No. 07-639

IN THE

Supreme Court of the United States

ZEN HUA DONG,

Petitioner,

v.

UNITED STATES ATTORNEY GENERAL,

Respondent.

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

REPLY BRIEF FOR PETITIONER

MEIR FEDER
JONES DAY
222 East 41st St.
New York, NY 10017
Tel: (212) 326-7900

DONALD B. AYER
JONES DAY
51 Louisiana Ave., NW
Washington, D.C.20001
(202) 879-3900

SAMUEL ESTREICHER
Counsel of Record
NEW YORK UNIVERSITY
SCHOOL OF LAW SUPREME
COURT CLINIC
40 Washington Sq. South
New York, NY 10012
(212) 998-6226

BRUNO JOSEPH BEMBI
62 Nicholas Court, Ste. 202
Hempstead, NY 11550
(516) 483-7372

Counsel for Petitioner

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INTRODUCTION

This petition presents an important question concerning the nation's asylum law as to which there is a square conflict among the Courts of Appeals: whether § 601(a) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA")—a 1996 amendment to the definition of "refugee" in § 101(a) of the Immigration and Naturalization Act ("INA"), 8 U.S.C. § 1101(a)(42)—allows the Board of Immigration Appeals ("BIA") to apply a threshold presumption of asylum eligibility to the partner of a person forced to undergo an involuntary abortion or sterilization. [1] *See* 8 C.F.R. § 1003.1(d)(1) (delegation of Attorney General's authority to BIA).

In an unusual *en banc* proceeding, the Second Circuit below held unmistakably that the Government lacks such authority. The Government here does not dispute the existence of the conflict in the lower courts or the importance of the issue. Rather, it suggests that review in this Court is unwarranted because even though the Court of Appeals felt it necessary to decide the threshold question of the Government's authority *vel non*, that

[1] Like the court below, the Government erroneously characterizes the BIA's rulings as providing for "per se" asylum eligibility. However, it is plain that the regulations and the BIA's decisions establish, and Petitioner seeks, only a presumption of eligibility. *In re S-L-L-*, 24 I. & N. Dec. 1, 7 (B.I.A. 2006); *In re C-Y-Z-*, 21 I. & N. Dec. 915, 919 (B.I.A. 1997) That presumption may be overcome, *inter alia*, if a "fundamental change in circumstances" in the applicant's home country makes further persecution unlikely, or "[t]he applicant could avoid future persecution by relocating to another part of the applicant's country." 8 C.F.R. § 208.13(b)(1)(i).

issue can be bypassed because Petitioner was not legally married to his partner at the time of his partner's two forced abortions, Opp. 13-14, and because a "definitive" administrative ruling of the Attorney General may somehow resolve the issue, Opp. 17. The Government's suggestion is misplaced. The Second Circuit's ruling below squarely addresses and resolves (against the Government) the issue of statutory authority; and no administrative consideration can resolve that first-order question of statutory authority.

Focusing narrowly on the wording the 1996 IIIRA amendment, the Court of Appeals rejected the Government's authority to extend presumptive eligibility to both members of a marital unit targeted for coercive family control practices, even though that exercise of authority was based on the preexisting language of § 101(a)(42) of the INA and there is absolutely no evidence that Congress intended to narrow asylum protections in the 1996 amendment.[2] The Second Circuit's "direct victim" position is in direct conflict with that of several Circuits and injects uncertainty and a serious risk of inconsistent outcomes in an important area of federal responsibility. Moreover, this case offers a well-developed factual and administrative record that directly implicates the circuit split, making it a

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[2] Paradoxically, the ruling below converts a statutory amendment that sought "to broaden the number of individuals eligible for asylum in connection with coercive family-planning policies such as China's," *Lin v. U.S. Dep't of Justice*, 416 F.3d 184, 187 (2d Cir. 2005) (Pet. App. 105a), into a provision having the effect of narrowing relief in a significant number of cases.

particularly attractive vehicle for reviewing the question presented.

I. THE GOVERNMENT CONCEDES THE EXISTENCE OF A CIRCUIT SPLIT ON THE ISSUE PRESENTED, WHICH HAS INJECTED UNDENIABLE UNCERTAINTY AND DELAY INTO THE ASYLUM SYSTEM

As the Government recognizes (Opp. 14-15), the Circuits are squarely divided over whether the BIA may extend a presumption of asylum eligibility to the partner of a person forced to undergo an abortion. The Second Circuit was the first court of appeals since the 1996 passage of IIRIRA and the BIA's 1997 decision in *In re C-Y-Z-*, 21 I. & N. Dec. 915, to hold that the BIA does *not* have the authority to extend asylum eligibility to persons whose spouses were forced to undergo an abortion or sterilization. The other Courts of Appeals have uniformly upheld spousal eligibility.[3]

The Second Circuit ruling, if left undisturbed, threatens a serious balkanization of the nation's asylum laws. There, asylum applicants who have not themselves directly undergone a forced abortion or

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[3] *See Zheng v. Ashcroft*, 397 F.3d 1139, 1148 (9th Cir. 2005); *Chen v. Att'y Gen. of U.S.*, 491 F.3d 100, 108 (3d Cir. 2007); *Li v. Ashcroft*, 82 F. App'x 357, 358 (5th Cir. 2003) (unpublished opinion); *Huang v. Ashcroft*, 113 F. App'x 695, 698-99 (6th Cir. 2004) (unpublished opinion); *Zhang v. Gonzales*, 434 F.3d 993, 1001 (7th Cir. 2006); *see also Lin v. Ashcroft*, 371 F.3d 18, 21 (1st Cir. 2004) (approvingly noting the spousal eligibility rule in dictum); *Lin-Jian v. Gonzales*, 489 F.3d 182, 188 (4th Cir. 2007); *Cao v. Gonzales*, 442 F.3d 657, 660 (8th Cir. 2006); *Wang v. U.S. Att'y Gen.*, 152 F. App'x 761, 767 (11th Cir. 2005) (unpublished opinion).

sterilization must now show "other resistance" to China's family planning laws to qualify for asylum—a requirement that seemingly requires an applicant who has already suffered the loss of an unborn child to subject himself or herself to the further risk of formally protesting China's repressive family planning laws in a society not known for tolerating dissent. In other Circuits, however, asylum applicants continue to benefit from the traditional rule that a refugee whose spouse was forced to undergo an involuntary abortion is presumptively eligible for asylum. Moreover, continuing uncertainty over the actual effect of the 1996 amendment has caused the BIA, the Attorney General and the Courts of Appeals to engage in "ping pong style" proceedings over the proper scope of § 601(a)—a process that, according to the Second Circuit, has now lasted at least ten years, *see* Pet. 18; Pet. App. 33 n.15, and will continue unabated until this Court intervenes. Only this Court's authoritative interpretation of the effect of the 1996 amendment on the Government's authority under INA § 101(a)(42) will restore uniformity to the nation's asylum law and prevent more years of unnecessary litigation.

II. THIS CASE IS AN IDEAL VEHICLE FOR RESOLVING THE QUESTION PRESENTED NOW

The Government's only arguments for denying the petition for certiorari are that this Court's review would be inappropriate because this case does not involve the *spouse* of a person forced to undergo an involuntary abortion, and premature because the Attorney General is presently considering the proper

interpretation of the 1996 amendment. Neither suggestion withstands scrutiny.

A. The Decision Below Squarely Held That the Attorney General Lacks Authority to Extend Threshold Eligibility to Spouses

The Government first argues that review is unwarranted because "this case does not raise the question of *spousal* eligibility." Opp. 15 (emphasis added). The Government, however, ignores the clearly expressed holding of the decision below.

As the Government itself has noted in other filings, the Second Circuit "rejected the BIA's *spousal* eligibility rule, holding that the statutory provision conferring refugee status on asylum applicants who have been subjected to involuntary sterilizations or abortions does not provide the *spouses* of such persons with a per se entitlement to refugee status." Opp. to Cert., *Yang v. Mukasey*, No. 07-756, at 16 (filed Apr. 7, 2008) (citing *Lin v. U.S. Dep't of Justice*, 494 F.3d 296 (2d Cir. 2007)) (emphasis added). Thus, the Government is mistaken in suggesting that the Second Circuit "went further" in order to reach the BIA's conclusion that the spouse of a person subjected to a forced abortion is presumptively eligible for asylum. Opp. 9. Rather, the court viewed the eligibility of spouses as an unavoidable threshold, foundational question to the issue of whether boyfriends and fiancés were eligible. Pet. App. 14a. The court answered that question in the negative, ruling that § 601(a) "does not provide that a spouse—and *a fortiori*, a boyfriend or fiancé—of someone who has been forced to undergo, or is threatened with, an abortion or sterilization is automatically eligible for

'refugee' status." Pet. App. 24a; *see also* Pet. App. 33a ("A necessary predicate for this result is our conclusion that § 601 does not confer automatic asylum eligibility on spouses, whether legal spouses or spouses from a traditional marriage, but only on individuals who themselves have undergone or been threatened with coercive birth control procedures.").

Any doubt that the decision below in fact precludes spouses from a presumption of eligibility is dispelled by consideration of the manner in which that decision has been applied by the Second Circuit. In case after case, that court has cited its prior decision as establishing a general rule against anyone but a person personally subjected to a forced abortion from benefiting from presumptive eligibility in the absence of a showing of "other resistance." *See, e.g.*, *Liu v. U.S. Dep't of Justice*, No. 07-4410-ag, 2008 WL 905035 (2d Cir. Apr. 4, 2008) (unpublished opinion) (rejecting asylum petition of applicant who "claims that he and his wife 'violated and opposed' the family-planning policy by having a second child in an urban household"); *Lin v. Mukasey*, No. 05-1197-ag, 2008 WL 552651 (2d Cir. Feb. 29, 2008) (unpublished opinion) (petitioner "was not entitled to asylum based solely on his girlfriend's forced abortion, regardless of their marital status"); *Ni v. Mukasey*, No. 07-2172-ag, 2008 WL 344785 (2d Cir. Feb. 7, 2008) (unpublished opinion) ("[E]ven assuming his credibility, [petitioner] was not entitled to asylum or withholding of removal based solely on his wife's forced abortions.").

B. The Pending Proceedings Before the Attorney General Will Not Resolve the Issue Presented

The Government additionally suggests that review would be premature because "the Attorney General is now considering whether the agency's position should be modified." Opp. 15; *see In re Shi*, No. A. 95-476-611 (A.G., referral from B.I.A.). But given the way the conflict in the circuits has developed, this argument comes too late.

The issue in this case—whether the 1996 IIRIRA amendment deprives the BIA of authority to apply a presumption of eligibility—is a basic question of statutory interpretation. In the decision below, the Second Circuit held the BIA enjoys no such authority. Pet. App. 14a ("We conclude that Congress has spoken to this issue and that it has done so unambiguously."); *see also* Pet. App. 13a-14a ("If the BIA's policy is at odds with the plain language of the statute, it makes little sense to consider only whether it can reasonably be limited to couples who are formally married."). Other Circuits have taken an opposing view—again, as a question of first-order statutory interpretation. *See, e.g.*, *Zhang*, 434 F.3d at 999 (construction of INA denying presumptive eligibility to persons married in traditional ceremony "would entirely subvert the Congressional amendment"); *Ma v. Ashcroft*, 361 F.3d 553, 561 (9th Cir. 2004) (same). Whatever the Government concludes in its administrative proceeding, it will not resolve the issue of statutory authority. If the Attorney General reaffirms he has such authority, the Government must still confront the barrier of an *en banc* ruling of the Second Circuit against such authority—a barrier only this Court can lift in the

absence of further Congressional action. If, on the other hand, the Government decides in that proceeding that it lacks authority, continued litigation in the Courts of Appeals over the status of their prior decisions finding such authority is inevitable.

C. Review Should Be Granted In This Particular Case

This petition offers a particularly suitable vehicle for considering the question presented. It is uncluttered by credibility issues, for the parties in Petitioner's removal proceedings "stipulated that if petitioner had testified, his testimony would have been credible and consistent with his asylum application." Opp. 3; *see* Pet. App. 120a-121a.[4]

In addition, this case is a particularly suitable vehicle due to the lower court's thorough analysis and the well-developed factual and administrative record. When Petitioner initially sought review of the BIA's decision in the Second Circuit, the panel remanded the case to the BIA with instructions, *inter alia*, to explain more precisely its rationale for providing that the "forced sterilization …" *Lin*, 416 F.3d at 192 (Pet. App. 104a-105a). The remand resulted in *In re S-L-L-*, 24 I. & N. Dec. 1 (B.I.A. 2006) (Pet. App. 126a-160a), a thoroughly reasoned *en banc* BIA decision affirming the agency's *C-Y-Z-* holding from nine years prior. *See id.* at 4 (Pet. App. 130a).

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[4] By contrast, the other petition pending that raises a closely related issue concerning the scope of § 601(a), *Yang v. Mukasey*, No. 07-756 (filed Dec. 6, 2007), raises significant credibility issues. *See Yang* Opp. to Cert. at 18.

When the case returned to the Second Circuit, the court *sua sponte* ordered rehearing *en banc*. The majority opinion, which was joined by seven judges, provoked an array of thoughtful and thoroughly-reasoned concurring and dissenting opinions. Specifically, five judges in three separate opinions disagreed with the majority's holding that the 1996 amendment precluded the BIA's traditional spousal eligibility rule. First, Judge Katzmann, joined by Judges Pooler, Straub, and Sotomayor, focused on Congress's intent to expand asylum eligibility in enacting IIRIRA § 601(a), noting that the amendment did not "provid[e] an exhaustive list of those who could claim asylum relief because they were victimized by China's family planning policy." Pet. App. 48a. Second, Judge Sotomayor, joined by Judge Pooler, separately wrote to highlight the effect that the majority's directly-suffered personal harm requirement may have on other asylum cases. Pet. App. 61a-64a. Finally, Judge Calabresi urged a second remand to the BIA to consider spousal eligibility under the general INA § 101(a) definition of "refugee." Pet. App. 77a-82a.

CONCLUSION

For the foregoing reasons, as well as those in the Petition for Certiorari, the petition should be granted.

Respectfully submitted,

MEIR FEDER
JONES DAY
222 East 41st St.
New York, NY 10017
Tel: (212) 326-7900

DONALD B. AYER
JONES DAY
51 Louisiana Ave., NW
Washington, D.C.20001
(202) 879-3900

SAMUEL ESTREICHER
Counsel of Record
NEW YORK UNIVERSITY
SCHOOL OF LAW SUPREME
COURT CLINIC
40 Washington Sq. South
New York, NY 10012
(212) 998-6226

BRUNO JOSEPH BEMBI
62 Nicholas Court, Ste. 202
Hempstead, NY 11550
(516) 483-7372

Counsel for Petitioner

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