No. 17-17002

IN THE

SUPREME COURT OF THE UNITED STATES OF AMERICA

Leila Marcos,

Petitioner

v.

Attorney General of the United States,

Respondent

On Writ of Certiorari
To the United States Court of Appeals
for the Thirteenth Circuit

BRIEF FOR RESPONDENT

Team No. 1015

QUESTIONS PRESENTED

1. Is the Ninth Circuit's disfavored group analysis a valid basis to establish a well-founded fear of prosecution for the purposes of asylum eligibility?
2. Did Petitioner properly assume the burden of demonstrating that substantial evidence supported a finding that future persecution could be avoided by internal relocation?

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STATEMENT OF JURISDICTION

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.

STATUTORY PROVISIONS INVOLVED

2 U.S. Code § 622(8)
See generally

22 U.S. Code § 2460
See generally

8 C.F.R. § 208.13(b)(2)(B)
"…Well-founded fear of persecution. (i) An applicant has a well-founded fear of persecution if:…. There is a reasonable possibility of suffering such persecution if he or she were to return to that country…"

8 C.F.R. § 208.13(b)(2)(ii)
"An applicant does not have a well-founded fear of persecution if the applicant could avoid persecution by relocating to another part of the applicant's country of nationality or, if stateless, another part of the applicant's country of last habitual residence, if under all the circumstances it would be reasonable to expect the applicant to do so."

8 C.F.R. § 208.13(b)(2)(iii)(A)
"…The asylum officer or immigration judge shall not require the applicant to provide evidence that there is a reasonable possibility he or she would be singled out individually for persecution if:

> (A) The applicant establishes that there is a pattern or practice in his or her country of nationality or, if stateless, in his or her country of last habitual residence, of persecution of a group of persons similarly situated to the applicant on account of race, religion, nationality, membership in a particular social group, or political opinion…"

8 C.F.R. § 208.16(b)(2)(i)-(ii)
"….The asylum officer or immigration judge shall not require the applicant to provide evidence that he or she would be singled out individually for such persecution if:

> **(i)** The applicant establishes that in that country there is a pattern or practice of persecution of a group of persons similarly situated to the applicant on account of race, religion, nationality, membership in a particular social group, or political opinion; and
>
> **(ii)** The applicant establishes his or her own inclusion in and identification with such group of persons such that it is more likely than not that his or her life or freedom would be threatened upon return to that country…"

8 C.F.R. § 208.13(b)(3)(i)
" In cases in 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. § 208.13(b)(3)(ii)
"In cases in which the persecutor is a government or is government-sponsored, or the applicant has established persecution in the past, 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 U.S.C.S. § 1101
See generally

8 U.S.C. § 1101(a)(13)(A)
"The terms "admission" and "admitted" mean, with respect to an alien, the lawful entry of the alien into the United States after inspection and authorization by an immigration officer"

8 USCS § 1101(a)(42)(A)
"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..."

8 U.S.C § 1103
See generally, Powers and duties of the Secretary, the Under Secretary, and the Attorney General

8 USCS § 1158(a)
"(a)Authority to apply for asylum
(1)In general
Any alien who is physically present in the United States or who arrives in the United States (whether or not at a designated port of arrival and including an alien who is brought to the United States after having been interdicted in international or United States waters), irrespective of such alien's status, may apply for asylum in accordance with this section or, where applicable, section 1225(b) of this title."

8 U.S.C.S § 1158(b)(1)(A)
"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 101(a)(42)(A) [8 USCS § 1101(A)(42)(A)]."

8 U.S.C. § 1158(b)(2)(A)(i)
"The alien 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."

INA, §§ 101(a)(42)(A)
"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."

INA §§ 208(a)

"In general. - Any alien who is physically present in the United States or who arrives in the United States (whether or not at a designated port of arrival and including an alien who is brought to the United States after having been interdicted in international or United States waters), irrespective of such alien's status, may apply for asylum in accordance with this section or, where applicable, section 235(b)."

INA § 237(a)(2)(A)(i)

"(i)Crimes of moral turpitude- Any alien who—

(I) is convicted of a crime involving moral turpitude committed within five years (or 10 years in the case of an alien provided lawful permanent resident status under section 1255(j) of this title) after the date of admission,

STATEMENT OF THE CASE

Life, Incorporated ("Life Inc.") is a water management company incorporated in Delaware, United States of America. R. at 3.[1] Life Inc.'s initiative is to provide water management solutions for regions suffering from grave water problems including water scarcity, saltwater pollution, and compromised infrastructure. R. at 3.

On January 1, 2013, Life Inc. entered a 30-year contract that assigned the company full control of all water resources in the Basag islands. R. at 3. The concession contract was an effort by the President of Basag to cure the failing water infrastructure in Basag. R. at 3. The contract terms required Life Inc. to pay an annual fee to the government for the assignment. R. at 3. The Basag government agreed to provide military to protect the water facilities only under the limited circumstance of a terrorist threat. R. at 3. Water Warriors, a rebel group, target government facilities with explosives and cause mistakenly identified casualties. R. at 5. Due to the lack of government protection, Life Inc. paid for armed guards to protect the water facilities, many of whom were ethnic Hilagan. R. at 5.

After signing the contract, Life Inc. began its initiative to rebuild the water facilities to source water for the citizens, tourists, and occupants of Basag. R. at 4. The contract did not express any indication of government sponsorship. The Basag government does not control Life Inc. and future Presidential candidates do not intend to reestablish control of the water facilities. R. at 5.

[1] For citations to the record, "R. at 3." corresponds to page three in the "Factual Backgound." Citations to the United States Court of Appeals For The Thirteenth Circuit will be represented as "Op. at. (page number)."

Leila Marcos ("Petitioner"), an ethnic Timog woman, lived with her husband in northern Isda. R. at 6. Every two to three days, Petitioner biked to a Life Inc. storage facility to obtain water. R. at 6. Petitioner experienced unwanted conduct at the storage facilities. R. at 6-9.

Between 2013 to early 2017, Petitioner heard rumors of rape. R. at 6. The rumors related to Life Inc. facility guards and Timog women. R. at 6. A United Nations report verified the foregoing rumors. Op. at 6. Petitioner testified to a recent rumor that occurred under similar circumstances that were recounted on March 6th. R. at 6. In response to hearing the rumors, Life Inc. issued a public statement. R. at 6. The statement assured Basag citizens that all of its employees underwent comprehensive sexual harassment training. R. at 6. As an added safety precaution, Life Inc. issued a public statement through a state-controlled radio and television broadcast, informing the public that any Life Inc. guard suspected of sexual assault would face immediate termination. R. at 6. Despite Life Inc.'s efforts, there is no indication Petitioner reported her unwanted confrontations.

On March 6, 2017, at a facility five miles away from home, Petitioner encountered a Life Inc. guard who told her she could get more water if she had sex with him. R. at 6.

On March 9, 2017, at a Life, Inc. facility ten miles away, she obtained water without incident. R. at 7. On her way home, she witnessed a potential terrorist threat at a newly metered well, only seven miles away. R. at 7. In fear of a potential Water Warrior with explosives, a Basag soldier ordered a woman to reveal a protrusion under her shirt, near her abdomen. R. at 7. The woman revealed her bare stomach and chest to confirm that she was not carrying explosives. R. at 7. Immediately thereafter, it became apparent that the woman was an expecting mother. R. at 7.

On March 12, 2017, Marcos recognized the same guard from March 6th at a water facility ten miles away. R. at 7. The guard stated, "I am going to have my way with you, honey, whether you want it or not." R. at 7.

From March 14, 2017 until March 27, 2017, Petitioner acquired water from a well seven miles from her home without incident. R. at 6.

On April 5, 2017, Petitioner obtained water from a closer facility provided by Life Inc. to accommodate villagers affected by a heat wave. R. at 6. As she left the water checkpoint, a Life Inc. guard grabbed her backside and whistled. R. at 8. The act was humorous to some guards. R. at 8. On the same day, Petitioner told her husband about the incident. R. at 8.

On April 6, 2017, Petitioner's husband began yelling and carried a fillet knife to confront the guard. R. at 8. In response to the dangerous threat, a guard shot the husband in his arm. R. at 8. Petitioner's husband was taken home by the security guards, one of which Petitioner recognized while he winked and made a "shooter" gesture. R. at 8. After returning home, Petitioner and her husband traveled to the neighboring island, Mayaman, to obtain medical treatment. R. at 8.

In Mayaman, Petitioner stayed at her friend's home located near a popular tourist area, less than a mile from the prosperous *Aqua Cerulean* hotel. R. at 8. Water scarcity was much more controlled there and Petitioner's friend had never seen any violence toward Timog women. R. at 8, 9. Within the first month of living in Mayaman, Petitioner obtained a job at a tourist shop. R. at 8. During the same month, she overheard Life Inc. guards discuss a sexual assault incident then she heard one of the guards say that getting sex was easy in Basag. R. at 8. Contrary to the guard's statement, a United Nations Report stated that violence was not prevalent in Mayaman. Op. at 6. A U.N. Report further provided that water scarcity on Mayaman was

much more controlled than Isda and the Mayaman infrastructure prevented any woman from traveling far to obtain water. Op. at 6.

On August 6, 2017, Marcos purchased a plane ticket and traveled to the United States. R. at 9. On August 7, 2017, upon arrival, she petitioned for asylum testifying that she did not feel safe on either Mayaman or Isda. R. at 9, 10.

Following a hearing, the Immigration Judge denied Petitioner's application because, although she demonstrated an objectively reasonable fear of persecution, she could have avoided persecution by relocating to another part of Basag. R. at 10. Petitioner then appealed to the Board of Immigration Appeals which affirmed the Immigration Judge's decision for the same reasons. R. at 10. Following the BIA's decision, Petitioner appealed to the U.S. Court of Appeals for the Thirteenth Circuit which, again, denied Petitioner's asylum application because she could have relocated in Basag. R. at 10.

OPINIONS BELOW

The opinion of the Board of Immigration Appeals was not reported and does not appear in the record. The opinion of the United States Court of Appeals for the Thirteenth Circuit may be found at pages 7-21 of the record.

SUMMARY OF THE ARGUMENT

This case presents two questions, the first of which is an issue of first impression for this Court. First, whether the disfavored group analysis is a valid basis to establish a well-founded fear of persecution for the purposes of asylum eligibility. The answer to this question is in the negative. Second, whether the proper party bore the burden of demonstrating if substantial evidence supported a finding that future persecution could be avoided by internal relocation. The answer to this question is in the affirmative.

The Ninth Circuit was outside the scope of its authority when it created the disfavored group analysis as an alternative to the pattern or practice analysis that was instituted by Congress. This court and others have made it clear that the court cannot overstep its boundaries by doing the work of Congress. Immigration and Naturalization Services ("INS") created the "well-founded fear of persecution" and the primary way of meeting this standard has been the pattern or practice analysis. Any new standard should be promulgated through the agency and not developed through the courts.

Further, numerous circuit courts have expressly rejected the disfavored group analysis. The disinterest in the analysis is because it creates a lower threshold for asylum seekers to overcome. The well-founded fear standard has always required a high level of proof, limiting the number of applicants. The disfavored group analysis lowers that threshold. There is a significant increase in the number of asylum applicants in recent years and a lower threshold will ultimately open the flood gates of the judicial system. The disfavored group analysis is not a valid basis to establish a well-founded fear of persecution.

If the disfavored group analysis was found valid, Petitioner does not meet the two-prong test. First, Petitioner is not a member of a disfavored group because Timog women were not so

widely victimized as to be members of a disfavored group. Petitioner relies primarily on random acts or rumors. Second, Petitioner does not face an individualized risk of persecution. The encounters she faced with Life Inc. guards amounted to mere harassment and did not rise to the level of persecution.

Concerning the internal relocation issue, the District Court properly affirmed the Board of Immigration Appeals holding that Petitioner was the proper party to assume the burden of proof because Life Inc. is a non-government actor. First, due to the lack of immigration-expertise inherent in the term "government-sponsored", the court was not required to remand. Under the *INS v. Orlando Ventura*, courts should adopt an exception to the "ordinary remand rule" only to the extent that is within the domain of the agency's special expertise in immigration law. 537 U.S. 12, 16–17 (2002). Further, remand was not required because the District Court's interpretation of "government-sponsored" was reasonable. The principles of statutory interpretation

Even if this Court finds that "government-sponsored" should be interpreted by the INA, Petitioner remained the proper party to assume the burden of proof. Under the substantial evidence standard, the record supported the Immigration Judge's conclusion that Life Inc. is a non-government actor.

In short, Respondent asks this Court to deny Petitioner's application for asylum. The disfavored group analysis is not a valid basis to establish a well-founded fear of persecution for asylum. Further, Respondent respectfully asks this Court to affirm the Thirteenth Circuit's decision by adopting an exception to the "ordinary remand rule."

STANDARD OF REVIEW

The issue of whether the disfavored group analysis is a valid basis to establish a well-founded fear of persecution is a question of law regarding asylum eligibility that should be reviewed *de novo*. *Chavez-Garcia v. Sessions*, 871 F.3d 991, 995 (9th Cir. 2017). If the disfavored group analysis is found to be valid, the issue of whether an alien has demonstrated this level of persecution is reviewed under the substantial evidence standard. *Abedini v. INS*, 971 F.2d 188, 190 (9th Cir. 1992).

Regarding the issue of burden of proof for internal relocation, an appellate court reviews *de novo* an issue that does not warrant Chevron deference, and a factual finding in a decision to terminate an asylum grant is reviewed for substantial evidence. *See Sandoval v. Sessions*, 866 F.3d 986, 993-94 (9th Cir. 2017); *Urooj v. Holder*, 734 F.3d 1075, 1077 (9th Cir. 2013).

ARGUMENT

I. THE DISFAVORED GROUP ANALYSIS IS NOT A VALID BASIS TO ESTABLISH A WELL-FOUNDED FEAR OF FUTURE PERSECUTION FOR THE PURPOSES OF ASYLUM ELIGIBILITY.

Congress delegates authority to the Immigration and Nationality Act ("INA") and Attorney General to grant asylum for any refugee. 8 U.S.C. § 1158(b)(1)(A). The INA provides a permanent and systematic procedure for asylum eligibility.[2] To become eligible for asylum, the alien must prove that she is someone unable or unwilling to avail herself to the protection of her country because of a well-founded fear of persecution. 8 U.S.C.S 1101(a)(42)(A); 8 U.SC.S 1158(a).

A well-founded fear must be "subjectively genuine" and "objectively reasonable." "Subjectively genuine" requires credible testimony from the asylum seeker. S*ee Wan Chien Kho v. Keisler*, 505 F.3d 50, 56 (1st Cir. 2007). "Objectively reasonable" requires a showing of past persecution or good reason to fear future persecution. *Ahmed v. Keisler*, 504 F.3d 1183, 1191 (9th Cir. 2007). In determining the objective reasonableness of an applicant's fear, an applicant must establish that she "faces a particularized threat of persecution." *Kotasz v. INS*, 31 F.3d 847, 851 (9th Cir. 1994); 8 C.F.R. § 208.13(b)(2)(B).

Absent a particularized threat, an applicant can establish an objective reasonableness of her fear by showing a pattern or practice of persecution. 8 C.F.R. 208.13(b)(2)(iii)(A). A pattern or practice of persecution exists when a group of persons are similarly situated to the applicant. *Id.* Such persecution must be systematic, pervasive, or organized, and the harm must be at the hands

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[2] *See Aliens and Nationality; Asylum and Withholding of Deportation Procedures*, 55 Fed. Reg. 30,674-01 (July 27, 1990) (codified at 8 C.F.R. pts. 3, 103, 208, 236, 242, and 253) (establishing asylum procedures).

of the government or a group that the government is unwilling or unable to control. *See Lie v. Ashcroft*, 44 F.3d 1378, 1383 (8th Cir. 1995).

Both the "individual risk" and "pattern or practice" standards were established by the Code of Federal Regulations, which provided immigration courts with guidelines of how and when these standards apply.[3] *See generally Diaz-Garcia v. Holder*, 609 F.3d 21 (1st Cir. 2010). Unlike an "individual risk" or a "pattern or practice", the disfavored group analysis is not articulated by the Code of Federal Regulation.[4] As a result, the disfavored group analysis has led to judicial inconsistency that lies in the fact that no two cases are alike, no two standards are alike, and this creates a problem for the courts and asylum seekers alike.

Presently, the Department of Homeland Security ("DHS") has not promulgated a rule clarifying how, or even whether, the asylum applicant can establish well-founded fear based on membership in a disfavored group. *See* 8 U.S.C.S. § 1101. Likewise, no agency has articulated a version of the disfavored group analysis for use by asylum officers. The numerous agency questions related to this analysis are interpreted entirely by the circuit courts, subjecting asylum applicants to injustice. *See generally Firmansjah v. Gonzales,* 424 F.3d 598 (7th Cir. 2005) (finding "[l]ack of unification among the courts can lead to injustice for U.S. asylum seekers.").

This Court must now resolve a circuit split and overrule a judicially imposed immigration standard that rests upon "alteration" of the standards of review. *Kho*, 505 F.3d at 55. Even if this Court elects to adopt a disfavored group analysis, substantial evidence in the record compels a contrary conclusion that Petitioner is not a member of a disfavored group.

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[3] *See supra* note 1.

[4] *See generally Id.*

A. The Disfavored Group Analysis Inherently Violates the Authority that Congress Delegated to the Attorney General, and Fails to Conform to this Court's Precedent.

Federal courts may not impose procedural requirements beyond what Congress has provided for. 8 U.S.C 1103; *Vermont Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 546 (1978) (finding "[...]Congress intended that the discretion of the agencies and not that of the courts be exercised [...] when extra procedural devices should be employed.") However, the Ninth Circuit has imposed the disfavored group analysis on the BIA. *Kho*, 505 F.3d at 55 (recognizing that the disfavored group analysis is an "alteration" of the standards of review and [...] "courts are 'bound by the standards Congress sets on matters of asylum eligibility").

The Ninth Circuit mistakenly assumed that a "pattern or practice" and a "practice of persecution" operate on a sliding-scale. *Sael v. Ashcroft*, 386 F.3d 922, 925 (9th Cir. 2004). Based on this assumption, the Court acted as a legislative body and disregarded a fundamental constitutional doctrine - separation of powers.[5] *See also Negusie v. Holder*, 555 U.S. 511, 517 (2009) (finding "congressional intent extends to agency rulemaking, [and] sufficiently careful and formalized agency individual adjudication").

Despite the constitutional respect owed to agency rule promulgation, the Ninth Circuit claimed that the disfavored group analysis is "a method consistent with that employed in other circuits." *Wakkary v. Holder*, 558 F.3d 1049, 1064 (9th Cir. 2009). However, there is ample disagreement with the *Wakkary* opinion, arguing that the disfavored group analysis improperly lowers the standard for asylum claims. *See Pupella v. Gonzales*, 207 F. App'x 683 (7th Cir.

[5] *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 588-89 (1952) (stating "Congress has exclusive constitutional authority to make laws necessary and proper to carry out the powers vested by the United States Constitution in the government of the United States, or any department, or officer thereof. The founders of the United States entrusted the lawmaking power to Congress alone in both good and bad times.")

2006) (holding that "the disfavored group analysis is based upon no statutory or regulatory text"); *See Siagian v. Holder*, 478 F. App'x 201, 203 (5th Cir. 2012); *See also Yanes-Estevez v. U.S. Att'y Gen.*, 389 F. App'x 974, 979 n.1 (11th Cir. 2010). *See Wan Chien Kho v. Keisler*. 505 F.3d 50, 55 (1st Cir. 2007) (rejecting the lower standard for individualized fear of future persecution). *cf. Knezevic v. Ashcroft*, 367 F.3d 1206, 1212 (9th Cir. 2004).

Additionally, the remaining circuits reject the disfavored group analysis test by expressing varying levels of uncertainty toward the analysis. *See Kasonso v. Holder*, 445 F. App'x 76, 80 (10th Cir. 2011); *Grichaev v. Holder*, 414 F. App'x 828, 830 (6th Cir. 2011); *Winata v. Mukasey*, 287 F. App'x 544, 547 (8th Cir. 2008); *Wijaya v. Gonzales*. 227 Fed. Appx 35, 38 fn.1 (2d Cir. 2007) (declining to use the disfavored group analysis).

Further, the disfavored group analysis directly contradicts this Court's precedent. *INS v. Cardoza-Fonseca*. 480 U.S. 421, 431 (1987). In *Cardoza-Fonseca*, this Court drew a boundary for courts to adhere to Congressional authority over asylum eligibility:

> "Courts must respect the interpretation of the agency to which Congress has delegated the responsibility for administering the statutory program[...]We do not attempt to set forth a detailed description of how the well-founded fear test should be applied..."

Id. at 448.

In disregard of this Court's precedent, the Ninth Circuit set forth a description of how the "disfavored group" in *Wakkary* should be applied. 558 F.3d at 1064. In *Wakkary*, the court detailed how the test should be applied, proscribing that disfavored groups are members that experience "widespread" "discrimination that affected a very large number of individuals" and "a certain portion of those individuals suffer treatment that rises to the level of persecution."

Wakkary, 558 F.3d at 1054. In addition, *Wakkary* cited specific examples for the agency to follow before remanding the case for review. *Id.* Therefore, this court should find that the disfavored group analysis is invalid because it is a judicially-created alternative to a statutory scheme. *Kho,* 505 F.3d at 55.

B. The Disfavored Group Analysis Improperly Modifies the Eligibility Standards Established by Congress in the Immigration and Nationality Act.

A disfavored group is a group of individuals, all of whom share a common, protected characteristic. *Kotasz*, 31 F.3d at 853. Many members of a disfavored group are mistreated, and a substantial number of whom are persecuted, are not threatened by a pattern of practice of systematic persecution. *Id.* An applicant can show a well-founded fear of persecution by showing membership in a disfavored group and face an individualized risk of being singled out for persecution. *Sael*, 386 F.3d at 925. These prongs operate in tandem and create arbitrary application without agency guidelines. 8 C.F.R. § 208.16(b)(2)(i)-(ii); *See Pupella*, 207 F. App'x 683 (stating the disfavored group analysis "seems needless in light of the 'pattern or practice' regulation"); *Firmansjah v. Gonzales,* 424 F.3d 598, 607 n. 6 (7th Cir.2005) (finding the disfavored group analysis creates a "lower threshold of proof").

This judicially-created procedure, when applied to immigration law, disrupts the very purpose of why refugees seek asylum in the United States - *equality*. For example, both the Ninth Circuit and the Third Circuit applied the disfavored group analysis to Chinese Christians facing persecution as Indonesian citizens. *See Lie v. Ashcroft,* 396 F.3d 530 (3d Cir.2005); *Sael v. Ashcroft,* 386 F.3d 922 (9th Cir.2004). In *Sael*, under the disfavored group analysis, the court ruled that ethnically Indonesian citizens had established a well-founded fear of persecution in Indonesia. 386 F.3d at 927. In contrast, the Third Circuit held that the Indonesian citizens failed to meet the threshold of a well-founded fear of future persecution. *Lie,* ,396 F.3d at 538.

If the disfavored group analysis is found valid, the denial of refugees facing the same persecution will depend on *where* they apply, as opposed to *why* they applied. *See Firmansjah v. Gonzales,* 424 F.3d 598, 607 n. 6 (7th Cir.2005). The only way to create a consistent standard is to give deference to agency rule promulgation, and limit rogue court-created standards in asylum proceedings. Otherwise, a limitless potential for court-created law will further detriment asylum eligibility. *See Negusie v. Holder*, 555 U.S. 511, 517 (2009) (stating that judicial deference in the immigration context is of special importance, because executive officials exercise especially sensitive political functions that implicate questions of foreign relations); *See also Gonzales v. Thomas*, 547 U.S. 183, 186 (2006).

Further, the disfavored group analysis disrupts an already backlogged immigration system. As the number of affirmative asylum applications has significantly increased in recent years, so has the backlog of cases pending final decisions. As of November 30, 2018, the immigration court had a backlog of more than 800,000 cases, a forty-nine percent increase since January 2017.[6] In March 2018 alone, 8,055 asylum applications were filed.[7] As of March 31, 2018, USCIS had 318,624 asylum applications pending final decision.[8] By the end of 2018, a total of 159,590 new asylum applications had been filed.[9]

Therefore, this Court should find that the disfavored group analysis is invalid. The disfavored group analysis further complicates immigration law and contradicts both Congressional authority and Supreme Court precedent. The standard for seeking asylum must remain consistent amongst all who wish to obtain freedom. Maintaining a narrow ground for asylum will prevent an

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[6] Syracuse University's Transactional Records Access Clearinghouse, December 18, 2018 at https://trac.syr.edu/whatsnew/email.181218.html

[7] *See* Department of Justice Workload and Adjudication Statistics found at https://www.justice.gov/eoir/workload-and-adjudication-statistics (updated December 6, 2018).

[8] *Id.*

[9] *Id.*

onslaught of inconsistent rulings that result from unauthorized standards. *See Ahmed,* 467 F.3d at 675.

C. The Thirteenth Circuit's Finding That Petitioner Had a Well-Founded Fear of Future Persecution is Not Supported by the Record And is an Example of the Arbitrary Findings That Result from Applying the Disfavored Group Analysis.

A court may reverse a BIA determination when substantial evidence compels a contrary conclusion. *See INS v. Elias-Zacarias*, 502 U.S. 478, 481 (1992); *Mazariegos v. Office of the United States AG*, 241 F.3d 1320, 1324 (11th Cir. 2001) (finding the standard is "*not* whether there is substantial evidence for some *other* finding that could have been, but was not, made.")

The lower court concluded that Petitioner had a well-founded fear of future persecution based on her membership as an ethnic Isda-Timog woman, and that she is likely to be targeted as a member of that group. Op. at 12. However, the court misapplied the disfavored group analysis by first, finding that Petitioner is a member of a disfavored group, and second, finding that Petitioner had an individualized risk.

1. *Petitioner Is Not a Member of a Disfavored Group Because the Threat of Harm to Ethnic Isda-Timog Women is Speculative and Remote.*

A disfavored group consists of "individuals [...] who share a common, protected characteristic, many of whom are mistreated, and a substantial number of whom are persecuted." *Kotasz*, 31 F.3d at 853. Female status alone will not meet the "disfavored group" standard. *Lolong v. Gonzales*, 484 F.3d 1173, 1186 fn. 6 (9th Cir. 2007). A government's perspective is a critical factor in determining both a "disfavored group" and individual targeting. *Halim v. Holder*, 590 F.3d 971, 979 (9th Cir. 2009).

Timog women were not regularly mistreated because the Basag government took an affirmative action to provide safety in Mayaman. R. at 6. The Basag government and Life Inc. took affirmative steps to protect women. R. at 6; *See Kotasz*, 31 F.3d at 855 (denying asylum to

petitioner's wife because evidence showed that the government instituted programs to help gypsies).

The Basag government took concrete steps to suppress ethnic violence because the government encouraged Basag citizens to report any harassment. R. at 6. *See also Halim,* 590 F.3d at 979. Additionally, while Life Inc. provided work safety training to employees to avoid female mistreatment, the government made affirmative efforts to provide Mayaman citizens with infrastructure for a safe walk to a water facility. R. at 8. After hearing of the reports of threats, Life Inc. immediately responded by requiring mandatory sexual harassment training for its employees. *Water Warriors: Crisis in Basag*, THE BASAG MAGAZINE (Jan. 14, 2017); *Risking Rape to Reach Water*, THE PACIFIC WORLDLY, at 20 (Jul. 18, 2017). Moreover, in this case, the persecution is not conducted by a government actor, but a private actor. (see analysis below in section II(B)).

Further, the mistreatment does not surmount to the widely targeted minorities as in Ninth Circuit case law. In *Sael*, an ethnic minority sustained a long history of anti-Chinese violence dating back to 1740, with hostile attacks continuing into the 1900s. 386 F.3d at 925. In *Tampubolon v. Holder*, military and political elite intentionally helped violent militia groups whose goal was to kill, convert, or drive out all non-Muslims. 598 F.3d 521, 525 (9th Cir. 2010). In *Kotasz*, the petitioner faced a communist regime, with members that had been detained, beaten, and harassed by government police. 31 F.3d at 855. However, in *Kotasz*, the petitioner's wife was denied asylum because evidence showed that the government instituted programs to help gypsies, analogous to the government's news broadcast to report Life Inc. crime. *Id.* at 854. Here however, there is no evidence that Timog women were beaten or detained like in *Kotasz*, no

evidence of a long history of violent attacks and hostility like in *Sael*, and no evidence of homes being destroyed or people being driven out like in *Tampubolon*.

Thus, because Petitioner lacked membership in a disfavored group, she must demonstrate a higher risk of individualized harm to counterbalance a weak showing of group mistreatment.

2. *Petitioner's Individualized Risk of Harm is Not Appreciably Different from the Dangers Faced by Fellow Citizens.*

Petitioner must also show an individualized risk of being singled out for persecution. *See Halim,* 590 F.3d at 978–80. The risk should be appreciably different from the dangers faced by fellow citizens. *Vides-Vides v. Immigration & Naturalization Serv.*, 783 F.2d 1463, 1469 (9th Cir. 1986); *See also Salamanca v. United States AG*, 135 F. App'x 406 (11th Cir. 2005) (holding that persecution requires more than a few isolated incidents of verbal harassment or intimidation).

Evidence of death, punishment, or the infliction of substantial harm did not extend broadly to Timog women. *See Vatulev v. Ashcroft,* 354 F.3d 1207, 1210 (10th Cir. 2003) (holding that the behavior must threaten death, punishment, or the infliction of substantial harm or suffering. Threats alone generally do not constitute persecution). Here, in Mayaman, people were not targeted because they were Timog women, but instead because of their poorer appearance. R. at 9. In Mayaman, Petitioner did not witness any violence toward Timog women, only hearing rumors of potential threats. R at 9. In Isda, she only heard rumors of potential sexual harassment and rape. R. at 9. The evidence presented merely amounts to general mistreatment and is insufficient to satisfy the requirements of an individualized risk of persecution.

Even accepting Petitioner's assertions as true, the evidence fails to establish the minimal showing of individual targeting. In *Lolong,* where relief had been granted, the "petitioner had presented some evidence that she faced a unique risk of persecution distinct from the mere

membership in a disfavored group." 484 F.3d at 1180 n. 5. Here, the evidence failed to distinguish Petitioner's exposure to threats from those of all other ethnic Timog women. The only time that she was threatened was when she lived in Isda, and was stopped by chance at the water facility. R. at 7. Two of the three instances occurred with the same guard, but the second encounter was by happenstance, without the guard's intent to personally target Petitioner. R. at 7. These instances could have happened to any woman or man at the water facility.

For these reasons, the record has provided substantial evidence that compels a conclusion contrary to the lower court's finding because Petitioner's lack of membership in a disfavored group creates an "objectively" high standard of proof for individualized risk. The harassment did not surmount to individualized risk. Petitioner failed to meet her burden of establishing a well-founded fear of future persecution and is therefore not eligible for asylum.

II. THE THIRTEENTH CIRCUIT PROPERLY AFFIRMED THE BOARD OF APPEALS FINDING THAT PETITIONER WAS THE PROPER PARTY TO ASSUME THE BURDEN OF PROOF FOR INTERNAL RELOCATION.

Beginning in 1943, this Court embarked on a path that deferred to "special administrative competence." *See SEC v. Chenery Corp.*, 318 U.S. 80 (1943). In 2009, the landmark holding in *INS v. Orlando* solidified that path in the Immigration and Nationality Act ("INA"). 537 U.S. 12, 16–17 (2002) ("our ordinary rule is to remand and give the BIA an "opportunity to address the matter in the first instance, in light of its own expertise.") Although the ordinary remand rule is triggered by INA ambiguity, the notion that ambiguity is the sole touchstone for remand fails to realize the primary principle pillar of *Chenery* – that institutional competence is the basis for agency remand. *See Negusie v. Holder*, 555 U.S. 511, 530 (2009).

Pursuant to the INA, an asylum applicant does not have a well-founded fear of future persecution if she could avoid persecution by relocating to another part of her country. 8 C.F.R. §

208.13(b)(2)(ii). Absent government or government-sponsored persecution, the asylum applicant has the burden of proving that internal relocation would be unreasonable. 8 C.F.R. § 208.13(b)(3)(i). If the alleged persecution is by the government or is government-sponsored, the burden shifts to the INS to show that internal relocation would be reasonable. 8 C.F.R. § 208.13(b)(3)(ii); *Singh v. Moschorak,* 53 F.3d 1031, 1034 (9th Cir.1995).

Petitioner seeks to remand Thirteenth Circuit's holding for a legal interpretation of "government-sponsored" under 8 C.F.R. § 208.13(b)(3)(i). Accordingly, the Thirteenth Circuit properly affirmed the Board of Immigration Appeal's ("BIA") holding that placed the burden of proof on the Petitioner. Op. at 18. Because "government-sponsored" has not been defined by promulgation or case-by-case adjudication, *Chevron* deference is inapplicable. *See Sandoval,* 866 F.3d at 993-94.

Congress expressly authorized the Attorney General to grant asylum to an alien who demonstrates a "well-founded fear of persecution." INA, §§ 101(a)(42)(A), 208(a), 243(h), 66 Stat. 166, as amended. Thus, absent *Chevron*, if the BIA has not spoken on "a matter that statutes place primarily in agency hands," the Court's ordinary rule is to remand determinations for agency expertise. *Orlando Ventura*, 537 U.S. at 16–17. Though, this Court noted that remand should not be applied when it would result in "idle and useless formality" that converts "judicial review of agency action into a ping-pong game." *NLRB v. Wyman–Gordon Co.,* 394 U.S. 759, 766 n. 6 (1969). In short, Petitioner bore the proper burden because the Thirteenth Circuit correctly determined that Life, Inc. was not "government-sponsored."

Because this question falls under an exception to the "ordinary remand rule," this Court should look to analogous circuit law regarding judicial remand. R. at 6. Circuit courts are split on the issue of whether *Orlando-Ventura* mandated judicial remand for the BIA to interpret all INA

ambiguity. *Denis v. Att'y Gen.*, 633 F.3d 201, 209 (3d Cir. 2011). Yet, the interpretive question in this case does not require BIA competency to resolve an immigration-specific question. *Id.* at n.11. Hence, the Thirteenth Circuit properly determined that remand was an improper method to resolve the meaning of "government-sponsored." R. at 13.

In the alternative, if this Court finds the definition of "government-sponsored" improper, the burden of proof remains on the Petitioner. Insofar as the record provides, there is substantial evidence to support the BIA's adopted conclusion, that Life, Inc. is a non-government actor.

A. The Court Should Adopt an Exception To The Ordinary Remand Rule When Ambiguous Language Does Not Implicate Immigration-Specific Expertise.

The argument that "law requires a remand when the statute is ambiguous" fails to distinguish between executive and judicial competencies. R. at 16. *See Negusie*, 555 U.S. at 530 (2009) (Stevens, J., concurring) (finding *Chevron* "accounts for the different institutional competencies of agencies and courts"). When the INA is "silent" on the question at issue, courts should remand only "to the extent that is within the domain of the agency's special expertise in immigration law." *See, e.g.*, *Higgins v. Holder*, 677 F.3d 97, 109 (2d Cir. 2012). Thus, if the ambiguous text is not immigration-specific, courts are better suited to interpret the INA, and accordingly, must not remand. *Wyman-Gordon, Co.*, 394 U.S. at 766, n.6.

Such a holding would provide a framework for the narrow circumstance when INA interpretation does not require immigration-specific expertise. *Dale*, 610 F.3d 294 (5th Cir. 2010) (finding that "although BIA possessed expertise in interpreting immigration regulations, it brought no specialized knowledge or expertise to the issue..."). In other words, if an interpretative question could implicate a U.S. company as government-sponsored, courts are better equipped to ensure that federal regulations align with a proper interpretation to avoid conflict with domestic regulations for companies, like Life Inc., who are engaged in global

business. *Murray v. The Schooner Charming Betsy,* 6 U.S. (2 Cranch) 64, 2 L.Ed. 208 (1804) ("a statute must be interpreted in a manner consistent with U.S. international obligations"); *Dale*, 610 F.3d at 294. Despite BIA's expertise in interpreting immigration regulations, it brings no specialized knowledge and expertise to answer the question outside the scope of Congressional authority. *Id.*

"Government-sponsored" is the quintessential example of a term that should undergo judicial, rather than agency, interpretation. Taking the instant case as an example, judicial courts regularly construe "government-sponsored" under federal law. *See, e.g., Denis*, 633 F.3d at 209 n.11; See also *Drakes v. Zimski*, 240 F.3d 246, 251 (3d Cir. 2001) (finding BIA did not call upon any particular expertise to define 'forgery' because courts interpret the term "all the time" under federal law).

For example, a "government-sponsored" enterprise is defined under Title 2 of the U.S. Code, permitting the court to interpret the types of conduct Congress intended the phrase to encompass. 2 U.S. Code § 622(8); *Denis*, 633 F.3d at 209 n.11. Likewise, "government-sponsored" is referenced outside the scope of the INA in the context of government-sponsored agencies, activities, or violations. 22 U.S. Code § 3102 (agency); 22 U.S. Code § 2460 (exchanges and training); 22 U.S. Code §6401(a)(4) (violations).

At this point, an agency interpretation of "government-sponsored" is likely more grounded in speculation than reality. Indeed, the agency often misinterprets even the most rudimental words such as "admission" under INA § 237(a)(2)(A)(i). *Aremu v. Dep't of Homeland Sec.*, 450 F.3d 578, 579 (4th Cir.2006) ("Regardless of the BIA's speculation...[the] statute plainly says what it says, and the fact remains that the definition of "admission" [...] simply does not include an adjustment of status."). This concern illustrates why remand is appropriate *only* when

immigration-expertise is required to interpret the term. 8 U.S.C. § 1101(a)(13)(A); *See also Conn. Nat'l Bank v. Germain,* 503 U.S. 249, 253–54 (1992) ("We have stated time and again that [immigration] courts must presume that a legislature says in a statute what it means, and means in a statute what it says...").

Petitioner seeks to circumvent the immigration-specific issues in Supreme Court precedent. *See, e.g., Negusie*, 555 U.S. at 530; *Orlando Ventura*, 537 U.S. at 16–17; *I.N.S. v. Aguirre-Aguirre*, 526 U.S. 415 (1999). The cases in which Petitioner relies, weaken Petitioner's argument because they are all distinguishable. In *Negusie*, this Court stated that remand was proper because the BIA's analysis was based on legal error and because agency expertise was required to determine whether duress was included in the "persecutor bar." 8 U.S.C. § 1158(b)(2)(A)(i); 555 U.S. at 530. Hence, ambiguity was not enough on its own to remand for BIA interpretation. 555 U.S. at 530.

Similarly, in *Orlando Ventura*, remand was based on providing the BIA the opportunity to bring its expertise to bear upon the "changed circumstances" in Guatemala. 537 U.S. at 16–17. Lastly, the Ninth Circuit in *Aguirre-Aguirre* ultimately failed to accord deference for the BIA to interpret a serious nonpolitical crime exception. 526 U.S. at 415. Unlike *Aguirre-Aguirre*, the interpretative question here does not risk defining a political crime in another country or granting asylum to an applicant that may have been involved with the political group overseas. *Id.*

In contrast, many circuits have adopted a diligent reading of Supreme Court precedent that acknowledged both ambiguity and immigration expertise as a basis for remand. *Bamidele v. I.N.S.*, 99 F.3d at 557 (3d Cir. 1996) (declining remand because question "did not require special knowledge within INS's field of technical expertise"); *Yong Wong Park*, 472 F.3d 66, 71 (3d Cir. 2006) (declining remand because foreign policy concerns were "largely absent"); *Soliman v.*

Gonzales, 419 F.3d 276, 281 (4th Cir. 2005) (declining remand because criminal law is "not within BIA authority or expertise"); *Omagah v. Ashcroft*, 288 F.3d 254, 258 (5th Cir. 2002) (declining remand because federal and state criminal law "lies beyond the scope of the BIA's delegated power or accumulated expertise"); *Zivkovic v. Holder*, 724 F.3d 894, 897-98 (7th Cir. 2013) (declining to remand because "some questions of law do not depend on agency expertise"); *Marmolejo-Campos v. Holder*, 558 F.3d 903 (9th Cir. 2009) (declining remand when the BIAs' interpretation of "moral turpitude" failed to "particularize" the term in any meaningful way).

Moreover, an absolute remand rule is particularly ill-suited because the immigration courts are severely backlogged.[10] As of November 30, 2018, as noted in Section I(B) of this argument, the immigration court system had a backlog of more than 800,000 cases, a forty-nine percent increase since January 2017. In contrast, adopting a specific-expertise exception reflects the proposition that instead of working against the agency, courts can work together in a synchronized manner to avoid futile remands. *See* Patrick J. Glen, "To Remand, or Not to Remand": Ventura's Ordinary Remand Rule and the Evolving Jurisprudence of Futility, 10 Rich. J. Global L. & Bus. 1 (2010) (finding that an overwhelming circuit majority has confronted the "question of whether remand for further proceedings would be futile").

Therefore, this Court should find that immigration-specific expertise is not required to define "government-sponsored." Furthermore, this Court should also affirm the Thirteenth Circuit on this issue and adopt an exception to the remand rule to honor the respect this Court provides to the competency of administrative and judicial courts.

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[10] Syracuse University's Transactional Records Access Clearinghouse, December 18, 2018, https://trac.syr.edu/whatsnew/email.181218.html

B. The Thirteenth Circuit's Interpretation of "Government-Sponsored" Persecution Is a Reasonable Construction of the Statute and Is Supported by the Underlying Policy of Internal Relocation.

Government-sponsored persecution is presumed to have countrywide presence. *Singh v. Moschorak*, 53 F.3d 1031(9th Cir. 1995). Without countrywide harm, the government has no burden to show that, under the circumstances, internal relocation is reasonable. *Id.*

In the appellate opinion, the Thirteenth Circuit echoed a similar fact-specific analysis for determining whether Life Inc. was government-sponsored. Op. at 17. In sum, the Thirteenth Circuit determined that an entity is not government-sponsored when, under the totality of the circumstances, its "reach is not so extensive to equate it to the extent of the government." Op. at 17. This analysis provided a reasonable conclusion that is supported by the principles of statutory interpretation and the underlying policy of internal relocation. Op. at 17.

1. The Principles of Statutory Interpretation Strongly Support a Conclusion That Life Inc. is a Non-Government Actor Under 8 C.F.R. § 208.13(b)(3)(ii).

The plain and unambiguous language in a statute must prevail unless legislation has clearly expressed contrary intent. *Barnhart v. Sigmon Coal Co., Inc.*, 534 U.S. 438 (2002). The meaning of statutory language depends placement and purpose in the statutory scheme context. *Id.* at 450 ("inquiry ceases in a statutory construction case if the statutory language is ambiguous and the statutory scheme is coherent and consistent.")

Under the plain meaning of 8 C.F.R. § 208.13(b)(3)(ii), "government-sponsored" includes two discrete phrases — "government" and "sponsored." "Government" indicates Basag as the organization with "authoritative direction or control" over the country. *Government,* Merriam-Webster Dictionary (10th ed. 2019). However, "sponsor" is ambiguous because it has multiple meanings: 1) "a person or an organization that pays for or plans and carries out a project or

activity"; or 2) "one who assumes responsibility for some other person or thing." *Sponsor,* Merriam-Webster Dictionary (10th ed. 2019).

Applying the first definition to the text, to be an alleged "government-sponsored" persecutor, Basag must have paid, or planned, for Life Inc. to carry-out persecution. *Corley v. U.S.*, 556 U.S. 303 (2009). The record here contained no evidence that Basag paid or planned for Life Inc. guards to carry-out persecuting acts. Under the canon of "*expressio unius*", the Thirteenth Circuit reasonably read "government-sponsored" in context with persecution. *Corley,* 556 U.S. at 303 (defining the canon of *expressio unius est exclusio alterius*: "Statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous.")

The second definition prohibits an overreaching conclusion the Basag government assumed responsibility for Life Inc.'s alleged persecution because the government never engaged, or showed a willingness to allow persecution in Basag. *Singh v. Moschorak,* (9th Cir. 1995) (holding that there is no safe place for an asylum applicant when the government has *engaged* in acts of punishing opinion [...]"); *Lopez-Gomez v. Ashcroft*, (5th Cir. 2001) 263 F.3d 44 (finding that INS must rebut the government's *willingness* and *ability* to persecute an individual anywhere within its jurisdiction"). The Basag government at most, engaged in a concession contract to improve its water infrastructure. However, an agreement to manage water is not an agreement to persecute. 8 C.F.R. § 208.13(b)(3)(ii).

Suitably, the principles of statutory interpretation support the Thirteenth Circuit's conclusion that Life Inc. is a non-government actor. *N.L.R.B. v. SW General, Inc.*, 137 S.Ct. 929 (2017).

2. A Reviewing Court Must Consider the Totality of the Circumstances to Determine Whether a Company is "Government-Sponsored."

The totality of the circumstances analysis is reasonable to determine government sponsorship for corporate entities because the relationship between the government and company greatly

varies on a case-by-case basis. See, e.g. *Ham Investments, LLC v. U.S.*, 89 Fed.Cl. 53 (2009) (finding Court of Federal Claims will look to the totality of the circumstances if government waived the contractual requirements with a third-party company).

On appeal, Judge Castanien reasonably concluded that Life Inc. was more comparable to a non-government actor. Op. at 17. Unlike a bright line rule that imposes per se government-sponsorship based on a concession contract, a totality of the circumstances test will avoid a harsh mischaracterization when the government has little involvement with the company.

To illustrate, the dissent referenced Gambia's Supreme Islamic Council ("SIC"), to show a "government-sponsored" group could be tasked to fulfill a government role.[11] Under the circumstances, the court would find that unlike SIC, who banned religious programs on the government-owned public and private radio stations, Life Inc. encouraged Basag citizens to report criminal activity on the government owned radio stations in Basag. R. at 6.

Similarly, this case is distinguishable from the oil concession contracts in Angola, where the circumstances include oil facilities defended by military and razor-wire fences that secured government revenue for a corrupt state.[12] Conversely, under the concession contract here, Life Inc. protected the water facilities with privately funded guards, and Basag leaders retain no control of the company or water resource. R. at 5.

In a different example, Bechtel, a California company, managed Bolivia's water resources under a 40-year concession.[13] Bechtel raised the water prices for indigent citizens by 50%, causing an unlimited amount of litigation against the Bolivian government. Contrary to Bechtel,

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[11] 2016 International Religious Freedom Reports: The Gambia (Aug. 15, 2017), https://www.state.gove/j/drl/rls/irf/2016/af/268652.htm.
[12] Kristin Reed, Crude Existence: Environment and the Politics of Oil in Northern Angola, Ch. 1 (2009)
[13] A. de Gramont, 2006 After the Water War: The Batte For Jurisdiciton in Aguas Del Tunari, S.A. v. Republic of Bolivia, https://www.crowell.com/documents/After-the-Water-War_The-Battle-for-Jurisdiction-in-Aguas-del-Tunari_v_Bolivia.pdf

Life Inc. made affirmative efforts to help the community by training staff and encouraging the public to report any mistreatment so the offender could be terminated. Op. at 5. The concession contracts in Angola, Bolivia, and Gambia represent the intertwinement noted in the Thirteenth Circuit's opinion. Op. at 16. Accordingly, under the totality of the circumstances here, the Thirteenth Circuit correctly found the lack of government control between Basag and Life Inc. Op. at 17.

Thus, the Thirteenth Circuit properly defined Life, Inc. as a non-government actor because under the circumstances at issue, the lack of violence in Mayaman showed a separation between the Basag government and Life, Inc.

C. If the Thirteenth Circuit's Interpretation is Outside the Scope of Judicial Authority, Petitioner Remains the Proper Party to Assume the Burden of Proof Because Substantial Evidence Supports the Board of Appeals' Finding that Life Inc. is a Non-Government Actor.

As a preliminary matter, Respondent does not argue that this Court must make a determination of whether internal relocation was reasonable. The paramount issue, however, specifically asks this Court whether the proper party bore the burden of proof for internal relocation. Op. at 2.

Under the substantial evidence standard, the BIA's determination must be upheld when supported by reasonable, substantial, and probative evidence in the record. See *INS v. Elias-Zacarias*, 502 U.S. 478, 481 (1992).

As noted in the appellate record, the IJ found that "Life Inc. is a non-governmental actor" and thus, determined that "Marcos must prove...it would be reasonable for her to relocate" Op. at 15. Accordingly, this Court should find that substantial evidence supported a conclusion that Life, Inc. is a nongovernment actor, and affirm the circuit court decision that remand is not compelled by the record. I.N.S. v. *Elias–Zacarias*, 502 U.S. 478 (1992).

1. *Substantial Evidence Strongly Supports A Conclusion That Life, Inc. Is A Non-Government Actor, And Basag Was Able And Willing To Control The Private Criminal Conduct.*

Non-government action does not constitute persecution when there is some showing of government involvement or control of the organization. INA, § 101(a)(42)(A), as amended, 8 U.S.C.A. § 1101(a)(42)(A). To establish persecution by a private actor, Petitioner must show that Basag was either "unwilling or unable" to protect her from persecution. *See Kholyavkiy v. Mukasey,* 540 F.3d 555, 575 (7th Cir. 2008). *Burbiene v. Holder*, 568 F.3d 251, 255 (1st Cir. 2009).

The record offered specific findings that demonstrated a lack of government involvement in Life Inc.'s conduct. Op. at 5. First, the Basag government did not own Life, Inc. because Life, Inc. is a private entity, "incorporated in Delaware." R. at 5. Second, the concession contract attenuated the relationship between Basag and Life, Inc. because Life, Inc. had the "exclusive obligation" to operate the water resources. Op. at 4. Hence, Basag had no influence over Life, Inc.'s management or daily operations. Op. at 4. Third, the Basag military force limited protection to Life, Inc., requiring Life, Inc. to hire private guards, separate from the Basag military. Op. at 5. Lastly, the future presidential candidates of Basag had no interest to reinstate government control over the water resources. Op. at 5. Under the preceding facts, and the record as a whole, provided substantial evidence to support a finding a marginal connection between the Basag government and Life Inc. *See* Li v. INS, 453 F.3d 129, 135 (2d Cir. 2006).

Furthermore, the Basag government had the ability and willingness to control the criminal activity of Life Inc. employees. *Menjivar v. Gonzalez*, 416 F.3d 918, 922 (8th Cir. 2005) (finding control of a private actor because a problem of violence does not override evidence that police conducted a thorough investigation). The record indicated that Basag was willing to protect

Petitioner because the "Basag police force would investigate any reported crimes committed by Life Inc. guards." Op. at 17.

However, because Petitioner did not report her interactions or fears to the government, Petitioner did not provide an opportunity for an officer to employ the available protections. Op. at 17. Additionally, on a state radio and public news broadcast, the Basag government proactively encouraged its citizens to report the criminal activity, announcing Life Inc.'s statement that "any Life Inc. guard suspected of sexual assault would face immediate termination." Op at 17. *Kholyavskiy v. Mukasey*, 540 F.3d 555, 575 (7th Cir. 2008).

Thus, because Life Inc. is not subject to Basag control, and Basag is able and willing to control criminal conduct of any Life Inc. employees, the finding that Life, Inc. is a nongovernment actor is supported by substantial evidence. I.N.S. v. *Elias–Zacarias*, 502 U.S. 478 (1992).

2. *The Record Failed to Provide Evidence to Compel a Remand Because the Evidence Lacked Proof of Unequivocal Error.*

To reverse a BIA determination, the applicant must show that the evidence was so compelling that any reasonable fact finder would disagree with the BIA's conclusion. *Blanco De Belbruno v. Ashcroft*, 362 F.3d 272 (4th Cir. 2004) ("This...standard...recognizes the respect we must accord to both the BIA's expertise in immigration matters and its status as the Attorney General's designee in deportation decisions.") A reversal may occur "only if the record "unequivocally indicates error." "The mere fact that the record may support a contrary conclusion is not enough to justify a reversal of administrative finding." *Adefemi v. Ashcroft,* 386 F.3d 1022, 1027 (11th Cir. 2004).

Petitioner speculates that Life, Inc. is "government-sponsored", and in doing so, thwarts the respect given to BIA determinations. *De Belbruno*, 362 F.3d at 273. Because the IJ determined

that "Life, Inc. is a non-government actor", the substantial evidence standard does not support a remand on the basis of speculation. *Chen v. D.O.J.*, 471 F.3d 315, 399 (2d Cir. 2006) ("because the record...contains substantial evidence supporting the BIA's finding, we need not determine whether its lack of discussion of the claim's speculative nature constitutes error").

Despite Petitioner's notion that the BIA must address whether Life Inc. is government-sponsored, the record indicates that the Immigration Judge had already done so. Even if there is support that the Immigration Judge should provide more reasoning, the evidence does not compel remand based on inference. *cf. Afriyie v. Holder*, 613 F.3d 924 (9th Cir. 2010) (finding remand because the IJ's opinion contained contradictory findings for the burden of proof); *Tillery v. Lynch*, 821 F.3d 182, 185 (1st Cir. 2016); *Patel v. AG of the United States*, 259 F.App'x 511, 513 (3d Cir. 2007).

Thus, the evidence does not compel a reversal, and for these reasons, substantial evidence supported the finding that Life, Inc. is a non-government actor, rendering Petitioner the proper party to assume the burden of proof for internal relocation. See *INS v. Elias-Zacarias*, 502 U.S. 478, 481 (1992).

CONCLUSION

The disfavored group analysis is not a valid basis to establish a well-founded fear of persecution for the purposes of asylum eligibility. The INS and the DHS have promulgated asylum laws through the Immigration and Naturalization Act, which does not include a disfavored group analysis standard. Significant case law has found the disfavored group analysis outside the scope of judicial authority and a lower threshold for asylum seekers, creating significant inconsistencies in asylum eligibility. If this standard applied, however, petitioner does not meet her burden of showing that Timog women are a widely victimized and disfavored group, nor that she specifically faces an individualized risk of persecution.

Although this Court need not reach the remand issue because substantial evidence strongly supported the conclusion that Life Inc. is a non-government actor, an opinion articulating the proper test for remand in future cases would be helpful. Accordingly, it was proper to allow an exception to the remand rule when INA ambiguity does not implicate immigration-specific expertise. Moreover, the interpretation of "government-sponsored" was reasonable by consideration of the circumstances at issue.

For these reasons, Respondent requests that this Court to find that the disfavored group analysis is invalid based on an unauthorized standard. Secondly, Respondent asks this Court to affirm the Thirteenth Circuit on finding that Petitioner was the proper party to assume the burden of internal relocation, and articulate a clear holding that an exception to the ordinary remand rule may apply when administrative competency is not in question.