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 of the United States,
Respondent.

On Petition for Review of an Order of the
Board of Immigration Appeals

PETITIONER'S OPENING BRIEF AND REQUIRED SHORT APPENDIX

Charles Roth
Lisa Koop
Ashley Huebner
NATIONAL IMMIGRANT JUSTICE CENTER
208 South LaSalle Street
Chicago, IL 60604
(312) 660-1613

Thomas J. Maas
KATTEN MUCHIN ROSENMAN LLP
525 W. Monroe Street
Chicago, IL 60661-3693
(312) 902-5258

Attorneys for Petitioner

ORAL ARGUMENT REQUESTED

CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 12-2471

Short Caption: F. H.-T. v. Eric Holder, Jr.

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

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(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P 26.1 by completing item #3):

F. H.-T.

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Katten Muchin, LLP

The National Immigrant Justice Center

The Law Office of Alex Hernandez (San Antonio, TX)

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

N/A

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

N/A

Attorney's Signature: s/ Charles Roth Date: 11/14/2012

Attorney's Printed Name: Charles Roth

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** X **No** ____

Address: 208 S. LaSalle St., Ste. 1818
Chicago, IL 60625

Phone Number: 312-660-1613 Fax Number: 312-660-1505

E-Mail Address: croth@heartlandalliance.org

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N/A

Attorney's Signature: s/ Lisa Koop Date: 11/14/2012

Attorney's Printed Name: Lisa Koop

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ____ **No** X

Address: 208 S. LaSalle St., Ste. 1818
Chicago, IL 60625

Phone Number: 312-446-5365 Fax Number: 312-660-1505

E-Mail Address: lkoop@heartlandalliance.org

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N/A

Attorney's Signature: s/ Thomas J. Maas Date: 11/14/2012

Attorney's Printed Name: Thomas J. Maas

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ____ **No** X

Address: 525 W. Monroe Street
Chicago, IL 60661-3693

Phone Number: (312) 902-5258 Fax Number: (312) 902-1061

E-Mail Address: thomas.maas@kattenlaw.com

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JURISDICTIONAL STATEMENT[1]

Petitioner F.H.-T. petitions for review of a decision issued by the Board of Immigration Appeals ("Board" or "BIA") on May 22, 2012, which affirmed the immigration judge's ("IJ") October 22, 2009, decision denying his application for asylum and withholding of removal. (SA at 4.) The Board's jurisdiction arose under 8 C.F.R. § 1003.1(b)(3), which grants it appellate jurisdiction over decisions of IJs in removal proceedings.

The Court's jurisdiction to review the Board's order is governed by 8 U.S.C. § 1252. On June 21, 2012, Petitioner timely appealed the Board's May 22, 2012, decision as required by 8 U.S.C. § 1252(b)(1). Venue is proper in this Court because the proceedings before the IJ were completed in Chicago, Illinois, which is within this judicial circuit. *See* 8 U.S.C. § 1252(b)(2); (SA at 5-6 (confirming that the IJ's home office was located in Chicago).)

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the Board committed legal error by finding Petitioner barred from receiving asylum by the material support of terrorism bar at 8 U.S.C. § 1182(a)(3)(B)(iv)(VI) when he reasonably believed that the actions of the group he supported were a part of an independence movement sanctioned by law.

2. Whether the Board committed legal error by refusing to consider whether Petitioner would be eligible for asylum if not for the material support

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[1] Material in the Required Short Appendix bound with this brief is cited as SA __. Other material in the Certified Administrative Record not included in the Required Short Appendix is cited as AR __.

bar, when the Department of Homeland Security ("DHS") has publicly stated that it will only consider an exemption from the bar once an applicant has been found asylum-eligible but for 8 U.S.C. § 1182(a)(3)(B)(iv)(VI), and where the Board's approach essentially nullifies the statute as to the Petitioner.

3. Whether the government's current process for adjudicating exemptions of the material support bar is contrary to the law where, rather than abating the removal process to permit exemption consideration, a removal order must actually be entered before an exemption from the material support bar will be considered; where such a process impedes judicial review and subjects non-citizens to potential detention and removal in the meantime.

4. Whether Petitioner has suffered prejudice from the Board's mishandling of his case, where the Board declined to address the deep flaws in the IJ's decision solely because it applied the material support bar, where Petitioner would be eligible for asylum but-for the bar, and where DHS will refuse to consider an exemption to the bar in Petitioner's case unless he is determined to be otherwise eligible for asylum.

STATEMENT OF THE CASE

Petitioner appeals from the May 22, 2012, decision of the Board affirming the IJ's removal order dated October 22, 2009. (SA at 4); *see also* (*id.* at 5-40). The IJ denied Petitioner's applications for asylum and withholding of removal under 8 U.S.C. §§ 1158 and 1231(b)(3). The IJ granted Petitioner deferral of removal under the Convention Against Torture ("CAT"), which was not appealed

to the Board by DHS and is not on review before this Court. (*Id.* at 1.) The IJ also ordered removal. (SA at 45.)

A single member panel of the Board affirmed the IJ's determination that Petitioner is barred from receiving asylum and withholding of removal for having provided material support to the Eritrean People's Liberation Front ("EPLF"), which the Board and IJ classified as a terrorist organization as defined in 8 U.S.C. § 1182(a)(3)(B)(vi)(III). (SA at 1); *see also* (*id.* at 34, 39). The Board did not examine whether Petitioner knew or reasonably should have known that the EPLF was involved in the *unlawful* use of force, rather than the lawful use of force as part of a legitimate war of independence. The Board held that it "need not address the other arguments on appeal regarding the merits of [Petitioner's] claim of persecution in Eritrea on account of actual or imputed political opinion." (*Id.* at 3.) As a result of the Board's refusal to consider Petitioner's appeal regarding the merits of his asylum claim, Petitioner cannot seek a terrorism bar exemption under current DHS policy, which only allows an individual to be considered for exemption if he has a final order finding him eligible for relief but for the bar. (AR at 46-50.) Based on these legal errors, Petitioner asks this Court to reverse and remand his case to the Board.

STATEMENT OF FACTS

Petitioner is a 46-year-old citizen of Eritrea. (AR at 868.) Beginning before Petitioner's birth, Eritrea was involved in a war of national liberation against a repressive Ethiopian government. (AR at 566, 616.) The war commenced after Ethiopia's illegal annexation of Eritrea in the early 1960s,

and continued until Eritrea achieved independence in 1991. (AR at 403-404, 566.) The Eritreans fought against a ruthless Ethiopian regime that launched brutal attacks on Eritrean civilians and conducted carpet bombing, scorched earth campaigns, well poisonings, and torture. (AR at 403, 566, 616, 762.) Between 1978 and 1980 — before Petitioner joined the EPLF — major Ethiopian offensives killed between 70,000 to 80,000 Eritrean soldiers and civilians. (AR at 662.)

As a boy in 1982, Petitioner ran away from home to join the EPLF. (AR at 305, 753.) Petitioner made this decision without fully understanding what the EPLF was, how they operated, or what his life would be like in the EPLF. (AR at 305-07.) He quickly regretted his impulsive decision and requested permission to return home to his family. (AR at 351-53.) His request was denied and for the next nine years, Petitioner served in the EPLF. (AR at 351-52, 56, 763.) During that time, he was assigned work as a small car and truck driver and a telephone operator in Sudan, along the border of the southern region of Eritrea. (AR at 311-16, 763.) This area was far from the front lines and served as a route through which the EPLF provided humanitarian aid to the Eritrean people. (AR at 312-13, 350, 353-54, 392.) As a driver, Petitioner transported food and clothing, and as a telephone operator, Petitioner primarily transferred calls and relayed requests for truck parts within the garage where he worked. (AR at 312-15.)

During his time with the EPLF, Petitioner was aware that his country was in the midst of a war of liberation, seeking independence from Ethiopia.

(AR at 367-68, 372.) Though he only had access to news filtered and censored by the EPLF, he knew that the EPLF was fighting the Ethiopian government for independence. (AR at 307, 345, 367-69.)

In 1991, Eritrea achieved independence and the EPLF was transformed into the People's Front for Democracy and Justice ("PFDJ"), the political party that has ruled Eritrea since its independence. (AR at 567, 670.) By then, Petitioner was working as a transportation supervisor at a government-owned company. (AR at 753.) Many of the people with whom he worked were government conscripts working under Eritrea's National Service program. (AR at 753.)

The PFDJ maintains a compulsory labor program called the National Service under which all Eritrean citizens are forced to work for the government. Conscription in the National Service is only supposed to last a year and a half. (AR at 766.) In practice, however, the Eritrean government regularly refuses to release National Service workers after their 18-month terms and forces them to remain in the National Service indefinitely. (AR at 248-49, 685, 766.) Most conscripts work under terrible conditions and do not make enough money to support themselves or their families. (*Id.*)

Throughout 2005 and 2006, Petitioner repeatedly expressed concerns about abuses of Eritrea's National Service program. (AR at 249-51, 753-54.) When he received no response to his complaints about the government's abuses of the forced labor program, and the conditions of the conscripts, he elevated his complaints to a high-ranking member of the PFDJ. (AR at 754.)

This individual responded by threatening Petitioner with imprisonment if Petitioner continued voicing his opposition to the National Service program. (AR at 250, 754.)

In June 2006, the Eritrean secret police, known as "Internal Security," arrested two of Petitioner's supervisors at the government company. (AR at 754.) Soon after, on July 15, 2006, Petitioner was also arrested by Internal Security. (AR at 251-52, 754.) Petitioner was imprisoned in a well-known military prison camp used to detain political prisoners. (AR at 256, 754.) Conditions were deplorable, with inmates housed in filthy, crowded shipping containers — the kind transported on ships and used on tractor-trailer trucks — without proper ventilation, sanitation or protection from the heat and cold. (AR at 255, 257, 755.) Petitioner and many other prisoners became ill due to the conditions, and Petitioner lost 30 pounds while in prison. (AR at 755.)

During his imprisonment, the Eritrean secret police repeatedly interrogated Petitioner and accused him and his two supervisors of being part of an anti-government movement. (AR at 261-63, 755-56.) His interrogators claimed that Petitioner was undermining the government and demanded information about an alleged anti-government group to which they believed Petitioner belonged. (AR at 261-62, 755-56.) Petitioner told his interrogators the truth — that he was not part of any such group — but they did not believe him. (AR at 755-56.) During one interrogation, Petitioner was presented with a file detailing his complaints about the National Service program and asked how he dared question the government. (AR at 264, 756.)

After five months of detention in these appalling conditions, Petitioner was released without ever having been officially charged with or convicted of any crime. Upon his release, Petitioner was required to report daily to his office at the government-owned company. (AR at 265-66, 756-57.) He was not permitted to do any work and was not paid for his time. He was required to present himself at the office each morning and remain there all day, apparently to serve as a warning to other workers. (AR at 266, 303, 757.)

After his release, Petitioner was under surveillance at all times and regularly interrogated by the secret police about the anti-government group to which he allegedly belonged. (AR at 266-67, 757.) The secret police accused Petitioner of wanting to destroy the county and they threatened his life. (AR at 757.) When Petitioner believed the government was on the verge of killing him for his political disobedience, he fled Eritrea and made his way to the United States, where he requested asylum upon arrival. (AR at 268, 757.)

SUMMARY OF ARGUMENT

There are four reasons this petition for review should be granted and Petitioner's case should be remanded to the Board for further review.

First, Petitioner is not barred from asylum by virtue of his involvement with an undesignated group such as the EPLF — even if that group technically met the definition of a terrorist group — if Petitioner did not know and should not reasonably have known the EPLF to be a terrorist organization. Because international law sanctions the activity of a nation seeking independence from foreign occupiers, as well as in legitimate self-defense, it was not unreasonable

for Petitioner to believe the EPLF to be lawful. The Board found the Petitioner barred from asylum because it found that he knew of the EPLF's violent acts; but that was uncontested. Violence is inherent in war. Petitioner denied knowledge of *unlawful* acts, such as attacks against civilians. Because the Board treated the terrorism bars as triggered by any use of violence, rather than requiring unlawfulness, the Board erred in rejecting his claim.

Second, and alternatively, Petitioner's case should be remanded because the Board's handling of the case cannot be reconciled with the existence of a process whereby Congress allows DHS to "exempt" applicants from the material support bar. First, the Board should have reviewed the rest of Petitioner's asylum claim even if the material support bar had been triggered. The DHS has adopted public guidelines for its exemption process whereby an applicant will be considered for the exemption only if found eligible for asylum but for the material support bar. As such, the Board's refusal to rule for or against Petitioner on the rest of his claim deprived him of a fair opportunity to seek the relief which Congress provided for such a circumstance. This Court's case law requires "coordination" between the Board and DHS to avoid nullifying statutory protections. Indeed, given that the language of the exemption statute calls for consultation between the governmental agencies, the need for coordination is heightened in this context.

Moreover, the policy of the Board and DHS of entering a removal order first, and only then considering exemption eligibility, is not consistent with the statute's specific language permitting judicial review of exemption decisions in

the context of a removal order. This policy either deprives the non-citizen of his right to judicial review, or counter-textually turns exemption denials into the equivalent of removal orders for purposes of judicial review, creating multiple cases for the same individual.

Finally, Petitioner has suffered prejudice from the Agency's improper handling of his case. The IJ, amazingly, found that Petitioner could not show that the Eritrean government had persecuted him on account of political opinion, although while he was imprisoned for five months in an Eritrean jail, an anti-government opinion was repeatedly imputed to Petitioner, and he was interrogated further about this purported involvement after his release. Further, Petitioner actually held strong views on the issue of Eritrean National Service, which he expressed repeatedly and which were at least one central reason for his persecution. The Board refused to consider these points on appeal, finding it unnecessary because it found the material support bar triggered; but the Board's refusal to rule on the IJ's errors effectively prevent Petitioner from being considered for an exemption, which would make him eligible for asylum.

For these reasons, the Petition for Review should be granted.

ARGUMENT

I. Standard of Review.

This Court reviews all questions of law *de novo*. *Orejuela v. Gonzales*, 423 F.3d 666, 671 (7th Cir. 2005). The Court's jurisdiction over the application of the material support bar, as well as the exemption process, is

limited. 8 U.S.C. § 1158(b)(2)(D); 8 U.S.C. § 1182(d)(3)(B)(i). Notwithstanding these jurisdictional limitations, the Court has jurisdiction to review questions of law and constitutional questions. 8 U.S.C. § 1252(a)(2)(D).

The final agency decision is that of the Board. The decision of the IJ is reviewed only to the extent it was adopted by the Board; "where the BIA does not expressly adopt the IJ's findings but rather issues its own opinion," the Court "review[s] the BIA's decision alone." *Borovsky v. Holder*, 612 F.3d 917, 920 (7th Cir. 2010).

The Court's review of the agency's legal interpretations proceeds under the familiar principles of *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). *INS v. Aguirre-Aguirre*, 526 U.S. 415, 425 (1999). Under *Chevron*, the Court does not defer to an agency interpretation that lacks "the force of law," *Arobelidze v. Holder*, 653 F.3d 513, 519 (7th Cir. 2011), or that is inconsistent "with the language and purposes of the statute," *Gattem v. Gonzales*, 412 F.3d 758, 762-63 (7th Cir. 2005) (internal quotation marks omitted). Only published, precedential Board decisions may be "entitled to *Chevron* deference" because they "carry the force of law." *Arobelidze*, 653 F.3d at 519 (emphasis added). By contrast, non-precedential Board decisions are not afforded *Chevron* deference. *Id.*

II. The Board Erred in Its Analysis of 8 U.S.C. § 1158(b)(2)(A)(v).

An individual is barred from asylum and withholding of removal if he provided material support to a "Tier III"[2] terrorist organization, unless the individual can show that he "did not know, and should not reasonably have known, that the organization was a terrorist organization." *See* 8 U.S.C. §§ 1158(b)(2)(A)(v); 1182(a)(3)(B)(iv)(VI), (vi)(III). The Board erred in assessing Petitioner's argument that he did not know that the EPLF was a terrorist organization because the Board failed to distinguish between knowledge of lawful and unlawful EPLF activities. (SA at 2-3.) As to a Tier III organization, this is a crucial distinction.

A. The Board failed to consider Petitioner's argument that his knowledge that the EPLF was engaged in a war of independence did not equate to knowledge that the EPLF was engaged in terrorist activity.

Petitioner began participating in the EPLF in 1982 when he was about 15 years old and remained connected to the EPLF until Eritrea gained independence in 1991. (AR at 305, 753.) Petitioner believed the EPLF was engaged in a legitimate war against Ethiopia "to liberate, to get free from Ethiopia" and that many "people were following to EPLF." (AR at 341.) There is no dispute that Petitioner was aware of the fighting between Eritrean and

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[2] The immigration statutes distinguish between three "tiers" of terrorist organizations. Tiers I and II are groups designated as terrorist organizations by the Department of Homeland Security, 8 U.S.C. § 1189, and the Department of State, respectively. 8 U.S.C. § 1182(a)(3)(B)(vi). Tier III is broadly defined as "a group of two or more individuals, whether organized or not, which engages in, or has a subgroup which engages in, the activities described in subclauses (I) through (VI)." 8 U.S.C. § 1182(a)(3)(B)(vi)(III). The government maintains no formal list of organizations thought to fall under Tier III.

Ethiopian forces during the war. However, he consistently denied having any knowledge of any unlawful actions committed by the EPLF during the time he was affiliated with the group. *See, e.g.*, (AR at 191.) By focusing broadly on whether Petitioner 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.

Petitioner's understanding of the EPLF as a pseudo-government engaged in a legitimate war against Ethiopia, and his lack of knowledge of any unlawful EPLF actions, is corroborated by a letter from his friend, who also served in the EPLF. (AR at 653 (stating that he had not been aware the EPLF targeted civilians or relief convoys and he did not believe Petitioner had known about these kinds of human rights violations, either).) The testimony of Eritrean country expert Dr. Trisha Hepner corroborated the likelihood of his ignorance on this point. (AR at 386 (explaining that the EPLF acted as a government and many non-combatants were involved in it), 389-90 ("there was a high level of secrecy about . . . military operations" and very few of the individuals affiliated with the EPLF knew its combat strategy).)

The Board concluded that because Petitioner was affiliated with the EPLF for nine years, he must have known about the EPLF's violent actions in the war zone. (SA at 3.) Clearly so. But the relevance of this analysis turns on the Board's erroneous view of when independence movements are terrorist organizations and when their actions are "unlawful." The Board entirely missed the distinction Petitioner drew between his knowledge of the EPLF's

combat operations as part of the legitimate war and his knowledge of illegitimate, unlawful violence against civilians, a distinction that the IJ also had trouble understanding. (SA at 2) (AR at 368.)

Petitioner never denied knowledge of violence or fighting by the EPLF. (AR at 313 ("I was not anywhere near the fighting areas"), 345 ("What I heard on the radio and read in the newspaper is that they had confronted each other and each other [sic] say they kill this and they kill that much"), 348, 367 (explaining he knew that the EPLF and Ethiopian forces fought).) Doing so would be nonsensical since the EPLF — and the majority of the Eritrean population — was involved in a 30-year war for independence from Ethiopia at the time of Petitioner's involvement. (AR at 368-69.)[3]

By contrast, Petitioner 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. It was only when he came to the United States that he learned of such activities by the EPLF. (AR at 340, 343, 345-46, 361, 191.)[4] The Board's

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[3] The Department of Homeland Security also did not appear to question whether Petitioner knew the EPLF was engaged in a war, but instead focused on whether Petitioner knew about specific EPLF actions in the war that target civilians. *See, e.g.*, (AR at 341-346.)

[4] The Board focused on the difference in the knowledge the Petitioner had while working for the EPLF with the knowledge he obtained in the United States as proof that the Petitioner was equivocating about his knowledge generally. (SA at 2.) However, the Petitioner's statement that he "only heard that they were attacking the civilian trucks or killing civilians," which the Board cited as an example of an inconsistency, refers to information he heard after he came to the United States:

> Q. [DHS Attorney Hollander]: Sir, you were with the EPLF for nine years. What were their goals?

rejection of Petitioner's claim rested entirely on the Board's failure to consider the difference between his knowledge of *violent* EPLF activity and his knowledge of *unlawful* EPLF activity.[5]

In this circuit, it is a question of law whether the Board adequately addressed "critical components" of a particular claim. *Champion v. Holder*, 626 F.3d 952, 957 (7th Cir. 2010); *see also Munoz-Pacheco v. Holder*, 673 F.3d 741, 745 (7th Cir. 2012) ("Failure to exercise discretion is not exercising discretion; it is making a legal mistake."). In the face of "the BIA's use of the wrong legal standard, or simply a failure to exercise discretion or to consider factors acknowledged to be material to such an exercise," the Court has found it appropriate to grant petitions for review to remand for further analysis.

(continued...)

> A. [Petitioner]: According to my understanding, is for freedom of Eritrea from the very beginning. At the time, there was nothing that I knew. But later on, you hear others saying that they were violent and they were killing. It's now that I came to find out that people are saying that. But while in my presence, there is nothing that I have witnessed. . . .

(AR at 357); *see* (SA at 2.) Petitioner's response makes clear that while he always understood the EPLF was using force against Ethiopia as part of the war, he only became aware of "unlawful" EPLF uses of force after he came to the United States.

[5] Petitioner acknowledges that there is published Board case law which treats groups seeking independence from Burma as terrorist groups. *See Matter of S-K-*, 23 I&N Dec. 936 (BIA 2006). In *S-K-*, the Board did not address the *mens rea* argument raised here. Further, as discussed *infra* at 30-31, intervening legislation may have undercut *S-K-* as it applies to groups like the EPLF. Moreover, even if the Petitioner's claims would have failed at the Board, the Board ought nonetheless to have confronted his claims directly to permit effective appellate review.

Lam v. Holder, No. 11-2576, 2012 WL 4875151, at *3 (7th Cir. Oct. 16, 2012). That is the correct course here.

B. Congress did not intend to impose strict liability on asylum seekers, rendering them ineligible for asylum on the basis of any support for armed independence movements against dictatorial regimes.

To the extent that the Board was implicitly holding that the material support bar includes all support for independence movements (and that this implicit holding could survive the clear holding requirements of *Champion* and *Lam*), such a holding would be vastly overbroad, and should be rejected.

Through the terrorism-related inadmissibility grounds, as incorporated in the asylum statute, Congress has determined that a non-citizen is ineligible for asylum if he provides material support to a terrorist organization, including a Tier III undesignated terrorist organization. 8 U.S.C. §§ 1182(a)(3)(B)(iv)(VI); 1158(b)(2)(A)(v). To constitute a Tier III terrorist organization, a group must have engaged in, or have a subgroup that engages in, terrorist activity. 8 U.S.C. § 1182 (a)(3)(B)(vi)(III). Terrorist activity, in turn, is defined as "any activity which is *unlawful* under the laws of the place where it is committed (or which, if it had been committed in the United States, would be *unlawful* under the laws of the United States)" and involves the use of force, such as hijacking, sabotage, and violent attacks. 8 U.S.C. §1182(a)(3)(B)(iii) (emphasis added).

The plain language of 8 U.S.C. § 1182(a)(3)(B)(iii), always the starting point of statutory analysis, *see Barma v. Holder*, 640 F.3d 749, 751 (7th Cir. 2011), makes clear that Congress did not intend to make every person who

participated in any violent or armed struggle ineligible for immigration relief in the United States. Rather, Congress intended to only bar individuals from relief and protection in the United States if they supported or were affiliated with groups that had used force *unlawfully* with an intent to endanger safety or cause substantial damage. *See McAllister v. Att'y Gen.*, 444 F.3d 178, 186-87 (3d Cir. 2006) (noting that the *mens rea* element of the definition requires a specific intent and therefore does not include situations in which the individual acted in self-defense).

The language of the statute as a whole also confirms that Congress only intended to bar individuals based on the *unlawful* actions of an undesignated group. *See Negusie v. Holder*, 555 U.S. 511, 544 (2009) ("The language and design of the statute as a whole is instructive in determining the provision's plain meaning.") (internal citation omitted). As to a group designated as a terrorist organization under Tiers I or II, the mere fact of a knowing act of support is sufficient to trigger the bar. 8 U.S.C. § 1182(a)(3)(B)(iv)(VI)(cc). There is no requirement that "terrorist activity" as such be implicated; money and other support is fungible, *Matter of S–K-*, 23 I&N Dec. 936, 944 (BIA 2006), and is sufficient to trigger the bar. This is not so as to Tier III groups. There, the statute requires that the group have engaged in terrorist activity as described in 8 U.S.C. § 1182(a)(2)(B)(iv), and all of the possible prongs of that definition relate back to the terrorist activity itself, which requires that the acts have been unlawful. 8 U.S.C. § 1182(a)(2)(B)(iii). Simply put, an individual is strictly liable for support to a designated Tier I or II terrorist organization; but

as to an undesignated Tier III group like the EPLF, liability turns on the unlawfulness of the group's actions.

Similarly, in the persecutor bar to asylum, the statute enacts a strict liability scheme that does not differentiate between "lawful" and "unlawful" persecution against another person on account of a protected ground. 8 U.S.C. § 1158(b)(2)(A)(i). All persecutive actions, even if lawful under the laws of that place, trigger the bar. "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion and exclusion." *Russello v. U.S.*, 464 U.S. 16, 23 (1983).

Because a group cannot constitute a Tier III terrorist organization unless it has engaged in unlawful uses of force, the question of Petitioner's knowledge is not whether he knew of *any violence* committed by the EPLF, but whether he knew or should reasonably have known about any *unlawful* violence committed by the EPLF. The Board's decision fails to ask this question or examine in any way whether the EPLF's activities — specifically those of which Petitioner had knowledge while he was affiliated with the group — were lawful.

C. It does not violate U.S., foreign, or international law to engage in independence struggles such as that in Eritrea, absent other improper actions.

To the extent that an asylum-seeker's *mens rea* as to the material support bar turns on his perception of legality, a reasonable non-citizen could fairly conclude that support for an independence movement is not *per se*

unlawful under the laws of the United States, or under international law, or under foreign law.

1. International law recognizes independence movements.

International law has long recognized that the use of force during hostilities can be legitimate and lawful. *See, e.g.*, U.N. Charter, arts. 41, 51. (allowing the use of force when authorized by the U.N. Security Council or in self-defense.) During the last century, the United Nations and the international community have also recognized that in many situations, the use of force by armed groups in wars of national independence can also be legitimate. *See* Wojciech Kornacki, *When Minority Groups Become "People" Under International Law*, 25 N.Y. Int'l L. Rev. 59, 91-95 (2012) (describing attempts by the international community to address the use of force in liberation movements). Numerous United Nations General Assembly Resolutions have recognized the legitimacy of struggles for self-determination and independence and that such armed conflicts should be treated as other international armed conflicts under the 1949 Geneva Conventions. *See, e.g.*, G.A. Res. 2547 (XXIV), at 1, U.N. Doc. A/7826 (Dec. 11, 1969) (the General Assembly recognizes "the legitimacy of the struggle by the opponents of apartheid, racial discrimination and Portuguese colonialism in southern Africa to realize their human rights and fundamental freedoms"); G.A. Res. 3103 (XXVIII), at 1-3, U.N. Doc. A/9412 (Dec. 12, 1973) (affirming that the struggle of people under domination and racist regimes is "legitimate and in full accordance with . . . international law" and that armed conflict involving this struggle should be "regarded as

international armed conflicts in the sense of the 1949 Geneva Conventions"); *see also Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations*, G.A. Res. 2625 (XXV), at 124, U.N. Doc. A/8082 (Oct. 24, 1970) ("In their actions against, and resistance to, such forcible action in pursuit of the exercise of their right to self-determination, such peoples are entitled to seek and to receive support.").

The 30-year war for Eritrean independence began after Ethiopia's illegal annexation of Eritrea. It continued in self-defense against Ethiopia's violent and oppressive regime that tortured and murdered Eritrean civilians, outlawed Eritrean languages, and violently suppressed Eritrean demonstrations. (AR at 565-66.) This war had the relevant components of a lawful war of self-determination and self-defense: a struggle by an ethnic and linguistic group for political independence from a "racist regime" that had unlawfully taken control of the group by force. *See* G.A. Res. 3103 (XXVIII), at 1, U.N. Doc. A/9412 (Dec. 12, 1973); (AR at 385).

The statute only requires that Petitioner establish that he did not know and should not reasonably have known the EPLF was engaged in terrorism, which—since the EPLF was not designated as a terrorist organization by the State Department or the DHS—requires knowledge of the unlawfulness of the group's activities. When examining whether Petitioner reasonably believed the EPLF's combat actions were lawful, customary beliefs about the right to self-determination, the particular conditions of the war (including Ethiopia's

illegal annexation of Eritrea in violation of a U.N. resolution), and Eritrea's current status as an independent country are relevant both to Petitioner's *mens rea* and to the choice of law issues that were triggered by the subsequent independence of Eritrea.

2. The law of the place in this context is Eritrean law.

Terrorist activity is defined as any activity which is "unlawful under the laws of the place where it is committed (or which, if it had been committed in the United States, would be unlawful under the laws of the United States)." 8 U.S.C. §1182(a)(3)(B)(iii). In the context of a (successful) independence movement, it is an open question whether a court ought to examine the law of the newly independent nation or the laws of the oppressor nation. The Board has not opined on this issue; but it implicitly relied upon Ethiopian law to the exclusion of Eritrean law.

The United States has recognized the independence of Eritrea. *Habtemicael v. Ashcroft*, 370 F.3d 774, 778 (8th Cir. 2004). It is not alone in this; countries from around the world have recognized Eritrea, and Eritrea has been granted status at the United Nations. S.C. Res. 828, U.N. Doc. S/RES/828 (May 26, 1993); *see also*, G.A. Res. 47/230, U.N. Doc. A/RES/47/230 (July 16, 1993). Petitioner submits that any consideration of the "law of the place" is bound by the executive branch's foreign policy determination to recognize and exchange ambassadors with Eritrea. U.S. CONST. art.2, § 2, cl.2. As it stands, Eritrea is recognized as a country; it would be strange to regard the "law of the place" as Ethiopian law.

Eritrea's constitution appears, naturally enough, to recognize the EPLF's wartime activities as lawful. *See* Eri. Const. pmbl., available at http://unpan1.un.org/intradoc/groups/public/documents/cafrad/unpan004654.pdf (last accessed Oct. 31, 2012) (affirming "Eternal Gratitude [sic] to the scores of thousands of our martyrs who sacrificed their lives for the causes of our rights and independence, during the long and heroic revolutionary struggle for liberation"). To the extent that the Board held that Petitioner did not have a reasonable belief in the legality of his actions under Eritrean law, that holding would lack a basis in law.

Even if Ethiopian law were taken to govern the matter, it is not clear that the EPLF's actions would be considered unlawful *in se*. Ethiopia has adopted the African Charter on Human and People's Rights, which recognizes the right of people to seek independence. Organization of African Unity, African Charter on Human and People's Rights, June 27, 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58. Moreover, Ethiopia's most recent constitution states that "Every Nation, Nationality and People in Ethiopia has an unconditional right to self-determination, including the right to secession." Eth. Const. art. 39, pt. 1 (1995), available at http://www.unhcr.org/refworld/docid/3ae6b5a84.html (last accessed 13 November 2012). An independence struggle, as such, would seem to fit within those guaranteed rights.

A reasonable Eritrean, believing in his nation's rightful independence, could reasonably conclude that his support of his nation's independence movement was not unlawful under the "law of the place."

3. U.S. law does not forbid independence movements.

Terrorist activity includes not only activities defined as unlawful within other countries, but also any activity "which, if it had been committed in the United States, would be unlawful under the laws of the United States or any state." 8 U.S.C. §1182(a)(3)(B)(iii). Viewed in proper context, an independence movement executed by nationals of a country against a non-democratic government would not violate U.S. law, because the Constitution guarantees the contrary.

It is conceded that it violates the law to conspire or aim to overthrow the government of the United States. 18 U.S.C. §§ 2384, 2385. However, to be a proper analog to the activities of the EPLF, one would have to presume two other factors: (a) a foreign oppressor; and (b) a non-democratic government. The domestic law of this country did not bar this country's own independence movement against a non-democratic foreign oppressor. Nor could domestic law bar such an action if it happened again. The Guarantee Clause guarantees a republican form of government and requires the federal government to protect against foreign invasion. U.S. Const., Art. IV, § 4.

Moreover, the meaning of the Guarantee Clause is illuminated by laws contemporary in time to that provision, as well as by traditional common law principles. For instance, the state constitution in New Hampshire granted a right to rebel against oppression. *See* N.H. Const. pt. 1, art. X ("The doctrine of nonresistance against arbitrary power, and oppression, is absurd, slavish, and destructive of the good and happiness of mankind."). The Pennsylvania

Constitution protected the "unalienable and indefeasible" right to abolish the government. Pa. Const. ch. I, § V (1790) (the people "have, at all times, an unalienable and indefeasible right to alter, reform, or abolish their government, in such manner as they may think proper"); *see also* Pa. Const. art. I, § 2 (1968) (same). A right of rebellion against oppression also finds support in Blackstone. William Blackstone, *Commentaries on the Laws of England* (4 vols., Oxford, 1765-1769, Facsimile ed., repr., 1979), I:238; *see also* Christian G. Fritz, *American Sovereigns: The People and America's Constitutional Tradition Before the Civil War* (Cambridge Univ. Press, 2008), 14 (noting that under English constitutional law the right of revolution "belonged to the community as a whole, as one of the parties to the original constitutional contract"); John Phillip Reid, *Constitutional History of the American Revolution* (4 vols., University of Wisconsin Press, 1986-1993), I:111 (identifying the collective right of the people "to preserve their rights by force and even rebellion against constituted authority"), III:427 n,31 (quoting Viscount Bolingbroke that the "collective Body of the People" had the right to "break the Bargain between the King and the Nation"). To the extent that the United States ceased to have a republican form of government, the constitutionality of laws such as § 2384 would be dubious.

Also, post-independence, the United States recognized that anticipatory self-defense involving an intervention into the territory of another country can be deemed lawful in certain circumstances. Martin A. Rogoff & Edward Collins, Jr., *The Carolina Incident and the Development of International Law*, 16 Brook.

J. Int'l L. 493, 497-98 (1990). U.S. foreign policy from the Monroe Doctrine though the Treaty of Versailles has supported self-determination of peoples, *i.e.*, the right to seek and maintain independence from foreign regimes, particularly non-democratic regimes.

This continues to be reflected in the nation's foreign policy. The United States has supported Syrian rebel forces against the oppressive Assad regime and supported Libyan rebels against the Qaddafi regime. *See* Mark Hosenball, *Obama authorizes secret U.S. support for Syrian rebels*, Reuters, Aug. 1, 2012, *available at* http://www.reuters.com/article/2012/08/01/us-usa-syria-obama-order-idUSBRE8701OK20120801 (last accessed Oct. 26, 2012); Paul Richter, *U.S. gives limited support to rebel government in Libya*, L.A. Times, April 28, 2011, *available at* http://articles.latimes.com/2011/apr/28/world/la-fg-libya-rebels-20110428 (last accessed Oct. 26, 2012).

It is true that federal law makes it unlawful for a non-citizen residing in the U.S. to support any military or naval expedition from within the territory of the United States, against a country with which the United States is at peace. 18 U.S.C. § 960. But that would be an inapt analogy to the Petitioner's circumstance. That provision was designed to keep the United States from becoming embroiled in the affairs of other nations, and to stop private "filibuster" adventures funded from this country and aiming to take over foreign lands. It was not aimed at preventing the nationals of foreign countries from declaring and securing independence.

Thus, under domestic U.S. law, while no precise analogues exist, it is unlikely that any action analogous to the independence struggle in Eritrea would be unlawful. An asylum-seeker could reasonably believe that support of his country's independence movement would not be unlawful.

The Board erroneously assumed, without analysis, that the EPLF's activities during the war were unlawful and therefore, any knowledge Petitioner had regarding the EPLF's use of force demonstrated that he knew the EPLF was engaged in terrorist activity. The Board's failure to give any meaning to the word "unlawful" in the terrorist activity definition resulted in a decision that did not consider whether Petitioner could have reasonably believed that the EPLF was involved in the lawful use of force in self-defense or as part of a struggle for self-determination.

D. The Board's analysis of the material support bar does not merit *Chevron* deference.

To the extent the Court finds that the Board's decision below interpreted the material support provision to bar Petitioner notwithstanding his asserted lack of knowledge of unlawful EPLF activities, the Board's analysis in the non-precedential, unpublished opinion by a single panelist lacks "the force of law" on its own. *See* 8 C.F.R. § 1003.1(e)(6); *see also, e.g.*, *Familia Rosario v. Holder*, 655 F.3d 739, 746 (7th Cir. 2011) (declining to defer to the Board's interpretation of aggravated felony definition that the Board had interpreted only "in non-precedential, unpublished opinions"); *Arobelidze*, 653 F.3d at 519-20.

Nor is the Board's opinion below "*merely applying reasoning* that already carries precedential weight." *Id.* at 519 (emphasis added). While the single member opinion did discuss *Matter of S-K-*, 23 I&N Dec. 936 (BIA 2006) and *Matter of D-R-*, 25 I&N Dec. 445 (BIA 2011), the opinion went well beyond "merely applying" a rule established in a published case. *See* (SA at 1-3.) It is true that *Matter of S-K-* considered the circumstance of a person who assisted a rebel group fighting against an oppressive regime, and found that the group constituted a terrorist organization under 8 U.S.C. § 1182 (a)(3)(B)(vi)(III). 23 I&N Dec. at 940-41. However, that case did not involve a claim related to the applicant's *mens rea*, as does this case. The Board has not yet addressed the question of whether an individual might reasonably perceive a group's independence struggle as lawful, where the group was engaged in a decades-long war against an unlawful occupier and subsequently became its own independent state, ruled by the very group whose activities are now in question.

Moreover, subsequent to *Matter of S-K-*, Congress provided by statute that the group found to be a terrorist organization in *S-K-* was itself *not* to be considered a terrorist group. The Consolidated Appropriations Act, 2008, Pub. L. No. 110-161, Div. J, § 691(b), 121 Stat. 1844, 2364-66 (Dec. 26, 2007) lists several specific groups that, "[f]or purposes of . . . 8 U.S.C. § 1182(a)(3)(B) . . . shall not be considered to be a terrorist organization on the basis of any act or event occurring before the date of enactment of this section." The Board has not addressed the effect of Congress's decision not to treat these

"freedom-fighter" groups as terrorist organizations in its overbroad interpretation of the bar. Petitioner believes that this intervening provision—in effect, disapproving the Board's *S-K*-decision—ought to shape the Board's interpretation of 8 U.S.C. § 1182(a)(3)(B).

Unpublished Board decisions do not establish agency rules, and thus do not have "the force of law." *Arobelidze*, 653 F.3d at 519. *Chevron* deference is conferred upon only those unpublished decisions that "*merely* apply" past precedent, *id.* (emphasis added), by reaching a conclusion all but compelled by binding authority. *See, e.g.*, *Lagunas-Salgado v. Holder*, 584 F.3d 707, 711 (7th Cir. 2009) (cited by *Arobelidze*) (deferring to unpublished classification of petitioner's fraud conviction as crime of moral turpitude, when a long line of published BIA decisions "considered fraud a crime of moral turpitude"); *Ali v. Mukasey*, 521 F.3d 737, 739 (7th Cir. 2008) (cited by *Arobelidze*) (same). The Court should therefore decline to provide *Chevron* deference to the Board's decision below.[6]

For all of these reasons, the unpublished decision below ought not be analyzed under the *Chevron* rubric.

Even if the Court were to apply *Chevron* to this scenario, the Board's interpretation ignores the plain text of the statute, by ignoring the word

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[6] Without *Chevron* deference, "the Board's interpretation is [still] entitled to respect—but only to the extent that it has the power to persuade," under *Skidmore* deference. *Arobelidze*, 653 F.3d at 520 (internal quotation marks omitted) (discussing *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944)). As discussed in Section I.B-C, the decision below is not a persuasive understanding of the terrorist activity definition.

"unlawful." It would thus fail as inconsistent with the statutory text. Even if the Court found the text to be ambiguous, the Board's interpretation would fail because, in the context of the asylum statute, it does violence to the overall intent of Congress, and is thus not "reasonable in light of the legislature's revealed design." *NationsBank of N.C., N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 257 (1995).

III. It Was Legally Erroneous to Deny Asylum and Order Removal Solely on Account of the Material Support Bar.

Assuming *arguendo* that Petitioner's activities triggered the material support bar, the denial of asylum and the entry of a removal order was nonetheless legally erroneous because it denied him a fair opportunity to obtain an exemption from that bar. Congress, recognizing the extraordinary breadth of the terrorism bar definition, created an exemption possibility, but the actions of the Board effectively render that possibility null. First, the Board erred in its adjudication by refusing to address asylum issues other than the material support bar, despite the fact (which it acknowledged) that an exemption possibility existed for Petitioner. Second, the Board erred in ordering removal and denying asylum before the DHS adjudicated the exemption matter. Third, the effect of the Board's errors is to prevent effective judicial review over this matter, in derogation of Congressional command.

A. Congress has expressly provided for limited judicial review over decisions relating to the material support bar and to decisions relating to exemption to that bar.

In response to the Supreme Court's decision in *INS v. St. Cyr*, 533 U.S. 289 (2001), which found the Suspension Clause implicated in withdrawal of all judicial review over removal orders, Congress adopted 8 U.S.C. § 1252(a)(2)(D). That provision generally permits the federal courts to review agency action for legal and constitutional error.

The issues presented here are all "questions of law" which are reviewable by the Court under § 1252(a)(2)(D). First, the Court may review the legality and constitutionality of agency policy regarding exemptions, including the refusal to consider exemptions until a final order of removal has been entered by the Board of Immigration Appeals. *Lam v. Holder*, No. 11-2576, 2012 WL 4875151, at *3 (7th Cir. Oct. 16, 2012) (legal error "could be a misinterpretation of a statute, regulation, or constitutional provision, but it could also include a misreading of the BIA's own precedent, the BIA's use of the wrong legal standard, or simply a failure to exercise discretion or to consider factors acknowledged to be material to such an exercise.") (citations omitted). Second, "[t]he procedural sufficiency of an immigration hearing is a legal question." *Boyanivskyy v. Gonzales*, 450 F.3d 286, 291 (7th Cir. 2006). Third, the agency's procedures can present a question of law to the extent that they effectively "thwart the congressional design." *Benslimane v. Gonzales*, 430 F.3d 828, 832 (7th Cir. 2005); *see also, Subhan v. Ashcroft*, 383 F.3d 591 (7th Cir. 2004); *Ceta v. Mukasey*, 535 F.3d 639, 645 (7th Cir. 2008); *Boyanivskyy*, 450 F.3d at 291-92 (finding jurisdiction over a procedure that "operates to nullify some statutory right or leads inescapably to a substantive adverse

decision on the merits of an immigration claim"). Finally, the Court may require agency clarity below in order to permit the Court to exercise its judicial review function. *See SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947) ("If the administrative action is to be tested by the basis upon which it purports to rest, that basis must be set forth with such clarity as to be understandable."); *Munoz-Pacheco*, 673 F.3d at 745 ("Failure to exercise discretion is not exercising discretion; it is making a legal mistake."); *Champion*, 626 F.3d at 957 (finding that "the BIA erred by failing to consider the impact of Yomi's potential deportation" and remanding "for the BIA to address this critical component of the hardship analysis"); *Kadia v. Holder*, 557 F.3d 464, 468 (7th Cir. 2009) ("We cannot affirm the BIA if the basis for its decision is unclear."); *Iglesias v. Mukasey*, 540 F.3d 528, 531 (7th Cir. 2008) ("[A] claim that the BIA has completely ignored the evidence put forth by a petitioner is an allegation of legal error."); *Boyanivskyy*, 450 F.3d at 291 ("[t]he procedural sufficiency of an immigration hearing is a legal question"); *Cuellar Lopez v. Gonzales*, 427 F.3d 492, 498 (7th Cir. 2005) (remanding for Board to clarify its reasoning).

When Congress last amended the exemption process, in apparent response to the Board's decision in *Matter of S-K-*, Congress added language in the exemption statute particularly requiring that exemption decisions be subject to judicial review under § 1252(a)(2)(D). The Consolidated Appropriations Act, 2008, Pub. L. No. 110-161, Div. J, § 691, 121 Stat. 1844, 2364-66 (Dec. 26, 2007), did four things in this regard: (a) it expressly designated the Taliban as a terrorist organization, *id.* at § 691(d); (b) it

expressly precluded eight Burmese groups (including the group at issue in *S-K-*) as well as similar Montagnard and Hmong groups from terrorist treatment, *id.* at § 691(b); (c) it struck and replaced 8 U.S.C. § 1182(d)(3)(B)(i) in its entirety, refining the exemption criteria for groups and individuals, *id.* at § 691(a); and (d) in the new codified statute, it expressly permitted for, and channeled, judicial review. Specifically, Congress limited and channeled federal court jurisdiction as follows: "no court shall have jurisdiction to review such a 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).

The Consolidated Appropriations provisions are significant for three reasons: (a) they clearly confirm Congress's intention that these matters be reviewable; (b) the judicial review language, together with the Congressional disapprobation of the designation of Burmese dissident groups, and its simultaneous designation of the Taliban as a terrorist group, suggests that Congress saw the Agency's interpretations in this area as legally problematic, and wanted to ensure the refinement of the Agency's interpretations through legal processes; and (c) they necessarily implied that Congress understood the exemption process as one which would occur within the context of removal proceedings, presumably prior to the issuance of any removal order.

B. Since a waiver process exists for the material support bar, it was illogical for the Board to dismiss Petitioner's asylum claim without addressing the rest of this claim.

Petitioner maintains that the material support bar at 8 U.S.C. § 1182(a)(3)(B)(iv)(VI) does not apply to him for the reasons articulated above. However, if he were to be found subject to the bar, the Board erred by stopping its analysis of the rest of the merits of his asylum claim once it found the material support bar triggered. As the Board acknowledged, a waiver of the material support bar exists, though the Board cannot itself exercise that authority. (SA at 3.) Moreover, published DHS guidance provides that an exemption will be considered only if all other elements of the asylum claim have been found. (SA at 49-50); *see also* (SA at 46-48).

1. Agency rules would preclude an exemption for Petitioner because of the Board's refusal to rule on the rest of his claim.

Congress empowered the Secretary of State and the Secretary of Homeland Security to, in consultation with each other and the Attorney General, waive the application of the material support bar for individual aliens or for groups of aliens. *See* 8 § U.S.C. 1182(d)(3)(B)(i). DHS has issued guidelines for granting waivers under this grant of authority from Congress. *See* (SA at 46-50). A threshold requirement before granting such a waiver is that an applicant "is seeking a benefit or protection under the Act *and has been determined to be otherwise eligible* for the benefit or protection. . . ." (SA. at 46-47, 49) (emphasis added). DHS has explicitly stated that an asylum case will only be given "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." (SA at 49.)

In this case, the Board stopped its analysis once it found the bar to have been triggered: "As the respondent is barred from receiving asylum and withholding of removal, we need not address the other arguments on appeal regarding the merits of the respondent's claim of persecution in Eritrea on account of actual or imputed political opinion." (SA. at 3.) Given the clear DHS policy on exemptions, the Board's refusal to consider these aspects of the case necessarily deprived Petitioner of any opportunity to seek an exemption from DHS, as the statute permits. Such an approach clearly "operates to nullify some statutory right or leads inescapably to a substantive adverse decision on the merits of an immigration claim." *Boyanivskyy*, 450 F.3d at 291-92.

In order for Petitioner to seek the waiver authorized by Congress, he must have a final determination as to his asylum eligibility, but for the bar. But Petitioner does not have a final determination regarding his asylum eligibility but for the bar because the IJ erroneously found him ineligible for asylum on a different ground, a finding Petitioner appealed but which the Board refused to consider. Petitioner thus does not have a final determination on his asylum eligibility but for the bar. 8 U.S.C. §1101(a)(47); 8 C.F.R. § 1242.1.

Under the Board's decision, Petitioner is left in a Catch-22: unable to seek a waiver because no final finding of asylum eligibility has been made, unable to receive a full adjudication of asylum eligibility on grounds that he is subject to the bar. This is precisely the type of situation the Court has rejected

on multiple occasions. *See Ceta*, 535 F.3d at 645; *Potdar v. Mukasey*, 550 F.3d 594, 594 (7th Cir. 2008); *Benslimane*, 430 F.3d at 832; *Subhan*, 383 F.3d 591. It should rule similarly here.

2. This Court's case law requires a minimum level of coordination between the various agencies implicated here.

The Court has previously granted petitions for review and required coordination between the agencies: "unless [] subagencies engage in some minimal coordination of their respective proceedings-for example, by the immigration courts favorably exercising discretion... to continue proceedings to allow the other subagency to act-the statutory opportunity to seek [relief] will prove to be a mere illusion." *Ceta*, 535 F.3d at 646-47. Particularly in situations as here, where Congress has entrusted certain functions to one department and other functions to another department, refusal to stay or delay one proceeding may have the effect of "thwart[ing] the congressional design." *Benslimane*, 430 F.3d at 832; *see also, Ceta*, 535 F.3d at 645; *Subhan*, 383 F.3d 591.

For instance, in *Potdar v. Keisler*, 505 F.3d 680 (7th Cir. 2007), modified *Potdar*, 550 F.3d 594, a non-citizen wished to pursue a legalization application which by law could only be considered by DHS; the Board refused to continue or abate the removal proceedings on the sole ground that it had no jurisdiction over the legalization claim. The Court found this a "misapprehen[sion]", noting that "the IJ should have considered whether, to allow administrative adjudication to proceed, it would have been appropriate to terminate or

continue exclusion proceedings." 505 F.3d at 684. The Court ultimately granted that Petition for Review. 550 F.3d at 598.

The Board's approach below was precisely that of the Board in *Potdar*, *Subhan*, *Benslimine*, and *Ceta*: lacking jurisdiction over some aspects of the case, the Board decided to order removal immediately, effectively preventing Petitioner from exercising statutory rights. The Board declined to address the full merits of Petitioner's case, though it acknowledged the existence of an exemption process. (SA at 3.) The requirements of that process are of public record and Petitioner had specifically pleaded with the Board in his appeal brief to adjudicate the case fully for that precise reason. (AR at 70-76.) Nor, having decided the case solely on the basis of the bar, did the Board abate the matter to permit Petitioner to seek an exemption from the bar from DHS. Such action might have clarified, if further clarity were needed, that DHS would not consider the exemption without a full adjudication of the asylum merits.

The effect was to "nullify" Petitioner's statutory right to seek an exemption, and to "lead[] inescapably to a substantive adverse decision" in that matter. *Boyanivskyy*, 450 F.3d at 292.

C. The process currently in place makes no provision for "consultation" between DHS and the Immigration Courts, as provided by statute.

In addition to this Court's jurisprudence generally requiring agency cooperation in cases involving overlapping jurisdictions, *see Ceta*, 535 F.3d at 646-47, the statute implicated herein specifically calls for consultation between the DHS and the other relevant departments, including the Attorney General.

8 U.S.C. § 1182(d)(3)(B)(i). The Board and the Immigration Courts act under authority delegated by the Attorney General. The Board's error below in foreclosing such consultation is a separate and adequate reason to reverse the proceedings below.

Of course, Petitioner does not suggest *ex parte* consultations between Board Members or IJs and DHS. Nor is it disputed that Congress had the power to give DHS authority over this process, and acted reasonably in doing so, in light of the classified and confidential matters involved. However, the statute clearly calls for some interaction between the administrative court system and DHS, which DHS may then consider in making a decision. For instance, an IJ or the Board could make a recommendation regarding the exemption to DHS, which would not be binding, but might be considered by DHS in its decision making. But in this case, far from making a recommendation, formal or informal, *cf.*, *e.g.*, *S-K-* at 23 I&N Dec. at 950 (Osuna, concurring) (recommending exemption consideration), the Board's approach affirmatively undermines the exemption process by refusing to make the kind of case adjudication which would permit DHS to decide the matter under its current rules. DHS procedures limit consideration to individuals found otherwise eligible for asylum, (SA at 46-50), but the Board neither found Petitioner otherwise eligible for asylum nor ineligible for asylum for other reasons.

Petitioner did not ask the Board to recommend that an exemption be granted in his case, and he does not press the claim that the Board might have

an obligation to make such recommendations. Rather, he urges the more modest point that the consultation clause in § 1182(d)(3)(B)(i) must at a minimum mean that the Board not adjudicate the case in willful disregard of the exemption possibility. Here, the Board abdicated its consultative role by not only not making a recommendation, but by issuing a decision which hinders DHS from making any exemption decision in the case. This is not a discretionary decision by the Board, but an administrative failure to decide. "Failure to exercise discretion is not exercising discretion; it is making a legal mistake." *Munoz-Pacheco*, 673 F.3d at 745.

D. The entry of a removal order prior to any exemption process frustrates judicial review or requires the federal courts to expand their jurisdiction beyond determinations normally treated as removal orders.

As noted *supra* in section III.A., Congress expressly provided for federal judicial review over exemption determinations, under the limited jurisdictional provisions of 8 U.S.C. § 1252(a)(2)(D). *See* 8 U.S.C. § 1182(d)(3)(B)(i). To the extent that DHS requires that a final removal order be entered before the exemption decision—and the Board obliges—that process either frustrates judicial review or requires the courts to expand their jurisdiction in novel ways. Petitioner submits that the more natural reading of the statute is to require that exemption decisions be made *before* a final removal order, not afterward. The contrary policy, adopted by DHS with the Board's concurrence, is legally flawed.

Federal judicial review pursuant to the Petition for Review process has traditionally been read to include "not only the actual order of deportation, but

all orders closely related to the deportation proceeding … and entered during the proceeding, such as an order denying voluntary departure or an adjustment of status." *Carvajal–Munoz v. INS*, 743 F.2d 562, 566 (7th Cir. 1984), citing *Foti v. INS*, 375 U.S. 217, 220–23 (1963). However, the Court has generally declined to exercise its jurisdiction over ancillary matters; "[a]ncillary determinations made outside the context of a [removal] proceeding …, such as granting a stay of deportation, are not subject to direct review." *Carvajal–Munoz*, 743 F.2d at 566. This follows Supreme Court guidance that only matters "intimately associated and immediately associated" with the removal order or "governed by the regulations applicable to the deportation proceeding itself, and … ordinarily presented to the [immigration judge] who entered the deportation order" are directly reviewable. *Cheng Fan Kwok v. INS*, 392 U.S. 206, 217 (1968). The Court has had recent occasion to reaffirm this rule. *Fonseca–Sanchez v. Gonzales*, 484 F.3d 439 (7th Cir. 2007); *Torres-Tristan v. Holder*, 656 F.3d 653 (7th Cir. 2011).[7]

Here, Congress has plainly required that review of the exemption occur, and that it occur in the context of a Petition for Review from a final removal

[7] Of course, immigration law has become more complex in the years since *Cheng Fan Kwok*. For instance, noncitizens are now commonly removed by DHS, rather than immigration judges, resulting in direct appeal jurisdiction from DHS orders. *See*, *e.g.*, *Gomez-Chavez v. Perryman*, 308 F.3d 796 (7th Cir. 2002) (jurisdiction over orders prior reinstating removal orders); *Bayo v. Napolitano*, 593 F.3d 495, 500–02 (7th Cir. 2010) (en banc) (finding jurisdiction over removal order entered under Visa Waiver Program); *Eke v. Mukasey*, 512 F.3d 372 (7th Cir. 2008) (individual ordered removed by DHS, then afforded a withholding-only hearing before immigration court).

order. The question is whether this rule is consistent with the practice of the Board of entering a removal order first, before DHS considers an exemption.

One analogous provision might be 8 U.S.C. § 1255a(f)(4), which authorizes review via Petition for Review of legalization denials, but only in the context of a Petition for Review from a final removal order. By statute, legalization decisions are made by DHS, and are not reviewable by the Board of Immigration Appeals. 8 U.S.C. § 1255a(f)(3)(A); *Matter of Singh*, 21 I&N Dec. 427 (BIA 1996). Congress automatically stayed removal for individuals presenting prima facie legalization claims. 8 U.S.C. § 1225a(e)(2); *see also* 8 U.S.C. § 1160(d)(2) (same, for applicants under farmworker program). Thus, unlike here, there was no *per se* impossibility of pursuing the two courses simultaneously. *See Lucy Ko Yao v. INS*, 2 F.3d 317, 319 (9th Cir. 1993) (allowing removal proceedings to be initiated and completed despite legalization case). Even so, entry of a removal order before the legalization case is decided would trigger great jurisdictional complexities.

For instance, in *Siddiqui v. Holder*, 670 F.3d 736, 741 (7th Cir. 2011), the applicant's legalization appeal was denied seven years after a removal order. On the one hand, the statute authorized an appeal; on the other hand, the time to appeal the actual removal order had long passed.[8] In *Siddiqui*, the parties ultimately sought joint reopening at the Board, to facilitate a federal court

[8] In Petitioner's view, under *Ceta* and *Subhan*, entry of a removal order was probably erroneous in the face of a pending legalization application, but the Court had not yet decided those cases in 2003, when the removal order was entered against *Siddiqui*.

appeal. The Court noted that "[t]he BIA's reissuance of its deportation decision resolved many of the jurisdictional complexities of this case and brings the removal order and the legalization decisions properly before us." *Id.* It did not purport to decide how it would have ruled had there not been a reissued removal order.

The exemption process presents a similar issue for the federal courts. DHS has explicitly stated it will "consider a case for an exemption only after an order of removal is administratively final." *See* (SA at 49); *see also* (*id.*) ("The implementation currently covers . . . non-detained cases with an administratively final order of removal that was issued on or after Sept. 8, 2008."). Thus, under current DHS procedures, DHS considers whether to grant an exemption only after a final removal order is entered. The removal order triggers a 30-day window for the asylum-applicant to seek federal judicial review. 8 U.S.C. § 1252(b)(1). The exemption appears entirely disengaged from the removal process.

As noted above, the Court generally has appeal authority only over matters intimately intertwined with the removal order, which generally means either matters presented to the Board, or those matters immediately connected with a removal order. Congress has the right to control the Court's jurisdiction, and would likely be able to counter-textually define exemption decisions as somehow themselves constituting a final removal order. But the courts generally attempt to avoid such interpretations; "Congress, like 'Humpty Dumpty,' has the power to give words unorthodox meanings. But … the

Government argues for a result that the English language tells us not to expect, so we must be very wary of the Government's position." *Carachuri-Rosendo v. Holder*, 130 S.Ct. 2577, 2585 (2010) (internal quotations and citations omitted).

It is possible, but unlikely, that Congress intended DHS exemption decisions to become separately reviewable decisions, analogous to removal orders. Policy reasons argue against such an approach. Such an approach would often mean bifurcated appeals to this Court, resulting in additional costs of judicial resources. Worse, individuals would face the specter of removal from the United States before an exemption decision could be made or appealed. Removal in this context is particularly problematic; removal of a legitimate asylum-seeker can be a matter of life and death.

This apparent problem is unnecessary, and is due entirely to the procedures adopted by DHS and the Board of Immigration Appeals. If the Board abstained from issuing a final removal order until after DHS made exemption decisions, those decisions could be reviewed naturally in the course of an appeal from the removal order itself. The Board might, for instance, communicate its decision to the parties, but withhold finality from the order until DHS could make a decision on the exemption possibility. That would facilitate appeal to this court, should appeal become necessary, while limiting the proliferation of multiple claims for the same Petitioner and minimizing the risk of wrongful removal.

The Court's review authority permits it (indeed, requires it) to require the Agency to handle matters in ways that permit effective judicial review. *See*

Cuellar-Lopez, 427 F.3d at 497 (remanding to Board where affirmance without opinion prevented effective judicial review). That authority may properly be exercised here, to order DHS and the Board to coordinate adjudication so that asylum applicants are not ordered removed before an exemption decision has been made, so as to permit effective judicial review over both the removal proceeding and the exemption decision.

IV. Petitioner Suffered Prejudice From the Board's Procedural Error Because He Is Eligible for Asylum But For the Material Support Bar.

The Board's refusal to consider Petitioner's asylum eligibility but for the material support bar is prejudicial because he would prevail in his claim for asylum if it were properly analyzed. Petitioner was falsely imprisoned by the Eritrean government for approximately five months in a shipping container with atrocious sanitation, ventilation and temperature control. (AR at 255, 257, 755.) After his release, Petitioner was interrogated, forced to report for work without pay and threatened with death. The IJ properly found that these abuses by the Eritrean government constitute persecution. (SA at 29.)

The IJ, however, erroneously found that this persecution was not on account of a protected ground for purposes of asylum. This "nexus" issue was the only reason—apart from the material support bar—that the IJ found Petitioner did not establish a case for asylum. (SA at 29, 31, 34.) However, contrary to the IJ's finding, Petitioner is eligible for asylum on two independent grounds: (1) he was persecuted, and reasonably fears future persecution, on account of the political opinions imputed to him by government authorities; and (2) he was persecuted, and reasonably fears future persecution, on

account of his actual political opinions relating to the National Service conscripted labor program.

Neither the IJ nor the Board ever considered Petitioner's argument relating to imputed political opinion. To establish an imputed political opinion theory, an applicant must show that his persecutors attributed a political opinion to him which motivated his persecution. *Mema v. Gonzales*, 474 F.3d 412, 416 (7th Cir. 2007). Untrue accusations by government interrogators can constitute the imputation of political opinions. *Tolosa v. Ashcroft*, 384 F.3d 906, 910 (7th Cir. 2004).

Petitioner was incarcerated by members of the Eritrean secret police and repeatedly accused during interrogations of being part of an anti-government group. (AR at 261-63, 755-56.) His interrogators claimed that Petitioner sought to undermine the government and demanded information about this alleged group. (AR at 261-62, 755-56.) After his release from prison, Petitioner was continuously under surveillance by Internal Security agents and interrogated about the anti-government group to which he allegedly belonged. (AR at 266-67, 757.) During these interrogations, the agents threatened Petitioner's life. (AR at 757.) The threats and accusations of the Internal Security agents demonstrate the Eritrean government attributed to Petitioner an anti-government political opinion. The nature and context of Petitioner's persecution strongly suggest the Eritrean government believed Petitioner to possess anti-government views. *Hamdan v. Mukasey*, 528 F.3d 986, 992-993

(7th Cir. 2008) (remanding where the IJ failed to examine whether a militant group imputed to Petitioner a political affiliation with the government).

The record also compels a finding that at least one central reason for Petitioner's persecution by the Eritrean government was his actual political views regarding the Eritrean government's forced labor program. Petitioner criticized the program to high-ranking government officials. (AR at 754.) Like many other political dissidents who complained about the National Service program, Petitioner was threatened, interrogated, and incarcerated in inhuman conditions for his opinion. (AR at 255, 257, 261-62, 755-56.) Like other political dissidents, Petitioner was sent to a military prison camp. (AR at 256, 754.) His persecution on account of these opinions constitutes persecution on account of his political opinions, a protected ground under the Act. *See Ndonyi v. Mukasey*, 541 F.3d 702, 710-11 (7th Cir. 2008) (finding that the Board had failed to consider evidence in the record that the persecutors were partially motivated by politics, including "strong circumstantial proof of a political animus."); *Osorio v. INS*, 18 F.3d 1017, 1029-30 (2d Cir. 1994) (reversing the Board's decision that persecution was not on account of a political opinion where the Board "ignored the political context of the dispute" and showed "a complete lack of understanding of the political dynamics" in the country).

Petitioner has experienced past persecution on account of his political opinion. As such, he is presumed to possess a well-founded fear of persecution and it is the government's burden to rebut that presumption by showing country conditions have improved to the point that Petitioner is no longer at

risk or by showing he could relocate internally to avoid persecution. 8 C.F.R. § 1208.13(b)(1). The government is unable to meet either of these evidentiary burdens. Conditions in Eritrea remain abysmal for those who hold or are perceived to hold anti-government views. (AR at 570, 670, 675-76, 764-65.) And where, as here, the persecution is inflicted by the government, it is presumed to be countrywide. 8 C.F.R. § 1208.13(b)(3)(ii).

Petitioner presents no negative discretionary factors that would militate against a grant of asylum. On the contrary, he is a man who fell victim to an abusive group at a young age, but nonetheless developed an earnest sense of justice that compelled him to speak out to his own detriment. He is a humble man who has never committed any crime in the United States but, instead, aspires to contribute to American society by seeking education and pursuing the operation of a small business. (AR at 272-74.) He is precisely the type of man this country's asylum laws were written to protect. For this and all the reasons described above, this petition should be granted and Petitioner's case should be remanded to the Board of Immigration Appeals.

CONCLUSION

Because Petitioner did not know and should not reasonably have known that the EPLF was engaged in unlawful behavior, he is not subject to the material support bar. Even if he is found to be subject to the bar, this case should be remanded with instructions for the Board to adjudicate the substance of Petitioner's asylum claim so he may be evaluated for an exception to the bar. Finally, the process by which DHS and the Board coordinate

waivers of the terrorism-related inadmissibility bars should be found unlawful as it currently exists. A finding in favor of Petitioner on any of these points requires that this case be remanded to the Board for further treatment in compliance with the law.

Dated: November 13, 2012

Respectfully submitted,

/s/ Charles Roth

Charles Roth
Lisa Koop
Ashley Huebner
NATIONAL IMMIGRANT JUSTICE CENTER
208 South LaSalle Street
Chicago, IL 60604

THOMAS J. MAAS
Katten Muchin Rosenman LLP
525 W. Monroe Street
Chicago, IL 60661-3693
p / (312) 902-5258
f / (312) 902-1061
thomas.maas@kattenlaw.com

Attorneys for Petitioner

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), the undersigned attorney for Petitioner certifies that the foregoing brief

(i) complies with the type-volume limitation in Fed. R. App. P. 32(a)(7)(B) because it contains 11,944 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii); and

(ii) complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6), as supplemented by Circuit Rule 32(b), because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2007 in 12-point Bookman Old Style.

Dated: November 13, 2012

/s/ Charles Roth
Charles Roth

CIRCUIT RULE 30(d) CERTIFICATE

Pursuant to Circuit Rule 30(d), the undersigned hereby certifies that all materials required by Circuit Rules 30(a) and (b) are included in the Required Short Appendix bound with the brief.

Dated: November 13, 2012 /s/ Charles Roth

Charles Roth

CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of November 2012, 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.

/s/ Charles Roth
Charles Roth