
COMMENT

Authorized Marriages Only? Refugee Relief Under Section 601(a) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996

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INTRODUCTION

In 1983, at the peak of China's population control program, the Chinese government forced its citizens to undergo 21 million sterilizations, 18 million intrauterine device insertions, and 14 million abortions.¹ To these victims and millions thereafter, the United States government offered refugee relief by enacting section 601(a) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("1996 Amendment").² In 1997, the Board of Immigration Appeals ("BIA"), the highest administrative body that interprets and applies immigration law, extended this relief.³ The BIA allowed one spouse to seek refugee relief based on the persecution of his or her spouse.⁴

The BIA extended this relief, however, without clarifying its scope under the 1996 Amendment.⁵ Specifically, the BIA did not define the term "spouse" in its decision.⁶ Thus, the BIA did not address

¹ *Coercive Population Control in China: Hearings Before the Subcomm. on International Operations and Human Rights of the H. Comm. on International Relations*, 104th Cong. 8 (1995) [hereinafter *Hearings*] (testimony of John S. Aird, demographer) (noting that Chinese government forced many of these procedures throughout China).

² Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 601, 110 Stat. 3009-546 (codified as amended at 8 U.S.C. § 1101(a)(42) (2000)); Craig B. Mousin, *Standing with the Persecuted: Adjudicating Religious Asylum Claims After the Enactment of the International Religious Freedom Act of 1998*, 2003 BYU L. REV. 541, 592 n.113 (2003) (stating Congress modified refugee definition to offer relief to persons fearing persecution from China's One Child Policy); see, e.g., *Hearings*, *supra* note 1, at 56 (testimony of asylum seeker Chen Yun Fei). Mrs. Fei testified that she came to the United States because she believed that its government would rescue her from China's coercive population control program. *Hearings*, *supra* note 1, at 56; cf. Press Release, Dep't of Justice, Fact Sheet: Board of Immigration: Final Rule (Aug. 23, 2002), available at <http://www.usdoj.gov/eoir/press/02/BIARulefactsheet.pdf> (stating that millions of refugees come to United States seeking refuge). See generally Hiep D. Truong, *The Illegal Immigration Reform and Responsibility Act of 1996: A Cost Effective Measure for U.S. Citizens or a Punishment for Immigrants Seeking the American Dream?*, 3 DEPAUL DIG. INT'L L. 54 (1997) (arguing that refugees come to United States for refuge, but IIRIRA impedes their ability to be successful and productive members of society).

³ *In re C-Y-Z*, 21 I. & N. Dec. 915, 918-19 (B.I.A. 1997); see Dep't of Justice Executive Office for Immigration Review, Board of Immigration Appeals, <http://www.usdoj.gov/eoir/biainfo.htm> [hereinafter Executive Office for Immigration Review] (last visited Oct. 16, 2006) (describing BIA as highest administrative body that interprets and applies immigration laws).

⁴ *C-Y-Z*, 21 I. & N. Dec. at 918-19.

⁵ *Id.*

⁶ *Id.*

whether a person whose marriage China does not legally recognize qualifies as a spouse under the 1996 Amendment.⁷

The federal circuit courts have addressed the scope of refugee relief under the 1996 Amendment.⁸ The Ninth Circuit has held that refugee relief under the 1996 Amendment applies to persons whose marriages China does not legally recognize.⁹ The Third Circuit, however, has held that such relief applies only to persons whose marriages China does legally recognize.¹⁰

This Comment argues that the Ninth Circuit correctly interpreted the 1996 Amendment by providing refugee relief to persons in marriages not legally recognized by China.¹¹ Part I of this Comment presents a brief background on China's population control program.¹² Part II describes the 1996 Amendment, the circuit split, and the leading circuit cases.¹³ Part III argues that refugee relief under the 1996 Amendment applies to persons whose marriages China does not legally recognize.¹⁴ First, the 1996 Amendment contains broad language that provides courts with a textual basis for providing refugee relief.¹⁵ Second, federal courts cannot rely on China's marriage law in determining refugee claims.¹⁶ Such reliance would be absurd because China's marriage law is an integral part of its population control program.¹⁷ Last, relying on China's marriage law undermines congressional intent.¹⁸

⁷ *Id.*

⁸ *Chen v. Gonzales*, 418 F.3d 110, 111 n.2 (1st Cir. 2005) (acknowledging that there is circuit split on scope of refugee relief under 1996 Amendment); *Ma v. Ashcroft*, 361 F.3d 553, 561 (9th Cir. 2004); *Chen v. Ashcroft*, 381 F.3d 221, 235 (3d Cir. 2004); *see infra* Part II.D.

⁹ *Ma*, 361 F.3d at 561.

¹⁰ *Chen*, 381 F.3d at 235.

¹¹ *See infra* Part III.

¹² *See infra* Part I.

¹³ *See infra* Part II.

¹⁴ *See infra* Part III.

¹⁵ *See infra* Part III.A.

¹⁶ *See infra* Part III.B.

¹⁷ *See infra* Part III.B (discussing that federal courts must avoid statutory interpretations that would produce absurd results).

¹⁸ *See infra* Part III.C.

I. BACKGROUND: CHINA'S ONE CHILD POLICY

In 1949, when the current Chinese government assumed power, it promoted population growth.¹⁹ Chinese leaders thought a large population would enable China to achieve its production and construction goals.²⁰ Moreover, because China did not have social security and pension plans, leaders believed that a larger population meant more children who would provide for their parents.²¹ In the 1970s, however, the Chinese government began to worry about the repercussions of unchecked population growth.²² Specifically, officials became concerned about the government's ability to provide food, employment, and housing to future generations.²³

In response to these concerns, the Chinese government instituted a number of family planning policies, such as a propaganda campaign that encouraged later marriages and longer intervals between births.²⁴ These early family planning policies eventually became China's population control program.²⁵ In 2001, China passed formal legislation that codified this program.²⁶ China's Population and Family Planning Law permits couples to have only one child.²⁷ The

¹⁹ Kimberly Sicard, *Section 601 of IIRIRA: A Long Road to a Resolution of United States Asylum Policy Regarding Coercive Methods of Population Control*, 14 GEO. IMMIGR. L.J. 927, 928 (2000).

²⁰ *Id.*

²¹ *Id.* The family is the basic source of support for the elderly. Xizhe Peng, *Population Policy and Program in China: Challenge and Prospective*, 35 TEX. INT'L L.J. 51, 59 (2000).

²² Sicard, *supra* note 19, at 928.

²³ *Id.*

²⁴ Gerrie Zhang, Comment, *U.S. Asylum Policy and Population Control in the People's Republic of China*, 18 HOUS. J. INT'L L. 557, 561 (1996).

²⁵ Sicard, *supra* note 19, at 928.

²⁶ U.S. DEP'T OF JUSTICE, CHINA (INCLUDES TIBET, HONG KONG, AND MACAU): COUNTRY REPORT ON HUMAN RIGHTS PRACTICES — 2002 (2003), available at <http://www.state.gov/g/drl/rls/hrrpt/2002/18239.htm> [hereinafter COUNTRY REPORT ON HUMAN RIGHTS].

²⁷ See Wesley Hsu, *The Tragedy of the Golden Venture: Politics Trump the Administrative Procedures Act and the Rule of Law*, 10 GEO. IMMIGR. L.J. 317, 319-22 (1996) (detailing China's One Child Policy). In 1984, China allowed certain categories of couples to have more than one child. Sicard, *supra* note 19, at 928. For example, the Chinese government permits non-ethnic Han couples to have more than one child. *Id.* The Chinese government also allows couples who live in rural areas and already have a daughter to have a second child after a certain amount of time has passed. *Id.*; see COUNTRY REPORT ON HUMAN RIGHTS, *supra* note 26.

law is more commonly known as China's "One Child Policy" ("OCP").²⁸

The Chinese government uses education, incentives, and penalties to further its OCP.²⁹ It sponsors education campaigns to raise public awareness of the consequences of unchecked population growth.³⁰ The Chinese government gives incentives to men and women who comply with the OCP, such as monthly stipends and medical and educational benefits.³¹ In some instances, the government gives these compliant individuals larger living quarters.³²

The law's penalties are the more controversial component of China's OCP.³³ Men and women who do not comply with the OCP face fines, job demotions, and the withholding of social services.³⁴ They may also suffer more coercive penalties, such as severe fines, imprisonment, mandatory intrauterine device ("IUD") insertions, forced abortions, and sterilizations.³⁵ The OCP does not specify how

²⁸ See, e.g., Zhang, *supra* note 24, at 561 (discussing development of China's One Child Policy).

²⁹ Sicard, *supra* note 19, at 929-30; Zhang, *supra* note 24, at 562-63; see also COUNTRY REPORT ON HUMAN RIGHTS, *supra* note 26. See generally JOHN S. AIRD, SLAUGHTER OF THE INNOCENTS, COERCIVE BIRTH CONTROL IN CHINA (1990) (documenting and analyzing development of China's One Child Policy).

³⁰ Sicard, *supra* note 19, at 929-30; Zhang, *supra* note 24, at 563-64.

³¹ See sources cited *supra* note 30.

³² See sources cited *supra* note 30.

³³ See generally AIRD, *supra* note 29, at 1 ("China's birth control program has earned a worldwide reputation as the most draconian since King Herod's slaughter of the innocents.").

³⁴ Zhang, *supra* note 24, at 563. See generally *Chen v. INS*, 95 F.3d 801 (9th Cir. 1996) (denying asylum to male Chinese citizen whose home had been destroyed, whose children had been barred from attending school, and who had been fined and scheduled for sterilization after having third child).

³⁵ See generally *Dong v. Slattery*, 84 F.3d 82 (2d Cir. 1996) (forcing woman to have abortion); *Zheng v. INS*, 44 F.3d 379 (5th Cir. 1995) (forcing Chinese citizens to undergo sterilization); *Chen v. Slattery*, 862 F. Supp. 814 (E.D.N.Y. 1994) (applying strong economic pressures); AIRD, *supra* note 29. An IUD is a form of contraception where a medical professional places a small plastic device inside the uterus. BOSTON WOMEN'S HEALTH BOOK COLLECTIVE, OUR BODIES, OURSELVES 295 (1992); Medline Plus, Medical Dictionary, <http://www.nlm.nih.gov/medlineplus/plusdictionary.html>, "intrauterine device" (Oct. 2, 2006); Planned Parenthood, Your Contraceptive Choices, <http://www.plannedparenthood.org/pp2/portal/files/portal/medicalinfo/birthcontrol/pub-contraception-choices-3.xml> (last visited Oct. 2, 2006); see also L.M. Cirando, Note, *Informed Choice and Population Policy: Do the Population Policies of China and the United States Respect and Ensure Women's Right to Informed Choice?*, 19 FORDHAM INT'L L.J. 611, 642 n.138 (1995).

local officials should implement these penalties.³⁶ Rather, the OCP establishes a quota system and permits local government officials to determine its implementation.³⁷ In other words, the Chinese government allows local officials to determine both the law's penalties, as well as the degree of severity used to enforce them.³⁸

The Chinese government has given local officials broad discretion to enforce its OCP.³⁹ The government relies on local officials in approximately 2,300 county-level offices, 31,000 town-level offices, and many village-level offices throughout the country to enforce the OCP.⁴⁰ Thus, this reliance on thousands of individual officials has resulted in arbitrary and inconsistent application of the OCP's penalties.⁴¹ For instance, some local officials have deprived citizens of their farm land, imposed fines of up to three times couples' annual incomes, and even destroyed couples' homes.⁴² Further, under the OCP, officials have forced women to undergo abortions, regardless of how far along their pregnancies have progressed.⁴³ Officials have even

³⁶ Zhang, *supra* note 24, at 563; see COUNTRY REPORT ON HUMAN RIGHTS, *supra* note 26.

³⁷ COUNTRY REPORT ON HUMAN RIGHTS, *supra* note 26.

³⁸ Zhang, *supra* note 24 at 569; COUNTRY REPORT ON HUMAN RIGHTS, *supra* note 26.

³⁹ See Zhang, *supra* note 24, at 569.

⁴⁰ Peng, *supra* note 21, at 56. These local officials further rely on community members. Cirando, *supra* note 35, at 656. The Chinese government rewards local officials who achieve the birth quotas for their province. Rachel Farkas, *The Bush Administration's Decision to Defund the United Nations Population Fund and Its Implication for Women in Developing Nations*, 18 BERKELEY WOMEN'S L.J. 239, 239 (2003). But it also punishes them with sanctions, demotions, and salary reductions if they fail to achieve the quotas. Xiaorong Li, *License to Coerce: Violence Against Women, State Responsibility, and Legal Failures in China's Family Planning Program*, 8 YALE J.L. & FEMINISM 145, 152 (1996). In some provinces, the local government officials publicly monitor a woman's menstrual cycle and contraceptive use. Cirando, *supra* note 35, at 656; Farkas, *supra*, at 239.

⁴¹ Zhang, *supra* note 24, at 563; cf. Cirando, *supra* note 35, at 656-57 (arguing that Chinese government's inaction and local government officials' broad power results in continuing use of physical force and coercion); Farkas, *supra* note 40, at 253 (emphasizing that reports of coercive practices and abuse continue to exist); Nicole M. Skalla, *China's One-Child Policy: Illegal Children and the Family Planning Law*, 30 BROOK. J. INT'L L. 329, 361 (2004) (discussing how China's codification of its OCP has not changed how it is enforced).

⁴² Li, *supra* note 40, at 154; Skalla, *supra* note 41, at 339.

⁴³ Li, *supra* note 40, at 163. "Since no restriction on gestational period is imposed and the goal is to achieve the targeted birth quota, family-planning officials are obligated and motivated to track down women with 'out-of-plan' pregnancies and make sure that they have abortions, regardless of how far their pregnancies have advanced." *Id.* In some areas, local officials mobilize local militia to track down women who have refused to undergo abortion or sterilization. *Id.* at 164. In some

applied coercive penalties based on their mere suspicion that a woman is pregnant.⁴⁴ Therefore, local officials have subjected and continue to subject more Chinese citizens to coercive penalties under the OCP.⁴⁵

Key to the OCP's enforcement is China's 1980 Marriage Law.⁴⁶ In fact, the 1980 Marriage Law is an integral part of the OCP.⁴⁷ The law requires married couples to register their marriages with the government.⁴⁸ Without this registration, the Chinese government will not legally recognize a marriage.⁴⁹ Further, the government forbids couples without legally recognized marriages from having children.⁵⁰

Because China's marriage law is an integral part of its OCP, local government officials have also enforced, and continue to enforce, the marriage law arbitrarily and inconsistently.⁵¹ For example, the 1980 Marriage Law establishes that the minimum age for marriage is twenty-two years for men and twenty years for women.⁵² In some provinces, however, local officials have increased the legal age for marriage to twenty-three, twenty-four, or twenty-five.⁵³ If a woman in

provinces, when a fetus survives an abortion, officials suffocate the fetus. *Id.* at 163.

⁴⁴ *E.g.*, *Li v. Ashcroft*, 356 F.3d 1153, 1156 (9th Cir. 2004) (finding that Chinese government forced applicant to undergo violent pregnancy examination based on rumor that applicant was pregnant).

⁴⁵ *Ma v. Ashcroft*, 361 F.3d 553, 560 (9th Cir. 2004) (finding that China designed its marriage law to reduce period of time married couple could have children); *cf. Hearings*, *supra* note 1, at 26 (testimony of John S. Aird, demographer) (arguing that China uses its adoption laws to compel compliance with its OCP); Sicard, *supra* note 19, at 929 (stating that by 1993 China had prevented 100 million couples from bearing second children).

⁴⁶ Marriage Law (promulgated by the Standing Comm. Nat'l People's Cong., Sept. 10, 1980, effective Jan. 1, 1981) art. 5, *translated in* http://www.novexc.com/marriage_law.html (P.R.C.) [hereinafter Marriage Law] (stating that legal age for marriage is twenty-two for men and twenty for women, and encouraging late marriage and late childbirth). In fact, the Chinese government only provides birth control and family planning services to couples in legally recognized marriages. Peng, *supra* note 21, at 58.

⁴⁷ Marriage Law, *supra* note 46.

⁴⁸ *Id.* art. 7.

⁴⁹ *Id.*

⁵⁰ *Id.* art. 2 (setting forth that "[f]amily planning shall be practiced"). Thus, article 2 imposes a duty on married couples to comply with its OCP. *Id.* The OCP permits only legally recognized married couples to have children. See sources cited *supra* note 27. In fact, the Chinese government offers free contraceptive services and supplies to married women. Peng, *supra* note 21, at 58.

⁵¹ See *Chen v. Ashcroft*, 381 F.3d 221, 223 n.1 (3d Cir. 2004) (acknowledging that some local government officials have established higher requirements for marriages).

⁵² Marriage Law, *supra* note 46.

⁵³ *Chen*, 381 F.3d at 223 (finding some local officials established higher minimum

an illegal marriage becomes pregnant, officials consider it an unauthorized pregnancy.⁵⁴ The Chinese government classifies such unauthorized pregnancies as violations of its OCP. Local officials can then subject such a couple to any of its penalties, like forced abortion or sterilization.⁵⁵ Thus, the marriage law permits the Chinese government to subject more of its citizens to coercive penalties.⁵⁶

II. THE STATE OF THE LAW

The United States is the most vocal opponent of China's OCP.⁵⁷ To address the OCP's penalties, Congress passed the 1996 Amendment, which modified the refugee definition to offer refugee relief to OCP

age for marriage, such as twenty-five years for men and twenty-three years for women); Tara A. Gellman, *The Blurred Line Between Aiding Progress and Sanctioning Abuse: United States Appropriations, The UNFPA and Family Planning in the P.R.C.*, 17 N.Y.L. SCH. J. HUM. RTS. 1063, 1073 n.55 (2001) (noting some local officials established minimum age for marriage at twenty-four years for women).

⁵⁴ *Ma v. Ascroft*, 361 F.3d 553, 560 (9th Cir. 2004); see Skalla, *supra* note 41, at 330 (discussing how children from illegal marriages or born out of wedlock "have no legal identity").

⁵⁵ Marriage Law, *supra* note 46. Article 5 states: "Late marriage and late childbirth shall be encouraged." *Id.*; see Skalla, *supra* note 41, at 333 n.4. In 2001, the Chinese government amended its 1980 Marriage Law. Skalla, *supra* note 41, at 354. Among its many additions, the Chinese government included a provision that expressly defines a void marriage. *Id.* at 338. It does not matter whether a couple live together as husband and wife. Xiaoqing Feng, *A Review of the Development of Marriage Law in the People's Republic of China*, 78 U. DET. MERCY L. REV. 331, 348 (2002). The "marriage relationship is deemed invalid and cannot be protected by law." *Id.* Local officials will likely subject such a couple to sterilization or IUD insertion. Peng, *supra* note 21, at 56. Officials frequently use these two procedures due to local budget constraints. *Id.*

⁵⁶ *Ma*, 361 F.3d at 560 (finding that China designed its marriage law to reduce period of time couple could have children) (citing *Hearing on China's Planned Birth Policy Before the Subcomm. on International Operations and Human Rights of the H. Comm. on International Relations*, 105th Congress (1998)); cf. *Hearings*, *supra* note 1, at 26 (testimony of John S. Aird, demographer) (arguing that China uses its adoption laws to compel compliance with its OCP); Sicard, *supra* note 19, at 929 (stating that by 1993 China had prevented 100 million couples from bearing second children) (citing April Adell, Note, *Fear of Persecution for Opposition to Violations of the International Human Right to Found a Family as a Legal Entitlement to Asylum for Chinese Refugees*, 24 HOFSTRA L. REV. 789, 792 (1996)). For more information about China's adoptions laws, see DEATH BY DEFAULT: A POLICY OF FATAL NEGLIGENCE IN CHINA'S STATE ORPHANAGES (Human Rights Watch ed., 1996) (documenting patterns of cruelty, abuse, and neglect in China's state orphanages and discussing China's adoptions laws).

⁵⁷ See generally Farkas, *supra* note 40, at 237 (analyzing U.S. government's investigation of China's population control law and practices).

victims.⁵⁸ The 1996 Amendment allows a person to seek refugee relief based on his or her experience resisting a coercive population control program.⁵⁹

A. *The Original Refugee Definition Placed an Additional Burden on Those Facing Coercive Population Control Programs*

Before the 1996 Amendment's passage, an applicant could not base his or her refugee claim on experience with, or resistance, to China's OCP.⁶⁰ Rather, he or she had to satisfy the refugee definition.⁶¹ Federal law defines "refugee" as one who can show persecution or a well-founded fear of persecution based on one of the following five categories: race, religion, nationality, membership in a particular social group, or political opinion.⁶²

Accordingly, prior to the 1996 Amendment, an applicant seeking refugee relief from a coercive population control program had to show that his or her experience fell within one of the five categories. That is, the applicant had to demonstrate that his or her government selectively applied a coercive penalty to him or her.⁶³ For example, a person would have to show that the Chinese government forcibly sterilized him because he is a member of a certain religion.⁶⁴ Thus, before the 1996 Amendment, an applicant's experience with, or resistance to, a coercive population control program, in and of itself, was insufficient to gain refugee status.⁶⁵

⁵⁸ Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 601, 110 Stat. 3009-546 (codified as amended at 8 U.S.C. § 1101(a)(42) (2000)); see *infra* Part II.B.

⁵⁹ 8 U.S.C. § 1101(a)(42).

⁶⁰ *In re Chang*, 20 I. & N. Dec. 38, 44 (B.I.A. 1989) (finding that refugee claim based solely on person's experience with China's population control program must fail).

⁶¹ *Id.*

⁶² 8 U.S.C. § 1101(a)(42).

⁶³ *Lin v. Gonzales*, 416 F.3d 184, 187 (2d Cir. 2005) (citing *Chang*, 20 I. & N. Dec. at 44) (stating that victim of China's coercive population control program must show Chinese government specifically targeted him or her on basis of one of recognized grounds).

⁶⁴ *Chang*, 20 I. & N. Dec. at 44. The BIA denied withholding of deportation because it found that China's OCP did not constitute persecution on any statutory basis, such as political opinion, religion, or race. *Id.*

⁶⁵ *Id.*

B. *The 1996 Amendment Removed the Burden Placed on Those Facing Coercive Population Control Programs*

As reports of China's OCP surfaced, Congress became aware of the law's atrocities and wanted to address them.⁶⁶ As a result, Congress modified the refugee definition by passing the 1996 Amendment.⁶⁷ Specifically, Congress modified the refugee definition's political opinion category to include resistance to a coercive population control program.⁶⁸ Thus, an applicant seeking refugee relief may now base his

⁶⁶ Sicard, *supra* note 19, at 932-35. Two incidents attracted the attention of the international community to coercive population control measures in China. *Id.* at 932. In 1989, 150,000 Chinese troops mobilized and stifled prodemocracy rallies at Tiananmen Square, killing one thousand Chinese civilians. *Id.* This incident brought human rights abuses in China to the forefront, including its OCP. *Id.* In 1993, a freight ship called the *Golden Venture* ran aground off the coast of New York. *Id.* Hundreds of Chinese refugees had been smuggled on this ship. *Id.* Six died during the swim to shore and approximately 90% applied for refugee status based on their resistance to China's OCP. *Id.* The Clinton administration, however, denied relief to the *Golden Venture* refugees. *Id.* at 935. The Administration also implemented a campaign targeting the smuggling of refugees and the filing of fraudulent claims. *Id.* In time, reports of the OCP's atrocities surfaced and spurred Congress to take legislative action. *Li v. Ashcroft*, 356 F.3d 1153, 1157 (9th Cir. 2004). "Concern for the victims of these harsh population control practices prompted Congress to amend the definition of 'refugee.'" *Id.* Congress even conducted hearings on China's OCP to show that the refugee definition needed to be modified. *E.g., Hearings, supra* note 1, at 55 (statement of Eni F. H. Faleomavaega, Member, H. Comm. on Int'l Relations). As stated by Congressman Faleomavaega:

I certainly have a very deep interest in wanting to know what the witnesses have here before us, what they have to share with us in the unfortunate experiences they have had in their lives. And hopefully not only to make it as a matter of public record but certainly something that the Congress ought to address very seriously and very forcefully.

Id. Fellow representatives, such as Congressman Christopher Smith, echoed this sentiment, stating: "[T]he purpose of this hearing is to hear their stories, to bring home to Congress and to the American public the horrors to which they have been subjected and the brutality that they will face if the Clinton administration forcibly returns them to China." *Hearings, supra* note 1, at 54 (statement of Christopher H. Smith, Chairman, Subcomm. on Int'l Operations and Human Rights).

⁶⁷ 8 U.S.C. § 1101(a)(42)(B) (2000).

⁶⁸ *Id.* Stated in full, § 1101(a)(42)(B) provides:

For purposes of determinations under this chapter, 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

or her claim solely on experience with, or resistance to, China's OCP.⁶⁹ An applicant no longer bears the additional burden of proving that the government selectively applied a coercive OCP penalty, because the 1996 Amendment classified resistance to a coercive population program as persecution under political opinion.⁷⁰

In addition, the same provision allows an applicant to seek refugee relief based on "other resistance" to a coercive population control program.⁷¹ This phrase has existed since Congress created the modified refugee definition.⁷² In fact, Congress has not changed it in any version of the definition.⁷³ Thus, from the very beginning Congress included this language to encompass unknown or unanticipated forms of resistance to a coercive population control program.⁷⁴

shall be deemed to have a well founded fear of persecution on account of political opinion.

Id. See generally *Qu v. Gonzales*, 399 F.3d 1195 (9th Cir. 2005) (citing *In re X-P-T*, 21 I. & N. Dec. 634 (B.I.A. 1996)) (determining that person who resisted coercive population control program has suffered past persecution on account of political opinion); *Ma v. Ashcroft*, 361 F.3d 553, 561 (9th Cir. 2004) (finding that person in marriage not legally recognized by China could apply for refugee relief under 1996 Amendment); *Chen v. Ashcroft*, 381 F.3d 221, 235 (3d Cir. 2004) (finding it is reasonable to limit political opinion category to legally recognized marriages only); *Lin v. Ashcroft*, 385 F.3d 748 (7th Cir. 2004) (noting legislative history of 1996 Amendment and Congress's concern to not send victims back to undergo forced abortions and sterilizations); *Qiu v. Ashcroft*, 329 F.3d 140 (2d Cir. 2003) (finding that person can base his refugee claim on his wife's forced sterilization); *Zhao v. U.S. Dep't of Justice*, 265 F.3d 83 (2d Cir. 2001) (noting that 1996 Amendment expressly supercedes *In re Chang*, 20 I. & N. Dec. 38, 44 (B.I.A. 1989)).

⁶⁹ *In re C-Y-Z*, 21 I. & N. Dec. 915, 921 (B.I.A. 1997). The 1996 Amendment provided refugee relief to persons who suffer from a coercive population control program that "fails to respect fundamental human rights." *Id.*

⁷⁰ 8 U.S.C. § 1101(a)(42)(B).

⁷¹ *Id.*

⁷² H.R. 2202, 104th Cong. § 501(a) (2d Sess. 1995) (demonstrating Congress included phrase "other resistance" since creation of modified refugee definition).

⁷³ *Id.*

⁷⁴ See *Yuan v. U.S. Dep't of Justice*, 416 F.3d 192, 197-98 (2d Cir. 2005); *Li v. Ashcroft*, 356 F.3d 1153, 1157 (9th Cir. 2004); cf. *Hearings, supra* note 1, at 29 (statement of Christopher H. Smith, Member, H. Comm. on Int'l Relations). Prior to 1994, the United States had "the longstanding policy of granting asylum to applicants who can prove a well-founded fear of forced abortion or forced sterilization or other forms of persecution for resistance to the PRC coercive population control program." *Id.*; see also *Yuan*, 416 F.3d at 197-98 (acknowledging that phrase "other resistance" may support extending relief beyond actual victims, but refraining from weighing in on issue).

Even with this modification, the refugee definition provides no guarantee that applicants will receive refugee relief.⁷⁵ An immigration court must still find that an applicant's refugee claim is credible.⁷⁶ When the 1996 Amendment was enacted, even if a court determined a claim was credible, it could still withhold relief, because Congress had

⁷⁵ See 8 U.S.C. § 1158(b)(1)(A) (2000) (setting forth that “the Attorney General may grant asylum to an alien who has applied for asylum . . . if the Secretary of Homeland Security or the Attorney General determines that such alien is a refugee within the meaning of section 1101(a)(42)(A) of this title”); see also *Zhang v. INS*, 386 F.3d 66, 70-71 (2d Cir. 2004) (“Even if an applicant establishes his eligibility for asylum, however, the Attorney General retains discretion whether to grant the request.”). The Attorney General has delegated his authority to the BIA. See e.g., 8 C.F.R. § 1003.1(d) (2000) (describing BIA's powers); 8 C.F.R. § 1003.1(g) (noting Attorney General expressly delegates rule-making authority to BIA). Within the BIA, the immigration judges also enjoy discretionary power. 8 U.S.C. § 1158(b)(1)(B)(ii) (2000) (“The testimony of the applicant may be sufficient to sustain the applicant's burden without corroboration, but only if the applicant satisfies the trier of fact that the applicant's testimony is credible, is persuasive, and refers to specific facts sufficient to demonstrate that the applicant is a refugee. In determining whether the applicant has met the applicant's burden, the trier of fact may weigh the credible testimony along with other evidence of record. Where the trier of fact determines that the applicant should provide evidence that corroborates otherwise credible testimony, such evidence must be provided unless the applicant does not have the evidence and cannot reasonably obtain the evidence.”); 8 C.F.R. § 1003.10 (“Immigration Judges, as defined in 8 C.F.R. part 1, shall exercise the powers and duties in this chapter regarding the conduct of exclusion, deportation, removal, and asylum proceedings and such other proceedings which the Attorney General may assign them to conduct.”); Jared Joyce-Schleimer, *Developments in the Legislative Branch: The State of the REAL ID Act of 2005*, 19 GEO. IMMIGR. L.J. 611, 611-12 (2005) (stating that “[i]mmigration Judges (IJs) are afforded greater discretion in hearings, as the Act (1) allows IJs to make determinations of an applicant's credibility based on indirect evidence . . . (2) gives no rebuttable presumption of credibility to the applicant except on appeal; and (3) expands definitions of ‘terrorist activity’ and ‘terrorist organization’ to expand grounds for inadmissibility based on support of terrorism. Further, the Act constricts judicial review of IJs' determinations in hearing such requests. In particular, the Act provides that (1) no court may reverse findings concerning availability of corroborative evidence, thus establishing a deferential factual review standard where previously there was no set standard; (2) no court may review any discretionary judgment, decision, or action made in removal proceedings; and (3) only U.S. Courts of Appeals have jurisdiction to review removal orders.”).

⁷⁶ See sources cited *supra* note 75. Refugees often leave their country of origin “under urgent circumstances.” See *Zhang v. INS*, 386 F.3d 66, 71 (2d Cir. 2004). Courts recognize that in some cases, a refugee can only present his or her testimony because he or she does not have or cannot access any corroborating evidence. *Id.* In this situation, a court may find an applicant's claim credible if his or her testimony is consistent and detailed. *Id.* (citing *Diallo v. INS*, 232 F.3d 279, 285 (2d Cir. 2000)).

prescribed an annual cap of 1,000 persons.⁷⁷ In other words, immigration courts could grant refugee status to only 1,000 people per year.⁷⁸ If courts reached the annual cap and it still found applicants had credible claims, the government would place those applicants on a waiting list.⁷⁹ In 2005, Congress repealed this cap when the number of credible applicants on the waiting list exceeded 9,000 persons.⁸⁰

C. *The Board of Immigration Appeals Allowed One Spouse to Seek Refugee Relief Based on the Experience of the Other Spouse*

The United States Department of Justice (“DOJ”) oversees the adjudication of immigration cases, including refugee claims.⁸¹ Within the DOJ, the BIA, the highest administrative body for interpreting and applying immigration laws, reviews the decisions of immigration

⁷⁷ Immigration and Nationality Act, ch.1, § 207(a)(5), *repealed by* REAL ID Act of 2005, Pub. L. No. 109-13, § 101(g)(2), 119 Stat. 305 (2005) (setting forth that immigration courts could not grant refugee asylum to more than 1,000 persons per year).

⁷⁸ *Id.*

⁷⁹ *Id.*; see also U.S. Citizenship and Immigration Services, *Resistance to Coercive Population Control Programs*, <http://uscis.gov/graphics/services/asylum/cpc.htm> (last visited Oct. 16, 2006) (explaining that if number of persons eligible for asylum exceeded 1,000 annually, government would give those individuals conditional status).

⁸⁰ REAL ID Act of 2005, Pub. L. No. 109-13, § 101(g), 119 Stat. 231 (2005); see U.S. DEP’T OF JUSTICE, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, FY 2003 STATISTICAL YEAR BOOK 1, VI fig.20 (2004) (showing total number of appeals from immigration judges’ decision involving Chinese nationals was 8,873); News Release, Executive Office for Immigration Review, EOIR Notifies Persons Eligible for Full Asylum Benefits for Fiscal Year 2004 Based on Coercive Population Control Policies (Dec. 16, 2004) (showing that United States receives “greater than 1,000” claims each year and noting that before repeal of annual cap there were approximately 9,000 people on waiting list), *available at* <http://www.usdoj.gov/eoir/press/04/CPCAsylumReleaseDec04.htm>. Therefore, a statutory construction of the 1996 Amendment cannot rely on the existence of an annual cap. *Lin v. Gonzales*, 416 F.3d 184, 188 n.1 (2d Cir. 2005).

⁸¹ See Dep’t of Justice, Executive Office for Immigration Review, Responsibilities, <http://www.usdoj.gov/eoir/responsibilities.htm> (last visited Oct. 2, 2006).

judges (“IJ”).⁸² The BIA frequently reviews refugee claims under the 1996 Amendment that have been denied by an IJ.⁸³

In re C-Y-Z is the seminal BIA decision concerning refugee relief under the 1996 Amendment.⁸⁴ Arguably, *C-Y-Z* ignited the current circuit split.⁸⁵ In *C-Y-Z*, a Chinese national claimed that Chinese government officials forced his wife to be fitted with an IUD after the birth of their first child.⁸⁶ When he objected, government officials arrested him.⁸⁷ Following the birth of their second child, officials

⁸² *Id.*; see also 8 C.F.R. § 1003.1(g) (2000) (noting Attorney General expressly delegates rule-making authority to BIA). Stated in full, § 1003.1(g) provides:

Decisions as precedents. Except as Board [i.e., BIA] decisions may be modified or overruled by the Board or the Attorney General, decisions of the Board, and decisions of the Attorney General, shall be binding on all officers and employees of the Department of Homeland Security or immigration judges in the administration of the immigration laws of the United States. By majority vote of the permanent Board members, selected decisions of the Board rendered by a three-member panel or by the Board en banc may be designated to serve as precedents in all proceedings involving the same issues or issues. Selected decisions designated by the Board, decisions of the Attorney General, and decisions of the Secretary of Homeland Security to the extent authorized in paragraph (i) of this section, shall serve as precedents in all proceedings involving the same issues or issues.

8 C.F.R. § 1003.1(g); see also Executive Office for Immigration Review, *supra* note 3.

⁸³ See Executive Office for Immigration Review, *supra* note 3 (stating BIA reviews denials, which include denials of refugee claims made under 1996 Amendment). The majority of the BIA’s docket involves orders of removal and applications for relief from removal. *Id.* Removal is the expulsion of an alien from the United States. U.S. Citizenship and Immigration Services, Glossary and Acronyms, <http://uscis.gov/graphics/glossary3.htm#R> (last visited Oct. 2, 2006). The BIA rarely hears oral arguments. Executive Office for Immigration Review, *supra* note 3. The BIA has nationwide jurisdiction to review appeal from decisions by immigration judges and by Department of Homeland Security (“DHS”) officers. *Id.* Federal circuit courts judicially review BIA decisions on appeal. See 8 U.S.C. § 1252(b) (2000) (authorizing federal appellate jurisdiction over BIA decisions); see also *Abdulai v. Ashcroft*, 239 F.3d 542, 548-49 (3d Cir. 2001) (noting that federal courts have authority to review BIA’s final orders of removal). The BIA’s decisions only bind DHS officers and immigration judges. See Executive Office for Immigration Review, *supra* note 3. There are circumstances, however, where the BIA’s interpretation requires the circuit courts to defer to it. See *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 842-43 (1984) (setting forth standard of review for administrative agency decisions).

⁸⁴ 21 I. & N. Dec 915 (B.I.A. 1997).

⁸⁵ *Id.* at 915 (allowing person to apply for asylum based on his wife’s forced abortion); see also *Chen v. Ashcroft*, 381 F.3d 221, 224-35 (3d Cir. 2004) (analyzing *C-Y-Z* in great detail before deciding case on its merits).

⁸⁶ *C-Y-Z*, 21 I. & N. Dec. at 915-16.

⁸⁷ *Id.* at 916.

further fined him.⁸⁸ After the birth of their third child, government officials forced his wife to undergo sterilization.⁸⁹

The IJ found the applicant ineligible for refugee relief.⁹⁰ The applicant appealed the decision to the BIA.⁹¹ On appeal, the BIA considered whether the applicant could establish persecution based upon his wife's sterilization.⁹² The BIA held that one spouse may establish persecution based on the coerced abortion or sterilization of the other spouse.⁹³ However, the BIA majority did not fully explain its rationale.⁹⁴ For example, the BIA did not identify specific text in the 1996 Amendment that supported its interpretation.⁹⁵ Moreover, the BIA did not address the issue of who can qualify as a spouse.⁹⁶ That is, the BIA did not address whether a person could be a spouse even if China does not legally recognize his or her marriage.⁹⁷

D. The Circuit Split

Two Courts of Appeal have split over whether refugee relief under the 1996 Amendment includes persons in marriages that China does not legally recognize.⁹⁸ The Ninth Circuit has held that refugee relief

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.* The IJ did not determine whether the applicant's testimony was credible. *Id.* The judge believed that the applicant was merely "rid[ing] on his wife's coattails" in his refugee claim. *Id.* That is, the immigration judge reasoned that only the applicant's wife allegedly suffered under the OCP and found that the applicant had not personally suffered or feared persecution. *Id.* The immigration judge reasoned that the applicant's experiences did not qualify as persecution because officials only threatened to arrest him, briefly detained him, and imposed a minimal fine. *Id.*

⁹¹ *Id.* at 915.

⁹² *Id.* at 917.

⁹³ *Id.* at 918. When one spouse is forced to undergo an abortion or sterilization procedure, those acts are also acts against the other spouse. *Id.*

⁹⁴ See *id.* at 918-19 (failing to explain rationale of its holding). Any knowledge of what was the majority's rationale can only be gleaned from the concurring and dissenting board members' opinions. *Id.* at 920-36.

⁹⁵ See *id.* (failing to identify specific text in 1996 Amendment that would support its interpretation); see also *Lin v. Gonzales*, 416 F.3d 184, 186-87 (2d Cir. 2005) (noting BIA did not articulate its rationale or point to specific language to support its interpretation); *Zhang v. INS*, 386 F.3d 66, 73 (2d Cir. 2004) (recognizing BIA failed to explain its holding in *C-Y-Z*).

⁹⁶ *C-Y-Z*, 21 I. & N. Dec. at 918-20 (failing to address who qualifies as a spouse).

⁹⁷ *Id.*

⁹⁸ See *Chen v. Gonzales*, 418 F.3d 110, 111 n.2 (1st Cir. 2005) (describing circuit split).

applies to persons whose marriages China does not legally recognize.⁹⁹ The Third Circuit, conversely, has held that refugee relief only applies to persons whose marriages China does legally recognize.¹⁰⁰ The differences between the Ninth and Third Circuit center on the courts' conflicting interpretations of the 1996 Amendment.¹⁰¹

1. The Ninth Circuit Has Held That Refugee Relief Under the 1996 Amendment Applies to Persons Whose Marriages China Does Not Legally Recognize

The Ninth Circuit directly addressed refugee relief under the 1996 Amendment in *Ma v. Ashcroft*.¹⁰² Ma could not legally marry his fiancée because he had not reached China's minimum age for marriage.¹⁰³ Nonetheless, the couple was married in a traditional Chinese marriage ceremony.¹⁰⁴ After the ceremony, Ma attempted to legally register his marriage, but the government repeatedly denied his requests.¹⁰⁵ In time, Ma's wife became pregnant.¹⁰⁶ When Chinese government officials learned of the pregnancy, they forced Ma's wife to undergo an abortion.¹⁰⁷

The IJ allowed Ma to base his refugee claim on his wife's forced abortion, even though China did not legally recognize Ma's marriage.¹⁰⁸ According to the IJ, no existing authority precluded a husband in a "traditional marriage" from claiming refugee status when his wife underwent a forced abortion.¹⁰⁹ The IJ reasoned that the traditional marriage ceremony was sufficient to qualify the applicant

⁹⁹ *Ma v. Ashcroft*, 361 F.3d 553, 561 (9th Cir. 2004).

¹⁰⁰ *Chen v. Ashcroft*, 381 F.3d 221, 226-27, 229 (3d Cir. 2004)

¹⁰¹ *Compare Ma*, 361 F.3d at 561 (holding that 1996 Amendment should not be limited to persons in marriages legally recognized by China), *with Chen*, 381 F.3d at 229, 235 (holding that 1996 Amendment should be limited to persons in marriages legally recognized by China).

¹⁰² *Ma*, 361 F.3d at 553, 559-61.

¹⁰³ *Id.* at 555.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 555-56 (noting that Chinese government forced Ma's wife to undergo abortion in her third trimester).

¹⁰⁸ *Id.* at 556.

¹⁰⁹ *Id.*

as a spouse under the 1996 Amendment.¹¹⁰ The IJ found Ma's refugee claim credible and granted Ma refugee status.¹¹¹

The Immigration and Naturalization Service ("INS") appealed the IJ's decision to the BIA.¹¹² The INS contended that refugee relief applied only to persons in marriages legally recognized by China.¹¹³ The BIA did not address the sufficiency of a traditional marriage ceremony.¹¹⁴ The BIA agreed with the INS and reasoned that Ma failed to provide evidence that he was part of a legal marriage.¹¹⁵ Furthermore, the BIA determined that only a person in a marriage legally recognized by China constitutes a spouse within the meaning of the 1996 Amendment.¹¹⁶ Thus, only persons in marriages legally recognized by China can seek refugee relief under the 1996 Amendment.¹¹⁷ Consequently, the BIA denied Ma's refugee claim.¹¹⁸

Ma appealed the BIA's denial before the Ninth Circuit.¹¹⁹ The Ninth Circuit held that a person whose marriage China does not legally recognize can still qualify as a spouse.¹²⁰ Thus, the court held that the

¹¹⁰ *Id.* at 555-56. The immigration judge gave due weight to the fact that although the Chinese government prohibited Ma and his fiancée from entering into a legally recognized marriage, the couple had a "traditional Chinese ceremony in their village." *Id.* at 555. The immigration judge found that this traditional marriage qualified Ma as a spouse under the 1996 Amendment. *Id.* at 556.

¹¹¹ *Id.* at 556.

¹¹² *Id.* at 557. The INS has ceased to exist. Homeland Security Act of 2002, Pub. L. No. 107-296, § 471, 116 Stat. 2135. In 2003, the President transferred the functions of the INS to the Department of Homeland Security. Homeland Security Act § 441. Specifically, the President transferred the functions to the newly formed U.S. Citizenship and Immigration Services. Homeland Security Act §§ 441, 451, 471; see U.S. Citizenship and Immigration Services, *This Is USCIS*, <http://uscis.gov/graphics/aboutus/thisisimm/index.htm> (last visited Oct. 2, 2006). This Comment will continue to refer to the agency as the INS for the sake of clarity.

¹¹³ *Ma*, 361 F.3d at 557.

¹¹⁴ *Id.* (noting that BIA did not discuss sufficiency of Ma's traditional marriage ceremony).

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.* The BIA's limitation of refugee relief to spouses only applies to one avenue of seeking refugee relief under the 1996 Amendment. *Lin v. Ashcroft*, 385 F.3d 748, 752-53 (7th Cir. 2004). For example, if a single man undergoes a forced sterilization, he does not have to be married to seek refugee relief. *Id.* Also, if a single woman undergoes a forced abortion, she too can seek refugee relief. *Id.*

¹¹⁸ *Ma*, 361 F.3d at 557.

¹¹⁹ *Id.*

¹²⁰ *Id.* at 561. The court reasoned that the "marriages would be legally recognized, but for China's coercive family planning policies, [thus, relief should not be exclusive for] . . . husbands whose marriages are recognized by Chinese authorities." *Id.*

1996 Amendment applied to persons whose marriages China does not legally recognize.¹²¹

The Supreme Court has held that courts must defer to the BIA's statutory interpretations.¹²² The Ninth Circuit, however, declined to defer to the BIA in *Ma*.¹²³ The court held that it need not defer to a BIA interpretation if that interpretation contradicts congressional intent or produces absurd results.¹²⁴

In *Ma*, the Ninth Circuit held that the BIA's interpretation contravened the congressional intent underlying the 1996 Amendment.¹²⁵ The court held that Congress had two goals: providing relief to persecuted couples and keeping families together.¹²⁶ The court also reasoned that denying refugee eligibility solely because China does not legally recognize, in effect, withholds protection from applicant's with credible claims, such as in the case of *Ma*.¹²⁷ Moreover, the court reasoned that the BIA's interpretation would lead to the break-up of families.¹²⁸

Key to the Ninth Circuit's reasoning was its characterization of China's marriage law.¹²⁹ The court found that Congress constructed the 1996 Amendment to provide relief to couples who suffered under or feared China's OCP.¹³⁰ The court acknowledged that the United States respects the marriage laws of other countries.¹³¹ But the court found that China's marriage-age law was an integral part of China's OCP.¹³² That is, China's marriage-age law is part of its OCP, which Congress deemed oppressive and persecutory.¹³³ Thus, the Ninth

¹²¹ *Id.*

¹²² *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984).

¹²³ *Ma*, 361 F.3d at 559.

¹²⁴ *Id.* at 558 (citing *United States v. Wilson*, 503 U.S. 329, 334 (1992)).

¹²⁵ *Id.* at 559-60.

¹²⁶ *Id.* at 559 (citing H.R. REP. NO. 104-469(I), at 174 (1996)).

¹²⁷ *Id.* at 560 (finding that Congress passed 1996 Amendment "to provide protection to individuals who suffer persecution, in the form of forced abortion, as a result of their violation of the population control program. . . . [T]o exclude husbands who marry their spouses prior to the authorized age established in the program contravenes the purposes and policies of the statutory amendment.").

¹²⁸ *Id.* at 561.

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.* at 559-60. The Ninth Circuit found that China's marriage law is an integral part of China's OCP. *Id.* To further support its interpretation, the court also relied on evidence from congressional intent and international reports. *Id.* at 560-61.

¹³³ *Id.* at 559.

Circuit held that courts cannot rely on China's marriage law to deny refugee claims.¹³⁴ Because the IJ had based his decision on the OCP's definition of marriage, the Ninth Circuit directed the lower court to grant Ma refugee status.¹³⁵

2. The Third Circuit Has Held That Refugee Relief Under the 1996 Amendment Does Not Apply to Persons Whose Marriages China Does Not Legally Recognize

In contrast to the Ninth Circuit, the Third Circuit adopted a more limited interpretation of the 1996 Amendment.¹³⁶ The Third Circuit held that only a person whose marriage China legally recognizes qualifies as a spouse under the 1996 Amendment.¹³⁷ In *Chen v. Ashcroft*, a Chinese national sought refugee relief.¹³⁸ The Chinese government had denied Chen's request for a marriage permit because he and his fiancée had not reached the minimum age for marriage.¹³⁹ Unlike the applicant in *Ma*, Chen did not have a marriage ceremony.¹⁴⁰ In time, Chen's fiancée became pregnant.¹⁴¹ Chinese government officials discovered the pregnancy and forced Chen's fiancée to undergo an abortion.¹⁴²

The IJ concluded that the *C-Y-Z* decision applied to Chen's refugee claim and granted Chen refugee relief.¹⁴³ The INS appealed the IJ's decision.¹⁴⁴ On appeal, the BIA reversed the IJ's decision because it determined that the 1996 Amendment does not apply to unmarried partners.¹⁴⁵

¹³⁴ *Id.* at 561.

¹³⁵ *Id.*

¹³⁶ *Chen v. Ashcroft*, 381 F.3d 221, 235 (3d Cir. 2004) (holding that only persons in marriages legally recognized by China qualify as spouses under 1996 Amendment); *see also* *Chen v. Ashcroft*, 106 F. App'x 129, 131 (3d Cir. 2004) (affirming, in unrelated case, BIA's denial of refugee status to applicant and his fiancée because applicant was not in any kind of marriage).

¹³⁷ *Chen*, 381 F.3d at 235.

¹³⁸ *Id.* at 222-23.

¹³⁹ *Id.* at 223.

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

Chen sought review of his refugee claim before the Third Circuit.¹⁴⁶ Chen argued that the BIA's interpretation was erroneous because China's marriage law is part of China's OCP.¹⁴⁷ In addition, Chen argued that China's refusal to permit him to marry constituted persecution.¹⁴⁸

The Third Circuit held that refugee relief only applied to persons whose marriages China does legally recognize.¹⁴⁹ The court found that the BIA's decision to limit refugee relief to legally married partners was reasonable, primarily on policy grounds.¹⁵⁰ The court found that the BIA's interpretation promoted effective administration and adjudication of immigration cases.¹⁵¹ The court also found that the existence of the annual 1,000-person cap on relief under the 1996 Amendment suggested that Congress intended to limit its scope.¹⁵² Prior to Congress's repeal of that cap, the Third Circuit found that

¹⁴⁶ *Id.* at 222.

¹⁴⁷ *Id.* ("Chen argues that, while he and his fiancée were never married, they *would* have married had it not been for China's inflated minimum age requirement, which was instituted as part of the country's oppressive population control program.")

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 235. It is important to note that the Third Circuit uses the term "non-spouses" to refer to unmarried partners. *Id.* at 228. The Third Circuit attempted to reframe the Ninth Circuit's holding as limiting refugee relief under the 1996 Amendment to legally recognized marriages. *Id.* at 231-32. The Third Circuit emphasized that the Ninth Circuit's holding is consistent with its position because by the time Ma appealed to the federal court, Ma had already reached the legal age to marry in China. *Id.* at 231. Ma could and did legally register his marriage in China. *Id.* Thus, the Third Circuit found the Ninth Circuit's holding unnecessary. *Id.*

¹⁵⁰ *Id.* at 228-32. The BIA's interpretation of immigration laws requires deference under certain circumstances. *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843-44 (1984). To determine whether a court should give deference to an administrative agency's statutory interpretation, a court must engage in a two-pronged inquiry. *Chevron*, 467 U.S. at 842-43. A court must ask whether Congress has already addressed the issue. *Id.* If so, then an agency must defer to Congress's expressed intent. *Id.* If a term is ambiguous, however, a court must give great deference to the agency's determination unless it is "arbitrary, capricious, or manifestly contrary to the statute." *Id.* at 844.

¹⁵¹ *Chen*, 381 F.3d at 228-32. The Third Circuit noted that extending relief to non-spouses would burden the BIA. *Id.* at 228. If refugee relief under the 1996 Amendment extended to unmarried partners, then the BIA would have to involve itself in difficult determinations of paternity and the nature of relationships. *Id.* at 229. Moreover, extending relief may spur applicants to file false refugee claims. *Id.*

¹⁵² *Id.* at 225, 234. However, in 2005, Congress eliminated the 1,000 person cap. REAL ID Act of 2005, Pub. L. No. 109-13, § 101(g), 119 Stat. 231 (2005). Therefore, a construction of the 1996 Amendment cannot rely on the existence of an annual cap. *Lin v. Gonzales*, 416 F.3d 184, 188 n.1 (2d Cir. 2005).

limiting refugee relief to persons in legally recognized Chinese marriages was consistent with Congress's intent.¹⁵³

It is important to note that unlike the Ninth Circuit, the Third Circuit did not consider whether China's marriage law was part of China's OCP.¹⁵⁴ The court found that China, like other foreign countries, could regulate the marriages of its citizens.¹⁵⁵ Moreover, the court found that China's marriage law simply made people wait longer to get married.¹⁵⁶ Thus, the court reasoned that prosecution for a violation of China's marriage law did not rise to the level of persecution.¹⁵⁷ The court's rationale carries the implication that China does not typically persecute a couple for their illegal marriage alone.¹⁵⁸ China has, however, punished spouses in illegal marriages based on mere suspicion of an unauthorized pregnancy.¹⁵⁹ Such punishments may qualify as persecution under the 1996 Amendment.¹⁶⁰

¹⁵³ *Chen*, 381 F.3d at 234.

¹⁵⁴ *See id.* at 229-31 (failing to address whether China's marriage law is integral part of OCP).

¹⁵⁵ *Id.* at 230-31.

¹⁵⁶ *Id.* at 231.

¹⁵⁷ *Id.* The Third Circuit noted that persecution does not involve all treatment that the United States regards as unfair and unconstitutional. *Id.* (citing *Fatin v. INS*, 12 F.3d 1233, 1240 n.10 (3d Cir. 1993)). The Third Circuit found that China's marriage laws simply require a person to wait until he or she reaches the required age. *Id.* The court reasoned that waiting was not "so far outside the accepted realm of human decency as to constitute persecution." *Id.*

¹⁵⁸ *Id.* at 230 (stating that "although minimum marriages ages of 23 and 25 are contrary to our traditions and international practice, we cannot go so far as to say that enforcement of these laws necessarily amounts to persecution"). The Third Circuit emphasized that China's marriage law did not permanently bar the couple from marrying and having children, but rather the law only makes the couple wait for marriage. *Id.* at 231. In fact, the court cited the dissenting opinion in *Li v. Ashcroft*, 356 F.3d 1153, 1164 (9th Cir. 2004) (Kleinfeld, J., dissenting) ("[They are free to] have 2, 3, or 10 children [so long as] the government does not forcibly abort their children or sterilize them.")

¹⁵⁹ *See supra* Part I (discussing enormous discretion that Chinese government bestows on local government officials to enforce OCP).

¹⁶⁰ *See supra* Part II.A-B (discussing Congress's awareness of OCP's coercive penalties and modified refugee definition to classify experience with, or resistance to, OCP as persecution of political opinion). It was reasonable for the Third Circuit to deny *Chen* refugee relief under the 1996 Amendment. *Chen*, 381 F.3d. at 231. *Chen* did not consider himself in a marriage. *Id.* at 232. He did not have a traditional marriage ceremony. *Id.* Even under the rationale of the *Ma* court, *Chen* is not a spouse in a marriage not legally recognized by China. *Id.* at 231-32.

III. APPLYING REFUGEE RELIEF TO PERSONS WHOSE MARRIAGES CHINA DOES NOT LEGALLY RECOGNIZE RESOLVES THE CIRCUIT SPLIT

Courts should apply refugee relief under the 1996 Amendment to persons whose marriages China does not legally recognize.¹⁶¹ The 1996 Amendment contains broad language that provides courts with a textual basis for extending such refugee relief.¹⁶² Courts cannot rely on China's marriage law to determine refugee claims.¹⁶³ This reliance is absurd because the marriage law is an integral part of China's OCP.¹⁶⁴ Furthermore, such reliance undermines Congress's intent behind the 1996 Amendment.¹⁶⁵

A. *The 1996 Amendment Contains Broad Language That Provides Courts with the Textual Basis for Extending Refugee Relief*

The 1996 Amendment contains broad language that provides courts with a textual basis for extending refugee relief to persons whose marriages China does not legally recognize.¹⁶⁶ In the 1996 Amendment, the phrase "other resistance" provides courts with the specific basis for this extension.¹⁶⁷ In *C-Y-Z*, the BIA determined that one spouse can seek refugee relief under the 1996 Amendment based on the other spouse's experience.¹⁶⁸ In reaching its conclusion, the BIA did not cite specific text in the 1996 Amendment that supported its interpretation.¹⁶⁹

However, the phrase "other resistance" supports the BIA's analysis — it indicates that Congress did not intend to limit the 1996

¹⁶¹ See *Ma v. Ashcroft*, 361 F.3d 553, 561 (9th Cir. 2004) (holding that refugee relief under 1996 Amendment applies to persons whose marriages China does not legally recognize).

¹⁶² See *infra* Part III.A.

¹⁶³ See *infra* Part III.B.

¹⁶⁴ See *infra* Part III.B.

¹⁶⁵ See *infra* Part III.C.

¹⁶⁶ Cf. *Yuan v. U.S. Dep't of Justice*, 416 F.3d 192, 197-98 (2d Cir. 2005) (acknowledging that phrase "other resistance" may support extending refugee relief beyond actual victims, but refraining from weighing in on issue); *Lin v. Ashcroft*, 385 F.3d 748, 757 (7th Cir. 2004) (acknowledging that phrase "other resistance" refers to types of resistance that Congress sought to protect); *Li v. Ashcroft*, 356 F.3d 1153, 1157 (9th Cir. 2004) (noting that other federal courts have not addressed what could constitute "other resistance").

¹⁶⁷ See cases cited *supra* note 166.

¹⁶⁸ *In re C-Y-Z*, 21 I. & N. Dec. 915, 919 (B.I.A. 1997).

¹⁶⁹ *Id.* (failing to point to specific text in 1996 Amendment that would support its decision).

Amendment to its face.¹⁷⁰ Rather, by including this phrase, Congress recognized that resistance to a coercive population control program has many manifestations.¹⁷¹ For example, “other resistance” could be local government officials forcibly taking a woman and subjecting her to a long, invasive, and violent pregnancy examination.¹⁷² Rather than try to list or predict all possible manifestations, Congress included this broad language.¹⁷³ Similarly, the BIA and most federal courts have not articulated what experiences could amount to “other resistance.”¹⁷⁴ In fact, the Ninth Circuit is the only federal court to grapple with the meaning of this language.¹⁷⁵ Thus, the broadness of the phrase “other resistance” provides textual support for extending refugee relief to persons whose marriages China does not legally recognize.

Some may argue that applying refugee relief to such persons conflicts with the plain meaning of the 1996 Amendment.¹⁷⁶ Such opponents argue that the 1996 Amendment emphasizes personal experience.¹⁷⁷ That is, a person may seek refugee relief only if he or she actually underwent coercive surgical procedures or resisted

¹⁷⁰ See cases cited *supra* note 166.

¹⁷¹ Cf. *Hearings*, *supra* note 1, at 29 (statement of Christopher H. Smith, Member, H. Comm. on Int'l Relations). Prior to 1994, the United States had “the longstanding policy of granting asylum to applicants who can prove a well-founded fear of forced abortion or forced sterilization or other forms of persecution for resistance to the PRC coercive population control program.” *Id.*; see also *Yuan v. U.S. Dep't of Justice*, 416 F.3d 192, 197-98 (2d Cir. 2005) (acknowledging that phrase “other resistance” may support extending relief beyond actual victims, but refraining from weighing in on issue).

¹⁷² *Li v. Ashcroft*, 356 F.3d 1153, 1158, 1160 (9th Cir. 2004) (finding that applicant's forced pregnancy examinations and other physical force by Chinese government officials amounted to “other resistance”).

¹⁷³ Cf. *Hearings*, *supra* note 1, at 29 (acknowledging that there may be other forms of resistance).

¹⁷⁴ See *Li*, 356 F.3d at 1157 (stating Ninth Circuit is first circuit court to address “other resistance” language).

¹⁷⁵ *Id.* at 1157 (finding that applicant's forced pregnancy examinations and other physical force by Chinese government officials amounted to “other resistance”).

¹⁷⁶ See generally *Yuan*, 416 F.3d 192 (recognizing plain text of 1996 Amendment directly conflicts with BIA's construction and noting that BIA failed to fully explain its reasoning); *Chen v. Ashcroft*, 381 F.3d 221 (3d Cir. 2004) (advocating narrow interpretation of 1996 Amendment).

¹⁷⁷ See generally *Yuan*, 416 F.3d 192 (emphasizing that applicants' were never directly subjected to OCP's coercive penalties); *Chen*, 381 F.3d at 226 (stating that “it is not clear why every spouse of a person who undergoes a forced abortion or sterilization should be deemed to have ‘resist[ed]’ the ‘coercive population control program,’” especially if that spouse did not personally suffer under OCP).

them.¹⁷⁸ Accordingly, they argue that a person may not base his or her refugee claim on the experiences of another person.¹⁷⁹ Further, they argue that a plain interpretation is the most natural and reasonable reading.¹⁸⁰ However, a plain meaning interpretation conflicts with the BIA's decision in *C-Y-Z*.¹⁸¹

These advocates err in applying a plain interpretation to the 1996 Amendment. The 1996 Amendment contains the phrase "other resistance."¹⁸² This phrase does not have a plain or clear meaning.¹⁸³ The broadness of "other resistance" in and of itself does not preclude granting refugee relief to persons whose marriages China does not legally recognize.¹⁸⁴ This broad language provides courts with a flexible textual basis that supports extending refugee relief when necessary to uphold congressional intent.¹⁸⁵

B. Courts Should Not Deny Refugee Relief Just Because China Does Not Legally Recognize a Marriage

Respecting China's marriage law in determining refugee relief under the 1996 Amendment is absurd.¹⁸⁶ Federal courts must avoid

¹⁷⁸ See cases cited *infra* note 180.

¹⁷⁹ *In re C-Y-Z*, 21 I. & N. Dec. 915, 935 (B.I.A. 1997). "A narrow reading of section 601(a) does not support a grant of asylum to this applicant. He has not been forced to abort a pregnancy or undergo involuntary sterilization." *Id.*

¹⁸⁰ See generally *Yuan*, 416 F.3d 192 (noting that 1996 Amendment extends relief only to individuals who have been personally targeted with a coercive population control technique); *Chen*, 381 F.3d 221 (questioning whether spouse can base refugee claim on experiences of other spouse); *C-Y-Z*, 21 I. & N. Dec. at 935 (arguing that political opinion cannot be imputed to another person). To establish refugee status based on political opinion, a person must show that he or she (1) held a political opinion; and (2) was persecuted because of that political opinion. Donald W. Yoo, *Exploring the Doctrine of Imputed Political Opinion and Its Application in the Ninth Circuit*, 19 GEO. IMMIGR. L.J. 391, 395 (2005). The Ninth Circuit held that an imputed political opinion is "a political opinion attributed to the applicant by his persecutors." *Cruz-Navarro v. INS*, 232 F.3d 1024, 1030 (9th Cir. 2000) (quoting *Sangha v. INS*, 103 F.3d 1482, 1489 (9th Cir. 1997)). In other words, even if an applicant does not actually hold that opinion, persecution "can be a valid basis for asylum." Yoo, *supra*, at 396.

¹⁸¹ See *Chen*, 381 F.3d at 225-26 (discussing BIA's decision in *C-Y-Z*).

¹⁸² 8 U.S.C. § 1101(a)(42)(B) (2000).

¹⁸³ *Id.*; see also *Li v. Ashcroft*, 356 F.3d 1153, 1157 (9th Cir. 2004) (noting that other federal courts have not addressed what could constitute "other resistance").

¹⁸⁴ *Li*, 356 F.3d at 1160.

¹⁸⁵ See cases cited *supra* note 166.

¹⁸⁶ *Cf. Zhang v. Gonzales*, 434 F.3d 993, 999 (7th Cir. 2006) (finding that respecting China's marriage law would undermine 1996 Amendment); *Ma v. Ashcroft*,

statutory interpretations that would produce absurd results.¹⁸⁷ To deny refugee relief solely because China does not recognize the marriage is equivalent to allowing the Chinese government to interpret the 1996 Amendment.¹⁸⁸ Respecting China's marriage law in refugee determinations allows China to determine who qualifies as a spouse.¹⁸⁹ By determining who qualifies as a spouse under the 1996 Amendment, China is, in effect, deciding who is entitled to relief in the United States.¹⁹⁰ It is axiomatic that courts should not interpret a statute in a manner that would lead to absurd results.¹⁹¹ It is absurd to allow the very evil that Congress is trying to eliminate to dictate the terms of its elimination.¹⁹²

China's marriage law has been and continues to be an integral part of China's OCP.¹⁹³ Congress enacted the 1996 Amendment to provide relief to OCP victims.¹⁹⁴ In doing so, Congress deemed China's OCP

361 F.3d 553, 558-61 (9th Cir. 2004) (finding that respecting China's marriage law would produce absurd results).

¹⁸⁷ *Ma*, 361 F.3d at 558 (citing *United States v. Wilson*, 503 U.S. 329, 334 (1992)); see also *United States v. Turkette*, 452 U.S. 576, 580 (1981) (holding courts must avoid absurd results); *In re Trans. Alaska Pipeline Rate Cases*, 436 U.S. 631, 643 (1978) (holding courts should defer to statutory constructions by authoritative administrative agencies unless it would produce absurd results).

¹⁸⁸ *Cf. Zhang*, 434 F.3d at 999 (holding that China's marriage law cannot be used in determining refugee claims because law is part of OCP that 1996 Amendment targeted).

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ See cases cited *supra* note 187 (discussing that federal courts must avoid statutory interpretations that produce absurd results).

¹⁹² See cases cited *supra* note 187; cf. *Hearings*, *supra* note 1, at 15 (testimony of John S. Aird, demographer). Mr. Aird emphasized that the United States must do more than verbally criticize China: "We [the United States] are directly responsible, however, for what we do with those who do arrive here. If we send them back without giving adequate consideration to their asylum claims we make the United States Government an accomplice of the Chinese family planning program." *Id.* Although Mr. Aird was speaking about the need for refugee relief in the form of legislation, his sentiments apply here as well. Congressional representatives agreed with Mr. Aird. *Hearings*, *supra* note 1, at 64 (statement of Henry J. Hyde, Member, H. Comm. on Int'l Relations). Representative Hyde emphasized that withholding refugee relief from persons facing China's OCP would be like the United States "giving full faith and credit to the Chinese law, of which they are in violation, the family planning coercive abortion, sterilization law. As we are respecting that as legitimate." *Id.* Representative Hyde's concern applies here as well since China's marriage law is an integral part of China's One Child Policy.

¹⁹³ See *supra* Part I.

¹⁹⁴ See sources cited *supra* note 66. In the early 1970s, the Chinese government adopted a program called "Wan-Xi-Shao." Peng, *supra*, note 21, at 52. The objectives

to be of international concern because it was oppressive and persecutory.¹⁹⁵ The United States cannot now rely on the legitimacy of China's OCP and marriage law as bases for denying refugee relief to those persecuted under the OCP.¹⁹⁶

Some would argue that China's marriage law deserves deference.¹⁹⁷ Ordinarily, the United States respects the rules and regulations of other countries, including marriage laws.¹⁹⁸ A country has sovereignty, i.e., supreme authority over its domestic affairs.¹⁹⁹ Therefore, under ordinary circumstances, the United States will not intervene in the domestic affairs of another country.²⁰⁰

The United States will, however, intervene when another country's domestic concern becomes an international concern, such as in the context of human rights abuses.²⁰¹ The United States has, in fact,

of this early program were to delay marriage and childbearing, space births, and limit the number of children. *Id.*; see *supra* Part I.

¹⁹⁵ *Cf.* *Ma v. Ashcroft*, 361 F.3d 553, 558-61 (9th Cir. 2004) (finding that Congress passed 1996 Amendment because OCP is oppressive policy and its coercive penalties could amount to persecution); *Zhang v. Gonzales*, 434 F.3d 993, 999 (7th Cir. 2006) (noting that Congress passed 1996 Amendment to ensure that families who are victimized under OCP could receive asylum and that respecting China's marriage law would "entirely subvert" that intent).

¹⁹⁶ *Zhang v. Gonzales*, 434 F.3d 993, 999 (7th Cir. 2006).

¹⁹⁷ See *Chen v. Ashcroft*, 381 F.3d 221, 230-31 (3d Cir. 2004).

¹⁹⁸ *Ma v. Ashcroft*, 361 F.3d 553, 561 (9th Cir. 2004) (citing *Adams v. Howerton*, 673 F.2d 1036, 1038-39 (9th Cir. 1982)).

¹⁹⁹ BLACK'S LAW DICTIONARY 1430 (8th ed. 2004); see also U.N. Charter art. 2 (stating that United Nations shall not intervene in matters of domestic jurisdiction).

²⁰⁰ U.N. Charter art. 2.

²⁰¹ RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(1) (1987) ("A rule of international law is one that has been accepted as such by the international community of states (a) in the form of customary law; (b) by international agreement; or (c) by derivation from general principles common to the major legal systems of the world."); *Id.* § 206 cmt. a ("Upon achieving statehood, a state becomes subject to customary international law as it has developed to that time."); *Id.* § 702 ("A state violates international law if, as a matter of state policy, it practices, encourages, or condones . . . (d) torture or other cruel, inhuman, or degrading treatment or punishment, (e) prolonged arbitrary detention, . . . or (g) a consistent pattern of gross violations of internationally recognized human rights."); *Id.* § 703 (if one state has violated customary international law of human rights, then "any state may pursue international remedies" against the offending state); *Id.* § 703 cmt. f (stating that "state may criticize another state for failure to abide by recognized international human rights standards, and may shape its trade, aid or other national policies so as to dissociate itself from the violating state or to influence that state to discontinue the violations"). Moreover, the bodies under the United States may consider and address violations of human rights. U.N. Charter arts. 34, 36 (setting forth that respective U.N. bodies may intervene when "the continuance of . . . the situation is likely to endanger the maintenance of international peace and security").

already intervened with respect to China's OCP.²⁰² For example, the United States has withheld millions of U.S. dollars from China to spur OCP reform.²⁰³ Therefore, disregarding China's marriage law in the context of refugee relief under the 1996 Amendment in the United States would not be an extraordinary act of interference with China's sovereignty.

Furthermore, by interpreting the 1996 Amendment to include persons whose marriages China does not legally recognize, the United States is merely exercising its own sovereignty within its borders.²⁰⁴ The United States chose to offer refugee relief to victims of the OCP who come to the United States for refuge.²⁰⁵ The BIA — the highest administrative body for interpreting immigration law — decided to allow an individual to seek refugee relief based on his spouse's persecution.²⁰⁶ This decision directly affects the United States, not

The United States has codified this dedication to human rights in its domestic laws. See 22 U.S.C. § 2304 (2000) (establishing implementation requirements for observing human rights in international community). Section 2304 sets forth the following:

The United States shall . . . promote and encourage increased respect for human rights and fundamental freedoms throughout the world without distinction as to race, sex, language, or religion. Accordingly, a principal goal of the foreign policy of the United States shall be to promote the increased observance of internationally recognized human rights by all countries.

Id. The 1996 Amendment provided refugee relief to persons who suffer from a coercive population control program that “fails to respect fundamental human rights.” *In re C-Y-Z*, 21 I. & N. Dec. 915, 921 (B.I.A. 1997). The United States and many other countries recognize the right to have a family and reproductive rights. See Refugee Act of 1980, 8 U.S.C. § 1101 (2000); Universal Declaration of Human Rights, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 10, 1948); International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), 21 U.N. GAOR, 21st Sess., Supp. No. 16, at arts. 21, 52, U.N. Doc A/6316 (1966).

²⁰² Farkas, *supra* note 40, at 246-47.

²⁰³ *Id.* at 247 (noting Bush administration chose to withhold \$34 million from U.N. Population Fund, trust fund aimed at financing population control programs around world, including China's OCP).

²⁰⁴ *Cf.* U.S. CONST. art. I, § 1 (establishing powers of Congress, including power to enact legislation); U.N. Charter art. 2 (providing for sovereign equality of all U.N. members and stating that U.N. shall not intervene in matters within states' domestic jurisdiction); *Ma v. Ashcroft*, 361 F.3d 553, 561 (9th Cir. 2004) (holding that United States does not have to respect China's marriage law in determining refugee claims because it is integral part of its OCP); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 206(a) (1987) (stating that under “international law, a state has: . . . sovereignty over its territory and general authority over its nationals.”).

²⁰⁵ 8 U.S.C. § 1101(a)(42) (2000).

²⁰⁶ *C-Y-Z*, 21 I & N Dec. at 918-19; see Executive Office for Immigration Review,

China.²⁰⁷ Just as China is free to exercise sovereignty in its territory, the United States is free to exercise its sovereignty within its borders.²⁰⁸

C. *Relying on China's Marriage Law Undermines Congressional Intent*

The BIA and the federal courts should not rely on China's marriage law to determine refugee claims under the 1996 Amendment.²⁰⁹ Such reliance undermines congressional intent.²¹⁰ Federal courts must avoid statutory interpretations that would undermine congressional intent.²¹¹ In passing the 1996 Amendment, Congress intended to address the OCP's atrocities and keep families together.²¹² Congress targeted and responded to the OCP's coercive nature by expanding the United States refugee definition.²¹³ If courts rely on China's marriage law to determine refugee claims, they will fail to recognize the OCP's atrocities as Congress intended.²¹⁴ Further, relying on China's marriage law will lead to the separation of families.²¹⁵ Denying relief will separate husbands, wives, and children from one another.²¹⁶ The

supra note 3 (describing BIA as highest administrative body that interprets and applies immigration law).

²⁰⁷ *Cf. Zhang v. Gonzales*, 434 F.3d 993, 999 (7th Cir. 2006) (finding that respecting China's marriage law would impact person's refugee claim in United States).

²⁰⁸ *Cf. U.N. Charter art. 2* (providing for sovereign equality of all U.N. members and stating that U.N. shall not intervene in matters within states' domestic jurisdiction).

²⁰⁹ *Zhang*, 434 F.3d at 999.

²¹⁰ *Id.* (finding that respecting China's marriage law in determining refugee claims would subvert 1996 Amendment); *Ma v. Ashcroft*, 361 F.3d 553, 561 (9th Cir. 2004).

²¹¹ *Ma*, 361 F.3d at 558 (citing *United States v. Wilson*, 503 U.S. 329, 334 (1992)); *see also United States v. Turkette*, 452 U.S. 576, 580 (1981) (holding that courts must interpret unambiguous statutory language as conclusive absent clear congressional intent to contrary); *In re Trans. Alaska Pipeline Rate Cases*, 436 U.S. 631, 643 (1978) (holding courts should defer to statutory constructions unless it would undermine congressional intent).

²¹² *See Ma*, 361 F.3d at 561 (finding Congress enacted 1996 Amendment to prevent separation of families); *supra* Part II.B (discussing Congressional intent to address atrocities suffered under OCP's coercive penalties).

²¹³ *See supra* Part II.B.

²¹⁴ *See supra* Part II.B (discussing that Congress passed 1996 Amendment to address atrocities suffered under China's OCP). By denying a refugee claim based solely on the technicality of a person's marriage, an immigration court does not address the merits of the refugee claim itself.

²¹⁵ *Ma*, 361 F.3d at 561.

²¹⁶ *Id.*

spouse and child left behind in China will be unable to reunite with their family in the United States.²¹⁷ The only way for that family to stay together would be to remain in China, under the very government and policy that has persecuted them.²¹⁸

Some may argue that granting relief to persons whose marriages China does not legally recognize will open the floodgates to meritless refugee claims.²¹⁹ The problem with this argument, however, is that it loses sight of the fact that merit, or credibility, is not a prerequisite to apply for refugee status. But rather, credibility is something that can only be determined. In fact, the U.S. immigration courts' principal aim is to determine which refugee claims have merit or credibility.²²⁰ Courts can only determine credibility after a hearing, and not when a person files an application.²²¹ Thus, opponents' argument has no merit.²²²

Reliance on China's marriage law to determine refugee claims contradicts Congress's intent.²²³ Courts would be unable to recognize the atrocities that Congress intended to address.²²⁴ Such reliance

²¹⁷ *Id.*

²¹⁸ *Cf. Hearings, supra* note 1, at 29 (statement of Christopher H. Smith). He noted:

Five of these women [who testified before the committee] had fled from China after being forced to have abortions. Others had been forcibly sterilized or had escaped after being ordered to undergo abortion and/or sterilization. Their asylum claims were rejected. It appears that their deportation to the People's Republic of China is imminent. These women and others like them may be forced back to China because of novel and bizarre interpretation of the United States asylum law under which those who have resisted forced abortion and forced sterilization are regarded common criminals rather than as victims of persecution. After all, they did break the law. And never mind what kind of law that they broke, never mind fundamental human rights and broken lives; the law is the law, and people who break a forced abortion law or any other law must be sent back to their punishment. This is the kind of thinking that we are up against.

Id. But this is precisely the kind of reasoning that has been offered to justify limiting refugee relief to persons in marriages legally recognized by China. *See supra* Part II.D.

²¹⁹ *Zhang v. INS*, 386 F.3d 66, 72 (2d Cir. 2004).

²²⁰ *See supra* Part II.B.

²²¹ *See supra* Part II.B (discussing that it is duty of immigration court to determine credible refugee claims).

²²² *Cf. Yang v. Gonzales*, 427 F.3d 1117, 1122 n.5 (8th Cir. 2005) (finding government's argument that extending refugee relief would open floodgates unpersuasive, especially since Congress repealed annual cap).

²²³ *Zhang v. Gonzales*, 434 F.3d 993, 999 (7th Cir. 2006); *Ma*, 361 F.3d at 561.

²²⁴ *See supra* Part II.

would also produce the very result that Congress intended to prevent: the break-up of families.²²⁵ Thus, any reliance on China's marriage law would completely subvert the 1996 Amendment.²²⁶ What Congress intended in passing the 1996 Amendment, no court should tear asunder.²²⁷

CONCLUSION

One hundred million — that is the number of couples that the Chinese government had prevented from having a child as of 1993.²²⁸ Because China permits local government officials to determine how its One Child Policy is enforced, it is unclear just how many couples actually volunteered for these procedures.²²⁹ Nonetheless, two things are clear: the OCP's atrocities continue today, and the need for refugee relief remains pressing.²³⁰

Refugee relief under the 1996 Amendment should apply to persons whose marriages China does not legally recognize.²³¹ First, the 1996 Amendment contains broad language that provides courts with a textual basis for extending refugee relief.²³² Second, federal courts cannot rely on China's marriage law to determine refugee claims.²³³ Such reliance would be absurd because China's marriage law is an integral part of its One Child Policy.²³⁴ The United States must not allow the very evil the government seeks to eradicate to dictate how the government will eradicate it.²³⁵ Last, relying on China's marriage law undermines Congress's intent behind the 1996 Amendment.²³⁶ It ignores the atrocities that couples have faced and continue to face.²³⁷

²²⁵ *Ma*, 361 F.3d at 561.

²²⁶ *Zhang*, 434 F.3d at 999.

²²⁷ *Cf.* cases cited *supra* note 212 and accompanying text (discussing that federal courts must avoid statutory interpretations which would undermine congressional intent).

²²⁸ *Sicard*, *supra* note 19, at 929 (noting that by 1993 China had prevented 100 million couples from bearing second children).

²²⁹ *See supra* Part I (discussing local government officials' arbitrary and inconsistent imposition of OCP's coercive penalties).

²³⁰ *See supra* Part I.

²³¹ *See supra* Part III.

²³² *See supra* Part III.A.

²³³ *See supra* Part III.B.

²³⁴ *See supra* Part III.B.

²³⁵ *See supra* Part III.B.

²³⁶ *See supra* Part III.C.

²³⁷ *See supra* Part III.C.

Moreover, it would foster one of the very results that the 1996 Amendment was intended to prevent: the destruction of the family unit.²³⁸ These arguments demand justice in the form of refugee relief for the millions of couples that have suffered and will suffer the atrocities under China's One Child Policy.

²³⁸ See *supra* Part III.C.