No. 17-17002

IN THE

SUPREME COURT OF THE UNITED STATES

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 THE RESPONDENT

UC DAVIS ASYLUM & REFUGEE LAW
NATIONAL MOOT COURT COMPETITION FOR

ATTORNEYS FOR THE RESPONDENT: TEAM 1016

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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.

ISSUES PRESENTED

I. Federal immigration regulations dictate that the only way for a petitioner to prove a well-founded fear of persecution absent individualized risk is by establishing a pattern or practice of discrimination against a group to which petitioner is a member. Here, the Thirteenth Circuit found a well-founded fear of persecution because of Marcos' membership in a "disfavored group," despite a lack of any pattern or practice of persecution. Is the "disfavored group" approach an valid interpretation of immigration regulations?

II. An asylum applicant has the burden of proof to establish that internal relocation is unreasonable, unless they establish past persecution, the persecutor is a government, or the persecution is government-sponsored. Marcos failed to establish past persecution, does not argue that she was persecuted by the Basag government, and was sexually harassed by security guards from a privately-owned company. Did the Immigration Judge correctly assign the burden of proof to Marcos to demonstrate that substantial evidence supported a finding that future persecution could be avoided by internal relocation?

STATEMENT OF FACTS

This case concerns an asylum application by Petitioner, Leila Marcos, a citizen of Basag, resident of Isda, and a Timog woman. (Thirteenth Circuit Record ("TCR") at 3). Basag is a nation located in the Western Pacific Ocean. (Factual Background ("FB") at 2). Basag consists of two islands: Mayaman and Isda. (FB at 2). It is home to two ethnic groups: the Hilagan and the Timog. (FB at 2). Generally, the Hilagan people live on Mayaman, and the Timog people resident on Isda. (FB at 2).

Recent global warming has caused rising tides and extreme flooding which destroyed several Isda villages and severely damaged the fishing industry—Isda's primary economic source. (FB at 2). As a result of the damage, many Isda-Timog relocated to Mayaman but they were noticeably poorer and had difficulty integrating into Mayaman's culture. (FB at 3).

The rising tides also polluted Isda's water sources with salt water. (FB at 3). In order to protect Basag's water supply, President Aquinto nationalized Basag's water sources in January 2012. (FB at 3). A year later, President Aquinto signed a 30-year Concession Contract with Life Incorporated ("Life Inc.") in which Basag assigned full control of all water facilities to the international corporation incorporated in Delaware, United Staes. (FB at 4). Life Inc. agreed to maintain and rebuild the water works in Basag, provide water, and pay annual fees to the government for the assignment for exclusive rights to the water facilities. (FB at 4). The Basag government agreed to provide military support for the water facilities if needed. (FB at 4).

Despite the contract, limited access to clean water continued to plague Isda residents giving rise to protests and a group called "Water Warriors." (FB at 4). The Water Warriors want the government to take control and accountability of the water situation and to that end they have attacked Life Inc. and government facilities with explosives. (FB at 4–5). In order to protect its

facilities, Life Inc. hired armed guards, many of which are ethnically Hilagan. (FB at 5). Since July 2016, the Basag military and Life Inc. guards have killed more than 75 people mistakenly identified as Water Warriors. (FB at 5).

These circumstances have given rise to other problems as well. A United Nations report indicates that women gathering water have been victims of nonconsensual sexual interactions with Life Inc. Guards between 2013 and February 2017. (TCR at 4).

Leila Marcos bikes ten miles every three days to gather water for her and her husband from a storage facility. (TCR at 4). On March 6, 2017, a Life Inc. guard told Marcos that she could get more water if she had sex with him. (TCR at 4). Marcos left the facility because she was afraid the Life Inc. guard would rape her based on a rumor that a Life Inc. guard had raped another woman. (TCR at 4). While there are no facts that suggest Basag police or government took legal action again the Life Inc. guard for the allege rape, Life Inc. carry out a sexual harassment training for its employees and created a new policy that any Life Inc. guard suspect of sexual assault would be immediately terminated. (TCR at 5).

On March 9, 2017, Marcos traveled to a second Life Inc. water distribution facility. (TCR at 5). On her way back, she found a newly metered well stationed with Basag military. (TCR at 5). There, she observed a Basag soldier ask a pregnant Isda-Timog woman to expose her stomach and chest to ensure she was not carrying explosives because he suspected her of being a Water Warrior. (TCR at 5, FB at 7). Once it was established that the woman was pregnant, she received her water and left without incident. (FB at 7).

On March 12, 2017, Marcos traveled to the second Life Inc. water facility where she met the Life Inc. Guard who has harassed her on March 6. (TCR at 5). This time, the guard told her that he would have his way with her. (TCR at 5). Between March 14 and March 27, Marcos

traveled to the first Life Inc. water facility without incident. Because of a heat wave, Life Inc provided water access closer to Marcos' village. (TCR at 5). On April 5, 2017, as she was living, a different Life Inc. guard grabbed har backside and whistled. (TCR at 5). Marcos told her husband of the incident, and on April 6, Marcos' husband confronted the guards with a fillet knife. (TCR at 5). When he pulled the knife, a guard shot Marco's husband in the arm. (TCR at 5). A group of the guards, including the guard who had solicited Marcos for sex, returned Marcos' husband to his home. (TCR at 6). When the guard saw Marcos, he made an upward thrusting motion with his two fingers toward her. (TCR at 6). That same day, the Marcos family traveled to Mayaman to receive medical attention. (TCR at 6). Because Mayaman is a tourist area, the water scarcity is more controlled, the tourism infrastructure prevents women from traveling far to gather water, and violence is not prevalent because the Water Warriors do not operate in the main tourist areas. (TCR at 6). The Marcos family stayed in Mayaman from April 2017 until August 2017. (TCR at 6). During that time, Marcos secured work at a small tourist shop. (TCR at 6). On one occasion, Marcos heard a Life Inc. guard say that "getting sex here is as easy as it is on Isda." (TCR at 6). Because Marcos feared for her safety, she left the Basag Islands for the United States on August 6, 2017. (TCR at 6).

STATEMENT OF THE CASE

On August 7, 2017, Marcos attempted to enter the United States but was denied entry because of an expired passport. (TCR at 3). She then applied for asylum which was subsequently denied by an Immigration Judge ("IJ"). (TCR at 3). The IJ found that Marcos had established a well-founded fear of persecution based on her membership in a disfavored group, namely as a Timon woman in the Basag Islands. (TCR at 3). However, the IJ found that Marcos could have avoided the persecution by relocating within Basag. (TCR at 3). Consequently, the

IJ denied Marcos' asylum application. (TCR at 3). The Board of Immigration Appeals ("BIA") affirmed the IJ's decision. (TCR at 3).

Marcos petitioned for review of the order denying asylum issued by the IJ and the Thirteenth Circuit granted review. (TCR at 3). The Thirteenth Circuit affirmed the IJ and BIA by holding that disfavored group analysis can establish well-founded fear of persecution and that Marcos had established well-founded fear of persecution. (TCR at 10–12). In addition, the Thirteenth Circuit affirmed the IJ and the BIA by not only holding that the court could answer whether Life Inc. is a government-sponsored entity, but also by maintaining that Life Inc. is not a government-sponsored entity. (TCR at 16). Therefore, Petitioner Marcos had the burden to show that relocation would not evade the persecution but failed to do so. (TCR at 17–18). On October 12, 2018, the Supreme Court granted certiorari. (Writ of Certiorari ("WC") at 2).

SUMMARY OF THE ARGUMENT

This Court should reverse the Thirteenth Circuit regarding the issue of well-founded fear of persecution. 8 C.F.R. sections 208.13(b)(2)(C)(iii) and 1208.13(b)(2)(C)(iii) dictate that the only way an asylum-seeker can prove a well-founded fear absent individualized risk is by establishing a pattern or practice of persecution against a group of people in which she is a part. However, the Eighth, Ninth, and now Thirteenth Circuits have held that someone can fulfill their burden of proof with membership in a "disfavored group", even if that group isn't subject to any current pattern or practice of persecution. This "disfavored group" approach simply contradicts the law on this issue instead of reasonably interpreting it. Accordingly, we ask this Court to hold that the "disfavored group" analysis is inappropriate in determining a well-founded fear.

Further, this Court should use the proper legal framework to hold that Marcos did not have a well-founded fear of persecution, based on the facts in the record. Although she claims to

be persecuted against as an Isda woman, her personal knowledge is limited to her encounters with a single guard who attacked her husband and harassed her. Harassment does not rise to the level of persecution, and persecution against women would not have resulted in injury to Marcos' husband. Plus, much of her belief of ongoing persecution is based on rumor, which is not enough for a fear to be well-founded. Finally, 8 C.F.R. sections 208.13 and 1208.13 do not provide for a well-founded fear of persecution based on gender. For these reasons, this Court should reverse the Thirteenth Circuit on the Well-founded fear issue, hold that membership in a disfavored group does not suffice, and further hold that Marcos did not establish a well-founded fear.

Meanwhile, this Court should affirm the Thirteenth Circuit regarding the burden of proof question because the IJ correctly assigned the burden of proof to Petitioner to show that internal relocation was unreasonable, and Petitioner failed to satisfy this burden. Under the Code of Federal Regulations, an asylum applicant does not have a well-founded fear of persecution if, under all the circumstances, the applicant could reasonably avoid persecution by relocating to another part of the applicant's country. 8 C.F.R. § 208.13(b)(2)(ii) (2018). The applicant bears the burden of proof to establish that relocation is unreasonable unless the applicant establishes past persecution, the persecutor is a government, or the persecution is government-sponsored. 8 C.F.R. § 208.13(b)(3)(i).

Petitioner did not contend that there was past persecution or that the persecutor was the government. (TCR at 9 n.3). Thus, the question depends on whether Life Inc. guards are government-sponsored. The answer to this question depends on whether (1) the BIA assigned the burden of proof with justification; (2) the Thirteenth Circuit could properly review if Life

Inc. was government-sponsored; and (3) whether the actions by Life Inc. guards were not government-sponsored.

Where the BIA fails to state who has the burden of proof regarding internal relocation, or if the Court of Appeals is unable to determine from the record if the BIA improperly assigned the burden of proof, then remand is required. *Singh v. Holder*, 423 Fed. Appx. 681 (9th Cir. 2011). Here, the BIA summarily affirmed the IJ, and the IJ expressly indicated that Petitioner had the burden of proof because Life Inc. was not government sponsored.

The Thirteenth Circuit correctly determined that Life Inc. was not "government-sponsored" because *Chevron* deference does not apply, and even if it does, the circumstances permit an exception to the ordinary remand rule. Under *Chevron* deference, a court reviewing an agency's interpretation of a statute must defer to that agency's interpretation under certain circumstances. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 468 U.S. 837, 842–44 (1984). However, where a statute is ambiguous and the agency has not provided an administrative interpretation, it is necessary for the court to construct its own interpretation of the statute. *Id.* at 843. Here, "government-sponsored" is ambiguous, Congress has not expressed its intent, and the BIA did not provide an administrative interpretation. Therefore, *Chevron* deference does not apply, there is no need to remand to the BIA for further investigation, and Thirteenth Circuit properly addressed the question *de novo*. However, even if *Chevron* deference applies, several circuit courts refuse to remand to the BIA when they already had the opportunity to address the issue in the first instance. *Ali v. Ashcroft*, 394 F.3d 780, 788 (9th Cir. 2005). Here, because the BIA summarily affirmed the IJ's decision, the IJ's decision is treated as the final agency decision. As such, the agency did address the issue in the first instance by determining that Life Inc. was not government-sponsored. (TCR at 4).

Finally, harassment by privately hired Life Inc. guards does not constitute government-sponsored persecution. In assessing whether persecution by a private party is government-sponsored, "the claim fails unless [the applicant] shows that the incidents of abuse 'occurred with the imprimatur' of the government." *Salman v. Holder*, 687 F.3d 991, 995 (8th Cir. 2012). Persecution is considered government-sponsored if it is executed "by persons or an organization that the government was unable or unwilling to control." *Menjivar v. Gonzales*, 416 F.3d 918, 921 (8th Cir. 2005). Here, Petitioner failed to give local authorities the opportunity to address her persecution because she did not report the events. In addition, Life Inc. does not carry the government's imprimatur because it is a private company that hired private guards for the facilities that it has complete control over. (TCR at 3–4). Furthermore, Life Inc. acts independent of the Basag government and is subject to Basag laws. (TCR at 5 n.1). Therefore, Life Inc. does not bear the imprimatur of the Basag government and the Basag government is not unwilling or unable to control Life Inc. Therefore, Life Inc. is not government sponsored and this Court should affirm the Thirteenth Circuit regarding the burden of proof question. Here, Petitioner failed to establish that internal relocation was unreasonable. Even if the burden of proof should have been assigned to Respondent, the factors weigh in favor of rebutting the presumption that relocation to Mayaman is unreasonable.

STANDARD OF REVIEW

This Court only reviews the BIA's decision unless the BIA summarily affirms the IJ's finding, in which case this Court reviews the IJ's decision as the final agency decision. *Salman v. Holder*, 687 F.3d 991, 994 (8th Cir. 2012) (citing *Mamana v. Gonzales*, 436 F.3d 966, 968 (8th Cir. 2006); *see Zhou Hua Zhu v. United States AG*, 703 F.3d 1303, 1312 (11th Cir. 2013) ("We review 'only the BIA's decision,' except to the extent that it 'expressly adopt[s] the IJ's opinion

or reasoning.'"). Here, the Court reviews the IJ's decision because the BIA summarily affirmed the IJ's opinion and reasoning. (TCR at 7).

Purely legal questions are reviewed *de novo*, while questions of fact are reviewed under the substantial evidence test. *Zhou Hua Zhu v. United States AG*, 703 F.3d 1303, 1312 (11th Cir. 2013); *Ali v. Holder*, 637 F.3d 1025, 1028–29 (9th Cir. 2011); *see De Castro-Gutierrez v. Holder*, 713 F.3d 375, 379 (8th Cir. 2013) (holding that the legal portion of a mixed question of law and fact is reviewed *de novo*). The substantial evidence standard provides that "administrative findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary." *Ali v. Holder*, 637 F.3d 1025, 1029 (9th Cir. 2011). Nevertheless, under *Chevron* deference, this Court defers to the agency's reasonable interpretation of the underlying statute. *Manzoor v. U.S. Dept. of Justice*, 254 F.3d 342, 346 (1st Cir. 2001) (quoting *Gailius v. INS*, 147 F.3d 34, 43 (1st Cir. 1998)).

ARGUMENT

I. THIS COURT SHOULD REVERSE THE THIRTEENTH CIRCUIT'S DECISION REGARDING WELL-FOUNDED FEAR OF PERSECUTION BECAUSE MEMBERSHIP IN A DISFAVORED GROUP DOES NOT ESTABLISH SUCH A FEAR UNDER FEDERAL REGULATIONS, AND BECAUSE PETITIONER DID NOT DEMONSTRATE SUCH A FEAR OF PERSECUTION.

A. Membership in a Disfavored Group Does Not Establish a Well-Founded Fear of Persecution Because The Ninth Circuit Disfavored Group Analysis Is A Contradiction of Federal Regulations, Not an Interpretation.

The Immigration and Nationality Act ("INA") gives authority to the Attorney General to grant asylum to any noncitizen inside the United States who is a refugee. 8 U.S.C. § 1103(a)(3) (2018). Under the INA, a refugee is any person outside of their country of nationality who is unable or unwilling to return to that country "because of persecution or a well-founded fear of persecution on account of race, nationality, membership in a particular social group, or political

opinion." 8 U.S.C. § 1101(a)(42) (2018). Here, Marcos does not challenge the finding that she did not experience past persecution. *See* TCR at p. 10, n. 3. Thus, to be granted asylum, Marcos must demonstrate a well-founded fear of persecution in the future.

The BIA has consistently defined persecution as "the infliction of suffering or harm, under government sanction, upon persons who differ in a way regarded as offensive (*e.g.,* race, religion, political opinion, etc.), in a manner condemned by civilized governments." *Matter of Laipenieks*, 18 I. & N. Dec. 433 (BIA 1983) (noting Congress's observations regarding BIA case law). Courts recognize that persecution is extreme conduct; conduct that is unjust, offensive, or even illegal does not suffice. *See*, *e.g.*, *Nelson v. INS*, 232 F.3d 258 (1st Cir. 2000). Incidents of harm must be more than sporadic or isolated. *See*, *e.g.*, *Theodore v. Lynch*, 640 Fed. Appx. 653 (9th Cir. 2016) (citable under Fed. R. App. P. 32.1) (holding that ethnic Chinese applicant from Indonesia was not persecuted when his father was assaulted with machete by Indonesian man, he was bullied at school, and he stayed inside for a week during anti-Chinese riots).

Under authority of Congress, Immigration and Naturalization Service ("INS") established regulations stating that the only way for an applicant to prove a well-founded fear of persecution aside from individualized risk is by establishing that (1) there is a "pattern or practice" in her country of nationality of persecution of a group of similar persons, and (2) she is included in that group being persecuted. 8 C.F.R. §§ 208.13(b)(2)(C)(iii), 1208.13(b)(2)(C)(iii). The pattern or practice must be "extreme;" "systematic, pervasive, or organized;" and "perpetrated or tolerated by state actors." *Mitreva v. Gonzales*, 417 F.3d 761 (7th Cir. 2005). Neither this nor any other pertinent regulation provide for another group-based exception to individualized risk. *See* 8 C.F.R. §§ 208.13, 1208.13.

Accordingly, most circuits have followed the regulation and required that applicants establish a pattern or practice of persecution in order to be granted asylum without a showing of individualized risk. *See*, *e.g.*, *Ronghua He v. Holder*, 555 Fed. Appx. 786 (10th Cir. 2014); *Patel v. AG of the United States*, 509 Fed. Appx. 133 (3rd Cir. 2013); *Datau v. Mukasey*, 540 F.3d 37 (1st Cir. 2008); *Narantika v. Gonzales*, 237 Fed. Appx. 674 (2d Cir. 2007).

However, the Eighth and Ninth Circuits have held that 8 CFR 1208.13(b)(2)(iii) actually does not require a pattern or practice of persecution. In its landmark case of *Kotasz v. INS*, 31 F.3d 847 (9th Cir. 1994), the Ninth Circuit stated that while "the INS's *views* as expressed in this regulation are patently correct, . . . the regulation leaves the standards governing non-pattern or practice cases to be developed through case law . . . ." *Kotasz*, 31 F.3d at 853. Since then, the Eighth and Ninth Circuits have held that a petitioner can attain asylum as a member of a "disfavored group," even if the group isn't subject to a pattern or practice of persecution. *See Bogale Assefa Tegegn v. Holder*, 702 F.3d 1102 (8th Cir. 2013); *Sael v. Ashcroft*, 386 F.3d 922 (9th Cir. 2004).

The "disfavored group" approach contradicts the law. The regulation itself provides only one exception to showing individualized risk—a pattern or practice of discrimination against a group. 8 C.F.R. § 1208.13(b)(2)(C)(iii) (2018). A lack of further exceptions does not imply that the matter is meant to be dealt with under case law; it means there are no other exceptions. Further, Congress gave the Attorney General, and now the Secretary of Homeland Security, the authority to establish regulations to administer and enforce the INA and other immigration laws. 8 U.S.C. § 1103(a)(3) (2018). When a lower court contradicts a regulation, it contradicts Congress' tacit approval of that regulation. The Ninth Circuit's decision to go beyond the regulation in *Kotasz* was a defiance of Congressional intent.

To maintain an accurate interpretation of the law, this Court must reject the "disfavored group" alternative to the pattern-or-practice rule established by INS. Since the Thirteenth Circuit relied on this improper analysis in concluding that Marcos established a well-founded fear of persecution, this Court should reject that finding.

B. Petitioner Did Not Demonstrate a Well-Founded Fear of Persecution, Further Illustrating The Impropriety of Disfavored Group Analysis

Agency decisions are reviewed under the heightened "arbitrary and capricious" standard of review. 5 U.S.C. § 706 (2018). However, that heightened standard is met the agency decision is "not in accordance with law." *Id.* Here, the IJ and BIA—and later the Thirteenth Circuit—made such a mistake of law in finding a well-founded fear of persecution by relying primarily on her membership in a disfavored group, which is insufficient to satisfy pertinent regulations. *See* Section I.B, *supra*. Thus, in this case, this Court may review the lower decisions *de novo* to determine whether Marcos established a well-founded fear of persecution.

Under the appropriate legal framework, Marcos failed to demonstrate a well-founded fear of persecution for the following three reasons:

1. Marcos' Well-Founded Fear Was Due To Encounters With an Individual, which is Insufficient to Establish Persecution Due To Group Membership.

A petitioner can only be granted asylum under a well-founded fear of persecution if the persecution is "on account of race, nationality, *membership in a particular social group*, or political opinion." 8 U.S.C. § 1101(a)(42) (2018) (emphasis added). Here, Marcos' fear of the March 6 guard may certainly be well-founded, due to the guard's repeated harassment of Marcos, along with his apparent assault of her husband on April 6. However, these instances do not establish that the guard targeted Marcos due to membership in a group because these instances only show that the one guard harassed her individually. Further, Marcos' claim that this

illustrates persecution of Isda women fails to account for the fact that her husband was physically assaulted by the guard. Thus, interactions with a single guard and her husband do not constitute persecution against Isda women.

2. Marcos' Fear of Persecution Was Based on Rumor and thus Not Well-Founded.

Outside of the encounters with the March 6 guard, Marcos' only first-hand knowledge of wrongdoing by Life, Inc. guards was on March 9, when she witnessed a guard harass a pregnant women (who may or may not have been from Isda). Again, mere harassment does not amount to persecution. *See Nelson*, 232 F.3d 258.

Beyond that, Marcos' fear of persecution is based on rumor. She heard from a friend that some other Isda women had been raped. FB at 6. She heard about guard targeting Isda women from Bayani Santos, who admittedly had not seen any violence toward Isda women. FB at 8–9. She overheard a guard talk about hitting a woman (who, if true, is not found to be from Isda). FB at 9.

Marcos' rumor-based fear is not well-founded because rumors do not provide an adequate foundation. The first two statements she heard from friends would be considered inadmissible evidence in United States court proceedings because of how unreliable they are in determining the truth of the matter asserted. *See* Fed. R. Evid. 801 *et seq.* The third statement does not actually establish that any asserted event took place. Since this Court consistently disallows hearsay as a foundation for truth, it should do so here as well.

3. Gender is Not a Basis for a Well-Founded Fear of Persecution.

As noted above, a petitioner can only be granted asylum under a well-founded fear of persecution if the persecution is "on account of race, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1101(a)(42) (2018) (emphasis added). Noticeably

absent from this list is gender. The fact is, the regulation does not allow for a well-founded fear of persecution on the basis of gender. Thus, Marcos' claims of being targeting because she is a woman fail to support a finding of a well-founded fear.

For these reasons, this Court should find that Marcos did not prove a well-founded fear of persecution and this reverse the Thirteenth Circuit's decision on this issue.

II. THIS COURT SHOULD AFFIRM THE THIRTEENTH CIRCUIT BECAUSE THE IJ CORRECTLY ASSIGNED THE BURDEN OF PROOF TO PETITIONER TO SHOW THAT INTERNAL RELOCATION WAS UNREASONABLE, AND PETITIONER FAILED TO SATISFY THIS BURDEN.

Under the Code of Federal Regulations, an asylum applicant does not have a well-founded fear of persecution if, under all the circumstances, the applicant could reasonably avoid persecution by relocating to another part of the applicant's country. 8 C.F.R. § 208.13(b)(2)(ii) (2018). Court's ask whether safe relocation is (1) possible and (2) reasonable. *Oryakhil v. Mukasey*, 528 F.3d 993, 998 (7th Cir. 2008); *Moahamed v. Ashcroft*, 396 F.3d 999, 1006 (8th Cir. 2005). Reasonableness is ascertained by considering various factors including but not limited to "whether the applicant would face other serious harm in the place of suggested relocation; any ongoing civil strife within the country; administrative, economic, or judicial infrastructure; geographical limitations; and social and cultural constraints, such as age, gender, health, and social and familial ties." 8 C.F.R. § 208.13(b)(3).

The applicant bears the burden of proof to establish that relocation is unreasonable unless the applicant establishes past persecution, the persecutor is a government, or the persecution is government-sponsored. 8 C.F.R. § 208.13(b)(3)(i). However, where the persecutor is a government or government-sponsored, the Court presumes that internal relocation is unreasonable unless the Service rebuts the presumption by proving "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).

In the present case, the IJ determined that Petitioner failed to establish past persecution. (*See* TCR at 9 n.3). Petitioner does not dispute this finding. (*See* TCR at 9 n.3). Furthermore, the government of Basag was not the perpetrator in any of the events giving rise to Petitioner's alleged well-founded fear of persecution. (*See* TCR at 4–6). Instead, the perpetrators in all of the incidents presented by Petitioner were guards hired by Life Inc., a privately-owned corporation. (*See* TCR at 4–6). Thus, whether Petitioner was properly assigned the burden of proof depends on whether the alleged persecution was government-sponsored. The answer to this question depends on whether (1) the BIA assigned the burden of proof with justification; (2) the Thirteenth Circuit could properly review if Life Inc. was government-sponsored; and (3) whether the actions by Life Inc. guards were not government-sponsored. Here, the Thirteenth Circuit correctly affirmed the BIA because first, the IJ explicitly assigned the burden of proof to Petitioner with justification; second, the Thirteenth Circuit could properly review whether Life Inc was government-sponsored because *Chevron* deference does not apply; and third, Life Inc. is not a government-sponsored entity. As a result, Petitioner was a correctly assigned the burden of proof to demonstrate that substantial evidence supported that internal relocation was unreasonable. Here, Petitioner failed to carry its burden of proof. Nevertheless, even if the burden of proof was incorrectly assigned, there is substantial evidence that relocation was reasonable.

A. The IJ Correctly Assigned the Burden to Petitioner Because it Determined That Life Inc. Was Not "Government-Sponsored."

Where the BIA fails to state who has the burden of proof regarding internal relocation, or if the Court of Appeals is unable to determine from the record if the BIA improperly assigned the burden of proof, then remand is required. *Singh v. Holder*, 423 Fed. Appx. 681, 1 (9th Cir. 2011) (remanding because BIA failed to specify who had the burden of proof regarding internal relocation); *Afriyie v. Holder*, 613 F.3d 924, 935–36 (9th Cir. 2010) (same). Here, the BIA summarily affirmed the IJ, and the IJ expressly indicated that Petitioner had the burden of proof regarding the reasonableness of internal relocation. (TCR at 15). Furthermore, the IJ justified its assignment by determining that Petitioner had failed to establish that Life Inc. was a government-sponsored entity. (*See* TCR at 9 n.3, 15). Therefore, the Thirteenth Circuit correctly affirmed the BIA's decision.

B. The Thirteenth Circuit Correctly Determined Whether Life Inc. Was "Government-Sponsored" Because *Chevron* Deference Does Not Apply, and Even If It Does, The Circumstances Permit an Exception to the Ordinary Remand Rule.

1. Chevron Deference Does Not Apply Because the BIA did not Provide an Administrative Interpretation, and Therefore, the Court Reviews the Meaning of "Government-Sponsored" De Novo.

In answering whether Petitioner properly bore the burden of proof, it is necessary to answer whether, pursuant to *Chevron* deference, this Court should remand the case to the BIA to interpret the term "government-sponsored." Under *Chevron* deference, a court reviewing an agency's interpretation of a statute must defer to that agency's interpretation under certain circumstances. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 468 U.S. 837, 842–44 (1984). However, where a statute is ambiguous and the agency has not provided an administrative interpretation, it is necessary for the court to construct its own interpretation of the statute. *Id.* at 843 ("If, however, the court determines Congress has not directly addressed the

precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation.").

Here, the parties disagree regarding the meaning of "government-sponsored," and the Thirteenth Circuit acknowledged that the term is ambiguous. (TCR at 15.) In addition, Congress did not make its intent clear regarding the issue, nor has the BIA given an explicit definition for the term. (TCR at 19). Thus, the Court finds itself in the rare situation where an ambiguous term is left ambiguous by Congress and the agency empowered to define it. Consequently, *Chevron* deference does not apply, and the Thirteenth Circuit correctly reviewed whether Life Inc. was government-sponsored instead of remanding to the BIA for further investigation.

2. Even if Chevron Deference Does Apply, the Circumstances do not Require the Ordinary Remand Rule Because the IJ Already Considered the Issue in the First Instance.

This Court gives controlling weight to an agency's interpretation of an ambiguous statute when the agency is authorized to administer it. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 468 U.S. 837, 842 (1984). The initial inquiry, referred to as step zero of *Chevron* deference, asks whether Congress has delegated authority to the agency to speak with the force of law. *Adam Fruit Co. v. Barrett*, 494 U.S. 638, 649 (1990). If Congress has delegated authority to the agency, then the Court first asks if the statute is ambiguous and whether Congress has spoken to the issue at hand. *Chevron*, 467 U.S. at 849. If Congress has spoken to the issue, then the Court follows Congress's interpretation and *Chevron* deference does not apply. *Id.* at 842–43. If the statute is ambiguous and Congress's intent is unclear, then the second inquiry is to determine whether the agency's interpretation is a "permissible construction of the statute." *Id.* at 849. As long as the definition is permissible, the court must follow the BIA's interpretation. *INS v. Aguirre-Aguirre*, 526 U.S. 415, 425 (1999).

With regards to asylum eligibility decisions, the law grants the agency broad limits to make these decisions. *Gonzales v. Thomas*, 547 U.S. 183, 186 (2006). In these circumstances, "a judicial judgment cannot be made to do service for an administrative judgment." *Id.* (quoting *SEC v. Chenery Corp.*, 381 U.S. 80, 88 (1943)). "When the BIA has not spoken on 'a matter that statutes place primarily in agency hands,' our ordinary rule is to remand to 'giv[e] the BIA the opportunity to address the matter in the first instance in light of its own expertise.'" *Negusie v. Holder*, 555 U.S. 511, 518 (2009) (quoting *INS v. Orlando Ventura*, 537 U.S. 12, 16–17 (2002) (*per curiam*). However, circuit courts have refused to apply the ordinary remand rule where the BIA has already had an opportunity to address the legal and factual issues. *Retuta v. Holder*, 591 F.3d 1181, 1189 n.4 (9th Cir. 2010); *Zhu v. Gonzales*, 493 F.3d 588, 602 (5th Cir. 2007) (distinguishing that where the BIA has not had the opportunity to address the issue, remand is required, but where the BIA had the opportunity and rejected the contention, remand is inappropriate). In other words, where the BIA has had the opportunity to address the legal issue, the court does not give a second bite at the apple. *Id.*; *Ali v. Ashcroft*, 394 F.3d 780, 788 (9th Cir. 2005) (refusing to remand because the IJ considered the issue and the BIA summarily affirmed).

Here, Congress has given authority to the Attorney General to administer questions of immigration, and the Attorney General has delegated this power to the BIA. 8 U.S.C. § 1103(a)(1); 3 C.F.R. § 3.1(d)(1) (2018); *see Negusie v. Holder*, 555 U.S. 511, 516–17 (2009) (confirming BIA's authority to define ambiguous statutory terms "through a process of case-by-case adjudication" (quoting *I.N.S. v Aguirre-Aguirre*, 526 U.S. 415, 425 (1999)). It is also clear that Congress has not explicitly defined the meaning of "government-sponsored." Furthermore, Congress has not made its intent clear, and parties agree that the term "government-sponsored" is

ambiguous. (TCR at 15). Nevertheless, remanding to ascertain the BIA's interpretation of "government-sponsored" is not warranted.

In *Ali v. Ashcroft*, the Ninth Circuit refused to remand to the BIA the legal issue of whether there were changed circumstances because the BIA had summarily affirmed the IJ's decision without opinion. 394 F.3d at 788. That court explained that remanding was unnecessary because the IJ's opinion was the final agency decision subject to review and the IJ had already considered whether changed circumstances had occurred. *Id.* In effect, the court determined that it was unnecessary to give the BIA another "bite at the apple." *Id.*

Congruent with *Ali*, the Thirteenth Circuit correctly determined that remand was unnecessary. Here, the BIA summarily affirmed the IJ's decision without opinion, making the IJ's decision the final agency decision under review. (TCR at 7). In the same way that the IJ considered the question of changed circumstances in *Ali*, the IJ determined that Life Inc. was not government-sponsored. (TCR at 15). Therefore, the agency designated with addressing the meaning of "government-sponsored" in the first instance has already had the opportunity to adjudicate the issue on a case-by-case basis. Thus, like in *Ali*, this Court should hold that the ordinary remand rule does not apply because the agency already considered the issue.

This case is different from *Neguise v. Holder* where this Court remanded to the BIA to interpret an ambiguous provision in the INA. 555 U.S. 511, 522 (2009). In *Neguise*, the Court remanded the case to the BIA because it determined that the BIA had not exercised its interpretive authority. *Id.* at 523. There, the BIA appeared to use its *Chevron* discretion by determining that an ambiguous term was controlled by a prior decision of this Court. *Id.* at 522. The Court determined that the BIA had done so in error because the case did not control. *Id.* Furthermore, the Court held that the BIA had not actually interpreted the ambiguity in the statute

because it not called upon its own special experience to interpret the statute. *Id.* at 522-23. Consequently, the Court remanded the case. *Id.* The present case is distinguishable because the BIA did not erroneously apply incorrect authority. More importantly, the BIA did not fail to engage in its interpretive authority. By summarily affirming the IJ, the BIA concluded that the IJ's determination and reasoning for "government-sponsored" was its own interpretation. Therefore, the Thirteenth Circuit correctly determined that remand was unnecessary.

C. Harassment by Privately Hired Life Inc. Guards Does Not Constitute Government-Sponsored Persecution

An asylum applicant bears the burden of proof to establish that he or she qualifies as a refuge. *Singh v. Holder*, 649 F.3d 1161, 1166 (9th Cir. 2011). Thus, the applicant must also establish that the persecution is government-sponsored. *Abdramane v. Holder*, 569 Fed.Appx. 430, 438 (6th Cir. 2014) (holding that the applicant must establish that internal relocation is unreasonable because applicant did not argue that the persecution was government-sponsored); *Khan v. Holder*, 727 F.3d 1, 7 (1st Cir. 2013) (holding that applicant has burden to show connection between persecution and government and holding that applicant failed to show persecution was government-sponsored).

In assessing whether persecution by a private party is government-sponsored, "the claim fails unless [the applicant] shows that the incidents of abuse 'occurred with the imprimatur' of the government." *Salman v. Holder*, 687 F.3d 991, 995 (8th Cir. 2012); *Valioukevitch v. INS*, 251 F.3d 747, 749 (8th Cir. 2001); *see Hor v. Gonzales*, 400 F.3d 482, 485 (7th Cir. 2005) (finding government-sponsored persecution if government condones or throws in its lot with the persecution). Persecution is considered government-sponsored if it is executed "by persons or an organization that the government was unable or unwilling to control." *Menjivar v. Gonzales*,

416 F.3d 918, 921 (8th Cir. 2005) (quoting *Valioukevitch*, 251 F.3d at 749); *Hor*, 400 F.3d at 485 ("[P]roviding protection so ineffectual that it becomes a sensible inference that the government sponsors the misconduct."); *Miranda v. INS*, 139 F.3d 624, 627 & n.2 (8th Cir. 1998). However, there must be more than just a showing that it is difficult to control private behavior. *Menjivar*, 416 F.3d at 921 (quoting *In re McMullen*, 17 I. & N. Dec. 542, 546, 1980 WL 121935 (BIA 1980)). The government must be completely incapable of protecting the applicant. *Salman*, 687 F.3d at 995; *Menjivar*, 416 F.3d at 921; *see Galina v. INS*, 213 F.3d 955, 958 (7th Cir. 2000); *Roman v. INS*, 233 F.3d 1027, 1034 (7th Cir. 2000). Importantly, "the fact that police take no action on a particular report does not necessarily mean that the government is unwilling or unable to control criminal activity, because there may be a reasonable basis for inaction." *Menjivar*, 416 F.3d at 921. Thus, "[n]either difficulty controlling private behavior nor failure to solve every crime or to act on every report is sufficient to meet the standard." *Saldana v. Lynch*, 820 F.3d 970, 976 (8th Cir. 2016).

In *Manjivar v. Gonzales*, the Eighth Circuit affirmed the IJ's finding that persecution by a gang member was private persecution and not government-sponsored because the government was not unable or unwilling to control the gang member's actions. 416 F.3d at 921. There, the police sufficiently investigated a gang member named Moncho when he shot and killed the applicant's grandmother and niece after the applicant refused to be Moncho's girlfriend. *Id.* at 920, 922 (noting that the police search for Moncho was effective enough to make Moncho angry at the applicant). A year and half later, Moncho reappeared looking for the applicant, but the applicant never reported the incident. *Id.* Instead, the applicant relocated to San Salvador to live with her sister where she still feared that Moncho's large gang would find her. *Id.* at 920. The Eighth Circuit held that the government had not acquiesced to the persecution or failed to

perform its duty to try and protect the applicant because of the police's efforts to apprehend Moncho. *Id.* at 922. Nor did the fact that the government struggled to deal with gang violence discredit the government's ability to protect the applicant. *Id.* Therefore, the private persecution was not imputed to the government.

The present case resembles *Mejnivar*. Like the applicant in *Mejnivar*, who suffered persecution by Moncho (a private non-government actor), Marcos experienced harassment by two private individuals hired to work as guards for Life Inc. (TCR 4–6). Moncho independently attacked the applicant's family and returned to harass her later. Here, one Life Inc. security guard independently made sexual advances towards Petitioner on three occasions, while the other grabbed Petitioner's backside on another occasion. (TCR 4–6). Gang members and private companies are private actors. In the same way that individual members of gangs do not carry the imprimatur of the government, an individual hired by a privately-owned company does not carry the imprimatur of the government. The lack of their intertwinement is further evidenced by the fact that the Life Inc. guards were only stationed at water facility distribution centers, while Basag military was stationed at wells where the Water Warriors would attack. (TCR at 4–6). In addition, only Life Inc. guards were stationed at the facilities where Petitioner was harassed, and Petitioner never relates any sexual harassment instigated by Basag military.[1] (TCR at 4–6). As such, Life Inc. did not carry the Basag government's imprimatur.

Furthermore, like in *Mejnivar*, there is no evidence to indicate that the government was unwilling or unable to control the violations of Basag law. While police were notified of the

[1] Petitioner did witness one occasion where a Basag military member suspected a pregnant woman was a member of the Water Warriors and was carrying a bomb. (TCR at 5). On that occasion, the military required that she remove her shirt to ensure that she was not carrying explosives. (FB at 7). Once it was verified that she was pregnant, she was allowed to get water and leave without any further incident (FB at 7). This is more indicative of military precautionary measures when dealing with a guerrilla warfare group than violations of sexual harassment or molestation.

initial crime in *Mejnivar*, Petitioner failed to report any of her interactions with the Life Inc guard. Instead, like the applicant in *Mejnivar*, Petitioner relocated without notifying the police of the criminal activity. (TCR at 6). In effect, the IJ pointed out that there is some evidence that the Basag police would have investigated and no evidence that the Basag government acquiesced to the criminal acts by Life Inc. guards or would not have responded to the crimes against Petitioner. (TCR at 17). For example, the Basag government outlawed rape, acts of lasciviousness, and molestation.[2] (FB at 5 n.1). Furthermore, the Basag government required Life Inc. to comply with Basag law in their contract which provided for civil and criminal liabilities against Life Inc. if it failed to do so. (FB at 5 n.1). Simply put, the Basag government combats criminal activities while dealing with a guerrilla war group much like El Salvador struggled to combat gang violence. As held by the Eighth Circuit, this does not rise to the level of unable or unwilling to control persecution, but only indicates that it is difficult to control private behavior. *Menjivar v. Gonzales*, 416 F.3d 918, 922 (8th Cir. 2005).

This remains true even though there is no evidence that action was taken against a Life Inc. guard for an alleged rape, because "the fact that police take no action on a particular report does not necessarily mean that the government is unwilling or unable to control criminal activity, . . . there may be a reasonable basis for inaction." *Menjivar v. Gonzales*, 416 F.3d 918, 921 (8th Cir. 2005). Here, there are no findings to indicate why no action was taken, but Life Inc. did implement a mandatory sexual harassment training for its employees as a result of the allegations and created a policy that an Life Inc. guards suspected of sexual assault would be terminated. (FB at 6).

[2] "Molestation is defined as any person who commits an act that subjects or exposes another person to unwanted or improper sexual advances or activity. Basag Pen. Code § 4350 (a)(1).

Petitioner relies on *Angoucheva v. INS* to argue that Life Inc. actions are "inextricably tied" to the Basag government. 106 F.3d 781, 793 (7th Cir. 1997). However, *Angoucheva* is distinguishable. In *Angoucheva*, the party persecuting the applicant was a sergeant in the El Salvador military. *Id.* 793. Sergeants of the military are agents of the government and carry the government's imprimatur. In contrast, the Life Inc. guards were hired by Life Inc., an independent and private corporation incorporated in the state of Delaware in the United States. (FB at 4). While, the Basag government did contract with Life Inc., giving them "full control of all water facilities," (FB. at 4), this does not rise to the level of giving Life Inc. the imprimatur of the government's authority.

Petitioner also tries to analogize Life Inc. to Gambia's Supreme Islamic Council (SIC), a government-sponsored religious council that acted on behalf of the government to squelch religious dissent. (TCR at 16). As a government-sponsored religious council, SIC banned certain types of religious programming from government-owned radio and television stations. Bureau of Democracy, Human Rights, and Labor, *2016 International Religious Freedom Reports: The Gambia* (Aug. 15, 2017) https://www.state.gov/documents/organization/268896.pdf. It also proclaimed to the country that it was in charge of religious affairs in the country and that they would screen and certify all Islamic scholars for all public and private radio stations. *Id.* In this way, SIC acted with impunity under the auspices of the government. This analogy stretches too far. In contrast to SIC which was created by the government, given government powers, and regulated government forums including public airwaves, Life Inc. is a privately held and owned company that has merely contracted to rebuild and maintain the water facilities and provide water to Basag citizens. Furthermore, unlike the SIC which created policy and regulated the country's religion,

Life Inc. is subject to Basag laws, as well as criminal and civil penalties. (FB at 5 n.1). The contract explicitly leaves policing power to the government but does not prevent Life Inc. from hiring security guards to protect the property that Life Inc. is in full control of. Thus, for these reasons, Life Inc. is closer to a private entity that has individuals that engage in criminal behavior instead of a government-sponsored entity. Therefore, the Thirteenth Circuit properly assigned the burden of proof to Petitioner. As the Thirteenth Circuit acknowledged, Petitioner failed to present evidence to satisfy this burden of proof.

D. Even if the Burden of Proof was Incorrectly Assigned, the IJ's Factual Findings Establish that it was Safe and Reasonable for Petitioner to Relocate.

Where the persecution is government-sponsored, the Court presumes that internal relocation is unreasonable unless the Service rebuts the presumption by proving "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 can rebut a presumption Reasonableness is ascertained by considering various factors including but not limited to "whether the applicant would face other serious harm in the place of suggested relocation; any ongoing civil strife within the country; administrative, economic, or judicial infrastructure; geographical limitations; and social and cultural constraints, such as age, gender, health, and social and familial ties." 8 C.F.R. § 208.13(b)(3).

Regarding the safety of the suggested place of relocation, Petitioner already exhibited that she could move to Mayaman, the northern island of Basag, and adequately escape the the fear of persecution. (TCR at 6). Petitioner arrived in Mayaman on April 6, 2017 and remained there until August 6, 2017 without incident. (TCR at 6). For a total of four months, Petitioner was never sexually harassed or assaulted. (TCR at 6). Only on one occasion did she hear Life

Inc. guards express that they could get sex on Mayaman as they did on Isda. While hearing Life Inc. guards express this sentiment is troubling, Petitioner's own experiences show that she only experienced the harassment on Isda. This factor weighs in favor of relocation.

Regarding the ongoing civil strife within the country factor, the IJ's findings show that while the Water Warriors were still actively protesting the Basag government, they were not active in the area where Petitioner relocated. (TCR at 6). In fact, the Water Warriors avoided the main tourist areas including where Petitioner relocated to on Mayaman. As such, this factor weighs slightly in favor of relocation.

Regarding the administrative, economic, or judicial infrastructure and any geographical limitations, this factor also weighs in favor of relocation. The area of relocation was on the edge of a popular tourist area. (TCR at 6). The infrastructure was better because of the tourism and it prevent woman from traveling great lengths to obtain water. (TCR at 6). Furthermore, the water scarcity on Mayaman is more controlled and there is greater protection. (TCR at 6). Although Petitioner was unable to secure lucrative employment, she was able to secure employment in a small but safe tourist shop. (TCR at 6). This factor weighs in favor of relocation.

Regarding the social and cultural constraints, this factor weighs slightly in favor of no relocation. Here, while petitioner does have friends in Mayaman, she does not appear to have family in the area. (TCR at 6). *But see Lobo v. Holder*, 684 F.3d 11, 19 (1st Cir. 2012) (quoting *Budiono v. Mukasey*, 548 F.3d 44, 50 (1st Cir. 2008). "The fact that close relatives continue to live peacefully in the alien's homeland undercuts the alien's claim that persecution awaits his return."). Furthermore, it is difficult for an Isda-Timog woman, like Petitioner, integrate into the local Mayaman culture. Isda-Timog women appear poorer. Nevertheless, while this factor favors no relocation, difficulty in adjusting to economic and cultural differences does not

outweigh the other three factors. As such, under the all the circumstances and by a preponderance of the evidence in the factual findings of the IJ, there is substantial evidence to indicate that Petition can safely and reasonably relocate to Mayaman to avoid future persecution. Therefore, even if this Court determines that the proper party did not bear the burden of proof, this Court can hold that under the IJ's findings, there is substantial evidence to rebut the presumption that internal relocation is unreasonable. Thus, this Court should affirm the Thirteenth Circuit. on this issue.

CONCLUSION AND RELIEF SOUGHT

For the foregoing reasons, Respondent respectfully requests that this Court reverse the Thirteenth Circuit's holding that group-analysis establishes a well-founded fear of future persecution, while affirming the Thirteenth Circuit's holding that Petitioner properly bore the burden of proof regarding the reasonableness of internal relocation.

Respectfully submitted,

Date: February 7, 2019

By: /s/ TEAM 1016

Team 1016
Attorneys for Respondent
Attorney General of the United States