No. 18-0512

IN THE SUPREME COURT OF THE UNITED STATES

Leila Marcos,

Appellant,

v.

Attorney General of the United States,

Appellee.

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

BRIEF FOR RESPONDENT UNITED STATES

Filed February 2, 2019

Team 1019

QUESTIONS PRESENTED

1. Is the disfavored group analysis a valid basis to establish a well-founded fear of persecution for the purposes of asylum eligibility when it was judicially created with a lower evidentiary threshold than required by law and the executive agencies authorized to interpret the law?

2. Since Leila Marcos did not face past persecution and Life Inc. was not government-sponsored, was she the proper party to bear the burden of demonstrating if substantial evidence supported a finding that future persecution could be avoided by internal relocation?

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STATEMENT OF THE CASE

On August 7, 2017, Leila Marcos filed an application for asylum at a port of entry in the United States. The Immigration Judge denied Marcos' application on that grounds that, while she had established an objectively reasonable fear of future persecution, she could have avoided persecution by relocating to another part of Basag. The Board of Immigration Appeals ("BIA") summarily affirmed the Immigration Judge's decision and upheld the denial of her application for asylum. Marcos then petitioned to the United States Court of Appeals for the Thirteenth Circuit for review of the BIA's denial, and the government cross-appealed to challenge the validity of the Board of Immigration's well-founded fear analysis. The Thirteenth Circuit affirmed the BIA's decision in denying Petitioner's asylum application and adopted the disfavored group analysis. The Supreme Court of the United States granted certiorari.

OPINIONS BELOW

The order of the Immigration Court denying Leila Marcos' application for asylum on the grounds that, while she had established an objectively reasonable fear of future persecution, she could have avoided persecution by relocating to another part of Basag is in the record at 10. The opinion of the Board of Immigration Appeals affirming the Immigration Judge's decision is in the record at 10. The United States Court of Appeals for the Thirteenth Circuit upheld the Immigration Judge's denial of Marcos' application for asylum in the record at 10.

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.

STANDARD OF REVIEW

Appellate courts review legal decisions of the Board of Immigration Appeals ("BIA") regarding the Immigration and Nationality Act *de novo*. *Abedini v. INS*, 971 F.2d 188, 190-191 (9th Cir. 1992). Factual findings underlying a denial of asylum are reviewed under the substantial evidence standard and should be reversed "only if the evidence presented to the Board was so compelling that no reasonable factfinder could fail to find the requisite fear of persecution." *Id.* at 191. (citing *INS v. Elias-Zacarias*, 502 U.S. 478 (1992)). Because the issue of whether the disfavored group analysis is a valid basis for the purposes of asylum eligibility and the issue of whether the proper party bore the burden of demonstrating if substantial evidence supported a finding that future persecution could be avoided by internal relocation are both questions of law, the Court should review these issues *de novo*. The factual findings, such as whether Petitioner is a member of a "disfavored group" and whether Petitioner could avoid persecution by internal relocation, should be reviewed under the substantial evidence standard with deference given to the BIA. *INS v. Elias-Zacarias*, 502 U.S. 478, 481 (1992).

NATURE OF THE PROCEEDINGS

The Court is being asked to reverse the Thirteenth Circuit's judgement that, although Appellant established an objectively reasonable fear of future persecution, she could nevertheless have avoided persecution by relocating to another part of Basag. The issue before the Court is whether the disfavored group analysis is a valid basis to establish a well-founded fear of persecution for the purposes of asylum eligibility and whether the proper party bore the burden of proof regarding future persecution.

STATEMENT OF THE FACTS

The country of Basag is a two-island nation. R. at 2. The two islands are Mayaman and Isda. *Id.* The Hilagan people typically live on Mayaman while the Timog people reside on Isda. *Id.* Unfortunately, Isda faced hardships due to storm intensity increases and ocean levels rising from global warming. *Id.* This caused some Isda-Timog people to relocate to Mayaman. R. at 3. However, there was a noticable difference between the Isda people and the Mayaman people, because the Isda were much poorer, which made it difficult for the Isda-Timog to integrate on Mayaman. *Id.* To this day, Mayaman has remained prosperous, while Isda continues to be impoverished. R. at 4.

Water became scarce on Isda in 2011, so in 2012, the President began to step in to remedy the water problems. R. at 3. On January 1, 2013, the President signed a 30-year Concession Contract with Life Inc., assigning it full control of all water facilities in order to maintain and rebuild the water works in Basag. R. at 4. Life Inc., a United States corporation, was required to pay annual fees to the Basag government, and if the water facilities were ever threaten the Basag government would provide military aid. R. at 4. Then in 2016, some Basag citizens began protesting because they wanted the government to take back control of the water on Basag. *Id.* The Basag military had to step in to protect the water facilities at one point, but then Life Inc. hired its own armed guards. R. at 5.

Leila Marcos and her husband Bernardo lived in northern Isda, where Leila had to travel far from home in order to get water for the family while her husband worked. R. at 5. On March 6, 2017, Leila was harassed by a guard at the water facility, so she had to start travelling even further to get water from a different facility from there on out. *Id.* She had heard from a friend

that an Isda woman had been raped by a guard a couple weeks before she was harassed, and this is why she began travelling to a further facility. R. at 6. However, at the new facility, she witnessed a guard harass a pregnant woman, so she returned to the old facility. R. at 7. When she returned to the old facility on March 12, the same guard that had harassed her told her, "I am going to have my way with you, honey, whether you want it or not." *Id.* The next time she returned to the facility on April 5, a different guard grabbed her backside and whistled, while the other guards laughed and whistled. R. at 8. When she returned home and told her husband, he went and confronted the guards. *Id.* The confrontation ended badly when her husband pulled a knife on a guard, was shot in the arm, and then escorted home by the guard who had threatened Leila. *Id.*

Consequently, that night Leila and Bernardo boarded a fishing boat to Mayaman to receive medical treatment and stay with a fishing mate of Bernardo's. R. at 8. Leila expressed that she feared for her safety, so the couple offered them a temporary place to stay. *Id.* But, the fishing mate did warn Leila that the guards on Mayaman tended to target Isda-Timog women due to their poorer appearance. R. at 9. After a month of staying on Mayaman, neither Leila nor Bernardo had been able to find a permanent job because of Bernardo's injury. *Id.* Leila began to beg for money on the streets, until one night when she had to hide from Life Inc. guards. *Id.* She overheard them discussing harassing other women, and they said, "getting sex here is as easy as it is on Isda." *Id.* After this incident, Leila collected enough money to buy a one-way plane ticket to the United States, and at the port of entry, she filed an application for asylum. *Id.* No substantial change in conditions has occurred in Basag since Leila's departure. *Id.*

SUMMARY OF THE ARGUMENT

The Court should reverse the Thirteenth Circuit's decision finding Marcos established eligibility for asylum under the disfavored group analysis and affirm its finding that Marcos failed to prove that it would not be reasonable for her to internally relocate to avoid persecution. The Thirteenth Circuit erred in adopting the disfavored group analysis but was correct in finding that Petitioner was the proper party to bear the burden of demonstrating future persecution could not be avoided by internal relocation.

The disfavored group analysis is an invalid basis to establish a well-founded fear of persecution for the purposes of asylum eligibility and should be rejected by the Court. The disfavored group analysis creates a lower evidentiary threshold than required by the laws and required by the regulatory agencies charged with the interpretation and administration of immigration laws. If the disfavored group analysis was a valid basis to establish asylum eligibility, it should have been created by the executive agencies charged with the interpretation and administration of the Immigration and Nationality Act. Therefore, the disfavored group analysis was unlawfully created as a form of judicial activism and should be declared invalid.

Even if the Court decides to accept the disfavored group analysis, Marcos has still failed to prove she has a well-founded fear of persecution under the disfavored group analysis, which requires the applicant to show he or she is a member of a "disfavored group" coupled with a showing of a sufficient level of individualized risk of persecution. First of all, Isda-Timog women, the group Marcos claims to be a member of, are not a "disfavored group." While Isda-Timog women may face some harassment, Petitioner has failed to prove they face actual persecution, which must rise above harassment or mere suffering. Furthermore, Petitioner failed

to demonstrate a sufficient level of individualized risk, because her past experiences were mere threats that never came to fruition. Therefore, even under the disfavored group analysis's lower evidentiary threshold, Marcos should be denied asylum, because she failed to establish a well-founded fear of persecution.

Lastly, even if the Court finds that Marcos established an objectively reasonable fear of future persecution, she could nevertheless have avoided persecution by relocating to another part of Basag. Because Marcos did not face past persecution, and Life Inc. is not a government entity or government-sponsored, Marcos is the proper party to bear the burden of demonstrating if substantial evidence supported a finding that future persecution could be avoided by internal relocation. Life Inc. is neither a government or government-sponsored. First, Life Inc. is not a part of the Basag government, because the corporation is a United States corporation contracted to pay the Basag government in order to control the water resources within Basag. Second, Life Inc. is not government-sponsored, because it is obliged to pay Basag and runs independently from the Basag government. Life Inc. had to hire its own guards to protect its facilities in Basag, because the government would only send military help if the facilities were threatened and Life Inc. could not control it on their own. This was a part of the contract in order to assist Life Inc. if necessary. Overall, Life Inc. is a non-governmental entity, because it is more comparable to a collection of private actors. Thus, Marcos was the proper party to bear the burden of proof since she did not face past persecution and Life Inc. is not government-sponsored.

In sum, the Court should reverse the Thirteenth Circuit's decision regarding the disfavored group analysis and declare the disfavored group analysis to be an invalid basis to establish a well-founded fear of persecution. If the Court finds the disfavored group analysis to

be valid, it should still deny Marcos asylum as she has failed to prove that she is a member of a disfavored group and that she has an individualized risk of persecution. The Court should affirm the Thirteenth Circuit's holding that Marcos was the proper party to bear the burden of demonstrating that she could not avoid persecution by internal relocation and that she failed to prove so. Thus, Marcos's asylum application should be denied.

ARGUMENT

I. THE DISFAVORED GROUP ANALYSIS IS AN INVALID BASIS TO ESTABLISH A WELL-FOUNDED FEAR OF PERSECUTION FOR ASYLUM ELIGIBILITY, BECAUSE IT CREATES A LOWER EVIDENTIARY THRESHOLD THAN THE LAW REQUIRES AND IS AN UNLAWFUL FORM OF JUDICIAL ACTIVISM.

The disfavored group analysis is an unlawful basis to establish a well-founded fear of persecution for the purposes of asylum eligibility. In order to be eligible for asylum, the applicant has the burden of proof to establish that he or she is a "refugee," and the applicant may qualify as a refugee if he or she has suffered past persecution or has a well-founded fear of future persecution. 8 C.F.R. § 1208.13. Petitioner does not contend she suffered past persecution but is asserting that she has a well-founded fear of future persecution. In proving that he or she has a well-founded fear of future persecution, the applicant must show a reasonable possibility that he or she will be singled out individually for persecution, unless the applicant proves there is a "pattern and practice" of persecution of a group of persons similarly situated to the applicant and the "applicant establishes his or her own inclusion in, and identification with, such group of persons such that his or her fear of persecution upon return is reasonable." *Id.* at (b)(2)(iii).

Despite case law detailing the high burden of proof to show a "pattern and practice" of systemic persecution, the Ninth Circuit created the "disfavored group" analysis as an alternative to prove a well-founded fear of future persecution. *Kotasz v. INS*, 31 F.3d 847 (9th Cir. 1994). A

"disfavored group" is a group that is not experiencing systematic persecution, but its members have an increased risk of non-systematic persecution. *Kotasz*, 31 F.3d at 853. Under this analysis, the applicant may show a well-founded fear of persecution by proving two elements that operate in tandem: (1) membership in a "disfavored group" and (2) an individualized risk of being singled out for persecution. *Sael v. Ashcroft*, 386 F.3d 922, 925 (9th Cir. 2004). "The more egregious the showing of group persecution—the greater the risk to all members of the group—the less evidence of individualized persecution must be adduced." *Kotasz*, 31 F.3d at 853.

However, the disfavored group analysis is an invalid basis to establish a well-founded fear of persecution. The disfavored group analysis installs a lower threshold for relieving the need for individualized showing than the immigration laws and agencies require. Furthermore, the disfavored group analysis was illegally created through judicial activism in the circuit courts rather than an impartial and reasonable interpretation of immigration laws, which are under the discretion of the immigration agencies to reasonably interpret and enforce. Because of these reasons, the Court should reverse the Thirteenth Circuit's ruling and find the disfavored group analysis to be an invalid basis to establish a well-founded fear of future persecution for the purposes of asylum eligibility. If the Court does not reject the disfavored group analysis, it should still find Petitioner ineligible for asylum, because she has not proved that she has a well-founded fear of future persecution if she were to return to her home country.

A. The Disfavored Group Analysis Creates a Different, Lower Threshold for Relieving the Need for Individualized Showing Than Required by Law.

The disfavored group analysis creates a lower evidentiary threshold for the applicant's burden of proof to establish a well-founded fear of future persecution than the Immigration and Nationality Act ("INA") and the BIA requires. The well-founded fear of future persecution must be on account of the applicant's actual or perceived race, religion, nationality, membership in a

particular social group, or political opinion. 8 C.F.R. § 1208.13(b)(2)(i)(A). As stated above, the applicant must show there is a reasonable possibility that he or she will be singled out individually for persecution, unless the applicant demonstrates there is a pattern or practice in his or her country of persecution of a group of persons similarly situated to the applicant. 8 C.F.R. § 1208.13(b)(2)(iii)(A). Most federal appellate courts have narrowly defined the term "pattern and practice" in 8 C.F.R. § 1208.13(b)(2)(iii)(A) to encompass only systematic, pervasive, or organized persecution against a particular group on account of a protected ground. *See, e.g., Lie v. Ashcroft*, 396 F.3d 530, 537 (3d Cir. 2005) ("[W]e agree with other courts that have held that, to constitute a 'pattern or practice,' the persecution of the group must be 'systemic, pervasive, or organized.") (citing *Ngure v. Ashcroft*, 367 F.3d 975, 991 (8th Cir.2004)); *Sugiarto v. Holder*, 586 F.3d 90, 97 (1st Cir. 2009) ("Our case law has narrowly defined 'pattern or practice' to encompass only the systematic or pervasive persecution of a particular group based on a protected ground, rather than generalized civil conflict or a pattern of discrimination."); *Woldemeskel v. INS*, 257 F.3d 1185, 1191 (10th Cir. 2001) ("A pattern or practice of persecution has been defined as 'something on the order of organized or systematic or pervasive persecution.'") (citing *Makonnen v. INS*, 44 F.3d 1378, 1383 (8th Cir.1995)). Furthermore, courts have held that asylum under the "pattern and practice" standard should be granted only in extreme cases. *Diaz-Garcia v. Holder*, 609 F.3d 21, 29 (1st Cir. 2010) (quoting *Rasiah v. Holder*, 589 F.3d 1, 5 (1st Cir. 2009)).

The disfavored group analysis has been repeatedly rejected in circuit courts over the past two decades. The First, Third, and Seventh Circuits have expressly and repeatedly rejected the disfavored group analysis.[1] In *Lie v. Ashcroft*, the Third Circuit rejected the disfavored analysis

[1] In unpublished opinions, the Second Circuit has also declined to follow the disfavored group analysis, and the Eighth Circuit rejected the disfavored analysis in a concurring opinion. See *Wijaya v. Gonzales*, 227 Fed.Appx. 35, 38 n.1 (2d Cir. 2007); *Winata v. Mukasey*, 287 Fed.Appx. 544, 547 (8th Cir. 2008). In rejecting the disfavored group

as an alternative to proving a well-founded fear of future persecution. *Lie v. Ashcroft*, 396 F.3d 530, 538 (3d Cir. 2005). In Footnote 4, the *Lie* court cited *Sael v. Ashcroft*, a case in which the Ninth Circuit found that an ethnically Chinese citizen of Indonesia established a well-founded fear of persecution under the disfavored group standard, and stated, "We disagree with the Ninth Circuit's use of a lower standard for individualized fear absent a 'pattern or practice' of persecution and, similarly, we reject the establishment of a 'disfavored group' category." *Id.* at 538 n.4. The court affirmed the BIA's decision to deny petitioner's asylum application, because she failed to show she faced an individualized risk of persecution or that there was a pattern and practice of persecution of Chinese Christians in Indonesia. *Id.* at 537.

Soon after *Lie v. Ashcroft* was decided, the Seventh Circuit also rejected the disfavored group analysis in another case in which an ethnic Chinese petitioner from Indonesia was claiming she had a well-founded fear of persecution because of anti-Chinese violence in Indonesia. *Firmansjah v. Gonzales*, 424 F.3d 598 (7th Cir. 2005). The *Firmansjah* court stated, "[The Ninth Circuit's] *Sael* required an even lower level of individualized risk after finding that the applicants were members of a 'disfavored group.' This circuit has not recognized a lower threshold of proof based on membership in a 'disfavored group.'" *Firmansjah*, 424 F.3d at 607 n.6. Once again, the court found the general anti-Chinese violence in Indonesia to not constitute a pattern and practice of systemic persecution and affirmed the petitioner's denial of application for asylum. *Id.* at 599.

Moreover, the First Circuit joined the Third and Seventh Circuits in flatly rejecting the disfavored group analysis in *Kho v. Keisler*. *Kho v. Keisler*, 505 F.3d 50, 55 (1st Cir. 2007). In *Kho*, an ethnic Chinese Christian argued that the BIA erred as a matter of law when it did not

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analysis, these circuit courts also found that it lowers the threshold for relieving the need for individualized showing than the laws and regulations require.

apply the disfavored group analysis from the Ninth Circuit when determining whether he had a well-founded fear of persecution. *Kho*, 505 F.3d at 52. In rejecting this claim, the *Kho* court stated:

> "The regulations establish a threshold for relieving the need for an individualized showing; the disfavored group analysis creates a different threshold, and we reject it. The regulations already contemplate the effect of group membership on an individual's circumstances by enumerating the five statutory categories of withholding eligibility."

Id. (Citing 8 U.S.C. § 1101(a)(42)(A); 8 C.F.R. § 1208.16(b).) Although the petitioner in *Kho* was applying for withholding of removal, the requirements for asylum have the same five statutory categories used to establish eligibility for withholding of removal, which is that the persecution must have been on account of race, religion, nationality, membership in a particular social group, or political opinion. 8 C.F.R. § 1208.13(b)(2)(i)(A). Therefore, the reasoning in *Kho* applies to the disfavored group analysis for the purposes of asylum eligibility as well as withholding of removal.

The Court should follow the reasoning outlined in *Kho* and reject the disfavored group analysis. The law specifically states that the applicant does not need to prove an individualized risk of persecution if the applicant shows a "pattern or practice" of persecution on account of his or her membership in a particular social group. 8 C.F.R. § 1208.13(b)(2)(iii)(A). In other words, the statutory language states that an applicant needs to show either a well-founded fear of persecution on an individual basis *or* be a member of a particular social group that suffers a pattern of persecution. It does not allow an applicant to prove a well-founded fear of persecution based on a combination of individual risk and group persecution.[2]

[2] *See* Bridget Tainer-Parkins, *Protection From A Well-Founded Fear: Applying the Disfavored Group Analysis in Asylum Cases*, 65 WLLR 1749, 1774-1775 (2008) ("The language of the CFR requires that in order to have a well-founded fear, the applicant must either face individual persecution or be a member of a group that suffers a pattern of persecution. The language does not allow an applicant to establish a showing of well-founded fear based on some combination of individual risk and group persecution. Thus, it appears that the disfavored group analysis is not an appropriate approach to well-founded fear according to the language of the CFR as promulgated by the INS.").

The Thirteenth Circuit erred in declaring the disfavored group analysis does not lower the asylum seeker's ultimate burden. R. at 10. Indeed, the Thirteenth Circuit admitted in its opinion that the disfavored group analysis lowers the threshold: "It lowers the focuses on evidence of group-based, but not systematic, oppression to demonstrate a higher likelihood or individualized persecution." *Id.* Additionally, the example cited by the Thirteenth Circuit of Jews fleeing persecution from Nazis does not aid Petitioner's argument.[3] The persecution of Jews under the Nazi regime would have constituted a "pattern or practice" of persecution that was indeed "systematic, pervasive, or organized." *Lie,* 396 F.3d at 537. Therefore, a Jewish asylum applicant fleeing Nazi persecution could avoid the need to show individualized risk by proving there was a pattern and practice of persecution against Jews, as the immigration laws already provide.

Thus, the disfavored group analysis establishes a lower evidentiary threshold that was judicially created as an alternative to the "pattern or practice" claim; an alternative which Congress did not create in the INA and which is not a part of the immigration statutes. Therefore, the Court should reject the disfavored group analysis as it is not in conformance with the statutory scheme for asylum eligibility.

B. The Disfavored Group Analysis is an Unlawful Form of Judicial Activism Rather Than an Appropriate Interpretation and Application of the Law.

The disfavored group analysis created by the Ninth Circuit is outside the bounds of its judicial authority. Congress charged the Department of Homeland Security ("DHS") with the administration and enforcement of the INA, and the Board of Immigration Appeals is the highest administrative body for interpreting and applying immigration laws. 8 U.S.C.A. § 1103; 8 C.F.R. § 1003.1(d)(1). Because these agencies are responsible for the interpretation and implementation

[3] "As the Ninth Circuit observed, '[I]t would not have been necessary for each individual Jew to await a personal visit to his door by Nazi storm troopers in order to show a well-founded fear of persecution.'" R. at 11. (citing *Kotasz*, 31. F.3d at 852).

of immigration laws set forth in the INA, the DHS and the BIA are the governmental agencies that may create and implement the disfavored group analysis if it were to truly be a valid basis for establishing a well-founded fear of persecution. Thus, the Court should reverse the Thirteenth Circuit's decision and reject the adoption of the disfavored group analysis.

Congress has plenary power in the area of immigration, and in the case of asylum, it has given much of its power over to the immigration agencies. The INA gives the DHS and the Attorney General discretion to grant asylum once an applicant has proved that he or she is a refugee but gives little guidance on how the decision should be made. *See* 8 U.S.C. § 1158 (2000). Because there was so little guidance, the Immigration and Naturalization Service ("INS"), the predecessor to the DHS, established procedures for making asylum determinations in 1990. *See Aliens and Nationality; Asylum and Withholding of Deportation Procedures*, 55 Fed. Reg. 30, 674-01 (July 27, 1990) (establishing asylum procedures). The regulations for asylum eligibility created by the INS have been codified at 8 C.F.R. § 1208.13. As stated above, the regulatory language created by the immigration agency does not allow an applicant to establish a showing of well-founded fear based on some combination of individual risk and group persecution as the disfavored group analysis proports to do. In other words, the "disfavored group analysis is not an appropriate approach to well-founded fear according to the language of the CFR as promulgated by the INS." Bridget Tainer-Parkins, *Protection From A Well-Founded Fear: Applying the Disfavored Group Analysis in Asylum Cases*, 65 WLLR 1749, 1775 (2008).

Despite the facts that Congress is the branch tasked with creating and reforming immigration laws and the immigration agencies are responsible for creating immigration regulations, the Ninth Circuit created the disfavored group analysis through caselaw. The Ninth

Circuit had no power to create the disfavored group and acted outside its judicial scope in order to allow more applicants to be granted asylum. Hence, the disfavored group analysis was created through judicial activism and not through the legitimate legal process. Therefore, the Court should find the disfavored group analysis to be an invalid basis to establish a well-founded fear for purposes of asylum eligibility.

II. IF THE COURT ACCEPTS THE DISFAVORED GROUP ANALYSIS, PETITIONER STILL FAILED TO MEET HER BURDEN OF ESTABLISHING A WELL-FOUNDED FEAR OF PERSECUTION.

Petitioner failed to meet her burden of proof to establish that she has a well-founded fear of future persecution. Under the disfavored group analysis, an applicant must prove membership in a disfavored group and an individualized risk of being singled out for persecution. *Sael*, 386 F.3d at 925. However, ethnic Isda-Timog women, the group that Petitioner claims to be a member of, are not a disfavored group in her home country of Mayaman. Furthermore, she failed to meet her burden of proving an individualized risk that would allow her to be eligible for asylum, whether or not the disfavored group analysis is applied. Therefore, the Court should reverse the Thirteenth Circuit's decision and find Petitioner ineligible for asylum.

A. Petitioner is Not a Member of a "Disfavored Group."

The Thirteenth Circuit erred in finding that Petitioner belonged to a disfavored group within Mayaman, because ethnic Isda-Timog women in Mayaman are not a disfavored group. A disfavored group is a "a group of individuals in a certain country or part of a country, all of whom share a common, protected characteristic, many of whom are mistreated, and a substantial number of whom are persecuted." *Wakkary v. Holder*, 558 F.3d 1049, 1052 (9th Cir. 2009) (holding an alien's membership in groups whose members were shown to have been widely targeted for discrimination was relevant evidence in assessing whether he had reasonable fear of

future persecution in an asylum application). To qualify as persecution, the applicant's experience must rise above "unpleasantness, harassment, or even basic suffering." *Nelson v. INS*, 232 F.3d 258, 263 (1st Cir. 2000) (citing *Aguilar–Solis v. INS*, 168 F.3d 565, 570 (1st Cir. 1999)). Petitioner is an ethnic Isda-Timog woman, and the experiences of ethnic Isda-Timog women may be unpleasant or constitute harassment; however, they do not rise to the level of being classified as a disfavored group. Therefore, Petitioner is not a member of a "disfavored group."

In cases where courts have found an applicant to be a member of a disfavored group, the groups have faced actual persecution. For example, in *Sael*, the Ninth Circuit found the ethnic Chinese minority to be a disfavored group in Indonesia due to an expansive history of anti-Chinese violence. *Sael*, 386 F.3d at 925. The court cited many reports detailing anti-Chinese violence dating as far back as 1740 and news articles documenting the 1998 anti-Chinese riots, when over 1,000 people were killed, and dozens of women reported to be raped. *Id.* at 925-926. The court further described how ethnic Chinese are made "scapegoats" for their economic and political problems in Indonesia and face continued tensions, resentment and violence. *Id.* at 926. Additionally, ethnic Chinese in Indonesia are still targets of official discrimination, including government regulations prohibiting Chinese schools, cultural groups, and trade associations. *Sael*, 386 F.3d at 926-927. Because of the voluminous record of ethnic Chinese facing persecution in Indonesia, the court held, "Sael's evidence compels the conclusion that Indonesia's ethnic Chinese minority is at least a 'disfavored group.'" *Id.* at 927.

Conversely, many applicants have been denied asylum for failing to provide sufficient evidence of group persecution. In *Chen v. U.S. I.N.S.*, a father claimed he had a well-founded fear of persecution if he were to return to China with his three children because of China's "one

child" policy. *Chen v. U.S. I.N.S.*, 195 F.3d 198 (4th Cir. 1999). Petitioner speculated he would be forced to undergo force sterilization, imprisonment, and severe fines and submitted a 1995 report by Human Rights in China describing beatings and forced surgeries for some families who violated the "one child" policy. *Id.* at 200-201. However, the INS submitted a 1995 State Department report on conditions in China, which indicated that forced abortions and sterilizations is uncommon and the coercive measures for violating the policy only involved psychological pressure and economic penalties. *Id.* at 201. The court found that Chen offered no evidence that seriously contested the State Department's findings regarding the enforcement status of the "one child" policy and affirmed the denial of his asylum application. I*d.* at 204.

In *Nelson v. INS*, the First Circuit affirmed the BIA's finding that petitioner failed to show a well-founded fear of persecution, because petitioner's past persecution did not rise above "unpleasantness, harassment, or even basic suffering." *Nelson*, 232 F.3d at 263. Nelson had been imprisoned in solitary confinement for less than 72 hours on three occasions and was physically abused each time. *Id.* at 264. She had also experienced continuous harassment, such as threatening phone calls and occasional stops and searches. *Id.* Despite this evidence of being targeted for violence and imprisonment, the court denied Nelson asylum and expressed, "Although Nelson's story is undoubtedly unfortunate, we cannot conclude that it extends so far beyond "harassment and annoyance" so as to compel a reasonable factfinder to find past persecution." *Nelson*, 232 F.3d at 264.

Similar to the petitioners in *Chen* and *Nelson*, Marcos failed to provide sufficient evidence that ethnic Isda-Timog women are a disfavored group with a "substantial number of whom are persecuted." *Wakkary*, 558 F.3d at 1052. The only evidence presented regarding violence are the deaths of over 75 men and women throughout Basag who were killed due to

being mistakenly identified as Water Warriors since July 2016. R. at 5. However, these people were killed because the military and/or Life Inc. guards thought they were Water Warriors; they were not killed on account of their ethnicity or other protected status. Furthermore, the Thirteenth Circuit classified Marcos' disfavored group membership to be "ethnic Isda-Timog women." R. at 11. These killings involved both men and women, and more than half of these killings happened on Isda. R. at 5. Thus, the actual number of killings of ethnic Isda-Timog women since 2016 (more than two years ago) constitutes less than half of the reported 75 deaths. This number is miniscule compared to the evidence presented in *Sael* of the over 1,000 ethnic Chinese people who were killed in Indonesia. *Sael*, 386 F.3d at 925-926.

The additional evidence provided by petitioner to support her assertion that she is a member of the disfavored "ethnic Isda-Timog women" group are mere rumors and hearsay. Marcos heard from a friend that an Isda woman was raped by a Life Inc. guard, and her husband's friend, Bayani, told her he heard a rumor that an unmarried Isda-Timog woman recently became pregnant by unknown means. R. at 6, 9. Marcos cannot prove these two rumors are true, and even if she did, two instances of rape are not enough to prove a substantial number of ethnic Isda-Timog women are persecuted. Furthermore, Marcos testified that she did not know anyone personally who had been the victim of rape or sexual violence by Life Inc. employees. R. at 10. Therefore, Marcos failed to present a sufficient amount of evidence to prove that ethnic Isda-Timog women comprise a disfavored group.

B. Petitioner Has Failed to Demonstrate a Sufficient Level of Individualized Risk.

The harassment faced by Petitioner over the course of a month is insufficient to prove an individualized risk of persecution. Absent a pattern or practice of persecution, an asylum applicant must provide evidence that there is a "reasonable possibility he or she would be singled

out individually for persecution." 8 C.F.R. § 1208.13(b)(2)(iii). The petitioner must show "specific, detailed facts supporting the reasonableness of [her] fear that [she] will be singled out for persecution." *Bhatt v. Reno,* 172 F.3d 978, 982 (7th Cir. 1999) (citing *Bevc v. INS*, 47 F.3d 907, 910 (7th Cir.1995)). Petitioner's past experiences are mere threats that did not come to fruition, and she failed to prove that she will be singled out for persecution. Thus, she has not demonstrated a sufficient level of individualized risk and should be denied asylum.

In *Salim v. Holder*, the court found an ethnic Chinese Christian from Indonesia ineligible for asylum, because he did not present evidence suggesting he would be singled out for persecution if returned to Indonesia. *Salim v. Holder,* 728 F.3d 718, 720 (7th Cir. 2013). Salim stated that he endured ongoing harassment from Muslim students at school, he was robbed for his lunch money several times, and a student once threatened him with a knife and punctured his neck because of his Chinese ethnicity while in Indonesia. *Id.* at 719. Even though there was general discrimination against Chinese Christians in Indonesia, the court agreed with the Immigration Judge's determination that he failed to prove he would be singled out for persecution if he were to return. *Salim,* 728 F.3d at 720. Thus, he was denied asylum because of his failure to provide sufficient evidence of individualized persecution. *Id.* at 719.

Petitioner has also failed to show she would be singled out for persecution if she were to return to Mayaman. Almost all of her instances of harassment stem from one Life Inc. guard, who sexually harassed her on March 6, March 12, and April 6. R. at 6, 7, 8, 12. The other instance of harassment on April 5 occurred at the temporary water checkpoint that was established during a heat wave, and she only had to go to that water station for two weeks. R. at 8. None of Marcos's experiences are as serious as the thefts and punctured neck wound that Salim experienced, and it was still found he did not have an individualized risk of persecution.

Furthermore, because all of these instances of sexual harassment derived from Life Inc. guards, Marcos could simply report him to the authorities and/or Life Inc., a company that has a policy that any guard suspected of sexual assault will face immediate termination. R. at 6. Therefore, her past experiences of sexual harassment and threats do not demonstrate a risk of being singled out for persecution if she were to return to Mayaman, and she should be denied asylum.

III. MARCOS WAS THE PROPER PARTY TO BEAR THE BURDEN OF DEMONSTRATING IF SUBSTANTIAL EVIDENCE SUPPORTED A FINDING THAT FUTURE PERSECUTION COULD BE AVOIDED BY INTERNAL RELOCATION BECAUSE LIFE INC. IS NOT GOVERNMENT-SPONSORED.

Before determining whether one has a well-founded fear of persecution, the Court must first consider internal relocation. "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 . . . if under all the circumstances it would be reasonable to expect the applicant to do so." 8 C.F.R. § 1208.13(b)(2)(C)(ii). In determining whether or not it is reasonable for an applicant to internally relocate, either the government or the applicant will be assigned with the burden of proof. Thus, the issue is who has the burden of proof in determining whether or not it is reasonable for the applicant to internally relocate.

If the applicant has proven that there has been past persecution, then the government will bear the burden of establishing by a preponderance of the evidence that internal relocation is reasonable. 8 C.F.R. § 1208.13(b)(1)(ii). However, "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. § 1208.13(b)(3)(i). Lastly, if the persecutor within the

applicant's country is the government or government-sponsored, then it is presumed that internal relocation would not be reasonable, unless the government can prove by a preponderance of the evidence that it would still be reasonable for the applicant to relocate under all of the circumstances. 8 C.F.R. § 208.13(b)(3)(ii).

In the case before the Court, Leila Marcos has not demonstrated past persecution, and the persecutor is not the government nor a government-sponsored entity. Therefore, the burden shifts from the government to Marcos. As a result, Marcos will bear the burden of demonstrating whether substantial evidence supports a finding that future persecution cannot be avoided by internal relocation. Because Life Inc. is a private corporation based out of the United States, it is not a government-sponsored entity. Nonetheless, there are no ramifications if the Court decides that Life Inc. is not government-sponsored, because Marcos could still obtain protection in her home country of Basag from the government. Thus, Marcos will be unable to show that future persecution cannot be avoided by internal relocation.

A. Life Inc. Is Not Government-Sponsored Because It is a Private Corporation.

Although courts have not exactly defined what "government-sponsored" means for the purposes of asylum law, Merriam-Webster Dictionary defines government as, "the organization, machinery, or agency through which a political unit exercises authority and performs functions and which is usually classified according to the distribution of power within it." "Government. " *Merriam-Webster.com*. Merriam-Webster, 2019. Web. 24 January 2019. Merriam-Webster also describes government as, "the complex of political institutions, laws, and customs through which the function of governing is carried out." *Id.* Life Inc. is not the government because it is incorporated in Delaware, U.S.A. and is required to pay annual fees to the Basag government.

Life Inc. is only in Basag in order to assist in rectifying the water crisis within the country. It is not there to assist with government functioning in any way. The President of Basag signed a thirty-year concession contract with Life Inc. assigning full control of all water facilities to the international corporation. Hence, Life Inc. must provide and source water to Basag occupants, because the contract gave the exclusive obligation to maintain and rebuild water works. The Basag government agreed to provide military aid if the assigned water facilities were ever threatened. However, Life Inc. hired armed guards, on its own account, in order to protect various water resources. This shows that the Basag government has not been assisting the Delaware corporation. Therefore, it is apparent that Life Inc. is not government-sponsored.

Based on the foregoing, Marcos is the proper party to bear the burden of proof because Life Inc. is not government-sponsored. In *Camara v. Holder*, Camara based his asylum on future persecution due to his opposition to possible female genital metalation of his daughters if he had to take them with him to Guinea. *Camara v. Holder*, 725 F.3d 11, 12 (1st Cir. 2013). The Court found that Camara did not provide evidence that he would be targeted by a government actor in any way. *Camara*, 725 F.3d at 14. The court concluded that he would only be persecuted by his family and fellow tribe people and could avoid persecution by relocating within his country, Guinea. *Id.* Because the persecution was not by the government or a government-sponsored entity, the Court held that Camara was the proper party to bear the burden of proof that relocation would not be reasonable. *Id.*

Also, in *Camara*, the persecution Camara was going to face was a common practice in Guinea that was illegal. However, the government did nothing to prevent it. *Camara*, 725 F.3d at 13. Although the government did nothing to prevent it, the Court still found that it was not

government persecution and Camara still bore the burden of proof. *Camara*, 725 F.3d at 13. This shows that the Court has a high standard in determining what is government or government-sponsored. If the court in *Camera* held Camara was the proper party to bear the burden of proof, then Marcos should also be the proper party to bear the burden of proof as Camara's persecution was more closely related to the government than Marcos' persecution is. Marcos' persecution is stemming specifically from the guards who work for Life Inc. As such, Marcos could reasonably go to the Basag government or the police force in Basag to ask for help. In Camara's case, the government knew of the persecution, made it illegal, but chose to do nothing to prevent it.

The guards hired by Life Inc. are similar to a social group rather than government-sponsored. In *Khan v. Holder*, Khan was seeking asylum in the United States because the Taliban became active in the area of Pakistan he lived in and he would face persecution by the group if he had to return. *Khan v. Holder*, 727 F.3d 1, 2 (1st Cir. 2013). The Court held that Khan was "victimized by the Taliban and not by the government of Pakistan . . . and that the government does not appear to have been unable or unwilling to control the Taliban." *Khan*, 727 F.3d at 3. The police in Khan's Pakistan community had been involved with investigating the Taliban and incidents that had occurred. *Id.* at. 4. The police force and the Pakistani army were attempting to take control and were even at war with the Taliban. *Id.* at 5. Therefore, Khan was the proper party to bear the burden of proof because he had not shown past persecution and the Taliban was considered a social group, not connected to the government of Pakistan. *Id.* at 6.

Further, Khan's family was still residing in Pakistan and had not been harmed. *Khan*, 727 F.3d at 6. His wife and children had moved from their home to stay with family while the

Taliban was targeting them. *Id.* at 4. The Court determined the Taliban was only secretly active in certain places, but not in control. Thus, it was possible for Khan and his family to stay away from the Taliban. *Id.* Similarly, Marcos' friends and family are still residing in Basag and have not been harmed by the guards of Life Inc. Thus, the burden of proof should indisputably shift to Marcos to show it is unreasonable for her to relocate within Basag since the guards of Life Inc. are a similar to a social group.

If the Taliban was not considered government-sponsored by the Court, then the guards working for Life Inc. should not be considered government-sponsored. In *Khan*, the Court found that Khan was "victimized by the Taliban and not by the government of Pakistan, and that [t]he government does not appear to have been unable or unwilling to control the Taliban." *Khan*, 727 F.3d at 6. Thus, it was determined "that there was no connection between Khan's fear of future persecution and the Pakistani government." *Id.* at 6.

The Taliban and the private guards for Life Inc. could also both be considered as gangs. Merriam-Webster defines a gang as, "a group of persons working to unlawful or antisocial ends." "Gang." *Merriam-Webster.com*. Merriam-Webster, 2019. Web. 24 January 2019. In *Perez v. Sessions*, Perez was a citizen of and living in Honduras where the MS-13 street gang tried to recruit him. *Perez v. Sessions*, 889 F.3d 331, 333 (7th Cir. 2018). They told him he could join or "suffer the consequences," which he knew meant beatings and even murder. *Id.* at 333. The Court determined that Perez was the proper party to bear the burden of proof because he had not faced past persecution since he escaped from the gang by coming to the United States. Also, MS-13 was a gang located in Honduras, it was not government or government-sponsored. *Perez*, 889 F.3d at 335. Consequently, the guards of Life Inc. are similar to MS-13 because they are a group

of people working together, and in these cases, they are working together to unlawful ends. Life Inc. was hired by the government to do a specific job in order to help the country with its water crisis, it is not government or government-sponsored. In fact, the guards of Life Inc. are hired and paid for directly by Life Inc. and have no connection to the Basag government. This shows that they are more like a gang than a government-sponsored entity.

Since Life Inc. is neither the government nor government-sponsored in Basag, Marcos can find protection within her government. Marcos can seek protection through the Basag government and/or the police force in Basag. Thus, Marcos is the proper party to bear the burden of showing substantial evidence that she cannot relocate within her home country since the guards of Life Inc. are hired and paid by Life Inc., who is not government or government-sponsored. Simply put, Life Inc. is a private entity from the United States and only temporarily in the country to assist in fixing the water crisis. It is not a government or government-sponsored because it is more like a gang of criminals as shown through the examples above.

B. There Are No Ramifications for The Decision That Life Inc. is Not Government-Sponsored Because Marcos Could Still Obtain Protection in Her Home Country, Basag.

If the Court decides that Life Inc. is not government-sponsored, there are no ramifications for this decision. Rather, this result would keep the proper balance within the United States asylum system. If the Court were to determine Life Inc. a government-sponsored company, it would be too easy for entities to be declared as government-sponsored, and all private companies contracted by the government would be considered government-sponsored. This would result in a slippery slope as it would be very easy for people to seek asylum in the United States. This

would cause chaos in the United States' court system. If it is easier for people to attain asylum, then more people will journey to the United States seeking asylum and cause the immigration courts to be overwhelmed with asylum cases.

There are several countries throughout the world where people fear or experience persecution. In *Ensuring Protection or opening the Floodgates?: Refugee Law and its Application to those fleeing Drug Violence in Mexico*, Benjamin Harville demonstrates that the corruption and violence in Mexico should be reason for more asylum protection to Mexicans fleeing to the United States. *Id.* at 172 . However, Harville also discusses the potential bars to relief for Mexican asylum seekers, specifically, internal relocation. *Id.* at 172. When a country is large and diverse, the groups that are persecuting others usually exert control only over certain territories. As a result, other areas in the country are safe from these groups who are persecuting others. Harville further argues that there are situations where the whole country is dangerous for asylum seekers. However, this is something the court will determine through facts and evidence. If an asylum seeker believes that it is difficult to seek asylum in the United States, they will only apply for asylum if he or she truly believes they have a strong case. If it becomes too easy for people to obtain asylum in the United States, everyone who believes they have the slightest chance to be granted legal status in the United States will attempt to seek asylum. As a result, people may begin to seek asylum for the sole purpose of living in the United States, not because they are sincerely seeking asylum. For many, it will be seen as an easy entrance into the United States. Therefore, the purpose of asylum would be frustrated, because it would no longer be used to protect those in need but rather as a means for foreigners to enter the United States.

Further, if the Court decides Life Inc. is not government-sponsored, this decision only shifts the burden from the government to Marcos, the asylum seeker. Thus, Marcos (the asylum seeker) still has the chance to prove that she cannot reasonably relocate within her country. The Court is not denying her the right to asylum immediately; the burden of proof is just shifting to Marcos to show that relocation is not plausible. Whether it be the government or the asylum seeker who bears the burden of proof, there are still two inquiries that must be proven. The first inquiry is whether safe relocation is possible. *Oryakhil v. Mukasey*, 528 F.3d 993, 998 (7th Cir. 2008). If safe relocation is possible, the second inquiry is whether it would be reasonable to expect the applicant to safely relocate. *Id.* Accordingly, this still gives the asylum seeker a chance to show the Court that asylum is appropriate.

Based on the foregoing, no ramifications exist if the Court determines Life Inc. is not government sponsored. The Court has set a bright-line rule where if the persecution is coming from the government or a government-sponsored entity then the burden is on the court to prove otherwise. However, if the persecution is not government or government-sponsored, then the burden shifts to the asylum seeker to prove otherwise. Very rarely does the Court have a bright-line rule to follow. Thus, this rule should be upheld, because it makes it easier for all to follow and it keeps order within the court system.

CONCLUSION

The Court should affirm in part and reverse in part the Thirteenth Circuit's decision. The Court should overrule the adoption of the disfavored group analysis as it is an invalid basis to establish a well-founded fear of persecution for the purposes of asylum eligibility. The Thirteenth Circuit's finding that Marcos proved a well-founded fear of persecution under the disfavored group analysis should be reversed, because Marcos failed to establish a well-founded fear of persecution, even under the lower evidentiary threshold of the disfavored group analysis. Furthermore, the Court should affirm the Thirteenth Circuit's holding that Marcos was the proper party to bear the burden of showing that internal relocation is not reasonably possible and that she failed to prove it would not be reasonable for her to internally relocate. Thus, Marcos should be denied asylum.

Respectfully submitted,

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