No. 24-777

In the Supreme Court of the United States

DOUGLAS HUMBERTO URIAS-ORELLANA, ET AL.,
Petitioners,

v.

PAMELA BONDI, ATTORNEY GENERAL,
Respondent.

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

BRIEF OF AMERICAN GATEWAYS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

Amicus Curiae American Gateways is a non-profit legal services provider in Central Texas advocating for low-income immigrants, refugees, and survivors of persecution, torture, conflict, and human trafficking. Created in 1987 to serve communities escaping war in Central America, American Gateways has since broadened its mission to ensure that refugees from all over the globe have a path to immigration relief.

American Gateways has an interest in the sound development of immigration and asylum law and presents this brief to advocate for a more fair and administrable immigration system. American Gateways hopes that this brief can highlight the importance of asylum relief, as well as other fear-based protection, and the need for this Court's review to ensure the proper balance between administrative immigration courts and federal courts of appeals.

INTRODUCTION AND SUMMARY OF ARGUMENT

1. This case raises an important question for review: whether courts of appeals review *de novo* (i.e. as a question of law) the BIA's determination that established facts do not rise to the level of persecution.

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[1] No counsel for any party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No entity or person, aside from *amicus curiae* and its counsel, made any monetary contribution intended to fund the preparation or submission of this brief. All parties were given timely notice of the intent to file this brief.

That question has intractably divided the courts of appeals. Pet. 15–22; *Fon* v. *Garland*, 34 F.4th 810, 816 (9th Cir. 2022) (Graber, J., concurring) ("[T]here is a circuit split concerning the proper standard to use when we review the BIA's determination that a particular set of facts does or does not rise to the level of persecution."). Moreover, the circuits are internally confused, sometimes reviewing persecution determinations *de novo* and sometimes for substantial evidence. Despite decades of opportunities to correct and clarify their precedents, the courts of appeals have failed to coalesce around a uniform standard of review in these circumstances. This intra-circuit confusion, alongside inter-circuit conflict, requires this Court's review to "resolve conflicts * * * concerning the meaning of provisions of federal law." *Braxton* v. *United States*, 500 U.S. 344, 347 (1991).

2. One central reason the courts have been unable to resolve the conflict is a flawed interpretation of this Court's opinion in *INS* v. *Elias-Zacarias*, 502 U.S. 478 (1992). Many circuits have inferred from that decision that "the ultimate question of past persecution * * * [is] judicially reviewed under the substantial evidence standard." *He* v. *Garland*, 24 F.4th 1220 (8th Cir. 2022). But those decisions overread *Elias-Zacarias,* which was narrowly focused on the *factual* question of whether acts of conscription by guerrillas were motivated by the asylum applicant's political opinion. 502 U.S. at 480. This Court's intervention is necessary to clarify the reach of *Elias-Zacarias* and restore the proper balance of administrative and judicial power.

The Court should grant the petition.

ARGUMENT

I. The existence of intra-circuit splits alongside inter-circuit splits reinforces the urgent need for this Court's guidance.

As petitioners have explained, federal appellate courts are deeply and intractably split as to what standard of review applies when the Board of Immigration Appeals ("BIA") determines that undisputed facts do or do not amount to "persecution" under the Immigration and Nationality Act ("INA"). Pet. 15–22; *Fon*, 34 F.4th at 816 (Graber, J., concurring) ("[T]here is a circuit split concerning the proper standard to use when we review the BIA's determination that a particular set of facts does or does not rise to the level of persecution."). That split has given rise to three petitions for certiorari in the last four years, including two near-simultaneous petitions currently pending before this Court—this petition and *Maldonado-Magno* v. *Bondi*, No. 24-805 (docketed Jan. 28, 2025).

Further, this intractable conflict has given rise to numerous intra-circuit splits on the same question that enhance the need for immediate intervention by this Court.

A. Over nearly three decades, intra-circuit divisions have proven difficult to overcome.

1. Intra-circuit conflicts persist even though the circuits have had ample time to unify their jurisprudence. For example, irreconcilable precedents have been on the books in the Ninth Circuit for nearly thirty years. Compare *Singh* v. *Ilchert*, 69 F.3d 375,

378 (9th Cir. 1995) (holding that because "the issues presented in this appeal involve the application of established legal principles to undisputed facts, our review of the BIA's asylum * * * determinations is de novo" (citation omitted)), with *Prasad* v. *INS*, 47 F.3d 336, 339 (9th Cir. 1995) (reviewing for substantial evidence despite accepting the "truth of [the asylum applicants'] testimony and examin[ing] only whether it is sufficient to establish statutory grounds for asylum"). Despite decades of opportunity, the Ninth Circuit has yet to issue an en banc decision disavowing one line of precedent or the other, and no clear rule has been established by any other means.

As Judge Collins recognized in May 2022, the Ninth Circuit's "caselaw [remains] internally inconsistent," or, put more bluntly, "is [still] a bit of a mess." *Fon*, 34 F.4th at 820, 823 (Collins, J., concurring). Panel decisions of that court, sometimes separated by mere months, have continued to diverge on the relevant question in much the same manner as their predecessors in the 1990s had. Compare *Kaur* v. *Wilkinson*, 986 F.3d 1216, 1221 (9th Cir. 2021), with *Sharma* v. *Garland*, 9 F.4th 1052, 1060 (9th Cir. 2021).

The Ninth Circuit is hardly an outlier. To greater and lesser degrees, the intra-circuit splits identified in the petition are both long-lived and long-unresolved. Pet. 15–21. Many circuits join the Ninth in repeatedly applying inconsistent standards of review across multiple decades. Compare, *e.g.*, *Sepulveda* v. *U.S. Att'y Gen.*, 401 F.3d 1226, 1231 (11th Cir. 2005) (reviewing for substantial evidence the conclusion that "menacing telephone calls and threats * * * do

not rise to the level of past persecution"), with *Mejia* v. *U.S. Att'y Gen.*, 498 F.3d 1253, 1257 (11th Cir. 2007) (reviewing *de novo* whether asylum applicant's treatment "constitutes past persecution"); and *Lin-Jian* v. *Gonzales*, 489 F.3d 182, 192 (4th Cir. 2007) (concluding that "the denial of [applicant's] claim of past persecution is not supported by substantial evidence"), with *Sorto-Guzman* v. *Garland*, 42 F.4th 443, 447–48 (4th Cir. 2022) ("[W]hether the maltreatment a noncitizen suffers amounts to past persecution is a question of law" that the court "review[s] * * * de novo.").

2. Not only do intra-circuit splits exist with respect to the standard of review applicable to persecution determinations, but some circuits have applied an inconsistent standard to analytically similar BIA decisions. For example, the First Circuit (whose decision is at issue here) reviews the BIA's persecution determinations under the INA for substantial evidence. Pet.App.13a; *Vargas Panchi* v. *Garland*, 125 F.4th 298, 309 & n.8 (1st Cir. 2025). But that court has taken the opposite approach in the closely analogous context of protection under the Convention Against Torture, which individuals regularly seek in conjunction with their requests for asylum. In that context, the First Circuit has held that "[w]hether a particular act constitutes torture is a legal conclusion that [the court] review[s] de novo." *Hernandez-Martinez* v. *Garland*, 59 F.4th 33, 40 (1st Cir. 2023); accord *DeCarvalho* v. *Garland*, 18 F.4th 66, 73 (1st Cir. 2021) ("[H]ow the law applies to [the] facts (e.g., whether such harm rises to the level of torture)" is reviewed *de novo*).

The First Circuit is not alone in this regard: multiple other circuits—including some that have applied substantial evidence review to persecution determinations in an asylum setting—review *de novo* the application of law to facts under the Convention Against Torture. *E.g.*, *Manuel-Soto* v. *Att'y Gen. of U.S.*, 121 F.4th 468, 472 (3d Cir. 2024); *Yar* v. *Garland*, 94 F.4th 1077, 1078 (8th Cir. 2024); *Arostegui-Maldonado* v. *Garland*, 75 F.4th 1132, 1144 & n.8 (10th Cir. 2023); *Jean-Pierre* v. *U.S. Att'y Gen.*, 500 F.3d 1315, 1316, 1321–22 (11th Cir. 2007).

There is no principled reason for courts to review for substantial evidence whether certain conduct rises to the level of "persecution" while reviewing *de novo* whether conduct rises to the level of "torture." This divergence in similar precedents appears to stem at least partly from some courts' misunderstanding of this Court's decision in *Elias-Zacarias*, 502 U.S. at 481, discussed further below. *Infra* Part II; see *Ravindran* v. *INS*, 976 F.2d 754, 758–59 (1st Cir. 1992) (citing *Elias-Zacarias* for substantial evidence standard); *Arostegui-Maldonado*, 75 F.4th at 1144 n.8 (acknowledging disparity in standards of review for Convention Against Torture ("CAT") and asylum claims, but stating that *Elias-Zacarias* requires treating persecution determinations as questions of fact). But this Court's recent decision in *Loper Bright Enterprises v. Raimondo* reinforces that interpreting "the meaning of statutes" is "exclusively a judicial function." 603 U.S. 369, 387 (2024) (citation omitted). That maxim is no less true for the INA than for the CAT.

The circuit courts' failure to converge on a single standard applicable to persecution determinations has put many appellate panels to the difficult task of navigating around their circuits' muddled jurisprudence. Some panels have managed to sidestep the inconsistency of their circuit precedents by concluding, fairly or unfairly, that the outcome is the same under either standard of review. See, *e.g.*, *KC* v. *Garland*, 108 F.4th 130, 134 (2d Cir. 2024); *Singh* v. *Garland*, 57 F.4th 643, 652 (9th Cir. 2023). Others, such as the Eighth Circuit, have also had to sidestep their own *stare decisis* rules en route to a preferred outcome. See *He*, 24 F.4th at 1224 (recognizing that "circuit court decisions support[]" reviewing persecution determinations *de novo*, but determining that this Court's decision in *Elias-Zacarias* mandates substantial evidence review); *Free the Nipple - Springfield Residents Promoting Equal.* v. *City of Springfield*, 923 F.3d 508, 511 (8th Cir. 2019) (holding that prior panel precedents are controlling, absent an "*intervening* Supreme Court decision" to the contrary (emphasis added)).

In short, the circuits have had ample time to police their own precedents, whether by deciding on the appropriate standard in an en banc decision or by reverting to the rule applied in the earliest published decision on point. See Michael Duvall, *Resolving Intra-Circuit Splits in the Federal Courts of Appeal*, 3 Fed. Cts. L. Rev. 17, 20 (2009) ("In most federal courts of appeal, resolution of an intra-circuit split is straightforward: the earliest decision controls."). But, instead of building cohesion, recent decisions of the appellate courts have exacerbated or strained to work

around existing intra-circuit divisions. Only this Court's guidance will bring uniformity within and among the circuits on this important question.

After all, a "principal purpose for [this Court's] certiorari jurisdiction * * * is to resolve conflicts * * * concerning the meaning of provisions of federal law." *Braxton*, 500 U.S. at 347. Certainly, inter-circuit conflicts are of paramount concern. R. Sup. Ct. 10(a). But intra-circuit conflicts are no less a source of confusion about the meaning and application of federal law. Thus, when intra-circuit conflicts exist *alongside* inter-circuit conflicts, as here, the resulting jumble is particularly vexatious to both courts and litigants, and the need for review by this Court is all the more compelling.

B. Despite the extensive confusion within some circuits, many circuits have settled on a standard of review and entrenched an inter-circuit split.

Notwithstanding the intra-circuit confusion, there is consensus that many of the circuits have entrenched standards of review. This petition is one of three filed on this issue in the last four years, including *He* v. *Garland*, No. 22-436 (2022), and *Maldonado-Magno* v. *Bondi*, No. 24-805 (2025). All petitioners agree that at least three circuits (the First, Seventh, and Tenth) generally review for substantial evidence, while at least four (the Second, Third, Eighth, and Ninth) generally review *de novo*. Pet. 16–18; No. 22-436 Pet. 14–16; No. 24-805 Pet. 10, 14. While the intra-circuit conflicts leave room for debate

for each of the remaining circuits,[2] there is a deep, acknowledged, and entrenched split that can only be resolved by this Court. See *Xue*, 846 F.3d at 1105 n.11.

The petition identifies five circuits—the First, Fourth, Sixth, Seventh, and Tenth—that apply the substantial evidence standard to the BIA's conclusions about whether established facts qualify as "persecution" under the INA. Pet. 16–18. As the petition makes clear, that is the wrong standard to apply. The question at issue has been described as "a basic matter of statutory interpretation" and thus a "quintessential question of law." See *Gjetani* v. *Barr*, 968 F.3d 393, 401 (5th Cir. 2020) (Dennis, J., dissenting) (citation omitted). That is a fair extension of this Court's own precedents, which have held that the term "'questions of law' includes the application of a legal standard to undisputed or established facts." *Guerrero-Lasprilla* v. *Barr*, 589 U.S. 221, 227 (2020).[3]

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[2] Petitioners here draw different conclusions with respect to the Fourth, Fifth, Sixth, and Eleventh circuits than the petitioners in *He* and *Maldonado-Magno*. Compare Pet. 16–18, with No. 22-436 Pet. 14-16; and No. 24-805 Pet. 10, 14. As Petitioners point out, each of those circuits has conflicting precedent from which reasonable practitioners (and appellate panels) can draw different conclusions. *E.g.*, Pet. 20 (identifying conflicting Fifth Circuit precedent).

[3] One court has argued that *Guerrero-Lasprilla* cannot be extended this way because it addressed a different provision of the INA, 8 U.S.C. § 1252(a)(2)(D), which allows for judicial review of "questions of law" in removal proceedings. See *Gjetani*, 968 F.3d at 397 n.2. In essence, the panel majority in *Gjetani* contended that *Guerrero-Lasprilla* can only be read to answer a narrow question of statutory construction and thus that the decision's

The circuits that review for substantial evidence when the BIA determines whether established facts constitute "persecution" thus betray a profound misunderstanding of the INA. The INA assigns the substantial evidence standard only to "administrative findings of fact." 8 U.S.C. § 1252(b)(4)(B). But, both under this Court's decision in *Guerrero-Lasprilla* and as a matter of common sense, the application of a legal standard like "persecution" to established facts presents a question of law.

In some circuits, this has been recognized in the vast majority of cases. For example, over a period of more than twenty years, nearly every relevant Second Circuit precedent has applied *de novo* review when determining whether established facts rise to the level of "persecution." See *Diallo* v. *INS*, 232 F.3d 279, 287 (2d Cir. 2000); *Edimo-Doualla* v. *Gonzales*, 464 F.3d 276, 281–82 (2d Cir. 2006); *Mirzoyan* v. *Gonzales*, 457 F.3d 217, 220 (2d Cir. 2006); *Hui Lin Huang* v. *Holder*, 677 F.3d 130, 136 (2d Cir. 2012); *Alom* v. *Whitaker*, 910 F.3d 708, 712 (2d Cir. 2018); but see *Scarlett* v. *Barr*, 957 F.3d 316, 336 (2d Cir. 2020) ("The agency's decision * * * is supported by substantial evidence

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reasoning cannot be extended beyond the narrow scope of the question presented in that case. *Ibid.* But the Fifth Circuit has long applied *de novo* review when the BIA decides "questions of law." *Zhu* v. *Gonzales*, 493 F.3d 588, 594 (5th Cir. 2007), and there is no principled reason that the application of a legal standard to established facts can be both a "question[] of law" and an "administrative finding[] of fact" in the same statute. 8 U.S.C. § 1252(a)(2)(D), (b)(4)(B); cf. *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 319 (2014) (this Court "ordinarily assumes" that "identical words used in different parts of the same [statute] are intended to have the same meaning" (citation omitted)).

that the past conduct did not rise to the level of 'persecution.'"). Because the great weight of Second Circuit authority favors *de novo* review, some courts have described the Second Circuit as a standard-bearer for one side of the inter-circuit split identified by petitioners. See *Xue* v. *Lynch*, 846 F.3d 1099, 1105 n.11 (10th Cir. 2017) (placing Second Circuit on the side of circuit split favoring a *de novo* standard); see also *Fon*, 34 F.4th at 823 (Collins, J., concurring).

Thus, even if this Court were reluctant to intervene before the most vexing intra-circuit conflicts have been resolved in the circuit courts, a writ of certiorari would still be warranted here. A genuine and entrenched inter-circuit split exists between circuits that have settled on one standard of review or the other. Without a decision from this Court, it is virtually guaranteed that litigants will continue to receive disparate treatment driven only by differences in geography. Granting review in this case would also allow this Court to clarify that *Guerrero-Lasprilla* abrogated the First, Seventh, and Tenth Circuit precedents (as well as precedent in other circuits) calling for substantial evidence review when the BIA "appli[es] a legal standard to undisputed or established facts." 589 U.S. at 227; cf. *supra* n.3. Such a ruling has already been foreshadowed by members of some courts in decisions applying substantial evidence review. *Gjetani*, 968 F.3d at 401 n.1 (Dennis, J., dissenting) ("[A]ny duty we had to follow these precedents was abrogated by the Supreme Court's recent affirmance of the basic principle that '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." (quoting *Guerrero-Lasprilla*, 589 U.S. at 227).

Review is also warranted to ensure that courts are applying their independent judgment to important statutory interpretation questions, consistent with this Court's recent decision in *Loper Bright*. 603 U.S. at 413. Indeed, this Court recognized that courts have "special competence in resolving statutory ambiguities," but agencies do not. 603 U.S. at 400–01. Thus, while the INA mandates respect for administrative findings of fact, 8 U.S.C. § 1252(b)(4)(B), it "remains the responsibility of the court to decide whether the law means what the agency says." 603 U.S. at 392 (citation omitted). Those decisions applying deferential substantial evidence review to administrative agency conclusions with respect to the legal meaning of "persecution" in the INA are inconsistent with this Court's precedent.

II. An opinion clarifying *INS* v. *Elias-Zacarias* would eliminate an important source of confusion in the circuit courts.

One reason that the circuits have been unable to resolve their intra-circuit conflicts is that many panels, including in the First Circuit, have endorsed an erroneous interpretation of this Court's opinion in *INS* v. *Elias-Zacarias*, 502 U.S. 478 (1992). See, *e.g.*, *Ravindran*, 976 F.2d at 758–59 (concluding that *Elias-Zacarias* requires substantial evidence review of persecution determinations); *Nazaraghaie* v. *INS*, 102 F.3d 460, 463 n.2 (10th Cir. 1996) (holding that *Elias-Zacarias* "foreclose[s] any argument" for application of a "standard less deferential than substantial evidence"). For example, in *He* v. *Garland*,

an Eighth Circuit panel acknowledged the existence of circuit precedents calling for *de novo* review, but applied the substantial evidence standard anyway, in large part because, in the panel's view, to do otherwise would be "contrary to controlling Supreme Court precedent." 24 F.4th at 1223–24.

The Eighth Circuit focused on a single sentence in *Elias-Zacarias* stating that a "determination that [an applicant] was not eligible for asylum must be upheld" if supported by substantial evidence. 502 U.S. at 481. From that sentence, the Eighth Circuit inferred that "the ultimate question of past persecution * * * as well as the findings underlying that determination, are judicially reviewed under the substantial evidence standard that applies to agency findings of fact." 24 F.4th at 1224. But that inference overreads this Court's narrow focus in *Elias-Zacarias*, which concerned disputed facts regarding the alleged persecutors' motive, not the ultimate legal question of whether a given set of facts amounted to persecution under the INA. 502 U.S. at 482–84.

This reading of *Elias-Zacarias* reflects a common form of confusion in the appellate courts. See *Xue*, 846 F.3d at 1105 n.11 (circuits rely "uncritically" on *Elias-Zacarias*). That confusion has caused courts to apply substantial evidence review to questions of law underlying asylum determinations. Granting certiorari in this case would allow the Court to provide crucial guidance about the meaning of *Elias-Zacarias*—and avoid the further entrenchment of some circuits' mistaken belief that *Elias-Zacarias* requires substantial evidence review whenever a

determination has any bearing on an applicant's "eligibility" for asylum.

A. The substantial evidence standard of review in *Elias-Zacarias* is limited to factual findings.

In *Elias-Zacarias*, this Court addressed whether "acts of conscription by a nongovernmental group constitute persecution on account of political opinion." 502 U.S. at 480. The Ninth Circuit had concluded that conscription by a guerilla organization "necessarily constitutes 'persecution on account of * * * political opinion.'" *Id.* at 481. This Court disagreed. Notably, this Court rested its decision upon the fact that the petitioner had only shown that he was harassed by the guerilla group because "of his refusal to fight with them" rather than any political opinion of his. *Id.* at 483. This Court explained that the motive for resisting recruitment could be as simple as "fear of combat, [or] a desire to remain with one's family and friends," rather than any political opinion held by the petitioner. *Id.* at 482. Indeed, this Court noted there was some evidence that the noncitizen was not expressing any political opinions, but was instead "afraid that the government would retaliate against him and his family." *Ibid.* Applying the substantial evidence standard, this Court concluded that the evidence did not "compel[] the conclusion" that the petitioner would be persecuted "*because of* [his] political opinion." *Id.* at 483 (emphasis in original).

While the *ratio decidendi* of *Elias-Zacarias* involved only the resolution of disputed fact issues regarding the guerrillas' motives,[4] the Court's description of the standard of review has caused disarray in the courts of appeals: "The BIA's determination that Elias-Zacarias was not eligible for asylum must be upheld if 'supported by reasonable, substantial, and probative evidence on the record considered as a whole.'" *Id.* at 481 (quoting 8 U.S.C. § 1105a(a)(4)). From that one sentence, courts of appeals have inferred that eligibility for asylum is a "factual conclusion." *E.g.*, *Zhao* v. *Gonzales*, 404 F.3d 295, 306 (5th Cir. 2005) (reviewing "the IJ's factual conclusion that an alien is not eligible for asylum").

However, the substantial evidence standard of review espoused in *Elias-Zacarias* is cabined to factual findings, like the motive at issue in that case. See *Xue*, 846 F.3d at 1105 n.11 (explaining that the question of persecution in *Elias-Zacarias* turned on disputed facts). Nor does the INA require deference to the entire decision on eligibility, but instead requires—as it has always required—courts to accept the "administrative findings of fact" unless compelled otherwise. 8 U.S.C. § 1252(b)(4)(B); 8 U.S.C. § 1105a(a)(4) (1992) ("the Attorney General's findings of fact"); Act of Sept. 26, 1961, Pub. L. 87-301, 75 Stat. 650, 651–52 (1961) (same). That standard does not apply to the *entire* asylum eligibility determination, which includes both questions of fact and questions of law. *Singh* v. *Ilchert ("Ilchert")*, 63 F.3d 1501, 1507 (9th Cir. 1995) (noting

[4] Indeed, what the persecutor's subjective motives are is a "classic factual question." *Crespin-Valladares* v. *Holder*, 632 F.3d 117, 128 (4th Cir. 2011).

that *Elias-Zacarias*'s holding that the substantial evidence standard of review applies to a certain factual finding "does not mean that every review of an asylum eligibility determination involves only questions of fact, nor does it alter [the] application of de novo review to questions of law").

Indeed, many courts have noted that *Elias-Zacarias* stands for an even narrower "central tenet": that refusing to join a military movement is not by itself persecution based on political opinion. *Ustyan* v. *Ashcroft*, 94 F. App'x 774, 777 (10th Cir. 2004); see also *Charalambos* v. *Holder*, 326 F. App'x 478, 481 (10th Cir. 2009); *Rivas-Martinez* v. *INS*, 997 F.2d 1143, 1147 (5th Cir. 1993) (recognizing that the finding regarding military conscription is one of two holdings in *Elias-Zacarias*). Nothing in *Elias-Zacarias* implies that the substantial evidence standard extends to every aspect of the asylum eligibility determination.

B. Courts of appeals continue to misconstrue *Elias-Zacarias* and apply the substantial evidence standard to questions of law.

Many courts have nonetheless mistakenly construed *Elias-Zacarias* to require deference to the *entire* asylum eligibility determination, including questions of law. See, *e.g.*, *Lumataw* v. *Holder*, 582 F.3d 78, 91 (1st Cir. 2009) (noting that the court's "authority to disturb the agency's determination" that undisputed facts "did not rise to the level of past persecution" was "constrained by [the] deferential 'substantial evidence' standard of review"); *Medhin* v. *Ashcroft*, 350 F.3d 685, 688–89 (7th Cir. 2003) (citing

Elias-Zacarias for proposition that substantial evidence standard applies to persecution determinations).

These erroneous interpretations have focused on the single sentence from *Elias-Zacarias* stating that "[t]he BIA's determination that Elias-Zacarias was not eligible for asylum must be upheld if supported by reasonable, substantial, and probative evidence on the record considered as a whole." *Elias-Zacarias*, 502 U.S. at 481 (citations omitted). And some courts of appeals have expanded that standard of review, inferring that "the ultimate question of past persecution * * * as well as the findings underlying that determination, are judicially reviewed under the substantial evidence standard that applies to agency findings of fact." *He*, 24 F.4th at 1224. But this interpretation of *Elias-Zacarias* "conflates the standard [of review] for individual factual findings with the overall determination of asylum eligibility." Stephen M. Knight, *Shielded from Review: The Questionable Birth and Development of the Asylum Standard of Review under Elias-Zacarias*, 20 Geo. Immigr. L. J. 133, 147 (Fall 2005). In fact, nowhere in *Elias-Zacarias* did this Court suggest that the standard of review for legal questions has changed, much less that substantial evidence rather than *de novo* review applies.

This confusion among courts is widespread and well documented. *E.g.*, *Gjetani*, 968 F.3d at 400 (Dennis, J., dissenting). For example, the Tenth Circuit has criticized courts for "rely[ing] uncritically on" *Elias-Zacarias* in applying substantial evidence review "to the question of whether an undisputed set of facts constitute persecution." *Xue*, 846 F.3d at 1105

n.11; see also *Fon*, 34 F. 4th at 820–22 (9th Cir.) (Collins, J., concurring) (questioning whether *Elias-Zacarias* mandates substantial evidence review for mixed questions). Likewise, legal scholarship in the wake of *Elias-Zacarias* has been critical of the fact that, after *Elias-Zacarias*, the substantial evidence standard of review has been "deployed to apply to the asylum applicant's broader eligibility * * *, rather than specifically to factual findings." Knight, *Shielded from Review*, at 146.

Thus, this Court should grant certiorari in this case and resolve the muddled divide between and within the courts of appeals. See *Fon*, 34 F.4th at 823 (Collins, J., concurring) (calling for either the Ninth Circuit en banc to resolve the internal circuit confusion or this Court to resolve the circuit split). Further, this Court should hold that whether undisputed facts rise to the level of persecution is a legal determination subject to *de novo* review.

III. The lack of clarity in this important area of the law has life-and-death consequences.

This Court should also grant review due to the substantial importance of the question. Often, the determination of whether to grant an asylum applicant's petition for review (or instead uphold the order of removal from the United States) hinges on the applicable standard of review. For example, in *Zhi Wei Pang* v. *Holder*, the BIA found the noncitizen to be credible, but found that the harm suffered for resisting China's population control policies did not rise to the level of persecution. 665 F.3d 1226, 1230, 1234 (10th Cir. 2012). Concurring in the result, Judge Matheson noted that, "[i]n [his] view, the evidence supports that

[petitioner] suffered past persecution" but he felt "[c]onstrained by the highly deferential standard of review." 665 F.3d at 1234 (Matheson, J., concurring); see also *Gjetani*, 968 F.3d at 401 (Dennis, J., dissenting) ("Upon de novo review, I believe Gjetani has made a sufficient showing to establish past persecution under our precedents."), *Diallo* v. *Ashcroft,* 381 F.3d 687, 697–98 (7th Cir. 2004) (affirming the BIA's past-persecution decision but suggesting the outcome would be different "[w]ere we reviewing Diallo's claim *de novo*").

And the consequences of an erroneous denial of asylum can be grievous. The Department of Justice does not track what happens to deported asylum-seekers, but the harms to them are well documented. For example, Human Rights Watch has identified 138 cases of Salvadorans killed since 2013 after deportation from the United States. Human Rights Watch, *Deported to Danger: United States Deportation Policies Expose Salvadorans to Death and Abuse*, (Feb. 2020), https://tinyurl.com/mr3asz2p. Similarly, an asylum-seeker from Honduras who was mistakenly deported before his asylum claim was resolved was imprisoned without charges and then died in a fire many believe was intentionally set by the government. Sarah Stillman, *When Deportation is a Death Sentence*, The New Yorker (Jan. 8, 2018), https://tinyurl.com/mryf76u7. And in Cameroon, Human Rights Watch documented at least 39 asylum-seekers from 2019-2021 who were imprisoned upon return, and "13 cases of torture, physical or sexual abuse, or assault of deported people by state agents in detention." Human Rights Watch, *How Can You Throw Us*

Back? Asylum Seekers Abused in the US and Deported to Harm in Cameroon (Feb. 10, 2022), https://tinyurl.com/yckv43xs. This Court should grant review and clarify that *de novo* review applies to these critical questions of law.

CONCLUSION

For the foregoing reasons, and those set forth in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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