No. _____

In the
Supreme Court of the United States

DOUGLAS HUMBERTO URIAS-ORELLANA;
SAYRA ILIANA GAMEZ-MEJIA; AND G.E.U.G.,
Petitioners,

v.

MERRICK B. GARLAND, U.S. ATTORNEY GENERAL,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Immigration and Nationality Act (INA) provides that noncitizens on American soil are generally eligible for asylum if they qualify as a "refugee." 8 U.S.C. § 1158(b)(1)(A). A refugee is someone with "a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." *Id.* § 1101(a)(42). Noncitizens are presumptively eligible for asylum if they have "suffered persecution in the past." 8 C.F.R. § 1208.13(b)(1).

If ordered removed by an immigration judge (IJ), noncitizens may appeal the removal order—and with it, the denial of asylum—to the Board of Immigration Appeals (BIA). From there, "judicial review" is available in "an appropriate court of appeals." 8 U.S.C. § 1252(a)(5). The INA mandates judicial deference on "findings of fact" and three other kinds of administrative decisions. *Id.* § 1252(b)(4). The statute also explicitly provides for judicial review of the BIA's decisions on "questions of law," but does not establish a deferential standard of review for such decisions. *Id.* § 1252(a)(2)(D), (b)(9).

The question presented is:

Whether a federal court of appeals must defer to the BIA's judgment that a given set of undisputed facts does not demonstrate mistreatment severe enough to constitute "persecution" under 8 U.S.C. § 1101(a)(42).

RELATED PROCEEDINGS

The following proceedings are directly related to this petition:

Urias-Orellana v. Garland, No. 24-1042, United States Court of Appeals for the First Circuit, judgment entered November 14, 2024 (121 F.4th 327).

Matter of Urias-Orellana, et al., File Nos. A208-691-512, A216-663-245, A216-663-246, Board of Immigration Appeals, decision entered December 7, 2023 (unpublished).

Matter of Urias-Orellana, et al., File Nos. A208-691-512, A216-663-245, A216-663-246, United States Department of Justice, Executive Office for Immigration Review, final order of removal entered March 14, 2022.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Douglas Humberto Urias-Orellana, Sayra Iliana Gamez-Mejia, and their minor child, G.E.U.G., respectfully petition this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case.

OPINIONS AND ORDERS BELOW

The court of appeals' decision (App.1a-17a) is reported at 121 F.4th 327. The decisions of the Board of Immigration Appeals (App.18a-24a) and the immigration judge (App.25a-56a) are unreported.

JURISDICTION

The court of appeals entered judgment on November 14, 2024. App.1a-2a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Relevant statutory and regulatory provisions are reproduced in the petition appendix. App.57a-68a.

INTRODUCTION

This case raises an important and recurring question about the judiciary's role in interpreting and applying asylum protections that Congress has afforded noncitizens fleeing persecution abroad. Administrative officials make the initial decision about whether a noncitizen has experienced persecution within the meaning of the Immigration and Nationality Act (INA), subject to judicial review by a federal court of appeals. The question presented is whether a court of appeals must defer to a determination by the Board of Immigration Appeals (BIA) that a given set of undisputed facts does not establish mistreatment severe enough to constitute "persecution" under 8 U.S.C. § 1101(a)(42).

The circuits are deeply divided on this issue. Five circuits consistently require deference, but published decisions from six others hold the exact opposite. Three circuits have acknowledged this entrenched split, along with numerous other judges and commentators. Two prior petitions for certiorari have asked this Court to settle the proper standard of review once and for all, only for the government to stipulate to dismissal before the petitions could be considered. The question presented deserves an answer—now.

Under the INA's plain text, this Court's precedents, and bedrock principles of appellate review, the right answer is clear: Federal courts must review de novo whether the mistreatment suffered by a noncitizen meets the legal standard for persecution. The INA provision governing judicial review directs courts to defer to four sets of administrative determinations. 8 U.S.C. § 1252(b)(4). What kinds

and degree of harm amount to persecution under Section 1101(a)(42) are not among them, even though the statute explicitly safeguards judicial review of "questions of law"—i.e., the "interpretation and application of constitutional and statutory provisions." 8 U.S.C. § 1252(a)(2)(D), (b)(9). There is thus no textual basis for courts to defer to the BIA's legal judgment on the matter. And such deference effectively preserves *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), in asylum cases, infringing on the judiciary's power to say what persecution means under the law.

Below, the First Circuit rejected pleas for asylum from Petitioners Douglas Humberto Urias-Orellana, Sayra Iliana Gamez-Mejia, and their minor child, G.E.U.G., who fled El Salvador after a cartel sicario pursued a years-long, violent vendetta against their extended family. The sicario shot two of Douglas's half-brothers, while vowing to kill their relatives. Armed cartel members then repeatedly threatened and physically attacked Douglas, pursuing his family across El Salvador. Yet the First Circuit upheld the BIA's judgment that these death threats were somehow insufficiently "menacing" to rise to the level of persecution, citing circuit precedent cabining review to whether substantial evidence supported the BIA's confounding conclusion. App.12a.

Whether that deferential standard of review is correct is an exceptionally important issue. It matters not just for Douglas and his family, but for the thousands of asylum-seekers whose lives and freedom depend on correctly deciding what kinds and degree of mistreatment rise to the level of persecution under Section 1101(a)(42). The atextual deference regime driving the decision below invites inconsistent and

incorrect results, often with life-threatening consequences. If it really "is emphatically the province and duty of the judicial department to say what the law is," interpreting the cornerstone of asylum protections should be no exception. *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 412 (2024) (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)).

Only this Court can resolve the circuit split and restore the judiciary's proper role in ensuring the just and even-handed treatment of asylum-seekers. The petition should be granted.

STATEMENT OF THE CASE

A. Legal Background

1. Consistent with the United States' obligations under international law, the INA establishes certain legal protections against removal for noncitizens fleeing persecution. *See INS v. Stevic*, 467 U.S. 407, 416-22 (1984). One such protection is asylum. *See* 8 U.S.C. § 1158. Noncitizens granted asylum may not be removed from this country and have a path to becoming lawful permanent residents. *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 428 n.6 (1987). Their "spous[es]" and "child[ren]" may "be granted the same status," even when the family members are "not otherwise eligible for asylum" themselves. 8 U.S.C. § 1158(b)(3)(A).

Although a noncitizen's ultimate entitlement to asylum is left to executive discretion, *eligibility* for asylum hinges on a detailed set of legal criteria. *Cardoza-Fonseca*, 480 U.S. at 428 n.6. To be statutorily eligible, a noncitizen must qualify as a "refugee." 8 U.S.C. § 1158(b)(1). A "refugee" is someone "who is unable or unwilling to return to, and

is unable or unwilling to avail himself or herself of the protection of, [his home] country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1101(a)(42).

The term "persecution" means a "threat to the life or freedom of, or the infliction of suffering or harm upon, those who differ in a way regarded as offensive." *Lumataw v. Holder*, 582 F.3d 78, 91 (1st Cir. 2009) (quoting *Matter of Acosta*, 19 I. & N. Dec. 211, 216 (B.I.A. 1985)); *accord Mulyani v. Holder*, 771 F.3d 190, 198 (4th Cir. 2014) (collecting cases). Experiencing "credible threats" can "amount to persecution, especially when the assailant threatens [a noncitizen] with death, in person, and with a weapon." *Sok v. Mukasey*, 526 F.3d 48, 54 (1st Cir. 2008). That holds true even if the threats ultimately went "unfilled" or "were directed primarily toward" family members. *N.L.A. v. Holder*, 744 F.3d 425, 431-32 (7th Cir. 2014); *accord Corpeno-Romero v. Garland*, 120 F.4th 570, 579 (9th Cir. 2024).

The INA further requires that a protected ground be "at least one central reason for" the persecution. 8 U.S.C. § 1158(b)(1)(B)(i); *see, e.g.*, *Lopez-Quinteros v. Garland*, 123 F.4th 534, 543 (1st Cir. 2024) (holding that "there is no question that a family unit constitutes a particular social group" under the INA). And the "harm must either be perpetrated by the government itself or by a private actor that the government is unwilling or unable to control." *Aguilar-Escoto v. Garland*, 59 F.4th 510, 518 (1st Cir. 2023); *see, e.g.*, *Portillo Flores v. Garland*, 3 F.4th 615, 636 (4th Cir. 2021) (acknowledging "significant evidence" that El Salvador's government

is "unable or unwilling to control" violence by "MS-13 gang members"). All told, then, a noncitizen seeking asylum must show: (1) "a certain level of serious harm (whether past or anticipated)"; (2) "a causal connection to one of th[e] statutorily protected grounds"; and (3) "a sufficient nexus between th[e] harm and government action or inaction." *Gonzalez-Arevalo v. Garland*, 112 F.4th 1, 8 (1st Cir. 2024); *accord Guo v. Sessions*, 897 F.3d 1208, 1213 (9th Cir. 2018).

A noncitizen can demonstrate refugee status in two ways. First, a "showing of past persecution 'creates a rebuttable presumption of a well-founded fear of future persecution.'" *Lopez-Quinteros*, 123 F.4th at 539. To rebut this presumption, the government "bear[s] the burden of establishing by a preponderance of the evidence" that either: (1) "[t]here has been a fundamental change in circumstances" in the noncitizen's home country; or (2) the non-citizen "could avoid future persecution by relocating to another part of [that] country" and, "under all the circumstances, it would be reasonable to expect the [noncitizen] to do so." 8 C.F.R. § 1208.13(b)(1)(i)-(ii).

Second, even without showing past persecution, a noncitizen can establish a "well-founded fear of persecution" by demonstrating both "a genuine fear of future persecution" and " an objectively reasonable basis for that fear." *Toloza-Jiménez v. Gonzáles*, 457 F.3d 155, 161 (1st Cir. 2006). "In cases in which the [noncitizen] has not established past persecution"—but *has* demonstrated a reasonable fear of future persecution—the noncitizen, rather than the government, generally "bear[s] the burden of

establishing that it would not be reasonable for him or her to relocate." 8 C.F.R. § 1208.13(b)(3)(i).

2. To commence "removal proceedings, the INA requires that [noncitizens] be provided with 'written notice,'" which usually takes the form of a "notice to appear." *Campos-Chaves v. Garland*, 602 U.S. 447, 451 (2024) (quoting 8 U.S.C. § 1229(a)(1)-(2)). Noncitizens in removal proceedings may request asylum and other relief from removal, claims that an immigration judge (IJ) decides in the first instance.

IJs are appointed by the Attorney General and "subject to" his or her "supervision." 8 C.F.R. § 1001.1(*l*). In removal proceedings, they perform the fact-finding function: IJs may "administer oaths, receive evidence, and interrogate, examine, and cross-examine the [noncitizen] and any witnesses." 8 U.S.C. § 1229a(b)(1). Given that role, IJs must "determine whether or not the [noncitizen's] testimony is credible." *Id.* § 1229a(c)(4)(B)-(C).

Noncitizens ordered removed by an IJ may appeal to the BIA. BIA members, who are likewise "appointed by the Attorney General," "act as the Attorney General's delegates in the cases that come before them." 8 C.F.R. § 1003.1(a)(1). The BIA "function[s] as an appellate body charged with the review" of IJ decisions. *Id.* § 1003.1(d)(1). As such, the BIA must "not engage in de novo review of findings of fact determined by an immigration judge," such as "findings as to the credibility of testimony." *Id.* § 1003.1(d)(3)(i). Rather, the BIA may reverse an IJ's factual findings only when they are "clearly erroneous." *Id.* By contrast, the BIA reviews "questions of law" decided by the IJ "de novo." *Id.* § 1003.1(d)(3)(ii). The BIA considers an IJ's decision on whether "a given set of facts amounts to

persecution" to be "legal in nature"—and thus reviews such decisions de novo. *Xue v. Lynch*, 846 F.3d 1099, 1104-05 & nn.9, 11 (10th Cir. 2017) (citing *Matter of Z-Z-O-*, 26 I. & N. Dec. 586, 591 (B.I.A. 2015)).

If the BIA declines to disturb the IJ's decision, the removal order becomes final and subject to judicial review in "an appropriate court of appeals." 8 U.S.C. § 1252(a)(5); *see id.* § 1252(b)(2). A court of appeals must decide whether to grant the noncitizen's petition for review based "only on the [relevant] administrative record." *Id.* § 1252(b)(4)(A). The INA directs courts to defer to four specified kinds of administrative determinations, including "findings of fact." *Id.* § 1252(b)(4). It also explicitly safeguards judicial review over "constitutional claims" and "questions of law"—which encompasses both the "interpretation *and application* of constitutional and statutory provisions." 8 U.S.C. § 1252(a)(2)(D), (b)(9) (emphasis added). But the statute does not establish deferential judicial review on those legal issues. *Id.* § 1252(a)(2)(D).

B. Factual Background

Petitioners Douglas Humberto Urias-Orellana, Sayra Iliana Gamez-Mejia, and their minor child, G.E.U.G., are citizens of El Salvador. App.2a. They fled their home country after an extended campaign of terror against their family orchestrated by "a 'sicario' (which roughly translates to 'hitman') for a local drug lord." *Id.* at 4a.

The trouble started in 2016, after an argument between the sicario and Douglas's half-brother, Juan, over a romantic relationship between the sicario's mother and Juan's father. *Id.* Enraged, the sicario shot Juan six times. *Id.* Juan survived, but he

"suffered severe injuries from the shooting" and "is now wheelchair-bound." *Id.*

"The shooting apparently did not placate" the sicario, who "vowed to kill Juan's entire family." *Id.* The sicario "turned his crosshairs next" on another of Douglas's half-brothers, Remberto. *Id.* The sicario "ambushed Remberto in a secluded alley, shooting him nine times." *Id.* Remberto, too, miraculously survived. *Id.* Douglas "feared for his and his family's safety," so they fled from their hometown of Sonsonate to Cojutepeque. *Id.* at 4a-5a. There they remained in hiding "for about one year." *Id.* at 4a.

"Believing the worst to be over," Douglas and his family moved to "another town in El Salvador" called "Claudia Lara" to be closer to family. *Id.* at 4a-5a. But the sicario got wind of their new location within "a few months." *Id.* at 5a. Soon afterwards, "two masked men" brandishing weapons approached Douglas, "demanded money," and "warned [Douglas] that they would 'leave [him] like' his half-brothers and possibly kill him if he did not cave to their demands." *Id.* (alteration in original). "About six months later," Douglas "again was threatened at gunpoint by masked men" warning that they would "kill him" if "he did not pay up." *Id.*

Fearing for their lives, Douglas's family moved "again within El Salvador" to "Cara Sucia." *Id.* They successfully remained in hiding there "for two-and-and-a-half years," but it was not to last. *Id.* In December 2020, Douglas and Sayra "returned to visit [Douglas's] family in Sonsonate," where Douglas "was confronted by two masked men on a motorcycle." *Id.* "They threatened [Douglas], assaulted him by striking him three times in the chest, and warned him that they would kill him if he did not pay them." *Id.*

"[O]n their journey" home, Douglas "noticed two men on a motorcycle—whom he believed to be the same men who beat him—following him to Cara Sucia." *Id.* at 5a-6a.

"Fearful that Cara Sucia was unsafe," Douglas's family "return[ed] to Claudia Lara." *Id.* at 6a. But once there, Douglas "noticed that the same men who assaulted him [in Cara Sucia] were patrolling Claudia Lara apparently in search for him." *Id.* Douglas later "overheard two men asking a store employee if there were any newcomers to the area and where they were located." *Id.* So the family fled El Salvador and came here. *Id.* at 3a.

C. Procedural History

Soon after entering the United States, Douglas and his family were served "with Notices to Appear in immigration court" on charges of "removability for being present in the United States without being admitted or paroled." *Id.* In response, the family "admitted their removability" but "noted that they would seek asylum." *Id.*[1]

1. At the hearing before an IJ, Douglas "was the sole witness." *Id.* at 28a. The IJ found that Douglas was "credible," because he was "responsive" and "forthright," and because his answers were "consistent with his documentary evidence" and "written application." *Id.* "Accordingly," the IJ "credit[ed] his testimony" and took as true all the facts Douglas described. *Id.* at 28a-29a.

Nevertheless, the IJ rejected Douglas's plea for asylum—and by extension, his family's. *See id.* at 28a

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[1] The family also sought other kinds of relief from removal, but those requests are not at issue. App.3a & n.2.

(treating Sayra and G.E.U.G.'s asylum claims as "derivative[]"). The IJ held that "the sum of the threats and the one time where [Douglas] was hit three times on the chest does not rise to the level of past persecution." *Id.* at 31a. According to the IJ, the series of threats that Douglas "would end up like his brothers or would be killed" were insufficiently "menacing" because "there was no type of medical evaluation, psychiatric evaluation, social worker evaluation, or other type of psychological or physiological evaluation" stating that the threats "cause[d] significant actual suffering." *Id.* Absent any medically documented "long-lasting physical or mental effects from that mistreatment," the IJ declared, Douglas could not demonstrate past persecution. *Id.* at 32a.

Because Douglas had "not shown past persecution," the IJ determined that he bore "the burden of establishing that it would not be reasonable" to "relocate" within El Salvador. *Id.* at 34a (quoting 8 C.F.R. § 1208.13(b)(3)(i)). In the IJ's view, Douglas could not carry that burden due to "long periods of time[] in which" his family evaded danger within El Salvador. *Id.* And in any event, the IJ continued, Douglas lacked an objectively reasonable fear of future persecution because "other members" of his family had "not been mistreated or harmed by anyone"—putting aside the attempted murder of his two half-brothers. *Id.* at 33a. The IJ also found that the death threats and physical assault suffered by Douglas lacked a sufficient nexus to a statutorily protected ground and were not committed by forces the government of El Salvador was unable or unwilling to control. *Id.* at 36a-42a.

2. The BIA upheld the IJ's removal order. *Id.* at 18a-24a. Accepting the IJ's credibility determination and taking Douglas's testimony as true, the BIA held that the facts of this case, taken "in the aggregate," do not "rise[] to past persecution." *Id.* at 21a (citing *Matter of Acosta*, 19 I. & N. Dec. at 222); *id.* at 19a (observing that the BIA "reviews questions of law . . . de novo"). The BIA reasoned that "[t]he sicario never *personally* threated or harmed [Douglas], his mother, or his sisters." *Id.* at 20a (emphasis added). And "for the reasons set forth by the [IJ]," the BIA agreed that "the threats" Douglas experienced "were not sufficiently menacing or imminent" to qualify as "persecution" under the INA. *Id.* at 19a-21a.

"Next," the BIA "agree[d] with the [IJ]'s determination" that—having failed to show "past persecution"—Douglas "did not carry []his burden" of disproving the reasonable possibility of safely relocating within El Salvador. *Id.* at 21a-22a. In support, the BIA claimed that, after his "half-brother[s] w[ere] shot by the sicario," Douglas "moved away and did not have further problems," except "when he returned to his hometown" of Sonsonate. *Id.* at 22a. The BIA neglected to address the threats Douglas experienced in Claudia Lara and Cara Sucia. *See id.*; *supra* at 9-10.

The BIA recognized that the purported lack of past persecution and the supposed feasibility of internal relocation were "dispositive" on the family's asylum claims. App.20a n.3. Accordingly, the BIA deemed "it unnecessary to address the remaining issues" decided by the IJ and raised by the family on appeal. *Id.*

3. In a published opinion, the First Circuit denied the family's petition for review. *Id.* at 1a-17a. Applying circuit precedent, the First Circuit

"cabin[ed] [its] review to whether" the BIA's "conclusion that [Douglas] had not demonstrated past persecution or a well-founded fear of future persecution was supported by substantial evidence." *Id.* at 10a. Under this highly deferential standard, the First Circuit emphasized, a federal court must accept the BIA's conclusions "as long as they are supported by reasonable, substantial and probative evidence on the record considered as a whole." *Id.* at 9a (quoting *Gomez-Abrego v. Garland*, 26 F.4th 39, 45 (1st Cir. 2022)). That left the First Circuit powerless to "disturb" the BIA's denial of asylum, unless "*any* reasonable adjudicator would be compelled to conclude to the contrary." *Id.* (emphasis added) (quoting *Gonzalez-Arevalo*, 112 F.4th at 8).

The First Circuit held that Douglas and his family could not satisfy this stringent standard. On past persecution, the First Circuit acknowledged that Douglas's "assailants were armed, assaulted him on one occasion, and promised to leave him like his half-brothers if he did not comply" with their demands. *Id.* at 11a. Yet in the court's view, the BIA "reasonably concluded" that these death threats were not sufficiently "menacing" to constitute past persecution because Douglas "did not testify" that the threats "caused significant actual suffering" and the physical attack "did not result in hospitalization." *Id.* at 11a-12a.

As for the risk of future persecution, the First Circuit rested its decision on internal-relocation grounds. "Because [the family] did not establish past persecution," the First Circuit reasoned, "they [we]re not entitled to a presumption of future persecution"—and thus "b[ore] the burden 'to establish that relocation would be unreasonable.'" *Id.* at 14a. The

First Circuit found that "[s]ubstantial evidence supports the [BIA]'s conclusion that internal relocation in El Salvador would be reasonable." *Id.* at 13a-14a.

REASONS FOR GRANTING THE WRIT

This petition readily satisfies all the traditional criteria for certiorari. *See* Sup. Ct. R. 10(a). In the decision below, the First Circuit adhered to circuit precedent mandating deference to the BIA's legal judgment that a given set of undisputed facts does not establish mistreatment severe enough to constitute "persecution" under Section 1101(a)(42). That decision confirms an entrenched circuit split: Five circuits consistently review such determinations for substantial evidence, but published decisions from six circuits hold that de novo review applies instead. Three circuits have acknowledged the split, and numerous federal judges have asked this Court to answer the question presented.

Certiorari is also warranted because the First Circuit has incorrectly resolved an important question of federal law. The INA directs federal courts to defer to a discrete list of administrative determinations, including factual findings. 8 U.S.C. § 1252(b)(4). The BIA's rulings on what kinds and degree of mistreatment qualify as "persecution" under Section 1101(a)(42) are not on that list. This Court should adhere to the INA's text and ensure de novo judicial review in this area, where noncitizens' lives and freedom so often depend on correct application of the law.

The question presented comes up frequently in asylum cases. Unwarranted judicial deference to the BIA's judgment on what qualifies as persecution has

resulted in substantial harm to noncitizens fleeing life-threatening peril. Only this Court can resolve the split, and this case provides an ideal vehicle to do so. The petition should be granted.

I. The Decision Below Solidifies A Deep And Acknowledged Circuit Split

The First Circuit's decision confirms a deep circuit split on whether federal courts must defer to the BIA's judgment that a given set of undisputed facts does not establish mistreatment severe enough to qualify as "persecution" under the INA. The Tenth Circuit has twice acknowledged that "the circuits are split" on the question presented, while lamenting that "the Supreme Court has yet to resolve it." *Matumona v. Barr*, 945 F.3d 1294, 1300 n.5 (10th Cir. 2019); *accord Xue v. Lynch*, 846 F.3d 1099, 1105-06 & n.11 (10th Cir. 2017). The Second and Ninth Circuits have acknowledged the split as well. *See KC v. Garland*, 108 F.4th 130, 134 & n.1 (2d Cir. 2024); *Fon v. Garland*, 34 F.4th 810, 813 n.1 (9th Cir. 2022). And given the circuits' "inconsistent positions," a slew of federal judges have requested "Supreme Court guidance on this important, recurring topic." *Fon*, 34 F.4th at 819 (Graber, J., concurring); *see id.* at 820 (Collins, J., concurring); *Liang v. U.S. Att'y Gen.*, 15 F.4th 623, 628-30 & n.3 (3d Cir. 2021) (Jordan, J., joined by Ambro, J., concurring); *Flores Molina v. Garland*, 37 F.4th 626, 640-41 (9th Cir. 2022) (Korman, J., concurring). This Court should now answer the call.

A. Five Circuits Defer To The BIA's Legal Judgment About What Constitutes Persecution Under The INA

On one side of the split, the First, Fourth, Sixth, Seventh, and Tenth Circuits all hold that a federal court of appeals must defer to the BIA's judgment about what kinds of harm constitute "persecution" under Section 1101(a)(42).

The First Circuit reviews for "substantial evidence" BIA determinations that a given set of undisputed facts do not demonstrate "mistreatment" that was "sufficiently severe to rise to the level of persecution." *Khalil v. Garland*, 97 F.4th 54, 62 (1st Cir. 2024); *see, e.g.*, *Gonzalez-Arevalo v. Garland*, 112 F.4th 1, 8 (1st Cir. 2024); *Gomez-Abrego v. Garland*, 26 F.4th 39, 45 (1st Cir. 2022). That is, the First Circuit uses the substantial-evidence standard that the INA establishes for review of "administrative findings of fact" to assess the BIA's conclusions about what constitutes persecution under the law. 8 U.S.C. § 1252(b)(4)(B). Applying this precedent, the decision below recognized that disagreement with the BIA's interpretation of persecution under Section 1101(a)(42) "is not enough to warrant upsetting" the denial of asylum. App.9a. Rather, deference to the BIA is required, so long as "the record" does "not compel a finding of past persecution." *Id.* at 13a.

The Sixth Circuit, too, applies Section 1252(b)(4)(B)'s substantial-evidence standard when reviewing whether a given set of undisputed facts "rose to the level of 'persecution'" under Section 1101(a)(42). *Kukalo v. Holder*, 744 F.3d 395, 400 (6th Cir. 2011). The Sixth Circuit recognizes that this standard is exceedingly "difficult" to meet. *Id.*;

see, e.g., *Haider v. Holder*, 595 F.3d 276, 287 (6th Cir. 2010) (rare case holding that "the evidence compels a finding of persecution" because the "police physically assaulted" a noncitizen with "a gun" and repeatedly subjected him to "sexual abuse").

Similarly, the Seventh Circuit "review[s] the conclusion that the harm the petitioner may have suffered did not rise to the level of persecution under the substantial evidence standard." *Tarraf v. Gonzales*, 495 F.3d 525, 534 (7th Cir. 2007); *accord Escobedo Marquez v. Barr*, 965 F.3d 561, 565 (7th Cir. 2020).

The Tenth Circuit does as well, reasoning that "the ultimate determination whether an alien has demonstrated persecution is a question of fact, even if the underlying factual circumstances are not in dispute and the only issue is whether those circumstances qualify as persecution" under the law. *Vicente-Elias v. Mukasey*, 532 F.3d 1086, 1091 (10th Cir. 2008); *see, e.g.*, *Witjaksono v. Holder*, 573 F.3d 968, 977 (10th Cir. 2009). And while more recent Tenth Circuit decisions have questioned this rule, they uniformly acknowledge that their court will remain "bound by" it unless "the Supreme Court" decides otherwise. *Matumona*, 945 F.3d at 1300 n.5; *accord Xue*, 846 F.3d at 1105-06 & n.11.

Finally, the Fourth Circuit also defers to the BIA's judgment about what constitutes persecution, but its caselaw is hopelessly confused about the nature and source of that deference. One line of decisions applies the substantial-evidence standard that the INA reserves for reviewing "administrative findings of fact." 8 U.S.C. § 1252(b)(4)(B); *see, e.g.*, *Mirisawo v. Holder*, 599 F.3d 391, 398 (4th Cir. 2010); *Lin-Jian v. Gonzales*, 489 F.3d 182, 191-92 (4th Cir. 2007). But

another strand of cases asks whether the BIA's decision was "manifestly contrary to the law and an abuse of discretion"—a separate standard that the INA prescribes for reviewing the BIA's ultimate "discretionary judgment whether to grant" asylum to a statutorily eligible noncitizen. 8 U.S.C. § 1252(b)(4)(D); *see, e.g.*, *Tairou v. Whitaker*, 909 F.3d 702, 708 (4th Cir. 2018); *Portillo Flores v. Garland*, 3 F.4th 615, 627 (4th Cir. 2021).

B. Published Decisions From Six Circuits Apply De Novo Review Instead

On the other side of the split, published decisions from the Second, Third, Fifth, Eighth, Ninth, and Eleventh Circuits hold that a court of appeals must *not* defer to the BIA's judgment about what constitutes persecution under Section 1101(a)(42). Instead, those decisions hold that courts must review such determinations de novo. While these six circuits also have opinions taking the opposite position, that entrenched confusion only underscores the need for this Court's intervention.

In *Mirzoyan v. Gonzales*, 457 F.3d 217 (2d Cir. 2006), the Second Circuit held that federal courts must "review *de novo*" whether a given set of "facts did not meet the legal definition of persecution in the INA." *Id.* at 220. The Second Circuit has repeatedly reiterated that holding. *See, e.g.*, *Huo Qiang Chen v. Holder*, 773 F.3d 396, 403 (2d Cir. 2014); *Edimo-Doualla v. Gonzales*, 464 F.3d 276, 282 (2d Cir. 2006). And it consistently reviews such BIA determinations de novo. *See, e.g.*, *Sherpa v. Garland*, 2023 WL 6057244, at *1 (2d Cir. Sept. 18, 2023); *Hassan v. Barr*, 821 F. App'x 1, 4 (2d Cir. 2020); *Flores Anyosa v. Whitaker*, 758 F. App'x 88, 89-90

(2d Cir. 2018); *Caci v. Gonzales*, 238 F. App'x 732, 733 (2d Cir. 2007).

True, in *Scarlett v. Barr*, 957 F.3d 316 (2d Cir. 2020), one Second Circuit panel concluded that "substantial evidence" supported a BIA determination that certain undisputed "past conduct did not rise to the level of 'persecution.'" *Id.* at 336. But *Scarlett* simply assumed deference was owed, while ignoring contrary circuit precedent and the panel's own statement that "we review *de novo* all questions of law, *including the application of law to facts*." *Id.* at 326 (emphasis added).

Like the Second Circuit, the Third Circuit has repeatedly held that, when "the facts underlying [a noncitizen's] past-persecution claim" are not in "dispute[]," a federal court must "review the BIA's application of [the INA's] past-persecution standard to those facts de novo." *Herrera-Reyes v. U.S. Att'y Gen.*, 952 F.3d 101, 106 (3d Cir. 2020); *accord Blanco v. U.S. Att'y Gen.*, 967 F.3d 304, 310-11 (3d Cir. 2020); *Espinoza v. U.S. Att'y Gen.*, 2023 WL 8295930, at *2 (3d Cir. Dec. 1, 2023). On other occasions, however, the Third Circuit has applied the "substantial evidence standard to an agency determination that an alien did not suffer harm rising to the level of persecution," even though "the underlying facts" were "undisputed." *Thayalan v. U.S. Att'y Gen.*, 997 F.3d 132, 137 n.1 (3d Cir. 2021); *see, e.g.*, *Voci v. Gonzales*, 409 F.3d 607, 616 (3d Cir. 2005). For this reason, in a concurrence joined by Judge Ambro, Judge Jordan critiqued his circuit's caselaw for not being "clearer and more consistent on this important point." *Liang*, 15 F.4th at 629-30 (Jordan, J., concurring).

The Fifth Circuit has likewise held that whether certain conduct "rises to the level of past-persecution

is a question of law" that courts "review de novo." *Morales v. Sessions*, 860 F.3d 812, 816 (5th Cir. 2017). And that court has often conducted de novo review of the BIA's decisions on this issue. *See, e.g.*, *Caliz v. Wilkinson*, 844 F. App'x 737, 738 (5th Cir. 2021); *Jalloh v. Barr*, 794 F. App'x 418, 421 (5th Cir. 2019). Yet the Fifth Circuit also has contradictory decisions that "use the 'substantial evidence' standard" in assessing what "amount[s] to persecution," including "when the agency determines the alien is credible and accepts his version of the facts." *Gjetani v. Barr*, 968 F.3d 393, 395-96 (5th Cir. 2020); *see, e.g.*, *Eduard v. Ashcroft*, 379 F.3d 182, 186-88 (5th Cir. 2004).

The Eighth Circuit has also repeatedly held that "whether undisputed facts meet the legal definition of persecution" is "a question of law" that must be "review[ed] de novo." *Njong v. Whitaker*, 911 F.3d 919, 923 (8th Cir. 2018); *see, e.g.*, *Padilla-Franco v. Garland*, 999 F.3d 604, 606 (8th Cir. 2021); *Alavez-Hernandez v. Holder*, 714 F.3d 1063, 1066 (8th Cir. 2013). Nevertheless, the Eighth Circuit occasionally reviews the issue for substantial evidence. *See, e.g.*, *Brizuela v. Garland*, 71 F.4th 1087, 1092-93 (8th Cir. 2023); *Tojin-Tiu v. Garland*, 33 F.4th 1020, 1024 (8th Cir. 2022).

Similarly, multiple Ninth Circuit decisions hold that "[w]hether particular acts constitute persecution for asylum purposes is a legal question" that courts must "review de novo." *Boer-Sedano v. Gonzales*, 418 F.3d 1082, 1088 (9th Cir. 2005) (emphasis omitted); *accord Kaur v. Wilkinson*, 986 F.3d 1216, 1221 (9th Cir. 2021). But other Ninth Circuit cases have deferred to the BIA on the matter, even when the noncitizen suffered indisputably "condemnable mistreatment." *Sharma v. Garland*, 9 F.4th 1052,

1059-60 (9th Cir. 2021); *see, e.g.*, *Wakkary v. Holder*, 558 F.3d 1049, 1059 (9th Cir. 2009). The Ninth Circuit has acknowledged that these conflicting holdings on the proper standard of review cannot be reconciled. *See, e.g.*, *Corpeno-Romero v. Garland*, 120 F.4th 570, 577 (9th Cir. 2024); *Singh v. Garland*, 97 F.4th 597, 603 (9th Cir. 2024).

Finally, the Eleventh Circuit has likewise held that a BIA decision on "whether, as a matter of law, what [a noncitizen] endured constitutes past persecution" is "a legal determination" that courts "review *de novo*." *Mejia v. U.S. Att'y Gen.*, 498 F.3d 1253, 1256-57 (11th Cir. 2007); *see, e.g.*, *Medina v. U.S. Att'y Gen.*, 800 F. App'x 851, 855 (11th Cir. 2020) (applying de novo review); *Polanco-Brun v. U.S. Att'y Gen.*, 361 F. App'x 106, 107 (11th Cir. 2010) (same). But the Eleventh Circuit also has opinions reviewing this issue under the substantial-evidence standard instead. *See, e.g.*, *Martinez v. U.S. Att'y Gen.*, 992 F.3d 1283, 1292 (11th Cir. 2021); *Kazemzadeh v. U.S. Att'y Gen.*, 577 F.3d 1341, 1352-53 (11th Cir. 2009).

C. This Court Should Resolve The Split

Only this Court can resolve the disarray described above. Waiting for a resolution in the lower courts is not a feasible option. Absent the Court's intervention, securing uniformity on the question presented would require en banc decisions from six circuits, each (mistakenly) holding that Article III courts must defer to the BIA's judgment about what constitutes "persecution" under Section 1101(a)(42). And achieving a *correct* consensus on the question presented would take en banc decisions from *eleven* circuits, each holding that de novo review applies.

None of that is going to happen—and certainly not anytime soon.

In the Ninth Circuit, for example, judges have made impassioned arguments for every possible rule, including deference to the BIA, de novo review, and something in between. *See, e.g.*, *Flores Molina*, 37 F.4th at 641-42 (VanDyke, J., dissenting) (advocating for "extreme deference"); *id.* at 640-41 (Korman, J., concurring) (defending de novo review); *Fon*, 34 F.4th at 819 (Graber, J., concurring) (supporting a "more nuanced" regime that only sometimes requires deference). And another judge has called the question presented "complicated," while emphasizing the "significant circuit split on this issue" and the Ninth Circuit's own doctrinal "mess" in the area. *Fon*, 34 F.4th at 820, 823 (Collins, J., concurring).

Furthermore, the Eighth and Tenth Circuits have each denied rehearing en banc in cases implicating the question presented—with four Eighth Circuit judges dissenting. *See Xue*, 846 F.3d at 1101 (denying rehearing en banc); *He v. Garland*, 2022 WL 2036976, at *1 (8th Cir. June 7, 2022) (also denying rehearing en banc, with Judges Gruender, Benton, Kelly, and Grasz dissenting). In both cases, the noncitizens sought certiorari on the same standard-of-review issue as this petition. *See* Cert. Pet. i, *Xue v. Sessions*, 583 U.S. 960 (2017) (No. 16-1274); Cert. Pet. i, *He v. Garland*, 143 S. Ct. 2694 (2023) (No. 22-436). And in both cases, the government stipulated to dismissal before the petitions could be considered by this Court. *See* Sup. Ct. R. 46(1).

The extraordinary degree of chaos among, and even within, numerous circuits on this important and recurring question warrants this Court's review.

II. The First Circuit Wrongly Deferred To The BIA's Legal Judgment About What Qualifies As "Persecution" Under Section 1101(a)(42)

Certiorari is also warranted because the INA does not permit judicial deference to the BIA's decision that harm suffered by a noncitizen falls short of "persecution" under Section 1101(a)(42). Numerous federal judges agree. *See, e.g.*, *Gjetani*, 968 F.3d at 400-01 (Dennis, J., dissenting); *Flores Molina*, 37 F.4th at 641 (Korman, J., concurring); *Liang*, 15 F.4th at 627-30 (Jordan, J., joined by Ambro, J., concurring); *see Xue*, 846 F.3d at 1104-06 (acknowledging the forceful arguments in favor of de novo review); *Fon*, 34 F.4th at 821-23 (Collins, J., concurring) (same). So do academic commentators. *See, e.g.*, Charles Shane Ellison, *The Toll Paid When Adjudicators Err: Reforming Appellate Review Standards for Refugees*, 38 Geo. Immigr. L.J. 143, 193-204 (2024). This chorus of criticism rings true: Statutory text, this Court's recent decision in *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024), and established background principles of appellate review all demand de novo review of the BIA's legal judgment in this area.

1. Judicial deference to the BIA's judgment on what rises to the level of "persecution" under Section 1101(a)(42) violates the INA's plain text. Section 1252 establishes a reticulated scheme for judicial review, which directs courts to defer to just four categories of administrative determinations. *First*, "administrative findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary"—i.e., factual findings are reviewed for substantial evidence. 8 U.S.C. § 1252(b)(4)(B); *see id.* § 1252(b)(7)(B)(i)

(similar). *Second*, a "decision that an alien is not eligible for admission to the United States is conclusive unless manifestly contrary to law." *Id.* § 1252(b)(4)(C). *Third*, the ultimate "discretionary judgment whether to grant" asylum to a statutorily eligible noncitizen is "conclusive unless manifestly contrary to the law and an abuse of discretion," *id.* § 1252(b)(4)(D)—and other exercises of executive discretion are not judicially reviewable at all, *id.* § 1252(a)(2)(B). *Fourth*, administrative decisions "with respect to the availability of corroborating evidence" may not be disturbed, "unless the court finds, pursuant to subsection (b)(4)(B), that a reasonable trier of fact is compelled to conclude that such corroborating evidence is unavailable." *Id.* § 1252(b)(4).

These textually enumerated mandates for judicial deference do not encompass the BIA's decisions on what mistreatment rises to the level of "persecution" under Section 1101(a)(42). Such decisions have nothing to do with a noncitizen's "eligib[ility] for admission to the United States." 8 U.S.C. § 1252(b)(4)(C). They involve a noncitizen's "statutory eligibility" for asylum, *Wilkinson v. Garland*, 601 U.S. 209, 218 (2024), not the ultimate "discretionary judgment whether to grant" asylum to an eligible noncitizen, 8 U.S.C. § 1252(b)(4)(D). And they obviously are not determinations "with respect to the availability of corroborating evidence." 8 U.S.C. § 1252(b)(4).

Nor is the BIA's legal judgment that certain mistreatment falls short of the legal standard for persecution an "administrative finding[] of fact." *Id.* § 1252(b)(4)(B). This Court has repeatedly held, while applying Section 1252, that "whether a given

set of facts meets a particular legal standard" is "a legal inquiry"—or otherwise said, a "mixed question of law and fact." *Guerrero-Lasprilla v. Barr*, 589 U.S. 221, 227-28 (2020); *accord Wilkinson*, 601 U.S. at 221; *Patel v. Garland*, 596 U.S. 328, 339 (2022). Even though it may entail "closely examin[ing] and weigh[ing] a set of established facts," interpreting what persecution means "is not a factual inquiry." *Wilkinson*, 601 U.S. at 221.[2] And while the INA explicitly safeguards judicial review of the BIA's decisions on "constitutional claims [and] questions of law"—which it defines to include both the "interpretation *and application* of constitutional and statutory provisions"—the statute nowhere provides for deferential judicial review of those legal issues. 8 U.S.C. § 1252(a)(2)(D), (b)(9) (emphasis added).

Because Section 1252 sets forth a discrete list of administrative decisions that courts must review deferentially, and because the BIA's decisions on what constitutes "persecution" are not on that list, judicial deference to those decisions violates the statute. *See Jennings v. Rodriguez*, 583 U.S. 281, 300 (2018) (observing that "[t]he expression of one thing implies the exclusion of others" under the canon of *expressio unius est exclusio alterius*); Antonin Scalia & Bryan A. Garner, *Reading Law* 107 (2012) (same).

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[2] Indeed, "the BIA itself has concluded" that an IJ's decision on whether "a given set of facts amounts to persecution" is "legal in nature"—and thus subject to de novo review by the BIA. *Xue*, 846 F.3d at 1104-05 & n.9 (citing *Matter of Z-Z-O-*, 26 I. & N. Dec. 586, 589-91 (B.I.A. 2015)); *see* 8 C.F.R. § 1003.1(d)(3)(i) (mandating that the BIA review only an IJ's "findings of fact" for clear error). "It is certainly odd, to say the least, for [a] court to review for substantial evidence" something that the BIA reviews de novo. *Xue*, 846 F.3d at 1105.

There is no textual basis for substantial-evidence review here.

2. This Court's recent decision in *Loper Bright* compels the same conclusion. The Court held that deference to administrative decisions is inappropriate when the relevant statute—there, the Administrative Procedure Act (APA)—"prescribes no deferential standard for courts to employ" when deciding "legal questions." *Loper Bright*, 603 U.S. at 392. A similar "omission is telling" in this case because, as just explained, the INA "*does* mandate that judicial review of agency . . . factfinding be deferential." *Id.*; *see* 8 U.S.C. § 1252(b)(4)(B).

In addition, the "settled pre-APA understanding that deciding [legal] questions was 'exclusively a judicial function'" cuts just as sharply against deference here as it did in *Loper Bright*. 603 U.S. at 392. Before Congress enacted the APA, courts confronted with "factbound statutory determinations" often "simply interpreted and applied the statute before" them, rather than defer to the agency. *Id.* at 389; *see id.* at 431 (Gorsuch, J., concurring) (noting the "time-worn" tradition of de novo review for "so-called mixed questions of law and fact"). And Section 1252 specifically safeguards judicial review to correct the BIA's "misapplication of a legal standard to the facts of a particular case." *Guerrero-Lasprilla*, 589 U.S. at 232. So as with the APA, "Congress surely would have articulated" a "deferential standard applicable to questions of law had it intended to depart from" the tradition of de novo review on such questions. *Loper Bright*, 603 U.S. at 392. "But nothing in the [INA] hints at such a dramatic departure." *Id.* "On the contrary, by directing courts to 'interpret constitutional and statutory provisions'

without differentiating between the two, Section [1252] makes clear that [the BIA's] interpretations of statutes—like [the BIA's] interpretations of the Constitution—are *not* entitled to deference." *Id.*; *see* 8 U.S.C. § 1252(a)(2)(D).

In some ways, substantial-evidence review of how the BIA interprets "persecution" goes further than *Chevron* ever did. Before *Loper Bright*, federal courts frequently applied *Chevron* deference to the BIA's rulings on this issue. *See, e.g.*, *Eusebio v. Ashcroft*, 361 F.3d 1088, 1091 (8th Cir. 2004); *Pitcherskaia v. INS*, 118 F.3d 641, 646 (9th Cir. 1997). But under that now-defunct regime, *Chevron* applied only when "three-member panels" of the BIA issued "precedential decisions." *Joseph v. Holder*, 579 F.3d 827, 832 (7th Cir. 2009); *see, e.g.*, *Quinchia v. U.S. Att'y Gen.*, 552 F.3d 1255, 1258 (11th Cir. 2008). *Chevron* thus didn't come into play for "the vast majority of BIA dispositions," which are "issued by a single Board member" and "nonprecedential." *Marmolejo-Campos v. Holder*, 558 F.3d 903, 922 n.5 (9th Cir. 2009) (Berzon, J. dissenting). By contrast, substantial-evidence review demands deference to non-precedential, single-member BIA decisions—like the one in this case. *See* App.9a, 18a. When applied to the BIA's interpretation of the term "persecution," substantial-evidence review is just *Chevron* deference by another name—only worse.

3. The INA's "statutory prescription" on the "appropriate standard of appellate review" is consistent with bedrock principles governing appellate review of mixed questions of law and fact. *Monasky v. Taglieri*, 589 U.S. 68, 83 (2020). The central importance of properly applying the term "persecution" in this statutory scheme, together with

the need to give uniform guidance to immigration officials, powerfully supports de novo review. That holds true even though determining what kinds and degree of mistreatment constitute persecution may require "plunging into a factual record." *U.S. Bank Nat'l Ass'n ex rel. CWCapital Asset Mgmt. LLC v. Vill. at Lakeridge, LLC*, 583 U.S. 387, 396 n.4 (2018).

Judging whether a given set of undisputed facts establishes mistreatment severe enough to qualify as "persecution" under Section 1101(a)(42) requires, well, *judging*. Federal courts' "role in marking out the limits" of the INA's persecution standard "through the process of case-by-case adjudication is of special"—indeed, paramount—"importance." *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 503 (1984). In enacting the INA, Congress exercised its constitutional power to "establish an *uniform* Rule of Naturalization." U.S. Const. art. I, § 8, cl. 4 (emphasis added); *see Arizona v. United States*, 567 U.S. 387, 394-95 (2012). And Section 1158, in particular, was meant "to conform" this country's "asylum law to the United Nation's Protocol [Relating to the Status of Refugees," which demands even-handed treatment of foreign nationals seeking refuge from persecution here. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 432 (1987).

The term "persecution" must be interpreted consistently to safeguard the system of "uniform naturalization and immigration laws" that the Founders envisioned, Congress enacted, and international law demands. *Hines v. Davidowitz*, 312 U.S. 52, 74 (1941). But a "policy of sweeping deference" to the BIA's judgment about what harms rise to the level of persecution directly undermines these important goals. *Ornelas v. United States*, 517

U.S. 690, 697 (1996). It invites "varied results" for similarly situated noncitizens, which is "inconsistent with the idea of a unitary system of law" for asylum claims. *Id.*

"Independent review is therefore necessary if appellate courts are to maintain control of, and to clarify, the legal principles" governing the protections against persecution that Congress has established, notwithstanding the "multi-faceted" and fact-laden inquiry it sometimes involves. *Ornelas*, 517 U.S. at 697-98. So as with other mixed questions that often require fact-intensive decisionmaking, de novo review is crucial. *See, e.g.*, *id.* (de novo review of a district court's probable-cause determination); *Google LLC v. Oracle Am., Inc.*, 593 U.S. 1, 23-24 (2021) (same for a jury's fair-use determination under the Copyright Act).[3] That is especially true because this case concerns not "which kind of *court*" is "better suited to resolve" an inquiry, but rather whether courts must defer to *administrative officials'* construction of a foundational statutory term. *U.S. Bank*, 583 U.S. at 395 (emphasis added).

Furthermore, for as much as interpreting the meaning of persecution under Section 1101(a)(42)

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[3] *See, e.g.*, *In re Long*, 322 F.3d 549, 553 (8th Cir. 2003) (collecting cases from six circuits holding "that an 'undue hardship' determination" under the Bankruptcy Code related to the discharge of student debt requires "de novo review"); *D.O. ex rel. Walker v. Escondido Union Sch. Dist.*, 59 F.4th 394, 405 (9th Cir. 2023) (reviewing de novo whether a particular condition constitutes a "health impairment" under the Individuals with Disabilities Education Act); *Morrison v. Magic Carpet Aviation*, 383 F.3d 1253, 1254-55 (11th Cir. 2004) (same for whether a given set of facts establishes an employment relationship under the Family Medical Leave Act).

can "immerse courts in case-specific factual issues," it *also* frequently involves "developing auxiliary legal principles for use in other cases." *Id.* at 396. For instance, courts have established a blanket rule that, when a noncitizen "demonstrates that she has suffered an attempted rape, she need not adduce additional evidence of harm—psychological or otherwise—to establish past persecution." *Kaur*, 986 F.3d at 1222. They have also broadly held that "the range of procedures collectively known as female genital mutilation rises to the level of persecution." *Mohammed v. Gonzales*, 400 F.3d 785, 795 (9th Cir. 2005); *accord Niang v. Gonzales*, 492 F.3d 505, 510 (4th Cir. 2007). And they have categorically concluded that "if you are forbidden to practice your religion, that is religious persecution." *Bucur v. INS*, 109 F.3d 399, 405 (7th Cir. 1997); *accord Kazemzadeh*, 577 F.3d at 1354. By "amplifying" and "elaborating on" Section 1101(a)(42)'s "broad legal standard" in this way, courts "expound on the law." *U.S. Bank*, 583 U.S. at 396. That function powerfully confirms the need for de novo review here.

III. The Question Presented Is Exceptionally Important And Merits Review In This Case

Whether courts must defer to the BIA's judgment about what kinds and degree of mistreatment qualify as "persecution" under Section 1101(a)(42) is a critically important issue. The question presented holds grave consequences for asylum-seekers, and this case is an ideal vehicle for answering it.

1. "The stakes" in removal proceedings are always "momentous." *Delgadillo v. Carmichael*, 332 U.S. 388, 391 (1947); *accord Ng Fung Ho v. White*, 259 U.S. 276, 284-85 (1922). But they are "all the more replete

with danger when [a noncitizen] makes a claim that he or she will be subject to death or persecution if forced to return to his or her home country." *Cardoza-Fonseca*, 480 U.S. at 449.

With so much "obviously at stake," asylum cases "are among the most difficult that [courts] face." *Dia v. Aschroft*, 353 F.3d 228, 261 (3d Cir. 2003) (en banc) (Alito, J., concurring in part and dissenting in part). But the "importance of independent judicial review in [this] area"—"where administrative decisions can mean the difference between freedom and oppression and, quite possibly, life and death"—cannot be overstated. *Rodriguez-Roman v. INS*, 98 F.3d 416, 432 (9th Cir. 1996) (Kozinski, J., concurring). Deference to the BIA's decisions about what constitutes persecution under Section 1101(a)(42) often proves dispositive in these life-and-death cases.

Here, for example, the BIA concluded "that the threats experienced by" Douglas were insufficiently "menacing" to constitute persecution. App.11a. Reviewing for substantial evidence, the First Circuit believed it could not disturb the BIA's decision, even though the sicario hunted down Douglas's two half-brothers, shot them both, and "vowed to kill [their] entire family"—and even though armed assailants later pursued Douglas and his family across El Salvador, while repeatedly threatening "to leave him like his half-brothers" unless they were paid off. *Id.* at 4a, 11a. It is inconceivable that the BIA's past-persecution determination would have survived de novo review; it arguably flunked even the substantial-evidence standard (though this petition does not seek to relitigate that dispute). *See N.L.A. v. Holder*, 744 F.3d 425, 434 (7th Cir. 2014) (record compelled a finding of past persecution because the

noncitizen received "a credible threat of imminent harm—one that was backed by the most proof of seriousness that one could require—the actual killing of one family member and kidnapping of another"); *supra* at 8-10; CA1 Petitioners' Br. 9-13.

Douglas and his family's experience with improper deference to the BIA is all too common. *See, e.g.*, *Diallo v. Ashcroft*, 381 F.3d 687, 697 (7th Cir. 2004) (noting that, if review had been "*de novo*, we might be inclined to find" that a noncitizen "was the victim of past persecution"); *Khup v. Ashcroft*, 376 F.3d 898, 903-04 (9th Cir. 2004) (denying relief "[b]ecause reasonable minds could differ on whether" the noncitizen had demonstrated past persecution). The consequences have been devastating: For example, between 2013 and 2019, at least 138 people were murdered after being removed from the United States to El Salvador—and that's just one country. *See* Human Rights Watch, *Deported to Danger: United States Deportation Policies Expose Salvadorans to Death and Abuse* (Feb. 5, 2020), https://www.hrw.org/report/2020/02/05/deported-danger/united-states-deportation-policies-expose-salvadorans-death-and. Whether deference to the BIA is appropriate in cases like this one matters for thousands of noncitizens at risk of a similar fate.

2. Resolving the question presented will also help ensure that asylum claims are not reduced to "a 'sport of chance.'" *Judulang v. Holder*, 565 U.S. 42, 58-59 (2011) (quoting *Di Pasquale v. Karnuth*, 158 F.2d 878, 879 (2d Cir. 1947) (Hand, J.)). For decades, there has been "remarkable variation in decision making" in asylum cases "from one official to the next, from one office to the next, from one region to the next, [and]

from one Court of Appeals to the next." Jaya Ramji-Nogales et. al., *Refugee Roulette: Disparities in Asylum Adjudication*, 60 Stan. L. Rev. 295, 302 (2007) (*Refugee Roulette*); *see* U.S. Gov't Accountability Office, *Asylum: Variation Exists in Outcome of Applications Across Immigration Courts and Judges*, GAO-17-72, at 2 (Nov. 14, 2016), https://www.gao.gov/assets/gao-17-72.pdf. That variation in outcomes cannot be adequately explained by differences in the legal merits of the underlying asylum claims. *Refugee Roulette*, *supra*, 60 Stan. L. Rev. at 301-03.

Substantial-evidence review of the BIA's legal judgment about what constitutes persecution perpetuates these alarming disparities. *See id.* at 387-88. Under that highly deferential standard, irreconcilable BIA decisions regarding what kinds and degree of mistreatment "constitute 'persecution'" must be upheld, save where all "reasonable adjudicator[s] would be compelled to" agree on the result. *Id.* at 389. That reality severely restricts courts' ability to "expound on the law" and establish guiding "legal principles of use in other cases." *U.S. Bank*, 583 U.S. at 396. Mandating de novo review of the BIA's "applications of law to fact" in construing the term "persecution," while keeping judicial deference limited "to formal findings of fact," will help ensure even-handed treatment of similarly situated noncitizens. *Refugee Roulette*, *supra*, 60 Stan. L. Rev. at 389.

Furthermore, the "differences in the circuits' willingness to defer to [the BIA's] applications of law to fact"—i.e., the circuit split at the heart of this petition—will continue to "account for the immense differences" in how federal courts themselves resolve

asylum cases. *Id.* Courts deferring to the BIA's persecution determinations are, by definition, much less likely to disturb those decisions than courts conducting de novo review. *See id.* So the longer this Court waits to address the entrenched circuit split, the longer inconsistency and unfairness will persist. Disarray on the question presented has already festered for far too long.

3. This case is a perfect vehicle for resolving this crucial standard-of-review issue. The outcome here turned entirely on the First Circuit's deference to the BIA's determination that this case's undisputed facts did not rise to the level of persecution. The decision below explicitly "cabin[ed]" its review to whether the BIA's decision on that issue "was supported by substantial evidence." App.10a. And despite compelling evidence of past persecution—including the attempted murder of Douglas's half-brothers, several in-person death threats by armed cartel members, a physical assault, and the sicario's years-long effort to track down Douglas—the First Circuit deferred to the BIA's determination that the threats were somehow insufficiently "menacing." *See id.* at 11a.[4] De novo review would have made all the difference. *See supra* at 31-32.

Douglas and his family have fully preserved their argument that the BIA's "determination of whether a

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[4] The family's purported failure to "establish past persecution" also drove the First Circuit's decision to uphold the BIA's separate "finding that they had no reasonable fear of *future* persecution on the basis that they could internally relocate." App.13a (emphasis added); *see id.* at 14a (holding that, because they supposedly had "not shown past persecution," the family "b[ore] the burden" of proving that "relocation would be unreasonable").

settled fact satisfies a legal standard" should be subject to "*de novo* review." CA1 Petitioners' Br. 7 (citing *Guerrero-Lasprilla*, 589 U.S. at 228). Nothing about that argument turns on disputed facts. Whether courts must defer to the BIA's interpretation of the term "persecution" under Section 1101(a)(42) is a pure question of law. That question is cleanly presented and exceedingly important. It should be resolved in this case.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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January 17, 2025

APPENDIX

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* "AR" refers to the Administrative Record filed in the First Circuit on February 5, 2024.

[121 F.4th 327]

United States Court of Appeals
For the First Circuit

No. 24-1042

DOUGLAS HUMBERTO URIAS-ORELLANA; SAYRA ILIANA GAMEZ-MEJIA; G.E.U.G.,

Petitioners,

v.

MERRICK B. GARLAND, United States Attorney General

Respondent.

PETITION FOR REVIEW OF AN ORDER OF THE BOARD OF IMMIGRATION APPEALS

Before

Gelpí, Lynch, and Montecalvo, Circuit Judges.

Kevin P. MacMurray and MacMurray and Associates, on brief for petitioners.

Brooke M. Maurer, Trial Attorney, Bryan M. Boynton, Principal Deputy Assistant Attorney General, and Nancy E. Friedman, Senior Litigation Counsel, Office of Immigration Litigation, U.S. Department of Justice, on brief for respondent.

November 14, 2024

GELPÍ, Circuit Judge. Petitioner Douglas Humberto Urias-Orellana ("Urias-Orellana") is a thirty-three-year-old native and citizen of El Salvador. He -- along with his wife, Sayra Iliana Gamez-Mejia ("Gamez-Mejia"), and their minor child, G.E.U.G. -- petition for review of a final order of the Board of Immigration Appeals ("BIA") affirming the Immigration Judge's ("IJ," together with the BIA, "the Agency") denial of their requests for asylum. Urias-Orellana also petitions for review of the denial of his application for protection under the Convention Against Torture ("CAT").[1] The Agency premised its denials on several grounds, including that Petitioners did not meet their burden to (1) demonstrate harm rising to the level of persecution to qualify for asylum or withholding of removal, or (2) show that they could not reasonably relocate in El Salvador. As to CAT relief, Urias-Orellana did not show there was error in the factual finding that it is "[un]likel[y] [Urias-Orellana] will face torture by or with the consent or

[1] Where necessary, we refer to the trio collectively as "Petitioners." Although Gamez-Mejia and G.E.U.G. can seek asylum as Urias-Orellana's derivative beneficiaries, they cannot assert derivative claims for CAT protection or withholding of removal. That is because those forms of relief do not carry derivative benefits, and Gamez-Mejia and G.E.U.G. did not file separate applications. See 8 C.F.R. § 1208.16(b), (c). The upshot is that our denials of Urias-Orellana's petitions for review of the asylum and withholding of removal determinations apply to their asylum application. Only Urias-Orellana brought a CAT claim. See Cabrera v. Garland, 100 F.4th 312, 315 n.l (1st Cir. 2024).

acquiescence (including willful blindness) of any public official or persona acting in an official capacity." We deny the petition for review.

I. BACKGROUND

"We draw our background 'from the administrative record, including [Urias-Orellana's] testimony before the IJ, which the IJ found credible.'" Gonzalez-Arevalo v. Garland, 112 F.4th 1, 6 (1st Cir. 2024) (quoting Chun Mendez v. Garland, 96 F.4th 58, 61 (1st Cir. 2024)).

A. UNDERLYING FACTS

On or about June 28, 2021, Petitioners entered the United States without authorization. The Department of Homeland Security ("DHS") served them on August 10 with Notices to Appear in immigration court. DHS charged Petitioners with removability for being present in the United States without being admitted or paroled, Immigration and Nationality Act ("INA") § 212(a)(6)(A)(i), 8 U.S.C. § 1182(a)(6)(A)(1). Petitioners conceded proper service and admitted their removability. In so doing, Petitioners noted that they would seek asylum, while Urias-Orellana indicated that he would also seek protection under the CAT.[2]

In his asylum application, Urias-Orellana explained that he feared harm because his half-brothers, Juan and Remberto, had been shot and

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[2] He also indicated his intent to seek withholding of removal. But Petitioners' brief is devoid of any argument mentioning withholding of removal. Accordingly, any challenge to the denial of withholding of removal has been waived. See Jimenez-Portillo v. Garland, 56 F.4th 162, 165 (1st Cir. 2022) .

severely injured, and he believed that similar harm would befall him and his family.

Urias-Orellana expanded on these concerns during his testimony before the IJ at a hearing on March 14, 2022, and through an affidavit filed in immigration court. Urias-Orellana, represented by counsel, explained that he feared persecution in El Salvador on the basis of his particular social group: Urias-Orellana's family. Specifically, Urias-Orellana feared returning to El Salvador because of Wilfredo, a "sicario" (which roughly translates to "hitman") for a local drug lord in El Salvador. Wilfredo's mother and the father of Urias-Orellana's half-brothers[3] were involved in a relationship of which Wilfredo did not approve. Around February 2016, Wilfredo's disapproval turned to violence when, after an argument with Juan at a cantina, he shot Juan six times. Juan suffered severe injuries from the shooting -- he is now wheelchair-bound -- and moved away to Cara Sucia (a forty-minute drive from where he was shot).

The shooting apparently did not placate Wilfredo's anger. So he vowed to kill Juan's entire family. He turned his crosshairs next on Remberto in August 2016. Wilfredo ambushed Remberto in a secluded alley, shooting him nine times. Remberto survived the encounter. Urias-Orellana feared for his and his family's safety, and they fled to Cojutepeque, El Salvador, where they remained in peace for about one year.

Believing the worst to be over, Petitioners moved in February or March 2017 to live with Gamez-Mejia's

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[3] Juan and Remberto have the same mother as Urias-Orellana but a different father.

family to another town in El Salvador, Colonia Claudia Lara -- about a thirty-minute drive from Sonsonate, where Urias-Orellana used to live. But, according to Urias-Orellana, Wilfredo must have learned of this move because two masked men approached Urias-Orellana in Claudia Lara a few months after. They demanded money and, when Urias-Orellana refused, warned him that they would "leave [him] like" his half-brothers and possibly kill him if he did not cave to their demands.

About six months later, Urias-Orellana again was threatened at gunpoint by masked men in August 2017. They threatened to kill him if he did not pay up the next time that they saw him.[4]

Petitioners then moved, again within El Salvador, to Cara Sucia to stay with Juan. They lived there without any harassment or complaints or threats for two-and-a-half years. In December 2020, Urias-Orellana and Gamez-Mejia returned to visit his family in Sonsonate, and while there, he was confronted by two masked men on a motorcycle demanding money. They threatened him, assaulted him by striking him three times in the chest, and warned him that they would kill him if he did not pay them.

Urias-Orellana and Gamez-Mejia returned to Cara Sucia thereafter. But, on their journey, Urias-Orellana noticed two men on a motorcycle -- whom he

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[4] Urias-Orellana testified that he and his family moved to Cara Sucia after the threats in February or March 2017. He explained that he was not approached again after that incident. But his affidavit indicates that he was targeted in August 2017. The IJ also analyzed the August 2017 encounter. Accordingly, we shall consider the August 2017 encounter in our analysis.

believed to be the same men who beat him -- following him to Cara Sucia. Fearful that Cara Sucia was unsafe, Petitioners took a taxi to San Salvador before ultimately returning to Claudia Lara.

Upon their return, Urias-Orellana noticed that the same men who assaulted him were patrolling Claudia Lara apparently in search for him. And, while shopping in Claudia Lara around February or March 2021, he overheard two men asking a store employee if there were any newcomers to the area and where they were located.

The IJ asked Urias-Orellana questions once he finished recounting this narrative. He asked if Urias-Orellana's mother had ever been harmed or mistreated while living in El Salvador. Urias-Orellana answered that she had not, besides a threat from individuals "from Guatemala." The IJ asked the same question about Urias-Orellana's siblings, who also lived in El Salvador. Neither his sister nor his half-sister (nor his half-sister's children) were ever harmed or mistreated while in El Salvador. The IJ asked about Urias-Orellana's other siblings besides Juan and Remberto -- Jaime, Celina, Rosabel, and Elmer. Although Urias-Orellana explained that some unknown assailants had "grabbed" and placed Jaime "in a room for [three] hours" at some point, he did not recall any of his other siblings facing harm or harassment in El Salvador.

The IJ further asked Urias-Orellana if he had been able to live without being harmed or threatened when he moved to Cojutepeque and Claudia Lara. Urias-Orellana admitted that he had been.

B. Procedural History

The IJ denied the application after considering Urias-Orellana's testimony, the submissions in support of Petitioners' claims, and the entire record. We focus on the facets of the IJ's decision that are relevant to this petition for review.

First, the IJ concluded that Urias-Orellana's testimony was credible, and that the recounted harm did not rise to the level of past persecution. The IJ acknowledged the death threats and assault, and found that the death threats were not so menacing as to qualify as past persecution. Further, the December 2020 assault did not require Urias-Orellana to receive medical treatment, and so was not past persecution.

Beyond that, the IJ found that Petitioners did not meet their burden to show that a reasonable person would fear returning to El Salvador. The IJ so concluded, reasoning (1) Urias-Orellana's relatives lived throughout El Salvador without suffering any harm or mistreatment at Wilfredo's hands, and (2) Petitioners were able to successfully relocate in El Salvador without facing any harassment or mistreatment. Indeed, the IJ noted, Urias-Orellana only encountered danger after he returned to his hometown.

Third, the IJ found that Urias-Orellana's CAT claim failed. The IJ noted that Urias-Orellana neither reported his harassment to the police nor demonstrated that doing so would be futile. The IJ acknowledged that a 2020 U.S. Department of State Country Conditions Report for El Salvador "present[ed] a mixed picture" on the country's efforts to combat organized crime. That mixed picture included the limited resources available to and

corruption in the Salvadoran police and judiciary. The IJ also noted that the Report stated that the police had developed new techniques to combat gang violence and made efforts to root out corruption in the police force. The IJ concluded it would not be futile for Urias-Orellana to report any threats to the authorities, and he had not shown that, if there were further harassment, the Salvadoran government would acquiesce to it.

Petitioners appealed to the BIA, attacking the IJ's finding that the Petitioners had not shown that they (1) faced past persecution due to the threats and December 20 assault; or (2) had a well-founded fear of future persecution due to internal relocation and unharmed family members. Petitioners also appealed the IJ's finding that Urias-Orellana had not shown he qualified for CAT relief.

The BIA affirmed. It adopted the IJ's reasoning and added its views as to the denials of Petitioners' asylum claim and Urias-Orellana's CAT claim. The BIA agreed with the IJ that the threats and assault did not amount to persecution. And, after recognizing that Petitioners' failure to prove past persecution meant that they bore the burden of showing that relocation would be unreasonable, the BIA concluded that Petitioners had not met this burden. Moreover, the BIA noted that Urias-Orellana's mother and sisters were never threatened or harmed in El Salvador, and that Jaime was held by someone unaffiliated with Wilfredo. Finally, the BIA noted, inter alia, as to Urias-Orellana's CAT claim, that he never attempted to report his mistreatment to the police -- and that it would not have been futile to do so, in light of the country conditions evidence.

This timely petition for judicial review, over which we have jurisdiction, followed. 8 U.S.C. § 1252(a)(1).

II. DISCUSSION

A. Legal Standards

"Where, as here, 'the BIA adopts and affirms an IJ's decision, we review the IJ's decision "to the extent of the adoption, and the BIA's decision as to [any] additional ground"'" López-Pérez v. Garland, 26 F.4th 104, 110 (1st Cir. 2022) (alteration in original) (quoting Sunoto v. Gonzales, 504 F.3d 56, 59-60 (1st Cir. 2007)).

"We review the [A]gency's legal conclusion de novo. But we review its factual findings under the substantial evidence standard." Gonzalez-Arevalo, 112 F.4th at 8 (citation omitted). Under this standard, we must "accept the findings 'as long as they are supported by reasonable, substantial and probative evidence on the record considered as a whole.'" Gomez-Abrego v. Garland, 26 F.4th 39, 45 (1st Cir. 2022) (quoting Aguilar-De Guillen v. Sessions, 902 F.3d 28, 32 (1st Cir. 2018)). Thus, "we will only disturb the [A]gency's findings if, in reviewing the record as a whole, 'any reasonable adjudicator would be compelled to conclude to the contrary.'" Gonzalez-Arevalo, 112 F.4th at 8 (quoting Barnica-Lopez v. Garland, 59 F.4th 520, 527 (1st Cir. 2023)). "That the record supports a conclusion contrary to that reached by the [Agency] is not enough to warrant upsetting the [Agency's] view of the matter; for that to occur, the record must compel the contrary conclusion." Santos Garcia v. Garland, 67 F.4th 455, 460-61 (1st Cir. 2023) (quoting Hincapie v. Gonzales, 494 F.3d 213, 218 (1st Cir. 2007)). It is

through this lens that we consider Petitioners' asylum claim and Urias-Orellana's CAT claim.

The INA requires a petitioner for asylum to prove that he is a "refugee," meaning someone "who is unable or unwilling to return to" his country of origin "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). "Persecution in this sense 'requires proof of a "certain level of serious harm (whether past or anticipated), a sufficient nexus between that harm and government action or inaction, and a causal connection to one of those statutorily protected grounds."'" Gonzalez-Arevalo, 112 F.4th at 8 (quoting Barnica-Lopez, 59 F.4th at 527). If a petitioner fails to meet any of these requirements, then so too must his past or future persecution claim fail. See id.

B. Asylum Claim

We consider Petitioners' arguments concerning asylum. In so doing, we cabin our review to whether the Agency conclusion they had not demonstrated past persecution or a well-founded fear of future persecution was supported by substantial evidence.

i. Past Persecution

Part of Petitioners' past persecution burden was to prove that Urias-Orellana suffered "a certain level of serious harm." Gonzalez-Arevalo, 112 F.4th at 8 (quoting Barnlea-Lopez, 59 F.4th at 527). Persecution transcends "unpleasantness, harassment, and even basic suffering." Santos Garcia, 67 F.4th at 461 (quoting Nelson v. INS, 232 F.3d 258, 263 (1st Cir. 2000)). While "'[c]redible, specific threats can amount to persecution if they are

severe enough' -- particularly if they are death threats," Montoya-Lopez v. Garland, 80 F.4th 71, 80 (1st Cir. 2023) (quoting Aguilar-Escoto v. Garland, 59 F.4th 510, 516 (1st Cir. 2023)) -- to qualify as past persecution, these threats must be "so menacing as to cause significant actual suffering or harm," Santos Garcia, 67 F.4th at 461 (quoting Lobo v. Holder, 684 F.3d 11, 18 (1st Cir. 2012)).

Petitioners argue that the record compelled a finding that the threats and assault experienced by Urias-Orellana met this burden. They emphasize that Urias-Orellana's assailants were armed, assaulted him on one occasion, and promised to leave him like his half-brothers if he did not comply.

Unfulfilled death threats rarely prove past persecution unless they are "so menacing as to cause significant actual suffering or harm." Id. The Agency reasonably concluded that the threats experienced by Urias-Orellana do not meet that threshold. As an initial matter, Urias-Orellana did not testify "about the 'immediate impact, if any, that these threats had on him,'" so we cannot say that the record compels a conclusion that they caused significant actual suffering or harm. Id. (quoting Rodriguez v. Lynch, 654 F. App'x 498, 500 (1st Cir. 2016)). Here, "there [was] no finding that [] threats [against the petitioner] were 'credible' threats of death as opposed to threats intended to frighten him into paying, especially given the lack of severity of the one assault." Vargas-Salazar v. Garland, 119 F.4th 167, 173 (1st Cir. 2024) (alterations in original) (quoting Santos Garcia, 67 F.4th at 461. Indeed, the Agency considered how, over a four-year period, Urias-Orellana was threatened only three times by unknown assailants who demanded money and, on

one occasion, struck him in the chest, three times -- an attack that did not result in hospitalization. That the assault "did not require hospitalization bears on the 'nature and extent' of [a petitioner's] injuries and is certainly 'relevant to the ultimate determination'" of persecution. Jinan Chen v. Lynch, 814 F.3d 40, 46 (1st Cir. 2016) (quoting Vasili v. Holder, 732 F.3d 83, 89 (1st Cir. 2013)).

Because this sequence of events did not involve threats or actions "so menacing as to cause significant actual suffering," Santos Garcia, 67 F.4th at 461, substantial evidence supports the Agency's no-past-persecution finding.

Petitioners highlight the assailants' striking the chest of Urias-Orellana and the assailants' mentioning of Juan and Remberto's fates as proof that they could make good on their threats. But these circumstances do not present a case distinct from our precedents. Previously, we have upheld Agency decisions concluding that nearly identical -- or even more egregious -- circumstances did not rise to the level of persecution. Vargas-Salazar, 119 F.4th at 172-73 (concluding that multiple extortionate death threats and an injury that did not require hospitalization did not compel a finding of past persecution); Santos Garcia, 67 F.4th at 459-61 (three extortionate threats and a beating by armed assailants did not constitute persecution); Jinan Chen, 814 F.3d at 42-43 (upholding the Agency's no-persecution finding when the petitioner "was beaten and subsequently taken to the police station where he was placed in custody, interrogated, further assaulted, and threatened with forced sterilization"); Cabas v. Holder, 695 F.3d 169, 174 (1st Cir. 2012) (upholding no-persecution finding where the

petitioner was kidnapped, beaten, and left unconscious and received threats after a break-in at his parents' home); Bocova v. Gonzales, 412 F.3d 257, 263 (1st Cir. 2005) (upholding no-persecution finding based on two death threats and a beating that left the petitioner unconscious and hospitalized). It follows that the record here did not compel a finding of past persecution.

ii. Well-Founded Fear of Future Persecution

Because Petitioners did not establish past persecution, they are not entitled to a presumption of future persecution. Santos Garcia, 67 F.4th at 462. The Agency ruled that Petitioners did not establish future persecution, finding that they had no reasonable fear of future persecution on the basis that they could internally relocate. We thus examine the merits of that conclusion.

Even if a petitioner proves that "[he has] suffered past persecution or [has] a well-founded fear of future persecution, [the] application for asylum will be denied if the adjudicator determines that [he] could avoid persecution by internally relocating within the country of removal and, under all the circumstances, it would be reasonable to do so." Caz v. Garland, 84 F.4th 22, 27 (1st Cir. 2023). For a petitioner "to be able to internally relocate safely, there must be an area of the country where he or she has no well-founded fear of persecution." Matter of M-Z-M-R-, 26 I. & N. Dec. 28, 33 (B.I.A. 2012). To determine this, the Agency considers "the totality of the relevant circumstances" for relocation, such as "the size of the country of nationality or last habitual residence, the geographic locus of the alleged persecution, the size, numerosity, and reach of the alleged persecutor, and

the [petitioner's] demonstrated ability to relocate to the United States in order to apply for asylum." 8 C.F.R. § 208.13(b) (3). Other relevant factors to the analysis include whether the petitioner previously had success relocating internally and his family's "continued safe residence . . . in the country of removal." Caz, 84 F.4th at 28. After all, a petitioner's unimpeded movement "demonstrates that [he] can relocate safely," Chen Qin v. Lynch, 833 F.3d 40, 45 (1st Cir. 2016), and that "close relatives continue to live peacefully in the [petitioner's] homeland undercuts the [petitioner's] claim that persecution awaits his return," López-Pérez, 26 F.4th at 112 (quoting Aguilar-Solis v. INS, 168 F.3d 565, 573 (1st Cir. 1999)). Because Petitioners have not shown past persecution, they bear the burden "to establish that relocation would be unreasonable." Camara v. Holder, 725 F.3d 11, 15 n.3 (1st Cir. 2013) .

Substantial evidence supports the Agency's conclusion that internal relocation in El Salvador would be reasonable. Urias-Orellana testified that he avoided harm, harassment, and threats twice successfully: first by moving to Cojutepeque and staying for one year, and then by moving to Cara Sucia and staying there for two and a half years. See Chen Qin, 833 F.3d at 45 (considering the petitioner's successful internal relocation to a relative's house). Likewise, as he has admitted, Urias-Orellana's relatives live throughout El Salvador undisturbed. See, e.g., López-Pérez, 26 F.4th at 112 (considering that the petitioner's sister and cousin still resided in Guatemala without being persecuted). Evidence of "prior successful internal relocation and the continued safe residence of [Petitioners'] family members in" El Salvador supports the Agency's

conclusion. Caz, 84 F.4th at 28 (first citing López-Pérez, 26 F.4th at 112; and then citing Chen Qin, 833 F.3d at 45).

Petitioners contend that Urias-Orellana did not internally relocate with success because, upon returning to Claudia Lara, he was confronted by the men who threatened him. They also note that El Salvador has a high per-capita murder rate; is full of criminal gangs dispersed throughout the country; and is so small as to make it impossible to avoid Wilfredo.

Petitioners' complaints falter against the substantial evidence standard. As we have stated, we do not consider whether the record contains any evidence suggesting that relocation might not be reasonable -- only "whether a reasonable factfinder, having considered all the evidence, would be compelled to conclude that [Urias-Orellana] could not safely relocate within" El Salvador. Id. at 29. A reasonable factfinder would not be so compelled here. Urias-Orellana was able to live in towns across El Salvador for years without harassment and only encountered difficulties once he returned to his hometown. And his relatives -- members of his family who Wilfredo would presumably also want dead -- have lived across El Salvador unscathed. Therefore, substantial evidence supports the Agency's conclusion that Urias-Orellana did not establish that relocation was unreasonable.

C. CAT Claim

To succeed on his CAT claim, Urias-Orellana "must show that 'it is more likely than not that he will be tortured if returned to his home country.'" Lafortune v. Garland, 110 F.4th 426, 438 (1st Cir. 2024) (quoting Bonnet v. Garland, 20 F.4th 80, 84 (1st

Cir. 2021)). In doing so, he must show that "he would be subject to torture 'by or with the acquiescence of a government official.'" Perez-Trujillo v. Garland, 3 F.4th 10, 18 (1st Cir. 2021) (quoting Aldana-Ramos v. Holder, 757 F.3d 9, 19 ('1st Cir. 2014)). "Acquiescence" requires that a "public official, prior to the activity constituting torture, have awareness of such activity and thereafter breach his or her legal responsibility to intervene to prevent such activity." 8 C.F.R. § 208.18(a)(7).

Urias-Orellana argues that the record compels the conclusion that the Salvadoran government lacked the resources to protect him from torture at the hands of criminal gangs. He stresses that the 2020 country conditions report demonstrates corruption in the judicial system and government, along with impunity for those officials, undermining the rule of law. In turn, he contends that this led to the government's inability to halt gangs.

Urias-Orellana's argument fails, as the Agency held, for a fundamental reason: The 2020 country conditions report does not "supplant the need for particularized evidence." Amouri v. Holder, 572 F.3d 29, 35 (1st Cir. 2009) (noting that country conditions reports "do not necessarily override petitioner-specific facts"). He is "oblig[ated] to point to specific evidence indicating that he, personally, faces a risk of torture." Alvizures-Gomes v. Lynch, 830 F.3d 49, 55 (1st Cir. 2016).

That he does not do. Urias-Orellana never even attempted to report his harassment, which did not rise to the level of persecution and certainly not torture, to the police. He only speculates here -- as he did before the Agency -- about its inability to protect him. See, e.g., Ramirez Pérez v. Barr, 934 F.3d 47, 52

(1st Cir. 2019) (rejecting petitioner's argument of government acquiescence where he never attempted to report his mistreatment to the police); Gomez-Abrego, 26 F.4th at 46 (rejecting petitioner's arguments where she only pointed to "her belief that the police were 'in cahoots' with gang members and [a] country report showing widespread violence and police corruption in El Salvador," and the Agency properly considered and rejected this as evidence of acquiescence to torture).

And "even where 'efforts at managing gang activity [are not] completely effectual,' that is insufficient to sustain a CAT claim unless the record 'compel[s] a conclusion that the government has acquiesced in gang activities.'" Perez-Trujillo, 3 F.4th at 20 (alteration in original) (quoting Mayorga-Vidal v. Holder, 675 F.3d 9, 20 (1st Cir. 2012)). The record does not compel such a conclusion. The IJ explicitly considered the 2020 country conditions report, and noted that report described how the Salvadoran police's investigative units "have shown great promise" in managing gangs. See id. at 20-21 (holding that substantial evidence supported the Agency's no-acquiescence finding where country conditions evidence stated, in part, that the Salvadoran police had made efforts to crack down on gang violence); Mayorga-Vidal, 675 F.3d at 20 (holding similarly).

III. CONCLUSION

For these reasons, we **deny** the petition for judicial review.

NOT FOR PUBLICATION

U.S. Department of Justice
Executive Office for Immigration Review
Board of Immigration Appeals

MATTER OF:

Douglas Humberto URIAS-ORELLANA, A208-691-512
Sayra Ilana GAMEZ-MEJA, A216-663-245
[G.E.U.G.], A216-663-246

Respondents

FILED
Dec. 07, 2023

ON BEHALF OF RESPONDENTS: Kevin P. MacMurray, Esquire

IN REMOVAL PROCEEDINGS
On Appeal from a Decision of the Immigration Court, Boston, MA
Before: Owen, Appellate Immigration Judge

OWEN, Appellate Immigration Judge

The respondents,[1] natives and citizens of El Salvador, have appealed from the Immigration

[1] The respondents in this case are the lead respondent (A208-691-512), who is the principal applicant for asylum, his wife (A216-663-245), and their minor child (A216-663-246). The wife and child seek asylum as derivative beneficiaries of the lead respondent, but they cannot assert derivative claims for

Judge's decision dated March 14, 2022. The Immigration Judge found the respondents removable, denied the respondent's applications for asylum and withholding of removal under sections 208 and 241(b)(3) of the Immigration and Nationality Act ("INA"), 8 U.S.C. §§ 1158 and 1231(b)(3), and denied their request for protection under the regulations implementing the Convention Against Torture ("CAT").[2] The Department of Homeland Security ("DHS") has not responded to the respondents' appeal. The appeal will be dismissed.

This Board reviews an Immigration Judge's findings of fact, including findings as to the credibility of testimony, under the "clearly erroneous" standard. *See* 8 C.F.R. § 1003.1(d)(3)(i). This Board reviews questions of law, discretion, and judgment, and all other issues raised in an appeal of an Immigration Judge's decision de novo. *See* 8 C.F.R. § 1003.1(d)(3)(ii).

On appeal, the respondent challenges the denial of asylum, withholding of removal under the INA, and withholding of removal under the CAT. We affirm the Immigration Judge's decision for the reasons set forth

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withholding of removal under the Immigration and Nationality Act, or protection under the Convention Against Torture. Section 208(b)(3)(A) of the INA, 8 U.S.C. § 1158(b)(3); 8 C.F.R. § 1208.3(a); *Matter of A-K-*, 24 I&N Dec. 275. 279 (BIA 2007) (stating that although the INA provides for derivative asylum, it does not provide for derivative withholding of removal). References to the "respondent" in the singular are to the lead respondent, unless otherwise indicated.

[2] The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, S. Treaty Doc. No. 100–20, 1465 U.N.T.S. 85 (entered into force for United States Nov. 20, 1994). 8 C.F.R. §§ 1208.16(c)-1208.18.

by the Immigration Judge. *See Matter of Burbano*, 20 I&N Dec. 872, 874 (BIA 1994) (recognizing that adoption or affirmance of a decision of an Immigration Judge, in whole or in part, is simply a statement that the Board's conclusions upon review of the record coincide with those which the Immigration Judge articulated in his or her decision). We supplement solely to address the dispositive issues raised on appeal.[3]

First, on appeal, the respondent argues that he suffered past persecution. The respondent credibly testified that, in 2016, a sicario who was angry with his stepfather for having had a relationship with the sicario's mother, shot at his two half-brothers, seriously injuring them. Because the sicario failed to kill them, he vowed to kill the entire family. The sicario never personally threatened or harmed the respondent, his mother, or his sisters. However, between 2017 and 2021, whenever the respondent returned to his hometown, armed masked men demanded money from him and threatened to kill him if he did not provide the demanded money. During one instance, one man pounded his chest three times (IJ at 4-6; Tr. at 30-55). The Immigration Judge concluded that the aggregate harm did not rise to the level of persecution because the threats of harm were not sufficiently menacing or imminent (IJ at 6-7). The

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[3] Because we find these issues to be dispositive, we find it unnecessary to address the remaining issues raised by the respondent on appeal. *See Matter of J-G-*, 26 I&N Dec. 161, 170 (BIA 2013) (holding that agencies are not required to make findings on issues that are unnecessary to the results they reach); *Matter of S-H-*, 23 I&N Dec. 462, 465 (BIA 2002) (concluding that resolving a case on the basis of a dispositive issue is a sound exercise of judicial economy).

Immigration Judge was not clearly erroneous in these factual findings, and we agree with the Immigration Judge's determination that the respondent did not establish that he suffered past harm in the aggregate rising to the level of persecution. *See* 8 C.F.R. § 1003.1(d)(3)(i) (concerning clear error); *Matter of O-Z- & I-Z-*, 22 I&N Dec. 23, 26 (BIA 1998) (indicating that, whether harm rises to past persecution is determined by assessing all harm suffered in the aggregate); *Matter of Acosta*, 19 I&N Dec. 211, 222 (BIA 1985) (holding that persecution includes a threat to life or freedom, the infliction of suffering or harm, confinement or torture, and economic deprivation or restrictions so severe that it constitutes a threat to life or freedom).

Next, the respondent argues that the Immigration Judge erred in determining that internal relocation was possible and reasonable. With regard to asylum and withholding of removal under the INA, where an applicant has not established past persecution, the applicant bears the burden of establishing that it would not be reasonable for the applicant to relocate, unless the persecution is by a government or is government-sponsored. *See* 8 C.F.R. §§ 1208.13(b)(3)(i) (concerning asylum), 1208.16(b)(3)(i) (concerning withholding of removal under the INA); *Matter of M-Z-M-R-*, 26 I&N Dec. 28, 34 (BIA 2012) (holding that, in assessing an asylum applicant's ability to internally relocate, an Immigration Judge determines whether the applicant could avoid future persecution by relocating to another part of the applicant's country of nationality and whether, under all the circumstances, it would be reasonable to expect the applicant to do so).

Here, because there was no past persecution and because the alleged persecutor was not the government or government-sponsored, the burden was on the respondent to show that internal relocation was not possible or reasonable. We agree with the Immigration Judge's determination that the respondent did not carry this burden (IJ at 7-10).

The respondent credibly testified that, after each half-brother was shot by the sicario, he moved away and did not have further problems. The respondent's stepfather has not been harmed either. The respondent also testified that, after the second half-brother was shot, the respondents moved to Cojutepeque for 1 year and had no problems there. The respondents later moved to Cara Sucia for 2.5 years and had no problems there. The respondent only had problems when he returned to his hometown. The respondent also admitted that his mother was not threatened or harmed by the sicario. None of his sisters has been threatened or harmed either. One lives in San Salvador, another lives in Sonsonate. His brother Jaime was held for 3 hours by someone, but it may not have been someone associated with the sicario (IJ at 4-5, 7-10; Tr. at 33-34, 39-41, 44-50). The Immigration Judge was not clearly erroneous in these factual findings, and we agree with the Immigration Judge's determination that the respondent did not carry his burden of establishing that the respondents could not reasonably internally relocate in El Salvador to avoid the sicario and the extortionists in their hometown. *See* 8 C.F.R. § 1003.1(d)(3)(i) (concerning clear error).

Finally, the respondent argues that the Immigration Judge erred in finding that he did not establish withholding of removal under the CAT.

However, we agree with the Immigration Judge's determination that the respondent did not establish withholding of removal under the CAT. *See* 8 C.F.R. § 1208.16(b) (indicating that the respondent has the burden of proving withholding of removal under the CAT).

The Immigration Judge noted that the respondent did not go to the police and noted that country conditions do not reflect that going to the police would be futile (IJ at 13-16; Tr. at 36-37). Consequently, the respondent did not establish that the government of El Salvador is likely to acquiesce in his torture. *See* 8 C.F.R. § 1208.18(a)(1) (defining torture); 8 C.F.R. § 1208.18(a)(7) (indicating that acquiescence requires that, prior to the tortuous activity, a public official must have awareness of the torture and breach the legal responsibility to intervene to prevent the torture). *Cf. Mayorga-Vidal v. Holder*, 675 F.3d 9, 20 (1st Cir. 2012) (indicating that the fact that El Salvador's efforts at managing gang activity have not been completely effectual is not a basis for finding that the government has acquiesced in gang activities).

We find no clear error in the Immigration Judge's predictive fact-finding regarding the likelihood that the respondent will face torture by or with the consent or acquiescence (including willful blindness) of any public official or person acting in an official capacity. *See* 8 C.F.R. § 1003.1(d)(3)(i) (concerning clear error); 8 C.F.R. § 1208.18(a)(1) (defining torture); 8 C.F.R. § 1208.18(a)(7) (defining acquiescence). *See also Matter of Z-Z-O-*, 26 I&N Dec. 586, 590 (BIA 2015) (concluding that an Immigration Judge's finding that a future event will occur is fact-finding subject to review for clear error).

Accordingly, the following order will be entered.

ORDER: The appeal is dismissed.

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
BOSTON, MASSACHUSETTS

File: A208-691-512/
216-663-245/ 246

March 14, 2022

In the Matter of

DOUGLAS URIAS-ORELLANA SAYRA GAMEZ-MEJIA [G.E.U.G.]	)	IN REMOVAL PROCEEDINGS
RESPONDENTS	)	

CHARGES: INA § 212(A)(6)(a)(i)

APPLICATIONS: Asylum, Withholding of Removal, CAT

ON BEHALF OF RESPONDENTS: DENIEL AKSELSEN, ESQUIRE

ON BEHALF OF DHS: ~~CATHERINE~~ Jennifer MULCAHY, ESQUIRE

ORAL DECISION AND ORDER OF THE IMMIGRATION JUDGE

The Respondents are a mother, father, and child. The lead Respondent, Douglas Urias-Orellana, is a 31-year-old native and citizen of El Salvador. The

co-Respondents are the lead Respondent's wife and partner, Sayra Gamez-Mejia, a 25-year-old native and citizen of a Salvador. The other co-Respondent is the child of the lead Respondent and his wife, [G.E.U.G.], a 4-year-old native and citizen of El Salvador. On August 13, 2021, the U.S. Department of Homeland Security filed Notices to Appear against the above-named Respondents. The filing of these charging documents commenced proceedings and vested jurisdiction with this Court. 8 C.F.R. § 1003.14(a). The Notices to Appear have been admitted into evidence as Exhibits 1,1-A, and 1-B, respectively. The Respondents have conceded proper service of the form I-862, Notices to Appear. Based upon the Respondents' admissions and concessions, and based upon the certificate of service contained in the respective Notices to Appear, the Court finds that the Notices to Appear have been properly served. The Respondents were afforded 10 days following service of the Notices to Appear prior to appearing before an Immigration Judge. The undersigned has familiarized himself with the record of proceedings in these matters.

REMOVABILITY

The Notices to Appear charge the Respondents with inadmissibility under INA § 212(a)(6)(A)(i). The Respondents, through counsel, have previously admitted the allegations contained in the Notices to Appear and conceded inadmissibility as charged. Based upon the Respondents' admissions and concessions, and based upon Exhibits 2, 2-A, and 2-B, the Court finds that the DHS has met its burden of proving removability by clear and convincing evidence as required by INA § 240(c). The Respondents have declined to designate a country for

removal. At the November 2, 2021, hearing, the Court directed El Salvador as the country of removal at the request of DHS. In lieu of removal, the Respondents do seek asylum, withholding of removal, and withholding of removal under the Convention Against Torture. The Court notes that in the written pleadings at Exhibits 2, 2-A, and 2-B, the Respondents also checked off voluntary departure. The Court notes that the Respondents are not statutorily eligible for post-conclusion voluntary departure under § 240B(b) of the Act, because the Notices to Appear ~~was~~ were served on them within 1 year of their last arrival. See Exhibits 1, 1-A, and 1-B. Additionally, the Court notes that the Respondents have not made any request for pre-conclusion voluntary departure under § 240B(a) of the Act and that the Respondents would otherwise have to withdraw their applications for relief and waive appeal and have a DHS stipulation in order to be granted voluntary departure at today's hearing. See generally 8 C.F.R. § 1240.26. The Respondents, through Counsel, have not indicated that they are seeking pre-conclusion voluntary departure because they did elect to go forward with their applications for relief and indicated they did wish to reserve appeal. Accordingly, even though the Respondents did indicate in their pleadings they were seeking voluntary departure, because the Respondents have not sought pre-conclusion voluntary departure and because the Respondents are not statutorily eligible for post-conclusion voluntary departure, the Court does not consider such applications for relief.

EVIDENTIARY RECORD

The evidentiary record of this proceeding consists of documentary Exhibits 1 through 8. Documentary Exhibits 1 through 7 have been admitted into evidence without objection. Documentary Exhibit 8 is a standard language addendum that is hereby ~~gonna~~ going form part of the oral decision today. Exhibit 8 is not evidence and is solely meant to be read in conjunction with the oral decision itself.

STATEMENT OF LAW

I hereby incorporate what's been marked as Exhibit 8 by the Court, which is the standard language addendum for asylum, withholding, and Convention Against Torture relief.

ANALYSIS AND FINDINGS ON ELIGIBILITY FOR RELIEF

I. CREDIBILITY AND CORROBORATION

The lead Respondent was the sole witness in this matter. The Court notes that the thrust of the co-Respondents' claims is to essentially be derivatives on the lead Respondent's claim for relief. The Court otherwise does consider the co-Respondents' independent claims as well for withholding and Convention Against Torture relief. The Court does find that the lead Respondent is a credible witness because the answers to the questions posed were responsive, internally consistent with his documentary evidence, and consistent with his written application. His demeanor appeared to be forthright and he appeared to be generally trying to try to answer all the questions that he was asked. Accordingly, the Court does credit his testimony and

does hereby incorporate by reference his March 14, 2022, testimony herein.

In a nutshell, according to the Respondent's testimony and sworn affidavit, the lead Respondent had two maternal half-brothers, Juan Antonio Urias and Remberto. Because his half-brothers' father had a relationship with a sicario named Wilfredo, a local drug lord, who also instigated murder, intimidation, and drug smuggling, Wilfredo did not approve of the relationship, that he got in a fight with Wilfredo's son, Juan Antonio, in February 2016. As a result of the fight, Juan went to a soccer field with his friends and Wilfredo came out with a gun and shot Juan six times. While he survived, Juan is still wheelchair bound and has been targeted by Wilfredo again because Juan moved away to Cara Sucia, a 40-minute drive from where the area where the shooting happened.

Upon discovering that Juan had survived, according to the Respondent's testimony, Juan vowed to kill Juan's whole family and came looking for Juan's family members. In August of 2016, Remberto got a call from a friend asking to meet in a secluded alley. When Remberto met the friend they talked for a while and then upon leaving, Wilfredo appeared and shot Remberto nine times and left. Fortunately, Remberto survived, and then after the attack, knowing that it was not safe, the Respondent and his family moved to Cojutepeque where he stayed there for about a year. The Court notes that during his time in El Salvador, the lead Respondent claims he worked as a cattle rancher.

In around February and March of 2017, thinking it would be safe to return to the general area where his family used to live, the lead Respondent moved to Colonia Claudia Lara to live with his wife's family.

About 3 to 4 months after moving back two unknown people approached the lead Respondent on a motorcycle with faces covered, with guns demanding money from him, and upon refusing to give them money, they warned that if he refused to comply with their demands, he would end up like his two brothers. Approximately 6 months later in August 2017, again two people approached the lead Respondent again faces covered with guns demanding money from him and when he said he didn't have any they warned the next time they approached him they would kill him. After the second approach, the lead Respondent and his family moved to Cara Sucia where he remained until approximately December 2020. In December 2020, 3 years after -- more than 3 years after the last threat against him, only when visiting his family in his town, again two people approached him and said he was lucky to escape the few previous time and that he still must pay, and they wouldn't forgive him the next time he didn't have the money or they'd kill him or whoever else he was with, and they hit him on the chest three times and left. Upon this incident, they went back to Cara Sucia, and again saw a motorcycle with two men constantly following them. So they stayed there for a week. They went and took a taxi to San Salvador where they stayed for a night, and then took another taxi to Colonia Claudia Lara, and then in February or March of 2021, the lead Respondent overheard that men were asking for any newcomers to the area and fortunately, the people in the stores did not reveal the Respondents' whereabouts. Because of the attacks on his brothers, and death threats, and extortion attempts, the lead Respondent and his family decided to leave El Salvador and come to the United States.

II. ASYLUM UNDER INA § 208

A. PAST PERSECUTION

The Court finds that the sum of the threats and the one time where he was hit three times on the chest does not rise to the level of past persecution. To rise to the level of persecution the sum of a non-citizen's experiences, "must add up to more than ordinary harassment, mistreatment, or suffering." Lopez De Hincapie v. Gonzales, 494 F.3d 213, 217 (1st Cir. 2007). In this case, the sum of the lead Respondent's and his family's mistreatment was approximately three threats, all of which demanded that if he does not pay money, he would end up like his brothers or would be killed. One instance he was hit in the chest. The Court certainly notes that credible verbal death threats may fall within the meaning of persecution, but this is only when the threats are "so menacing as to cause significant actual suffering or harm." Bonilla v. Mukasey, 539 F.3d 72, 77 (1st Cir. 2008) (quoting Tobon-Marin v. Mukasey, 512 F.3d 28, 32 (1st Cir. 2008) ("threats standing alone . . . constitute past persecution only in a small category of cases, and only when the threats are so menacing as to cause significant ~~—cause~~ actual suffering or harm.") In the instant matter, the Court is not able to find that the threats were so menacing as to cause significant actual suffering or harm. In this regard, the Court notes that there was no type of medical evaluation, psychiatric evaluation, social worker evaluation, or other type of psychological or physiological evaluation that the threats were so menacing as to cause significant actual suffering or harm either to the lead Respondent or the -- to the co-Respondents. Indeed, the sole time that he was physically mistreated he

was hit on the chest three times. There's no indication that he had long-lasting physical or mental effects from that mistreatment. Based on the Court's comparison to the facts in these matters to other First Circuit case law in which similar or higher levels of harm were found not to constitute past persecution, the Court finds that the Respondents have failed to show that the harm and mistreatment rises to the level of past persecution. See, e.g., Gilca v. Holder, 680 F.3d 109, 115 (1st Cir. 2012) (rejecting past persecution supported by five or six incidents of threats or extortion); Lobo v. Holder, 684 F.3d 11, 17 (1st Cir. 2012); Bocova v. Gonzales, 412 F.3d 257, 263 (1st Cir. 2005) (finding no persecution based on two death threats and a beating resulting in loss of consciousness and hospitalization).

B. WELL-FOUNDED FEAR

While the Court finds that the Respondent has established a subjective fear based on his credible testimony, the Court finds that the evidence is not sufficient to show ~~that there is a~~ that a reasonable person in the Respondent~~'~~s' situation would be afraid of returning to El Salvador today. The Court bases this finding first on the fact that the lead Respondent's and Respondents' well-founded fear of persecution based on his or her particular social group consisting that of family or nuclear family, is undermined by the fact that the lead Respondent has similarly situated family living in El Salvador unharmed. See Zhakira v. Barr, 2020 West Law 586 9460 at *5 (1st Cir. October 2, 2020) (finding agency supportedly found that Petitioner had "not differentiated himself from his family members who have not been directly threatened or harmed, or from

the majority of Kenyans who are also Christians and have [indiscernible] experienced no persecution"). Indeed living in El Salvador are other members of the lead Respondent's nuclear family who have not been harmed or mistreated, or where the evidence is lacking that they were ever harmed and mistreated, including his sister Lydia Urias [phonetic], who lives in San Salvador, is a mother with grown children and works delivering plastic cups and plates in El Salvador and has not been mistreated or harmed by anyone. The lead Respondent also testified that his sister Elsa Urias [phonetic] lives in Sonsonate, the birthplace of where the lead Respondent was born and where she has children and is a pastor, and there's no indication that she was ever threatened or harmed by anyone. He also indicated that he has no knowledge that Celina [phonetic], Rosabel [phonetic], or other siblings were ever harmed and mistreated by anyone in El Salvador. While his mother passed away sometime around March of 2017, although the lead Respondent cannot remember the exact date according to his testimony, he did indicate that his mother was threatened by people from Guatemala, but there was no connection to Wilfredo or his cohorts or other criminals connecting them to the personal animosity that occurred between Wilfredo and the father of Juan Antonio and Remberto. The lead Respondent also testified that his brother, Jaime [phonetic], was harmed on one occasion where he was placed in a room for 3 hours, but the lead Respondent testified he did not know if this were the same people who had a problem with his brothers or -- maternal half-brothers or if it was somehow unconnected to that. So the Court is not able to draw an inference based on that testimony. Considering that there are

similarly situated family members that continue to live in El Salvador without further harm and mistreatment, the Court ~~knows~~ finds that this factor does undermine the objectiveness of the Respondent~~'~~s' well-founded fear. See Lobo v. Holder, 685 F.3d 11, 19 (1st Cir. 2012) (stating that "we have often echoed the fact that close relatives continue to live peacefully in the alien's homeland undercuts the alien's claim that persecution await his return").

The Court notes that the objectiveness of the Respondent~~'~~s' well-founded fear is undermined by the fact that it appears that they had successfully relocated within El Salvador in the past. Because this Court finds that the Respondents have not shown past persecution, the regulations provide "in cases which the applicant has not established past persecution, the applicant shall bear the burden of establishing that it would not be reasonable for him or her to relocate, unless the persecution is by a government or is government-sponsored." 8 C.F.R. § 1208.13(b)(3)(i). In these matters, the Court notes that the threats and attacks occurred from private actors and there is no indication they were connected by or to the government. Additionally, there were long periods of times in which the lead Respondent and his family were to relocate -- able to relocate successfully within El Salvador and only brought themselves back in danger when they went to the hometown in which the threats had originated. For instance, after the attack on Remberto, his maternal half-brother, the lead Respondent and his family moved to Cojutepeque and stayed there for about a year, apparently working and living without any physical type of harm. It was only after they returned and they thought it would be safe to return in

February or March 2017 that they were threatened by unknown masked armed men and asked for money, and warned they would end up like the lead Respondent's two brothers. Again approached in August of 2017, the lead Respondent and his family moved to Cara Sucia where the lead Respondent's brother, Juan, who was handicapped and lived, and he lived there without any further harm or mistreatment until December 2020, for 3 years. It was only when the lead Respondent and his family and went back to visit his wife's family and his family in the same area, then they were located, and then followed again. The Court notes that, and it does express in extreme sympathy, that Juan Antonio appears to be handicap and that Remberto suffered a traumatic shooting. But similar to the lead Respondent, when they relocated, it appears they were able to escape any further harms or mistreatment in El Salvador. Similarly, the lead Respondent, when he did relocate to an area where the shootings never occurred, it appears that he was able to live his life peacefully with his family and avoid the harm or mistreatment that he suffered at or near his hometown. Based on the fact that it is his burden of proof to show that it would not be reasonable for him to relocate, based on the fact that he did successfully do it for long periods of time in the past, and only brought himself to danger when he returned to his same hometown, the Court finds that this further undermines the objectiveness of his well-founded fear, and also reflects that he hasn't been unable to show that internal relocation would not be reasonable or possible in El Salvador.

The Court further notes, as further explained in section D below, that because it appears that the

record evidence reflects that filing a police report would not have been futile in El Salvador, and where the lead Respondent nor his family ever reported any of the threats or attack to the police, this further undermines the objectiveness of his well-founded fear. Hence, the Court finds that the Respondents have failed to show that they have an objective well-founded fear of persecution in El Salvador.

C. NEXUS AND BASIS

The Court certainly recognizes that members of an immediate family may constitute a particular social group. See Matter of L-E-A-, 27 I&N Dec. 40, 42 (BIA 2018). The Court also views this case as required under the mixed-motive analysis. See Enamorado-Rodriguez v. Barr, 941 F.3d 589, 596 (1st Cir. 2019). Notwithstanding the lead Respondent's testimony, the Court finds that the testimony is insufficient to show that the threats and one beating on the chest that occurred on one occasion was on account of his particular social group of family, or that he has a well-founded fear of future persecution on account of family, even considering the mixed-motive analysis. The Court bases this finding first and foremost on the fact that in the three incidents in which he was encountered by the masked armed men, that they were simply demanding money from him, and that they warned he would end up like his two brothers if he did not pay the money. The Court certainly recognizes the arguments of the Respondents that because they warned he would end up like his two brothers, that the inference should be drawn that they were working in cahoots or in conjunction with the sicario Wilfredo. The Court does not find sufficient evidence to draw that inference in this

record, because Wilfredo's motivation in attacking Juan Antonio and Remberto appear to be animus based on the fact of who their father was, who is not the father of the lead Respondent. To be clear, Juan Antonio and Remberto only share a common mother and not a common father, and Wilfredo's animus appeared to be against the father of Juan Antonio and Remberto and perhaps his father's biological sons. There's no indication that Wilfredo ever directly or indirectly threatened the lead Respondent, or his partner, or children directly or even indirectly. While the unknown armed masked men made passing reference to his brothers and the lead Respondent ending up like his brothers, the Court is not able to draw an inference based on this evidence that they were motivated to attack him on account of his family, as opposed to wanting to extort money from him for criminal exploitative means. The Court bases this finding on the lead Respondent's own corroborative evidence. Indeed, the lead Respondent's own sister submitted a statement at Exhibit 6, page 10, which does reflect that because the lead Respondent "did not have the capacity to pay the amount of money that the gang members were asking for, and decided to leave for the country for the United States, to save his life." Furthermore, the lead Respondent's friend, Douglas Humberto Urias-Orellana, indicated that the lead Respondent immigrated to the United States because he was threatened with death and asked him for a large amount of money in order not to attempt against the lead Respondent's life, that he and his family decided to leave. ~~The statement -- see~~See Exhibit 6 at page 13. The lead Respondent's father-in-law at Exhibit 6, page 16, and the lead Respondent's friend at Exhibit 6, page 7, makes the same type of

statements that the armed masked men made extortions demand for money and does not make any reference, either direct or indirect, that the motivation for this was on account of his family, or nuclear family, or relationship with his maternal half-brothers, Juan Antonio or Remberto. The Court further finds that because, as indicated above, his mother had resided in El Salvador without any threats from Wilfredo or his cohorts, and where he has two sisters and other siblings who continue to reside in El Salvador without any type of threats or mistreatment, the U.S. Court of Appeals for the First Circuit, under whose jurisdiction this matter arises, has found that in similarly situated cases that the mere targeting of multiple family members does not establish that that family group was a central reason for the harm threatened or inflicted. See, e.g., Ruiz Varela v. Barr, 984 F.3d 122, 126-27 (1st Cir. 2020) (finding substantial evidence supporting the agency's finding that petitioner failed to establish a nexus between the police persecution of him and his family status, where his mothers and siblings continue to reside in the area without incident, and where it is not clear that the police conduct of shooting at or beating petitioner and his friend resulted because they had run a roadblock or because they refused to submit to extortion demands); Loja-Tene v. Barr, 975 F.3d 58, 62 (1st Cir. 2020) (finding that substantial evidence supported the agency's conclusion "that family ties did not motivate the petitioner's persecution, even though those ties may have brought him into proximity with his persecutor" based on fact persecutor only made menacing statements to petitioner and his father "only after they refused to leverage their day-to-day access to potential drug

clientele."). Accordingly, where it is not clear that the individuals who were making the extortionate demands were ever even tied to Wilfredo and his cohorts and where similarly situated family members continue to reside in El Salvador without incident, the Court finds that the Respondents have failed to show that any past harm or mistreatment or any well-founded fear would be on account of their particular social group consisting that of nuclear family or family.

D. UNABLE OR UNWILLING

The Court finds that the Respondents have failed to show that any persecution or a well-founded fear is inflicted either by the Government of El Salvador, or by persons or an organization of the Government of a Salvador, or by persons or an organization that the Government of El Salvador was unable or unwilling to control. See Matter of Acosta, 19 I&N Dec. 211, 222 (BIA 1985). As the First Circuit has held, failure to inform law enforcement of threats or attacks a non-citizen claims to have suffered is material to the [indiscernible]rejection of claims the government participation or complicity in past persecution. See, e.g., Castillo-Diaz v. Holder, 562 F.3d 23, 27-28 (1st Cir. 2009) (upholding Immigration Judge's determination that petitioner's failure to report a rape that occurred when she was 15 years old precluded her claim of government involvement in the attack, while noting Immigration Judge's consideration of evidence "that the Government of El Salvador has the power to prosecute rape cases and attaches a significant penalty to a conviction for rape"). In this case, the Court notes that the Respondents never reported any of the threats or a

single attack, physical attack that is, to the police because they believe that the police were corrupt, ineffective, or otherwise were somehow in cahoots with the gangs or criminal organizations. Nevertheless, a failure by the Respondents to make a report to the police is not necessarily fatal to Respondent's case if they can show "that reporting private abuse to government authorities would have been futile." Morales-Morales v. Sessions, 857 F.3d 130, 135 (1st Cir. 2017). Nevertheless, the subjective belief that authorities are "corrupt" is insufficient "to show that the mistreatment was attributive to the government, whether through action or inaction." Id. at 135. In this case, in reviewing the country conditions evidence record, the Court does not find that a police report would have been futile. Indeed, Exhibit 5, page 30, the Country Conditions Report for -- from the U.S. Department of State from 2020 certainly presents a mixed picture considering the efforts to combat organized crime in El Salvador. The Court is certainly not blind to the fact that organized criminal elements, including local and transnational gangs and narcotics traffickers, were significant perpetrators of violent crimes committing extortion, kidnapping, human trafficking, intimidation, and other threats and violence. See Exhibit 5 at page 31. Balancing that out is the fact that the National Civilian Police overseen by the Ministry of Justice and Public Security is responsible for maintaining public security, and that in November 2019 President Bukele signed a decree authorizing military involvement in police duties, which took effect December 31, 2019, authorizing the National Civilian Police to control and identify areas with the highest incidents of crimes to target peacekeeping operations,

conduct joint patrols with the police to prevent, deter, and apprehend members of organized crime and common criminal networks, carryout searches of individuals, vehicles, and property and help persons in cases of accidents or emergencies, make arrests, and hand over detainees to the police, prevent trafficking or goods of persons unauthorized national borders, and strengthen perimeter security at prisons and other detention centers and school. While the Court certainly notes that at times civilian authorities did not maintain effective control over security forces, including instances where the security forces committed abuses, sometimes acting overzealously against criminal elements, including gangs, the Court also notes that the government did take steps to ~~dismit [phonetic]~~ dismiss and prosecute abusers in the security forces. In some cases authorities investigated and prosecuted persons accused of committing crimes and human rights abuses. See id. at pages 30 through 31. The Court also notes that the record evidence at Exhibit 6, pages 20 through 23, do indicate that the type of crimes that the lead Respondent testified to do occur at a higher incidence in El Salvador. Nevertheless, while often the police suffer from inadequate funding ~~during~~ due to limited resources and because of perceived or actual corruption, they do not enjoy the full competence and cooperation of much of El Salvadoran citizenry. The Department of State Report said the police's investigative units have shown great promise, including routine street-level patrol techniques, anti-gang work, and crime suppression, but the efforts remain a difficult challenge with often lack of cooperation between police, prosecutors, and corrections. See Exhibit 6 at page 24. The Court

certainly notes that the country conditions evidence present a mixed picture of sometimes impunity, sometimes corruption, and sometimes overzealousness on behalf of the law enforcement apparatus. The Court also notes that the higher echelons of policy makers have moved the military to secure public safety and otherwise have moved to dismiss those who act beyond the control of laws. While the efforts to bring in line unruly police force or to increase public security have not always been completely effectual, the Court is not able to find that this record evidence shows that it would have been futile to report the threats to the police, especially where there are a lot of resources being devoted to this problem. As the First Circuit has held where a government is, "making every effort to combat" violence by private actors and its "inability to stop the problem" is not distinguishable "from any other government struggles," the private violence has no government nexus and does not constitute persecution. See Kahn v. Holder, 727 F.3d 1, 7 (1st Cir. 2013). Because the lead Respondents or the Respondents never reported any of the threats or attack to the police and where the Court notes that the record evidence, while certainly mixed, would reflect they would not have been futile, the Court shows that the Respondents have failed to show that the government would not be unable or unwilling to protect them if they were to return to El Salvador.

III. WITHHOLDING OF REMOVAL UNDER INA § 241(b)(3)

Because the Respondents were unable to establish eligibility for asylum, they were necessarily unable to meet the higher standard required to succeed on their

claim for withholding removal under INA § 241(b)(3). See 8 C.F.R. § 1208.16(b)(1)(i).

IV. WITHHOLDING OF REMOVAL UNDER ARTICLE THREE OF THE U.N. CONVENTION AGAINST TORTURE

The Court finds that the Respondents have failed to meet their burden of proof to show that it is more likely than not that a public official or other person acting in an official capacity would instigate, consent, acquiesce, or remain willfully blind to the Respondent's torture. The Court certainly notes the threats and one beating that the lead Respondent endured on his chest. However, the lead Respondent, nor any of the other family members ever reported this to the police. And as noted above, the Court notes that this would not have been futile based on the country conditions evidence. While the Respondent's reliance on generalized State Department Country Reports and other country conditions evidence at Exhibits 5 and 6 are sometimes helpful to their claim, "their generic nature is such that they are rarely dispositive." See Ramirez-Perez v. Barr, 934 F.3d 47, 52-53 (1st Cir. 2019). While gang activity and organized crime in El Salvador is certainly a serious problem, they are insufficient to establish that the El Salvador Government is a mere bystander to gang violence, or that it would acquiesce or turn a blind eye to the Respondent's possible torture. See Mayorga-Vidal v. Holder, 675 F.3d 9, 20 (1st Cir. 2012). Hence, the Court finds that the Respondents have failed to show eligibility for relief under the Convention Against Torture.

ORDERS

Based upon the above, the following orders will enter:

It is hereby ORDERED the Respondents' Applications for Asylum under INA § 208 be ~~in~~ and hereby are DENIED.

It is FURTHER ORDERED the Respondents' Applications for Withholding of Removal under INA § 241(b)(3) be ~~in~~ and hereby are DENIED.

It is FURTHER ORDERED that the Respondents' Applications for Withholding of Removal under Article Three of the U.N. Convention Against Torture be and hereby are DENIED.

It is FURTHER ORDERED the Respondents be REMOVED from the United States to El Salvador.

Please see the next page for electronic signature

Sturla, Mario J.
U.S. Immigration Judge

Digitally signed by
Sturla, Mario J. Immigration Judge
July 11, 2023 4:26 PM

Name: Douglas Urias-Orellana
A208-691-512
Sayra Gamez-Mejia
A216-663-245
[G.E.U.G.]
A216-663-246
Date of Decision: March 14, 2022
Exhibit No. 8

Standard Language Addendum: Asylum

The following statements of law are hereby incorporated into the Immigration Judge's oral decision. These statements are not the sole legal basis for the decision and are meant to be read in conjunction with any law cited in the oral decision itself.

I. Asylum

The Court may grant asylum to an applicant who timely files an application and establishes that he or she is a refugee within the meaning of section 101(a)(42)(A) of the Act. INA § 208(b)(1)(A); 8 C.F.R. § 1208.13(a); *see INS v. Cardoza-Fonseca*, 480 U.S. 421, 423 (1987). An applicant is a "refugee" within the meaning of INA § 101(a)(42)(A) if he or she is unwilling or unable to return to his or her country of nationality because of persecution or a well-founded fear of future persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.

An applicant for asylum also has the burden of establishing that he or she merits a favorable exercise of discretion. INA § 208(b)(1)(B); *Matter of Pula*, 19 I&N Dec. 467, 473-74 (BIA 1987) (superseded by

regulation on other grounds). In exercising discretion, the Court must examine the totality of the circumstances. *Matter of Pula*, 19 I&N Dec. at 473-74.

A. One Year Filing Deadline

An asylum applicant must prove by clear and convincing evidence that he or she filed the application within one-year of his or her most recent arrival in the United States or that he or she qualifies for an exception to the one-year deadline. INA § 208(a)(2)(B), (D); 8 C.F.R. § 1208.4(a)(2)(i)-(ii). To qualify for an exception to the filing deadline, the applicant must demonstrate either: (1) changed circumstances that materially affect his or her eligibility for asylum; or (2) extraordinary circumstances relating to the delay in filing the application. INA § 208(a)(2)(D); 8 C.F.R. § 1208.4(a)(4)-(5). In either case, the applicant must apply for asylum within a reasonable period following the changed or extraordinary circumstances. 8 C.F.R. § 1208.4(a)(4)(ii).

B. Past Persecution

To establish past persecution, an asylum applicant must demonstrate that he or she suffered persecution in his or her country of nationality on account of a protected ground, and that he or she is unable or unwilling to return to, or avail himself or herself of the protection of, that country because of such persecution. INA §§ 101(a)(42)(A), 208(b)(1)(B); 8 C.F.R. § 1208.13(b)(1). Persecution is "a threat to the life or freedom of, or the infliction of suffering or harm upon, those who differ in a way regarded as offensive *Matter of Acosta*, 19 I&N Dec. 211, 222 (BIA 1985), *overruled on other grounds by Matter of*

Mogharrabi, 19 I&N Dec. 439 (BIA 1987). Persecution does not encompass general conditions of violence shared by many others in a country or the harm an individual may experience as a result of civil strife. *See Tay-Chan v. Holder*, 699 F.3d 107, 112-13 (1st Cir. 2012). Rather, to qualify as persecution, a person's experience must "rise above unpleasantness, harassment, and even basic suffering" and consist of systemic mistreatment rather than a series of isolated events. *See Rebenko v. Holder*, 693 F.3d 87, 92 (1st Cir. 2012) (quoting *Nelson v. INS*, 232 F.3d 258, 263 (1st Cir. 2000)). The "severity, duration, and frequency of physical abuse" are relevant factors to this determination. *Topalli v. Gonzales*, 417 F.3d 128, 133 (1st Cir. 2005); *see Vasili v. Holder*, 732 F.3d 83, 89 (1st Cir. 2013) ("Infrequent beatings, threats, or periodic detention . . . do not rise to the level of persecution, and the nature and extent of an applicant's injuries are relevant to the ultimate determination.").

An applicant who has suffered past persecution on account of a statutorily protected ground is presumed to have a well-founded fear of future persecution on account of that same protected ground. 8 C.F.R. § 1208.13(b)(1). This presumption may only be rebutted if the government establishes, by a preponderance of the evidence: (1) that the applicant can reasonably relocate within his or her country of origin; (2) or there has been a "fundamental change in circumstances" in the country at issue, such that the applicant's fear is no longer well-founded. 8 C.F.R. § 1208.13(b)(1)(i)(A).

C. Well-Founded Fear of Future Persecution

An applicant who has not suffered past persecution may be granted asylum if he or she demonstrates a well-founded fear of future persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. *Id.* § 1208.13(b)(2). An applicant's fear is well-founded if it is both subjectively genuine and objectively reasonable. *Toloza-Jimenez v. Gonzales*, 457 F.3d 155, 161 (1st Cir. 2006).

Generally, the subjective component of this inquiry is satisfied by the applicant's credible testimony that he or she fears persecution. *See Cordero-Trejo v. INS*, 40 F.3d 482, 491 (1st Cir. 1994). An applicant may satisfy the objective prong if he or she demonstrates a "reasonable possibility" that he or she will be "singled out individually for persecution," or alternatively, if the applicant establishes a widespread "pattern or practice" in his or her country of persecuting "a group of persons similarly situated to the applicant on account of a protected ground." *Cardoza-Fonseca*, 480 U.S. at 440; *Sugiarto v. Holder*, 586 F.3d 90, 97 (1st Cir. 2009); 8 C.F.R. § 1208.13(b)(2)(i)(B), (iii). Evidence concerning treatment of the applicant's family or similarly situated friends or colleagues may be probative of such a pattern or practice. *See Sugiarto*, 586 F.3d at 97-98; *Matter of Villalta*, 20 I&N Dec. 142, 147 (BIA 1990).

An individual generally cannot establish a well-founded fear of persecution if he or she could avoid a future threat by relocating to another part of the proposed country of removal. 8 C.F.R. § 1208.13(b)(2)(ii). Where the persecutor is a government or a government-sponsored actor,

however, there is a presumption that relocation is not reasonable. *Id.* at § 1208.13(b)(3)(ii).

D. Basis and Nexus

The applicant must also establish that a statutorily-protected ground – race, religion, nationality, membership in a particular social group, or political opinion – is "at least one central reason" for the applicant's persecution. INA §§ 101(a)(42)(A), 208(b)(i); *see Sugiarto*, 586 F.3d at 95; *Matter of J-B-N- & S-M-*, 24 I&N Dec. 208, 212-15 (BIA 2007). Persecution on account of the statutorily protected grounds refers to persecution motivated by the victim's traits, not the persecutor's. *INS v. Elias-Zacarias*, 502 U.S. 478, 482 (1992). While the applicant need not identify the persecutors with certainty or prove that the alleged persecutors targeted him or her solely because of a protected characteristic, the applicant must provide some evidence, direct or circumstantial, to establish "that the persecution was based, 'at least in part,' on an impermissible motivation." *Ivanov v. Holder*, 736 F.3d 5, 12 (1st Cir. 2013) (quoting *Sompotan v. Mukasey*, 533 F.3d 63, 69 (1st Cir. 2008)); *see Matter of J-B-N- & S-M-*, 24 I&N Dec. at 215-17.

An applicant for asylum or withholding of removal seeking relief based on "membership in a particular social group" must establish that the group is: (1) composed of members who share a common immutable characteristic; (2) defined with particularity; and (3) socially distinct within the society in question. *Matter of M-E-V-G-*, 26 I&N Dec. 227, 237 (BIA 2014).

The characteristic may be innate or based upon a shared past experience. *Matter of Acosta*, 19 I&N Dec.

at 233; *see also Matter of C-A-*, 23 I&N Dec. 951, 958 (BIA 2006). The "common, immutable characteristic" is determined on a case-by-case basis and "must be one that the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences." *Matter of Acosta*, 19 I&N Dec. at 233. The particularity requirement is "definitional in nature" and focuses on delineation—whether the particular social group definition is sufficiently discrete and precise as opposed to amorphous. *Matter of M-E-V-G-*, 26 I&N Dec. at 239-41; *Matter of W-G-R-*, 26 I&N Dec. 208, 214 (BIA 2014). The proposed particular social group should address the "outer limits" of the group's boundaries and "provide a clear benchmark for determining who falls within the group." *Matter of M-E-V-G-*, 26 I&N Dec. at 239-41. In making this determination, the definition should be analyzed in the context of the society in question and focus on whether members of the society "generally agree on who is included in the group." *Id.*; *Matter of W-G-R-*, 26 I&N Dec. at 221.

Lastly, "social distinction" requires that members of the proposed group would be perceived as a separate or distinct group by society. *Matter of M-E-V-G-*, 26 I&N Dec. at 242 (clarifying that the perception of the society, and not the persecutor, is determinative for social distinction purposes). In other words, the society in question must meaningfully distinguish those with the common, immutable characteristic from those who do not have it. *Id.* at 238.

The First Circuit and the Board of Immigration Appeals ("BIA" or "Board") have found that fear of gang violence, recruitment, or extortion does not

constitute a cognizable particular social group for asylum purposes under the Act. *See Beltrand-Alas v. Holder*, 689 F.3d 90, 93 (1st Cir. 2012) (affirming that precedent establishes that opposition to gangs is not a cognizable particular social group); *Mendez-Barrera v. Holder*, 602 F.3d 21, 27 (1st Cir. 2010) (finding that the particular social group of "'young women recruited by gang members who resist such recruitment'—is not socially visible" to anyone but the alleged persecutors and as such is not a legally cognizable particular social group); *Larios v. Holder*, 608 F.3d 105, 109 (1st Cir. 2010) (holding that "young Guatemalan men recruited by gang members who resist such recruitment" was not socially visible nor was it sufficiently particular to constitute a particular social group); *see also Matter of E-A-G-*, 24 I&N Dec. 591. 594-95 (BIA 2008) (holding that a young Honduran male failed to establish membership in particular social group of "persons resistant to gang membership," as evidence failed to establish that Honduran society, including gang members themselves, would perceive those opposed to gang membership as members of a social group); *Matter of S-E-G-*, 24 I&N Dec. 579, 587-88 (BIA 2008) (holding that "young Salvadorans who have been subject to recruitment efforts by criminal gangs, but who have refused to join for personal, religious, or moral reasons, fails the 'social visibility' test and does not qualify as a particular social group."); *see, e.g.*; *Paiz-Morales v. Lynch*, 795 F.3d 238, 242 (1st Cir. 2015); *Mayora-Vidal v. Holder*, 675 F.3d 9 (1st Cir. 2012) (young Salvadoran males who were vulnerable to gangs from lack of parental or family protection is not a legally cognizable social group); *Villalta-Martinez v. Sessions*, 882 F.3d 20, 24 (1st Cir. 2018) (threats to

extort money, "albeit terrifying, do not satisfy the statutory requirements for asylum") (citing *Escobar v. Holder*, 698 F.3d 36, 38 (1st Cir. 2012) (internal citations omitted)); *Vanchurina v. Holder*, 619 F.3d 95, 99 (1st Cir. 2010) (criminal extortion and threats are not grounds for asylum); *Chikkeur v. Mukasey*, 514 F.3d 1381, 1383 (1st Cir. 2008) (citing *Hincapie v. Gonzales*, 494 F.3d 213, 219-20 (1st Cir. 2007) (distinguishing between "a desire to extort money" and "any motive connected to a statutorily protected ground")).

Moreover, violence at the hands of gangs is a "large societal problem" in many countries that affects a broad range of the population. *Matter of M-E-V-G-*, 26 I&N Dec. at 250-51. Gang members "may target one segment of the population for recruitment, another for extortion, and yet others for kidnapping," or other crimes, and "certain segments of a population may be more susceptible to one type of criminal activity than another." *Id.* However, these victims of gang violence generally are not targeted on a protected basis, but "suffer from the gang's criminal efforts to sustain its enterprise in the area." *Id.* at 251. "A national community may struggle with significant societal problems resulting from gangs, but not all societal problems are bases for asylum." *Id.* at 250-51; *see also Tay-Chan*, 699 F.3d at 112-13 ("[F]ear of harm from general conditions of violence and civil unrest does not even establish a well-founded fear of persecution, the asylum standard, much less a clear probability of persecution, the withholding standard"; "mere vulnerability to criminal predations cannot define a cognizable social group") (internal quotation marks omitted); *Arévalo-Girón v. Holder*, 667 F.3d 79, 83 (1st Cir. 2012)

("Fairly viewed, greed – not social group membership – is the apparent trigger for gangs' interest . . . and mere vulnerability to criminal predations cannot define a cognizable social group") (internal citations omitted).

E. Government Action

Additionally, the persecution that the applicant experienced or fears must be the direct result of government action, government-supported action, or the government's unwillingness or inability to control private conduct. *Ivanov*, 736 F.3d at 12 (quoting *Sok v. Mukasey*, 526 F.3d 48, 54 (1st Cir. 2008)). "Action by non-governmental actors can undergird a claim of persecution only if there is some showing that the alleged persecutors are in league with the government or are not controllable by the government." *Da Silva v. Ashcroft*, 394 F.3d 1, 7 (1st Cir. 2005); *see also Rosales Justo v. Sessions*, 895 F.3d 154, 162-64 (1st Cir. 2018) (explaining the unwilling or unable standard in light of its misapplication). Where an asylum applicant reports persecution to the government and the government provides a prompt response, the quick response is strong evidence of the government's willingness to protect the applicant. *Ortiz-Araniba v. Keisler,* 505 F.3d 39, 42 (1st Cir. 2007).

II. Withholding of Removal Under Section 241(b)(3) of the Act

Section 241(b)(3) of the Act is a non-discretionary provision requiring the Court to withhold removal of an individual if his or her life or freedom would be threatened in that country on account of one of the five protected grounds. 8 C.F.R. § 1208.16(b). To qualify for withholding of removal, an applicant must

establish a "clear probability" of persecution, meaning that it is "more likely than not" that he or she would be subject to persecution on account of a protected ground. *Cardoza-Fonseca*, 480 U.S. at 430 (citing *INS v. Stevic*, 467 U.S. 407 (1984)). The applicant may establish eligibility for withholding of removal by demonstrating either that he or she has suffered past persecution on the basis of one such statutory ground or that "it is more likely than not" that he or she "would be persecuted" in the future on account of a protected ground. INA § 241(b)(3); 8 C.F.R. § 1208.16(b)(1)-(2). A withholding of removal applicant must establish that a protected ground "was or will be at least one central reason" for the persecution he or she will face. *Matter of C-T-L-*, 25 I&N Dec. 341, 348 (BIA 2010).

III. Protection Under the Convention Against Torture

Under the United Nations Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, as implemented by sections 1208.16–1208.18 of Title 8 of the Code of Federal Regulations, an applicant is eligible for withholding or deferral of removal if he or she establishes that it is "more likely than not" that he or she would be tortured in the proposed country of removal by, or at the instigation of, or with the consent or acquiescence of a public official. 8 C.F.R. §§ 1208.16(c)(2), 1208.18(a)(1); *see also* Convention Against Torture, art. 3, Dec. 10, 1984, S. Treaty Doc. No. 100–20 (1988). "Torture" is defined, in part, as the intentional infliction of severe pain or suffering. 8 C.F.R. § 1208.18(a)(1).

To establish a *prima facie* claim under the Convention Against Torture, the "applicant must offer specific objective evidence showing that he or she will be subject to: '(1) an act causing severe physical or mental pain or suffering; (2) intentionally inflicted; (3) for a proscribed purpose; (4) by or at the instigation of or with the consent or acquiescence of a public official who has custody or physical control of the victim; and (5) not arising from lawful sanctions.'" *Rashad v. Mukasey*, 554 F.3d 1, 6 (1st Cir. 2009) (quoting *Romilus v. Ashcroft*, 385 F.3d 1, 8 (1st Cir. 2004)).

An applicant who establishes that he or she is entitled to protection under the Convention Against Torture shall be granted withholding of removal unless he or she is subject to mandatory denial of that relief, in which case he or she shall be granted deferral of removal. 8 C.F.R. §§ 1208.16(c)(4), 1208.17(a). An applicant is subject to mandatory denial of withholding of removal under the Convention Against Torture if he or she participated in the persecution of others, if he or she was convicted of a particularly serious crime, if there are serious reasons to believe he or she committed a serious nonpolitical crime outside of the United States, or if there are reasonable grounds to believe he or she is a danger to the security of the United States. 8 C.F.R. § 1208.16(d)(2); *see also* INA § 241(b)(3)(B). An applicant's criminal convictions, no matter how serious, are not a bar to deferral of removal under the Convention Against Torture. *See* 8 C.F.R. § 1208.17(a); *Matter of G-A-*, 23 I&N Dec. 366, 368 (BIA 2002).

Order of the Immigration Judge

/s/ Mario J. Sturla

Immigration Judge: Surla, Mario 03/14/2022

Certificate of Service

This document was served:

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By: Sturla, Mario, ☐ Court staff ☒ Immigration judge

Date: 03/14/2022

8 U.S.C. § 1101

§ 1101. Definitions

(a) As used in this chapter—

* * *

(42) The term "refugee" means (A) any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion, or (B) in such special circumstances as the President after appropriate consultation (as defined in section 1157(e) of this title) may specify, any person who is within the country of such person's nationality or, in the case of a person having no nationality, within the country in which such person is habitually residing, and who is persecuted or who has a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. The term "refugee" does not include any person who ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion. For purposes of determinations under this 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 shall be deemed to have a well founded fear of persecution on account of political opinion.

* * *

8 U.S.C. § 1158

§ 1158. Asylum

* * *

(b) Conditions for granting asylum

(1) In general

(A) Eligibility

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.

(B) Burden of proof

(i) In general

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.

(ii) Sustaining burden

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.

(ii) Credibility determination

Considering the totality of the circumstances, and all relevant factors, a trier of fact may base a credibility determination on the demeanor, candor, or responsiveness of the applicant or witness, the inherent plausibility of the applicant's or witness's account, the consistency between the applicant's or witness's written and oral statements (whenever made and whether or not under oath, and considering the circumstances under which the statements were made), the internal consistency of each such statement, the consistency of such statements with other evidence of record (including the reports of the Department of State on country conditions), and any inaccuracies or falsehoods in such statements, without regard to whether an inconsistency, inaccuracy, or falsehood goes to the heart of the applicant's claim, or any other relevant factor. There is no presumption of credibility, however, if no adverse credibility determination is explicitly made, the applicant

or witness shall have a rebuttable presumption of credibility on appeal.

* * *

8 U.S.C. § 1252

§ 1252. Judicial review of orders of removal

(a) Applicable provisions

(1) General orders of removal

Judicial review of a final order of removal (other than an order of removal without a hearing pursuant to section 1225(b)(1) of this title) is governed only by chapter 158 of title 28, except as provided in subsection (b) and except that the court may not order the taking of additional evidence under section 2347(c) of such title.

(2) Matters not subject to judicial review

(A) Review relating to section 1225(b)(1)

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, no court shall have jurisdiction to review—

(i) except as provided in subsection (e), any individual determination or to entertain any other cause or claim arising from or relating to the implementation or operation of an order of removal pursuant to section 1225(b)(1) of this title,

(ii) except as provided in subsection (e), a decision by the Attorney General to invoke the provisions of such section,

(iii) the application of such section to individual aliens, including the determination made under section 1225(b)(1)(B) of this title, or

(iv) except as provided in subsection (e), procedures and policies adopted by the Attorney General to implement the provisions of section 1225(b)(1) of this title.

(B) Denials of discretionary relief

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, and except as provided in subparagraph (D), and regardless of whether the judgment, decision, or action is made in removal proceedings, no court shall have jurisdiction to review—

(i) any judgment regarding the granting of relief under section 1182(h), 1182(i), 1229b, 1229c, or 1255 of this title, or

(ii) any other decision or action of the Attorney General or the Secretary of Homeland Security the authority for which is specified under this subchapter to be in the discretion of the Attorney General or the Secretary of Homeland Security, other than the granting of relief under section 1158(a) of this title.

(C) Orders against criminal aliens

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, and except as provided in subparagraph (D), no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed a

criminal offense covered in section 1182(a)(2) or 1227(a)(2)(A)(iii), (B), (C), or (D) of this title, or any offense covered by section 1227(a)(2)(A)(ii) of this title for which both predicate offenses are, without regard to their date of commission, otherwise covered by section 1227(a)(2)(A)(i) of this title.

(D) Judicial review of certain legal claims

Nothing in subparagraph (B) or (C), or in any other provision of this chapter (other than this section) which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section.

* * *

(b) Requirements for review of orders of removal

With respect to review of an order of removal under subsection (a)(1), the following requirements apply:

* * *

(4) Scope and standard for review

Except as provided in paragraph (5)(B)—

(A) the court of appeals shall decide the petition only on the administrative record on which the order of removal is based,

(B) the administrative findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary,

(C) a decision that an alien is not eligible for admission to the United States is conclusive unless manifestly contrary to law, and

(D) the Attorney General's discretionary judgment whether to grant relief under section 1158(a) of this title shall be conclusive unless manifestly contrary to the law and an abuse of discretion.

No court shall reverse a determination made by a trier of fact with respect to the availability of corroborating evidence, as described in section 1158(b)(1)(B), 1229a(c)(4)(B), or 1231(b)(3)(C) of this title, unless the court finds, pursuant to subsection (b)(4)(B), that a reasonable trier of fact is compelled to conclude that such corroborating evidence is unavailable.

(5) Treatment of nationality claims

(A) Court determination if no issue of fact

If the petitioner claims to be a national of the United States and the court of appeals finds from the pleadings and affidavits that no genuine issue of material fact about the petitioner's nationality is presented, the court shall decide the nationality claim.

(B) Transfer if issue of fact

If the petitioner claims to be a national of the United States and the court of appeals finds that a genuine issue of material fact about the petitioner's nationality is presented, the court shall transfer the proceeding to the district court of the United States for the judicial district in which the petitioner resides for a new hearing on the nationality claim and a decision

on that claim as if an action had been brought in the district court under section 2201 of title 28.

(C) Limitation on determination

The petitioner may have such nationality claim decided only as provided in this paragraph.

(6) Consolidation with review of motions to reopen or reconsider

When a petitioner seeks review of an order under this section, any review sought of a motion to reopen or reconsider the order shall be consolidated with the review of the order.

(7) Challenge to validity of orders in certain criminal proceedings

(A) In general

If the validity of an order of removal has not been judicially decided, a defendant in a criminal proceeding charged with violating section 1253(a) of this title may challenge the validity of the order in the criminal proceeding only by filing a separate motion before trial. The district court, without a jury, shall decide the motion before trial.

(B) Claims of United States nationality

If the defendant claims in the motion to be a national of the United States and the district court finds that—

(i) no genuine issue of material fact about the defendant's nationality is presented, the court shall decide the motion only on the

administrative record on which the removal order is based and the administrative findings of fact are conclusive if supported by reasonable, substantial, and probative evidence on the record considered as a whole; or

(ii) a genuine issue of material fact about the defendant's nationality is presented, the court shall hold a new hearing on the nationality claim and decide that claim as if an action had been brought under section 2201 of title 28.

The defendant may have such nationality claim decided only as provided in this subparagraph.

(C) Consequence of invalidation

If the district court rules that the removal order is invalid, the court shall dismiss the indictment for violation of section 1253(a) of this title. The United States Government may appeal the dismissal to the court of appeals for the appropriate circuit within 30 days after the date of the dismissal.

(D) Limitation on filing petitions for review

The defendant in a criminal proceeding under section 1253(a) of this title may not file a petition for review under subsection (a) during the criminal proceeding.

(8) Construction

This subsection—

(A) does not prevent the Attorney General, after a final order of removal has been issued, from detaining the alien under section 1231(a) of this title;

(B) does not relieve the alien from complying with section 1231(a)(4) of this title and section 1253(g)[1] of this title; and

(C) does not require the Attorney General to defer removal of the alien.

(9) Consolidation of questions for judicial review

Judicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States under this subchapter shall be available only in judicial review of a final order under this section. Except as otherwise provided in this section, no court shall have jurisdiction, by habeas corpus under section 2241 of title 28 or any other habeas corpus provision, by section 1361 or 1651 of such title, or by any other provision of law (statutory or nonstatutory), to review such an order or such questions of law or fact.

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1 See References in Text note below.