

1           IN THE SUPREME COURT OF THE UNITED STATES

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3   DANIEL GIRMAI NEGUSIE,                                 :

4                                 Petitioner                                 :

5                                 v.                                 :   No. 07-499

6   MICHAEL B. MUKASEY,                                 :

7   ATTORNEY GENERAL.                                 :

8   - - - - - x

9   Washington, D.C.

10    Wednesday, November 5, 2008

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12                                 The above-entitled matter came on for oral  
13   argument before the Supreme Court of the United States  
14   at 10:04 a.m.

15   APPEARANCES:

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17   the Petitioner.

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20   of the Respondent.

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1 P R O C E E D I N G S

2 (10:04 a.m.)

3 CHIEF JUSTICE ROBERTS: We will hear  
4 argument first this morning in Case 07-499, Negusie v.  
5 Mukasey.

6 Mr. Pincus.

7 ORAL ARGUMENT OF ANDREW J. PINCUS

8 ON BEHALF OF THE PETITIONER

9 MR. PINCUS: Thank you, Mr. Chief Justice,  
10 and may it please the Court:

11 A father forced at gunpoint to engage in  
12 incest with his daughter because of his religion, race,  
13 or political views, and told that he and his daughter  
14 will be killed if he refuses, is far outside the class  
15 of persons brought to mind by the ordinary meaning of  
16 the phrase at issue in this case, which is reprinted on  
17 page 1 of our brief, quoting from section (a)(42): "Any  
18 person who ordered, incited, assisted, or otherwise  
19 participated in the persecution of any person" on  
20 account of a prohibited factor.

21 The same is true if -- of someone who, as  
22 part of the religious persecution directed against him,  
23 is forced on threat of death to disrupt a prayer meeting  
24 and injure his co-religionists. The father and the  
25 co-religionists are victims of persecution. They would

1 not be described in ordinary parlance as "persecutors."  
2 And we think that that really under the Government's  
3 view, the persecutor bar turns solely on what they term  
4 "objective effect of an individual's acts." But that  
5 means that the act need not be accompanied by any of the  
6 indicia of moral offensiveness that the law typically  
7 requires, even if the individual acted under duress,  
8 under threat of death, even if the individual did not  
9 know that his conduct related to persecution, and even  
10 if the individual.

11 JUSTICE KENNEDY: Do we begin with the  
12 assumption that this is a Chevron deference case? And I  
13 think Aguirre, INS v. Aguirre, would tell us that it is.  
14 It was a different statute. Do we begin with that  
15 assumption?

16 MR. PINCUS: Well, I think under Chevron  
17 that, one, the first question is is there a gap to be  
18 filled here? The language --

19 JUSTICE KENNEDY: Well, do I begin with  
20 Chevron?

21 MR. PINCUS: Well, yes. We think Chevron  
22 supplies the framework. The first question is, is there  
23 ambiguity. We would -- we argue that here and our  
24 principal submission is that there is no ambiguity here  
25 and that there is therefore no occasion for deference.

1 If the Court were to disagree with that --

2 CHIEF JUSTICE ROBERTS: I take it your  
3 position is that there's no ambiguity in the way the  
4 term is used in the statute, as opposed to no ambiguity  
5 in some abstract sense?

6 MR. PINCUS: Yes, our submission,  
7 Mr. Chief Justice, is that the phrase here, using the  
8 principle that the Court applied in Watson and looking  
9 at the phrase and looking at the picture that it brings  
10 to mind, would never bring to mind the examples that I  
11 cited as conduct that would be captured by this  
12 provision.

13 JUSTICE SCALIA: Mr. Pincus, could I ask  
14 about your description of the Government's position as  
15 saying that it's purely objective and that there's no  
16 mental factor whatever. Is it clear that the Government  
17 not only would not take into account coercion, the fact  
18 that it was done under coercion, but also would not take  
19 into account the fact that the individual even knew?

20 MR. PINCUS: There are cases --

21 JUSTICE SCALIA: -- that he was persecuting  
22 somebody?

23 MR. PINCUS: Yes, Your Honor, there are  
24 cases, some of which that determination has been  
25 reversed by a court of appeals. But the BIA has taken

1 the position that --

2 JUSTICE SCALIA: Has the Government taken  
3 that position here in in this case?

4 MR. PINCUS: The -- well, we pointed out  
5 that that is the position that the BIA has taken and the  
6 Government has not disavowed it. So I don't know  
7 whether they're --

8 JUSTICE SCALIA: I guess I should ask the  
9 Government?

10 MR. PINCUS: Yes, Your Honor. But there  
11 certainly have been a number of decisions along that  
12 line, including one, for example, where an individual  
13 was told, you know, "Stand here. "

14 JUSTICE SCALIA: I could think that that's  
15 wrong without thinking that you also have to take into  
16 account whether there was coercion.

17 MR. PINCUS: You could, Your Honor, although  
18 the underlying -- the Government's underlying theory for  
19 all three of its positions, both that coercion doesn't  
20 matter, that knowledge doesn't matter, and that  
21 subjective intent doesn't matter, is its view that these  
22 words require only objective acts. Once you've  
23 determined that the words require something more --

24 JUSTICE SCALIA: Well, but it's very -- -  
25 it's very common in -- in criminal statutes to require

1 knowledge of the act. Indeed, if the person doesn't  
2 know what he's doing, you know, he may be insane, but  
3 he's not a criminal. Whereas, it is not automatically  
4 clear that the fact that the -- you killed somebody  
5 because otherwise they'd break your arm would -- would  
6 be a justification. I mean, it seems to me the two are  
7 quite separable.

8 MR. PINCUS: Well, two responses, Your  
9 Honor. Certainly in the criminal context, duress is a  
10 well-recognized defense and this Court has said that in  
11 Dixon and other cases. But I just want to be clear that  
12 the knowledge that we are talking about here that the  
13 Government has disavowed is not knowledge that you  
14 engaged in an act. They don't -- they don't take the  
15 position that sleepwalking is -- can be a persecutive  
16 act. But their view is even if you don't know that your  
17 act is contributing to persecution -- you're kept in the  
18 dark by the actual persecutors; they just ask you to do  
19 something that in fact is contributing to persecution --  
20 - they say that doesn't matter, and that it all rests on  
21 what we think is their wrong-headed construction of the  
22 statute.

23 I just want to return to --

24 JUSTICE ALITO: Your position is that any  
25 threat of serious injury is sufficient?

1 MR. PINCUS: Excuse me?

2 JUSTICE ALITO: Your position is that any  
3 threat of serious injury is sufficient?

4 MR. PINCUS: No, Your Honor. I mean,  
5 obviously --

6 JUSTICE ALITO: But that's what your brief  
7 says: "Being forced upon threat of death or serious  
8 injury to participate in the persecutory acts of his  
9 oppressors."

10 MR. PINCUS: Yes, and our position is that  
11 that's a logical starting point. There is of course a  
12 body of law that's been developed in the criminal  
13 context about the parameters about the defense of duress  
14 and that would be a pretty logical starting point, we  
15 think. The Attorney General would have discretion, once  
16 the Court corrected the view that the statute doesn't --  
17 that coercion is irrelevant, just to, within the limits  
18 of Chevron, define what the coercion test is.

19 JUSTICE ALITO: If someone said, if you  
20 don't -- there are 500 men, women and children in a  
21 shed; if you don't administer lethal gas to them, we are  
22 going to administer 20 lashes, that would be sufficient  
23 in your view?

24 MR. PINCUS: Well, under some -- under some  
25 conceptions of this defense, there is a balancing test



1 between the threat that is directed against the  
2 individual and the threat -- and what the injury that he  
3 is asked to carry out. That could be part of the test.

4 JUSTICE ALITO: Well, that's not very  
5 helpful. How would the balancing be struck? How would  
6 you strike it there?

7 MR. PINCUS: Well, what the courts have said  
8 in the criminal context is that there are three  
9 criteria: An immediate threat of death or serious  
10 bodily injury; a well-grounded fear that it will be  
11 carried out; and no reasonable opportunity to escape.  
12 That's the general standard. So in the criminal context  
13 --

14 JUSTICE SCALIA: So you wouldn't balance.  
15 So, you know, gas these 20,000 people or we will kill  
16 you?

17 MR. PINCUS: It might be appropriate --

18 JUSTICE SCALIA: You gas the 20,000 people,  
19 right, and that's okay?

20 MR. PINCUS: Well, some courts have said  
21 that murder is a different kettle of fish and that there  
22 is a question unanswered in the Federal system about  
23 whether or not there is a direct defense for murder.  
24 The States are divided. The Model Penal Code has said  
25 yes, there should be. That is one of the issues that

1 would be open for the Attorney General to the extent he  
2 wishes to exercise his discretion to decide.

3 What's clear, though, is, we think, the  
4 rule -- the current construction of the statute is not  
5 right. There is a body of law out there that is well  
6 developed in the criminal context that could be a very  
7 logical starting point.

8 JUSTICE GINSBURG: Why shouldn't the  
9 starting point be what this Court decided in the  
10 Fedorenko case? The wording of this provision is very  
11 close to the wording of that statute, much closer than  
12 the UN covenant that you have referred to.

13 MR. PINCUS: Well, Your Honor, two responses  
14 to that. First of all, the language in Fedorenko, the  
15 text was very context-specific and it shows that. The  
16 language that applied there specifically referred to the  
17 enemy and specifically referred to persecution of  
18 civilians, making it quite clear that that was a statute  
19 that was targeted in the specific World War II context,  
20 which was all that it applied to.

21 JUSTICE SOUTER: It was also the distinction  
22 about the use of the word "voluntary," in which the  
23 operative language which barred those people didn't have  
24 "voluntary" in it, and I forget what it was, the next  
25 textual section it was there, so it was reason to infer

1     that voluntary activity was not a criteria for the bar.  
2     Isn't that right?

3                 MR. PINCUS:   Exactly, Your Honor, and the  
4     Court said the deliberate omission -- it specifically  
5     looked at the fact that these sections were adopted at  
6     the same time, followed on each other immediately, and  
7     one had "voluntary," and then it said this was a  
8     deliberate omission and we conclude that that deliberate  
9     omission provides the basis for interpreting the  
10    language --

11                JUSTICE KENNEDY:   Do you take the position  
12    that the Government is wrong in saying that it's bound  
13    by Fedorenko and that's the reason perhaps for us to  
14    send it back?

15                MR. PINCUS:   Exactly, Your Honor.   I was  
16    going to get to the second part of your Chevron question  
17    and respond just that.   If the Court were to conclude,  
18    contrary to our submission, that the language here is  
19    ambiguous and there's a gap to fill, our position is --  
20    and we think it's quite well borne out by the decisions  
21    -- that the BIA's decisions here rested on the mistaken  
22    assumption that Fedorenko bound it in this case.

23                JUSTICE KENNEDY:   And do we begin with the  
24    decision in Rodriguez-Majano, the BIA decision --

25                MR. PINCUS:   Yes.

1 JUSTICE KENNEDY: -- which cited Fedorenko?

2 MR. PINCUS: Rodriguez-Majano was the first  
3 one. The issue was not even raised in that case. It  
4 was dicta in the paragraph before citing Fedorenko> In  
5 fact, the BIA says: "The service agreed at oral  
6 argument that the actions don't constitute participation  
7 and persecution." So there really wasn't an issue  
8 there. But all that's there is a sentence and a  
9 reliance on Fedorenko, seems pretty clear that that  
10 decision just mistakenly believed Fedorenko controlled  
11 the case.

12 JUSTICE SCALIA: Well, to give the devil his  
13 due, it's not just the BIA that took that view, it's  
14 every court of appeals that -- that has looked at this  
15 provision has said that Fedorenko is a guide to what it  
16 means, right?

17 MR. PINCUS: Yes.

18 JUSTICE SCALIA: So you are faulting the BIA  
19 for -- you are saying it's beyond reasonable  
20 interpretation for the BIA to adopt the -- the  
21 resolution of the ambiguity, assuming there is an  
22 ambiguity, which comports with every court of appeals to  
23 address the matter has said?

24 MR. PINCUS: I think there are -- there are  
25 two different questions here, Justice Scalia. If the

1 BIA purported to -- if the -- if the BIA said there is a  
2 gap to fill here, we are going to exercise our expertise  
3 and discretion and decide that, that would be one  
4 situation. We think it's quite clear here that the BIA  
5 believed erroneously that Fedorenko compelled the  
6 result, that it thought this was a Chevron step one  
7 case, and it was merely reciting what it believed to be  
8 the rule and saying that Fedorenko controls. So we  
9 think --

10 JUSTICE SCALIA: Why do you think that's  
11 clear? What's -- what's the text you rely on?

12 MR. PINCUS: The text that we are relying on  
13 is -- is the actual decision, which just makes a flat  
14 statement, again in dicta: "The participation or" -- I  
15 am reading from Rodriguez-Majano.

16 JUSTICE SCALIA: Do I have it in front of  
17 me?

18 MR. PINCUS: You don't. It's a decision of  
19 the BIA.

20 JUSTICE SCALIA: Well, gee. I mean, if this  
21 is central to your case, don't you think I ought to have  
22 the language in front of me somewhere?

23 MR. PINCUS: Well, actually the language is  
24 on page 27 of our yellow brief.

25 JUSTICE SCALIA: Wonderful.

1 MR. PINCUS: At the very top of the page.  
2 So all that there is there is a recitation of the rule  
3 and a citation to Fedorenko. And our submission is --

4 JUSTICE SCALIA: It's a "see" citation,  
5 right?

6 MR. PINCUS: Yes.

7 JUSTICE SCALIA: Well, I mean, you know,  
8 it's just not a flat citation which would say that  
9 governs. It means this is a relevant case that you  
10 should look to. And you don't deny that it's relevant.  
11 You try to distinguish it, but it's certainly something  
12 you should consider, no?

13 MR. PINCUS: Well, Your Honor, it is  
14 certainly --

15 JUSTICE SCALIA: And that's all you have to  
16 say that they -- they based it on Fedorenko?

17 MR. PINCUS: Yes. Well, first of all, as I  
18 say --

19 JUSTICE SCALIA: That's not very much.

20 MR. PINCUS: -- the statement in this  
21 decision is dicta. Here I'm not sure whether they  
22 consulted the Bluebook before they picked the "see"  
23 cite, but -- but it -- it seems to me that -- that all  
24 we have here is a legal rule and a legal rule that  
25 generally has been perceived to be the rule that -- that

1 was announced by Fedorenko, not tied in any way to the  
2 different statutory language at issue in this case or  
3 anything else.

4 Let me -- let me also turn to the second  
5 decision that is relied on, which is the decision in  
6 this case. And there -- and I am looking at -- at page  
7 6a of the petition. And the BIA says, citing to -- to  
8 its prior decision in Matter of Fedorenko, it -- it  
9 recites this rule. Now --

10 JUSTICE SCALIA: It's a "see" cite again,  
11 isn't it?

12 MR. PINCUS: It's another "see" cite.

13 JUSTICE SCALIA: All right, that's good.

14 MR. PINCUS: Which they indicate because  
15 they are actually directly -- well, anyway.

16 The Matter of Fedorenko, that's a case --  
17 and I apologize. In our brief we said that was the case  
18 that relied on the DPA. That's actually a case that  
19 involved the Holtzman Amendment, again not the statute  
20 at issue in this case, and therefore just sort of  
21 reflexively taking a rule in a different case and  
22 applying it to this very different statute without any  
23 analysis. And not to get into too much of a train of  
24 BIA logic, but I think it is important.

25 The second case cited here, Matter of

1 Laipenieks, which is the actually the -- the precedent  
2 that Matter of Fedorenko relies on, again specifically  
3 called out the language of Fedorenko and says, as in  
4 Fedorenko -- and I am quoting from page 464 of that  
5 decision -- as in Fedorenko, the plain language mandates  
6 the result.

7 So here in -- in all of the BIA analysis,  
8 there is no analysis in terms of exercising expertise  
9 and discretion.

10 CHIEF JUSTICE ROBERTS: I'm sorry. Where --  
11 the plain language dictates the result, where do I see  
12 that?

13 MR. PINCUS: I apologize. It's in a  
14 different BIA decision. It's In the Matter of  
15 Laipenieks decision at page 464.

16 JUSTICE SCALIA: You say "Citing Matter of  
17 Laipenieks"?

18 MR. PINCUS: Yes.

19 JUSTICE SCALIA: Citing it. It says "citing  
20 Matter of Laipenieks." Do you know if they cited it  
21 just flatly or was it a "see" cite?

22 MR. PINCUS: That I don't know, Your Honor.

23 JUSTICE SCALIA: Do you want to bet?

24 MR. PINCUS: I'm betting on "see."

25 CHIEF JUSTICE ROBERTS: If -- if they say



1 that the plain language of the statute dictates a  
2 particular result, I say -- I suspect that that's a  
3 concession we are in Chevron step one, rather than two.

4 MR. PINCUS: Exactly, Your Honor. And  
5 that's why in -- my response to Justice Kennedy's  
6 question is that if the Court were to disagree with us  
7 and conclude, contrary to our submission that the  
8 language is ambiguous, then we don't have an exercise of  
9 agency discretion under step one or step two, because  
10 all the agency decisions rest on the belief that the  
11 statutory language forecloses that -- the -- the.

12 Exercise of that discretion.

13 So in that event we submit the appropriate  
14 result would be to remand the case, but --

15 JUSTICE SCALIA: Mr. Pincus, can you tell  
16 me: What is the consequence of this? I mean if,  
17 indeed, your client is -- is denied asylum because --  
18 because he participated in -- in, under coercion or not,  
19 discriminatory action against others, what is the  
20 consequence? He is not sent back to the -- to the  
21 country that -- that is persecuting him, is he?

22 Well, his -- his deportation has been  
23 deferred under the Convention Against Torture. So he  
24 has some -- some protection, not the protection, not the  
25 full protections that he would be entitled to if he were

1 found to be a refugee.

2 JUSTICE SCALIA: What -- what happens to  
3 him? Does he -- does he stay here or --

4 MR. PINCUS: He gets to stay here --

5 JUSTICE SCALIA: Until some other country  
6 other than the one that will persecute him will receive  
7 him, is that -- is that it?

8 MR. PINCUS: Yes. Or if -- if he were to --  
9 he gets to stay here as long as sending him back would  
10 not involve torture. So the protection is narrower than  
11 the protection that generally would be available in two  
12 senses:

13 First of all, it only applies to torture.  
14 If you were sent back and you were going to be  
15 imprisoned for life for your -- for the acts that are  
16 protected --

17 JUSTICE SCALIA: Oh, really?

18 MR. PINCUS: -- the CAT would not protect  
19 you. And CAT also does not protect you against  
20 non-state actions. So especially in the world today,  
21 where a lot of the bad things that happen in other  
22 countries are by rebels and non-state actors, the  
23 Convention Against Torture would not provide protection  
24 in that situation. So it's broader protection for a  
25 broader -- for a somewhat broader group of people.

1 JUSTICE SCALIA: Okay.

2 JUSTICE ALITO: Let me ask you -- let me ask  
3 you about another practical consequence of your  
4 provision. I -- I have seen a lot of these asylum  
5 cases, and usually the evidence consists almost entirely  
6 of the uncorroborated statement made by the person who  
7 is claiming asylum.

8 So in your view the immigration judges are  
9 going to have to decide the degree of the threat that  
10 the asylum claimant underwent and the consequences of  
11 failing to comply with whatever he was directed to do.  
12 And they are going to have to do that based solely on  
13 the credibility determination made about an  
14 uncorroborated witness who's typically testifying  
15 through an interpreter and who has all of the mannerisms  
16 and aspects of speech of someone who comes from an  
17 entirely different culture. That's the consequences of  
18 the position that you are advocating?

19 MR. PINCUS: Yes, Your Honor, just -- just  
20 as in the initial question about whether someone has  
21 been subject to persecution in the first place, that's  
22 -- that is the process that we have. And immigration  
23 judges are quite skilled in getting to the bottom of  
24 what's going on.

25 They also have, in addition -- and as relied

1 on in this case --

2 JUSTICE ALITO: You really think that's  
3 true? They are quite skilled at getting to the bottom  
4 of making --

5 MR. PINCUS: Well, I think -- I think it is  
6 their job. I think they also have the country reports  
7 that the State Department prepares, and they were relied  
8 on in this case. If -- if, for example, someone were to  
9 come in and say, I am a victim of coercion, and the  
10 country report does not provide any indication that that  
11 is happening in the country, that's obviously a reason  
12 to look quite skeptically --

13 JUDGE SCALIA: Well, if I claim I would be  
14 subject to persecution in Denmark if I were sent there,  
15 that might be an easy question. But they typically come  
16 from a country where there is persecution, and they  
17 could easily have been subjected to it, or they could  
18 also just as easily have read about it or heard about it  
19 in -- along their way here.

20 You think that's an easy determination?

21 MR. PINCUS: If -- but -- well, but it's  
22 true of the initial claim of persecution. But if -- if  
23 the refugee, an asylum applicant, comes and says, I have  
24 been subject to persecution, and there is no issue of  
25 coercion in the case, that is -- the concern that you

1 have identified arises there. If a case-specific, the  
2 case-specific decision has to be made, this is an  
3 additional question that will have to be answered.

4 JUSTICE SCALIA: Your unprovable question  
5 upon unprovable question. I mean, to say that one  
6 question is really, really hard to figure out is no  
7 justification for laying on another one.

8 MR. PINCUS: And -- and we also think it's  
9 significant in this respect, that the Secretary of  
10 Homeland Security has in connection with a different  
11 disability, the material support disability, said that,  
12 promulgated an exclusion for -- in some circumstances  
13 for people who are coerced to provide material support.

14 JUSTICE BREYER: I am quite curious why -- I  
15 am curious, why did you answer Justice Alito's question  
16 "yes"? I -- I would have thought that if you win this  
17 case, the Attorney General would still have tremendous  
18 leeway in deciding where, when, under what  
19 circumstances, the duress defense applied. Why isn't  
20 that so?

21 MR. PINCUS: That's absolutely right,  
22 Justice Breyer.

23 JUSTICE BREYER: If that's right, then why  
24 do you not -- why was your answer yes?

25 MR. PINCUS: My answer was in the absence of

1 action by the Attorney General. But I think you are  
2 absolutely right that the important thing to point out  
3 here is, as with the standard itself, the Attorney  
4 General could in the asylum context decide that in  
5 certain kinds of situations that this coercion is not  
6 relevant.

7 JUSTICE STEVENS: Mr. Pincus, refresh my  
8 recollection about something about the Fedorenko case,  
9 which I should have reread, but I honestly didn't in  
10 detail. Am I not correct that the point that  
11 Justice Alito makes was really part of the background of  
12 the case there was that nobody really believed his  
13 testimony? It was assumed, for purposes of decision,  
14 that he was telling the truth, but it was pretty clear  
15 he was not. Whereas here everybody does assume, for  
16 purposes of decision, that this man is telling the  
17 truth?

18 MR. PINCUS: Yes, I think that's -- that's  
19 correct, Justice Stevens. And part of what was going on  
20 there was the sheer -- two things: The sheer  
21 administrative burden of millions of refugees and the  
22 need to process them in some kind of expeditious  
23 fashion; and the fact that it was known that there was  
24 sort of an organized effort by people who had been  
25 participating, especially in the concentration camps, to

1     come up with this defense.

2                   JUSTICE SCALIA:  Mr. Pincus, I didn't -- I  
3     didn't get the bottom line of your exchange with  
4     Justice Breyer.  Is it your position that there -- there  
5     has to be some -- some coercion defense, but it's up to  
6     the Attorney General to say what it is?  I mean, he  
7     could say only if he were threatened with death?

8                   MR. PINCUS:  Yes.

9                   JUSTICE SCALIA:  And only if you were  
10    threatened with torture, not if it was threatened that  
11    your family would be exterminated?  Where do you get  
12    that discretion in the -- in the statute?

13                  MR. PINCUS:  Well, the Attorney General has  
14    rulemaking authority in the asylum area, certainly.  And  
15    we think even in -- even with respect --

16                  JUSTICE SCALIA:  Any old coercion defense he  
17    can do -- make.  So long as there is some coercion  
18    defense, that's all you want.  Some coercion defense?

19                  MR. PINCUS:  Well, we think the question now  
20    before the Court is, is there no coercion defense?  
21    That's the -- that's the Government's position --  
22    flatly, totally irrelevant.

23                  JUSTICE KENNEDY:  But why does the Attorney  
24    General have expertise in -- in that area?  I can  
25    understand why he has expertise when he knows that, from

1 experience, that certain defenses are harder to prove  
2 than others, that certain evidence is harder to obtain  
3 than other evidence. But does the Attorney General  
4 really have expertise in determining degrees of duress,  
5 degrees of culpability? Is that within the Chevron  
6 framework?

7 MR. PINCUS: Well, it -- it -- it seems to  
8 me it could well -- I mean, obviously, that would be a  
9 question that would come up, but -- but given that --

10 JUSTICE KENNEDY: I don't know why you -- I  
11 don't know why you concede that.

12 MR. PINCUS: Well, I think once there is a  
13 coercion defense, it would be fleshed out in the  
14 administrative process.

15 JUSTICE SCALIA: You said -- you never get  
16 past step one of Chevron. You say that this statute is  
17 clear. You say it's not ambiguous.

18 MR. PINCUS: Absolutely. Well, we --

19 JUSTICE SCALIA: I think it's pretty  
20 ambiguous if, you know, there is some old coercion  
21 defense, but we don't really know what it is.

22 MR. PINCUS: Well --

23 JUSTICE SCALIA: It seems to me if you are  
24 going to say step one is clear, there has to be some  
25 coercion defense that -- you know, of -- of a



1 substantial nature that the Attorney General cannot  
2 fritter away.

3 MR. PINCUS: We agree with that, Your Honor,  
4 and I apologize if I suggested to the contrary.

5 JUSTICE GINSBURG: What would be -- what  
6 would be the minimum. You say the statute is clear. It  
7 requires some culpability, how would you verbalize what  
8 is the lowest standard that the Attorney General could  
9 impose to read statute to infuse in it some element of  
10 culpability?

11 MR. PINCUS: Because the statutory context  
12 here was to implement our treaty obligations, and the  
13 treaty obligations refers -- refer to criminal  
14 conduct -- we think the logical starting point that --  
15 that you are asking about, Justice Ginsburg, would be  
16 the criminal law standards, which, as I say, are well  
17 developed in the Federal system.

18 JUSTICE SOUTER: Serious bodily harm?

19 MR. PINCUS: Yes, it's a -- it's a  
20 three-part test: Threat of serious bodily harm; no  
21 reasonable well-grounded fear that it will be carried  
22 out; and no reasonable way to avoid it.

23 Unless the Court has any further questions,  
24 I'll reserve the time.

25 CHIEF JUSTICE ROBERTS: Thank you, Mr.

1 Pincus.

2 Mr. Katsas.

3 ORAL ARGUMENT OF GREGORY G. KATSAS

4 ON BEHALF OF THE RESPONDENT

5 MR. KATSAS: Mr. Chief Justice, and may it  
6 please the Court:

7 In categorical terms, the Immigration and  
8 Nationality Act provides that persons who assist or  
9 otherwise participate in persecution may not obtain  
10 certain immigration benefits.

11 CHIEF JUSTICE ROBERTS: Where you stopped --  
12 you stopped in the part that interests me, "participated  
13 in persecution on account of race, religion, nationality  
14 or membership in a particular group. When these people  
15 are forced to engage in persecution, it's not because of  
16 the victim's race or religion; it's because someone's  
17 got a gun at their head.

18 So, you ask them, "Well, why did you do  
19 that? Why did you, you know, whip that person? They  
20 will say: Because they were going to kill me. They are  
21 not going to say, I -- you know, because I was biased  
22 against his race or religion.

23 MR. KATSAS: No, but the -- the "on account  
24 of" phrase, Mr. Chief Justice, modifies the  
25 "persecution." The persecution in this case was

1 directed --

2 CHIEF JUSTICE ROBERTS: Well, how do you  
3 know that? Why can't it just as easily modify  
4 "incited," "participated in"? You have persecution.  
5 Did they participate in the persecution on account of  
6 race; or did they participate, again, in the persecution  
7 on account of what the -- what the force exerted against  
8 them was?

9 MR. KATSAS: I think grammatically, the  
10 immediately preceding noun is "persecution." If the "on  
11 account of" phrase modified -- modified the assistance,  
12 Mr. Chief Justice, it seems to me that would prove far  
13 too much, in that a prison guard who served voluntarily,  
14 voluntarily in order to get a paycheck, wouldn't be  
15 within the bar because he would -- he wouldn't be  
16 assisting on account of --

17 CHIEF JUSTICE ROBERTS: Well, that just  
18 bring you back to what "assistance" means. If you --  
19 normal statutory canon, you have got "ordered,"  
20 "incited," "assisted."

21 MR. KATSAS: Right.

22 CHIEF JUSTICE ROBERTS: "Assistance" can be  
23 read in the same sense as ordered or incited with terms  
24 of an active -- I don't know what it is --  
25 predisposition or desire. Or it can be read in the

1 manner you suggested, somebody who's just doing it  
2 for -- for the paycheck.

3 So, if we read it in eiusdem generis terms,  
4 then I think your response falls short.

5 MR. KATSAS: I don't -- I don't think so,  
6 Mr. Chief Justice, in that the question here -- the  
7 question here is the availability of a duress defense.  
8 One can -- one can order persecution under duress just  
9 as one could assist in persecution under duress.

10 Imagine, for instance, the camp commandant  
11 at Treblinka ordering the slaughter of thousands of  
12 innocent people. He could say: Well, I'm doing that  
13 under duress because if I don't, if I don't order  
14 persecution, someone up my chain of command will kill  
15 me, which is precisely what's wrong with Petitioner's  
16 theory here, its -- its unbounded nature.

17 CHIEF JUSTICE ROBERTS: Well, but that  
18 argument is at one extreme, where if this does apply as  
19 the way Petitioner suggests we assume the Attorney  
20 General can exercise his discretion and not afford  
21 relief. But on the other hand, it could go to some of  
22 the horrific examples that Mr. Pincus suggested; and in  
23 those circumstances the Attorney General could exercise  
24 his discretion to afford relief.

25 MR. KATSAS: The Attorney General does not

1 have discretion with respect to withholding. And  
2 remember, the persecutor bar in the asylum statute is  
3 identical to the persecutor bar in the withholding  
4 statute.

5 But in any event, this Court said in cases  
6 like Phinpathya the fact that the text goes to an  
7 eligibility requirement is not a ground for the Court  
8 reading in limitations that aren't there on the theory  
9 that the Attorney General can address something case by  
10 case. That's because immigration is subject to the  
11 plenary control of Congress, and when Congress writes a  
12 rule and this Court converts it into a standard, it's  
13 shifting control over the immigration laws from Congress  
14 to the Executive and ultimately to the courts.

15 It seems to us that reasoning governs here.  
16 With respect to your question about hard hypotheticals,  
17 I don't dispute that there are hard, sympathetic --  
18 sympathetic persecutors on Mr. Pincus' side of the case,  
19 but keep in mind what is at stake here.

20 Persecution is not typically a grassroots  
21 phenomenon. It's a -- it's a phenomenon typically  
22 ordered by governments or rebel groups aspiring to be  
23 governments. It's typically carried out through  
24 coercion. So if Petitioners are correct, not only the  
25 prison guard in this case who held a gun to keep people

1 out in the sun until they died, not only would he have a  
2 colorable defense, but so too would every single guard  
3 at Treblinka.

4 CHIEF JUSTICE ROBERTS: And so too would, I  
5 gather, the person who is threatened with harm if he  
6 doesn't build the prison walls, right? He knows they  
7 are going to be used to persecute people and hold them  
8 in. I mean, if -- you know, if you push the extreme  
9 interpretations they go either way.

10 MR. KATSAS: But the point --

11 CHIEF JUSTICE ROBERTS: Does he -- does he  
12 persecute people on account of race?

13 MR. KATSAS: Well --

14 CHIEF JUSTICE ROBERTS: We have a prison  
15 here; we are going to hold members of a particular  
16 racial group here, and we are going to force you to  
17 build the walls.

18 MR. KATSAS: Mr. Chief Justice, you are  
19 absolutely correct that there will, of course, be hard  
20 cases about how broadly to draw the circle. But in  
21 Fedorenko, this Court instructed that the way to deal  
22 with that problem is not by reading in a -- a  
23 voluntariness exception into a statute that simply  
24 doesn't contain it, but rather by --

25 JUSTICE KENNEDY: Well, but your position is

1 that it is unbounded. If the legislature passes a  
2 statute requiring specific intent, scienter, concepts of  
3 personal responsibility, we don't say this is unbounded.

4 MR. KATSAS: Of course, Justice Kennedy,  
5 Congress could pass a statute with whatever --

6 JUSTICE KENNEDY: I'm saying in the general  
7 criminal law. We don't say, oh, this is unbounded.  
8 This is what courts are for. This is what adjudication  
9 is for, is to establish and define what duress means,  
10 what scienter means, what degree of intent is culpable,  
11 what isn't. It's not unbounded.

12 MR. KATSAS: That's true in the context of  
13 criminal law. But think about why it's true,  
14 Justice Kennedy. It's true because Congress when it  
15 passes criminal statutes legislates against a background  
16 of hundreds of years of common law precedent in the  
17 criminal area; and this Court has said presumptively  
18 Congress legislates against that common law background,  
19 and that is the theory for on some occasions reading  
20 mens rea requirements and common law defenses like  
21 duress into criminal statutes.

22 JUSTICE BREYER: Why not any statute? I'm  
23 mean, starting where Justice Kennedy left off, you said  
24 a hundred years. It's thousands of years. You could go  
25 back into the history of the human race --

1 MR. KATSAS: Exactly.

2 JUSTICE BREYER: -- and you will discover,  
3 of course, that your word "involuntary" is never  
4 something where the action is involuntary that we praise  
5 or blame people. Rather, every action where we praise  
6 or blame people must be a voluntary action. The classic  
7 example is: "The wind blew my arm." Now, you are  
8 saying that if this person's arm was blown by the wind,  
9 that this statute prevents him having asylum in the  
10 United States or having -- you know, withholding. How  
11 could one assume that involuntary actions are covered by  
12 this statute -- are not covered?

13 MR. KATSAS: Justice Breyer, the case --

14 JUSTICE BREYER: Are covered.

15 MR. KATSAS: Two points. With respect --  
16 with respect to involuntary actions, this case -- this  
17 case doesn't present that question.

18 JUSTICE BREYER: All right. Then once you  
19 say that, then let's talk about intentional actions.

20 MR. KATSAS: Okay.

21 JUSTICE BREYER: And are you going to have  
22 intentional actions?

23 MR. KATSAS: Yes.

24 JUSTICE BREYER: Because praise or blame  
25 typically involves a voluntary action, an intentional



1 action, and an action where there is a degree of  
2 freedom, which is to say that the choice is not too  
3 skewed. And we see that in the criminal law by a  
4 reading into statutes that say nothing of the word  
5 "intentional," and by the use of the duress defense.

6 Now what reason do we have for thinking that  
7 Congress didn't mean these words here in exactly that  
8 way, which traces back at least to Aristotle?

9 MR. KATSAS: Because the thousand-year  
10 tradition that you correctly identify is a criminal law  
11 tradition.

12 JUSTICE BREYER: Oh, but Aristotle doesn't  
13 say criminal law. He says praise or blame.

14 MR. KATSAS: Justice Breyer, this is a  
15 statute -- this is a statute that allocates immigration  
16 benefits. Immigration law is a creature of statute.  
17 There is no background in common law --

18 JUSTICE BREYER: That's absolutely right.  
19 But do you think Congress intended that this absolute  
20 bar should apply where the person is in no sense  
21 blameworthy?

22 MR. KATSAS: The question -- with respect to  
23 intentional conduct, the conduct at issue here,  
24 Justice Breyer, is knowing and intentional. So there is  
25 no question about --

1 JUSTICE SOUTER: No, the reasoning here, Mr.  
2 Katsas, it seems to me implicates exactly what  
3 Justice Breyer brings up. We had a colloquy earlier on  
4 -- on the extent of the reliance by the BIA for its  
5 general policy on Fedorenko, and what the does a see  
6 cite mean and so on. But in -- in this particular case,  
7 going to page 6a or 7a from which Mr. Pincus was -- was  
8 earlier quoting, if you look on page 7a, the reason that  
9 Fedorenko is thought to be appropriate here is, he --  
10 that is to say, the Petitioner here -- has not  
11 demonstrated his conduct is distinguishable from that of  
12 the alien in that case. The conduct of the alien in  
13 that case was identified as relevant by the  
14 voluntary/involuntary distinction. It was so identified  
15 because of the text of the statute, voluntary was used  
16 in one place; it wasn't used in the place where the bar  
17 was set up.

18 So that it seems to me that by the express  
19 reasoning in this case, this case is governed by a rule  
20 that in effect says the distinction between voluntary  
21 and involuntary action is not a relevant distinction.

22 So I don't think you can get by in this  
23 case without confronting just what Justice Breyer says.  
24 And I don't see how you can answer his point in this  
25 case without admitting that Fedorenko in fact was -- was

1     improvidently relied upon, because it's not good  
2     authority here.

3                 MR. KATSAS:   I -- I don't know why it --  
4     with respect to the BIA's reasoning, this decision is a  
5     straightforward application of 20 years of BIA precedent  
6     concluding -- consistent with Fedorenko that  
7     voluntariness is not relevant matter.

8                 JUSTICE SOUTER:   This is not really  
9     consistency with Fedorenko.   This -- in this case the  
10    BIA is saying that he cannot say that his conduct in  
11    effect is different from the conduct in Fedorenko.   And  
12    what was relevant about the Fedorenko conduct was it did  
13    not have to be voluntary conduct.

14                So it is bringing -- it seems to me, the  
15    reasoning in this case is relying upon a rule that says  
16    that the voluntary/involuntary distinction is not  
17    significant.

18                MR. KATSAS:   Right.   That was the  
19    construction -- with the construction --

20                JUSTICE SOUTER:   Which answers  
21    Justice Breyer's question.

22                MR. KATSAS:   But the -- I may be missing  
23    some of the subtlety of your point.   But let me try --

24                JUSTICE SOUTER:   I doubt it, but go ahead.

25                (Laughter.)

1           MR. KATSAS: Let me try it this way. The --  
2     the statutory formulation that we are discussing is the  
3     concept of assistance in persecution. Fedorenko in the  
4     context of the displaced person's act construes that  
5     provision to make involuntariness irrelevant as a matter  
6     of law.

7           JUSTICE SOUTER: Right.

8           MR. KATSAS: Many courts of appeals and the  
9     BIA repeatedly over the last 20 years have held that the  
10    reasoning that Fedorenko governs not only the displaced  
11    person's act, where it is of course directly  
12    controlling, but subsequent statutes, of which there are  
13    no fewer than seven, using essentially the identical  
14    formulation of assistance in persecution: Congress  
15    carries forward that formulation in a canonical way  
16    statute after statute.

17           If you look to legislative history, you will  
18    see that Congress repeatedly expresses an affirmative  
19    intent that all of these persecutor bar provisions be  
20    construed in pari materia and against that backdrop we  
21    have administrative precedent.

22           JUSTICE SOUTER: But one thing that Congress  
23    has not done and it didn't do it in this Act, is to make  
24    the express voluntary/involuntary distinction textually  
25    that the DPA made in Fedorenko. And it seems to me that

1 the reasoning set out in this case says this is exactly  
2 like the Fedorenko situation; that implies that the same  
3 rule in Fedorenko should apply. If the same rule  
4 applies, presumably it should be on the basis of a  
5 statute which is identical on the -- on the textual  
6 voluntariness point to the statute in Fedorenko. This  
7 one -- this one is not.

8 MR. KATSAS: Identical or not textually  
9 distinguishable, to the extent that --

10 JUSTICE SOUTER: Well, you don't have the  
11 voluntary/involuntary distinction here in -- or -- in  
12 textual treatment that you had in -- in the DPA statute  
13 in Fedorenko, do you?

14 MR. KATSAS: You -- well, you have the same  
15 operative language of assisting persecution.

16 JUSTICE SOUTER: You don't -- you don't  
17 follow that with the section that uses the word  
18 "voluntary," whereas the bar does not use the word  
19 "voluntary," right?

20 MR. KATSAS: Except you do. Throughout the  
21 -- throughout the INA are provisions that are expressly  
22 keyed to voluntariness. So you have the same -- the  
23 same contrast can be made with respect to the INA bars  
24 as Fedorenko made with respect to the DPA bar.

25 JUSTICE SOUTER: Can you --

1 MR. KATSAS: And they --

2 JUSTICE SOUTER: Can you give me a couple of  
3 examples of the voluntariness that creates in effect the  
4 same distinction here as under the DPA?

5 MR. KATSAS: Sure. Let me give you one:  
6 The asylum -- the asylum statute -- the substantive  
7 asylum statute itself in 8 U.S.C. 1158 provides --

8 JUSTICE SOUTER: Was that passed as part of  
9 the same legislation that created the bar section we are  
10 dealing with?

11 MR. KATSAS: Yes and no. Let me explain.  
12 Section 1158, the substantive asylum law, did not have a  
13 persecutor bar as originally enacted by the Refugee Act  
14 of 1980. The persecutor bar in the substantive asylum  
15 statute was added in 1996 by the IIRIRA statute, which  
16 in the same statute, in the same section, has a  
17 provision that asylum can be terminated if the alien  
18 voluntarily decides to return to his home.

19 So you have a contrast in the same section  
20 of the same statute. Conduct-based --

21 JUSTICE SOUTER: But it's -- I don't want to  
22 split hairs here, but I mean the voluntary return  
23 behavior is a behavior of the alien in this country with  
24 respect to, in effect, an election under existing  
25 federal law; whereas, the voluntary/involuntary

1 distinction in the DPA was a distinction that referred  
2 to the alien's conduct overseas at the relevant time.

3 MR. KATSAS: That's a fair point,  
4 Justice Souter, but to the extent part of the reasoning  
5 in Fedorenko rests on the -- and the inference from the  
6 contrast, those same contrasts are present here where --  
7 the point of the example --

8 JUSTICE SOUTER: You have convinced me there  
9 are contrasts, but I am not sure that they are contrasts  
10 that raise the implication in a clear way as it was  
11 raised in the DPA. And I think that's my only  
12 disagreement with you at this point.

13 MR. KATSAS: Well, you have --

14 JUSTICE SCALIA: Mr. Katsas, can I bring you  
15 back to Aristotle?

16 (Laughter.)

17 MR. KATSAS: Absolutely.

18 JUSTICE SCALIA: Thank you. This is not a  
19 criminal statute.

20 MR. KATSAS: Exactly.

21 JUSTICE SCALIA: The government is not  
22 imposing punishment upon this person --

23 MR. KATSAS: Exactly.

24 JUSTICE SCALIA: -- for some malfeasance.  
25 Rather, it's -- it's giving a grant of a great benefit

1     --

2                   MR. KATSAS:   Exactly.

3                   JUSTICE SCALIA:  -- to a class of people.

4     And your position is that it has narrowed that class,  
5     perhaps now more than was necessary, but that the  
6     government thought that, rather than letting in and  
7     giving asylum to the commandant of Trebenko, it would be  
8     better to have a provision that simply excludes those  
9     who, under coercion or not, persecuted others.  Isn't  
10    that --

11                  MR. KATSAS:   That's --

12                  JUSTICE SCALIA:  Did Aristotle say anything  
13    about that?  Limiting --

14                  MR. KATSAS:   I'm not sure.

15                  JUSTICE SCALIA:  Limiting the nation's  
16    generosity on the basis of a provision that may or may  
17    not have anything to do with blame?

18                  MR. KATSAS:   I don't know what Aristotle had  
19    to say about it, but --

20                  JUSTICE SOUTER:  But you do know that  
21    Aristotle was not construing this Federal statute, don't  
22    you?

23                  (Laughter.)

24                  CHIEF JUSTICE ROBERTS:  Well, speaking of --  
25    to get back to the language, what's wrong with saying,



1     you have a clause that says "otherwise participated,"  
2     right?

3                     MR. KATSAS:   Right.

4                     CHIEF JUSTICE ROBERTS:   So that must mean, I  
5     gather, or could mean that "assisted" does not have as  
6     broad a meaning as you suggest, because otherwise the  
7     "otherwise participated" language would be unnecessary  
8     and redundant.

9                     MR. KATSAS:   I don't think so,  
10    Mr. Chief Justice, because the statutory sequence is the  
11    word "assist" goes all the way back to the Displaced  
12    Persons Act in the 1977 -- when Congress changes  
13    "assist" to "assists or otherwise participates in" --

14                    CHIEF JUSTICE ROBERTS:   Right.

15                    MR. KATSAS:   -- the only consequence of  
16    that, if any, could be a broadening, not a narrowing.

17                    CHIEF JUSTICE ROBERTS:   Well, I'm not sure  
18    that's right, because if "otherwise participated" covers  
19    -- "assisted" does not include "otherwise participated,"  
20    and I understood your broad reading of "assisted" to  
21    cover the prison walls, and if it does, then I would say  
22    "assisted" needs to be interpreted with "ordered" and  
23    "incited," and if it is, then "otherwise participated"  
24    should be interpreted along the same lines.

25                    MR. KATSAS:   Mr. Chief Justice, the word

1 "assist" was construed in Fedorenko not to -- not to  
2 contain an implicit voluntariness exception. Congress  
3 adds to that the word "participate," which this Court in  
4 Yeskey construed not to have an implicit involuntariness  
5 --

6 CHIEF JUSTICE ROBERTS: So you think there  
7 was just a -- it was a belt-and-suspenders redundancy?

8 MR. KATSAS: Either belt-and-suspenders or  
9 broadening the circle in ways that are difficult to  
10 describe in the abstract. But "participate" -- this  
11 Court has said in Reves, "participate" is a term of  
12 breadth. So I don't -- I don't see the argument that by  
13 adding an additional term of breadth to the scheme  
14 Congress somehow narrowed what would otherwise apply.

15 CHIEF JUSTICE ROBERTS: What I may have  
16 missed, what was your answer to the prison walls? The  
17 guy who builds the prison walls?

18 MR. KATSAS: Yes.

19 CHIEF JUSTICE ROBERTS: Is he or is he not  
20 participating in the persecution?

21 MR. KATSAS: My answer is that the analysis  
22 of that question does not turn on whether or not he is  
23 compelled to build the prison walls; it turns on  
24 footnote 34 of Fedorenko, which says that courts will  
25 have to draw difficult lines in distinguishing between

1 the kind of aid that constitutes assistance within the  
2 meaning of the statute and the kind of aid that does  
3 not.

4 JUSTICE SCALIA: That's very helpful.

5 (Laughter.)

6 MR. KATSAS: But --

7 JUSTICE SCALIA: You -- can I get from you  
8 an answer to the question that I put to Mr. Pincus? Do  
9 you -- does the Government deny even the necessity of  
10 knowledge that what you are doing is assisting in the  
11 persecution of somebody? You don't even have to know  
12 that you are assisting in the persecution?

13 MR. KATSAS: In this case, Justice Scalia,  
14 our position is that knowledge is a sufficient mens rea  
15 and is clearly satisfied here where Petitioner, by his  
16 own testimony, knew about the mistreatment.

17 JUSTICE STEVENS: What is your answer to the  
18 question?

19 MR. KATSAS: We have taken the position,  
20 Justice Stevens, in other cases, that knowledge is not  
21 required.

22 JUSTICE STEVENS: All right.

23 MR. KATSAS: It's been rejected by a few  
24 courts of appeals.

25 JUSTICE SCALIA: Good for them. I mean,

1     that is really an extreme position.

2                 MR. KATSAS:  It is a broader position, but  
3     happily for me, it is not the position before the Court  
4     today, particularly --

5                 (Laughter.)

6                 MR. KATSAS:  -- particularly in light of  
7     Fedorenko, Justice Scalia, which puts a gloss on  
8     voluntariness, but does not address --

9                 JUSTICE STEVENS:  Voluntariness is the  
10    purpose the statute.  What is the difference between  
11    intent and knowledge, in terms of the purpose of the  
12    statute?  Why is intent different -- lack of intent any  
13    different from lack of knowledge?  If you read this  
14    statute literally?

15                MR. KATSAS:  The question -- I'm not sure  
16    the distinction.

17                JUSTICE STEVENS:  You say that, do you not,  
18    that with a case involving lack of knowledge.

19                MR. KATSAS:  Or intent.

20                JUSTICE STEVENS:  Pardon?

21                MR. KATSAS:  Or intent, Justice Stevens.  
22    The conduct here intentional.  The question is whether  
23    there is duress exception to it.

24                JUSTICE STEVENS:  There was an intent to  
25    persecute or an intent to perform certain acts that

1     constitute persecution?

2                   MR. KATSAS:   Intent to perform the acts that  
3     constitute --

4                   JUSTICE BREYER:   People use that word  
5     "intent" in the course of the human race to encompass  
6     the notion of duress.   I mean, that's -- that's  
7     sometimes done, sometimes not.   They are part and parcel  
8     of the same thing, which is whether you can blame the  
9     person for what he did.

10                  MR. KATSAS:   They were not the same thing,  
11     even in the criminal --

12                  JUSTICE BREYER:   In criminal law they were  
13     not, I agree --

14                  MR. KATSAS:   Right.

15                  JUSTICE BREYER:   -- because that's --  
16     because we've seen the need for specificity.   But the  
17     question, I think, Justice Stevens had, and certainly I  
18     have, is why do you read some aspects of what it takes  
19     to hold a person responsible into the statute, but you  
20     don't read other aspects of what it takes to hold a  
21     person responsible morally into the statute?

22                  MR. KATSAS:   We don't read -- our position  
23     is it's not fair to -- it's not fair to incorporate the  
24     full common law background criminal concepts, including  
25     that of duress.   The question by Justice Breyer whether

1 assistance in persecution contains an implicit duress  
2 limitation seems to me very different from the question  
3 whether it contains an implied knowledge limitation.  
4 And the latter question is not present here with respect  
5 to a prison guard who, by his own admission, knew  
6 exactly what was going on and deliberately implemented  
7 torture by keeping people in the sun, exposed in the sun  
8 to the point of death.

9 CHIEF JUSTICE ROBERTS: Your concession --  
10 statement earlier on, that there are going to be  
11 situations for judicial line-drawing --

12 MR. KATSAS: Right.

13 CHIEF JUSTICE ROBERTS: And it suggests to  
14 me that BIA's discretion isn't applicable here under  
15 Chevron step two. Because what you are saying is this  
16 is not a situation where the statute never applies.

17 In a situation where you can logically  
18 determine and your answer on the knowledge question is  
19 pertinent, you can logically draw a line between what a  
20 person's doing and persecution; and yet you said the c  
21 courts are going to have to draw lines. So BIA -- the  
22 board might get discretion with respect to where that  
23 line is drawn and when, but they do not get discretion  
24 on the question of does it ever apply. And what your  
25 position is, that this never applies, whenever there is

1 a but-for logical intention between the action and  
2 persecution.

3 MR. KATSAS: Mr. Chief Justice, they  
4 certainly get discretion in conducting the analysis of  
5 what constitutes assistance. But Fedorenko said that  
6 that -- that inquiry is independent of any question of  
7 duress on -- it said that the inquiry should happen  
8 case-by-case, that's fine; but it gave -- the footnote  
9 in Fedorenko gave us two clear data points to help frame  
10 the analysis.

11 One is the conduct of a woman who does  
12 nothing more than cut the hair of people bound for  
13 execution. Court said, as a matter of law, that cannot  
14 constitute assistance. The other data point is the case  
15 of an armed prison guard who, perimeter guard who keeps  
16 people in a camp; and the Court said, of course, that  
17 constitutes assistance.

18 CHIEF JUSTICE ROBERTS: But you would say  
19 the woman who cuts the hair does participate in the  
20 persecution if there is a guideline that says look, we  
21 are not going to execute anybody unless -- before their  
22 hair is cut, right?

23 MR. KATSAS: I would not say that. I think  
24 Fedorenko --

25 CHIEF JUSTICE ROBERTS: You would view that

1 as a case that's not covered by the statute, even if the  
2 person is not going to be executed unless the woman does  
3 her job?

4 MR. KATSAS: I think Fedorenko -- Fedorenko  
5 says that the -- the level and degree and character of  
6 assistance of the woman simply cutting the hair does not  
7 constitute assistance. At the other continuum of  
8 conduct, Fedorenko says that the conduct of an armed  
9 prison guard does constitute assistance, even if, as in  
10 Fedorenko, the guard served under duress.

11 And Justice Stevens, if I could come back to  
12 the facts of Fedorenko, the district court in that case  
13 found that if Fedorenko did not serve at the prison  
14 guard -- at the prison camp, he would have been  
15 executed. That finding was not reversed either by the  
16 Fifth Circuit or by this Court, which held that duress  
17 was not relevant to the inquiry of assistance.

18 JUSTICE GINSBURG: Mr. Katsas --

19 MR. KATSAS: Petitioner --

20 JUSTICE GINSBURG: What -- what about the  
21 position that the displaced person's act was special to  
22 the Holocaust? I mean, we are dealing with people who  
23 said we were just following orders, and we did not want  
24 to grant those people asylum.

25 Now in this post-World War II effort, we are



1 engaged in an enterprise where other countries in the  
2 world -- and should we look to see how they are  
3 interpreting this notion of duress, coercion? Are they  
4 considering it irrelevant; would just look to see if the  
5 person in fact was provided some material assistance to  
6 persecution?

7 MR. KATSAS: Justice Ginsburg, it's true  
8 that the Displaced Persons Act was limited to the Nazi  
9 regime, and later statutes, the Refugee Act generalizes  
10 in the sense of eliminating the time and place  
11 restrictions on the definition of refugee.

12 On the specific question of the persecutor  
13 bar, Congress carries forward the same language with an  
14 affirmative indication of intent to preserve the  
15 concept.

16 With respect to your point about the Nazis  
17 being singularly horrific in human history, think of how  
18 that feature plays out under Petitioner's theory. Under  
19 Petitioner's theory, the uniquely horrific nature of the  
20 Nazi regime gives rise to a dramatically expanded class  
21 of people who can credibly raise a duress defense on  
22 anyone under -- anyone under Adolf Hitler in the  
23 organization chart of the Nazi government could credibly  
24 say, if I didn't kill Jews, I would be killed myself.  
25 The Executive permissibly rejected that construction of

1 things in -- in construing the persecutor bar at issue  
2 here.

3 CHIEF JUSTICE ROBERTS: Thank you, Mr.  
4 Katsas.

5 Mr. Pincus, you have four minutes.

6 REBUTTAL ARGUMENT OF ANDREW J. PINCUS

7 ON BEHALF OF THE PETITIONER

8 MR. PINCUS: Thank you, Mr. Chief Justice.

9 JUSTICE SCALIA: Mr. Pincus, who has the  
10 burden of proof? Assume there is an exception for  
11 coercion.

12 MR. PINCUS: The applicant would have the  
13 burden of proof.

14 JUSTICE SCALIA: The applicant would. And  
15 -- and what -- how do you decide? There's not going to  
16 be any evidence on the other side, I assume. The  
17 applicant's going to say I was coerced. And -- and the  
18 only basis for rejecting is -- a sufficient basis is  
19 just, I -- "I don't believe you"?

20 MR. PINCUS: Yes. Credibility  
21 determinations are made all the time. And there is some  
22 -- I mean here, the applicant --

23 JUSTICE GINSBURG: What do you mean they  
24 were made all the time?

25 JUSTICE: But how are they made? How are

1 they made? I looked into the person's eyes and they  
2 looked shifty? No, they have to -- they search around  
3 for some little contradiction in the testimony. If the  
4 - if the IJ has a suspicion that this person's who  
5 testifying through an interpreter -- what language did  
6 the Petitioner here speak?

7 MR. PINCUS: I'm not -- not English.

8 JUSTICE ALITO: You don't know.

9 MR. PINCUS: I don't know, but not English.  
10 There was an interpreter at the hearing.

11 JUSTICE ALITO: How many interpreters are  
12 there of that language in the United States and what are  
13 the quality of the interpreters?

14 JUSTICE SCALIA: And do they have shifty  
15 eyes?

16 (Laughter.)

17 MR. PINCUS: But these are -- I mean --

18 CHIEF JUSTICE ROBERTS: Do they typically  
19 have views on the underlying persecution issue that is  
20 at issue?

21 MR. PINCUS: Do the interpreters?

22 CHIEF JUSTICE ROBERTS: Yes. I mean, it is  
23 not at all unreasonable, if you have a clash between two  
24 ethnic groups in a particular country, that the  
25 interpreters are going to have views one way or the

1 other. They are going to come from one of the groups of  
2 one or the other.

3 MR. PINCUS: They may, Your Honor. But that  
4 -- that's a problem -- we already have a system where we  
5 were deciding whether someone is persecuted and all  
6 these issues arise. We are already looking very  
7 specifically at all the facts. The same facts -- the  
8 same factual development would be relevant to the  
9 coercion issue. As I said, the applicant will bear the  
10 burden of proof.

11 And here, the -- as in other cases, the  
12 country reports are often relied on and are revealing as  
13 to whether what the situation is, what the specific  
14 context is, makes sense.

15 If I could turn to the criminal law question  
16 that Justice Scalia asked. I think the criminal law  
17 background is very relevant here as well, because the  
18 treaty that this statute was enacted to implement our  
19 obligations with respect to, right -- referred  
20 specifically to crimes. The exclusion that was -- that  
21 is authorized by the treaty says, and I am quoting from  
22 an excerpt on page 11 of our reply brief: "has  
23 committed a crime against people" -- "a war crime or a  
24 crime against humanity." That therefore makes very  
25 relevant this body of law that has been developed in the

1 criminal --

2 JUSTICE ALITO: Why is that an apt analogy?

3 If we looked at all the duress cases that have been  
4 decided since the beginning, are we going to find cases  
5 where someone said -- someone claims that I was told I  
6 had to kill 25 people, 100 people; I had to put people  
7 out in the sun until they died, because if I didn't do  
8 that, I was going to be shot?

9 Aren't the situations entirely different?

10 MR. PINCUS: I think you are combining two  
11 questions, Your Honor. One -- one is should this  
12 language be interpreted to have a coercive -- to require  
13 uncoerced conduct in order to label someone a  
14 persecutor. We think this is very relevant in deciding  
15 that question, because the underlying treaty that was  
16 implemented specifically referred to crimes, and crimes  
17 generally have that -- that -- crimes don't -- a  
18 criminal liability doesn't apply to someone who acts if  
19 they are coerced.

20 Whether the precise standards that have been  
21 developed in the federal criminal context control in all  
22 situations here, I think that is something that may not  
23 be clear. As I suggested, the Attorney General may have  
24 discretion to flesh out, and the board may, what is  
25 coercion in this context; and there is a debate as I

1 said before, about whether intentional murder,  
2 especially the intentional murder of a group of people,  
3 is -- is an act for which coercion is -- a coercion  
4 defense is ever available.

5 But those are issues that -- that don't take  
6 away from the fact that here the Government's position  
7 is there is coercion is totally irrelevant.

8 If I could just -- one other issue, the  
9 voluntariness provisions in the statute that my  
10 colleague raised in response to Justice Souter's  
11 question, those provisions were enacted subsequently.

12 The 1980 Refugee Act adopted the language  
13 that's at issue here. May I finish my answer?

14 CHIEF JUSTICE ROBERTS: It's not actually an  
15 answer but go ahead.

16 (Laughter.)

17 MR. PINCUS: Well, I'm sorry. May I finish  
18 my --

19 CHIEF JUSTICE ROBERTS: You finish your  
20 sentence.

21 MR. PINCUS: -- my thought. The language at  
22 issue here, those came later in the re-enactment of that  
23 language in another context.

24 CHIEF JUSTICE ROBERTS: Thank you, Counsel.  
25 The case is submitted.

1                   (Whereupon, at 11:05 a.m., the case in the  
2 above-entitled matter was submitted.)  
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