No. 12-2471

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

F.H.-T.,
Petitioner,

v.

ERIC H. HOLDER, Jr., Attorney General,
Respondent.

BRIEF FOR RESPONDENT

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MISCELLANEOUS

No. 12-2471

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FOR THE SEVENTH CIRCUIT

F.H.-T.,[1]

Petitioner,

v.

ERIC H. HOLDER, JR.,
Attorney General of the United States,

Respondent.

ON PETITION FOR REVIEW OF AN ORDER OF
THE BOARD OF IMMIGRATION APPEALS

BRIEF FOR RESPONDENT

INTRODUCTION

Prior to applying for political asylum in the United States, F.H.-T. worked for nine years with the Eritrean People's Liberation Front (EPLF), a terrorist organization, first as a radio operator and then a truck driver. It is undisputed in

[1] In accordance with this Court's order of June 26, 2012, the Respondent refers to the petitioner by his initialed pseudonym. *See* PACER Electronic docket, *F.H.-T. v. Holder*, No. 12-2471 (7th Cir. June 21, 2012), docket entry 4.

this case that providing such services to a terrorist group amounts to material support for terrorism and bars an alien subject to a removal order – such as F.H.-T. – from a grant of asylum or withholding of removal. In removal proceedings, F.H.-T. attempted to qualify for a statutory knowledge exception available to individuals who unwittingly provide such material support. But the immigration judge disbelieved F.H.-T.'s claim that he was ignorant of any EPLF violence, and when F.H.-T. was later confronted with record evidence of EPLF's attacks against civilians, including its bi-weekly execution of civilian dissidents during the very same time period that F.H.-T. was in the group, the immigration judge found utterly incredible F.H.-T.'s equivocal response that he was unaware of those attacks because he did not personally "witness" them. For those, and other reasons, the immigration judge and the Board of Immigration Appeals ("Board") ruled that F.H.-T. failed to carry his burden under the knowledge exception and was thus ineligible for asylum and withholding of removal, although they granted him protection from removal under the Convention Against Torture.

In petitioning this Court for review of that ruling, in order to pursue the additional relief of asylum and withholding of removal, F.H.-T. attempts to rehabilitate his wavering testimony. Now he contends he was always aware of the EPLF's violence, but that such knowledge does not defeat eligibility for the

statutory knowledge exception, because the EPLF's violent struggle for independence from Ethiopia was "lawful" conduct, rather than "unlawful" terrorist activity. This lawful-violence theory, rejected in every circuit court of appeals to consider it, is unnecessary to address here, because it has at least two critical flaws: (1) F.H.-T. never presented it to the Board, and (2) F.H.-T. concedes that EPLF's violence against civilians *is* terrorist activity, thus the Board's ruling that he failed to disprove awareness of such activity is dispositive, even assuming EPLF's violence against military targets were not "terrorist activity."

Regardless of F.H.-T.'s theory, his appeal is undone by the facts: his nine-year stint in the communications hub and supply chain of the EPLF combined with his floundering accounts of what he saw, heard, or knew, defeated his ability to meet the heavy clear-and-convincing burden below, as the Board ruled, and he similarly fails to meet his burden on this petition to show that the record compels reversal of that ruling.

F.H.-T.'s sole alternative, to obtain a discretionary statutory waiver of, or exemption from, the terrorism bar, leads him to attack the Board for allegedly blocking his eligibility for the waiver. But this Court lacks jurisdiction, because the statute authorizes review over a waiver "determination," not over contentions

that an alien is entitled to consideration for such a waiver at any particular point in time, if ever.

Even assuming jurisdiction, the Court must decline to hear F.H.-T.'s challenge because it derives from a DHS "Fact Sheet" and two exercises of the Secretary of Homeland Security's terrorism exemption authority ("exemption authorities") that F.H.-T. never presented to the Board, and thus he has failed to exhaust his administrative remedies.[2] Apart from these documents, F.H.-T.'s claims regarding the timing of a waiver determination present non-justiciable political questions the Court may not review. Finally, assuming both exhaustion and justiciability, neither the "Fact Sheet" nor the exemption authorities govern the Board or require it to do what F.H.-T. contends. Accordingly, his claims lack merit in any event.

For these reasons, and based upon the discussion set forth below, the petition should be dismissed or denied.

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[2] F.H.-T. included with his brief two of the DHS Secretary's published exemption authorities: *Exercise of Authority Under Sec. 212(d)(3)(B)(i) of the Immigration and Nationality Act*, 72 Fed. Reg. 26,138 (Apr. 27, 2007) (authorizing exemption of material support provided under duress to designated terrorist organizations); and *Exercise of Authority Under Sec. 212(d)(3)(B)(i) of the Immigration and Nationality Act*, 72 Fed. Reg. 9,958 (Mar. 6, 2007) (authorizing exemption of material support provided under duress to undesignated, or "Tier III," terrorist organization). *See* F.H.-T.'s Supplemental Appendix ("SA") at 46-48.

STATEMENT OF JURISDICTION AND TIMELINESS

F.H.-T.'s jurisdictional statement is incomplete and partially incorrect. The correct statement of jurisdiction is as follows:

On May 22, 2012, the Board of Immigration Appeals affirmed an immigration judge's decision, denying F.H.-T.'s applications for asylum and withholding of removal because he engaged in terrorist activity, and ordering his removal to Eritrea. *See* Certified Administrative Record (AR) 4-7. It also affirmed the immigration judge's order deferring F.H.-T.'s removal under the regulations implementing the United States' obligations under the Convention Against Torture Torture (CAT protection).[1] The Board had jurisdiction to review the direct appeal from the immigration judge's decision under 8 C.F.R. §§ 1003.1(b)(3), and 1240.15.

The Court lacks jurisdiction to review the Board's asylum denial because it is predicated on the factual determinations that F.H.-T. provided material support to the Eritrean People's Liberation Front (EPLF), and that he failed to prove clearly and convincingly that he did not know and should not reasonably have known that EPLF was a terrorist organization. AR 4-6. *See* 8 U.S.C. § 1158(b)(2)(D). No similar jurisdictional bar restricts review of the Board's

denial of withholding of removal, and the Court may review that aspect of the Board's decision under 8 U.S.C. § 1252(a).

The Court also lacks jurisdiction under 8 U.S.C. § 1182(d)(3)(B)(i), as discussed below, *see* Section IV, *infra*, to review F.H.-T.'s argument that the Board erred in failing to decide the merits of his asylum and withholding of removal claims.

F.H.-T. timely petitioned for review on June 21, 2012, within thirty days of the Board's decision. *See* 8 U.S.C. § 1252(b)(1). Venue lies in this Court because the immigration judge completed the proceedings in Chicago, Illinois. AR 121, 160, 437, 448; *see* 8 U.S.C. § 1252(b)(2).

STATEMENT OF THE ISSUES

I. Whether the Court must decline to review F.H.-T.'s claim that his knowledge of the EPLF's "lawful" violence does not disqualify him from relief, where he failed to exhaust an administrative remedy by raising the argument to the Board, the Board lacked an opportunity to apply its specialized reasoning and expertise to the claim, and there is no reasoning or disposition of the claim for this Court to review?

II. Whether, even assuming exhaustion of F.H.-T.'s lawful-violence argument, the Court need not reach the matter, where F.H.-T. concedes

that violence against civilians is terrorist activity, and no record evidence compels reversal of the Board's conclusion that F.H.-T. failed to show clear and convincing evidence that he did not have knowledge or constructive knowledge of EPLF's terrorism against civilians?

III. Whether the Court lacks jurisdiction over F.H.-T.'s claim that the Board improperly impeded his effort to obtain a discretionary terrorism exemption from the Department of Homeland Security (DHS), where the statute authorizes review over a waiver "determination," not over whether a terrorism-barred alien is entitled to consideration for a waiver at any particular point in time, if at all?

IV. Whether, even assuming jurisdiction, the Court must either deny or decline to reach F.H.-T.'s terrorism waiver claims, where he failed to exhaust his administrative remedies, the claims are non-justiciable, and such claims otherwise lack merit?

STATEMENT OF THE CASE

Ethiopian native and Eritrean citizen F.H.-T. entered the United States illegally on July 23, 2007, and was subsequently referred for removal proceedings on charges that he was inadmissible as an alien present in the United States without a valid entry document. AR 940-953. F.H.-T. conceded removability as charged.

AR 179, 926. He filed an application for asylum, withholding of removal, and CAT protection on July 16, 2008.[3] AR 868-877. In removal proceedings, an immigration judge denied asylum as a matter of discretion, and denied both asylum and withholding of removal alternatively on the basis of F.H.-T.'s lack of credibility, his provision of material support to the EPLF, and because he failed to show statutory eligibility for those forms of relief on the merits. AR 121-60. Nonetheless, the immigration judge granted F.H.-T. deferral of removal under the Torture Convention. AR 157-60. On appeal, the Board upheld the immigration judge's denial of asylum and withholding of removal based upon F.H.-T.'s provision of material support, and affirmed the grant of protection under the Torture Convention. AR 4-7. Accordingly, in light of F.H.-T.'s grant of relief under the Torture Convention, this petition for review concerns only F.H.-T.'s pursuit of the additional remedies of asylum and withholding of removal.

[3] F.H.-T.'s asylum application is date-stamped July 24, 2008, one day after the asylum statute's one-year deadline, *see* 8 U.S.C. § 1158(a)(2)(B), but the immigration judge allowed his motion to file his application as of July 16, 2008. AR 179-180, 864-867.

STATEMENT OF THE FACTS

I. THE ERITREAN PEOPLE'S LIBERATION FRONT

A. Origin of the EPLF

In 1950, the United Nations General Assembly voted to merge Eritrea with Ethiopia as an autonomous federated unit with Eritrea under Ethiopian sovereignty. AR 403, 565. Ethiopia abolished the federation by unilateral decree on November 16, 1962, triggering the onset of a thirty-year civil war. AR 403, 566.

The Eritrean People's Liberation Front (EPLF) emerged in 1970 from a series of splinter groups that broke away from the predecessor Eritrean Liberation Front. AR 385, 404, 561, 666, 762. By the 1980s, "the EPLF replaced the ELF as the primary rebel group in Ethiopia." AR 561.

The EPLF defeated the Ethiopian army in 1991. AR 559, 567. "In 1994, the EPLF dissolved itself, voting to transform itself into a mass political party – the People's Front for Democracy and Justice (PFDJ)." AR 385, 567. The PFDJ remains Eritrea's sole political party. AR 567, 670.

B. EPLF's Targeting Of Civilians

Record evidence demonstrates that the EPLF strategically targeted civilians from its earliest days until it achieved its goal of Eritrean independence. As early as 1974, the EPLF executed at least eleven dissidents who objected to its use of "Soviet-style democratic centralism" to impose policies, and suppress criticism.

AR 566 (internal quotations omitted). The EPLF executed the dissidents to "set the tone for the way in which Eritrean society was mobilized by the leadership." AR 566.

One of the most infamous EPLF attacks against civilians occurred on October 20, 1987, when it ambushed a convoy of twenty-three United Nations and Catholic Relief Services trucks carrying food relief. AR 399, 561-562, 620, 662, 666. During the attack, the EPLF drained fuel tanks, and burned the trucks and over 400 tons of food. *Id.* It also murdered one of the drivers. AR 662. The EPLF accepted responsibility for this attack that drew "worldwide condemnation." AR 399, 562, 620, 662. International human rights organizations subsequently accused the EPLF of using starvation as a weapon. AR 399, 562, 620, 667.

In May 1989, the EPLF assassinated approximately 200 ethnic Afars who did no more than refuse recruitment. AR 400, 620, 667. In February 1990, the EPLF attacked Ethiopian forces in the Port of Massawa. AR 400, 6662. Approximately 200 civilians died in the fighting. AR 400, 662.

"[F]rom 1990 to 1992 . . . the EPLF carried out assassinations of political opponents and of Eritreans believed to have supported or collaborated with the Ethiopian government." AR 620. The EPLF claimed responsibility for these biweekly assassinations. AR 400-401, 562.

II. F.H.-T.'S PROVISION OF MATERIAL SUPPORT TO THE EPLF

F.H.-T. joined the EPLF as a teenager in April 1982. AR 305, 366, 753. He testified that he joined because his peers were joining and he "really didn't know what [the] EPLF was doing." AR 306-307. His asylum application indicates that he was motivated by his "youthful emotions . . . the prevailing war, and politics." AR 753.

Two days later, "reality" set in, and F.H.-T. attempted to quit. AR 305, 366, 753. EPLF officials refused, and assigned him to be "the radio communication person for the transportation department." AR 305-306, 753. F.H.-T. explained his role was "like being a telephone operator," and he transferred calls coming into the garage where he was stationed. AR 306, 314-315. He served the EPLF in this capacity for four years. AR 313, 753.

From 1986-1988, F.H.-T. transported food and clothing to EPLF fighters stationed "where the struggle was going on." AR 311-313. He said he did not transport weapons because "[w]eapons and ammunition were not coming through the Sudan," where he was stationed. "They were getting that from the other side." AR 312, 315.

F.H.-T. drove a truck from 1988-1991. AR 240, 313, 753. He said he delivered supplies "to the logistics area[s]," rather than the "fighting areas." AR 313.

F.H.-T. testified that he learned about EPLF activities at monthly political indoctrination meetings. AR 367-368. He said EPLF officials briefed attendees about the war effort, including territorial gains and Ethiopian casualties. *Id.* Despite having attended these meetings over the course of nearly a decade, served as a radio operator for several years, and ferried supplies for EPLF soldiers as a truck driver, F.H.-T. asserted he did not know of any EPLF violence. For example, when questioned generally about his knowledge of the "civil war," F.H.-T. replied: "we used heard [sic] something had happened, but we never knew and we never witnessed" it. AR 345. Asked whether he knew about the 1987 attack on the relief convoy, F.H.-T. equivocated, at first testifying that on "the media they say that they have . . . kill this kind, destroy some vehicles . . . ." AR 345. But he said that he did not "witness it," and that there was "nothing I know about it." *Id.*; see AR 357 (asserting that he learned about EPLF violence "later on," but while he was in Eritrea with the EPLF "there is nothing that I have witnessed.").

Regarding the assassination of 200 Afars who refused to join the EPLF, F.H.-T. further wavered, at first conceding that EPLF activities were "reported by

radio or newspapers," AR 347, next qualifying his testimony to say "we only listened about their victories," AR 348, and finally denying knowledge of the Afar killings. AR 348 ("The answer that I'm giving is that I didn't hear anything.").

On continued examination, however, F.H.-T. admitted knowing that the EPLF killed deserters and collaborators. When asked whether he knew of the EPLF's execution every two weeks during 1990 and 1991 of Eritrean civilians accused of collaborating with Ethiopia, F.H.-T. conceded that "[i]n 1990, I heard of one incident." AR 349. "It was by Radio EPLF," he said, "and they said that they had killed one Eritrean who was cooperating with the enemy." *Id.*

Finally, F.H.-T. also testified that he knew that EPLF killed deserters. When asked why he did not try to leave the group, F.H.-T. replied that "anybody [who] tries to leave the EPLF is subject to shooting." AR 356; *see also* AR 351 ("if you are found escaping then you can be killed.").

III. THE IMMIGRATION JUDGE'S OCTOBER 22, 2009, DECISION

On October 22, 2009, at the conclusion of the evidence, the immigration judge denied F.H.-T.'s applications for asylum and withholding of removal, but granted him protection from removal to Eritrea under the CAT. AR 122, 146, 156, 159. The immigration judge's denial was based upon alternative findings that (1) F.H.-T. lacked credibility, (2) he failed to prove his eligibility for asylum on the

merits, and (3) he was statutorily ineligible for having provided material support to the EPLF, a terrorist organization.

Lack of Credibility. "The Court has serious concerns about [F.H.-T.'s] credibility on key parts of his testimony," the immigration judge found. AR 140. In particular, the immigration judge disbelieved F.H.-T.'s claim that "he was unaware of the EPLF's violent activities" during nearly a decade of war, and during a nine-year period in which F.H.-T. was part of the EPLF's war effort, as a "radio operator, a messenger, and a truck driver." *Id.* His ignorance of the 1982 attack on Asmara "fl[ew] in the face of what a reasonable person would be expected to know," the immigration judge found, given that the attack "destroyed a large portion of the city where [F.H.-T.'s] family resided." *Id.*

The immigration judge highlighted F.H.-T.'s equivocation regarding EPLF attacks against civilians, where he claimed "to be unaware [of] several EPLF attacks on United Nations relief convoys and assassination of Eritrean civilians," but then stated "he knew of one attack." *Id.* The immigration judge noted F.H.-T.'s admission of attending monthly EPLF meetings, where "he was informed of their current actions, the fighting, and the number of soldiers killed." AR 141. While it was "reasonable to expect that someone who is a radio operator, a messenger, and a truck driver for the EPLF during this time . . . would be aware of

these events," the immigration judge reasoned, F.H.-T. claimed "he did not know about these events because he did not personally 'witness them.'" *Id.* Thus, the immigration judge wrote, the "Court does not find [F.H.-T.] is credible." AR 141.

Ineligibility on the Merits. Although F.H.-T. asserted that he had been persecuted by the Eritrean government for complaining about working conditions and low pay in the National Service, the immigration judge found him ineligible for asylum and withholding of removal because his claimed persecution was not on account of a statutorily protected ground. AR 144. Citing this Court's opinion in *Musabelliu v. Gonzales*, 442 F.3d 991 (7th Cir. 2006), the immigration judge found that F.H.-T.'s "complaints about treatment of members of the national service within the scope of his employment with the government of Eritrea did not qualify as an expression of a political opinion for asylum purposes." AR 145-146. The immigration judge noted that F.H.-T.'s claim that his father and sister were arrested following his departure from the country failed to establish a well-founded fear that he would be persecuted upon his return, because these arrests were "tied to [F.H.-T.'s] previous internal complaint[s]" about the National Service. AR 148-149.

Because F.H.-T. failed to prove his asylum eligibility, the immigration judge found that "it necessarily follows that [he] failed to satisfy the more stringent probability of persecution standard required for withholding of removal." AR 156.

Material Support Ineligibility. The immigration judge found that even if F.H.-T. proved his eligibility for asylum and withholding of removal, he would nevertheless be "barred from relief by having given material support to a terrorist organization." AR 149; *see* 8 U.S.C. §§ 1158(b)(2)(A)(v), 1182(a)(3)(B)(iv)(VI)(dd) (material support bar). In support of this finding, the immigration judge cited F.H.-T.'s admission to "provid[ing] material support to the EPLF for nine years as a radio operator, manager, and truck driver." AR 150.

The immigration judge found that the group satisfied the definition of a "Tier III" terrorist organization under 8 U.S.C. § 1182(a)(3)(B)(vi)(III), because of "the egregious activities it committed against military and civilian targets." AR 150. The immigration judge cited record evidence of the EPLF's "sabotage, assassinations, and use of dangerous weapons to endanger the public and damage property," including:

- using incendiary devices to burn aid trucks (citing AR 661-662);
- murdering a truck driver during an attack on the aid trucks (citing AR 662);

- intercepting food and humanitarian assistance, thereby "endangering the lives of countless civilians." (Citing AR 662, 666). AR 151.

F.H.-T.'s own expert witness confirmed these events, the immigration judge determined, including the murder of 200 ethnic Afars who resisted EPLF recruitment. AR 152. Because F.H.-T. admitted transporting supplies such as food and clothing for the EPLF, the immigration judge found that he was statutorily ineligible for asylum and withholding of removal for having materially supported a terrorist organization. AR 153-157. Nevertheless, the immigration judge credited other evidence on the risk of torture and granted F.H.-T. CAT protection. AR 158-159. F.H.-T. appealed the asylum and withholding of removal denials to the Board.

IV. F.H.-T'S APPEAL AND THE BOARD'S DECISION

F.H.-T. argued in his Board appeal that the immigration judge erred by: (i) failing to consider his imputed political opinion theory of asylum, AR 70-73; (ii) finding that his complaints regarding the National Service amounted to mere whistle-blowing, AR 73-76; (iii) finding incredible his denial of knowing that EPLF engaged in terrorist activity, AR 76-78, and (iv) applying the material support bar because the support he "provided to the EPLF was not material." AR 78-80.

The Board dismissed F.H.-T.'s appeal in a May 22, 2012 decision. AR 4-7. The Board upheld the immigration judge's ruling that F.H.-T. had provided material support to a terrorist organization. *See* AR 4-5. Noting F.H.-T.'s failure to challenge the immigration judge's finding that the EPLF was a terrorist organization, the Board determined that his "argument that distinguishes providing fungible goods from providing services is . . . unavailing," because the material support bar lists providing "communications" as an example of the type of support it prohibits. AR 4-5 (citing 8 U.S.C. § 1182(a)(3)(B)(iv)(VI)). And the Board rejected F.H.-T.'s related argument that the material support bar did not apply to him because he did not engage in combat. AR 5 (quoting *Hussain v. Mukasey*, 518 F.3d 534, 538 (7th Cir. 2008) ("[i]f you provide material support to a terrorist organization, you are engaged in terrorist activity even if your support is confined to the nonterrorist activities of the organization.")). AR 5.

The Board also sustained the immigration judge's ruling that F.H.-T. was ineligible under the material support bar's knowledge exception. *See* AR 5-6. "We agree with the Immigration Judge that [F.H.-T.] did not satisfy his burden of proving such lack of knowledge," the Board ruled," because while F.H.-T. "denied being aware of the EPLF's acts of violence, he often equivocated, qualifying repeatedly, for instance, that he did not personally see or witness this violence."

AR 5. The Board noted other examples of F.H.-T.'s equivocations, observing that F.H.-T. testified he heard "on the media" about EPLF's "kill[ing] and "destroying some vehicles," but also asserted he "cannot recall anything that the EPLF has done because of his age at the time." *Id.* Similarly, the Board noted F.H.-T.'s denial of any awareness of "any acts or violence perpetrated by the EPLF on civilians," but later conceded he was informed about EPLF's fighting and other war-related activities at monthly "political indoctrinations." *Id.* (internal quotation marks omitted). These equivocations, the Board found, together with the fact of F.H.-T.'s "significant period of 9 years" service in the EPLF as a radio operator and truck driver supported the immigration judge ruling: "[W]e cannot conclude that the Immigration Judge clearly erred in finding that [F.H.-T.] did not establish, with clear and convincing credible evidence, that he did not know, or should not have reasonably known, that the EPLF was engaged in terrorist activities." AR 5-6 (citing 8 C.F.R. § 1003.1(d)(3)(i); *In re D-R-*, 25 I. & N. Dec. 445, 455 (BIA 2011)).

The Board rejected F.H.-T.'s argument that the immigration judge failed to consider his expert's testimony because: (i) the immigration judge "explicitly considered it" in his decision, and (ii) the expert's testimony did not constitute clear and convincing evidence that F.H.-T. should not reasonably have known that

EPLF engaged in terrorist activity. AR 6. The Board determined that the immigration judge "did not err in declining to accord probative weight to [Daniel] Weldeselasie's affidavit," because he was unavailable for cross-examination even though he is a United States citizen living in Indiana, and because Weldeselasie failed to mention the EPLF in his affidavit. AR 6 (citing AR 789).

Finally, because the Board determined that the material support bar rendered F.H.-T. ineligible for asylum and withholding of removal, the Board found it unnecessary to reach F.H.-T's arguments challenging the denial of his political persecution claim on the merits. AR 4, 6. The Board noted the availability of an exemption for F.H.-T.'s activity under 8 U.S.C. § 1182(d)(3)(B)(i), and that it lacked authority to grant such an exemption. AR 6, n.1.

This petition followed.

SUMMARY OF ARGUMENT

The Board properly upheld the immigration judge's finding that F.H.-T. failed to meet his burden of showing by "clear and convincing evidence" that he either did not know, or should not reasonably have known that the EPLF was a terrorist organization. F.H.-T. provided inconsistent and fluctuating testimony regarding his purported ignorance of EPLF's terrorist activity, ultimately conceding that he did know of one civilian who was killed by the EPLF. Although

that concession was sufficient to disqualify him, the Board properly found that F.H.-T.'s uncertain and implausible claims of ignorance in the face of his near-decade of service in the communications and supply apparatus of the EPLF and an administrative record replete with evidence of EPLF's consistent attacks on military and civilian targets independently rendered him unable to meet the heavy statutory burden.

F.H.-T.'s contention that he reasonably believed that the EPLF engaged in only "lawful" violence has been rejected by the courts. But even assuming it were viable here, the Court need not address it, because F.H.-T. never presented it to the Board. Moreover, F.H.-T. concedes that violence against civilians *is* terrorist activity, so the Board's finding that he failed to disprove his knowledge or constructive knowledge of terrorism against civilians is dispositive.

F.H.-T.'s next argument that the Board impeded his effort to obtain a discretionary terrorism waiver fails. The statute provides jurisdiction solely over waiver "determinations," not the manner in which the Board decides immigration appeals. Despite F.H.-T.'s contention that the Court may review anything that adversely affects his ability to obtain consideration for an exemption, this argument lacks any support in the statute, regulations, or the Constitution. Thus, the Court lacks jurisdiction over F.H.-T.'s claims.

Assuming jurisdiction, the Court must nevertheless decline to hear his challenge because it is based on a DHS "Fact Sheet" and exemption authorities that F.H.-T. never presented to the Board. Even assuming exhaustion of administrative remedies, F.H.-T.'s challenge to the timing of DHS's consideration of a terrorism waiver is non-justiciable, precluding review.

Finally, F.H.-T.'s claims have no merit. The Fact Sheet and exemption authorities do not support what F.H.-T. claims them to mean. But even if they do, DHS's policy is a permissible exercise of its statutory discretion under the Supreme Court's decision in *Lopez v. Davis*, 531 U.S. 230 (2001). The statute in no way limits the considerations for determining who among those possibly eligible for an exemption "will be accorded grace." *INS v. Yueh–Shaio Yang*, 519 U.S. 26 (1996).

Accordingly, the Court must dismiss or deny F.H.-T.'s exemption claims.

ARGUMENT

F.H.-T. IS INELIGIBLE FOR ASYLUM AND WITHHOLDING OF REMOVAL BECAUSE OF HIS MATERIAL SUPPORT FOR TERRORISM

I. SCOPE AND STANDARD OF REVIEW

"Where, as here, the Board relies on the findings of the IJ but adds its own analysis, [the Court] review[s] the IJ's decision as supplemented by the Board's

additional reasoning." *Yi Xian Chen v. Holder*, 705 F.3d 624, 628 (7th Cir. 2013) (citing *Milanouic v. Holder*, 591 F.3d 566, 570 (7th Cir. 2010)).

The Court reviews agency factual findings for substantial evidence, and must uphold them unless "any reasonable adjudicator would be compelled to conclude to the contrary." 8 U.S.C. § 1252(b)(4)(B); *Abraham v. Holder*, 647 F.3d 626, 632 (7th Cir. 2011) (same). The Court is "'not at liberty to overturn the Board's determination simply because [it] would have decided the case differently.'" *Bueso-Avila v. Holder*, 663 F.3d 934, 937 (7th Cir. 2011) (quoting *Jamal-Daoud v. Gonzales*, 403 F.3d 918, 922 (7th Cir. 2005)).

The Court reviews questions of law *de novo*, "ow[ing] the Board deference in its interpretation of the INA." *See Duron-Ortiz v. Holder*, 698 F.3d 523, 526 (7th Cir. 2012) (citations and internal quotation marks omitted).

II. STATUTORY FRAMEWORK

The statute defines "terrorist organization" to include "a group of two or more individuals, whether organized or not, which engages in, or has a subgroup which engages in" terrorist activity. 8 U.S.C. § 1182(a)(3)(B)(vi)(III). "Organizations that meet this definition are known as 'Tier III' terrorist organizations, by contrast to Tier I and Tier II terrorist organizations that have

been specifically designated as such." *Haile v. Holder*, 658 F.3d 1122, 1126 n.4 (9th Cir. 2011).

The term "engage in terrorist activity," as applied to an individual or organization, includes committing "an act that the actor knows, or reasonably should know, affords material support, including . . . transportation [and] communications" to a Tier III terrorist organization, "unless the actor can demonstrate by clear and convincing evidence that the actor did not know, and should not reasonably have known, that the organization was a terrorist organization." 8 U.S.C. § 1182(a)(3)(B)(iv)(VI)(dd) (material support bar).

In addition to rendering an alien inadmissible to the United States, the material support bar prohibits a grant of asylum[4] and withholding of removal.[5] *See*

[4] The asylum statute ordinarily deprives the Court of jurisdiction to review the Board's determination that an alien is ineligible for asylum for having engaged in terrorist activity. 8 U.S.C. § 1158(b)(2)(D). However, the REAL ID Act of 2005 restored "jurisdiction to review of 'constitutional claims' or 'questions of law,'" *Khan v. Filip*, 554 F.3d 681, 687 (7th Cir. 2009), and this Court has held that "fact-based argument[s]" lie outside the scope of that limitation. *Aguilar-Mejia v. Holder*, 616 F.3d 699, 703 (7th Cir. 2010) ("[T]he problem is that this is a fact-based argument, and we have no jurisdiction to entertain it . . . Section 1252(a)(2)(D) authorizes review only over constitutional claims or questions of law."). Thus, as discussed *infra*, the Court is without jurisdiction to consider those parts of F.H.-T.'s argument that dispute findings of fact. This statutory limitation does not affect review of the denial of F.H.-T.'s request for withholding of removal.

[5] The statute provides that an alien is ineligible for withholding of removal if the Attorney General decides that "there are reasonable grounds to believe that the

8 U.S.C. §§ 1158(b)(2)(A)(v) (asylum), 1231(b)(3)(B)(iv) (withholding); *Hussain v. Mukasey*, 518 F.3d 534, 537 (7th Cir. 2008) (noting application of material support bar to asylum applicants).

III. THE MATERIAL SUPPORT BAR RENDERS F.H.-T. INELIGIBLE FOR ASYLUM AND WITHHOLDING OF REMOVAL

A. F.H.-T.'s Challenge to the Denial of Asylum And Withholding Of Removal Is Not Properly Raised Here and Should be Rejected

F.H.-T. does not challenge that the EPLF was a terrorist organization, or that he provided material support to it. *See* AR 4, 59-82, Pet. Br. at 11. He was therefore ineligible for asylum and withholding of removal unless he satisfied the statutory knowledge exception, in which he had the burden to prove by clear and convincing evidence that he did not know, and should not reasonably have known, that the EPLF was a terrorist organization. *See* 8 U.S.C. §§ 1158(b)(2)(A)(v) (material support bar to asylum), 1182(a)(3)(B)(iv)(VI)(dd) (material support bar to admissibility); 8 C.F.R. § 1240.8(d); *Viegas v. Holder*, 699 F.3d 798, 801-802

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alien is a danger to the security of the United States. 8 U.S.C. § 1231(b)(3)(B)(iv). An alien described in § 1227(a)(4)(B) "shall be considered to be an alien with respect to whom there are reasonable grounds for regarding as a danger to the security of the United States." *Id*.; 8 U.S.C. § 1227(a)(4)(B). Section 1227(a)(4)(B) cross-references § 1182(a)(3), which provides that any alien who engages in terrorist activity is inadmissible. Similarly, 8 C.F.R. § 1208.16(d)(2) provides for the mandatory denial of withholding of removal or withholding under CAT "if the applicant falls within [§ 1231(b)(3)(B)]." However, an alien who is ineligible under these provisions may receive deferral of removal, which F.H.-T. did.

(4th Cir. 2012). The Board upheld the immigration judge's finding that F.H.-T. failed to satisfy this evidentiary burden. *See* A.R. 5-6.

F.H.-T. contends that "he reasonably believed that the actions of the [EPLF] were part of an independence movement sanctioned by law." Pet. Br. at 1. Because the statute defines "terrorist activity" as an "any activity which is *unlawful* under the laws of the place where it is committed," he argues he did not possess the type of knowledge that would disqualify him from meeting the statutory knowledge exception. *See id.* at 15-16 (citing the definition of "terrorist activity" in 8 U.S.C. § 1182(a)(3)(B)(iii)). The only two federal courts of appeals to address this argument, however, have rejected it. *See Khan v. Holder*, 584 F.3d 773, 781 (9th Cir. 2009) (the definition of "terrorist activity" in § 1182(a)(3)(B)(iii) does not "exclude[] legitimate armed resistance against military targets."); *McAllister v. Attorney General*, 444 F.3d 178, 187-88 (3rd Cir. 2006) (the definition of "terrorist activity" does not contemplate international laws that distinguish between types of conflicts, purposes of resistance groups, and whether citizens were targeted); *see also In re S-K-*, 23 I. & N. Dec. 936, 941 (BIA 2006) (holding there is "no exception in the Act to the bar to relief in cases involving the use of justifiable force to repel attacks by forces of an illegitimate regime.").[6]

[6] In *dicta*, in *Khan*, the Court noted the issue – not presented in that case -- of

Nevertheless, this Court does not have to reach the issue, because of two fundamental flaws in F.H.-T.'s case: (1) F.H.-T. failed to exhaust the claim before the Board, and (2) the Board's ruling that F.H.-T. failed to prove he did not know, or should not reasonably have known of EPLF's terrorism of civilians is independently dispositive.

1. F.H.-T. Failed To Exhaust His Lawful-Violence Claim To The Board

This Court holds that "an alien must exhaust 'all administrative remedies available to the alien as of right,' . . . and this includes the obligation first to present to the Board any arguments that lie within its power to address." *Issaq v. Holder*, 617 F.3d 962, 968 (7th Cir. 2010) (citing 8 U.S.C. § 1252(d)(1)) (other citations omitted). It has explained that rather than a jurisdictional rule, the exhaustion requirement is a "a case-processing rule that limits the arguments available to an alien in this court when those arguments have not been raised properly at the agency level," *id.* (citation omitted), and that it serves a number of goals: "[I]t gives the Board an opportunity to apply its specialized knowledge and experience to the matter, it provides the petitioner with the relief requested in the

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whether the incorporation of international law into the domestic law of a place where the terrorist activity was committed might sanction certain types of violence. However, the issue was never reached, and the violence against civilians by the group at issue in that case – as established with respect to the EPLF -- made the issue even less pertinent. *See Khan*, 584 F.3d at 781, 787-88.

first instance, and it provides us with reasoning to review." *Arobelidze v. Holder*, 653 F.3d 513, 517 (7th Cir. 2011). F.H.-T.'s failure to present his argument to the Board frustrates all three of these goals.

In his Board appeal, F.H.-T. contended that he met the knowledge exception because he "neither witnessed [the EPLF's] combat operation nor [was] informed about their details." AR 76. But his contention has nothing to do with drawing a distinction – so integral to his theory -- between "lawful" and "unlawful" EPLF actions. Indeed, before the Board, he never (1) used such terminology, (2) cited § 1182(a)(3)(B)(iii)'s definition of "terrorist activity," or discussed the laws of the place where EPLF's violence was carried out. *See* AR 20-25, 59-81. This is because his goal was to persuade the Board that he was altogether ignorant, not that he possessed innocuous as opposed to inculpating knowledge. *See* AR 78 (asserting that he "could certainly remain ignorant of the details of combat operations.").

F.H.-T. now argues that "[b]y focusing broadly on whether [he] knew of any violence committed by the EPLF rather than any *unlawful* violence, the Board's analysis asked the wrong question and reached the wrong conclusion." Pet. Br. at 12 (emphasis in original). But this ignores *Issaq* and *Arobelidzer* and turns the exhaustion requirement on its head. The burden is not on the Board to

make the argument, but on the alien, including "the obligation first to present to the Board any arguments that lie within its power to address." *Issaq*, 617 F.3d at 968. And because F.H.-T. failed to present any such argument below, the Board had no "opportunity to apply its specialized knowledge and experience to the matter," or provide this Court with any "reasoning to review." *Arobelidzer*, 653 F.3d at 517; *see also El-Gazawy v. Holder*, 690 F.3d 852, 858-859 (7th Cir. 2012) (no exhaustion of administrative remedies, where petitioner's "unformed argument" lacked "citation or supporting authority," and was "simply too thin for the BIA to recognize it in the form the petitioner now urges us to consider.").[7]

2. The Court May Uphold The Board Without Reaching The Lawful-Violence Argument

Even assuming exhaustion, the Court need not reach F.H.-T.'s lawful-violence argument, because the Board and the immigration judge clearly found that F.H.-T. failed to disprove his awareness of EPLF's terrorism against civilians, and that determination is dispositive, even assuming that EPLF attacks on the Ethiopian military do not equate with "terrorist activity." F.H.-T. concedes that

[7] The Court's exhaustion holdings are consistent with the Supreme Court's decision in *INS v. Ventura*, 537 U.S. 12, 16, (2002), which held that the Board is entitled to decide in the first instance any matter that the statutes places primarily in agency hands. *See id.* at 17 (finding that the court of appeals clearly erred in deciding a claim "without giving the BIA the opportunity to address the matter in the first instance in light of its own expertise.").

targeting civilians is unlawful, and amounts to terrorist activity. *See* Pet. Br. at 12-15. That is why he disputes the agency's finding, and asserts a "lack of knowledge of any unlawful EPLF actions." Pet. Br. at 12. Indeed, he contends that he "consistently testified that during the time of his involvement with the EPLF he had no knowledge of any improper uses of force by the EPLF," such as "unlawful violence against civilians." *Id.* at 13. But F.H.-T.'s testimony -- as we demonstrate immediately below -- was anything but consistent, and his disagreement with the Board's finding does not prove that the record compels its reversal. In short, the agency's determination that EPLF engaged in terrorist activity against civilians is dispositive of F.H.-T.'s challenge to the denial of asylum and withholding, and the Court need not reach his lawful-violence argument.[8]

[8] As noted previously, the Court's jurisdiction over the denial of an asylum application differs from the scope of its review of a denial of withholding of removal. *See* note 4, *supra*. The former grant of jurisdiction is limited to constitutional claims and questions of law. Thus, because F.H.-T. disputes the agency's finding regarding his knowledge of violence against civilians, that dispositive and factual issue is barred from review, and the Court must dismiss F.H.-T.'s challenge to the denial of his asylum application for lack of jurisdiction. *Aguilar-Mejia*, 616 F.3d at 703 ("[T]is is a fact-based argument, and we have no jurisdiction to entertain it . . . .").

B. No Record Evidence Compels Reversal Of The Board's Determination That F.H.-T. Failed To Clearly And Convincingly Prove That He Did Not Know And Should Not Reasonably Have Known About The EPLF's Targeting Of Civilians

F.H.-T. admitted that he heard a 1990 Radio EPLF report about EPLF's execution of "one Eritrean who was cooperating with the enemy." AR 349. He also testified that he never attempted to escape from the EPLF because "if you are found escaping then you can be killed." AR 305-306, 351. His testimony on both counts – the killing of collaborators, and execution of deserters -- was consistent with broader record evidence describing the EPLF's massacre of 200 ethnic Afars who refused to join its ranks. AR 400, 620, 667. Standing alone, therefore, F.H.-T.'s admitted knowledge of the execution of at least one civilian, and his own experience in which he feared being killed if tried to escape,[9] provides substantial evidence supporting the Board's determination that he failed prove eligibility under the knowledge exception. *See Wanjiru v. Holder*, 705 F.3d 258, 265 (7th Cir. 2013) ("It is [petitioner's] burden to show that the administrative decision was *not* supported by substantial evidence.") (emphasis added). Indeed, it is patently unreasonable for an individual who claimed to fear being killed for escaping from

[9] A "threat, attempt, or conspiracy" to endanger the "safety of one or more individuals" falls within the definition of "terrorist activity." *See* 8 U.S.C. §§ 1182(a)(3)(B)(iii)(V), (iii)(VI).

the EPLF, to also disclaim any knowledge or awareness that the EPLF has killed deserters.[10]

To be sure, F.H.-T.'s argument that he "consistently testified that . . . he had no knowledge of any improper uses of force by the EPLF," Pet. Br. at 13, is directly contradicted by his own experience, as well as by his admission of hearing the 1990 EPLF report. But it is even more broadly undercut by the undisputed evidence of his having worked for nearly a decade in the midst of the EPLF's war effort, serving as a radio operator and truck driver, *see* AR 6, 306, and having attended monthly "political indoctrination" meetings over the course of years, where he learned about "current events" and what the EPLF was doing. AR 367-

[10] In his brief, F.H.-T. fails to confront the most damaging findings made by the immigration judge, including F.H.-T.'s concession that he knew of one of the EPLF's civilian killings. Thus, he has waived his challenge to those findings. *See Haichun Liu v. Holder*, 692 F.3d 848, 851 (7th Cir. 2012) (CAT protection claim waived by failure to argue issue in his opening brief). Moreover, insofar as the immigration judge's decision provides substantial evidence to uphold the Board, the waiver is dispositive.

Even assuming no waiver, F.H.-T. cannot avoid the immigration judge's detailed findings, because the Board upheld the immigration judge's decision, and this Court reviews both such decisions. *See Chen*, 705 F.3d at 628; *Milanouic*, 591 F.3d at 570. The Board's discussion of examples of such findings, *see, e.g.*, AR 5 (noting "for instance," certain evidentiary conclusions of the immigration judge), does not exclude its reliance on other findings in the immigration judge's ruling that the Board did not specifically restate. *See Iglesias v. Mukasey*, 540 F.3d 528, 531 (7th Cir.2008) (The Board is "not required to write an exegesis on every contention.").

368. As the immigration judge found, F.H.-T.'s asserted ignorance "fl[ew] in the face of what a reasonable person would be expected to know." AR 140.

F.H.-T.'s case was also undermined by his own expert who underscored the magnitude of EPLF's brutality. His expert confirmed that in May 1989, the EPLF executed as many as 200 ethnic Afars who simply refused EPLF recruitment. AR 400, 620. She also testified about the 1987 EPLF attack on a United Nations relief convoy that resulted in the killing of a relief worker and the burning of trucks and 400 tons of food. AR 399; *see* AR 561-562, 620; *see also* § 1182(a)(3)(B)(iii)(V)(b) ("terrorist activity" includes acts intended "to cause substantial damage to property"). The EPLF drew international condemnation after claiming responsibility for this attack. AR 399, 561-562. And the expert noted that EPLF claimed responsibility for the assassinations of Eritrean civilians accused of collaborating with Ethiopia. AR 398.

Although F.H.-T. denied hearing of these attacks in particular, he admitted listening to the radio, AR 349, of learning of other EPLF activities through "the media," AR 345, and ultimately the immigration judge disbelieved his claims of ignorance. Indeed, the courts reject such self-serving denials when the events of concern amount to "common knowledge." *See Viegas v. Holder*, 699 F.3d 798, 803 (4th Cir. 2012) (substantial evidence supported determination that petitioner

should reasonably have known that his organization engaged in terrorist activity where the petitioner "admitted to hearing reports about [its] violent activities."). Like the widely reported violence in *Viegas*, F.H.-T.'s own expert clarified -- regarding the destruction of relief convoys and execution of civilians -- that there was "no doubt" the EPLF employed "brutal" tactics, AR 399, and it was known that "certainly . . . this kind of thing did take place." AR 400.

The record simply cannot compel the conclusion that F.H.-T. presented a "clear and convincing" case for his ignorance, where substantial record evidence establishes that he provided inconsistent testimony and wavering denials in the face of mounting evidence to the contrary. He initially denied knowing about EPLF's attacks on United Nations relief convoys, and the execution of those resisting recruitment. AR 341-342, 400, 620, 667. Then equivocated with claims of never personally having "witnessed" them. AR 343, 345, 357. When asked about the 1982 EPLF attack on the city where his family resided, which occurred four months prior to F.H.-T.'s departure to join the EPLF, he answered he would not "recall anything . . . done by the EPLF" because he was "under age." AR 344. These repeated equivocations and attempts to dodge what he knew or should have known about the EPLF's brutality justified the immigration judge's skepticism, as

well as the Board's conclusion that he failed to meet his burden of proof. AR 140-141.

In sum, the immigration judge and the Board properly determined that F.H.-T. failed to meet his burden below, and no record evidence compels reversal of their conclusions. *See Bueso-Avila*, 663 F.3d at 937 (substantial evidence standard).

IV. THE COURT LACKS JURISDICTION OVER F.H.-T.'S TERRORISM EXEMPTION CLAIMS, AND EVEN ASSUMING JURISDICTION, HIS CLAIMS ARE BARRED FOR LACK OF EXHAUSTION, JUSTICIABILITY, AND MERIT

The statutory terrorism waiver (or "exemption provision"), provides that the Secretary of Homeland Security, or the Secretary of State, in consultation with each other and the Attorney General, "may determine" in such Secretary's sole unreviewable discretion that the statutory terrorism-related grounds of inadmissibility shall not apply to certain aliens. 8 U.S.C. § 1182(d)(3)(B)(i). It further provides that no Court shall have jurisdiction "to review such a determination" except in a proceeding for review of final removal order, and except for legal and constitutional claims. *Id.*

F.H.-T. attempts to raise three legal claims challenging the Board's failure to conform its adjudication of removal cases involving terrorism bars – and F.H.-T.'s case in particular -- to the manner described in a DHS "Fact Sheet" and two

exemption authorities on the processing of terrorism waivers. *See* Pet. Br. at 28-42. But the statute provides jurisdiction solely over waiver "determinations," not Board adjudication or decisional practices. F.H.-T. argues that the Court may review anything -- including actions collateral to the exemption determination itself -- that adversely affects his ability to obtain consideration for an exemption. But this argument lacks any support in the statute, regulations, or the Constitution. Thus, the Court must dismiss F.H.-T.'s claims for lack of jurisdiction.

Even assuming jurisdiction, the Court should decline to hear his three claims. Each of these claims depends upon the DHS "Fact Sheet" and exemption authorities that F.H.-T. never presented to the Board. Regardless of whether such documents are "of public record," Pet. Br. at 35, nothing in the administrative record shows the Board considered them, much less F.H.-T.'s interpretations of them. Because of F.H.-T.'s default, the Board lacked an opportunity to apply its expertise, or provide any reasoning for this Court to review, so the Court must decline to hear F.H.-T.'s claims.

Apart from the Fact Sheet and exemption authorities, F.H.-T.'s claims amount to a dispute over the proper timing of DHS's consideration of a terrorism waiver. But the issue of when or whether DHS adjudicates the waiver is non-justiciable, further precluding review.

Finally, even assuming jurisdiction, exhaustion, and justiciability, F.H.-T.'s claims have no merit. The Fact Sheet and exemption authorities do not match F.H.-T.'s descriptions of those documents. But even if they do, the documents do not govern the Board, but instead would constitute a discretionary waiver processing policy that, as held in *Lopez v. Davis*, is a permissible exercise of delegated agency discretion. Thus, DHS may exercise its discretion to exclude categorically from consideration cases in which the Board has denied relief solely on the basis of a terrorism bar, without deciding whether the alien otherwise qualifies for such relief. Accordingly, the Court must dismiss or deny F.H.-T.'s exemption claims.

A. The Court Lacks Jurisdiction Under § 1182(d)(3)(B)(i) To Review The Board's Case Adjudication Practices

In the exemption provision, Congress directs that "no court shall have jurisdiction to review [an exemption] determination or revocation except in a proceeding for review of a final order of removal pursuant to section 1252 of this title, and review shall be limited to the extent provided in section 1252(a)(2)(D)." 8 U.S.C. § 1182(d)(3)(B)(i). F.H.-T. asserts that the Court has jurisdiction under this provision to review three claims: (1) "the Board erred in its adjudication by refusing to address asylum issues other than the material support bar," despite acknowledging an "exemption possibility" for F.H.-T.; (2) the Board erroneously

ordered removal and denied asylum "before the DHS adjudicated the exemption matter;" and (3) the "Board's errors . . . prevent effective judicial review over this matter." Pet. Br. at 28. Because the statute confers upon aliens no right, entitlement, or interest in exemption relief, and accords no jurisdiction to review anything other than a "determination or revocation" of a terrorism waiver, the Court lacks jurisdiction over all three claims.

F.H.-T. argues that the Court has jurisdiction over his challenge to the Board's adjudication practices because such practices operate to "nullify [a] statutory right," and effectively "thwart the congressional design" to provide aliens subject to immigration terrorism bars with an exemption possibility. *See* Pet. Br. at 29 (quoting *Boyanivskyy v. Gonzales*, 450 F.3d 286, 291-92 (7th Cir. 2006), and *Benslimane v. Gonzales*, 430 F.3d 828, 832 (7th Cir. 2005), respectively, and citing *Ceta v. Mukasey* 535 F.3d 639, 646 (7th Cir. 2008), and *Subhan v. Ashcroft*, 383 F.3d 591, 595 (7th Cir. 2004)) (internal quotations omitted). However, F.H.-T. misreads the statute. Nothing in the exemption provision establishes a right in any alien to apply for an exemption, or any right, entitlement, or interest in the exemption possibility itself.[11] The provision delegates "sole unreviewable

[11] The Secretary underscores the lack of such rights or interests, declaring that her exercise of the provision's authority is "not intended to create any substantive or procedural right or benefit that is legally enforceable by any party." SA 46.

discretion" to Executive Branch officials to grant a waiver, enumerating only bars to the extension of that relief, but no rights in affected aliens to apply for, or seek the discretionary waiver.

F.H.-T.'s heavy reliance upon *Ceta*, *Subhan*, *Boyanivskyy*, and *Benslimane* is therefore misplaced. These cases *do* concern such a "statutory right," either to apply for adjustment of status (*Ceta*, *Subhan*, *Benslimane*), or to present evidence in a removal hearing (*Boyanivskyy*), and are therefore readily distinguishable from the instant case. *See Subhan*, 383 F.3d at 595 ("Congress "intend[ed] . . . to entitle illegal aliens to seek an adjustment of status upon the receipt of certificates from the state and federal labor departments"); and *Ceta*, 535 F.3d at 647 ("The denial of Mr. Ceta's motion for a continuance 'operate[d] to nullify [his] statutory right' to apply for adjustment of status.") (citing *Boyanivskyy*, 450 F.3d at 292 (citing *Subhan*, 383 F.3d at 595)).[12] The adjustment of status provision directs that an alien may be considered for adjustment of status if, among satisfaction of other

[12] F.H.-T.'s parallel between *Ceta*, *Subhan*, and *Benslimane* on the one hand, and the Board's adjudication of F.H.-T.'s case on the other, fails for other reasons. The adjustment applicants were otherwise eligible for relief, and merely sought more time to complete the "formalities" of their application processes. *See*, *e.g.*, *Benslimane*, 430 F.3d at 835 ("Benslimane had completed all the formalities required for an adjustment of his status, just like Subhan, but the immigration authorities had, through no fault of his or his wife's, failed as yet to act on his wife's petition."). F.H.-T. is clearly not otherwise eligible. He seeks neither a continuance nor the approval of an application for a benefit, but the equivalent of a pardon to remove the disability of his material support for terrorism.

pre-requisites, he "makes an application for such adjustment." 8 U.S.C. § 1255(a); *see* 8 C.F.R. §§ 245(a)(3)(iii) ("Any alien who is physically present in the United States . . . may apply for adjustment of status . . . ."), 1245(a)(3)(iii) (same). Likewise, the removal hearing provisions examined in *Boyanivskyy* confer, among other "[a]lien's rights in [a removal] proceeding," the "rights" to examine and present evidence. 8 U.S.C. § 1229a(b)(4)(B). These statutes are therefore distinct from an exemption provision which confers no similar "right" in exemption relief. Rather, the terrorism waiver "may" or may not be dispensed in the sole discretion of the Executive Branch. *See* 8 U.S.C. § 1182(d)(3)(B)(i).[13]

Lacking any statutory or regulatory rights to apply or be considered for exemption relief, F.H.-T. nevertheless argues that the Board "denied him a fair opportunity to obtain an exemption," implying a constitutionally protected interest in a "fair" process. Pet. Br. at 28. But such an argument also fails. "It is

[13] F.H.-T.'s citation to *Siddiqui v. Holder*, 670 F.3d 736, 739 (7th Cir. 2012), and *Potdar v. Mukasey*, 550 F.3d 594, 595 (7th Cir. 2008), both of which involve petitioners seeking "legalization" under 8 U.S.C. § 1255a, is similarly inapt. *See* Pet. Br. at 34-35, 39-40. The legalization statute provides eligible aliens the opportunity "to apply for temporary residence and then to apply for permanent residence one year later." *Siddiqui*, 670 F.3d at 739 (citing 8 U.S.C. § 1255a); *see also* 8 C.F.R. §§ 245a.11 (legalization eligibility requirements), 245a.12 (application procedures). Thus, *Siddiqui* and *Potdar* are similar to the legal regimes affording opportunities to apply for adjustment of status, and to present evidence, and unlike the discretionary terrorism waiver, which guarantees no such opportunities.

axiomatic that before due process protections can apply, there must first exist a protect[a]ble liberty or property interest." *Bunn v. Conley*, 309 F.3d 1002, 1010 (7th Cir. 2002). And to have a protectable property or liberty interest in a benefit, "a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972); *Roberts v. Spaulding*, 783 F.2d 867, 870 (9th Cir. 1986) ("A mere expectation of receiving a benefit is not enough to create a protected interest"); *Valdez v. Rosenbaum*, 302 F.3d 1039, 1045 (9th Cir. 2002) (If a statute does not "mandate a particular outcome," there is no legitimate claim of entitlement and, hence, no liberty interest.). The exemption provision mandates no particular outcome, and guarantees no opportunity to apply or be considered for relief. *Compare Dandan v. Ashcroft*, 339 F.3d 567, 575 (7th Cir. 2003) ("the decision when to commence deportation proceedings is within the discretion of the Attorney General and does not, therefore, involve a protected property or liberty interest."). F.H.-T. thus lacks any protectable interest in a "fair opportunity" to be considered for the waiver. Pet. Br. at 28.

Where neither the statute, regulations, nor the Constitution afford F.H.-T. a right or entitlement to apply or be considered for a terrorism waiver, F.H.-T.

necessarily also lacks any ground upon which to assert that the jurisdictional clause in § 1182(d)(3)(B)(i) – providing jurisdiction to review an exemption "determination," -- pertains to anything other than the exemption "determination" he has not obtained. Accordingly, the Court lacks jurisdiction over his first two claims.

In his third and final claim, asserting that the "Board's errors . . . prevent effective judicial review over this matter," F.H.-T. erroneously asserts a right to judicial review of an exemption-related claim in the absence of a waiver "determination." Pet. Br. at 28. That claim must be rejected, however, because it would turn the statute on its head to interpret it as requiring the Secretaries to afford an alien the opportunity to apply for a terrorism waiver in order to vindicate a right to judicial review of that waiver. The statute guarantees no such right, it merely identifies where (on petition for review of a removal order) and when (after a determination or revocation) judicial review may occur, assuming such a determination takes place. *See* 8 U.S.C. § 1182(d)(3)(B)(i).

Finally, interpolating a right to invoke the Court's jurisdiction to review a determination that has not yet occurred, and that the statute itself guarantees in no particular circumstance, violates the established principle that the "process" attendant to discretionary relief cannot itself be the protected interest. *See Ohio*

Adult Parole Auth. v. Woodard, 523 U.S. 272, 280 n.2 (1998) (holding that asserting a mere protected interest in a process itself is not a cognizable claim); *Olim v. Wakinekona*, 461 U.S. 238, 250 (1983) (an "expectation of receiving process is not, without more, a liberty interest protected by the Due Process Clause"); *Id.* ("The Court of Appeals thus erred in attributing significance to the fact that the prison regulations require a particular kind of hearing before the administrator can exercise his unfettered discretion."); *Shvartsman v. Apfel*, 138 F.3d 1196, 1199 (7th Cir. 1998) (observing that "[i]f a right to a hearing is a liberty interest, . . . then one has interpreted [due process] to mean that the state may not deprive a person of a hearing without providing him with a hearing. Reductio ad absurdum").

In sum, without a "determination" by DHS under the exemption provision, there is nothing for the Court to review. Neither the statute, any regulation, nor the Constitution guarantees any of the procedural interests claimed by F.H.-T., and the judicial review clause itself cannot force the Executive to provide a determination that the statute delegates to its sole unreviewable discretion. Accordingly, the Court lacks jurisdiction over F.H.-T.'s three claims.

B. F.H.-T. Failed to Exhaust His Exemption Claims, Because They Depend On Documents Never Presented to the Board

Even assuming jurisdiction, the Court must find that F.H.-T. has failed to exhaust his administrative remedies, and decline to hear his three claims. Each such claim has the common premise that DHS's Fact Sheet and the exemption authorities establish a policy "whereby an applicant will be considered for the exemption only if found eligible for asylum but for the material support bar." Pet. Br. at 8; *see id.* at 32 (citing the Fact Sheet for the conclusion that DHS will not consider a terrorism unless the Board has made "a final determination as to [F.H.-T.'s] asylum eligibility."); *id.* at 28 (DHS policy requires the Board to "address asylum issues other than the material support bar"). But F.H.-T. never presented the Fact Sheet or exemption authorities to the Board, and he points to no record evidence that the Board considered those documents, let alone F.H.-T.'s interpretation of them. Under *Arobelidze*, *Issaq*, and *El-Gazawy*, therefore, the Court must decline to hear F.H.-T.'s claims.

F.H.-T. argues that the requirements of the "exemption process . . . are of public record," and that he "specifically pleaded with the Board in his appeal brief to adjudicate the case fully for that precise reason." Pet. Br. at 35. But the record does not support this characterization of what he pled to the Board. There was no reference to any policy, much less a published policy. Rather, the record shows

that F.H.-T. observed in a footnote to his opening Board appeal brief that his political opinion asylum theory was "not moot" because he "may be eligible for a discretionary waiver" under § 1182(d)(3)(B)(i). AR 73, n.2. Similarly, in his reply brief, F.H.-T. did assert that his "other administrative remedies" required the Board to decide all his arguments on appeal, but he did not define those "remedies," or cite or discuss any agency policy or publication, let alone the "Fact Sheet." *See* AR 24. Nor did he explain under what authority the Board must address issues potentially unnecessary for resolution of the case (*i.e.*, reviewing the validity of the removal order) – especially given the common practice for any appellate tribunal to reach the dispositive issue and no more. *See, e.g., Ault v. Speicher*, 634 F.3d 942, 945 (7th Cir. 2011) (declining to address subsidiary issues where ruling on dispositive issue sufficed to dispose of appeal); *United States v. Espinoza*, 256 F.3d 718, 728 (7th Cir. 2001) ("Because we find this issue to be dispositive of the appeal, we need not address the parties' other arguments . . . ."); *Li v. Gonzales*, 416 F.3d 681, 684 (7th Cir. 2005) ("[W]e need not address that issue because the IJ's alternative holding -- that Ms. Li failed to show persecution on account of a political opinion -- is dispositive.").

In short, failing to present to the Board the Fact Sheet and exemption authorities that now form the basis of his current exemption-related claims, and

further omitting any indication that his request was supported by any such publications, the Court must decline to hear his claims. *See El-Gazawy*, 690 F.3d at 858-859 (raising exhaustion bar, where petitioner's "unformed argument" lacked "citation or supporting authority," and was "simply too thin for the BIA to recognize it in the form the petitioner now urges us to consider."); *see also Arobelidze*, 653 F.3d at 517 (no exhaustion where the Board lacks opportunity to apply its "specialized knowledge and experience to the matter," and where its decision "provides us with [no] reasoning to review.").

C. F.H.-T.'s Challenge Regarding the Timing of His Waiver Determination Presents a Non-Justiciable Question

Assuming jurisdiction and the exhaustion of administrative remedies, and apart from the Fact Sheet and exemption authorities – which, as demonstrated below, do not entitle an alien to a waiver determination at any specific point in time or require the Board to adjudicate the terrorism cases before it in any particular way -- F.H.-T.'s three claims amount to a challenge over the timing of DHS's determination of the terrorism waiver. However, because the issue of when – if at all -- the Secretaries must decide to waive a terrorism bar in a particular case presents a non-justiciable political question, the Court must decline to hear F.H.-T.'s claims.

"The political-question doctrine 'identifies a class of questions that either are not amenable to judicial resolution because the relevant considerations are beyond the courts' capacity to gather and weigh, or have been committed by the Constitution to the exclusive unreviewable discretion of the executive and/or legislative – the so-called "political" – branches of the federal government.'" *Judge v. Quinn*, 624 F.3d 352, 358 (7th Cir. 2010), *cert. denied before judgment by*, *Burris v. Judge*, 131 S. Ct. 2958 (2011) (quoting *Miami Nation of Indians of Indiana, Inc. v. U.S. Dep't. of the Interior*, 255 F.3d 342, 347 (7th Cir. 2001) (alterations in original)). In *Baker v. Carr*, the Supreme Court set forth six factors indicating the existence of a non-justiciable political question. 369 U.S. 186, 217 (1962). These factors include: (i) "a textually demonstrable constitutional commitment of the issue to a coordinate political department," and (ii) "a lack of judicially discoverable and manageable standards for resolving it." *Id.* F.H.-T.'s challenge to the timing of any waiver determination implicates at least these two factors. The presence of either establishes a non-justiciable political question. *See INS v. Chadha*, 462 U.S. 919, 941 (1983) ("a political question may arise when any one of the" *Baker* factors "is present").

Any decision by the Secretaries – including the decision to take no action – under the terrorism waiver provision is inextricably intertwined with the conduct of

foreign affairs and national security policy. These are matters that the Constitution commits exclusively to the political branches. *See* U.S. Const. art. I, § 8, cl. 3 (The Congress shall have the Power . . . To regulate Commerce with foreign Nations"); art. II, § 2, cl. 2 (The President "shall have Power, by and with the Advice and Consent of the Senate, to make Treaties," and "appoint Ambassadors, other public Ministers and Consuls"); art. II, § 3 (The President "shall receive Ambassadors and other public Ministers"); *United States v. Pink*, 315 U.S. 203, 222-223 (1942) ("[T]he conduct of foreign relations is committed by the Constitution to the political departments of the Federal Government . . . the propriety of the exercise of that power is not open to judicial inquiry.").

In the waiver context, foreign policy and national security considerations may counsel delay – or even withholding – of a decision in a particular case, particularly if the consequences of either a decision to grant or deny would be prejudicial to the interests of the United States. *See Reno v. American-Arab Anti-Discrimination Committee*, 525 U.S. 471, 491 (1999) ("The Executive should not have to disclose its 'real' reasons for deeming nationals of a particular country a special threat - or indeed for simply wishing to antagonize a particular foreign country by focusing on that country's nationals - and even if it did disclose them a court would be ill equipped to determine their authenticity and utterly unable to

assess their adequacy."); *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2727 (2010) ("when it comes to collecting evidence and drawing factual inferences in [the national security] area, the lack of competence on the part of the courts is marked") (internal quotations omitted) (*HLP*); *North Jersey Media Group, Inc. v. Ashcroft*, 308 F.3d 198, 219 (3d Cir. 2002), *cert. denied*, 538 U.S. 1056 (2003) ("national security is an area where courts have traditionally extended great deference to Executive expertise."). Because these decisions cannot be severed from a request for a waiver, the timing of the Secretaries' determination is a non-justiciable political question. To hold otherwise would be "to supplant a foreign policy decision of the political branches with the courts' own unmoored determination." *Zivotofsky ex rel. Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1427 (2012).

To be sure, not every decision concerning national security and foreign policy is beyond the courts' review. *See, e.g. Mitchell v. Forsyth*, 472 U.S. 511, 523 (1985) ("we cannot accept the notion that restraints" on the Attorney General's activities in the name of national security "are completely unnecessary"). But the judiciary's role in this context is limited to instances involving individual rights and liabilities, or the constitutionality of a statute. *See Zivotofsky* 132 S. Ct. at 1428 ("No policy underlying the political question doctrine suggests that Congress

or the Executive ... can decide the constitutionality of a statute; that is a decision for the courts.") (internal quotations omitted) (alteration in original). Section 1182(d)(3)(B)(i) does not implicate either of these considerations. Aliens lack a constitutional interest in the waiver provision's purely discretionary form of government largesse, including when (and whether) a decision is made. *See Cruz-Mayaho v. Holder*, 698 F.3d 574, 579 (7th Cir. 2012) (alien lacked a protected liberty interest in the discretionary relief of a grant of a motion to reopen); *see also Jay v. Boyd*, 351 U.S. 345, 354 n.16 (1956) (Attorney General's discretionary authority to suspend deportation similar to "a judge's power to suspend the execution of a sentence, or the President's to pardon a convict"). And F.H.-T. does not challenge the waiver provision's constitutionality. In short, *Baker's* first factor indicates that F.H.-T.'s argument amounts to a non-justiciable political question.

F.H.-T.'s complaint about the timing of any waiver determination also implicates *Baker's* second factor because the waiver provision does not, and by its nature cannot, provide judicially manageable standards for determining when or whether the Secretaries must decide a particular case. *See Baker*, 369 U.S. at 217. National Security and foreign policy considerations are inherently fluid and unsuitable to judicial review. *See HLP*, 130 S. Ct. at 2727 ("neither the Members of this Court nor most federal judges begin the day with briefings that may

describe new and serious threats to our Nation and its people.") (internal quotations omitted); *Arizona v. United, States*, 132 S. Ct. 2492, 2499 (2012) ("The dynamic nature of relations with other countries requires the Executive Branch to ensure that [immigration] enforcement policies are consistent with this Nation's foreign policy"). For this reason, Congress intended that "the executive alone [would] decide whether a [terrorism] bar should be inapplicable," and recognized that "keeping these non-applicability decisions out of the courts . . . allow[s] the Government to take the common sense approach of treating different groups different based on how violent they are and how much of a threat they pose to the United States." 153 Cong. Rec. S15,843, 15,876 (daily ed. Dec. 18, 2007) (statement of Sen. Kyl); *see Emergency Services Billing Corp., Inc. v. Allstate Ins. Co.*, 668 F.3d 459, 470 (7th Cir. 2012) (examining legislative history as means to determine Congressional intent). The absence of judicially manageable standards is another reason why the timing of a given waiver determination comprises a political question beyond the scope of the Court's review. See *Baker*, 369 U.S. at 217; *Mejia Rodriguez v. Reno*, 178 F.3d 1139, 1148 (11th Cir. 1999) (finding no prejudice from the denial of an "act of grace" by the Attorney General "because no standards exist for a court to determine whether the executive would have granted the extraordinary relief anyway").

In the end, F.H.-T.'s challenge to the timing of the Secretary's waiver determination, including the presumption that he is entitled to consideration for a waiver altogether, is a non-justiciable question the Court should decline to reach. *See Baker*, 369 U.S. 186, 217; *Judge*, 624 F.3d at 357-358; *see also Annachamy v. Holder*, 686 F.3d 729, 736 n.7 (9th Cir. 2012) (declining to reach "the adequacy of the Secretary's waiver mechanism," noting that such determinations have been "delegated solely to the Secretaries of State and of Homeland Security and . . . Congress appears to be monitoring the mechanism in an effort to strike the appropriate balance between the United States' humanitarian obligations and national security.").

D. Even Assuming Jurisdiction, Exhaustion, and Justiciability, F.H.-T.'s Claims Must Fail

Assuming jurisdiction, exhaustion of administrative remedies, and the justiciability of F.H.-T.'s claims, the Court nevertheless must deny F.H.-T.'s contentions because they have no merit. The language in the Fact Sheet and the published exercises of exemption authority do not say what F.H.-T. claims they do.

1. The "Fact Sheet" and Exemption Authorities Do Not Require – or Entitle an Alien to Have -- The Board Do Anything

According to F.H.-T., the Fact Sheet and exemption authorities provide "that an exemption will be considered only if all other elements of the asylum claim

have been found [by the Board]." Pet. Br. at 32. Thus, he contends that "the Board erred in its adjudication by refusing to address asylum issues other than the material support bar." Pet. Br. at 28. But the Fact Sheet does not state that it requires or even expects "all other elements of the asylum claim" to be adjudicated by the Board. *Id.* at 32. Instead, it provides:

> DHS will consider a case for an exemption only after an order of removal is administratively final. An order of removal is generally considered an administratively final order when either a decision by the Board of Immigration Appeals (BIA) affirms an order of removal or the period in which the individual is permitted to seek review of such order by the BIA has expired, whichever date is earlier. By adjudicating the exemption at this stage, *all parties will have a chance to litigate the merits of the case up through the BIA*, and DHS will be able to focus its resources on cases where the possible exemption is the only issue remaining in the individual's case.

Fact Sheet, October 23, 2008, at 1 (emphasis added), at SA 49. The Fact Sheet makes no guarantee regarding the Board's handling of the case, although it observes that the parties "will have a chance to litigate the merits of the case." It thus speaks in terms of "chance[s]," best practices, and "focus [of] resources," not mandates.

F.H.-T.'s characterization of the Fact Sheet is also at odds with the Fact Sheet's criteria for referring cases for exemption consideration. The Fact Sheet outlines two circumstances under which Immigration and Customs Enforcement

(ICE) will forward a case to United States Citizenship and Immigration Services (USCIS) for exemption consideration:

> [T]he ICE Office of the Chief Counsel handling the case will forward the case to [USCIS] for exemption consideration if relief or protection was denied **solely** on the basis of one of the grounds of inadmissibility for which exemption authority has been exercised by the Secretary.

Id. (emphasis in the original). Thus, the case must be one in which relief was (1) denied "soley" on the basis of a ground of inadmissibility, and (2) such inadmissibility ground must be one "for which exemption authority has been exercised by the Secretary." *Id.* Here, the Board denied F.H.-T.'s applications for relief *solely* on the basis of his material support for terrorism. *See* AR 6. Regarding, the second criterion, F.H.-T. includes no argument or discussion of whether the material-support denial ground *is* one for which exemption authority has been exercised.[14] Unlike the applicants in *Ceta*, *Subhan*, *Boyanivskyy*, *Benslimane*, *Potdar*, and *Siddiqui*, who had established all the pre-requisites and formalities associated with their applications and were simply waiting for the "wheels of bureaucracy [to] grind," *Subhan*, 383 F.3d at 594, F.H.-T. has not even begun to establish *prima facie* eligibility. To the extent he argues that the Board

[14] F.H.-T. included in his Supplemental Appendix copies of the Secretary's exemption authorities relating to material support provided under duress. But he offered no argument concerning whether he believes himself to be eligible under those authorities, or why. *See* SA 46-48.

was required to conform its case adjudication to alleged policy expectations in the Fact Sheet, that document provides that referral of exemption cases occurs only when "relief or protection was denied **solely** on the basis of one of the grounds of inadmissibility for which exemption authority has been exercised by the Secretary." SA 49. Yet, F.H.-T. has not established this criterion to the Court, much less to the Board. Thus, he hardly establishes the Board's disposition of his case frustrated a DHS policy.

2. Even Accepting F.H.-T.'s Interpretation of the Fact Sheet, DHS May Exercise its Discretion To Exclude Cases Such as His

For the sake of argument, assuming F.H.-T. had demonstrated that (1) he was denied relief on a ground for which an exemption authority has been exercised by the Secretary, and (2) DHS will consider a case for an exemption only if the Board has determined all elements of an asylum claim, the Court must still reject F.H.-T.'s exemption claims, for two reasons. First, nothing in the Fact Sheet or the exemption authorities create any right, entitlement, or even expectation that DHS will decide exemption cases that *do not* meet its criteria. Second, in exercising statutorily-delegated discretion, the agency may categorically exclude such cases, *i.e.*, those for whom the Board did not decide or reach all elements of an asylum claim.

First, as established above, purely discretionary relief such as the exemption provision creates no entitlement, and aliens have no right even to be considered for terrorism waivers. Neither the Fact Sheet nor the published exercises of exemption authority imply anything to the contrary. The Fact Sheet, for example, denotes which cases will and will not be referred for consideration. Regarding cases in which the Board has not decided all the elements of an asylum claim – again, accepting F.H.-T.'s contention that the Fact Sheet even addresses the intermediate circumstance between denying or granting asylum on the merits – the Fact Sheet simply provides that such cases will not be referred for consideration by USCIS. *See* SA 49. Even more explicitly, the exemption authorities declare that they are "not intended to create any substantive or procedural right or benefit that is legally enforceable by any party." SA 46. Nothing in the Fact Sheet or the published exercises of exemption authority direct the Board to dispose of all potential issues in a given case, or imply an expectation that it should do so.[15] Thus, the Fact Sheet and exemption authorities are consistent with the broad statutory prerogatives established in the exemption provision.

[15] The exemption authorities apply, *inter alia*, to an alien who is "seeking a benefit or protection . . . and has been determined to be otherwise eligible for the benefit or protection." *See, e.g.*, *Exercise of Authority Under Section 212(d)(3)(B)(i)*, May 8, 2007, at SA 47. This language, contrary to F.H.-T.'s contention, identifies no particular official or agency determining eligibility.

Second, it is well-established that an agency may categorically exclude certain cases in exercising its statutorily-delegated discretion, so long as the categorical exclusion is consistent with the statutory authority itself. Here, assuming F.H.-T.'s reading is correct, DHS can or should be deemed to have categorically excluded cases in which the Board has declined to determine that an alien is eligible for asylum on the merits. Those exclusions are permissible under the broad statutory delegation of discretion.

In *Lopez v. Davis*, 531 U.S. 230 (2001), a statute allowed the Bureau of Prisons (BOP) to decrease the sentence of a prisoner convicted of a nonviolent offense who completed a treatment program by up to a year. BOP promulgated a regulation categorically denying reduction to any prisoner whose current offense was a drug felony involving a gun. The Supreme Court upheld the regulation as "delineat[ing] . . . an additional category of ineligible inmates," noting that "Congress simply did not address how the Bureau should exercise its discretion within the class of inmates" who are eligible. *Id.* at 240. It noted that "[b]eyond instructing that the Bureau has discretion to [reduce sentence], Congress has not identified any further circumstance in which the Bureau either must grant the reduction, or is forbidden to do so." *Id.* at 242.

Like the statute addressed in *Lopez*, Congress has not identified in the exemption provision "any further circumstance in which [the Secretaries] must grant the [terrorism waiver]." *Id.* The exemption provision only establishes enumerated circumstances under which exemptions may not be granted. *See* 8 U.S.C. § 1182(d)(3)(B)(i) (barring the grant of exemptions, for instance, to aliens who are engaged or likely will engage in terrorist activity after entry to the United States).

The Court in *Lopez* relied heavily on its prior ruling in *INS v. Yueh–Shaio Yang*, 519 U.S. 26 (1996), a case which involved a statute authorizing the Attorney General to waive deportation of aliens deportable for entry fraud. The Attorney General had refused to waive deportation for an alien because of "acts of fraud . . . in connection with his entry." *Id.* at 27. The alien argued that because the statute made aliens who had committed entry fraud eligible for waiver, the Attorney General was precluded from taking such conduct into account "at all" in deciding whether to grant relief. *Id.* at 30. The Supreme Court rejected this view, noting that the statute "imposes no limitations on the factors that the Attorney General (or her delegate, the INS, see 8 C.F.R. § 2.1 (1996)) may consider in determining who, among the class of eligible aliens, should be granted relief." *Id.* The Court observed that it had previously described a similar discretionary waiver as "'an act

of grace' which is accorded pursuant to [the Attorney General's] 'unfettered discretion,' *Jay v. Boyd*, 351 U.S. 345, 354 (1956) (quoting *Escoe v. Zerbst*, 295 U.S. 490, 492, (1935)),'' and had quoted approvingly Judge Learned Hand's likening of that provision "to 'a judge's power to suspend the execution of a sentence, or the President's to pardon a convict.'" *Id.* (internal citation and quotation marks omitted). The Court concluded that the statute before it "establishes only the alien's eligibility for the waiver. Such eligibility in no way limits the considerations that may guide the Attorney General in exercising her discretion to determine who, among those eligible, will be accorded grace." *Id*. at 31.

DHS's case processing criteria, which – as F.H.-T. contends -- have the effect of excluding from consideration cases in which the merits of asylum have not been decided, are nonetheless a permissible exercise of the Secretary's statutory discretion. Just as in *Lopez v. Davis* and *Yueh–Shaio Yang*, the Fact Sheet and exemption authorities permissibly exclude those cases because the statute "in no way limits the considerations that may guide the [Secretary] in exercising her discretion to determine who, among those [possibly] eligible, will be accorded grace." *Id.*[16] Moreover, the Board does not frustrate the DHS policy by

[16] Because the "exercise of authority as a matter of discretion" applies only to

its longstanding adjudication practices. It cannot be said that DHS could not envision the Board's practice of deciding only so many of the issues in a given case that are necessary to dispose of the case. This has always been the Board's practice, it is reflected in innumerable decisions, and DHS is the prosecuting agency in every Board case.

Finally, the Fact Sheet reflects a rational basis for DHS's case-processing rules, noting the need to "focus its resources on cases where the possible exemption is the only issue remaining in the individual's case." SA 49; *see id.* (noting the Secretary has "begun implementation" of the exemption authority, which "currently covers" certain cases, and not others). As this Court observed in *Lara-Ruiz v. I.N.S.*, 241 F.3d 934 (7th Cir. 2001), regarding Congress's decision to exclude from waiver eligibility lawful permanent residents who committed aggravated felonies, while affording such eligibility to non-lawful permanent residents:

> [T]he step taken by Congress was a rational first step toward achieving the legitimate goal of quickly removing aliens who commit certain serious crimes from the country, and as such it should be upheld. ("[A] legislature

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aliens who "satisfy[y] the agency" that they have "been determined to be otherwise eligible for the benefit or protection," SA 47, the question of whether an alien has been "determined to be otherwise eligible" is itself a matter of discretion. *Id.* It is clearly permissible to conclude that an alien, such as F.H.-T., who has neither been granted nor denied asylum on the merits, is not an alien who has been "determined to be otherwise eligible for the benefit or protection."

> traditionally has been allowed to take reform 'one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind,' ... and a legislature need not run the risk of losing an entire remedial scheme simply because it failed, through inadvertence or otherwise, to cover every evil that might conceivably have been attacked." *McDonald v. Board of Election Comm'rs of Chicago*, 394 U.S. 802, 809, 89 S.Ct. 1404, 22 L.Ed.2d 739 (1969) (internal quotations omitted)).

241 F.3d at 947. If such choices, based upon limited resources are rational exercises of Congress's plenary power over immigration, then DHS's discretionary allocation of its scarce resources to decide only cases in which an alien *has* been found otherwise eligible for relief is permissible.[17]

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[17] Should the Court determine that the Fact Sheet or exemption authorities require any action by the Board, it must remand the matter to the Board to decide that issue in the first instance. *See Gonzales v. Thomas*, 547 U.S. 183, 186 (2006) (remand to agency is proper course when additional determination or explanation is necessary); *INS v. Ventura*, 537 U.S. 12, 16 (2002) (per curiam) (same).

CONCLUSION

For the foregoing reasons, the Court should dismiss for lack of jurisdiction, or otherwise deny F.H.-T.'s petition.

Respectfully submitted,

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March 8, 2013

CERTIFICATE OF COMPLIANCE

Under Fed. R. App. P. 32(a)(7)(c) and Ninth Circuit Rule 32-1, the attached answering brief is proportionally spaced using Times New Roman 14-point typeface and contains 13,847 words of text. Respondent has used Microsoft Word 2010 to prepare this brief.

/s/ Daniel I. Smulow
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CERTIFICATE OF SERVICE

I hereby certify that on March 8, 2013, I electronically filed the foregoing with the Clerk of the Court of the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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