No. 17-17002

IN THE

Supreme Court of the United States

Leila Marcos,
Petitioners,

v.

Attorney General of the United States,
Respondents

ON WRIT OF CERTIORARI TO THE
THIRTEENTH CIRCUIT COURT OF APPEALS

BRIEF FOR THE PETITIONERS

Oral Argument
Date: March 2, 2019

Team Number: 101
Attorney for Petitioners

ISSUES PRESENTED

I. Whether disfavored group analysis is a valid basis to establish a well-founded fear of persecution for the purposes of asylum eligibility, because Ms. Marcos showed a subjective fear and objectively reasonable possibility of persecution.

II. Whether it was improper for Ms. Marcos to bear the burden of demonstrating if substantial evidence supported a finding that future persecution could be avoided by internal relocation, because the case should have been remanded to define "government-sponsored."

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OPINION BELOW

The opinion of the Thirteenth Circuit Court of Appeals is reported at *Leila Marcos v. Attorney General of the United States*, No. 18-0512 (13th Cir. 2018).

JURISDICTIONAL STATEMENT

A statement of jurisdiction has been omitted in accordance with the rules of the UC Davis School of Law Asylum and Refugee Law National Moot Court Competition.

STATEMENT OF THE CASE

Statement of Facts

Petitioner Leila Marcos ("Ms. Marcos") and her husband, Bernardo Marcos ("Mr. Marcos") are members of the Timog ethnicity from the northern part of the Isda island, which forms part of the two-island nation of Basag. (R. 2.) Since 1992, Isda continues to suffer from the effects of climate change, as a combination of torrential storms, tide movement, and extreme flooding has destroyed its villages, fishing industries, and coastlines. (R. 2.) The natural disasters have forced many people from Isda to relocate to the more developed, wealthier island of Mayaman, which is dominated by the Hilagan ethnicity. (R. 2.) Relocated Isda-Timog people are generally noticeably poorer than the Hilagan or Mayaman-Timogs, and the displaced Isda-Timogs have had difficulty integrating into the Mayaman culture. (R. 2.)

Due to concerns about the potability of Isda's water supply, President Ferdinand Aquinto signed a 30-year Concession Contract ("the contract") with Life Incorporated ("Life Inc.") on January 1, 2013, which terminates on January 1, 2043. (R. 3-4.) Under this contract, Life Inc. fully controls all of Basag's water facilities and has the exclusive obligation of maintaining and rebuilding all water works in Basag. (R. 4.) The contract dictates that Life Inc. must provide and source water to Basag occupants. (R. 4.) Additionally, the contract requires that the Basag government provide military aid if the assigned water facilities are threatened. (R. 4.) Finally, Life Inc. is required to pay annual fees to the government for the assignment. (R. 4.)

However, despite this contract, the residents of Isda continue to struggle with limited access to clean water, leading to political unrest among a small group of Basag citizens. (R. 4.) This small, but highly organized group, called the "Water Warriors," work to undermine Life Inc., targeting the government facilities with homemade explosives. (R. 4-5.) Although most of Basag do not support the small extremist group, Life Inc. hired armed guards to protect various

water resources throughout Basag. (R. 5.) Since July 2016, Life Inc. and the Basag military have mistakenly identified and killed more than 75 men and women on Basag as Water Warriors, with more than half of those individuals killed on Isda. (R. 5.) On Isda, women are the primary collectors of water because most men work in local businesses or in fisheries. (R. 6.)

In February 2017, Life Inc. permanently closed the nearest water facility to Mr. and Ms. Marcos due to salt-water pollution and compromised infrastructure. (R. 6.) Consequently, Ms. Marcos had to bike every three days for a total of ten miles to another one of Life's controlled water storage facility, where the Water Warriors also happen to be active. (R. 6.) On March 6, 2017, a water facility guard harassed Ms. Marcos, claiming she could get more water if she had sex with him. (R. 6.) Due to other incidents Ms. Marcos previously heard about between Isda women and Life Inc. guards, she knew this was actually a threat rather than just harassment. (R. 6.) Two weeks prior, a friend told Ms. Marcos, a Life Inc. guard raped an Isda woman from a nearby village at a Life Inc. water facility after the guard approached her in a similar manner to Ms. Marcos. (R. 6.) As a result, Ms. Marcos chose to visit a different, newly metered well about 15 miles from her home. (R. 7.) When she visited the well on March 9, Ms. Marcos saw a Basag soldier threaten a pregnant woman from a nearby village. (R. 7.) The soldier accused the woman of working for the Water Warriors and demanded that she remove her shirt to prove she was not carrying explosives. (R. 7.) The soldier saw that the woman was pregnant and nothing further occurred. (R. 7.)

Shortly after that incident, the Water Warriors ruined an alternative well closer to Ms. Marcos' home, forcing her to return to this storage facility on March 12, 2017. (R. 7.) When she returned, she recognized the guard from March 6. (R. 7.) He whispered to her, "I am going to have my way with you, honey, whether you want it or not," as he handed her the allotted water.

(R. 7.) Leila feared for her safety after this encounter, but, with no other sources of clean water accessible, had no choice but to continue to use Life Inc facilities to receive water. (R. 7.)

On March 14, 2017, Life Inc. provided water access closer to the villages during a record heat wave that impaired Ms. Marcos' ability to travel. (R. 7.) On April 5, 2017, while visiting the new water access site, a guard grabbed Ms. Marcos' backside and whistled as she left the water checkpoint. (R. 8.) The other guards laughed and whistled at Ms. Marcos. (R. 8.) After hearing about the incident, Mr. Marcos went to the checkpoint on April 6, 2017 to confront the guards, who then shot him in the arm. (R. 8.) The Life Inc. guards then escorted Mr. Marcos back to the Marcos' home. (R. 8.) When Ms. Marcos answered the door, she recognized the guard who threatened her on March 6. (R. 8.) The guard who previously harassed her winked and made an upward thrusting gesture with two fingers towards her as he left. (R. 8.) Later that night, Mr. and Ms. Marcos took a fishing boat to Mayaman to seek medical treatment for Mr. Marcos' injured arm. (R. 8.)

After receiving treatment for Mr. Marcos' arm, Mr. and Ms. Marcos stayed in the home of one of Bernardo's fishing mates, Bayani Santos ("Mr. Santos"), in Mayaman. (R. 8.) Mr. Santos assured them that Mayaman had much better water infrastructure, but warned Ms. Marcos that some of the Life Inc. guards still tend to target Isda-Timog women. (R. 8-9.) Mr. Santos also shared a rumor that an unmarried Isda-Timog woman had recently become pregnant by "unknown means." (R. 9.)

About a month later, while on the streets near the tourist area of Mayaman, Ms. Marcos hid to avoid several Life Inc. guards. (R. 9.) As they walked by her hiding place, she overheard one say, "I cornered her by the well, and hit her until she submitted. Getting sex here is as easy as it is on Isda." (R. 9.)

By August 2017, Ms. Marcos collected enough money to buy a one-way plane ticket to the United States, and departed Basag on August 6, 2017. (R. 9.)

Procedural History

Upon arriving to the United States, Ms. Marcos applied for asylum at a port of entry based on her well-founded fear of future persecution due to a pattern or practice of rape and harassment against similarly-situated Timog women in Basag. (R. 9-10.) The Immigration Judge reviewed Ms. Marcos' asylum application and agreed that Ms. Marcos' asylum application established an objectively reasonable fear of future persecution. (R. 10.) However, the IJ denied Ms. Marcos' application on the grounds that she could have avoided persecution by relocating to another part of Basag. (R. 10.)

Ms. Marcos appealed the IJ's decision to the Board of Immigration Appeals ("BIA"). (R. 10.) The BIA summarily affirmed the IJ's decision, also noting that despite the denial, "[i]n light of the general mistreatment of Isda-Timog women in Basag, we believe her fear of future persecution is objectively reasonable." (R. 10.)

Ms. Marcos then petitioned to the United States Court of Appeals for the Thirteenth Circuit for review. (R. 10.) The government cross-appealed to challenge the BIA's well-founded fear analysis. (R. 10.). The Thirteenth Circuit affirmed the IJ's decision, in the process adopting disfavored group analysis and holding that Life Inc. was not "government-sponsored." (R. 12, 17-18.)

Ms. Marcos then filed a Writ of Certiorari, which this Court granted on October 12, 2018. (R. 2.)

SUMMARY OF THE ARGUMENT

This Court should uphold the decision of the Thirteenth Circuit in part because disfavored group analysis is a valid basis to establish a well-founded fear. Disfavored group

analysis comports with the 10% chance of persecution standard from this Court's holding in *Cardoza-Fonseca*. Furthermore, disfavored group analysis fills in a gap in the regulations, which do not purport to be comprehensive. Since disfavored group analysis is an appropriate standard, Ms. Marcos has established an objectively reasonable fear because (1) she is a member of a disfavored group, and (2) she is individually at risk of persecution as a result of her membership.

However, this Court should remand the decision in part, because the Thirteenth Circuit incorrectly affirmed that Ms. Marcos was the proper party to bear the burden of demonstrating that substantial evidence supported a finding that future persecution could be avoided by internal relocation. Instead, this Court should remand the case to the BIA to determine what "government-sponsored" means for two reasons. First, Congress exclusively entrusts the BIA, through the Attorney General, to make basic asylum eligibility decisions, which an appellate court cannot intrude upon. Second, immigration administration and enforcement carry sensitive political implications that the BIA is better suited to decide. Alternatively, even in if de novo review is appropriate, this Court should interpret Life Inc. as a "government-sponsored" entity, because of the vast power vested in the company by the Basag government. Therefore, since Life Inc. qualifies as a "government-sponsored" entity, the U.S. government should bear the burden of showing whether internal relocation was reasonable.

ARGUMENT

I. THE THIRTEENTH CIRCUIT CORRECTLY ADOPTED DISFAVORED GROUP ANALYSIS AS A VALID BASIS FOR ESTABLISHING A WELL-FOUNDED FEAR BECAUSE IT COMPLIES WITH EXISTING STANDARDS AND BETTER ADDRESSES THE REALITIES OF PERSECUTION THAT APPLICANTS FACE.

This Court should affirm the Thirteenth Circuit's decision and follow the Ninth, Fourth, and Eighth Circuits in adopting disfavored group analysis. *See Kotasz v. INS*, 31 F.3d 847, 851-53 (9th Cir. 1994); *see also Makonnen v. INS*, 44 F.3d 1378, 1383-84 (8th Cir. 1995); *see also*

Yong Hao Chen v. United States INS, 195 F.3d 198, 203-04 (4th Cir. 1999); *see also* (Opinion Below at 8-11.) This Court should adopt disfavored group analysis because it addresses an objectively reasonable possibility of persecution that is not explicitly covered by the Code of Federal Regulations, it complies with the 10% chance of persecution standard set by this Court, and it does not alter any standards of proof nor create an additional ground for asylum.

A. Disfavored Group Analysis Fits within Existing Well-Founded Fear Standards, and Ms. Marcos Established an Objectively Reasonable Fear of Persecution Based on Her Membership in a Disfavored Group.

To obtain asylum, an applicant may show a well-founded fear of persecution ("well-founded fear") on the basis of a protected, enumerated ground, including membership in a particular group. 8 C.F.R. § 208.13(b)(1).

This Court previously held that to establish a well-founded fear, an applicant for asylum must have a subjectively genuine fear of persecution, and that the possibility of persecution must be objectively reasonable. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 430-31 (1987). A 10% chance that an applicant will suffer persecution may be sufficient to establish an objectively reasonable fear. *Id.* at 431, 440. Here, there is no dispute that Ms. Marcos possesses a genuine, subjective fear of return.

Under disfavored group analysis, an applicant can establish a reasonable possibility of persecution by showing that (1) she is a member of a "disfavored group," and that (2) she is individually at risk of being singled out for persecution as a result of her membership. *Sael v. Ashcroft*, 386 F.3d 922, 925 (9th Cir. 2004). The burden of proof for each prong depends on the strength of support for the other. *Id.* at 925 (quoting *Mgoian v. INS*, 184 F.3d 1029, 1035 n.4 (9th Cir. 1999). When an applicant can show she belongs to a disfavored group, she then has a lower burden of proof to establish individualized risk in order to reach the 10% chance of

persecution standard. *Sael*, 386 F.3d at 925. Therefore, if the cumulative risk of persecution to the applicant is 10% or higher, she establishes an objectively reasonable fear of persecution.

For example, in *Kotasz*, where disfavored group analysis was first used, the Ninth Circuit held that the BIA was overly literal in its interpretation of "singled out" and erred in denying the petitioner asylum. *Kotasz,* 31 F.3d at 854. There, the petitioner's membership in the sub-group "active opponents of the Communist government" put him at greater risk of persecution than Hungarian anti-Communists. *Id.* at 854-55. Specifically, the petitioner's detentions and beatings by the police occurred after the police arrested him as part of a group at political rallies, as opposed to alone as an individual. *Id.* In explaining its rationale for using disfavored group analysis, the court noted that group membership is a key part of nearly all asylum claims. *Id.* at 853. Specifically, the enumerated grounds of asylum refer almost exclusively to groups, and discrimination against a group to which an applicant belongs is always relevant to an asylum claim. *Id.*

Despite other courts' misreading, disfavored group analysis does not alter nor lower the burden of proof for asylum. *See Lie v. Ashcroft*, 396 F.3d 530, 538 n.4 (3rd Cir. 2005); *see also Firmansjah v. Gonzales*, 424 F.3d 598, 607 n.6 (7th Cir. 2005). The only "lower" burden of proof is the "lower proportion of specifically individualized evidence of risk, counterbalanced by a greater showing of group targeting" that an applicant must present to meet of 10% chance of persecution standard set forth in *Cardoza-Fonseca*. *Wakkary v. Holder*, 558 F.3d 1049, 1064 (9th Cir. 2009). Indeed, even the Ninth Circuit previously denied asylum based on disfavored group analysis when it found evidence of an applicant's individualized risk lacking. *Halim v. Holder*, 590 F.3d 971, 979 (9th Cir. 2009).

Far from creating a lower evidentiary standard for asylum, disfavored group analysis merely provides another route to establishing the required 10% possibility of persecution. Ms.

Marcos meets that standard because, as will be explored, (1) she is a member of a disfavored group, and (2) she is individually at risk of being singled out for persecution as a result of her membership in a disfavored group.

1. Ms. Marcos is a member of the disfavored group "Timog women in Basag who collect water for their families."

"Timog women in Basag who collect water for their families" is a disfavored group. On Isda, women tend to carry the responsibility of collecting water, as most men work in local businesses or fisheries. (R. 6.) Evidence in the record points to various instances of Life Inc. security guards, many of whom are Hilagan, harassing and raping Timog women who travel to Life Inc. facilities to collect water for their families on both Isda and Mayaman. (R. 6-7, 9.) In one heavily publicized case where a Life Inc. guard raped a Timog woman, neither Life Inc. nor the Basag government took any official action. (R. 6 n.2.) Ms. Marcos overheard one Life Inc. guard divulge to other guards that he beat and raped a woman while bragging that obtaining sex on Mayaman was as easy as on Isda. (R. 9.) Ms. Marcos' friend, Mr. Santos, also admitted that on Mayaman, Life Inc. guards target Timog women because of their poorer appearance. (R. 9.) He shared a rumor with Ms. Marcos that a Timog woman was impregnated by "unknown means," implying that a Life Inc. guard was responsible. (R. 9.)

Mr. Marcos' job and, later, his injury, forced Ms. Marcos to take on the responsibility of collecting water for her family. (R. 5, 8.) Therefore, she is a member of the group "Timog women in Basag who collect water for their families." Similar to the petitioner in *Kotasz*, who faced a higher risk of persecution based on his membership in a sub-group, Ms. Marcos' membership in the sub-group "Timog women in Basag who collect water for their families" puts her more at risk of persecution than the larger group of Timog women. As the record shows, Ms. Marcos and the Timog women who obtain water for their families from Life Inc. are more

vulnerable to harassment, rape, and assault from Life Inc. guards than the larger group of Timog women, and are a disfavored group.

2. Ms. Marcos faces individualized risk because of the discrimination and harassment she experienced in Basag.

As stated above, a member of a disfavored group, she bears a comparatively lower burden of proof in showing her individualized risk. *Sael*, 386 F.3d at 927. In *Sael*, the Ninth Circuit applied disfavored group analysis to ethnic Chinese Indonesians. *Id.* at 925. There, the court noted the centuries-long history of anti-ethnic Chinese violence. *Id.* The court pointed out that such violence occurred at practically "every outbreak of social and political unrest" in the recent past, and that the minority is often scapegoated for Indonesia's problems. *Id.* at 925-27. These conditions were sufficient to categorize ethnic Chinese in Indonesia as a significantly disfavored group. *Id.* at 927. The court also held that the petitioner established sufficient individualized risk of future persecution through the harassment and incidents of discrimination and violence. *Id.* at 927-28. Finally, the court held that the petitioner possessed a well-founded fear of persecution and was eligible for asylum, subject to the Attorney General's discretion. *Id.* at 930.

Like the petitioner in *Sael*, Ms. Marcos suffered discrimination, threats, and harassment because of her membership in a disfavored group. A guard threatened to rape Ms. Marcos while she collected water on March 6, 2017. (R. 6-7.) The same guard threatened her again three days later at another Life Inc. well, whispering that he would "have [his] way with [her] . . . whether [she] want[ed] it or not." (R. 6-7.) On April 5, 2017, a second Life Inc. guard groped Ms. Marcos, while the other guards laughed at her instead of helping her. (R. 8.) The next evening, after Ms. Marcos' husband was shot for confronting the Life Inc. guards about the harassment, the same guard from the previous incidents made a vulgar gesture to Ms. Marcos, clearly referencing his prior threats, and clearly recognizing and remembering her. (R. 8.) These

specific instances where Life Inc. guards singled out Ms. Marcos, together with the similar attitudes she heard expressed by guards on Mayaman, show that Life Inc. guards have and will continue to target her due to her sub-group membership.

The record shows that "Timog women in Basag who collect water for their families" is a disfavored group. Through Ms. Marcos' membership in this group, plus the threats, harassment, and discrimination she has personally faced, Ms. Marcos has established that she has an objectively reasonable fear of persecution.

B. Disfavored Group Analysis Addresses a Gap in the Regulations and Permits Applicants with a Well-Founded Fear Whose Cases Do Not Fit Neatly into The Enumerated Categories the Opportunity to Obtain Relief.

The Code of Federal Regulations provides two ways an applicant may show an objectively reasonable possibility of persecution. The applicant can either (1) show that she will be singled out individually for persecution or (2) establish the existence of a "pattern or practice" of persecution against similarly-situated persons in her country of nationality and her inclusion in that group. 8 C.F.R. § 208.13(b)(2)(C)(iii). In the latter situation, an applicant does not need to show any individualized risk of persecution. 8 C.F.R. § 208.13(b)(2)(C)(iii)(A).

Courts generally interpret "pattern or practice" to mean "systematic," "organized" or "thorough." *See Kotasz*, 31 F.3d at 852; *see also Makonnen*, 44 F.3d at 1383; *see also Chen*, 195 F.3d at 203; *see also Wan Chien Kho v. Keisler*, 505 F.3d 50, 54 (1st Cir. 2007); *see also Wakkary*, 558 F.3d at 1061. The clearest example of "pattern or practice" is the systematic persecution of Jews in Nazi Germany: in such a situation, individual Jews would not have needed a personal visit by "Nazi storm troopers" to establish a well-founded fear of persecution. *Kotasz*, 31 F.3d at 852. Despite this clear historical example, in most cases, an applicant shoulders a heavy burden to prove that a "pattern or practice" of persecution exists. Applicants struggle with this burden because reviewing courts typically look to whether the persecution fits

neatly into a "pattern or practice." Tragically, persecution can still manifest deep within the structure and culture of a nation, without fitting neatly into a "pattern or practice" or purely individualized risk. For example, despite acknowledging centuries of anti-ethnic Chinese violence and discrimination, even the Ninth Circuit declined to find a "pattern or practice" of persecution against ethnic Chinese in Indonesia given the government's official promotion of tolerance and decreasing levels of violence. *See Sael*, 386 F.3d at 929; *see also Wakkary*, 558 F.3d at 1061.

Significantly, the regulations are not and do not purport to be comprehensive or exclusive. *Kotasz*, 31 F.3d at 853; *see* 8 C.F.R. § 208.13(b)(2). Moreover, "non-pattern and practice persecution" is far more common than systematic "pattern or practice" persecution. *Kotasz*, 31 F.3d at 853. Although placing members of a group at some risk that may rise to the level of persecution, such persecution may not rise to the level of systemic persecution, and fall outside of the regulations. *Id.*; *Wakkary*, 558 F.3d at 1061. Disfavored group analysis occupies this middle ground between the "pattern or practice" persecution and purely individualized risk enumerated in the regulations.

As noted above, even the Ninth Circuit declined to find a "pattern or practice" of anti-ethnic Chinese violence and discrimination in Indonesia partly because of the Indonesian government's tolerant official policy. *Sael*, 386 F.3d at 925-27. However, merely because a government's official policy is not overtly discriminatory against a group does not mean an individual member of the group faces a less than 10% chance of persecution. Even the U.S. government in *Sael* conceded that a middle ground between purely individualized risk and "pattern or practice" exists, and that individuals belonging to groups whose persecution falls short of the latter may still have a well-founded fear. *Id.* at 927. Many asylum claims involve

both individualized and group persecution, and disfavored group analysis is a response to this reality. *See Kotasz*, 31 F.3d at 853; *see also Chen*, 195 F.3d at 203-04.

Other courts mistakenly understood disfavored group analysis as a separate, unenumerated ground for asylum. *See Kho*, 505 F.3d at 55; *see also* 8 U.S.C. § 1158(b)(1)(B)(i). However, disfavored group analysis merely provides a framework for addressing the realities of most asylum claims that the regulations do not consider. *Kotasz*, 31 F.3d at 853. In particular, that the risk involved in most claims is neither purely individualized nor purely "pattern or practice," but heavily involves group membership. *Id.* Even appellate courts that reject disfavored group analysis recognize its merits. Although the Seventh Circuit rejected disfavored group analysis, it recognized that its own practice of discussing membership in a particular group within the context of an individualized threat of persecution may lead to the same results. *Salim v. Holder*, 728 F.3d 718, 723-24 (7th Cir. 2013). Likewise, the First Circuit admitted that "evidence short of a pattern or practice will enhance an individualized showing of likelihood of a future threat to an applicant's life or freedom." *Kho*, 505 F.3d at 55. The Fourth Circuit adopted disfavored group analysis for the very same reason. *Chen*, 195 F.3d at 203-04. ("Individual targeting and systematic persecution do not necessarily constitute distinct theories . . . an applicant will typically demonstrate some combination of the two to establish a well-founded fear of persecution.") As a result, disfavored group analysis merely stands as a method for weighing indicators of future risk in the context of a well-founded fear. *Wakkary*, 558 F.3d at 1063-65. It recognizes the "common-sense evidentiary proposition" that treatment of a group is "indisputably relevant" to evaluating individualized risk and is consistent with the other circuits. *Id.*

Here, "Timog women in Basag who collect water for their families" is similar to ethnic Chinese Indonesians in *Sael* because of the differences between how official policy regards the

group versus how the group is treated in reality. In response to a guard raping a Timong woman, Life Inc. required its guards to undergo "comprehensive" sexual harassment training. (R. 6 n.2.) It also issued a new policy declaring that it would immediately terminate any guard suspected of sexual assault. (R. 6 n.2.) Additionally, in its concession contract with Life Inc., the Basag government requires Life Inc. and its employees to follow Basag law, including provisions against rape, attempted rape, and molestation. (R. 5 n.1.) Like in *Sael*, this official opposition to the harm experienced by Timog women collecting water for their families undermines the contention that the persecution experienced by these women forms a "pattern or practice."

In reality, similar to *Sael*, official positions do not reflect the serious humanitarian crisis faced by Timog women who collect water for their families. Despite Life Inc.'s training and official policy, Life Inc. guards continue to sexually harass and rape Timog women unabated. (R. 6-9.) In addition, although the contract compels Life Inc. to follow Basag law, violating the law does not breach the contract. (R. 5 n.1.) The contract does not provide whether any threshold of violations exist that would constitute a breach of contract by Life Inc. (R. 5 n.1.) Moreover, if the Basag government cancels the contract at any point, the law subjects Basag to substantial liability. (R. 5.) However, the contract does not provide for the same risk of liability for Life Inc. (R. 5.) Thus, a massive incentive exists for the Basag government to never cancel the contract, even if it means ignoring violations of Basag law. In fact, the government took no official action against the Life Inc. guard who raped a Timog woman. (R. 6 n.2.)

These conditions on the ground show that, despite not rising to the level of systematic "pattern or practice," "Timog women in Basag who collect water for their families" still face a high risk of sexual harassment and rape. Similar to ethnic Chinese Indonesians in *Sael*, these women face constant danger in Basag. Consequently, if they can show personalized risk, like Ms. Marcos has done, they deserve to qualify for protection.

Although the regulations provide two avenues to show an objectively reasonable fear of persecution, the U.S. government and other Circuit Courts that have rejected disfavored group analysis acknowledge that the regulations leave a gap in protection. *See Chen*, 195 F.3d at 203-04; *see also Sael*, 386 F.3d at 927; *see also Kho*, 505 F.3d at 55. Disfavored group analysis fills that gap. It allows those who meet the 10% chance of persecution standard the opportunity to receive relief, even if their case does not fit neatly into the framework provided by the regulations. As shown above, although the persecution of "Timog women in Basag who collect water for their families" does not rise to the level of "pattern or practice," Ms. Marcos nevertheless possesses an objectively reasonable fear of persecution based on the treatment of other members of her group and her individual experience. A court holding that Ms. Marcos does not possess a well-founded fear simply because the facts of her case do not fit into the regulations' strict categories, would unjustly put Ms. Marcos' life in peril. Therefore, this Court should affirm the holding of the Thirteenth Circuit and hold that disfavored group analysis is a valid basis to establish a well-founded fear.

II. MS. MARCOS WAS NOT THE PROPER PARTY TO BEAR THE BURDEN OF DEMONSTRATING IF SUBSTANTIAL EVIDENCE SUPPORTED A FINDING THAT FUTURE PERSECUTION COULD BE AVOIDED BY INTERNAL RELOCATION.

To obtain asylum, an applicant must show a "well-founded fear" of persecution on the basis of a protected, enumerated ground. 8 C.F.R. § 208.13(b)(1). The government shall deny the asylum application if the applicant could avoid future persecution by relocating to another part of their country and, under all the circumstances, it would be reasonable to expect the applicant to do so. 8 C.F.R. § 208.13(b)(1)(i)(B). This section will focus on defining the source of the persecution. Critically, the source of the persecution determines which party carries the burden of proving, by a preponderance of the evidence, whether internal relocation was reasonable or not. 8 C.F.R. § 208.13(b)(3)(ii).

According to Title 8 of the Code of Federal Regulations, it "shall be presumed" that internal relocation is not reasonable if the persecutor in the asylum case qualifies as "government-sponsored." 8 C.F.R. § 208.13(b)(3)(ii). In cases where the persecutor qualifies as "government-sponsored," the U.S. government bears the burden to establish, by a preponderance of the evidence, that, under all circumstances, the applicant could reasonably relocate in her home country. 8 C.F.R. § 208.13(b)(3)(ii).

Here, Ms. Marcos improperly bore the burden of demonstrating that she could have avoided future persecution by internal relocation. Instead, the BIA must first define "government-sponsored" to then determine which party bears the burden of proof. However, even if this Court decides to determine the meaning of "government-sponsored" de novo, Life Inc. qualifies as a "government-sponsored" entity, and the government bears the burden of proof.

A. This Court Should Remand the Case to the BIA to Clearly Define "Government-Sponsored," Thus Determining Whether the Government is the Proper Party to Bear the Burden of Reasonable Internal Relocation.

The lower court discussed whether de novo or *Chevron* was the proper standard of review. Courts properly use a de novo review for legal and constitutional questions. *Zhou Hua Zhu v. United States AG*, 703 F.3d 1303, 1307 (11th Cir. 2013). A reviewing court appropriately uses a *Chevron* standard of review when an agency interprets an ambiguous legislative term. *Chevron, U.S.A., Inc. v. NRDC, Inc*., 467 U.S. 837, 842-45 (1984); *INS v. Aguirre-Aguirre*, 526 U.S. 415, 424 (1999). If the agency creates a reasonable construction of the ambiguous term, the reviewing court will defer to the agency's interpretation. *United States v. Mead Corp*., 533 U.S. 218, 229 (2001) (citing *Chevron*, 467 U.S. at 842-45). If the agency has not made a clear construction of the ambiguous term, the reviewing court should remand the case to give the BIA the opportunity to address the matter in light of its own expertise. *Negusie v. Holder*, 555 U.S. 511, 517 (2009).

The court below erred in reviewing the question of the meaning of "government-sponsored" de novo because remanding the case is the proper procedure. This Court should follow proper procedure and remand the case for two reasons. First, Congress exclusively entrusts the agency to make basic asylum eligibility decisions that an appellate court cannot intrude upon. *INS v. Ventura*, 537 U.S. 12, 16 (2002). Second, this Court acknowledges the importance of judicial deference to the Executive Branch in immigration cases, because officials "exercise especially sensitive political functions that implicate questions of foreign relations." *INS v. Abudu*, 485 U.S. 94, 110 (1988).

1. Congress entrusts the BIA with administration and enforcement of the INA, so the BIA must decide what the ambiguous term "government-sponsored" means.

Title 8, Chapter 12, the Immigration and Nationality Act (INA), provides that the Attorney General "shall be charged" with the administration and enforcement of the statute. 8 U.S.C. § 1103(a)(1). The Attorney General's determination and ruling "shall be controlling" with respect to all questions of law. *Id.* This power extends to provisions of the INA and all immigration laws. *Id.* From there, the Attorney General assigns all cases that come before it to the BIA. 8 C.F.R. § 1003.1. Therefore, a reviewing court will grant the BIA *Chevron* deference when it (1) interprets an ambiguous statute, (2) fills statutory gaps, or (3) gives concrete meaning to ambiguous terms through case-by-case adjudication. *Negusie,* 555 U.S. at 521; *Delgado v. Holder*, 648 F.3d 1095, 1103 n. 12 (9th Cir. 2011) (en banc).

Ordinarily, when the BIA does not speak on "a matter that statutes place primarily in agency hands," this Court remands the case to give the BIA the opportunity to address the matter in light of its own expertise. *Negusie*, 555 U.S. at 517 (citing *Ventura*, 537 U.S. at 16-17 (per curiam)).

Since the law entrusts the BIA to make basic asylum eligibility decisions pursuant to the INA, a judicial judgment cannot serve for an administrative judgment. *Ventura*, 537 U.S. at 16 (citing *SEC* v. *Chenery Corp.*, 318 U.S. 80, 88 (1943)). Accordingly, this Court found it impermissible for an appellate court to intrude into the area that Congress exclusively entrusted to the administrative agency. *Id.* Generally, a court of appeals may not conduct a de novo inquiry and reach its own conclusions based on that inquiry. *Id.* (citing *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985)). Instead, the reviewing court should remand the matter to the agency for additional investigation or explanation. *SEC v. Chenery Corp.*, 318 U.S. at 88.

This Court considers this course of remand "a simple but fundamental rule of administrative law." *SEC v. Chenery Corp.*, 332 U.S. at 196. Thus, when analyzing a determination which Congress directed an administrative agency to make alone, a reviewing court must judge actions solely by the grounds invoked by the agency. *Id.* Here, the determination before this Court deals with establishing asylum eligibility per 8 C.F.R. § 208.13. Since the Attorney General delegates the INA administrative and enforcement power to the BIA, the BIA alone has the authorization to make the determination of what "government-sponsored" means. *Id.* at 196-97. If the reviewing court substitutes its own basis for determination, the court infringes upon the domain which Congress set aside exclusively for the administrative agency. *Id.* The administrative agency must first set forth a clear and understandable basis to test upon. *Id.* at 196. If the agency has not set a clear and understandable basis, a court cannot expect " . . . to chisel that which must be precise from what the agency has left vague and indecisive." *Id.* at 196-97. In other words, a court must know what an administrative decision means before it becomes the court's duty to say whether the decision is right or wrong. *Id.* at 196-97 (citing *United States* v. *Chicago, M., St. P. & P. R. Co*., 294 U.S. 499, 511 (1935)).

Here, the BIA did not set a clear basis for what the term "government-sponsored" means, and therefore, this Court should remand the case. *See Patel v. AG of the United States*, 259 F. App'x 511, 513 (3d Cir. 2007) (directing the BIA on remand to explicitly indicate whether persecution qualifies as government-sponsored persecution); *see also Tillery v. Lynch*, 821 F.3d 182, 185 (1st Cir. 2016) ("Although it enjoys broad authority to exercise independent judgment and to rest on an alternative basis when denying a petition, the BIA must clearly exposit its chosen path . . . This agency responsibility ensures, among other things, that a reviewing court is able to provide intelligent review on issues over which it has appellate jurisdiction.") (internal citations omitted.) Thus, a reviewing court cannot provide review on an internal relocation issue when the BIA does not define the type of persecutor.

It may be argued that the BIA did define the term "government-sponsored" on a case by case basis. *See Negusie*, 555 U.S. at 521. However, no definition of "government-sponsored" can be found from the lower court, nor the BIA, nor previous case law. Instead, the lower court and the BIA utilized vague analogies that did not consider immigration policy. The Department of Homeland Security claimed Life Inc. does not qualify as a government actor because it "acts more like a gang of criminals." (Opinion Below at 3.) The Thirteenth Circuit simply claimed that Life Inc.'s reach does not extend enough to equate it with the government. (Opinion Below at 3.) This lack of alignment and clarification between the analogies do not create a clear standard. Per fundamental administrative law, this Court should remand the case to the BIA for determination of what "government-sponsored" means. Once the BIA clearly defines "government-sponsored," reviewing courts can make an accurate determination of how to classify Life Inc., and, consequently, which party bears the burden of showing reasonable internal relocation.

2. Courts are not well positioned to decide agency definitions, and it is unjust to burden applicants because the agency failed to seriously consider whether the government's involvement made the persecution "government-sponsored."

Beyond the clear administrative law controlling this issue, there are also important policy implications. Judicial deference in the immigration context is of special importance, because executive officials "exercise especially sensitive political functions that implicate questions of foreign relations." *Abudu*, 485 U.S. at 110.

In *Aguirre-Aguirre*, this Court reviewed the manner in which the agency construed the INA's definition of the term "serious nonpolitical crime." *Aguirre-Aguirre*, 526 U.S. at 418-19. In reaching its decision, this Court faulted the Ninth Circuit, which had reversed the BIA, for not according the BIA the proper deference in construing the INA. *Id.* This Court emphasized that the Attorney General's decision to bar an alien who has participated in persecution "may affect our relations with [the alien's native] country or its neighbors." *Id* at 425. In that case specifically, the Attorney General's decision to regard certain violent offenses committed in another country as political in nature, and to allow the perpetrators to remain in the U.S., may affect U.S. relations with that country or its neighbors. *Id*. This Court concluded that the judiciary is not well positioned to " . . . shoulder primary responsibility for assessing the likelihood and importance of such diplomatic repercussions." *Id.*

While this case deals with a different section of the INA then in *Aguirre-Aguirre*, the discussion shows how seriously this Court considers immigration decisions and their possible repercussions. As previously mentioned, Congress entrusts the Attorney General and, consequently, the BIA with administering all of the INA. Congress did not detail that a government branch should treat any section of the INA differently from the others, implicating the political importance of the whole INA. The judiciary should defer this section to the BIA for its interpretation because immigration decisions, like the "serious nonpolitical crime" section

decision, carry diplomatic repercussions. Any decision concerning what "government-sponsored" means may significantly implicate U.S. diplomatic relationships with other countries. The U.S. implicates itself in another country's affairs when it decides to shield a foreign nation's citizens from the foreign nation's own reach. Therefore, Congress intended that the BIA make those decisions over the judicial branch.

These decisions not only impact U.S. diplomatic relations, but also impact asylum seekers attempting to enter the U.S. The plain text of 8 C.F.R. § 208.13(b)(3)(ii) reflects the importance of these procedures. The section clearly states that " . . . it shall be presumed that internal relocation would not be reasonable, unless the Service establishes by a preponderance of the evidence that, under all the circumstances, it would be reasonable for the applicant to relocate." 8 C.F.R. § 208.13(b)(3)(ii). The government did not provide any evidence that established, by a preponderance of the evidence, that Ms. Marcos could reasonably relocate. Instead, as previously discussed, the BIA and lower court just draw differing analogies. Therefore, the government unjustly imposes a burden on Ms. Marcos because the agency did not clearly consider whether the government's involvement with Life Inc. made the persecution "government-sponsored," contrary to the procedure set forth in 8 C.F.R. § 208.13.

Additionally, deciding whether corporations qualify as "government-sponsored" entities can have a major impact on future asylum claims similar to Ms. Marcos' case. Municipalities all over the world use concession contracts similar to the Life Inc. contract. *See, e.g.*, World Bank Group, *Water and Sanitation Concession Agreement - Example 1* (Dec. 11, 2016), https://ppp.worldbank.org/public-private-partnership/library/water-and-sanitation-concession-agreement-example-1. One case determining whether a corporation qualifies as "government-sponsored" greatly affects asylum law jurisprudence and the various international concession contracts currently in place throughout the world. In summary, the plain text of the INA and the

policy implications, both for asylum seekers and U.S. diplomatic relations, necessitates that the BIA properly define the scope and definition of "government-sponsored."

B. Even if Review was Appropriate Under the De Novo Standard, this Court Should Remand the Case Because Life Inc. Qualifies as a "Government-Sponsored" Entity, and the Lower Court Did Not Fulfill its Role as a Reviewing Court.

The reasonable relocation inquiry aims to protect applicants facing countrywide persecution. "If an applicant is able to avail . . . herself of protection in any part of . . . her country of origin, such applicant should not ordinarily need or be entitled to protection from another country." 63 Fed. Reg. 112 at 31948. Therefore, if the Court does find de novo review appropriate, Life Inc. qualifies as a "government-sponsored entity" since Life Inc. functions as the government in regulating water resources. As a result, burden should fall on the government to show that the applicant could reasonably relocate within her home country. However, even if this Court finds that Life Inc. does not qualify as a "government-sponsored" entity, this Court should remand the case, because neither the lower courts nor the IJ fulfilled their procedural duties.

1. Life Inc. qualifies as a "government-sponsored" entity because of the vast power vested in the company by the Basag government.

The Ninth Circuit previously found that certain characteristics of a persecutor can show that the act is politically motivated and, therefore, tied to the government. For example, a persecutor's connection to a military power that dominates over much of a nation, even when the government tries to restrain the actor, shows a political motivation. In *Lazo-Majano v. INS*, a Salvadoran military sergeant raped and abused the asylum applicant. *Lazo-Majano v. INS*, 813 F.2d 1432, 1433 (9th Cir. 1987). The persecutor belonged to the Armed Force, the Salvadoran military group that exercised domination over much of El Salvador despite the civilian government's efforts to restrain it. *Id.* at 1434. The persecutor "had his gun, his grenades, his bombs, his authority and his hold over Olimpia because he was a member of this powerful

military group." *Lazo-Majano*, 813 F.2d at 1434. For this reason, the Ninth Circuit determined that forcing the applicant to return to her native land put her in serious danger from the officer's persecution and targeting. *Id.* at 1435.

Similarly, the Seventh Circuit examined political persecution when an asylum applicant fled her home country after a State Security officer sexually assaulted her in the course of an interrogation at a State Security office. *Angoucheva v. INS*, 106 F.3d 781, 793 (7th Cir. 1997) (Rovner, J., concurring). The *Angoucheva* concurrence compares the case to *Lazo-Majano*, because, as a matter of law, the petitioners in both cases suffered persecution on account of a political opinion. *Id.*

While this case does not question the persecutor's political motivation, *Angoucheva* and *Lazo-Majano* still relate to this case. Internal relocation inquiries require a determination of whether the persecution results from the government, or from a person the government is unwilling or unable to control. *In re Kasinga*, Interim Decision 3278 (BIA June 13, 1996) (BIA recognizes that "persecution can consist of the infliction of harm or suffering by a government, or persons a government is unwilling or unable to control.") Life Inc.'s criminal actions result from the vast power vested in the corporation through the government.

As previously mentioned, the 30-year contract signed between President Aquinto and Life Inc. assigned full control of all Basag water facilities to Life Inc., including the exclusive obligation of maintaining and rebuilding all water works in Basag. (R. 4.) The contract dictates that Life Inc. must provide and source water to Basag occupants. (R. 4.) The terms of the contract show the extent to which Life Inc. functions as the government by controlling the water source on the islands.

Beyond having full control of the water resource on the island, Life Inc. works in tandem with Basag military forces, linking the two to distribute a vital resource. The contract obligates

the Basag government to provide military aid if the assigned water facilities are threatened. (R. 4.) After attacks by the "Water Warriors, Life Inc. supplemented its security with hired armed guards to protect various water resources throughout Basag. (R. 5.) Since July 2016, the Basag military and Life Inc. mistakenly identified as Water Warriors and killed more than 75 men and women, with more than half of those individuals killed on Isda. (R. 5.)

An analogous situation is the Gambia's Supreme Islamic Council, a "*government-sponsored* religious council tasked with providing Islamic religious guidance but with no legal mandate to regulate religious groups." Bureau of Democracy, Human Rights, and Labor, *2016 International Religious Freedom Reports: The Gambia* (Aug. 15, 2017), https://www.state.gov/j/drl/rls/irf/2016/af/268652.htm (emphasis added). This shows that a group tasked by the government to fulfill some government role qualifies as a "government-sponsored" group.

Similar to the persecutors in *Angoucheva* and *Lazo-Majano*, the actions by Life Inc. are inextricably tied to Ms. Marcos' vulnerable position that the Basag government allows Life Inc. to exploit. Additionally, the guards that sexually harassed Ms. Marcos functioned as agents of the government.

2. The case should be remanded because neither the lower court nor IJ fulfilled their procedural duties.

Even if this case should be reviewed de novo, the IJ, BIA and lower court did not fulfill their procedural duties, and therefore this Court remanded the case. The Thirteenth Circuit did not fulfill its self-appointed duty of defining "government-sponsored." Additionally, the IJ failed to specify why the burden was shifted to Ms. Marcos.

a. Since the Thirteenth Circuit did not provide a definition of "government-sponsored," it did not fulfill its role as a reviewing court.

Even if it can be argued that the Federal Register emphasizes the court's role in interpreting internal relocation, the BIA and the reviewing courts must provide a clear analysis and interpretation of their reasoning in order to fulfill their role as a reviewing court. 63 Fed. Reg. 112 at 31948 ("As with other aspects of the refugee definition, we expect that the [BIA] and the federal courts, as they interpret this regulation in individual cases, will provide guidance on the question of when internal relocation is reasonable.")

Here, the IJ, BIA, and the lower court gave a muddled analysis of "government-sponsored," so no clear interpretation of 8 C.F.R § 208.13(b)(3) exists. The most guidance that is provided by the lower court is that it a "government-sponsored" entity is "not Life, Inc." (Opinion Below at 20.) (Edlin, J., dissenting). This analysis does not clearly define the term. Therefore, the lower court avoided defining "government-sponsored" properly. Regardless of the standard of review, no definition was provided, and this Court should remand the case.

b. The IJ must specify why it shifted the burden of proof to Ms. Marcos in order for an appellate court to provide review.

This Court should also remand this case because reviewing courts previously reversed and remanded cases where the BIA found internal relocation reasonable but failed to specify which party had the burden of proof. *Khan v. Holder*, 727 F.3d 1, 9 (1st Cir. 2013); *Afriyie v. Holder*, 613 F.3d 924, 935-36 (9th Cir. 2010); *Gambashidze v. Ashcroft*, 381 F.3d 187, 193-94 (3d Cir. 2004). Similar to the judiciary deferring to the BIA for the definition of "government-sponsored" before courts can review a decision, the " . . . [BIA must] provide a comprehensible reason for its decision sufficient for us to conduct our review and to be assured that the petitioner's case received individualized attention." *Afriyie*, 613 F.3d at 935.

Here, the IJ failed to specify why it shifted the burden to Ms. Marcos. The IJ only specified that "Marcos must prove that, under all circumstances, it would not be reasonable for her to relocate." (R. 15.) As mentioned in the previous section, categorizing "government-sponsored" as "not Life Inc." is not a sufficient reason, and therefore this Court should remand this case. Alternatively, this Court should interpret Life Inc. as "government-sponsored," and the government should bear the burden of showing whether internal relocation was reasonable.

CONCLUSION

Petitioner respectfully requests that this Court AFFIRM in part, and REMAND in part the Thirteenth Circuit Court of Appeal's decision. The Thirteenth Circuit was correct in adopting disfavored group analysis as a method of showing an objectively reasonable fear of persecution. Disfavored group analysis comports with the 10% chance of persecution standard previously established by this Court, and it fills a gap currently unaddressed by the regulations. However, the Thirteenth Circuit erred in assigning the burden of proof to Ms. Marcos to demonstrate that future persecution could not be avoided by internal relocation. Instead of a reviewing court determining the meaning of "government-sponsored" de novo, this Court should remand in part to the BIA to provide a clear definition of what "government-sponsored" means.

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Respectfully Submitted,

s/ Team Number: 101

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