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 REPLY BRIEF

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

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INTRODUCTION

It is clear that Congress created a broad terrorism bar, but the Board's interpretation sweeps wider still. Under the Board's view, anyone involved in supporting an armed independence movement is a terrorist, regardless of whether the country is thereafter recognized internationally, if the law of the former colonizer would have made those actions unlawful. This would label as terrorist much of the world's population; there is no evidence to support a bar of such breadth.

Congress, recognizing the breadth of the terrorist bar but without consensus on limiting it, created a sweeping waiver for the bar. Then, going further, Congress specified that appellate review over waiver determinations was permitted. But the Department of Homeland Security (DHS) – the agency that grants waivers – won't act on them until after asylum is denied and a removal order is entered; and the Board won't wait for DHS to act before issuing a removal order. The result is that while Congress permits legal review over waiver determinations in an appeal from a removal order, those determinations are not made in a way as to allow that review.

The government seeks to enforce an absurdly stringent theory of waiver of issues for appeal, suggesting that Petitioner failed to exhaust administrative remedies by failing to use specific words or to cite particular authorities in the Board briefing. This Court's case law requires that issues be presented to the Board, and Petitioner's arguments have been consistent throughout. Likewise, the Government's slanted view of the facts is unresponsive to Petitioner's legal

arguments; and to the extent the Government argues for some factual concession, its argument now was not the basis for the Board decision, and cannot be entertained.

The Government argues that even if the scheme employed by the agencies below frustrates the statutory scheme, the issue is not within this Court's jurisdiction. However, agency frustration of Congressional intent has been held a question of law cognizable under the current immigration statutes. To the extent that the Agency procedure nullifies the statute and frustrates Congressional intent, that kind of executive "aggrandizement" at the expense of Congress is reviewable by courts.

The harm from the agency procedures is evident on these facts. One flawed aspect of the Immigration Judge ("IJ") decision – one neither adopted by the Board nor defended now by the Government – held that the awful persecution which Petitioner experienced was not "on account of" one of the protected grounds for asylum. Because that portion of the IJ's decision was never addressed by the Board, he was not found eligible for asylum but for the terrorist bars; so DHS will not consider whether to grant him a waiver. He has been granted protection under the Convention Against Torture, but will remain in a state of legal limbo indefinitely, rather than being permitted to move forward toward permanent status, as would be the case as an asylee.

The Court should grant the Petition for Review and remand the matter to permit adjudication under proper legal standards.

ARGUMENT

I. The Agency Erred Legally By Conflating Knowledge of Violence With Knowledge of Unlawful Violence.

The proposition that anyone who supported an armed independence movement is barred from asylum and withholding protections because of the terrorism bar is so out of step with national principles that one would expect clearly expressed Congressional intent for the statute to be construed so sweepingly. (*See* Br. for *Amicus Curiae* HIAS.) Yet the position adopted by the Board has no such support. The Government offers little defense for the Board's reasoning, arguing instead that the Court ought not address the question because it was not exhausted. However, throughout his presentation of his case, Petitioner consistently argued he is not subject to the terrorism bar by emphasizing the distinction between his knowledge of the EPLF's legitimate wartime activities and his lack of knowledge of any EPLF actions that would fall outside of a legitimate war of independence. This is sufficient to preserve his argument that he meets the knowledge exception to the terrorism bar.

A. The Government offers no meaningful defense of the Board's error in conflating knowledge that the EPLF was engaged in a war of independence with knowledge that the EPLF was engaged in terrorist activity.

The Government offers no substantive defense of the view that knowledge of the EPLF's war of independence against Ethiopia was *per se* sufficient to prove he knew the EPLF was a terrorist organization.

The extent of the Government's response on the merits is to claim – wrongly – that "[t]he only two federal courts of appeals to address this

argument, however, have rejected it." (Gov't Br. 26.) But no case has ever involved application of the terrorist bar to an independence movement which actually succeeded in obtaining independence. *Cf. Khan v. Holder*, 584 F.3d 773, 781 (9th Cir. 2009) (movement for independence of Kashmir); *McAllister v. Attorney General*, 444 F.3d 178, 187-88 (3rd Cir. 2006) (Irish Republican Army);[1] *Matter of S-K-*, 23 I. & N. Dec. 936, 941 (BIA 2006) (Burmese separatist group). As such, those cases are unresponsive to Petitioner's argument that Eritrean law was the relevant law for purposes of the acts' unlawfulness. (Petr's Br. 20-21.) Likewise, those cases did not involve a movement which obtained international recognition, including recognition by this country. To the contrary, diplomatic recognition was considered a relevant factor by the Board, *S-K-*, 23 I&N Dec. at 940 (finding U.S. government's "diplomatic relationship" with Burma relevant to the legitimacy of that regime), and the Ninth Circuit recognized that legalization of conduct could affect it inclusion in the terrorist definition. *See Khan,* 584 F.3d at 781; *Annachamy v. Holder*, 686 F.3d 729, 734 & n.4 (9th Cir. 2012).

Dicta in those cases briefly address the knowledge element but is unpersuasive. In *S-K-*, the Board's analysis consisted of one sentence. *See* 23 I&N Dec. at 941-42 ("Moreover, the record shows that the respondent knew or should have known of the CNF's use of arms"). It is unclear whether *S-K-* argued that she lacked knowledge requisite to triggering the bar. As the

[1] *McAllister* is distinguishable in any event. McAllister did not dispute knowledge of unlawful activity; indeed, he had been convicted of conspiracy to kill a member of the Royal Ulster Constabulary, 444 F.3d at 187-88.

definition requires reasonable knowledge of the illegality of violent action, the Board's analysis skips a step. Likewise, the Ninth Circuit's analysis of the knowledge element in *Khan* was brief, finding that Khan had known of military actions against the Indian government, as well as actions terroristic under any definition. 584 F.3d at 785. Neither of those cases addressed Petitioner's arguments.

Neither did the Government's brief. Indeed, it is unclear whether the Government wishes to defend the Board's position. Below, Petitioner distinguished between terrorist organizations and anti-colonial independence movements. (AR at 402.) The Government's attorney below contended that the EPLF's fight for independence from Ethiopia did not make the EPLF a tier three terrorist organization; she argued that the EPLF was a terrorist organization only during those years when unlawful acts against civilians were documented. (AR at 358, 424, 543.) This lends support to Petitioner's assertion that knowledge that a group is engaging in a war for independence is not, *per se*, knowledge of terrorism. If Petitioner did not know of any EPLF activities that fell outside the scope of that lawful struggle, he is not subject to the bars.

The single perfunctory sentence in the Government's brief citing tangentially relevant case law, Govt. Br. at 26, is insufficient to defend the Board's conclusion that knowledge of armed struggle necessarily amounted to knowledge of terrorist acts. *United States v. Berkowitz*, 927 F.2d 1376, 1384 (7th Cir.1991). The failure to respond to Petitioner's argument can support a grant of the petition. *Site v. Holder*, 656 F.3d 589, 593 (7th Cir. 2011).

B. Petitioner exhausted his point about the conflation of violence with unlawful violence by making repeated arguments about his knowledge of improper acts by the EPLF

The Government's assertion that Petitioner's goal on appeal was to persuade the Board "he was altogether ignorant" of EPLF activities is an inaccurate description of Petitioner's claims. (Gov't Br. 28.) Petitioner has never disputed that he knew the EPLF was engaged in a war against Ethiopia during the time he was involved with that group. He testified that he ran away from home as a child to join the EPLF because it was fighting for independence against an oppressive regime. (AR at 753.) However, Petitioner has consistently disputed that he had any awareness of EPLF activities that fell outside of normal combat operations. (AR at 340 – 350, 353, 356, 358, 361, 367, 368, 372, 474.) The statute does not require Petitioner to prove that the EPLF's acts were lawful. 8 U.S.C. § 1182(a)(3)(B)(iv)(VI)(dd). Rather, he needed to establish that he did not know and should not reasonably have known the EPLF was involved in terrorism, i.e., unlawfully violent activities.

Before the Board, Petitioner structured his argument appropriately, raising these arguments in multiple contexts. Petitioner's focus before the Board was on whether he knew of any EPLF activities that fell outside of the scope of lawful acts of war. (AR at 77-78, 114.) It is true that this was argued primarily in the context of the credibility finding; which was natural, since the conflation of violence and unlawful violence played a significant role in that finding. (*See*, e.g., AR 114 (Notice of Appeal) (noting that the credibility determination was premised on "the activities relied upon by the government to

characterize the EPLF as a Tier III terrorist organization and to support the application of the material support bar against [Petitioner].") But Petitioner's appeal also explicitly argued that "[t]he Immigration Judge also erroneously concluded that [Petitioner] knew or should reasonably have known that the EPLF was a terrorist organization. INA § 212(a)(3)(B)(i); *see also Daneshvar v. Ashcroft*, 355 F.3d 615,627-28 (6th Cir. 2003) [discussing appropriate *mens rea* for minor who joined terrorist organization]." (AR 113-14.)

These arguments were sufficient to place the Board on notice of this issue: "although [Petitioner's] submission to the BIA was not as detailed or as thorough as his brief filed with this court, it sufficiently put the BIA on notice" of the argument. *Hamdan v. Mukasey*, 528 F.3d 986, 991 (7th Cir. 2008); *see also*, *Ayele v. Holder*, 564 F.3d 862, 871 n.10 (7th Cir. 2009) (where additional authority offered in support of "a position ... maintained since the initial filing of her asylum application, ... the argument is not waived or unexhausted"); *Kaganovich v. Gonzales*, 470 F.3d 894, 897 (9th Cir. 2006) ("Petitioner's notice of appeal to the BIA ... was sufficient to put the BIA on notice"; *Yan Lan Wu v. Ashcroft*, 393 F.3d 418, 422 (3d Cir. 2005) (finding exhaustion "so long as an immigration petitioner makes some effort ... to place the Board on notice").

The Government faults Petitioner for phrasing his argument in terms other than "unlawful" or "lawful" acts. (Gov't Br. 28.) But Petitioner's extensive and repeated argument that he had no knowledge of "terrorist acts" is sufficient to exhaust the matter. (Cf. AR at 45-47 (Appeal Brief); AR at 113-14 (Notice of Appeal); AR at 474-76 (Post-Hearing Brief).) For instance, Petitioner's

post-hearing brief discussed "several specific human rights violations allegedly committed by the EPLF, including the targeting of civilians and of relief convoys (the "Alleged Terrorist Acts" or the "Acts")," noting that he had denied any knowledge of those actions. (AR at 475.) His point was the same throughout: that he had no knowledge of "the targeting of civilians and of relief convoys" which were what the Government treated as "Alleged Terrorist Acts." (*Id.*; *see also*, AR 113-14; AR 46.) It is not necessary to "cite each source of authority" in order to preserve an argument. *Banks v. Gonzales*, 453 F.3d 449, 453 (7th Cir. 2006).

C. The Appellate Suggestion that Petitioner Admitted Knowledge of Unlawful EPLF Acts Stretches the Law and Facts.

The Government attempts to sidestep Petitioner's argument that the Board erred in conflating knowledge of lawful and unlawful EPLF activities. It asserts that the Board made a factual determination that Petitioner knew of EPLF violence against civilians and this determination is dispositive, *see* Gov't Br. 29-30, and that Petitioner admitted knowledge that the EPLF had killed an Ethiopian collaborator and killed deserters. The first is patently inaccurate, the second misstates the law.

The Board's decision did not expressly find that Petitioner knew of violence against civilians. The Board found that Petitioner had not met his burden to establish that he did not know, and should not reasonably have known, that the EPLF was engaged in *terrorist activities*. (SA at 2-3.) However, the Board's analysis of the knowledge exception referred to "acts of violence"

generally, SA 2, without distinction between lawful and unlawful violence. Similarly, the IJ mixed together armed violence generally and violence which was targeted at civilians. (SA at 38 ("the EPLF engaged in terrorist activities based upon the sabotage of vehicles, use of assassinations, and the employment of explosives firearms and other dangerous weapons to endanger the safety of others and to cause damage to property.").) Given Petitioner's attack on the IJ's faulty suppositions, it cannot be said that the Board necessarily found that Petitioner knew of violence against civilians and the like. The Government's assertion that the Board's determination is dispositive is therefore misplaced. Where the Court cannot determine the basis of the Board's decision, remand is appropriate. *Cuellar Lopez v. Gonzales*, 427 F.3d 492, 493 (7th Cir.2005) (remanding where the court could not determine "on what grounds [the BIA] affirmed the IJ's decision").

The Government points to Petitioner's acknowledgment that the EPLF had killed a collaborator and Petitioner's fears that he would be killed if he deserted the EPLF as proof that he knew of the EPLF's unlawful activities. (*See* Gov't Br. 13, 31-33.) To the extent that the Government now argues that these were themselves acts of unlawful violence, the point was not the basis of the Board's decision. The *Chenery* Doctrine forbids the government from defending agency decisions on that basis. *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947); *Gebreeyesus v. Gonzales*, 482 F.3d 952, 955-56 (7th Cir. 2007).

Moreover, the argument does not follow. It is not unreasonable to believe that acts of violence against spies and deserters were lawful. The law of war

"draws a distinction between the armed forces and the peaceful populations of belligerent nations." *See Ex Parte Quirin*, 317 U.S. 1, 30-31 (1942). A spy for an opposing army is a combatant, albeit an unlawful one. *Quirin*, 317 U.S. at 37 (combatants " associate themselves with the military arm of the enemy government"). Spying against the United States in a time of war is punishable by death. 10 U.S.C. § 906.

Likewise, desertion in time of war, is punishable by death in this country. 10 U.S.C.A. § 885(c). Nor is this unique; "it is well established that governments may draft citizens for military service and punish those who avoid the draft." *Ghebremedhin v. Ashcroft*, 385 F.3d 1116, 1120 (7th Cir. 2004). It is hardly tenable to claim that the EPLF committed *per se* "unlawful" violent acts by meting out punishment on spies and deserters which is considered appropriate under U.S. law. Thus, to the extent that Petitioner knew of such actions by the EPLF, it does not follow that he knew or should have known of terrorist acts.

Nor is seizure of humanitarian supplies inherently unlawful. Petitioner, of course, denied any knowledge of attacks on aid vehicles. (AR 342-43, 346-46, 361, 372.) But even assuming a contrary finding, the Government does not spell out why this was necessarily unlawful. The evidence showed that the Ethiopian government was employing food as a weapon in the independence struggle. (AR 399-400.) The Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 6 U.S.T. 3516, T.I.A.S. No. 3365, Art. 23 (1956), bars belligerents from interfering with "essential foodstuffs" for civilians,

but that obligation "is subject to the condition that … there are no serious reasons for fearing" that a "definite advantage may accrue to the military efforts or economy of the enemy." *See also id.* at Art. 55. This is not to say that the EPLF's acts were lawful; but the Government's argument that a low-level individual, entirely removed from the action, would necessarily have realized illegality in such acts simply does not follow.

D. The Board's legal error would require remand; to the extent the Court reviews for substantive evidence, the illogical analysis below cannot stand.

The Government asserts that no record evidence compels a reversal of the IJ and Board's determination that Petitioner failed to establish he did not know and should reasonably have known that the EPLF was a terrorist organization. (Gov't Br. 31-35.) The Court's asylum jurisdiction is limited by 8 U.S.C. § 1158(b)(2)(D), meaning that it reviews only whether the Agency committed legal or constitutional error. 8 U.S.C. § 1252(a)(2)(D). Petitioner asserts that the Board erred legally in its terrorism bar analysis by conflating critical issues of his claim. If the Court finds the Board erred, then the question of whether evidence compels reversal is beside the point. The Government does not (and could not) argue that any error was harmless. The Court should remand Petitioner's case to allow the Board to address Petitioner's claim in the first instance, free from legal error. *See Champion v. Holder*, 626 F.3d 952, 957 (7th Cir. 2010); *Mema v. Gonzales*, 474 F.3d 412 (7th Cir. 2007).

The Government submits, however, that the jurisdiction-stripping provisions would not apply to the bar's application to the withholding request. (Govt. Br. 30.) Thus, the Government devotes five pages to arguing that substantive evidence supported the application of the bar. Petitioner's opening brief challenged the denial of asylum, not withholding; but the Government's affirmative choice to reach out and brief this issue despite Petitioner's waiver has waived the waiver, as the Government may choose to do. *Abdelqadar v. Gonzales*, 413 F.3d 668, 670-71 (7th Cir. 2005).

Analyzed under the substantive evidence test, the agency's conflation of lawful and unlawful violence undercuts its evidentiary analysis. At every stage, agency adjudicators missed Petitioner's distinction between his knowledge of violence inherent in war and his knowledge of "unlawful" violence. The IJ, for instance, claimed that "[t]he respondent said he was unaware of the EPLFs violent activities between 1982 and 1991"; which he found inconsistent with the fact that "The respondent admitted that he attended monthly EPLF … meetings where he was informed of their current actions the fighting and the number of soldiers killed." (SA at 20-21.) But the apparent inconsistency exists only because the IJ refused to take Petitioner's comments in context, as answering questions about *unlawful* violence.

Petitioner was not evasive in his testimony about his knowledge of EPLF acts. (*See* Petr's Br. 13-14.) Petitioner's responses to questions about attacks on civilian trucks and aid vehicles were an attempt to respond to a disjointed, confusing, and hostile line of questioning by the government attorney and

through broken and fragmented interpretation. (AR. at 339 – 358.) The government attorney prevented Petitioner from clarifying his answer, stating, "move to the next question, Your Honor. He's dodging the answer." (AR at 343.)

Petitioner clearly explained the basis for his limited knowledge of EPLF activities, "As I told you before, I was in the border of Eritrea and the Sudan and everything that has been done inside Eritrea was reported by radio or newspapers and nothing else would we know." (AR at 347.) On redirect, Petitioner testified that he was unaware of any unlawful acts by the EPLF. (AR at 361.) The Government offers no support for its assertion that Petitioner's knowledge of EPLF violence against enemy collaborators and deserters meant he had knowledge of acts that would reasonably be perceived unlawful acts outside the scope of a legitimate war of independence.

To the extent that the agency's evidentiary holding against Petitioner was premised on such conflation, it was premised on "a gaping hole in the reasoning of the board," not substantive evidence. *Kourski v. Ashcroft*, 355 F.3d 1038, 1039 (7th Cir. 2004). Under the substantive evidence test, "an applicant is entitled reasoned analysis, not one which wholly ignores or disregards relevant, probative evidence." *Gjerazi v. Gonzales*, 435 F.3d 800, 813 (7th Cir. 2006). The Court should alternately grant the Petition on that basis.[2]

[2] If the Court finds no reasoned basis for the Agency's withholding analysis, it could abstain from adjudicating the asylum aspects of the case, allowing the Board to consider both issues on remand.

II. Where agency procedures trump statutory eligibility, an error of law exists.

Assuming arguendo that the Court does not disturb the Board's finding that the terrorist bars were triggered, the Court should nonetheless grant the Petition, because the Agency procedures for considering a waiver from the extraordinarily broad terrorism bars have the effect of nullifying the statute.

As it now stands, one agency – DHS – considers whether to grant waivers from the terrorism grounds. However, DHS will not consider whether to grant a waiver (a) until the individual has received a final order denying him asylum (and thus ordering removal) by the Immigration Courts or Board, and (b) will not undertake a waiver determination unless the applicant was found eligible for asylum by the Immigration Courts or Board, except for the terrorist bar. Meanwhile, the Board must proceed with the case and cannot hold it in abeyance while waiting for waiver adjudication. 8 C.F.R. § 1003.1(e)(8).

Petitioner argues that this procedure is flawed in two respects. First, it necessarily postpones waiver adjudications until after a removal order is entered, effectively precluding judicial review over waiver determinations, despite the mandate for judicial review through a Petition for Review of a removal order. 8 U.S.C. § 1182(d)(3)(B)(i). Second, in this case, the Board's refusal to adjudicate the nexus issue foreclosed Petitioner from accessing even the abbreviated processes available under current agency protocol.

A. The Court's jurisdiction under § 1252(a)(2)(D) is established; no meaningful distinction exists between this matter and other cases where the Court overturned agency nullification of discretionary relief eligibility.

The Government argues that even if its procedures preclude individuals eligible under the statute from accessing this remedy, this does not raise a reviewable question of law. But it offers no meaningful distinction between this discretionary remedy and other situations where the Board has nullified the statutory design by allowing agency procedures to trump statutory eligibility. The Court has already resolved this issue, and the Government cannot distinguish away the Court's case law. *Potdar v. Mukasey*, 550 F.3d 594, 596-7 (7th Cir. 2008); *Ceta v. Mukasey*, 535 F.3d 639, 645 (7th Cir. 2008); *Boyanivskyy v. Gonzales*, 450 F.3d 286, 291-92 (7th Cir. 2006); *Benslimane v. Gonzales*, 430 F.3d 828, 832 (7th Cir. 2005); *Subhan v. Ashcroft*, 383 F.3d 591 (7th Cir. 2004).

The Government attempts to distinguish the Court's case law by arguing that those cases involved a "right." For instance, it claims that *Subhan* and *Ceta* involved the "right" to apply for adjustment of status. (Gov't Br. 39.) The statute includes no such language. Cf. 8 U.S.C. § 1255. To the contrary, the Adjustment of Status statute is plainly discretionary in nature, permitting that status "may be adjusted by the Attorney General, in his discretion and under such regulations as he may prescribe." 8 U.S.C. § 1255(a). The Court's decisions in *Subhan*, *Benslimane*, and *Ceta* did not turn on "rights" language. They turned on the legal proposition that the agency "cannot be permitted, by arbitrarily denying a [procedural] motion … to thwart the congressional design." *Benslimane*, 430 F.3d at 832. That a given form of relief is discretionary is beside the point.

To the extent that statutory "rights" language were necessary, Congress has required that an individual facing removal should be given a "reasonable opportunity" to be heard on the matter, including on issues relating to discretionary relief. 8 U.S.C. § 1229a(b)(4)(B). Even where there is no liberty interest, the statutory and regulatory protections guarantee fairness in the removal process. *Kadia v. Gonzales*, 501 F.3d 817, 824 (7th Cir. 2007) ("There is no need to invoke the Constitution when the immigration statute itself guarantees a fair hearing."); *Lagunas-Salgado v. Holder*, 584 F.3d 707, 713 (7th Cir. 2009). The Court has applied the fair hearing requirement in the context of agency procedures which deprived a non-citizen of a fair hearing. *Boyanivskyy*, 450 F.3d at 291-93. Clearly, Congress is free to go beyond constitutional requirements to provide additional procedural rights, as it sees fit; and it has done so here.

At any rate, the jurisdictional arguments advanced here are inconsistent with the Court's previous holdings. The Court found a cognizable legal error where agency process is permitted to trump the will of Congress: "[w]e are not required to permit Benslimane to be ground to bits in the bureaucratic mill against the will of Congress." *Benslimane*, 430 F.3d at 833. To the extent that the Court concludes that the agency process " thwart[s] the congressional design," *Benslimane*, 430 F.3d at 832, a legal issue is presented, one which the Court has repeatedly found to fall within the scope of legal review under 8 U.S.C. § 1252(a)(2)(D). "The procedural sufficiency of an immigration hearing is a legal question." *Boyanivskyy*, 450 F.3d at 291.

The Government argues that 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." (Gov't Br. 42.) But it is a standard rule of statutory construction that statutes must be interpreted in the context of the entire statute. *Vulcan Const. Materials, L.P. v. Fed. Mine Safety & Health Review Com'n*, 700 F.3d 297, 309 (7th Cir. 2012) (citing *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997)). The Government offers no alternate view for how any judicial review would occur over denials of waivers, if those decisions are not rendered before the final order of removal is entered. It is a cardinal principle of statutory construction that statutory provisions ought to be interpreted so that "no clause, sentence, or word shall be superfluous, void, or insignificant." *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001).

As initially drafted, § 1182(d)(3)(B)(i) contained no language permitting judicial review, and judicial review was then barred. 8 U.S.C. § 1252(a)(2)(B). But bipartisan concerns about agency handling of waivers, including the lethargic pace, arose. *See generally*, "The 'Material Support' Bar: Denying Refuge to the Persecuted," S. Hrg. 110–753, 1-6, 10 (Sept. 19, 2007) (only nine waivers cases had been approved). Senator Leahy, primary sponsor of the provision at issue herein, called the bars "a reactionary, blunt-instrument approach to a complex issue." *Id.* at 5. DHS acknowledged that "the material support bar has the potential to sweep too broadly and to prevent us from providing immigration benefits to those who are deserving of them." *Id.* at 7

(Statement of Paul Rosenzweig). Congress eventually acted, enacting judicial review provisions, reversing *S-K-* by exempting Burmese groups from the bar, and mandating periodic reporting on terrorist bar waivers. Pub. L. No. 110-161, Div. J, Title VI, § 691(e) (Dec. 26, 2007). That legislation was a partial response to concern that " the Department of Homeland Security has applied [the bars] in a manner that sweeps in conduct that no reasonable person would consider material support or terrorism." S. Hrg. 110–753, at 2.

The statute requires that judicial review occur in the context of a final removal order. Yet in the Government's view, a removal order must be entered before any waiver consideration can occur; and the Government does not suggest how judicial review would occur after that point. The Court interprets jurisdiction-stripping provisions against a backdrop presumption in favor of reviewability of agency action. *Kucana v. Holder*, 558 U.S. 233, 130 S.Ct. 827, 839 (2010); *INS v. St. Cyr*, 533 U.S. 289, 298 (2001); *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 434 (1995). Here, this presumption is seconded by express Congressional statutory intervention. The claim that the Executive may avoid such review entirely by channeling any review into review of a removal order, while not deciding waiver applications before the removal order is issued, simply cannot withstand scrutiny.

B. Petitioner's explicit invocation of the waiver process in his appeal brief was sufficient to put the Board on notice of his arguments.

Petitioner's briefing to the Board was explicit in asking the Board to consider and address his nexus arguments, on the ground that its

consideration would impact his opportunity to seek a waiver from the terrorist bars, assuming they were triggered.

The Government concedes that Petitioner raised these arguments in his opening brief to the Board, and again in a reply brief. (Gov't Br. at 44 – 45; AR 73, 24.) However, the Government argues that Petitioner was required to cite to additional authorities in making his argument to the Board; to argue not only that the Board ought to adjudicate the asylum claim in its entirety because the waiver process kept it a live issue, but to submit DHS processing information to the Board.

Petitioner cited the relevant statutory provisions, and fully explained that while DHS, not the Board, would adjudicate waivers, that a full asylum adjudication was necessary for that process. That was the essence of his claim:

> [T]he Board's review of [Petitioner's] eligibility for asylum is not moot even if the Board upholds the IJ's conclusion that the material support bar applies .... If the Board or an IJ on remand finds that there was a nexus between [Petitioner's] past persecution and a protected ground under the INA, [Petitioner] may be eligible for a discretionary waiver of the material support bar. [Petitioner] is not asserting or imply that this remedy could be obtained from the IJ or Board directly, but merely notes that he has other administrative remedies that require the Board to consider all his arguments on appeal even if the Board upholds the material support bar."

(AR at 24.) Contrary to the Government's suggestion, this argument was clear and explicit. It expressly explained and reiterated the reason why the Board decision on asylum eligibility but for the bar was needed, i.e., the DHS waiver process. It noted that the "other administrative remedies… require the Board

to consider all his arguments." *Id.*[3] This was more than sufficient to "put the BIA on notice," *Hamdan*, 528 F.3d at 991, of his claims. It is not necessary to "cite each source of authority" in order to preserve an argument. *Banks*, 453 F.3d at 453. And the Board was certainly aware of the waiver possibility; it expressly noted DHS waiver authority in its decision. (SA at 6.); *Ayele v. Holder*, 564 F.3d 862, 871 n.10 (7th Cir. 2009) (where additional authority offered in support of "a position ... maintained since the initial filing of her asylum application, [that] means the argument is not waived or unexhausted")

Moreover, while the Government now faults Petitioner for not citing additional authorities, implying that the request was somehow unclear, the Board itself did not deny due to any lack of clarity in Petitioner's request. For the Government to now claim that the Board denied Petitioner's request for lack of cited authority violates the *Chenery* Doctrine. *See Gebreeyesus*, 482 F.3d at 955-56; *Smykiene v. Holder*, __ F.3d __, 2013 WL 514556, *5 (7th Cir. Feb. 13, 2013) ("failure to plead these things was not the ground of the Board's decision. . . . So once again the Justice Department in defending the Board of Immigration Appeals in a court of appeals has violated the Chenery doctrine."). Nor is there any reason to think that the Board – which has substantial responsibility for adjudicating material support issues – is unaware of DHS

[3] Contrary to the Government's argument that Petitioner "did not define those 'remedies,'" Gov't Br. 45, the previous sentence in the brief could leave no doubt that Petitioner the remedy to which Petitioner was referring was a "discretionary waiver of the material support bar." (AR 24.)

agency policies. Those policies were not secret law; they were published in the Federal Register. (*See* SA at 46-48.)

C. Exceptions to Exhaustion Apply to Any Issues Not Raised to the Board.

It is true that Petitioner did not make the futile argument to the Board that the split waiver adjudicative process was unlawful to the extent that it deprived him of a fair opportunity to be heard. This is because the issue was beyond the authority of the Board to consider or remedy; and Petitioner was not required to exhaust issues before the Board where the Board cannot remedy the complaint. *Ghaffar v. Mukasey*, 551 F.3d 651, 654 (7th Cir.2008) ("[t]he duty to exhaust includes the obligation to first present to the BIA any argument against the removal order as to which the Board is empowered to grant the alien meaningful relief."). Moreover, the Board discussed this issue in its decision; and Board adjudication of a matter is a second exception from the exhaustion requirement. (SA at 6.)

First, the Board has repeatedly disclaimed any authority over the waiver process, because Congress has entrusted that process to DHS. *S-K-*, 23 I&N Dec. at 942 ("[the respondent's] sole remedy to extricate herself from the statutory bar appears to lie in the waiver afforded by Congress for this purpose.... However, the Immigration Judges and the Board have *no role* in the adjudication of such a waiver.") (emphasis added). That policy, a matter of published Board law, was repeated in the Board's decision below. (SA at 6 n. 1.) ("to the extent that [Petitioner] has argued his possible eligibility for a waiver ... this provision does not affect the disposition of the instant removal

proceedings"). Because the Board considers itself to have no authority over the waiver process – including how it intersects with the removal process – the Board had no authority to provide "meaningful relief" to Petitioner. *See Ghaffar*, 551 F.3d at 654.

Second, the Board is, in fact, mandated by regulation *not* to delay adjudication of an appeal. It is required, with certain exceptions, to adjudicate cases within 180 days. 8 C.F.R. § 1003.1(e)(8). To the extent that Petitioner would have needed to ask the Board to delay adjudication of his appeal until such time as the DHS would modify its waiver process to permit consideration of claims such as his, it would not have been within the power of the Board to grant a remedy. The Board considers itself to have no authority to overrule regulations. *See Matter of C-*, 20 I&N Dec. 529, 532 (BIA 1992); *Matter of Akram*, 25 I. & N. Dec. 874, 880 (BIA 2012). Again, insofar as the Board had no authority to provide "meaningful relief" to Petitioner, *Ghaffar*, 551 F.3d at 654, raising these issues with the Board was not required.

It is worth noting that the Government does not suggest any "meaningful relief" which the Board could have provided as to the timing issues. The Government nowhere suggests that the Board had any authority over the DHS waiver process. The Government claims no Board authority to order the DHS to change its waiver process, or to alter its own process under the regulations. The Board lacked authority to look beyond the regulations to assess their legality; but this Court is mandated to do precisely that.

Finally, the Board's decision in this case addresses this issue to some extent. Held the Board, "to the extent that [Petitioner] has argued his possible eligibility for a waiver … this provision *does not affect* the disposition of the instant removal proceedings." (SA at 6 n.1 (emphasis added).) The Board's conclusion that potential waiver eligibility had no effect on its handling of the case (repeated entreaties from Petitioner to the contrary) is consistent with Board case law in this area, and accurately states its understanding of its role. By addressing the issue of which Petitioner complains, the Board's decision also excuses Petitioner from exhaustion. Exhaustion is not required as to "issues that are not raised by the parties but instead addressed by the administrative agency itself." *See Arobelidze v. Holder*, 653 F.3d 513, 517 (7th Cir. 2011) (internal citation omitted); *Watson v. Henderson*, 222 F.3d 320, 322 (7th Cir.2000).

For these reasons, all of the issues raised by Petitioner's opening brief are properly before the Court.

D. Where Congress expressly requires review of legal and constitutional errors, a legal error cannot be protected by the political question doctrine.

The Government also argues that the political question doctrine is implicated by the terrorist bar waiver process. This is a striking claim. The Executive essentially argues that even if the process adopted by the agencies below would deprive an applicant of statutory rights granted by Congress, that the Courts may not intervene to protect statutory rights.

To the extent that the Government argues that there is "a textually demonstrable constitutional commitment of the issue to a coordinate political department," the constitutional commitment is to the legislative branch, which has authority to establish a uniform rule of naturalization. U.S. Const. Art. I, § 8, cl. 4; *Fiallo v. Bell*, 430 U.S. 787, 792 (1977). "The Judicial Branch appropriately exercises [its] authority … where the question is whether Congress or the Executive is 'aggrandizing its power at the expense of another branch.'" *Zivotofsky ex rel. Zivotofsky v. Clinton*, 132 S.Ct. 1421, 1428 (2012) (quoting *Freytag v. Commissioner*, 501 U.S. 868, 878 (1991). Petitioner claims, *inter alia*, that the Executive's adjudication practice for terrorist bar waivers and removal orders effectively deprives him and others like him of a remedy which Congress has provided for individuals like him. This is very precisely a claim that the executive agencies are "aggrandizing" their power at the expense of the validly-enacted statute. The Court has authority to address that issue.

Second, the Government argues that there is "a lack of judicially discoverable and manageable standards for resolving" Petitioner's argument. But even if resolution of the claims "demands careful examination of the textual, structural, and historical evidence put forward by the parties …. This is what courts do." *Zivotofsky*,132 S.Ct. at 1430. This Court has repeatedly found sufficient judicially discoverable standards to determine whether executive agency actions have the effect of nullifying the immigration statutes. *See* e.g, *Potdar*, 550 F.3d at 596-7; *Ceta*, 535 F.3d at 645; *Benslimane*, 430 F.3d at 832; *Subhan*, 383 F.3d 591.

E. The Government offers no substantive response to Petitioner's point that the timing of the waiver process is inconsistent with the statute.

Aside from the host of procedural objections raised by the Government, it offers no substantive response to Petitioner's argument that the current waiver process is inconsistent with the statute. The Government does not contest that the statute requires that judicial review over waiver determinations must take place, it at all, in the context of a petition for review from a final order of removal. It does not suggest any way that a Petitioner could retroactively obtain such review when a waiver determination is unfavorable years after entry of a removal order. It does not dispute that many individuals face immediate deportation in the interim, often to situations where persecution or torture will immediately ensue.

Insofar as the Government has not responded substantively, the Court should grant the Petition for Review.

F. A split in agency authority over adjudication of a given case cannot permit finger-pointing so as to refuse to fully adjudicate the claim.

The Government does respond to Petitioner's argument that agencies splitting authority over Petitioner's asylum claim cannot deny the claim based solely by blaming the other agency. In essence, DHS argues that it is unnecessary to consider the waiver claim because the Board did not find Petitioner eligible for asylum but for the bar (because it did not complete its analysis of the case). The Board finds it unnecessary to assess his eligibility further than the triggering of the bar, because authority to waive the bar rests

with DHS, not with the Board. The Government argues that DHS policies do not "require" the Board to do anything. This is simply finger-pointing. The Board need not adjudicate the appeal in any particular way; DHS need not adjudicate the waiver in any particular way; but the agencies together are required to handle the case in a way that affords Petitioner a reasonable opportunity to be heard on his claim. "[U]nless [] subagencies engage in some minimal coordination of their respective proceedings … the statutory opportunity to seek [relief] will prove to be a mere illusion." *Ceta*, 535 F.3d at 646-47. A straightforward application of the Court's precedent shows that the joint agency handling of this issue does not suffice.

III. The Government offers no defense of the flawed finding that the persecution of Petitioner was not on account of his imputed political opinion.

Finally, the Government offers no defense of the IJ's finding – not adopted by the Board – that the persecution of Petitioner was not "on account of" his political opinion, or the Judge's failure to consider Petitioner's imputed political opinion argument. That indefensible holding is not defended by the Government or adopted by the Board, yet it stands as the reason why Petitioner will never be considered for an waiver from the terrorist bar purportedly applicable in this case. Petitioner offered a robust explanation for why this finding was erroneous, which need not be repeated here. (Petitioner's Br. at 42-45.) It is undisputed that Petitioner suffered awful mistreatment which rose to the level of past persecution and that he would more likely than not be tortured if returned to Eritrea. The only plausible reason for this is his

actual or imputed political opinion; yet he is improperly denied the opportunity to obtain asylum relief. That decision should not stand.

CONCLUSION

For these reasons, the Court should grant the petition for review and remand this matter for adjudication which is in compliance with the law.

Dated: March 22, 2013

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 6992 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: March 22, 2013

/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: March 22, 2013

/s/ Charles Roth

Charles Roth

CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of March 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.

/s/ Charles Roth
Charles Roth