to execution "cannot be found to have assisted in the persecution of civilians," a paid guard who shot at escaping inmates "fits within the statutory language" of the persecutor bar of the Displaced Persons Act. 449 U.S. at 512 n.34. This Court observed that "[o]ther cases may present more

the BIA's analysis as "consistent with" *Fedorenko* in that the agency referenced an earlier BIA case that cited *Fedorenko*, the majority made clear that the persecutor bar analysis has developed substantially in the decades since *Fedorenko*. App.19a, 21a. As the majority explained, the Sixth Circuit, like other courts of appeals, merely "look[s] to *Fedorenko* for *guidance* in determining what constitutes 'assisting in persecution.'" App.19a, 20a (emphasis added) (citing *Miranda Alvarado v. Gonzales*, 449 F.3d 915, 933 (9th Cir. 2006); *Zhang Jian Xie v. INS*, 434 F.3d 136, 144 (2d Cir. 2006); *Singh*, 417 F.3d at 739, 741). These courts of appeals, including the Sixth Circuit, have set out standards far more searching than the cursory framework of *Fedorenko*'s footnote 34. *See, e.g., Diaz-Zanatta v. Holder*, 558 F.3d 450, 455 (6th Cir. 2009); *Miranda Alvarado*, 449 F.3d at 927-930; *Zhang Jian Xie*, 434 F.3d at 143-44; *Singh*, 417 F.3d at 739-41.

The correct standard, the majority makes clear, is that set out by the Sixth Circuit in *Diaz-Zanatta v. Holder*, which interprets the persecutor bar to include "'two distinct requirements'": "First, 'there must have been some nexus between the alien's actions and the persecution of others.' .... '[S]econd, if such a nexus is shown, the alien must have acted with scienter.'" App.21a-22a (quoting *Diaz-Zanatta*, 558 F.3d at 455).

Although the panel majority acknowledged that Parlak had "urge[d]" remand so that the BIA could apply the correct standard in the first instance, it nonetheless forged ahead to apply the *Diaz-Zanatta* test to the facts of this case in the first instance (without any acknowledgement of *Ventura* or *Thomas*).

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difficult line-drawing problems but we need decide only this case." *Id.*

App.22a. Identifying the facts that it deemed relevant, the majority concluded that a sufficient "nexus exists between Parlak's actions and the persecution of others and that Parlak acted knowingly."[3] *Id.*

The majority relied heavily on the Ninth Circuit's determination in *Humanitarian Law Project v. Reno*, 205 F.3d 1130, 1136 (9th Cir. 2000), that for purposes of evaluating a First Amendment challenge to a criminal statute, "[m]oney is fungible"; from this, the majority concluded that "Parlak voluntarily and knowingly provided money [to ERNK], which he knew could be used by the PKK for anything." App.22a. Neither the IJ nor the BIA had relied on that concept, let alone *mentioned the Ninth Circuit case.*

Judge Martin dissented. He explained that this Court "has repeatedly reinforced the need to remand cases like this one rather than engage in post hoc rationalizations of the Board's legal errors." App.29a-30a (citing *Negusie v. Holder*, 129 S. Ct. 1159 (2009)). In the dissent's view, the BIA's reliance on "a 'vague and unhelpful,' and therefore inadequate, standard" mandated remand. App.30a (quoting App.21a). By failing to do so, the dissent observed, the majority

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[3] After applying *Diaz-Zanatta*, the majority inexplicably remarked that "even if we were to find" *Diaz-Zanatta*'s test inapplicable to Parlak, "providing money and weapons to PKK fighters satisfies the plain meaning of the phrase ['assisting in persecution']." App.22a. As the dissent notes, however, the persecutor bar test set out in *Diaz-Zanatta* is "universally accepted" among the courts of appeals, App.34a, and the majority affirmed that its persecutor bar determination in this case "can be decided based on existing circuit precedent." App.20a (quotation marks and citation omitted). The majority's speculation about findings it could have made, had it found *Diaz-Zanatta* inapplicable, is thus inconsequential to the decision.

"swe[pt] away the Supreme Court's *diktat* that a remand ... is unnecessary only in 'rare circumstances.'" App.30a-31a (quoting *Negusie*, 129 S. Ct. at 1167 (quoting *Thomas*, 547 U.S. at 186)). "Parlak's case," the dissent noted, "is not so rare." App.31a.

The dissent explained that remand is particularly necessary in this case, because the agency—not the court—should decide in the first instance whether, under the proper standard, the knowledge and nexus requirements were met. App.29a. The dissent observed that it is far from clear that the persecutor bar would be triggered under the correct standard. In contrast to the BIA's less demanding standard, "the persecutor bar's knowledge requirement cannot be satisfied by a general finding that Parlak might have been aware that the PKK had, at some point, engaged in terrorist activity." App.31a. As to the "nexus" requirement, the dissent noted, "there is no evidence that the weapons he supposedly carried into Turkey and buried there ever made it into the PKK's hands or were used by anyone." App.31a. And "Parlak did not 'provide[] money' to the PKK." App.32a. Rather, he "helped organize musical festivals for Kurds in Germany"; "if profits remained after paying for the musicians and other entertainment, the remaining money was sent to the ERNK—Parlak had no other involvement." App.32a-33a.

4. Parlak timely filed a petition for rehearing or rehearing en banc, which was denied on November 24, 2009. In a dissent from the denial of rehearing, Judge Martin explained that the majority's decision "directly contradicts instructions from the Supreme Court," which "[i]n this situation ... instructs us to remand the

case so that it may be analyzed in the first instance under the correct law." App.52a, 53a.

## REASONS FOR GRANTING THE WRIT

This case vividly demonstrates the importance of the ordinary remand rule and why courts of appeals are not authorized to make sensitive judgments reserved to agencies in the first instance. The Sixth Circuit's departure from decades of this Court's precedent further exacerbates an entrenched eleven-circuit conflict and warrants this Court's review in order to reconfirm bedrock principles of administrative law and separation of powers that a minority of the Nation's courts of appeals are now routinely flouting.

*First*, the Sixth Circuit's decision conflicts with over half a century of this Court's precedent defining the judiciary's limited role in reviewing agency decisions. This Court has long held that, once a reviewing court finds error, the rule—absent rare circumstances—is that the court must remand to the agency so that the agency can evaluate the facts in light of the correct legal standard. This Court confirmed in *Ventura* and *Thomas* that this rule applies with equal force in the immigration context. The Sixth Circuit disregarded this rule and usurped the BIA's authority when, after identifying error and no rare circumstances, it undertook its own analysis of the facts under the proper legal standard.

*Second*, the Sixth Circuit's decision deepens an already extensive circuit split. Seven circuits—the First, Second, Third, Seventh, Eighth, Ninth, and Tenth—have held that when the BIA applies the wrong legal standard, *Ventura* and *Thomas* require a reviewing court to remand to allow the BIA to re-evaluate the evidence under the proper standard.

Parlak's case would have been remanded to the BIA in these circuits. By contrast, consistent with the Sixth Circuit's decision here, the Eleventh Circuit and divided panels of the Fourth and Fifth Circuits have misunderstood *Ventura* and *Thomas* and have held that a remand is required only when further fact-finding by the agency is necessary. This conflict is mature and entrenched and warrants review.

## I. THE SIXTH CIRCUIT'S DECISION CONFLICTS WITH DECISIONS OF THIS COURT AND A MAJORITY OF THE COURTS OF APPEALS

### A. The Sixth Circuit's Decision Conflicts With Over Half A Century Of This Court's Precedent

The Sixth Circuit's decision cannot be reconciled with six decades of this Court's jurisprudence governing the judiciary's review of agency decisions.

1. As this Court has repeatedly held, the role of courts of appeals reviewing agency action "is limited to considering whether the announced grounds for the agency decision comport with the applicable legal principles." *Port of Portland v. United States*, 408 U.S. 811, 842 (1972) (citing *SEC v. Chenery Corp.*, 318 U.S. 80, 87-88 (1943) ("*Chenery I*")). This Court has made clear time and again that a court reviewing an administrative agency decision must judge the propriety of that decision solely on the grounds invoked by the agency: "If those grounds are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis. To do so would propel the court into the domain which Congress has set aside exclusively for the

administrative agency." *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947) ("*Chenery II*"). Because an appellate court sits as a court of review, not as a decision-maker, "[f]or purposes of affirming no less than reversing its orders, an appellate court cannot intrude upon the domain which Congress has exclusively entrusted to an administrative agency." *Chenery I*, 318 U.S. at 88. "[T]he guiding principle" in such cases is that "the function of the reviewing court ends when an error of law is laid bare. At that point the matter once more goes to the [agency] for reconsideration." *Federal Power Comm'n v. Idaho Power Co.*, 344 U.S. 17, 20 (1952).

This principle has particular force in the immigration context. "Congress has exclusively entrusted" to the executive branch in the first instance the interpretation and application of the immigration law in asylum and removal cases. *Ventura*, 537 U.S. at 16 (quoting *Chenery I*, 318 U.S. at 88). And this Court has recognized that construing the scope of immigration laws is an "especially sensitive political function[] that implicate[s] questions of foreign relations," *INS v. Aguirre-Aguirre*, 526 U.S. 415, 425 (1999) (quoting *INS v. Abudu*, 485 U.S. 94, 110 (1988)), which falls particularly within the province of the Executive Branch.

Accordingly, in *Ventura* and again in *Thomas*, this Court reemphasized more than half a century of firmly-rooted administrative law precedent: "A court of appeals 'is not generally empowered to conduct a *de novo* inquiry into the matter being reviewed and to reach its own conclusions based on such an inquiry.'" *Thomas*, 547 U.S. at 186 (quoting *Ventura*, 537 U.S. at 16 (quoting *Fla. Power & Light Co.*, 470 U.S. at 744)).

Rather, "the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation." *Id.* (quoting *Ventura*, 537 U.S. at 16 (quoting *Fla. Power & Light Co.*, 470 U.S. at 744)).

This Court has also made clear that the ordinary remand rule applies with equal force whether the agency's error is factual, legal, or both. In *Negusie v. Holder*, for example, this Court confirmed that the rule required remand to the agency "for its initial determination of the statutory *interpretation* question and its *application* to this case." 129 S. Ct. at 1168 (emphasis added). And in both *Ventura* and *Thomas*, this Court required remand so that the agency could "*evaluate the evidence*; ... *make an initial determination*; and, in doing so, ... through informed discussion and analysis, help a court later determine whether its decision exceeds the leeway that the law provides." *Thomas*, 547 U.S. at 186-87 (emphasis added) (quoting *Ventura*, 537 U.S. at 17); *see also Rapanos v. United States*, 547 U.S. 715, 786-87 (2006) (Kennedy, J., concurring) ("[A] remand is again required to permit *application* of the appropriate *legal standard*." (emphasis added) (citing *Ventura*, 537 U.S. at 16)). This rule is grounded in common sense; as the dissent to denial of rehearing queried, "How can we tell if substantial evidence supports another adjudicator's legal conclusions if the adjudicator employed the wrong legal analysis?" App.52a.

The Sixth Circuit's decision here is flatly inconsistent with this precedent. The BIA determined that the persecutor bar rendered Parlak ineligible for withholding of removal if his actions furthered persecution "in *some* way." App.21a. The Sixth

Circuit correctly recognized that this standard was "vague and unhelpful," *ibid.*; indeed, the BIA's standard both attenuates the nexus required between the petitioner's actions and any persecution and, as the dissent observed, "in no way captures the 'knowledge' requirement." App.29a. But instead of remanding the case to the BIA to consider whether the facts met the correct and more demanding legal standard, the court undertook its own independent analysis.

There was no basis for the Sixth Circuit to pursue its own inquiry. As this Court explained in *Ventura* and *Thomas*, the courts of appeals lack the Executive Branch's experience and expertise in foreign policy. The Constitution charges the Executive Branch, not the courts, with conducting the Nation's foreign affairs. *See Regan v. Wald*, 468 U.S. 222, 242 (1984) ("Matters relating 'to the conduct of foreign relations ... are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference.'" (quoting *Harisiades v. Shaughnessy*, 342 U.S. 580, 589 (1952))).

The Sixth Circuit's inquiry should have concluded once it determined that the BIA applied the wrong legal standard. As in *Thomas*, the case plainly required considering the facts and "deciding whether the facts as found fall within a statutory term." 547 U.S. at 186. The majority did not so much as hint at the presence of any rare circumstances. Thus, once the BIA's "error of law [was] laid bare," the "function of the reviewing court end[ed]," and the matter should "once more go[] to the [agency] for reconsideration." *Idaho Power Co.*, 344 U.S. at 20.

2. The record in this case, moreover, starkly illustrates why "a judicial judgment cannot be made to

do service for an administrative judgment." *Chenery I*, 318 U.S. at 88. As the dissent explained, it was far from clear that the evidence satisfied the correct standard, or that the BIA would so conclude on remand. The correct standard requires "a causal connection with 'actual persecution' and knowledge or intent of such persecution." App.33a n.3.

The majority merely found that "the facts do *support* a conclusion of general assistance in persecution," App.21a (emphasis added)—not that the BIA *would* have arrived at the same result had it applied the correct standard in the first instance, let alone that the record *compels* such a result. "Even on an unsympathetic reading of the record," the dissent observed, Parlak "did not donate money directly to the PKK, and there is no evidence that the weapons he supposedly carried into Turkey and buried there ever made it into the PKK's hands or were used by anyone." App.31a. Further, the dissent noted, "there was no evidence that any of the acts that supposedly assisted persecution—here, the Kurdish festivals—were 'actually used [by the PKK] to persecute some individual or individuals.'" App.33a-34a (alterations in original) (quoting *Diaz-Zanatta*, 558 F.3d at 460).

Worse yet, to conclude that Parlak was subject to the persecutor bar, the majority invoked and relied heavily on the Ninth Circuit's decision in *Humanitarian Law Project*, 205 F.3d at 1136. That case addressed a First Amendment challenge to a federal criminal statute, and cannot in any sense be traced to the Nation's immigration policy, let alone the BIA, the Attorney General, or the Executive Branch. The majority invoked the Ninth Circuit's comment in *Humanitarian Law Project* that "[m]oney is fungible;

giving support intended to aid an organization's peaceful activities frees up resources that can be used for terrorist acts." App.22a (citing *Humanitarian Law Project*, 205 F.3d at 1136). From this, the majority extrapolated that Parlak's knowledge that his fundraising efforts *could* possibly have found their way to the PKK was sufficient to invoke the persecutor bar.

But this is precisely the type of application of a legal standard to the evidence that should be left to the agency's discretion and expertise in the first instance. Parlak organized Kurdish dance festivals in Germany. Leftover profits, if any, were donated to ERNK, a Kurdish political action organization. Parlak had no further involvement with the funds; while he speculated that ERNK might have sent some funds to the PKK, a group designated a terrorist organization by the State Department *six years after Parlak's arrival in this country*, he had no way of knowing. The BIA should have the opportunity to determine whether this evidence meets the proper legal standard.

The Sixth Circuit's reliance on *Humanitarian Law Project* for purposes of the persecutor bar analysis has created a potentially far-reaching precedent with roots untethered to immigration policy.[4] Under the Sixth Circuit's decision, a petitioner who previously raised funds for an organization that may have dispersed funds to other organizations may be subject to the persecutor bar on account of a speculative, unverifiable path that those funds may have taken. For example, an immigrant who at some point donated money to a

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[4] The case is also not factually analogous. *Humanitarian Law Project* addressed donations made directly to designated terrorist organizations. 205 F.3d at 1135 n.1. Here, ERNK was never a designated terrorist organization.

humanitarian aid organization for purposes of disaster relief could be subjected to the persecutor bar if she knew, or reasonably should have known, that the aid organization might donate a portion of its monies to some other organization that may, in turn, be involved in terrorist activity.[5] Regardless of whether such a rule is prudent, it is indisputably a sensitive matter of domestic and foreign policy that falls squarely within the expertise of the Executive Branch.

As it stands, the BIA will have no opportunity to weigh in—either in the first instance or ever—on whether the principles wrenched from *Humanitarian Law Project* by the Sixth Circuit to extend the reach of the persecutor bar are consistent with the judgment and policy-making of the Executive Branch in this delicate area of immigration law. Whether the BIA itself could have chosen to rely on the reasoning of *Humanitarian Law Project* (however unlikely that prospect is) had the Sixth Circuit remanded the case, is beside the point.

As the Solicitor General argued in *Ventura*, "the rule requiring a remand after the reviewing court has ascertained *a legal error by the agency* is mandated by Congress's assignment of decision-making responsibility to the agency. ... Therefore, when the reviewing court decides the correct final result, the court 'usurp[s]' a congressionally delegated administrative function." Reply Brief for the Petitioner at 6-7, *INS v. Ventura*, 537 U.S. 12 (2002) (No. 02-29) (emphasis added) (quoting *Idaho Power*

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[5] *Cf.* Joseph Abrams, *UNICEF Partners with Islamic Charity Linked to Terror Groups*, FOXNews.com (June 19, 2008), http://www.foxnews.com/story/0,2933,366319,00.html.

*Co.*, 344 U.S. at 20). Indeed, "[i]t is immaterial for purposes of the petition whether—if the case had been remanded—the BIA would have reached the same conclusion as the court of appeals. The significant point is that the court of appeals denied the BIA the opportunity to decide an important immigration issue that is assigned to it by statute and regulation ...."[6] *Id.* at 8.

As this Court has made clear, this principle applies with equal force "[f]or purposes of affirming no less than reversing" an agency decision. *Chenery I*, 318 U.S. at 88. Here, as in *Ventura*, a remand was required.

### B. The Sixth Circuit's Decision Deepens An Existing Eleven Circuit Split

Despite the clarity of this Court's decisions in *Ventura* and *Thomas*, the courts of appeals are sharply divided over whether the ordinary remand rule applies where the BIA has not yet employed the correct legal standard to resolve an issue within the agency's field of expertise.[7] The Sixth Circuit concluded here that the

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[6] *See also Shi Liang Lin v. U.S. Dep't of Justice*, 494 F.3d 296, 337 (2d Cir. 2007) (Calabresi, J., dissenting in part) ("Significantly, *Ventura* and *Thomas* are designed to prevent just such judicial preemption of BIA positions, *even when that preemption reaches what is arguably the correct result.*" (emphasis added)).

[7] There is widespread agreement among the courts of appeals that remand is not required where the BIA has applied an incorrect legal standard concerning a statute that the agency is *not* charged with administering, such as the Controlled Substances Act. *See, e.g., James v. Mukasey*, 522 F.3d 250, 256 (2d Cir. 2008); *Al-Najar v. Mukasey*, 515 F.3d 708, 714 (6th Cir. 2008). This petition is concerned solely with circumstances where the BIA erred with respect to a statute that the agency *is* charged with administering.

BIA applied a "vague and unhelpful" standard, but did not remand the case to the BIA to apply the correct legal standard to the facts in the first instance, and instead undertook its own independent analysis. This decision is consistent with decisions from the Fourth, Fifth, and Eleventh Circuits, but squarely conflicts with decisions from the First, Second, Third, Seventh, Eighth, Ninth, and Tenth Circuits. Those latter seven circuits have held that when the BIA applies the incorrect legal standard, a remand is required to give the BIA the opportunity to apply the correct standard to the facts in the first instance.

1. The Fourth, Fifth, and Eleventh Circuits have held that the ordinary remand rule does not apply where the BIA's error is of a legal, as opposed to factual, nature. Those courts hold that a remand is necessary only when additional fact-finding is necessary.

In *Hussain v. Gonzales*, 477 F.3d 153, 156 (4th Cir. 2007), a divided panel of the Fourth Circuit found that the BIA had improperly failed to address the petitioner's motion to remand his case to the IJ. The majority declined to remand the case, however, because it interpreted this Court's decisions in *Ventura* and *Thomas* as concerning only "the appellate court's authority to review in the first instance *factual* issues not considered by the Board." *Id.* at 157 (emphasis in original). Instead of remanding to the BIA to review the motion on the merits in the first instance, the majority usurped that role and found that the petitioner would not have been able to make a sufficient legal case for the relief he sought. *Id.* at 157-58.

The dissent disagreed with the majority's narrow construction of *Ventura* and *Thomas*. *Id.* at 159-60 (Hamilton, J., dissenting). The dissent explained that "[t]he issues remanded in *Ventura* and *Thomas* both involved factual and legal aspects" which required "not only ... the Board's review of evidence in the record, but ... the Board's *application of the law to the facts*. Such *application of the law to the facts* brings into play the Board's conferred interpretative expertise in the field of immigration law." *Id.* at 160-61 (emphasis added) (citations omitted).

Similarly, in *Yu Zhao v. Gonzales*, 404 F.3d 295 (5th Cir. 2005), the court found that the BIA had erred when it "rubber-stamped" the IJ's adverse asylum determination and denied, under an unduly stringent legal standard, petitioner's motions to present new evidence of changed country conditions. *Id.* at 309-10. But over a dissent, the court declined to remand to the agency for further proceedings regarding changed country conditions, and instead *reversed* the BIA's ruling. *Id.* at 310-11. In declining to remand on that issue, the Fifth Circuit reasoned that, unlike in *Ventura,* the BIA had already rejected the petitioner's changed country conditions evidence, and therefore the court's ruling on the issue would not "usurp" the agency's authority to address the evidence in the first instance. *Id.*

And in *Calle v. United States Attorney General*, 504 F.3d 1324 (11th Cir. 2007), the Eleventh Circuit found that the BIA had failed to address the legal sufficiency of the petitioner's motion to reconsider the BIA's denial of her motion to reopen. *Id.* at 1329. Nevertheless, the court declined to remand, having determined that "[i]n this case, unlike *Ventura* and

*Thomas*, and like *Hussain*, the undecided issue is legal, not factual," and that it "fe[lt] comfortable deciding the issue left unresolved by the BIA in the first instance." *Id.* at 1330.

As in the Sixth Circuit's decision here, the line drawn between legal and factual issues by the Fourth, Fifth and Eleventh Circuits fails to recognize that an agency's application of the correct law to the facts is an important executive function that involves the formulation and administration of policy, as well as the exercise of expertise.

2. In direct conflict with those decisions, the First, Second, Third, Seventh, Eighth, Ninth, and Tenth Circuits have held that the rule of *Ventura* and *Thomas* governs where the BIA has applied an incorrect legal standard.

The First Circuit has held that "remanding to give the agency an opportunity to cure the error is the *ordinary* course" where "the agency decision is flawed by mistaken legal premises." *Castaneda-Castillo v. Gonzales*, 488 F.3d 17, 25 (1st Cir. 2007) (emphasis in original); *see also Rodriguez de Rivera v. Ashcroft*, 394 F.3d 37, 40 (1st Cir. 2005) (holding that because the agency action could not be sustained on the stated grounds, the appropriate remedy was to remand to the BIA for further proceedings consistent with the appropriate legal standard).

Similarly, the Third Circuit has held that where the BIA has "adopted an incorrect legal standard," the court must remand "to give the BIA the first opportunity to apply the correct standard." *Silva-Rengifo v. Attorney Gen. of the U.S.*, 473 F.3d 58, 70-71 (3d Cir. 2007) (citing *Ventura*, 537 U.S. 12). The Eighth Circuit has likewise held that "[w]hen the BIA applies

an incorrect legal standard, the proper remedy typically is to remand the case to the agency for further consideration in light of the correct standard." *Bushira v. Gonzales*, 442 F.3d 626, 633 (8th Cir. 2006) (quotation marks and citation omitted). And the Tenth Circuit has explained that a remand is required when the BIA applies the wrong legal standard, because it is the BIA that "should have the first opportunity to 'bring its expertise to bear upon the matter.'" *Mickeviciute v. INS*, 327 F.3d 1159, 1165 (10th Cir. 2003) (quoting *Ventura*, 537 U.S. at 17); *see also id.* ("[H]onoring an agency's authority is not measured by whether we reverse or affirm the agency's decision. Rather, we safeguard agency decision making by ensuring that the agency itself makes the decisions entrusted to its authority ....").

The Second, Seventh, and Ninth Circuits previously declined to apply the ordinary remand rule where the BIA had not yet applied the correct legal standard, but they have now adopted the majority approach. Despite criticisms from Judge Calabresi and then-Judge Sotomayor, the Second Circuit initially held that *Ventura* applies only where an issue "has not yet been considered by the BIA." *Shi Liang Lin v. U.S. Dep't of Justice*, 494 F.3d 296, 313 n.15 (2d Cir. 2007) (en banc). Judge Calabresi found that position "dangerously in tension with *Ventura*'s command," *id.* at 336 (Calabresi, J., dissenting in part), and then-Judge Sotomayor criticized the court for "constricting the BIA's congressionally delegated powers," *id.* at 328 (Sotomayor, J., concurring). But after this Court's GVR of the Second Circuit's decision in *Hong Ying Gao v. Gonzales*, 440 F.3d 62 (2d Cir. 2006), in light of *Thomas*, *see Keisler v. Hong Ying Gao*, 552 U.S. 801

(2007) (per curiam), the Second Circuit changed course. It now holds that it "may not enforce [an agency's] order by applying a legal standard the [agency] did not adopt," nor itself "engage in fact-finding under the appropriate legal standard." *Matadin v. Mukasey*, 546 F.3d 85, 92 (2d Cir. 2008) (quotation marks and citation omitted).

Similarly, the Seventh Circuit used to hold that *Ventura* and *Thomas* required a remand only where further fact-finding was required. *Ghebremedhin v. Ashcroft*, 392 F.3d 241, 243 (7th Cir. 2004). But it now holds that when the BIA employs an incorrect legal standard, "[t]he proper course of action" is not to decide the question in the first instance, "but to allow the BIA to re-evaluate the evidence under the proper standard." *Kholyavskiy v. Mukasey*, 540 F.3d 555, 571 (7th Cir. 2008).

The Ninth Circuit also changed course after *Ventura* and *Thomas*, and related GVRs of its decisions. *See Gonzales v. Tchoukhrova*, 549 U.S. 801 (2006) (GVR where the Ninth Circuit had failed to apply the ordinary remand rule); *INS v. Silva-Jacinto*, 537 U.S. 1100 (2003) (same); *INS v. Yi Quan Chen*, 537 U.S. 1016 (2002) (same). Now, the Ninth Circuit clearly holds that, "where the BIA applies the wrong legal standard to an applicant's claim, the appropriate relief from this court is remand for reconsideration under the correct standard, not independent review of the evidence." *Ornelas-Chavez v. Gonzales*, 458 F.3d 1052, 1058 (9th Cir. 2006).

Accordingly, it is clear that Parlak's case would have been remanded to the BIA by the First, Second, Third, Seventh, Eighth, Ninth, and Tenth Circuits. This eleven-circuit conflict is well developed, and there

is no reason to defer review. Further percolation in the courts of appeals will not lead to further clarity. Only this Court can clarify the scope of the ordinary remand rule and bring much-needed consistency to the courts of appeals' review of immigration decisions.

3. Certiorari review will also give this Court an opportunity to clarify that the "rare circumstances" exception to the ordinary remand rule was not intended to swallow the rule. The courts of appeals would benefit from the Court's guidance on this issue as well.

In *Calle*, for example, the Eleventh Circuit flatly declared that "rare circumstances" were present because "the undecided issue is legal, not factual," 504 F.3d at 1330—a situation that in this type of case is hardly rare. Similarly, in *Hussain* and *Yu Zhao*, the Fourth and Fifth Circuits both concluded that *Ventura*'s reference to "rare circumstances" makes the ordinary remand rule merely a "precatory" suggestion. *See Hussain*, 477 F.3d at 158 ("the language in *Ventura* is precatory, not mandatory"); *Yu Zhao*, 404 F.3d at 311 ("The Court could have worded its holding categorically, and its failure to do so must be a conscious decision."). As the *Hussain* dissent rightly pointed out, taking this approach under circumstances that are far from rare "creates an exception to the ordinary remand rule that swallows the rule." 477 F.3d at 161 (Hamilton, J., dissenting).

Other circuits—and the Solicitor General—have understood that the "rare circumstances" exception to the ordinary remand rule must not be permitted to make remand itself the exception. *See, e.g.*, *Wakkary v. Holder*, 558 F.3d 1049, 1067 (9th Cir. 2009) (finding that it was "obliged to remand to the BIA for an

appropriate decision based on all the relevant evidence" where the BIA had misunderstood the courts' disfavored group cases (citing *Ventura*, 537 U.S. at 16-17)); *Silva-Rengifo*, 473 F.3d at 70-71 (concluding that because the BIA had adopted an incorrect legal standard, the court "must remand to the BIA to give the BIA the first opportunity to apply the correct standard" (citing *Ventura*, 537 U.S. at 16)).

As the Solicitor General explained in its reply brief in *Ventura*, "[o]nly 'extraordinary circumstances' can justify judicial usurpation of an administrative agency's decision-making role." Reply Brief for the Petitioner at 3, *INS v. Ventura*, 537 U.S. 12 (2002) (No. 02-29). "[T]hat exception," the Solicitor General observed, "applies only in 'rare circumstances,' such as when the agency has manifestly demonstrated an unwillingness or inability to fulfill its congressionally assigned responsibilities, and there is *no other remedy available to the reviewing court*." *Id.* at 2-3 (emphasis added) (quoting *Fla. Power & Light Co.*, 470 U.S. at 744). Accordingly, the courts of appeals should not be permitted to stretch the rare circumstances exception beyond what this Court intended by declining to remand merely because the issue to be remanded involves the application of law to fact. Indeed, such circumstances are far from rare.

The Sixth Circuit's failure to remand to the BIA could only be justified if this case presented rare circumstances, but plainly it does not. This Court's guidance is required to clarify for the courts of appeals that the "rare circumstances" exception does not render the ordinary remand rule a mere suggestion.

### C. At A Minimum, Summary Reversal Is Warranted

In light of *Ventura* and *Thomas*, this Court should at a minimum summarily reverse the Sixth Circuit's decision. In *Thomas*, this Court explained that the court of appeals' "failure to remand is legally erroneous, and that error is 'obvious in light of *Ventura*,' itself a summary reversal." 547 U.S. at 185. This Court has also GVR'd a number of decisions, in light of either *Ventura* or *Thomas*, where courts of appeals have failed to apply the ordinary remand rule. *See Hong Ying Gao*, 552 U.S. 801 (citing *Thomas*); *Tchoukhrova*, 549 U.S. 801 (citing *Thomas*); *Silva-Jacinto*, 537 U.S. 1100 (citing *Ventura*); *Yi Quan Chen*, 537 U.S. 1016 (citing *Ventura*).

The Sixth Circuit, in failing to remand to the BIA, made the very same error here without even mentioning *Ventura* and *Thomas*, let alone distinguishing them. That error is "obvious in light of *Ventura*," and a summary reversal is likewise appropriate here to extinguish any doubt among the courts of appeals that remand is required where the BIA has not yet applied the correct legal standard.

## CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

DAVID S. FOSTER
*Counsel of Record*
KYLE R. RABKIN
MICHAEL A. RABKIN
LATHAM & WATKINS LLP
233 S. WACKER DRIVE
SUITE 5800
CHICAGO, IL 60606
(312) 876-7700
David.Foster@lw.com
*Counsel for Petitioner*