No. 99-1932

In the Supreme Court of the United States

PHILIPPE SAUVAGE, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals erred in determining that substantial evidence supports the Board of Immigration Appeals' decision that petitioner's prosecution by the Government of France for fraud and swindling did not constitute persecution.

2. Whether the court of appeals erred in not remanding petitioner's case and ordering the Board of Immigration Appeals to consider new evidence.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3-9) is not reported, but the judgment is noted at 199 F.3d 1333 (Table). The opinions of the Board of Immigration Appeals (Pet. App. 10-20 and 21-30) are not reported.

JURISDICTION

The court of appeals entered its judgment on September 17, 1999. A petition for rehearing was denied on March 3, 2000. Pet. App. 1-2. The petition for a writ of certiorari was filed on June 1, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is a native and citizen of France. Pet. App. 3. Petitioner is a Celtic faith healer who supports the ethnic rights of the Celtic people in the French province of Brittany. *Id.* at 34. In the early 1990s, French officials received approximately 200 complaints from persons who had paid petitioner money for his unsuccessful healing services. See *In re Petition of France for the Extradition of Sauvage*, 819 F. Supp. 896, 897 (S.D. Cal. 1993). They opened an inquiry, and a French investigating magistrate subsequently issued an international warrant for the arrest of petitioner for fraud and swindling, in violation of Section 405 of the French Penal Code. *Ibid.* Fearing his imminent arrest, petitioner left his wife and five children in France and fled to Greenland and, from there, to Canada. Pet. App. 19, 38. In 1992, petitioner twice entered the United States by using a falsified passport. *Id.* at 3, 31, 46.[1] In October 1992, he was arrested in the United States on the basis of an extradition request from France.[2]

In February 1993, the Immigration and Naturalization Service commenced deportation proceedings against petitioner. Pet. App. 31-32. Petitioner admitted that he had entered the country on a false passport, and applied for asylum and withholding of deportation.[3]

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[1] Petitioner has never alleged that he made his fraudulent entry into the United States because he could not have remained safely in Canada.

[2] A magistrate judge denied extradition. *In re Petition of France for the Extradition of Sauvage*, 819 F. Supp. 896 (S.D. Cal. 1993).

[3] To qualify for asylum, an alien must show persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. See 8 U.S.C. 1101(a)(42)(A), 1158(a) (1994 & Supp. IV

The immigration judge denied asylum and withholding of deportation on the ground that the petitioner had not demonstrated a clear probability or well-founded fear of persecution if returned to France. The immigration judge concluded that his prosecution by the French government for fraud reflected the proper enforcement of a valid criminal law rather than a veiled effort to persecute petitioner on the basis of religion or political opinion. *Id.* at 42-46.

2. Petitioner appealed to the Board of Immigration Appeals (Board). While his appeal was pending, he filed a motion to remand the case so that he could apply for adjustment of status based on his intervening marriage to a lawful permanent resident. The Board dismissed the claims for asylum and withholding of deportation and denied the motion to remand. Pet. App. 22-30. The Board found that much of the evidence petitioner submitted to show a reasonable fear of persecution based on his Celtic ethnicity and religion lacked credibility and was improperly translated. *Id.* at 24-25.[4] The Board further ruled that the prosecution of petitioner for fraud and swindling was legitimate and was not a pretext for religious or political persecution.

1998); *INS* v. *Elias-Zacarias*, 502 U.S. 478, 481-482 (1992). To qualify for withholding of deportation, an alien must show that it is more likely than not that his life or freedom would be threatened upon return "on account of race, religion, nationality, membership in a particular social group, or political opinion." See 8 U.S.C. 1253(h); *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 430 (1987); *INS* v. *Stevic*, 467 U.S. 407, 413 (1984).

[4] The Board noted that many of the documents were translated by petitioner's first wife and lacked a translator's certification, and further that, in most instances, the translator "added emphasis and/or explanatory notes, which suggests that the documents were in effect edited." Pet. App. 24.

Id. at 26-28. The Board noted that, despite his national reputation as a "Celtic spiritual leader and healer," petitioner had never been arrested or otherwise bothered by French officials prior to their receipt of hundreds of fraud complaints from angry citizens. *Id*. at 27 & n.7. The Board denied the motion to remand on the ground that petitioner is ineligible for adjustment of status because he "procured his admission into the United States through fraud or willful misrepresentation." *Id*. at 29.

3. Petitioner appealed the dismissal of his asylum and withholding of deportation claims, but not the denial of his motion to remand, to the United States Court of Appeals for the Ninth Circuit. While that appeal was pending, petitioner moved the Board to reopen his case and remand it to permit him to apply for a waiver of inadmissibility and adjust his status to that of lawful permanent resident based on his marriage. Pet. App. 10-11. The Board denied the motion. *Id*. at 10-20. The Board first noted that, in addition to his false entry into the United States, petitioner "is an admitted bigamist," having married a second wife in the United States while still married to his first wife in France. *Id*. at 12. The Board concluded that bigamy was a crime of moral turpitude, further disqualifying petitioner from adjustment of status. *Id*. at 14-15.

In addition, the Board ruled that petitioner had failed to establish that his third wife and their children would suffer extreme hardship if he were deported. The Board found the unsworn declaration of petitioner's third wife to be of little probative value, *id.* at 15-16, especially because she married petitioner while his deportation proceedings were pending and thus "knowing that he was a fugitive who faced deportation back to France," *id*. at 17. The Board further found insufficient

to constitute "extreme hardship" petitioner's wife's reluctance to follow her husband back to France and her concerns that his imprisonment would require her to obtain work outside the home, forcing her children "to undergo the 'extremely traumatic' experience of having the children cared for by a babysitter or in a day care center." *Id.* at 16. Finally, the Board ruled that, in any event, it would deny the adjustment of status in the exercise of its discretion, because petitioner did not marry his current wife until "after the commencement of deportation proceedings against him," committed bigamy at the very time his first wife was helping him with his asylum application, and gave false testimony at his deportation proceeding. *Id.* at 19-20. The Board concluded that "we do not consider the [petitioner] desirable as a permanent resident of the United States." *Id.* at 20.

4. The court of appeals affirmed. Pet. App. 3-9. The court held that substantial evidence supported the Board's conclusions both that the documentary evidence petitioner submitted was not credible and that his criminal prosecution in France did not amount to persecution. *Id.* at 5-7. In particular, the court agreed that the record "supports the [Board's] finding that this was a bona fide prosecution." *Id.* at 7. The court also affirmed the denial of petitioner's motion to reopen, noting that the Board "reasonably concluded" that petitioner's wife would not be forced to remain in the United States and that "any family separation occurring in Europe would result from [petitioner's] criminal prosecution for fraud." *Id.* at 8. The court also sustained the discretionary denial of adjustment of status based on petitioner's repeated fraudulent entries into the United States. *Id.* at 9.

5. While his petition for rehearing was pending, petitioner moved for a temporary stay to obtain his French criminal records and, in the alternative, asked that the case be remanded to the Board for reconsideration in light of those records. The court of appeals denied rehearing, as well as the requested stay and remand. Pet. App. 1-2.

In May 2000, petitioner filed a second motion to reopen with the Board and again requested a stay of deportation on the ground of "new" evidence that he had been convicted of fraud *in absentia* in France in 1995 and sentenced to five years' imprisonment. The application for a stay was denied; the motion to reopen is pending. Pet. 11.

Petitioner filed a second request for a stay from the court of appeals, which was denied. Pet. 12 n.19. Petitioner failed to report to the INS for deportation, as required, on June 23, 2000, and remains at this time a fugitive.[5]

ARGUMENT

1. Petitioner contends that the court of appeals erred in holding both that the French government's prosecution of him for fraud and swindling was not persecution (Pet. 14-18) and that he was not being persecuted "on account of Religion" (*id.* at 18-28). Neither of those claims merits this Court's review. Petitioner does not contend that the court of appeals' ruling conflicts with any decision of this Court or the other courts of appeals. Nor does petitioner disagree with the general legal standard that the court of

[5] A district court declined to grant Sauvage a preliminary injunction against deportation because "Sauvage flouts his legal obligations." *Sauvage* v. *Reno*, No. 00-1134-IEG (AJB) (S.D. Cal. June 23, 2000), slip op. 5.

appeals applied to his case, agreeing that "persecution is not the same as 'punishment for a common law offense.'" Pet. 16; see also *id.* at 14 (conceding that, "[a]s a general matter, * * * the Board has held that fear of prosecution for violations of *fairly administered laws* does not itself qualify one as a 'refugee' or make one eligible for withholding of deportation").[6]

Petitioner simply disagrees with the outcome of the court's application of that legal test to the particular facts of his case. This Court's certiorari jurisdiction, however, "is designed to serve purposes broader than the correction of error in particular cases." *Watt* v. *Alaska*, 451 U.S. 259, 276 n.5 (1981) (Stevens, J., concurring); see also *Boag* v. *MacDougall*, 454 U.S. 364, 367-368 (1982) (Rehnquist, J., dissenting) ("this Court is not a forum for the correction of errors"). That is particularly true when three different adjudicatory forums already have consistently and harmoniously rejected petitioner's fact-bound claims. Petitioner's claims, in other words, do not present any legal issues of broad or enduring importance that merit this Court's review.

2. The court of appeals' holding that petitioner did not satisfy his burden of proving persecution was,

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[6] Petitioner suggests (Pet. 16-17) that the court's decision failed to apply the analysis proposed by the Office of the United Nations High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status* (1992). That argument is unavailing. This Court recently held that the Handbook "is not binding on the Attorney General, the [Board], or the United States courts." See *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 427 (1999). Furthermore, while petitioner implies that the Handbook supports his claim, he fails to establish that anything in the Handbook would "compel[]" the court of appeals to conclude that the French government was persecuting him by prosecuting him for fraud. See *INS* v. *Elias-Zacarias*, 502 U.S. 478, 484 (1992).

moreover, correct. Substantial evidence supported the Board's conclusion that petitioner failed to show that (1) France's law against fraud and swindling was not facially neutral,[7] (2) the law in question was selectively or disproportionately enforced against religious minorities or political dissidents,[8] or (3) petitioner was ever

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[7] Article 405 of the French Penal Code provides:

> Anyone, either using false identities or titles, or acting fraudulently to persuade others of the existence of false companies, of an imaginary power or credit or to raise up hopes or fears of success, of accidents or all other chimerical event, will have obtained or tried to obtain funds, furniture, bonds, notes, agreements, receipts, and will have through one of these means swindled or attempted to swindle totally or partially someone's wealth will be condemned to imprisonment for one to five years at the most and to pay a fine of at least 3600 francs and 2,500,000 francs at most.

Sauvage, 819 F. Supp. at 900 n.2.

[8] Although petitioner complains to this Court (Pet. 21-23) about the five-year sentence imposed—which was within the range authorized by the statute—and cites three reports on country conditions in France alleging that France persecutes some (unspecified) minority religions, none of that evidence was presented to the Board or the court of appeals. See, *e.g.*, *New Haven Inclusion Cases*, 399 U.S. 392, 450 n.66 (1970) ("None of this is record evidence, and we do not consider it."); *Russell* v. *Southard*, 53 U.S. 139, 159 (1851) ("This court must affirm or reverse upon the case as it appears in the record. We cannot look out of it, for testimony to influence the judgment of this court sitting as an appellate tribunal. And, according to the practice of the court of chancery from its earliest history to the present time, no paper not before the court below can be read on the hearing of an appeal."). Nor, in any event, is petitioner's newly supplemented showing "so compelling that no reasonable factfinder could fail to find" (*Elias-Zacarias*, 502 U.S. at 484) that France's prosecution of petitioner is a facade for religious persecution. While his co-defendants—who remained in France to face the charges against them—received lesser sentences, petitioner does not contend that the French government

harassed or threatened because of his religious or political beliefs, or had any untoward encounter with any branch of the French government prior to that government's receipt of hundreds of fraud complaints against him.[9]

Petitioner asserts (Pet. 5, 21-22) that he had no intent to defraud. That argument, of course, was available for petitioner to present as a defense to his criminal prosecution in France, had he not fled to avoid the prosecution. Beyond that, petitioner fails to show either that the record compels the conclusion that he lacked fraudulent intent or that, even if true, France's alleged mistake in prosecuting him transforms his conviction into religious persecution.[10]

Petitioner further asserts (Pet. 21-22) that his religious activity "would be wholly protected religious expression in this country and under well-established

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has any record or practice of imposing five-year sentences for fraud exclusively on religious minorities or political dissidents.

[9] In fact, petitioner testified that he had been a member of the French police force for a number of years. Pet. App. 43.

[10] The magistrate judge's extradition decision is not to the contrary. Cf. Pet. 7. In denying extradition, the magistrate judge held only that, "[u]nder both the French swindling statute and the American statutes prohibiting false advertising and theft, a knowledge or intent requirement must be proved in order to convict," see *Sauvage*, 819 F. Supp. at 900, but that on the limited record presented, the magistrate judge could not discern whether the French magistrate had sufficient evidence of intent, *id.* at 901-902. Indeed, the magistrate judge acknowledged that "the French magistrate may very well have made [the finding of fraudulent intent] based on sufficient evidence," but that the magistrate judge could not "simply adopt that conclusion." *Id.* at 903. The magistrate judge thus held neither that petitioner was innocent of fraud nor that the French government was prosecuting petitioner in bad faith.

international norms." First, even if true, that argument would not compel the Board to conclude that France is persecuting petitioner because of his religion. Second, defrauding hundreds of people out of large sums of money is not religious expression under the laws of this country or international norms. See, *e.g.*, *Molko* v. *Holy Spirit Ass'n*, 762 P.2d 46, 56-58 (Cal. 1988) (en banc), cert. denied, 490 U.S. 1084 (1989).

3. Petitioner also seeks (Pet. 28-30) this Court's review of the court of appeals' refusal to remand his case and to order the Board to consider his "new" evidence—a French court decree finding him guilty *in absentia*—which predated by two years the Board's decision in his case. The court of appeals' decision denying the motion to remand does not conflict with any decision of this Court or the other courts of appeals; the ruling has no consequence beyond this particular case. In fact, the denial of the remand has little impact even on petitioner's case because petitioner already has filed a separate motion to reopen directly with the Board based on his 1995 evidence, and that motion remains pending.

Finally, petitioner's claims do not warrant an exercise of this Court's certiorari jurisdiction in light of his present fugitive status. See n.5, *supra*, and accompanying text; cf. *Molinaro* v. *New Jersey*, 396 U.S. 365, 366 (1970) (convicted defendant's fugitive status "disentitles the defendant to call upon the resources of the Court for determination of his claims").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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