

07-639 NOV 13 2007

No. 07-\_\_\_\_\_

OFFICE OF THE CLERK

---

IN THE  
**Supreme Court of the United States**

---

ZEN HUA DONG,

*Petitioner,*

v.

MICHAEL B. MUKASEY, UNITED STATES ATTORNEY  
GENERAL,

*Respondent.*

---

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

---

**PETITION FOR WRIT OF CERTIORARI**

---

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

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

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

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

*Counsel for Petitioner*

**QUESTION PRESENTED**

Whether the Second Circuit erred in concluding, contrary to five of its sister circuits, that the Attorney General may not extend a presumption of asylum eligibility under 8 U.S.C. § 1101(a)(42) to a person whose spouse—or, *a fortiori*, fiancé—was forced to undergo an abortion or sterilization pursuant to a coercive population control regime.

**PARTIES TO THE PROCEEDING**

The parties to the proceedings in the United States Court of Appeals for the Second Circuit were Shi Liang Lin, Zhen Hua Dong, and Xian Zou and Respondent Attorney General of the United States. Mr. Dong is the only remaining petitioner.

## TABLE OF CONTENTS

	Page
QUESTION PRESENTED.....	i
PARTIES TO THE PROCEEDING .....	ii
TABLE OF AUTHORITIES.....	v
INTRODUCTION.....	1
OPINIONS BELOW .....	2
JURISDICTION .....	2
STATUTORY PROVISION INVOLVED .....	2
STATEMENT .....	4
REASONS FOR GRANTING THE PETITION.....	16
I. THE DECISION BELOW CREATES A CLEAR CONFLICT IN THE CIRCUITS....	16
II. THE DECISION BELOW INJECTS CONSIDERABLE UNCERTAINTY INTO THE ASYLUM SYSTEM .....	18
III. THE DECISION BELOW INCORRECTLY DECIDES A SIGNIFICANT QUESTION OF FEDERAL LAW.....	19
CONCLUSION .....	23
APPENDIX	
<i>Lin v. U.S. Dep't of Justice, 2d Cir. En     Banc</i> Decision, July 18, 2007.....	1a
<i>In re Zhen Hua Dong, No. A77 293 661     (B.I.A. Nov. 27, 2006)</i> .....	96a
<i>Lin v. U.S. Dep't of Justice, 2d Cir. Panel     Decision, July 29, 2005</i> .....	103a
<i>In re Zhen Hua Dong, No. A77 293 661     (B.I.A. Sept. 25, 2002)</i> .....	117a

**TABLE OF CONTENTS**

	<b>Page</b>
<i>In re Zhen Hua Dong</i> , No. A77 293 661 (Imm. Ct. N.Y. City Oct. 12, 2000).....	118a
<i>In re S-L-L</i> , 24 I. & N. Dec. 1 (B.I.A. Sept. 19, 2006).....	126a
<i>In re C-Y-Z</i> , B.I.A., June 4, 1997 .....	161a
INS Office of General Counsel Memorandum, Oct. 21, 1996 .....	199a

## TABLE OF AUTHORITIES

	Page
<b>Cases</b>	
<i>Cao v. Gonzales</i> , 442 F.3d 657 (8th Cir. 2006) .....	17
<i>Chen v. Att’y Gen. of U.S.</i> , 491 F.3d 100 (3d Cir. 2007) .....	16
<i>Chen Zhou Chai v. Carroll</i> , 48 F.3d 1331 (4th Cir. 1995) .....	8
<i>Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.</i> , 467 U.S. 837 (1984) .....	14
<i>Ge v. Ashcroft</i> , 367 F.3d 1121 (9th Cir. 2004) .....	5
<i>Guo Chun Di v. Carroll</i> , 842 F. Supp. 858 (E.D. Va. 1994) .....	9
<i>Huang v. Ashcroft</i> , 113 Fed. App’x 695 (6th Cir. 2004) .....	17
<i>INS v. Aguirre-Aguirre</i> , 526 U.S. 415 (1999) .....	23
<i>Li v. Ashcroft</i> , 82 Fed. App’x 357 (5th Cir. 2003) .....	16
<i>Lin v. Ashcroft</i> , 371 F.3d 18 (1st Cir. 2004) .....	17
<i>Lin v. U.S. Dep’t of Justice</i> , 494 F.3d 296 (2d Cir. 2007) .....	<i>passim</i>
<i>Lin v. U.S. Dep’t of Justice</i> , 416 F.3d 184 (2d Cir. 2007) .....	12
<i>Lin-Jian v. Ashcroft</i> , 489 F.3d 182 (4th Cir. 2007) .....	17
<i>Ma v. Ashcroft</i> , 361 F.3d 553 (9th Cir. 2004) .....	5
<i>Rosendo-Ramirez v. INS</i> , 32 F.3d 1085 (7th Cir. 1994) .....	19

**TABLE OF AUTHORITIES**  
(Continued)

	Page
<i>Shi v. U.S. Att’y Gen.</i> , No. 06-1952, slip op. (3d Cir. July 27, 2007) .....	18
<i>Wang v. U.S. Att’y Gen.</i> , 152 Fed. App’x 761 (11th Cir. 2005) .....	17
<i>Yang v. U.S. Att’y Gen.</i> , 494 F.3d 1311 (11th Cir. 2007).....	5
<i>Zhang v. Gonzales</i> , 434 F.3d 993 (7th Cir. 2006) .....	17
<i>Zhang v. Slattery</i> , 55 F.3d 732 (2d Cir. 1995) .....	7
<i>Zheng v. Ashcroft</i> , 397 F.3d 1139 (9th Cir. 2005).....	16
<b>Agency &amp; Administrative Decisions</b>	
Att’y Gen. Order No. 1659-93 § 208.13(2)(ii) .....	9
<i>Matter of C-Y-Z-</i> , 21 I. & N. Dec. 915 (B.I.A. 1997)..... <i>passim</i>	
<i>Matter of Chang</i> , 20 I. & N. Dec. 38 (B.I.A. 1989).....	7, 10, 20
<i>Matter of G-</i> , 20 I. & N. Dec. 764 (B.I.A. 1993) .....	7, 10, 20
<i>Matter of Jianzhong Shi</i> , Order No. 2905-2007 (A.G. Sept. 4, 2007).....	18
<i>In re S-L-L-</i> , 24 I & N. Dec. 1 (B.I.A. 2006) .....	12, 18
<i>In re Zhen Hua Zong</i> , No. A77 293 661 (B.I.A. Sept. 25, 2002), <i>aff’g</i> No. A77 294 661 (Immig. Ct. N.Y. City Oct. 12, 2000).....	11

**TABLE OF AUTHORITIES**  
(Continued)

	<b>Page</b>
<b>Statutes &amp; Regulations</b>	
Immigration & Naturalization Act,	
8 U.S.C. § 1101(a)(42).....	<i>passim</i>
8 U.S.C. § 1157(a)(5)(1994 & Supp. 1998) .....	21
8 U.S.C. § 1158(b)(1).....	6
8 U.S.C. § 1158(b)(3).....	22
8 U.S.C. § 1158(d)(6).....	22
28 U.S.C. § 1254(1) .....	2
8 C.F.R. § 208.13(b)(1)(1997).....	12
8 C.F.R. § 1003.1(h)(1)(i) .....	18
8 C.F.R. § 1208.13(b)(1).....	6
<b>Legislative &amp; Executive Materials</b>	
55 Fed. Reg. 2803-02 (Jan. 29, 1990).....	7, 8
Coercive Population Control in China: New Evidence of Forced Abortion and Forced Sterilization: Hearing Before the H. Comm. on International Relations, 107th Cong., 1st Sess. (Oct. 17, 2001).....	20
Emergency Chinese Immigration Relief Act, H.R. 2712, 101st Cong. (1989).....	7
Exec. Order No. 12,711, 55 Fed. Reg. 13,897 (Apr. 11, 1990) .....	8



**TABLE OF AUTHORITIES**  
(Continued)

	<b>Page</b>
Forced Abortion and Sterilization in China: The View From the Inside: Hearings Before the Subcomm. on Int'l Operations and Human Rights of the House Comm. on Int'l Relations, 105th Cong., 2d Sess. (June 10, 1998).....	21
H.R. Rep. 104-469, Part I, 104th Cong., 2d Sess. (1996) .....	20
Hearings on Country Reports on Human Rights Practices During 1995 Before the International Operations and Human Rights Subcomm. of the H. International Relations Comm., 104th Cong. 2d Sess. (Mar. 26, 1996)...	20
President's Memorandum of Disapproval for the Emergency Chinese Immigration Relief Act of 1989, 25 Wkly. Comp. Pres. Doc. 1853 (Jan. 23, 1990).....	7
REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 231 (2005).....	21

**TABLE OF AUTHORITIES**  
(Continued)

	<b>Page</b>
<b>Other Materials</b>	
BIA Appeals Remain High in 2nd and 9th Circuits, <i>The Third Branch: Newsletter of the Fed. Cts.</i> (Admin. Office of the U.S. Cts. Office of Pub. Affairs, Wash. D.C. Feb. 2005)....	19
INS Resource Information Center, U.S. Dep't of Justice, <i>China: Family Planning Policy and Practice in the People's Republic of China</i> (Mar. 1995).....	4
Law of the People's Republic of China on Population and Family Planning (promulgated Dec. 29, 2001; effective Sept. 1, 2002).....	5
Memorandum from David A. Martin, INS General Counsel, <i>Asylum Based on Coercive Family Planning Policies—Section 601 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996</i> (Oct. 21, 1996) .....	10
Memorandum from the Office of General Counsel of INS (Nov. 7, 1991), <i>reprinted in</i> 69 Interpreter Releases app. I, at 311 (1991).....	8
U.S. Dep't of State, <i>Country Reports on Human Rights Practices: China 2006</i> (2007) .....	5

## INTRODUCTION

The decision below merits this Court's review because it creates a clear conflict in the lower courts on a significant question of immigration law—whether the Attorney General has the authority under § 101(a) of the Immigration and Naturalization Act (“INA”), 8 U.S.C. § 1101(a)(42), to treat persons whose spouses were forced to undergo an abortion or sterilization pursuant to their government's coercive population control program as presumptively eligible for asylum because of persecution on account of political opinion.

Through three presidential administrations, Congress, the Department of Justice, and the Immigration and Naturalization Service have maintained that the Attorney General enjoys such authority. Since the passage of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (“IIRIRA”), which expanded the scope of asylum eligibility under INA § 101(a), five courts of appeals have upheld that position.

However, the decision below—the product of a divided en banc court reaching out to decide an issue not squarely before it—holds that the Attorney General may not extend asylum eligibility to spouses of persons compelled to have an abortion or sterilization if they themselves have not been subjected to that procedure. Within the Second Circuit alone, between 70 and 80 percent of all asylum applicants are aliens fleeing China's repressive family planning laws. Outside the Second Circuit, the decision deeply divides the courts of appeals in an area where uniform application of federal law is of the utmost importance.

Accordingly, petitioner respectfully submits that this Court's review is warranted.

### OPINIONS BELOW

The *en banc* opinion of the court of appeals (Pet. App. 1a-95a) is reported at 494 F.3d 296 (2d Cir. 2007), and the prior opinion of a panel of the court of appeals (Pet. App. 103a-116a) is reported at 416 F.3d 184 (2d Cir. 2007). The first decision of the Board of Immigration Appeals (Pet. App. 117a) is *In re Zhen Hua Dong*, No. A77 293 661 (B.I.A. Sept. 25, 2002); the second decision of the Board of Immigration Appeals is *In re Zhen Hua Dong*, No. A77 293 661 (B.I.A. Nov. 27, 2006) (Pet. App. 96a-102a). The decision of the Immigration Judge (Pet. App. 118a-125a) is not reported.

### JURISDICTION

The judgment of the court of appeals was entered on July 16, 2007. On October 5, 2007, Justice Ginsburg granted petitioner an extension of time in which to file a writ of certiorari up to and including November 14, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

### STATUTORY PROVISION INVOLVED

Section 101(a) of the Immigration and Naturalization Act, as amended by § 601(a) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, provides that:

The term "refugee" means (A) any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such

person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion, or (B) . . . . The term "refugee" does not include any person who ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion. For purposes of determinations under this Act, a person who has been forced to abort a pregnancy or to undergo involuntary sterilization, or who has been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program, shall be deemed to have been persecuted on account of political opinion, and a person who has a well founded fear that he or she will be forced to undergo such a procedure or subject to persecution for such failure, refusal, or resistance shall be deemed to have a well founded fear of persecution on account of political opinion.

8 U.S.C. § 1101(a)(42).

## STATEMENT

This case concerns the Attorney General's authority under the Immigration and Naturalization Act to grant asylum to a person whose spouse was forced to undergo an abortion or sterilization pursuant to the family planning laws of the People's Republic of China (the "PRC" or "China"). The longstanding policy of the United States, expressed in legislation, regulations, and official statements of Executive Branch policy, is to afford relief to both members of the marital unit because the couple has been and remains the target of coercive family control practices implementing PRC's "one couple, one child" regime.

### **The PRC's Coercive Family Control Program**

In 1979, the PRC publicly announced plans to regulate the birth rate in China via a family planning program. INS Resource Information Center, U.S. Dep't of Justice, China: Family Planning Policy and Practice in the People's Republic of China 3 (Mar. 1995) (*available at* <http://www.uscis.gov/files/nativedocuments/prchn95-001.pdf>). The program's central feature is a state-imposed limit on the number of children a couple may bear, known as "one couple, one child." *See id.* Compliance is enforced by requiring couples to obtain permission to become pregnant or face a wide range of penalties. *Id.* at 15-18.

Although Chinese law formally prohibits the use of coercion to compel a couple to submit to a forced abortion or sterilization, "implementation of the policy by local officials [has] resulted in serious violations of human rights." U.S. Dep't of State,

*Country Reports on Human Rights Practices: China 2006* (2007) (available at <http://www.state.gov/g/drl/rls/hrrpt/2006/78771.htm>). Reported decisions of the federal courts confirm that forced abortion and sterilization remain prevalent official practices in the PRC.<sup>1</sup>

The PRC's coercive family planning program targets fathers as well as mothers of unauthorized children. China's National Family Planning Law requires that "husbands and wives shall bear *joint responsibility* in the implementation of family planning." See Law of the People's Republic of China on Population and Family Planning ch. 3, art. 17 (promulgated Dec. 29, 2001; effective Sept. 1, 2002) (emphasis added) (*translation available at* <http://www.lawinfochina.com/law/display.asp?db=1&id=2209&keyword=Population,Family%20Planning>). "For those in violation of this Law, failing to perform the obligation of assisting the family planning management, the relevant local people's government shall order *them* to make corrections and circulate a notice of criticism . . . ." *Id.* ch. 6, art. 40 (emphasis added).

---

<sup>1</sup> See, e.g., *Yang v. U.S. Att'y Gen.*, 494 F.3d 1311 (11th Cir. 2007) (government forced abortion approximately six months into pregnancy because husband and wife were below legal age of marriage); *Ma v. Ashcroft*, 361 F.3d 553 (9th Cir. 2004) (family planning officials seized woman's sixty-three year old father-in-law to compel her to have abortion); *Ge v. Ashcroft*, 367 F.3d 1121 (9th Cir. 2004) (after wife became pregnant, husband was arrested, beaten, and placed in solitary confinement for three days).

### The Administrative and Legislative Response

The Immigration and Naturalization Act (“INA”) vests the Attorney General with authority to grant asylum to an alien who establishes that he or she is a “refugee.” INA § 208(b)(1), 8 U.S.C. § 1158(b)(1). Under INA § 101(a)(42), an applicant qualifies as a “refugee” if he or she “is unable or unwilling to avail himself or herself of the protection of [his or her home country] because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.” 8 U.S.C. § 1101(a)(42).

In 1996, the Board of Immigration Appeals (“BIA” or “Board”) held that “past persecution of one spouse can be established by coerced abortion or sterilization of the other,” entitling the spouse to asylum if he or she also had a well-founded fear of future persecution. *Matter of C-Y-Z-*, 21 I. & N. Dec. 915, 917 (B.I.A. 1997) (Pet. App. 161a-198a, 165a); *see also* 8 C.F.R. § 1208.13(b)(1) (explaining nature of rebuttable presumption).

The Board in *C-Y-Z-* was not writing on a blank slate. Rather, its decision reflected a decades-old judgment by Congress and immigration officials dating back to at least the events of Tiananmen Square in 1989 that the Attorney General may accord presumptive eligibility for asylum to the spouse of a person forced to undergo an abortion or sterilization, or punished for refusing to do so.

On August 5, 1988, Attorney General Edwin Meese issued a memorandum to the Commissioner of the Immigration and Naturalization Service (“INS”) expressing his view that all persons opposed to, and



targeted by, the PRC's coercive family planning practices meet the INA § 101(a)(42) refugee definition. *See Zhang v. Slattery*, 55 F.3d 732, 738 (2d Cir. 1995) (quoting memorandum). The BIA, however, rejected Meese's view, reasoning that because the "one couple, one child" policy "applies to everyone," it could not constitute persecution. *Matter of Chang*, 20 I. & N. Dec. 38, 43 (B.I.A. 1989); *accord Matter of G-*, 20 I. & N. Dec. 764, 778 (B.I.A. 1993).

Congress promptly responded by passing the Emergency Chinese Immigration Relief Act on November 20, 1989, H.R. 2712, 101st Cong. (1989). In pertinent part, the measure would have provided eligibility for asylum where the "*applicant's spouse . . . refused to abort a pregnancy or resisted sterilization in violation of China's family planning policy directives.*" *Id.* at § 3(b) (emphasis added). Although President George H. W. Bush vetoed the proposed legislation on November 30, 1989, he did so in part because of diplomatic considerations and on the express understanding that executive branch action would provide "greater protection" to persons targeted by coercive population control programs than H.R. 2712. *See* President's Memorandum of Disapproval for the Emergency Chinese Immigration Relief Act of 1989, 25 Wkly. Comp. Pres. Doc. 1853, 1853-54 (Jan. 23, 1990).

Six days later, Attorney General Richard Thornburgh issued an interim regulation acting on President Bush's veto message. *See* 55 Fed. Reg. 2803-02, 2804 (Jan. 29, 1990). Like H.R. 2712, the regulation provided asylum eligibility for an applicant who had a well-founded fear he or she would be forced to abort a pregnancy or be sterilized.

The regulation also reaffirmed that the spouse of a person forced to abort a pregnancy or be sterilized was eligible for asylum. *See id.* at 2805 (“[e]ligibility for withholding of deportation on account of political opinion is established by the respondent who establishes that he or she (*or respondent’s spouse*) will be required to abort a pregnancy or to be sterilized . . .”) (emphasis added).

On April 11, 1990, President Bush issued an Executive Order referring to the interim rule, again requiring “enhanced consideration” for persons fleeing the PRC’s family planning laws. *See Exec. Order No. 12,711*, 55 Fed. Reg. 13,897, 13,897 (Apr. 11, 1990). President Bush’s Executive Order was implemented by a memorandum from the INS general counsel, released on November 7, 1991, directing that all victims, including spouses, of coerced abortions and sterilizations were eligible for asylum. Memorandum from the Office of General Counsel of INS (Nov. 7, 1991), *reprinted in* 69 Interpreter Releases app. I, at 311, 311 (1991) (“an applicant . . . *and the applicant’s spouse*” will be considered by the INS “to have established presumptive eligibility for asylum on the basis of past persecution on account of political opinion if the applicant has been forced to abort a pregnancy or to undergo involuntary sterilization or has been persecuted for failure or refusal to do so”) (emphasis added).

Attorney General Thornburgh’s final rule inadvertently omitted the forced abortion and sterilization provision. *See Chen Zhou Chai v. Carroll*, 48 F.3d 1331, 1337 n.4 (4th Cir. 1995) (describing omission as “mere inadvertence”). The

error was corrected, however, by a rule issued by Attorney General William Barr in 1993. *See* Att’y Gen. Order No. 1659-93 § 208.13(2)(ii), *reprinted in Guo Chun Di v. Carroll*, 842 F.Supp. 858, 864 (E.D.Va. 1994). The rule provided that “[a]n applicant (*and the applicant’s spouse, if also an applicant*)” could establish refugee status by showing he or she was victimized by coerced abortion or sterilization. *Id.* (emphasis added). Though scheduled to take effect on January 25, 1993, the Barr rule was withdrawn shortly before President Clinton took office pursuant to a policy that required the incoming agency head to approve all new regulations.

In 1996, after the Clinton Administration failed to issue specific regulations addressing whether victims of the PRC’s coercive family control practices were eligible for asylum, Congress passed section 601 of the Illegal Immigration Reform and Immigrant Responsibility Act, Pub. L. No. 104-208, Div. C, 110 Stat. 3009, 3009-689 (codified at 8 U.S.C. § 1101(a)(42)) (“IIRIRA § 601,” “section 601,” or “1996 amendment”). Congress stipulated that coerced abortion and sterilization amount to “persecution on account of political opinion”:

[A] person who has been forced to abort a pregnancy or to undergo involuntary sterilization, or who has been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program, shall be deemed to have been persecuted on account of political opinion . . . .

8 U.S.C. § 1101(a)(42).

In the Clinton Administration's first official interpretation of the 1996 amendment, the INS general counsel stated that section 601 was specifically intended to overrule the BIA's decisions in *Matter of Chang* and *Matter of G-*, *supra*. Memorandum from David A. Martin, INS General Counsel, *Asylum Based on Coercive Family Planning Policies—Section 601 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996* (Oct. 21, 1996) (Pet. App. 199a-209a).

On the very issue that is the subject of the Second Circuit's ruling below, General Counsel Martin expressly recognized that a person whose spouse was victimized by a forced abortion or sterilization was presumptively eligible under the statute for asylum:

In general, we believe *that an applicant whose spouse* was been forced to undergo an abortion or involuntary sterilization has suffered past persecution, and may thereby be eligible for asylum under the terms of the new refugee definition. In such a case, the applicant may or may not have a well-founded fear of future persecution.

*Id.* (Pet. App. 205-206a) (emphasis added). As noted, the BIA shortly thereafter confirmed that spouses *were* presumptively eligible for asylum in *Matter of C-Y-Z-*, 21 I. & N. Dec. 915, 918 (B.I.A. 1997) (en banc) (Pet. App. 167a). Until the decision below, *C-Y-Z-* remained the law nationwide.

### Proceedings Below

Petitioner Zhen Hua Dong, a native of Fujian Province, applied for asylum, withholding of removal, and relief under the Convention Against Torture on March 22, 2000. In his application, Dong stated that local family planning officials forced his fiancé, Zhu Hua, to submit to two abortions. Pet. App. 121a. Dong further recounted that the officials warned him that he would be sterilized and fined if Zhu became pregnant again. Pursuant to a stipulation of the parties, the Immigration Judge (“IJ”) accepted all of Dong’s statements in his asylum application as credible. *Id.* at 122a.

The IJ, however, denied any relief under *C-Y-Z* because he and Zhu were not legally married. *Id.* at 122-123a. On appeal, the BIA summarily affirmed. *In re Zhen Hua Dong*, No. A77 293 661 (B.I.A. Sept. 25, 2002), *aff’g* No. A77 293 661 (Immig. Ct. N.Y. City Oct. 12, 2000). Pet App. 117a.

Dong then petitioned the Second Circuit for review of the IJ’s decision. Because the panel had difficulty ascertaining the underlying rationale of *C-Y-Z* and thus determining whether the BIA rationally could exclude asylum applicants in Dong’s situation, it remanded to the BIA with instructions to

- (a) more precisely explain its rationale for construing IIRIRA § 601(a) to provide that the “forced sterilization of one spouse on account of a ground protected under the Act is an act of persecution against the other spouse” and . . .
- (b) clarify whether, when, and why boyfriends and fiancés may or may

not similarly qualify as refugees under IIRIRA § 601(a).

*Lin v. U.S. Dept. of Justice*, 416 F.3d 184, 192 (2d Cir. 2007) (Pet. App. 104a-105a). The court noted it was asking for a fuller articulation of *C-Y-Z*'s reasoning, without necessarily questioning the validity of the BIA decision. *Id.* at 191 (Pet. App. 104a-105a).

On remand, the BIA, sitting en banc, reaffirmed that a person whose spouse was forced to undergo an abortion or sterilization is presumed to be eligible for asylum. The Board further held that its ruling was limited to "applicants who are legally married under Chinese law." *In re S-L-L*, 24 I. & N. Dec. 1, 4 (B.I.A. 2006) (Pet. App. 126a-160a, 130a).

Dong's case returned to the Second Circuit where the court *sua sponte* ordered rehearing en banc. On July 16, 2007, the en banc court issued its ruling declaring that *C-Y-Z* was a statutorily unauthorized interpretation of the Attorney General's asylum authority.<sup>2</sup> *Shi Liang Lin v. U.S. Dept. of Justice*, 494 F.3d 296, 300 (2d Cir. 2007) (Pet. App. 4a). The court did not directly address whether the BIA properly limited presumptive eligibility to legally

---

<sup>2</sup> While the Second Circuit majority read the BIA's decisions as granting "per se" asylum eligibility to the spouse of a person forced to undergo an abortion or sterilization, *C-Y-Z* establishes only a rebuttable presumption of eligibility. *C-Y-Z*, 21 I. & N. Dec. at 919 ("[I]nasmuch as the applicant has adequately established that he suffered past persecution, there is a regulatory presumption that he has a well-founded fear of future persecution") (citing 8 C.F.R. § 208.13(b)(1) (1997)) (Pet. App. 167a).

recognized marital units. Instead, the court ruled that “the BIA erred in . . . failing to acknowledge language in [the 1996 amendment] that is unambiguous and that does not extend automatic refugee status to spouses or unmarried partners of individuals § 601(a) expressly protects.” *Id.* (Pet. App. 4a). The court reasoned that Congress had spoken unambiguously in IIRIRA § 601(a) as to which victims of the PRC’s coercive family planning program were entitled to asylum eligibility: “Congress’s specific designation of some persons (i.e., those who fear, resist, or undergo particular medical procedures) is incompatible with the view that others (e.g., their spouses) should also be granted asylum per se because of birth control policies.” *Id.* at 307 (Pet. App. 19a).

The court next rejected the BIA’s contention that general principles of asylum law supported its policy, noting that “the intention of Congress to limit the application of the clause to individuals who are themselves physically forced to undergo an abortion or sterilization..”<sup>3</sup> *Id.* at 306 (Pet. App. 16a-17a).

Five judges in three separate opinions disagreed with the majority’s ruling that the 1996 amendment precluded the presumptive eligibility of spouses not themselves subjected to a forced abortion or

---

<sup>3</sup> The court of appeals did recognize a narrow exception to its no-spouse coverage rule—where the spouse could prove resistance to the PRC’s coercive family control program independent of the physically coercive practices, fines, and psychological abuse to which they and their partners were subjected for seeking to have children in violation of the program. *See Lin*, 494 F.3d at 313.

sterilization.<sup>4</sup> Judge Katzmman, joined by Judges Pooler, Straub, and Sotomayor, objected to the majority's application of the *expressio unius* canon to a statutory provision intended to broaden asylum availability. He explained that section 601 could not be read to *narrow* the availability of asylum:

Congress's intent in enacting IIRIRA § 601(a) was to clarify that, contrary to the BIA's prior rulings, the imposition of some aspects of China's family planning policy can constitute persecution on the basis of political opinion, and that certain victims of that persecution are entitled to protection under our asylum laws.

*Id.* at 319 (Pet. App. 43a). The amendment thus did not "provid[e] an exhaustive list of those who could claim asylum relief because they were victimized by China's family planning policy," but "express[ed] a congressional determination that, contrary to the BIA's prior rulings, China's 'one couple, one child' policy is on its face persecutory, and victims of that policy who experienced persecution should be able to qualify for asylum relief without making an

---

<sup>4</sup> Judge Katzmman's opinion concurred in the judgment en banc on the ground that the BIA's failure to apply *C-Y-Z*'s presumption of spousal eligibility to fiancés and boyfriends was reasonable under the principles of *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). The reasonableness of not applying *C-Y-Z* to asylum applicants such as petitioner was not, however, addressed by the *Lin* majority, see *Lin*, 494 F.3d at 304 (Pet. App. 14a); and is therefore not presented by this petition.



additional showing of their own political opinion.” *Id.* at 321 (Pet. App. 48a).

Judge Sotomayor, joined by Judge Pooler, also wrote separately to highlight that the majority opinion “create[s] further circuit conflicts when such outcomes are easily avoided,” and to emphasize that the majority’s requirement of directly-suffered personal harm “may unduly and inappropriately limit the BIA not merely in cases under § 601(a) but in others as well.” *Id.* at 328 (Pet. App. 63a). Citing BIA decisions which found that the torture of the applicant’s father and brother could constitute persecution, Judge Sotomayor feared that the majority opinion called into doubt decisions where the BIA “identified specific situations in which the harm to close family members could be central to the finding of persecution and the granting of refugee status.” *Id.* at 332 (Pet. App. 72a).

Finally, Judge Calabresi urged a further remand to the BIA to allow the agency to consider the authority for *C-Y-Z-* under the general INA § 101(a) definition of “refugee” independent of the 1996 IIRIRA amendment. The majority, Judge Calabresi observed, “perhaps realizing that it could not, at this time, authoritatively speak on the question of *C-Y-Z-*’s *reasonableness as a construction of § 1101(a)(42)(A)*—by preemptive strike strips the BIA of its capacity to consider the issue under § 1101(a)(42)(A).” *Id.* at 337 (Pet. App. 82a) (emphasis in original).

**REASONS FOR GRANTING THE PETITION****I. THE DECISION BELOW CREATES A CLEAR CONFLICT IN THE CIRCUITS.**

The Second Circuit's ruling below creates a clear conflict in the circuits on a significant question of immigration law—whether the Attorney General has the authority under § 101(a) of the INA, 8 U.S.C. § 1101(a)(42), to treat persons whose spouses were forced to undergo an abortion or sterilization pursuant to their government's coercive population control program as presumptively eligible for asylum because of persecution on account of political opinion.

As the court of appeals acknowledged, its ruling directly conflicts with decisions of the Third, Fifth, Sixth, Seventh, and Ninth Circuits. *See Lin v. U.S. Dep't of Justice*, 494 F.3d 296, 300 (2d Cir. 2007) (Pet. App. 4a) (“recogniz[ing] that this decision creates a split among the circuits”); *see also id.* at 334 (Pet. App. 76a) (noting decision “is in direct conflict with every other circuit, the BIA, and ten years of rulings”) (Calabresi, J., concurring in part and dissenting in part).

Prior to *Lin*, each of the five courts of appeals addressing the issue upheld the Justice Department's position that “[a] person whose spouse has been forcibly sterilized or forced to have an abortion is automatically eligible for asylum.” *Zheng v. Ashcroft*, 397 F.3d 1139, 1148 (9th Cir. 2005); *accord Chen v. Att'y Gen. of U.S.*, 491 F.3d 100, 108 (3d Cir. 2007) (“In a great many cases, forced abortion or involuntary sterilization of one spouse will directly affect the reproductive opportunities of the other spouse, and so the BIA is not unreasonable in

considering the loss to the second spouse of the ‘natural fruits of conjugal life’ . . .”); *Li v. Ashcroft*, 82 Fed. App’x 357, 358 (5th Cir. 2003) (“the involuntary sterilization of Li’s wife constituted past persecution of Li”) (unpublished opinion); *Huang v. Ashcroft*, 113 Fed. App’x 695, 698-99 (6th Cir. 2004) (“The BIA has previously decided that a husband ‘stands in his wife’s shoes’ under [8 U.S.C. § 1101(a)(42)] and can receive asylum because of his wife’s forced sterilization or abortion”) (unpublished opinion); *Zhang v. Gonzales*, 434 F.3d 993, 1001 (7th Cir. 2006) (applying *C-Y-Z*-presumption of past persecution).

In addition, in cases where a denial of asylum relief was upheld, four other courts of appeals—the First, Fourth, Eighth, and Eleventh Circuits—albeit in dictum, have also approvingly noted the spousal eligibility rule. *Lin v. Ashcroft*, 371 F.3d 18, 21 (1st Cir. 2004); *Lin-Jian v. Gonzales*, 489 F.3d 182, 188 (4th Cir. 2007); *Cao v. Gonzales*, 442 F.3d 657, 660 (8th Cir. 2006); *Wang v. U.S. Att’y Gen.*, 152 Fed. App’x 761, 767 (11th Cir. 2005) (unpublished opinion).

In sum, each of these decisions recognizes that under INA § 101(a)(42), the Attorney General has the authority to treat a person whose spouse was forced to submit to an unwanted abortion or sterilization as presumptively eligible for asylum. Thus, the Second Circuit’s holding that the Attorney General lacks such authority creates a direct and acknowledged split in the circuits over a substantial question of asylum law.

## II. THE DECISION BELOW INJECTS CONSIDERABLE UNCERTAINTY INTO THE ASYLUM SYSTEM.

Review by this Court is necessary to prevent time-consuming and wasteful litigation in the wake of *Lin*. On July 27, 2007, the Third Circuit *sue sponte* ordered en banc review to assess “whether spouses of those victimized by China’s coercive population control policy are entitled to automatic asylum under the Immigration and Nationality Act” and whether the Third Circuit should “adopt any or all of the reasoning announced in the Second Circuit’s decision” in *Lin. Shi v. U.S. Att’y Gen.*, No. 06-1952 (3d Cir. July 27, 2007).<sup>5</sup> Only review by this Court can remove the uncertainty the ruling below has injected into the asylum system across the country.

After the Ninth Circuit, the Second Circuit hears the most asylum appeals—as many as the remaining courts of appeals combined.<sup>6</sup> *See* BIA Appeals

---

<sup>5</sup> On September 1, 2007, the Attorney General certified *Shi* for review under 8 C.F.R. § 1003.1(h)(1)(i) and directed the parties to submit briefs “address[ing] all relevant statutory questions,” including whether IIRIRA § 601(a) authorizes refugee status for “partners of individuals who have been subjected to forced abortion or sterilization, and whether the BIA interpretation of Section 601(a) set forth in [*Matter of C-Y-Z*, 21 I. & N. Dec. 915 (BIA 1997) and *Matter of S-L-L*, 24 I. & N. Dec. 1 (BIA 2006)] is correct.” *Matter of Jianzhong Shi*, Order No. 2905-2007 (A.G. Sept. 4, 2007). On September 4, 2007, the Department of Justice filed a motion to dismiss for lack of jurisdiction with the Third Circuit and on October 24, 2007, the court of appeals granted the Government’s motion.

<sup>6</sup> Within the Second Circuit alone, between 70 and 80 percent of all asylum applicants are aliens fleeing China’s repressive family planning laws. *See Lin*, 494 F.3d at 338.

Remain High in 2nd and 9th Circuits, The Third Branch: Newsletter of the Fed. Cts. (Admin. Office of the U.S. Cts. Office of Pub. Affairs, D.C. Feb. 2005), (*available at* <http://www.uscourts.gov/ttb/feb05ttb/bia/index.html>). According to a WESTLAW search by counsel, the Second Circuit alone had relied on the *Lin* decision in 106 cases by November 7, 2007.

Moreover, the decision below will have the effect of balkanizing the legal standards governing asylum. “Although the BIA seeks uniform nationwide interpretation of the immigration laws, it considers itself bound by the law of the circuit in which the administrative proceedings were held.” *Rosendo-Ramirez v. INS*, 32 F.3d 1085, 1091 (7th Cir. 1994). Thus, asylum claims based on the PRC’s family planning program are now adjudicated under two separate legal regimes, one for applicants who first arrive in this country in New York, Connecticut, or Vermont, another for those arriving elsewhere.

### **III. THE DECISION BELOW INCORRECTLY DECIDES A SIGNIFICANT QUESTION OF FEDERAL LAW.**

The Second Circuit’s decision is also plainly incorrect for several reasons. First, the court attributes the narrowing purpose of excluding spouses from asylum to the 1996 amendment when nothing in the language or statutory history of section 601 suggests the amendment was intended to *exclude* spouses from asylum. *See Lin*, 494 F.3d at 307 (Pet. App. 19a). The amendment does not speak in terms to spousal eligibility or to exclusion from asylum; for Congress’s specific purpose in enacting the amendment was to broaden the availability of asylum by overruling the BIA’s decisions in *Matter of*

*Chang and Matter of G-*, *supra*. The House Judiciary Committee, where the language of IIRIRA § 601(a) originated, stated in its report that the “primary intent” of the amendment was “to overturn several decisions of the Board of Immigration Appeals, principally *Matter of Chang* and *Matter of G-*.” H.R. Rep. 104-469, Part I, 104th Cong., 2d Sess., 173 (1996) (considering H.R. 2202).

Second, the spousal-eligibility rule rejected by the Second Circuit reflects Congress’s judgment that, in practice, the PRC’s “one couple, one child” policy entails the persecution of both members of the family unit. As the House Committee noted in its report, the PRC’s policies recognize that both partners in a relationship have a deep and abiding interest in the couple’s reproductive life: “*Both men and women* who have met their ‘quota’ for children may be forcibly sterilized. *Couples* with unauthorized children are subjected to excessive fines, and sometimes their homes and possessions are destroyed.” *Id.* at 174 (emphasis added). It is only natural, then, that the policy targets men as well as women, husbands along with wives. Congress’s conclusion to this effect was supported by extensive evidence gathered at hearings held over many years,<sup>7</sup> as well as by the text of Chinese law (*see* p. 5 *supra*).

---

<sup>7</sup> *See, e.g.*, Coercive Population Control in China: New Evidence of Forced Abortion and Forced Sterilization: Hearing Before the H. Comm. on International Relations, 107th Cong., 1st Sess. (Oct. 17, 2001); Hearings on Country Reports on Human Rights Practices During 1995 Before the International Operations and Human Rights Subcomm. of the House International Relations Comm., 104th Cong. 2d Sess. (Mar. 26, 1996); Forced Abortion and Sterilization in China: The View From the Inside: Hearings

Third, any doubt that the 1996 amendment is consistent with spousal eligibility was removed by Congress's further amendment of INA § 101(a)(42) in § 101(g)(2) of the REAL ID Act of 2005, Pub.L. 109-13, Div. B, Title III, § 301, 119 Stat. 231 (2005). Section 601 originally permitted the Attorney General to grant asylum to "not more than a total of 1,000 refugees," 8 U.S.C. § 1157(a)(5) (1994 & Supp. 1998). In the REAL ID Act, Congress *removed* this cap, allowing such asylum grants to an unlimited number of aliens persecuted under a coercive family control program. Congress's action reflects legislative approval of BIA asylum eligibility determinations under INA § 101(a)(42), including the spousal-eligibility rule introduced in *C-Y-Z*. As Judge Katzmann noted,

[w]hile the fact that Congress, in the course of its active attention to immigration issues and legislation, has not amended 8 U.S.C. § 1101(a)(42) in light of the interpretation it has been given by the BIA and the courts does not definitively mean that Congress intended to protect spouses, it does suggest, at the very least, that it was not Congress's intent to foreclose that relief.

---

Before the Subcomm. on Int'l Operations and Human Rights of the House Comm. on Int'l Relations, 105th Cong., 2d Sess. (June 10, 1998).

*Lin*, 494 F.3d at 323 (2007) (Pet. App. 53a) (Katzmann, J., concurring in the judgment en banc). More broadly, it reveals that Congress meant to expand, not restrict, this category of asylum.

Fourth, and finally, the court below, in rejecting the spousal-eligibility rule, was unduly influenced by policy considerations not reflected in the record. Without citing any statutory language or legislative history, the court characterized as “inconceivable” any congressional intent to extend asylum eligibility to spouses because it would have “the perverse effect of creating incentives for husbands to leave their wives,” *Lin*, 494 F.3d at 312 (Pet. App. 30a). Yet the court offered not a single case of a husband leaving behind his wife in order to “capitalize” on her persecution. *Id.* (Pet. App. 30a). The court further overlooked the substantial authority exercised by IJs to deny asylum on the basis of suspected fraud. Fraud in claims of asylum based on coercive family planning, like fraud in asylum cases generally, is addressed by credibility findings and an examination of the applicant’s country conditions, not by policy decisions handed down by courts of appeal. *See, e.g.*, INA § 208(d)(6), 8 U.S.C. § 1158(d)(6) (permanently denying relief “[i]f the Attorney General determines that an alien has knowingly made a frivolous application for asylum”). Finally, the court overlooked that extending asylum eligibility to spouses allows the spouse most capable of escaping China to seek asylum, later bringing in his or her conjugal partner under the derivative asylum provision. *See* INA § 208(b)(3), 8 U.S.C. 1158(b)(3). For all its progress, China remains a closed society; presumptive spousal eligibility provides an important



escape valve when one member of a couple targeted by the PRC's coercive population policies can escape the country but the other cannot.

In the end, by precluding the Government from giving effect to Congress's judgment that the PRC's "one couple, one child" policy targets both partners in the family unit, the court below failed to heed this Court's admonition that "judicial deference to the Executive Branch is especially appropriate in the immigration context where officials 'exercise especially sensitive political functions that implicate questions of foreign relations.'" *INS v. Aguirre-Aguirre*, 526 U.S. 415, 425 (1999) (citations omitted).

### CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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

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

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

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

*Counsel for Petitioner*