24-805

No. _____

IN THE

Supreme Court of the United States

WALTER MALDONADO-MAGNO;
ANDREA UCHUYPOMA-PALOMINO;
LOAN MALDONADO-UCHUYPOMA,

Petitioners,

v.

JAMES R. MCHENRY III,
ACTING UNITED STATES ATTORNEY GENERAL,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

CHRISTINE HERNANDEZ
HERNANDEZ &
ASSOCIATES, P.C.
1801 York Street
Denver, CO 80206

GREGORY J. DUBINSKY
Counsel of Record
BRIAN T. GOLDMAN
HOLWELL SHUSTER
& GOLDBERG LLP
425 LEXINGTON AVENUE
New York, NY 10017
(646) 837-5120
gdubinsky@hsgllp.com

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Counsel for Petitioners

QUESTION PRESENTED

Under the Immigration and Nationality Act ("INA"), an individual who meets the statutory definition of a "refugee" may be eligible for asylum. 8 U.S.C. § 1158(b)(1). Under the INA, a "refugee" includes any individual unwilling or unable to return to his or her country of nationality "because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion[.]" 8 U.S.C. § 1101(a)(42)(A). The courts of appeals are deeply divided as to the deference they should afford the agency's determination of whether the established facts satisfy the statutory standard.

The question presented is:

Whether the U.S. courts of appeals should review *de novo* or for substantial evidence the agency's determination that a given set of facts do not show "persecution or well-founded fear of persecution on account of" a protected characteristic under 8 U.S.C. § 1101(a)(42)(A).

PARTIES TO THE PROCEEDING

Petitioners Walter Maldonado-Magno; Andrea Uchuypoma-Palomino; and Loan Maldonado-Uchuypoma were petitioners below.

Merrick B. Garland, former United States Attorney General, was respondent below. James R. McHenry III, Acting United States Attorney General, "is automatically substituted as party" pursuant to Fed. R. Civ. P. 25(d).

RELATED PROCEEDINGS

- *Maldonado-Magno* v. *Garland*, No. 23-9604, U.S. Court of Appeals for the Tenth Circuit. Judgment entered November 6, 2024.

There are no other proceedings in state or federal courts, or in this Court, directly related to this case within the meaning of this Court's Rule 14(b)(1).

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Tenth Circuit is unreported but available at 2024 WL 4692214 and reproduced at Appendix ("Pet. App.") 1a. The Order of the Board of Immigration Appeals is unpublished but reproduced at Pet. App. 10a. The Decision of the Immigration Judge is unpublished but reproduced at Pet. App. 19a.

JURISDICTION

The Tenth Circuit filed its unpublished decision on November 6, 2024. Pet. App. 1a. This petition is timely, and the Court has jurisdiction under 28 U.S.C. § 1254(1).

PROVISIONS INVOLVED

The Immigration and Nationality Act, 8 U.S.C. § 1158(b)(1)(A)–(B), provides in pertinent part:

> The Secretary of Homeland Security or the Attorney General may grant asylum to an alien who has applied for asylum in accordance with the requirements and procedures established by the Secretary of Homeland Security or the Attorney

> General under this section 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.
>
> The burden of proof is on the applicant to establish that the applicant is a refugee, within the meaning of section 1101(a)(42)(A) of this title. To establish that the applicant is a refugee within the meaning of such section, the applicant must establish that race, religion, nationality, membership in a particular social group, or political opinion was or will be at least one central reason for persecuting the applicant.

8 U.S.C. § 1101(a)(42)(A), provides in pertinent part:

> The term "refugee" means any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion[.]

8 U.S.C. § 1252(b)(4)(B), provides in pertinent part:

> With respect to review of an order of removal ... the administrative findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary.

STATEMENT OF THE CASE

I. Legal Background

A. 8 U.S.C. § 1158(b)(1)(A) provides that the "Secretary of Homeland Security or the Attorney General may grant asylum to an alien ... 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."

The term "refugee" is defined by 8 U.S.C. § 1101(a)(42)(A) as "any person who is outside any country of such person's nationality ... who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion."

That definition reflects Congress's purpose in enacting the current scheme of refugee and asylum law: to "respond to the urgent needs of persons subject to persecution in their homelands" by providing such

individuals with the opportunity to apply for asylum. Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102.

Courts have explained that for individuals to be considered a "refugee" under the INA, they must prove (i) that treatment rises to the level of past persecution, (ii) that persecution was on account of one or more protected grounds, and (iii) that persecution was committed by the government or by forces the government was unwilling or unable to control. See *Meza Diaz* v. *Garland*, 118 F.4th 1180, 1188 (9th Cir. 2024). As pertains to prong (ii), section 1158 provides that applicants must "establish that race, religion, nationality, membership in a particular social group, or political opinion was or will be at least one central reason for persecuting the applicant" in order to establish that they are refugees within the statutory definition of that term. 8 U.S.C. § 1158(b)(1)(B)(i).

B. Under the current scheme, an immigration judge decides in the first instance whether an applicant meets this statutory definition. An applicant can appeal an adverse determination to the BIA, and subsequently to a U.S. Court of Appeals. 8 C.F.R. § 1003.1(d)(1); 8 U.S.C. § 1252(a).

Section 1252 of Title 8 sets out the standards for reviewing the BIA's determinations. Under that statute, a court of appeals should afford deference to "administrative findings of fact" in an order for removal. 8 U.S.C. § 1252(b)(4)(B). Specifically, "administrative findings of fact" are to be upheld as "conclusive unless any reasonable adjudicator would

be compelled to conclude to the contrary." *Id.* Courts refer to this standard of review as the "substantial-evidence standard." *Nasrallah* v. *Barr*, 590 U.S. 573, 584 (2020). While the statute does not state as much specifically, administrative findings on questions of law are reviewed *de novo*. See, *e.g.*, *Alvarado-Reyes* v. *Garland*, 118 F.4th 462, 470 (1st Cir. 2024).

II. Factual & Procedural Background

A. Underlying Facts

Petitioners Walter Maldonado-Magno, Andrea Uchuypoma-Palomino, and their minor son, Loan Maldonado-Uchuypoma lived in the district of El Augustino in the city of Lima, Peru until 2022. Pet. App. 2a, 20a. Ms. Uchuypoma-Palomino, with assistance from Mr. Maldonado-Magno, operated a seafood restaurant called the Fish Law until shortly before their departure. Pet App. 21a. Ms. Uchuypoma-Palomino was politically active in Peru and supported a candidate for Parliament who campaigned on a platform of combatting crime and cleaning up the streets of El Augustino. *Id.* at 24a.

Petitioners first began facing problems around April 2021. At that time, a group of criminals began extorting Petitioners for operating their restaurant, demanding biweekly payments on threat of harm. *Id.* at 21a. While Petitioners initially ceded to the criminals' demands, after eight months the criminals tripled their monetary demand, and Petitioners could no longer afford to make the payments. *Id.*

After Petitioners ceased paying the criminals, in January 2022, an unknown individual broke into their home while Petitioners were asleep and stole their money and Ms. Uchuypoma-Palomino's cellphone. The following day, Petitioners received a call from an individual who took credit for the robbery and threatened them with harm if they continued to ignore the extortion demands. *Id.* at 22a. The police were unable to identify the robber. *Ibid.*

Petitioners thereafter closed their restaurant for about a month. *Id.* But upon reopening, the criminals continued to extort money from Petitioners that Petitioners could not pay, and then began to harass and rob Petitioners' customers. *Id.* Feeling it was unsafe for themselves and their customers to continue to operate the restaurant, Petitioners closed the restaurant in April 2022. *Id.* at 23a. They relocated to live with Ms. Uchuypoma-Palomino's mother in another part of Lima. *Ibid.* However, still feeling unsafe, they decided to depart from Peru and travel to the United States.

B. Agency Proceedings

In 2022, the Department of Homeland Security initiated removal proceedings against Petitioners. *Id.* at 20a. Petitioners timely applied for asylum, identifying each of the grounds in § 1101(a)(42)(A) as a basis for their application. *Id.* at 25a, 28a.

Petitioners appeared before the Immigration Judge ("IJ") *pro se*. *Id.* at 19a. Based on his examinations of Petitioners, the IJ rejected

Petitioners' application for asylum on April 3, 2023. In a section titled "Statement of Law and Eligibility for Relief," the IJ concluded that Petitioners "have failed to demonstrate that they suffered past persecution or would face future persecution on account of any protected ground." *Id.* at 25a.

First, the IJ found that Petitioners failed to establish "past persecution," because the economic deprivation Petitioners suffered did not "rise to the level of persecution." *Id.* at 26a. Second, the IJ found that Petitioners failed to show that a protected characteristic under § 1101(a)(42)(A) was a "central reason" for the harm Petitioners suffered. *Id.* at 26a–27a. Noting that the Tenth Circuit and the BIA hold that "those targeted for criminal violence and extortion are not typically targeted because of any protected ground," the IJ found that Petitioners "failed to distinguish their cases from these binding decisions." *Id.* at 28a–29a.

Petitioners appealed the IJ's denial of their asylum application to the BIA. *Id.* at 10a–11a. The BIA noted that it would review the IJ's factual findings under a clearly erroneous standard, but that it would review all other issues, including issues of law, *de novo*. *Id.* at 11a (citing 8 C.F.R. § 1003.1(d)(3)(i)–(ii)).

Notwithstanding the fact that the IJ himself characterized his determination that Petitioners did not face persecution on account of a protected ground as a "Statement of Law," the BIA reviewed this determination only for clear error. *Id.* at 14a–15a. And

the Board found "no clear error" in the IJ's finding that Petitioners "have not shown that because they were targeted for criminal violence and extortion they were targeted on account of a protected ground." *Id.* at 15a. Affirming the IJ's other factual findings under the clear error standard, the BIA held that Petitioners "have not met their burden to establish eligibility for asylum," or for withholding of removal, and dismissed Petitioners' appeal. *Id.* at 17a–18a.

C. Tenth Circuit Proceedings

The Tenth Circuit affirmed the BIA's determination that Petitioners were ineligible for asylum.

The Circuit began its analysis of the BIA's determination with the applicable standard of review. It noted that "the circuits are split on the standard of review applicable to the issue" of whether an alien has established persecution. *Id.* at 6a (quoting *Matumona* v. *Barr*, 945 F.3d 1294, 1300 n.5 (10th Cir. 2019)). However, since "the Supreme Court has yet to resolve" the split, the Court was "bound by" a prior decision on the issue characterizing as a "question of fact" the question whether an alien has established persecution. *Id.* at 6a (citing *Matumona*, 945 F.3d at 1300 n.5; *Vicente-Elias* v. *Mukasey*, 532 F.3d 1086, 1091 (10th Cir. 2008)).

Accordingly, the Tenth Circuit applied the "substantial-evidence" standard used to review factual determinations, under which it "guarantee[s] that factual determinations are supported by

reasonable, substantial and probative evidence considering the record as a whole." *Id.* at 4a (citing 8 U.S.C. § 1252(b)(4)(B); *Aguayo* v. *Garland*, 78 F.4th 1210, 1216 (10th Cir. 2023)). Applying this standard, the Tenth Circuit found "[s]ubstantial evidence supports the BIA's finding of no nexus between the alleged persecution and a protected ground." *Id.* at 8a. The Tenth Circuit offered little analysis beyond quotations of the BIA's opinion and the fact that Petitioners had not offered any additional testimony or opinions "related to Ms. Uchuypoma's political opinions or involvement" that were not presented to the BIA or IJ. *Id.* at 5a, 7a.

Summarizing its analysis, the court explained that "the legal standards we must apply compel affirmance on the record before us." *Id.* at 8a. Therefore, it held that Petitioners did not establish their eligibility for asylum and denied the petitions for review. *Id.*

REASONS FOR GRANTING THE PETITION

I. There Is A Recognized and Entrenched Conflict On The Question Presented

The courts of appeals are sharply divided on the standard of review applicable to the agency's determination that an individual has not established persecution on account of a protected characteristic.

Pursuant to 8 U.S.C. § 1252(b)(4)(B), a reviewing court of appeals must accept the agency's "administrative findings" as "conclusive unless any

reasonable adjudicator would be compelled to conclude to the contrary." *Garland* v. *Ming Dai*, 593 U.S. 357, 365 (2021). Thus, the circuits are divided as to whether the agency's determination that an individual was persecuted on account of a protected characteristic is to be treated as a question of fact, which is reviewed deferentially, or as a question of law, which is reviewed *de novo*.

Several different circuits, including the court below, have recognized this split, and some have requested this Court's intervention to resolve it. See, *e.g.*, Pet. App. 6a ("Although the circuits are split on the standard of review applicable to the issue, the Supreme Court has yet to resolve it") (quoting *Matumona*, 945 F.3d at 1300 n.5); *Fon* v. *Garland*, 34 F.4th 810, 819 (9th Cir. 2022) (Graber, J., concurring) ("Supreme Court guidance on this important, recurring topic, on which circuits have taken inconsistent positions, would be welcome.").

This Court should grant the petition and clarify the caselaw on this important subject, with which the circuits have struggled. *Fon*, 34 F.4th at 823 (Collins, J., concurring) (characterizing "our caselaw on this subject" as "a bit of a mess").

A. Four Circuits Hold The Determination Of Refugee Status Is A Question Of Fact

1. Four circuits—the First, Fifth, Seventh, and Tenth—incorrectly apply the substantial-evidence standard to the question whether an established set of facts amount to persecution on account of a

protected characteristic under the INA. Those courts apply the substantial-evidence standard in reviewing the agency's determination as to both (1) whether an individual faces persecution and (2) whether such persecution is on account of a protected characteristic, which many courts refer to as the question of a "nexus" between the persecution and the protected ground.

The Fifth, Seventh, and Tenth Circuits (including in the decision below) apply the substantial-evidence standard to the overarching question whether an alien is a refugee eligible for asylum. See, *e.g.*, *Gjetani* v. *Barr*, 968 F.3d 393, 396 (5th Cir. 2020) ("we use the substantial evidence standard to review the IJ's factual conclusion that an alien is not eligible for asylum.") (internal citations omitted and cleaned up); *Ahmad* v. *I.N.S.*, 163 F.3d 457, 461 (7th Cir. 1999) ("Ordinarily, the Board's determination of refugee status is reviewed under the 'substantial evidence' test"); Pet. App. 6a–7a (considering the "nexus" determination a subcomponent of the purportedly factual question of whether an alien has established persecution).

The First Circuit breaks down the refugee determination into its constituent elements and applies the substantial evidence standard to both sub-questions. See, *e.g.*, *Aguilar-Escoto* v. *Garland*, 59 F.4th 510, 520 (1st Cir. 2023) (our "precedent has made clear that we apply the substantial evidence standard" to the "ultimate question" of the existence of persecution); *Ferreira* v. *Garland*, 97 F.4th 36, 46

n.4 (1st Cir. 2024) ("this court reviews the BIA's nexus determination under the substantial evidence standard").

2. Under both constructions, the result is the same: those four circuits review the question whether an individual has been persecuted on account of a protected characteristic, and therefore meets the statutory definition of refugee, under the "highly deferential" substantial-evidence standard. See *Nasrallah*, 590 U.S. at 583–84.

Indeed, those four circuits use the substantial-evidence standard "even if the underlying factual circumstances are not in dispute," *Vicente-Elias*, 532 F.3d at 1091, and have declined applicants' invitation to conduct "bifurcated" reviews where the court would "afford deference to the BIA's factual findings and then review *de novo* whether the BIA correctly applied the law to the facts," *Carcamo-Perez* v. *Garland*, 2024 WL 5074650, at *3 n.2 (10th Cir. Dec. 11, 2024).

Moreover, discordantly, those courts apply the substantial-evidence standard even though the BIA treats the same question as a matter of law when it reviews IJ decisions. See, *e.g.*, *Matter of A-S-B-*, 24 I. & N. Dec. 493, 497 (BIA 2008) ("The questions whether the facts demonstrate harm that rises to the level of persecution and whether the harm was inflicted 'on account of' a protected ground, however, are questions that will not be limited by the clearly erroneous standard.") (internal quotations omitted).

Unsurprisingly, judges within those circuits have called the correctness of their precedents into question. Indeed, the decision below cited Tenth Circuit precedent that firmly questioned the validity of its own rule applying the substantial evidence standard. See, *e.g.*, *Xue* v. *Lynch*, 846 F.3d 1099, 1105 (10th Cir. 2017) ("It is certainly odd, to say the least, for this court to review for substantial evidence a determination the BIA itself has concluded is legal in nature"); see also *id.* n. 11. The First Circuit has likewise acknowledged the "the tension between the standards of review applied to past persecution by the BIA and circuit courts," but continues to apply the substantial evidence standard based on established circuit precedent. *Aguilar-Escoto*, 59 F.4th at 519; see also *Ferreira*, 97 F.4th at 46 n.4 (explaining that "[t]his same tension exists in how we review the agency's nexus conclusion").

Similarly, judges in the Fifth Circuit have disputed the viability of the holding that refugee determinations are "factual conclusion[s]" in light of this Court's recent precedents. See *Gjetani*, 968 F.3d at 400 (Dennis, J., dissenting). While acknowledging that the "BIA's determination that an alien has failed to establish persecution on account of a protected ground can be based on factual determinations," such as the factual question of what motivated a persecutor, Judge Dennis noted that the question whether undisputed facts meet a statutory standard is a "quintessential question of law." *Id.* at 401. Indeed, "'the application of a legal standard to undisputed or established facts' is a 'question of law'

within the meaning of the Immigration and Nationality Act." *Id.*; see also *id.* at 401 n.1 (quoting *Guerrero-Lasprilla* v. *Barr*, 589 U.S. 221, 227 (2020)).

B. Seven Circuits—With The Executive Branch Agreeing—Review *De Novo*

1. Seven circuits—the Second, Third, Fourth, Sixth, Eighth, Ninth, and Eleventh—have all stated in published decisions that *de novo* review applies to either or both agency determinations that established facts do not constitute persecution or that such persecution was not on account of a protected characteristic. Those courts reason that this type of determination should be reviewed as a question of law because "the application of [a statutory] standard to a given set of facts is reviewable as a question of law." *Wilkinson* v. *Garland*, 601 U.S. 209, 217 (2024).

For example, in *Perez Vasquez* v. *Garland*, the Fourth Circuit reviewed the BIA's determination that an applicant for asylum had not established a "nexus" between the persecution they suffered and a statutorily protected characteristic. 4 F.4th 213, 221 (4th Cir. 2021). The court explained that while a persecutor's motivation is a "classic factual question" reviewed for substantial evidence, the determination whether the BIA applied the correct standard in the nexus analysis was a legal question requiring *de novo* review. *Ibid.* In that case, the Circuit held that the BIA failed to apply the correct legal standard to the "unrebutted" evidence: it erred by both (i) focusing on why applicant's family, rather than applicant herself,

was targeted, and (ii) failing to consider the intertwined reasons for the persecution the applicant had suffered. *Id.* at 221–224. The Circuit held that, contrary to the BIA, the record evidence demonstrated that the applicant's protected status *was* a central reason why she was targeted and reversed the BIA's finding on nexus. *Id.* at 224.

Six other circuits similarly review *de novo* the BIA's application of law to undisputed facts in persecution determinations.[1] See, *e.g.*, *Mirzoyan* v. *Gonzales*, 457 F.3d 217, 220 (2d Cir. 2006) (reviewing *de novo* IJ's conclusions that did not involve disputed facts); *Blanco* v. *Att'y Gen.*, 967 F.3d 304, 310, 315 (3d Cir. 2020) (reviewing *de novo* the BIA's "applications of law to undisputed facts"); *Mapouya* v. *Gonzales*, 487 F.3d 396, 405 (6th Cir. 2007) ("When the Court reviews the IJ's 'application of legal principles to undisputed facts, rather than its underlying determination of those facts or its interpretation of its

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[1] Those circuits have sometimes applied a substantial-evidence standard review to the "nexus" determination—*i.e.*, whether persecution was on account of a protected characteristic. See, *e.g.*, *Jathursan* v. *U.S. Att'y Gen.*, 17 F.4th 1365, 1373 (11th Cir. 2021) ("Whether a petitioner has established a sufficient nexus between persecution and a statutorily protected ground is a question of fact"); *Feitosa* v. *Lynch*, 651 F. App'x 19, 21 (2d Cir. 2016) ("With respect to the agency's denial of withholding of removal based on past persecution, we review *de novo* whether past harm rises to the level of persecution, and for substantial evidence the agency's finding that persecution lacks a nexus to a protected ground."). The application of inconsistent standards within some circuits, sometimes as to different elements of the same statutory provision, underscores the need for this Court's intervention.

governing statutes, the review of both the IJ's asylum and withholding of deportation determinations is *de novo*'" (internal citation omitted)); *Padilla-Franco* v. *Garland*, 999 F.3d 604, 606 (8th Cir. 2021) ("whether ... harm rises to 'the legal definition of persecution' is a legal issue we review *de novo*" (citing *Njong* v. *Whitaker*, 911 F.3d 919, 923 (8th Cir. 2018)); *Garcia* v. *Wilkinson*, 988 F.3d 1136, 1142 n.2 (9th Cir. 2021) ("When an applicant is deemed credible, we have considered nexus issues to be questions of law entitled to *de novo* review."); *Mejia* v. *U.S. Att'y Gen.*, 498 F.3d 1253, 1257 (11th Cir. 2007) (reviewing whether applicant established persecution "as a matter of law," because the IJ made no adverse credibility finding).

2. The executive branch also regards the question whether given facts show an applicant was persecuted "on account of" a protected characteristic as reviewable *de novo*. As noted, the BIA itself reviews the IJ's determination whether given facts entitle an applicant to refugee status *de novo*, rather than under the clearly erroneous standard; it deferentially reviews only the IJ's determination of "what happened." *Procedural Reforms To Improve Case Management*, 67 Fed. Reg. 54,878, 54,890 (Aug. 26, 2002).

Thus, while the BIA reviews for clear error the IJ's determination of a persecutor's motive, "the BIA must review *de novo* whether a persecutor's motives meet the nexus legal standards, *i.e.*, whether a protected ground was 'one central reason' (for asylum) or 'a

reason' (for withholding of removal) for the past or feared harm." *Umana-Escobar* v. *Garland*, 69 F.4th 544, 552 (9th Cir. 2023) (citing *Garcia* v. *Wilkinson*, 988 F.3d at 1146).

II. Resolving The Split Is Critically Important

Whether courts of appeals should apply a *de novo* or substantial-evidence standard of review when determining if established facts qualify an individual as a refugee is a question of critical importance.

First, the question of the proper standard of review arises in nearly every asylum case in every circuit, which means it is implicated in thousands of cases each year. One study estimates that, on average, more than 5,400 petitions for review of BIA decisions are filed each year. Table B.3, U.S. Courts of Appeals–Sources of Appeals, Original Proceedings, and Miscellaneous Applications Commenced, by Circuit, During the 12-Month Periods Ending September 30, 2017 through 2021, U.S. COURTS (September 30, 2021), https://tinyurl.com/yser8emk.

Second, standards of review can frequently be outcome-determinative, as this Court has recognized in granting certiorari to clarify the standard of review that appellate courts should use across a variety of statutes. See, *e.g.*, *McLane Co.* v. *E.E.O.C.*, 581 U.S. 72 (2017) (standard of review of a district court's decision to enforce or quash an EEOC subpoena under Title VII); *U.S. Bank Nat. Ass'n ex rel. CWCapital Asset Mgmt. LLC* v. *Vill. at Lakeridge, LLC*, 583 U.S. 387 (2018) (standard of review of certain bankruptcy

court determinations under Bankruptcy Code); *Loper Bright Enterprises* v. *Raimondo*, 603 U.S. 369 (2024) (standard of review of agency interpretations of administered statutes).

With respect to the split here, an asylum applicant ordered to appear before an immigration judge in Houston (where federal courts will review agency determinations for substantial evidence) will have a lesser chance of eventually obtaining asylum than the same applicant proceeding in Minneapolis (where federal court review is *de novo*).

The courts of appeals have acknowledged the importance of the standard of review in refugee-determination cases. For example, in *Diallo* v. *Ashcroft*, the Seventh Circuit explained that "[w]ere we reviewing Diallo's claim *de novo*, we might be inclined to find that . . . Diallo was the victim of past persecution." 381 F.3d 687, 697 (7th Cir. 2004). Concluding, however, that the more deferential substantial-evidence standard of review applied, the Circuit upheld the BIA's past-persecution determination and ruled that the applicant was ineligible for asylum. *Id.* at 698.

Similarly, dissents from decisions of the Courts of Appeals reviewing refugee determinations stem from disagreement over which standard of review applies, with the majority reaching one conclusion based on the substantial-evidence standard, and the dissent reaching a different conclusion based on the application of *de novo* review. See, *e.g.*, *Gjetani*, 968 F.3d at 400–402 (Dennis., J., dissenting). In the

decision below, the Tenth Circuit explained that "the legal standards we must apply compel affirmance on the record before us," Pet. App. 8a—suggesting that the standard of review was dispositive to the outcome.

III. The Decision Below Was Wrong

The Tenth Circuit in the decision below applied the substantial-evidence standard to a question that should receive *de novo* review: whether established facts amount to persecution on account of a protected characteristic under § 1101(a)(42)(A) and § 1158(b)(1)(B)(i).

The INA states plainly that the substantial-evidence standard applies to "administrative findings of fact." 8 U.S.C. § 1252(b)(4)(B). Whether established facts meet a statutory requirement is not a finding of fact. This Court has held that "the phrase 'questions of law' in" another INA provision, § 1252(a)(2)(D), "includes the application of a legal standard to undisputed or established facts." *Guerrero-Lasprilla*, 589 U.S. at 225. Just last Term, this Court reaffirmed that "[t]he application of a statutory legal standard ... to an established set of facts is a quintessential mixed question of law and fact" and is a "question of law" for jurisdictional purposes under § 1252(a)(2)(D). *Wilkinson* v. *Garland*, 601 U.S. at 212.

Regardless of whether the phrase "questions of law" is treated differently for purposes of § 1252(a)(2)(D), the application of a statutory standard to established facts is decidedly *not* an "administrative finding[] of fact" under

§ 1252(b)(4)(B). This Court has provided examples of "administrative findings of fact" under § 1252(b)(4)(B): a "noncitizen's past experiences in the designated country of removal," a "noncitizen's credibility," and "the political or other current conditions in that country." *Nasrallah*, 590 U.S. at 585. Such questions are, of course, far afield from the determination at issue here—whether a certain set of facts satisfy the statutory requirements for refugee status.

Moreover, "[t]reating the question here as a 'factual finding[]' subject to § 242(b)(4)(B) would effectively require [courts] to say that what is concededly a question of law in the BIA somehow transmogrifies into a question of fact when the case leaves the BIA and comes before [the] court. That does not make much sense." *Fon*, 34 F.4th at 823 (Collins, J., concurring); see *Xue*, 846 F.3d at 1105 ("It is certainly odd, to say the least, for this court to review for substantial evidence a determination the BIA itself has concluded is legal in nature").

Finally, federal courts' use of the substantial-evidence standard to review refugee determinations—even when they turn on the erroneous application of law—"forces judges to abandon the best reading of the law in favor of views of those presently holding the reins of the Executive Branch." *Loper*, 603 U.S. at 433 (Gorsuch, J., concurring).

IV. This Case Is An Ideal Vehicle

This case is an excellent vehicle to decide the question presented. In the decision below, the Tenth Circuit made clear that it analyzed the question whether Petitioners had established persecution on account of a protected characteristic under the substantial-evidence standard.

The court described the question whether an alien has established persecution as a "question of fact" and emphasized that nothing "compelled" the Board to reach an alternate finding, as "substantial evidence" supported the Board's finding. Pet. App. 7a–8a.

Moreover, unlike in other cases, where courts have noted that they would reach the same determination under either *de novo* review or the substantial evidence standard, the court below suggested the opposite. Compare Pet. App. 8a ("the legal standards we must apply compel affirmance") with *Fon*, 34 F.4th at 813 n.1 ("Because we would reach the same conclusion under any standard of review, we need not address whether a less deferential standard should pertain"). This case thus presents an ideal vehicle: The Circuit articulated the standard it applied and noted the standard "compel[led] affirmance." Pet. App. 8a.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for certiorari.

Respectfully submitted,

CHRISTINE HERNANDEZ
HERNANDEZ &
ASSOCIATES, P.C.
1801 York Street
Denver, CO 80206

GREGORY J. DUBINSKY
Counsel of Record
BRIAN T. GOLDMAN
HOLWELL SHUSTER
& GOLDBERG LLP
425 LEXINGTON AVENUE
New York, NY 10017
(646) 837-5120
gdubinsky@hsgllp.com

Counsel for Petitioners

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