No. 07-756

In the Supreme Court of the United States

YI QIANG YANG,

Petitioner,

v.

MICHAEL B. MUKASEY, UNITED STATES ATTORNEY GENERAL

Respondent.

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

REPLY BRIEF FOR PETITIONER

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The government concedes that the circuits are divided on a recurring question of undoubted importance: whether traditionally married spouses of women subjected to forced abortions in other nations are eligible for asylum under Section 601 of IIRIRA. Opp. 9. It nevertheless contends that review of this question would be premature because the courts that recognize a right to asylum for such refugees might reverse course in light of a recent BIA decision. But that simply is not so. Those courts *already* have expressly rejected "[t]he BIA's refusal to grant asylum" to such individuals because it "contravenes the statute and leads to absurd and wholly unacceptable results." *Ma* v. *Ashcroft*, 361 F.3d 553, 559 (9th Cir. 2004). There is no prospect that these courts will change a view that is grounded firmly on "the purpose and policies of the statut[e]." *Id*. at 560.

The government also is wrong in urging denial of the petition on the ground that the Attorney General is currently considering, in *Matter of Shi*, No. 95 476 611, whether spouses of persons subjected to coerced abortion or sterilization are entitled to asylum. It is not clear that the proceeding in *Shi* – which, the government concedes (Opp. 17), does *not* involve a traditionally married spouse – will have any direct bearing on the question presented here. And the conflict in the circuits on that question will, in any event, survive the resolution of *Shi* no matter how that proceeding is decided. But if it is thought that resolution of the question presented here should await the outcome of *Shi*, this petition should not be denied: it should be held by this Court, or returned to the court of appeals, so that ultimate disposition of petitioner's request for asylum may take account of any guidance

provided by *Shi*. Notably, the government's brief in opposition to the petition does not object to such a disposition.

A. The Circuits Will Remain Split On The Question Presented Here, Notwithstanding The BIA Decision In *S-L-L-*.

There is no denying the existing conflict in the courts of appeals. In the Seventh and the Ninth Circuits, traditionally married spouses are eligible for asylum relief under Section 601. *Zhang* v. *Gonzales*, 434 F.3d 993, 999 (7th Cir. 2006); *Ma* v. *Ashcroft*, 361 F.3d 553, 560 (9th Cir. 2004). In contrast, the court below denies such protection. Pet. App. 12a. So, too, does the Second Circuit, albeit on different grounds. *Shi Liang Lin* v. *U.S. Dep't Justice*, 494 F.3d 296, 300 (2d Cir. 2007), cert. filed *sub. nom Zen Hua Dong* v. *Mukasey*, No. 07-639 (Nov. 13, 2007). The government therefore cannot avoid acknowledging what it delicately characterizes as "some disagreement in the circuits on this issue." Opp. 14.

Despite conceding the circuit conflict, the government speculates that "the Seventh and Ninth Circuits may well reconsider their decisions" in light of the BIA's decision in *Matter of S-L-L-*, 24 I. & N. Dec. 1 (2006). Opp. 15. But this submission is wrong on two counts. First, contrary to the government's assertion (*id.* at 11-12), the BIA in *S-L-L-* was not presented with, and did not decide, the question whether traditionally married spouses are entitled to asylum. Instead, the petitioner there was the unmarried boyfriend of a woman who became pregnant. *Matter of S-L-L-*, 24 I. & N. Dec. at 11. Finding that marriage is the "linchpin" in determining whether an asylum applicant has been persecuted within the meaning of Section 601 (*id*. at 8-11), the BIA deter-

mined that boyfriends and fiancés are not per se eligible for asylum under that provision because relief should be awarded only "to couples who have actually committed to a marital relationship." *Id*. at 12.[1] That determination, however, begs the question presented by this petition: whether *traditionally married* spouses are eligible for relief under Section 601. Unlike the asylum applicant in *S-L-L-*, petitioner here has "actually committed to a marital relationship"; the government does not deny that traditional marriages in China are, except for the absence of a government registration form, identical in all relevant respects to legally registered marriages. See Pet. 24-26.[2]

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[1] To be sure, the BIA opinion in *S-L-L-* refers interchangeably to "marriage," "legal marriage," and "legally married." Given that the distinction between traditional and legal marriage was not at issue in *S-L-L-* and not expressly considered by the BIA, however, the opinion's inconsistent use of this terminology is not determinative. Indeed, immediately after stating that commitment to a "marital relationship" is key and that "we require that an applicant have entered into a legally recognized marriage" to satisfy this test (24 I. & N. Dec. at 12), the BIA acknowledged – without express disapproval – that "two circuit courts have decided to the contrary when an underage couple has entered into a traditional marriage ceremony." *Id*. at 12 n.14 (citing *Zhang* and *Ma*).

[2] Further, the government's position that *S-L-L-* precludes relief for traditionally married spouses is undercut by prior BIA decisions. *C-Y-Z-* itself – the decision that recognized application of Section 601 to spouses – provided relief to a traditionally married spouse. Pet. 27 n.5. See *Matter of C-Y-Z-*, 21 I. & N. Dec. 915, 915-16 & n.1 (BIA 1997). The BIA again provided relief to a traditionally married spouse in *Matter of Y-T-L-*, 23 I. & N. Dec. 601 (BIA 2003) (en banc). There, Board Member Pauley dissented, arguing that the majority's opinion extended Section 601 to provide asylum for those "whose marriages are evidenced only by a traditional ceremony in China (without a requirement

Second, and more fundamentally, whatever the meaning of the BIA's decision in *S-L-L-*, both the Seventh and Ninth Circuits premised their decisions awarding relief to traditional spouses on the unambiguous dictates of the statute, expressly rejecting the BIA's contrary view. Therefore, even if the BIA issues a specific and formal ruling with respect to the asylum eligibility of traditionally married spouses, these courts will not change course.

In *Ma*, 361 F.3d 553, the BIA held that the traditionally married spouse was ineligible for per se asylum protection under Section 601. *Id*. at 558. The Ninth Circuit acknowledged that it "owed" deference to "the BIA's reasonable interpretations" of the statute. *Ibid*. (quoting *Kalmalthas* v. *INS*, 251 F.3d 1279, 1282 (9th Cir. 2001)). But the court nonetheless held that the BIA's construction "contravenes the statute and leads to absurd and wholly unacceptable results." *Id*. at 559. As a consequence, the court expressly did "not defer to the BIA's decision." *Ibid*. See also *id.* at 560 (BIA approach "contravenes the purpose and policies of the statutory amendment."); *id.* at 561 ("it would contravene the statute to permit asylum decisions to be made in reliance on the legitimacy of [China's coercive] program.").

Similarly, in *Zhang*, the IJ denied asylum because China's "population control policy rendered the marriage illegal." *Zhang*, 434 F.3d at 999. The Seventh Circuit reversed, holding that this interpretation "would entirely subvert the Congressional amendment." *Ibid*. Like the Ninth Circuit, the Se-

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that such marriages be legally recognized by that country)." *Id*. at 619 (Pauley, Board Member, dissenting). But his dissent failed to carry the day, and the majority provided asylum for a traditionally married spouse.

venth Circuit therefore has already refused to defer to a contrary agency construction of Section 601. This conflict in the courts of appeals accordingly is settled and ripe for review.

B. The Proceeding Before The Attorney General Should Not Preclude Relief For Petitioner.

The government further argues that the matter pending before the Attorney General, *Matter of Jianzhong Shi*, provides an additional reason to deny certiorari. But as we explain in the petition (at 28-29), the conflict in the circuits will survive the outcome in *Shi*. The government does not deny that the Second Circuit's holding that *no* spouses are entitled to per se asylum relief under Section 601 rests on the statutory language and rejects a contrary administrative view. And as we show above, the opposite rule in the Seventh and Ninth Circuits likewise rests on an interpretation of the statute. Nothing the Attorney General decides in *Shi* can moot that disagreement.[3]

Moreover, if the Court nevertheless is of the view that resolution of the issue here should be deferred pending resolution of *Shi*, the proper outcome would be to hold or remand this case for reconsideration in light of the Attorney General's ruling in that proceeding. As we show in the petition (at 29-30), it would be grossly inequitable to petitioner to deny certiorari now – preventing him from benefiting either from a favorable ruling in *Shi* or from the possi-

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[3] An opinion of the Attorney General pursuant to 8 C.F.R. § 1003.1(h) is due no greater deference than an opinion of the BIA. See, *e.g.*, *Rumierz* v. *Gonzales*, 456 F.3d 31, 40-41 (1st Cir. 2006).

bility of this Court's review – simply because the Attorney General has not yet concluded a proceeding that might support petitioner's request for relief. The government's opposition makes no response to this point.

In closely analogous circumstances, this Court frequently grants certiorari, vacates the decision below, and remands for consideration in light of agency action that bears on the case. See, *e.g.*, *Schmidt* v. *Epsy*, 513 U.S. 801 (1994) (GVR in light of a new agency interpretation of federal statute that called into question the lower court's decision); *Lawrence* v. *Chater*, 516 U.S. 163, 165-66 (1996) (per curiam) (GVR after Social Security Administration reexamined its position on the question presented by the petition and issued a new interpretation beneficial to the petitioner). See also *Lawrence*, 516 U.S. at 166-67 (cataloguing appropriate uses of a GVR). Here, if the proceeding in *Shi* is thought relevant, it accordingly would be appropriate to await the forthcoming agency action before finally disposing of this case, either by holding the case in this Court or remanding the case to the Eleventh Circuit with instructions to reconsider its decision in light of the Attorney General's forthcoming decision in *Shi*.

C. There Is No Alternative Holding Below That Precludes Review.

The government's further contention that a ruling for petitioner on the meaning of Section 601 "would not affect the outcome in this case" because the IJ made credibility findings adverse to petitioner (Opp. 19) is flatly wrong. The court below made clear that its decision rested *solely* on its construction of Section 601; it "assum[ed] for present purposes that everything [petitioner] said is true." Pet.

App. 10a. The BIA likewise did not address petitioner's credibility. *Id.* at 36a. Upon remand, petitioner has substantial arguments – noted and reserved by the court below – responsive to the IJ's credibility findings.

First, as the court of appeals noted, the IJ's credibility determinations were largely based upon petitioner's statements at an airport interview. Pet. App. 9a. But the court added that "three of our sister circuits have held that an airport interview should only be used against an alien where the interview meets certain indicia of reliability." *Ibid*. (citing *Balogun* v. *Ashcroft*, 374 F.3d 492, 504 (7th Cir. 2004); *Ramsameachire* v. *Ashcroft*, 357 F.3d 169, 179 (2d Cir. 2004); *Balasubramanrim* v. *INS*, 143 F.3d 157, 164 (3d Cir. 1998)). The Third Circuit, for example, reversed an adverse credibility finding that had been based on an airport interview because the interview was improperly recorded, it did not take place in a forum meant to elicit accurate information regarding asylum claims, and the applicant lacked sufficient English language skills to assure the interview's reliability. *Balasubramanrim*, 143 F.3d at 163-64. Given its statutory holding, the Eleventh Circuit here "had no occasion to address the reliability of airport interviews" generally or the particular reliability of the interview in this case. Pet. App. 10a.

Second, the court below indicated that "[t]here was other evidence in the record supporting [petitioner's] account of the events" (*id*. at 10a), which it recounted in considerable detail: a note from a Chinese hospital "stating that Ling had an induced abortion"; a subpoena from the local security office "summoning Yang to its office the next day"; a receipt for two wedding rings "paid for by Yang"; a let-

ter from Yang's uncle describing the wedding of Yang and Ling; and an affidavit and letter from Ling describing their traditional wedding, the coerced abortion, and its aftermath. *Id*. at 3a-4a. If petitioner prevails regarding the proper interpretation of Section 601, he accordingly will have substantial arguments to make regarding his credibility. And certainly, unreviewed and dubious credibility determinations that expressly were disregarded by the court below do not provide a reasonable basis for denying review of issues that otherwise warrant this Court's consideration.[4]

D. Traditionally Married Spouses Are Eligible For Asylum Under Section 601.

Finally, the government's defense of the decision below on the merits (Opp. 12-14) offers no reason for the Court to decline to resolve the conflict in the courts of appeals regarding the proper interpretation of Section 601. Nor does this merits argument present a reason why the petition should not be held pending the Attorney General's resolution of *Shi*.

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[4] IJ credibility findings are frequently reversed by the courts of appeals. See Jaya Ramji-Nogales, Andrew I. Schoenholtz, & Phillip G. Schrag, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 Stan. L. Rev. 295, 362 tbl.2 (2007). Indeed, Judge Posner recently concluded that "the adjudication of [immigration] cases at the administrative level has fallen below the minimum standards of legal justice," noting that the Seventh Circuit had "reversed the Board of Immigration Appeals in whole or part in a staggering 40 percent of the 136 petitions to review * * * on the merits" over the prior year. *Benslimane* v. *Gonzales*, 430 F.3d 828, 829-830 (7th Cir. 2005). An adverse credibility determination by an IJ – especially one that has been questioned by the circuit court – does not provide a reasonable, independent ground to deny certiorari.

In any event, the government's argument is fundamentally flawed on its own terms. As we show in the petition (at 24-26) – and as the government does not deny – traditional and legally registered marriages in China are virtually indistinguishable in all relevant respects. Spouses in traditional and legal marriages perform exactly the same cultural wedding ceremony. John W. Engel, *Marriage in the People's Republic of China*, 46 J. of Family & Marriage 955, 958-59 (1984). The long-term commitment reflected by these relationships is identical. See Pet. 24-26. And the credibility determination necessary to establish the existence of a traditional marriage is not different in kind from the findings that IJs are routinely required to make in the course of administering the Nation's immigration and asylum laws.

The government nevertheless argues that legal marriage is the appropriate standard because legally married spouses jointly face the repercussions for disregarding China's population control policy. Opp. 13. In fact, however, traditionally and legally married spouses are persecuted in precisely the same way by the state for violations of that policy. The termination of the couple's pregnancy, or the forced sterilization of one individual, affects both spouses, regardless of the legal status of their marriage. See Pet. App. 2a-3a. Moreover, state-imposed punishments for violations of the family planning policy are imposed against *both* members of a traditionally married couple. See *Zhang*, 434 F.3d at 995 (authorities forcibly aborted the unborn child of Zhang and his wife, who were traditionally married; authorities then ordered Zhang to pay a fine); *Ma*, 361 F.3d at

556-57 (same).[5] When imposing punishments for violations of the family planning policy, Chinese officials do not distinguish between legally and traditionally married couples. U.S. asylum law should be no different.

In addition, as the Seventh and Ninth Circuits recognized, denying protection to traditionally married spouses directly frustrates the central purpose of Section 601. See Pet. 26-27. Congress enacted the legislation to provide relief for families that have been victimized by China's coercive family planning policy. But that same policy both prevented petitioner and his wife from obtaining legal recognition for their marriage and, because they were not legally married, forced them to abort their child. This "Catch-22," the Seventh Circuit explained, dictates the conclusion that, "[w]here a traditional marriage ceremony has taken place, but is not recognized by the Chinese government because of the age restrictions in the population control measures, that person nevertheless qualifies as a spouse for purposes of asylum." *Zhang*, 434 F.3d at 999. See also *Ma*, 361 F.3d at 561 ("[B]ecause the prohibition on underage marriage is an integral part of [China's family planning policy], it would contravene the fundamental purpose of the statute to deny asylum on the basis of that rule.").

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[5] In arguing to the contrary, the government, quoting *S-L-L-*, carefully refers to "'[a]n underage couple living in an unregistered de facto marital relationship.'" Opp. 13 (quoting 24 I. & N. Dec. 12 n.13). But the couple in *S-L-L-*, unlike petitioner and his wife, were not married at all.

CONCLUSION

The petition for a writ of certiorari should be granted. In the alternative, this Court should hold the case pending the outcome of the Attorney General's proceeding in *Matter of Jianzhong Shi*.

Respectfully submitted.

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