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
OF THE UNITED STATES COURT OF APPEALS
FOR THE THIRTEENTH CIRCUIT

BRIEF FOR THE RESPONDENT

Team 1020
Counsel for Respondent

QUESTIONS PRESENTED

I. Did the Thirteenth Circuit err in applying the disfavored group analysis to establish a well-founded fear of future persecution when the pattern or practice method already exists to establish this fear based on group membership?

II. Did the proper party bear the burden of demonstrating if substantial evidence supported a finding that future persecution could be avoided by internal relocation?

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The opinion of the United States Court of Appeals for the Thirteenth Circuit is reported at *Leila Marcos v. Attorney General of the United States*, No. 18-0512 (13th Cir. Mar. 12, 2018).

JURISDICTIONAL STATEMENT

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

STANDARD OF REVIEW

The issue of disfavored group analysis and internal relocation to establish a well-founded fear of persecution for the purposes of asylum eligibility is a question of law. This Court reviews questions of law de novo. *Zheng v. Ashcroft*, 332 F.3d 1186, 1194 (9th Cir. 2003) (holding that the BIA's interpretation of purely legal questions is reviewed de novo).

STATEMENT OF THE CASE

1. Statement of Facts

On August 7, 2017, Leila Marcos ("Petitioner") entered the United States at San Francisco International Airport. (R. 9; O.B. 3.) After being detained by customs officials, Petitioner filed an application for asylum. (R. 10; O.B. 3.)

Until entering the United States, Petitioner resided in northern Isda, one of the two islands of Basag. (R. 5.) While Isda's economy is built around its successful fishing industries, Mayaman, the other island, is a sought-after tourist destination due to its beaches and resorts. (R. 2-3.) In mid-1992, global warming began to affect the islands. (R. 2.) The decades following brought extreme whether to Isda, wrecking the villages, coastline, and fishing industries. (R. 2.)

In 2011, as a result of the wreckage, Isda's water supply became scarce due to floods polluting the wells with salt water. (R. 3.) In response, President Ferdinand Aquinto nationalized all water sources in Basag. *Id.* Mayaman was able to subsidize new water and sanitation facilities as well as protect other water sources through taxes produced through its tourism industry. (R. 4.) On Isda, however, the government shut down the polluted wells and relocated the water sources. (R. 4.) This forced the Isda people to procure water miles away from their villages and homes while the government attempted to remedy the water pollution problems. *Id.*

In search of a solution, President Aquinto entered into a contract with Life Inc. giving the company full control of Basag's water facilities. (R. 4.) The contract gave Life Inc. exclusive control in maintaining and rebuilding these facilities. *Id.* Per the contract, Basag would intervene and provide military aid if the facilities were threatened. *Id.* In response, a small group of Timogs held a protest against President Aquinto, "demanding more attention and concern towards the water problem on Isda." *Id.* A number of these protestors formed the "Water Warriors" to work to "undermine Life Inc. and push water resource control and accountability back on the government." *Id.* The Water Warriors have used various methods to show their disapproval of the contract, including targeting Life Inc. with homemade explosives. (R. 4-5.) Due to the ongoing threats against the water facilities by the Water Warriors, Life Inc. assigned armed guards and Basag soldiers to protect Basag's water resources. (R. 5.) These armed guards "have killed over 75 [people] mistakenly identified as Water Warriors." *Id.*

Like other Isda residents, Petitioner and her husband have been affected by the effects of global warming on the island. (R. 6.) The scarcity of water on Isda has required residents to travel in order to gather water. *Id.*

Petitioner's asylum claim rests on her argument that "her situation established a well-founded fear of persecution due to a pattern or practice of rape and harassment against similarly situation Timog women in the Basag Islands." (R. 10.) Notably, Petitioner has based this belief not on actual events that occurred, but rather rumors of rape and an incident where a guard verbally harassed her four months before leaving the island and seeking asylum. (R. 7-10.) Notably, in response to the claims of rape, Life Inc. required all of its employees to undergo sexual harassment training, including the implementation of a policy that results in immediate termination for any Life Inc. guard suspected of sexual assault. (R. 6, n. 2.) Additionally, the contract requires Life Inc. guards to follow Basag law, including Penal Code 4351 which "criminalizes rape and acts of lasciviousness, which includes 'molestation.'" *See* Basag Pen. Code § 4351 (2018); (R. 5, n. 1.). The following is a summarization of incidents where Petitioner claims to have felt threatened by the guards on Isda:

- On March 6, 2017, Petitioner was harassed by a guard at a water facility who told her she could get more water if she had sex with him. (R. 6.) She took this as an actual threat as she had heard an unconfirmed rumor from a friend that an Isda woman had been raped following a similar interaction. *Id.*
- On March 9, 2017, Petitioner witnessed a Basag soldier confront a pregnant woman whom he believed to be a Water Warrior. (R. 7.) He asked the woman to remove her shirt to confirm she was not carrying explosives. *Id.* The woman did as asked and upon proving she was not carrying explosives, received her water. *Id.*
- On March 12, 2017, Petitioner was again harassed by the guard from March 6, who said to her: "I am going to have my way with you, honey, whether you want it or not." *Id.*

- On April 5, 2017, a guard grabbed Petitioner's backside and whistled as she left the water checkpoint. (R. 8.)
- On April 6, 2017, Petitioner informed her husband of these incidents. *Id.* Upon confronting the guards, her husband was "shot in the arm when he pulled a fillet knife from his pocket while yelling at a guard." *Id.* The guards escorted her husband home where Petitioner answered the door. *Id.* The same guard from the March 6 and 12 incidents made a "thrusting upward gesture with two fingers toward [Petitioner] as he left." *Id.*
- Petitioner and her husband left Isda for Mayaman to seek medical treatment. *Id.* While they were there, Bayani Santos ("Santos") warned Petitioner that the guards target Isda-Timog women. (R. 8-9.) Santos had never witnessed any violence but had heard a rumor of a woman who "became pregnant by unknown means." (R. 9.) He then assured Petitioner that she and her husband "would be safe in Mayaman as long as they were not Water Warriors." *Id.*
- About a month later, Petitioner overheard a Life Inc. guard say: "I cornered her by the well, and hit her until she submitted. Getting sex here is as easy as it is on Isda." *Id.*

On August 6, 2017, Petitioner left Basag for the United States, filing her application for asylum the next day. *Id.* Since then, there has been "no substantial change in conditions" on Basag. *Id.*

2. Procedural History

On August 7, 2017, Petitioner filed an application for asylum based on an alleged fear of persecution faced by Timog women on the Basag Islands. (R. 9-10.) Petitioner claims that Life Inc. employees regularly engaged in a pattern of sexual harassment and rape

against Timog women in the Basag Islands. (R. 10.) The Immigration Judge ("IJ") denied Petitioner's request for asylum because Petitioner failed to show that she could not avoid persecution by relocating to another part of Basag. (R. 10.) Petitioner did not adequately demonstrate a clear pattern of rape. *Id.* Then, Petitioner appealed to the Board of Immigration Appeals ("BIA") which affirmed the IJ's decision. *Id.* The BIA found that while Petitioner's fear of persecution was reasonable, Petitioner could relocate internally to avoid such persecution. *Id.* Petitioner appealed to the Thirteenth Circuit Court of Appeals to review her request for asylum. *Id.* Petitioner appealed the decision because she contends that her circumstances produce a well-founded fear of persecution on account of a pattern or practice of rape, and that the harassment against Timog women in Basag makes them a mistreated group, which also creates a valid basis for a well-founded fear of persecution. (O.B. 6-7.) She further argues that remand is appropriate on the reasonableness of internal relocation because although the IJ assigned her the burden of proof to demonstrate such reasonableness, the IJ was not sufficiently specific as to why the burden shifted to her. (O.B. 15.) She also claims that Life Inc. is a governmental actor and the BIA should explicitly define government-sponsored per the *Chevron* deference rule. (O.B. 14-17.)

The Respondent answered with a cross-appeal in order to dispute BIA's use of the disfavored group analysis for assessing well-founded fear of persecution. *Id.* On October 12, 2018, the Supreme Court granted writ of certiorari. *Id.*

SUMMARY OF ARGUMENT

The United States Court of Appeals for the Thirteenth Circuit erroneously adopted the Ninth Circuit's disfavored group analysis as a method to establish fear of future persecution in asylum claims. Not only would this method create a dangerous precedent by enabling an

onslaught of asylum applicants, but there already exists a method to establish fear of future persecution based on group membership—the pattern or practice standard. Further, even if this court were to adopt the disfavored group analysis, Petitioner has not successfully proven her membership in such a group. According to the Ninth Circuit's own definition, a "disfavored group" is "'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' but who are 'not threatened by a pattern or practice of systematic persecution.'" *Tampubolon v. Holder*, 610 F.3d 1056, 1060 (9th Cir. 2010) (quoting *Wakkary v. Holder*, 558 F.3d 1049, 1063 (9th Cir. 2009)). Petitioner simply does not provide sufficient evidence to properly allege that Timog women are indeed a disfavored group on Basag. Second, even if Petitioner had provided such evidence, her lack of a showing an individualized risk bars her from seeking asylum based on the disfavored group method of analysis. Moreover, even if this Court were to adopt the disfavored group analysis and find that Petitioner does indeed demonstrate a well-founded fear of future persecution, she is unable to qualify for asylum based on her ability to reasonably relocate within Basag, her home country.

Further, the Thirteenth Circuit properly assigned the burden of proof to Petitioner in establishing whether or not internal relocation is reasonable. When the persecution is not government-sponsored, the burden of proof rests with the asylum applicant. *Lopez-Gomez v. Ashcroft*, 263 F.3d 442, 445 (5th Cir. 2001). According to *Lopez-Gomez v. Ashcroft*, only when the persecutor is the government itself or a government-sponsored entity does the burden of proof shift to the entity rather than the petitioner to establish the reasonableness of internal relocation. *Id.* Here, Life Inc. is correctly classified as a nongovernmental agency, requiring Petitioner to bear the burden of proof in the context of reasonable relocation.

Respondent respectfully requests this Court reverse in part and affirm in part the decision of the Court of Appeals for the Thirteenth Circuit for the following reasons: first, the disfavored group analysis is an improper method in establishing a fear of future persecution; second, the court properly adopted the decision of the IJ and BIA in determining that Petitioner bears the burden of proof in establishing internal relocation as unreasonable.

ARGUMENT

I. THE THIRTEENTH CIRCUIT ERRED IN FORMALLY ADOPTING THE DISFAVORED GROUP ANALYSIS AS A MEANS OF ESTBALISHING A WELL-FOUNDED FEAR OF FUTURE PERSECUTION FOR PURPOSES OF SEEKING ASYLUM.

The IJ erred as a matter of law in considering evidence regarding whether Petitioner belonged to a disfavored group in assessing the likelihood that she would face future persecution. While many circuit courts have rejected the adoption of the disfavored group analysis, the Thirteenth Circuit took on the position of the Ninth Circuit in considering an asylum applicant's membership in a disfavored group as a factor in determining individualized risk. *See Wakkary v. Holder*, 558 F.3d 1049 (9th Cir. 2009); *see also Kho v. Keisler*, 505 F.3d 50, 55 (1st Cir. 2007) (where the court rejected the disfavored group standard, thereby joining other circuit courts that have "rejected the use of a lower standard for individualized fear absent a pattern or practice of persecution and rejected the establishment of a disfavored group category"). The Thirteenth Circuit mistakenly relied upon *Sael v. Ashcroft* in finding that Petitioner had established her membership in a disfavored group and could use that membership to demonstrate a well-founded fear of future persecution. In *Sael v. Ashcroft*, the Ninth Circuit ruled that an asylum applicant can demonstrate a well-founded fear of future persecution by establishing a pattern or practice of persecution of people similarly situated or by proving that she is member of disfavored group

coupled with showing that she, in particular, is likely to be targeted as member of that group. 386 F.3d 922, 925 (9th Cir. 2004).

Respondent respectfully requests that this Court reverse in part the decision of the Court of Appeals for the Thirteenth Circuit for the following three reasons: first, the court erred in adopting the Ninth Circuit's recognition of the disfavored group analysis as a legitimate means of establishing an asylum applicant's well-founded fear of future persecution; second, even if this Court were to accept the disfavored group analysis as a proper method of establishing the requisite fear, Petitioner has not sufficiently proved her membership in such a group; lastly, Petitioner could avoid future persecution by internal relocation.

A. The Thirteenth Circuit's Adoption of the Disfavored Group Analysis Is a Departure from the Established Statutory and Regulatory Scheme Articulated in the Immigration and Nationality Act.

While the Immigration and Nationality Act does not define "persecution" within its text, U.S. courts have generally described persecution as a flexible concept. *See* 8 U.S.C. § 1101; *Mei Fun Wong v. Holder*, 633 F.3d 64, 71-72 (2d Cir. 2011) ("[persecution] is not statutorily defined and courts have not 'settled on a single, uniform definition,'" *quoting Ivanishvili v. U.S. Dep't of Justice*, 433 F.3d 332, 340 (2d Cir.2006)); *Karim v. Holder*, 596 F.3d 893, 896 (8th Cir. 2010) ("[p]ersecution is a 'fluid concept'"). Central to each definition, however, is the requirement that "[t]o qualify as persecution, a person's experience must rise above unpleasantness, harassment, and even basic suffering." *See Vasili v. Holder*, 732 F.3d 83, 88 (1st Cir. 2013) (no persecution where the petitioner was beaten up by men with guns because the petitioner did not show he experienced something more than unpleasantness, harassment, or even basic suffering); *Zhou Ji Ni v. Holder*, 635 F.3d 1014, 1018-19 (7th Cir. 2011) (no persecution where the petitioner's parents were arrested and the petitioner received threats and warnings against himself and his

family because the acts against him are better characterized as harassment). While Respondent does not doubt the credible evidence submitted by Petitioner, her experiences do not meet the requisite requirement of rising above unpleasantness, harassment, or basic suffering.

For example, much of the persecution faced by Petitioner is, at best, derivative persecution, or persecution by proxy, as she uses experiences faced by another woman and Petitioner's husband to establish persecution against her own person. *See Zhou Ji Ni*, 655 F.3d at 1018; (R. 7, 8.). Beyond that, the personal persecution faced by Petitioner is nothing more than mere harassment and, by definition, cannot justify a finding of persecution per se. *See Vasili*, 732 F.3d at 88. Because the IJ correctly ruled that Petitioner's experiences did not rise to the level of past persecution, the Thirteenth Circuit did not address it and instead focuses on Petitioner's desire to establish a well-founded fear of future persecution.

1. The disfavored group analysis serves as an unnecessary alternative to the pattern or practice method of establishing fear of future persecution based on group membership.

Generally, in order to establish a well-founded fear of future persecution, the asylum applicant must establish either that she was the victim of individual, particularized persecution or that a likelihood of future persecution exists because of membership in a systematically persecuted group. 8 C.F.R. § 208.13(b)(2)(iii) (2008); *see* Bridget Tainer-Parkins, *Protection from a Well-Founded Fear: Applying the Disfavored Group Analysis in Asylum Cases,* 65 Wash. & Lee L. Rev. 1749, 1754 (2008). However, it is not necessary that the applicant prove that she will be singled out for persecution if she can show: (1) that in her home country there is a pattern or practice of "persecution of a group of persons similarly situated to the applicant on account of race, religion, nationality, membership in a particular social group, or political opinion," and (2) her own "inclusion in, and identification, with such group of persons" such that there is a

reasonable possibility that she would be threatened upon return to that country. 8 C.F.R. § 208.13(b)(2)(iii)(A); 8 C.F.R. § 208.13(b)(2)(iii)(B); *see* Tainer-Parkins at 1754.

Instead of the established pattern or practice standard described above, the Thirteenth Circuit applied the disfavored group analysis to determine whether Petitioner had a legitimate fear of future persecution. When applied by the Ninth Circuit in *Kotasz v. I.N.S.*, the disfavored group analysis served as an alternative to the pattern or practice claim. 31 F.3d 847, 853 (9th Cir. 1994). There, the court determined the disfavored group analysis as a method to address and resolve asylum claims brought by asylum applicants alleging group mistreatment, rather than individualized mistreatment. *Id.* In abandoning the pattern or practice requirement, the *Kotasz* Court justified its application of the disfavored group analysis by recounting the persecution faced by Jewish people during World War II. *Id.* at 852. The Ninth Circuit observed that "it 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." *Id.* Through this analogy, the court attempted to show difficulty in satisfying the pattern or practice scheme articulated in the Immigration and Nationality Act. *See* 8 U.S.C. § 1101(a)(42)(A) (2000); *see also* 8 C.F.R. § 208.13(b)(2)(i). The court's theory was this: while group persecution can be so systematic as to satisfy the pattern or practice scheme (as it was in WWII), that is often not the case. *Kotasz*, 31 F.3d at 853. More often, the court reasoned, asylum applicants face non-systematic group persecution that cannot satisfy the high pattern or practice standard where being a member of a group places an asylum applicant at risk even if the entire group is not subjected to such widespread persecution. *Id.* In response, the Ninth Circuit adopted the disfavored group analysis, where asylum applicants who belong to such groups can make claims

based on a fear of future persecution by showing membership in a group paired with some individualized risk, without satisfying the pattern or practice scheme. *Kotasz*, 31 F.3d at 853.

Notably, the Thirteenth Circuit, in formally adopting the Ninth Circuit's disfavored group analysis, erred in its reasoning and therefore adopted the framework on illegitimate grounds. In arguing that it would be "overburdensome to ask an asylum applicant to prove that she would be individually selected for persecution when significant evidence of mistreatment against a group to which she belongs exists," the court used the analogy provided in *Kotasz* of the persecution faced by Jewish people during WWII. (O.B. 11.) The Thirteenth Circuit specifically focused on the aforementioned excerpt from *Kotasz*: "[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." *See Kotasz*, 31 F.3d at 852; (O.B. 11.). We agree with this claim—a court would not require an individual risk of persecution when such a systematic one exists against an entire religious group. However, the disfavored group analysis is not necessary to arrive at this conclusion, as this persecution clearly satisfies the already-established pattern or practice scheme. In its holding, the Thirteenth Circuit misconstrues the Ninth Circuit's reasoning for adopting the disfavored group analysis, allowing for asylum applicants to make a showing of fear of persecution without satisfying the pattern or practice test.

Adoption of the disfavored group analysis is unnecessary, as well as contrary to the statutory and regulatory scheme, as the Immigration and Nationality Act already provides a framework for establishing fear based on group membership—the pattern or practice claim. *See* 8 U.S.C. § 1101(a)(42)(A) (2000); *see also* 8 C.F.R. § 208.13(b)(2)(iii)(A); 8 C.F.R. § 208.13(b)(2)(iii)(B). To satisfy the pattern or practice requirement, an asylum applicant need not make a showing of individualized risk, but instead must present evidence of systematic

persecution as well as evidence that the group is targeted "specifically on account of one of the five statutory grounds" (race, religion, nationality, membership in a particular social group, or political opinion). *Kho*, 505 F.3d at 54; *see Meguenine v. INS*, 139 F.3d 25, 28 (1st Cir.1998); *Pieterson v. Ashcroft*, 364 F.3d 38, 43 (1st Cir.2004). Adoption of the disfavored group analysis unnecessarily goes against the provided statutory and regulatory scheme articulated in the Immigration and Nationality Act, paving a path for asylum that would allow applicants to show fear of future persecution simply by being a member of a disfavored group, nowhere near satisfying the requirement of proving systematic persecution.

2. Adoption of the disfavored group analysis would set a dangerous precedent by lowering the asylum applicant's ultimate burden.

Further, the Thirteenth Circuit erred in stating that the disfavored group method of analysis does not lower the asylum applicant's ultimate burden. Indeed, it does significantly lower this burden by creating a balancing test that allows evidence of non-systematic group-based mistreatment to essentially eliminate the need for the asylum applicant to establish an individualized risk of persecution. The Seventh Circuit reasoned that "[t]he standard for providing fear of future persecution must remain high as '[o]nce the court finds that a group was subject to a pattern or practice of persecution, every member of the group is eligible for asylum.' *Ahmed v. Gonzales*, 467 F.3d 669, 675 (7th Cir.2006) (holding that the petitioner did not satisfy the pattern or practice method of analysis where the persecution faced by the Midgan clan was not deemed "extreme"). This narrow interpretation stops an onslaught of asylum applicants. *Id.* Should the court adopt the disfavored group analysis, a standard much easier to meet than the pattern or practice test, the number of people able to seek asylum would grow exponentially, allowing anyone to claim asylum status.

The pattern or practice standard is admittedly high, but not without good reason. To satisfy this requirement, the alien must show a "systematic, pervasive, or organized effort to kill, imprison, or severely injure members of the protected group, and this effort must be perpetrated or tolerated by state actors." *Mitreva v. Gonzales*, 417 F.3d 761, 764 (7th Cir. 2005). As required by the statutory and regulatory scheme, the Thirteenth Circuit should have applied the pattern or practice standard. Not only does Petitioner fail to show a "systematic, pervasive, or organized effort to kill, imprison, or severely injure members of the protected group," but the alleged effort is not tolerated by state actors. In fact, many steps have been taken to ensure employees of Life Inc. do not mistreat any individual, specifically focusing on women and allegations of sexual assault. (R. 5, n. 1; R. 6, n. 2.) Simply put, if this Court were to adopt the disfavored group analysis and allow Petitioner to use it to establish a well-founded fear of persecution, it would be making a general grant of asylum to all Timog women on Isda. Should this Court adopt the disfavored group analysis and deem legitimate Petitioner's argument, it would open the door to all women on Isda to apply for and receive asylum.

B. Even if This Court Were to Adopt the Disfavored Group Analysis, Petitioner Should Still Be Denied Asylum Due to Her Failure to Properly Establish a Fear of Future Persecution Using This Method.

Because Petitioner cannot satisfy the balancing test promulgated by the disfavored group analysis, she cannot successfully use this alternative method to establish a well-founded fear of future persecution. An asylum applicant must make two showings to prevail on a disfavored group claim: (1) membership in a disfavored group, and (2) "an individualized risk of being singled out for persecution." *Sael*, 386 F.3d at 935. The court explained in *Kotasz* that membership in a disfavored group that experiences some persecution, coupled with some degree of individualized persecution, may establish the well-founded fear of persecution necessary to

obtain asylum. *Kotasz*, 31 F.3d at 853. The court discussed this coupling as a balancing approach: the greater the persecution against the disfavored group of which the asylum applicant is a member, the less evidence of individualized persecution is necessary. *Id.* Here however, Petitioner fails to adequately establish herself as a member of a disfavored group, and similarly fails to show any individualized seeking-out or persecution against her to show a reasonable well-founded fear of future persecution.

Notably, Petitioner's case largely consists of rumors, rather than personal experiences. (R. 6, 9.) Although she did recount certain instances where she may have felt subjective fear, Petitioner has not provided sufficient evidence to prove that Life Inc. guards regularly mistreat Timog women as a group. In fact, according to the record, Life Inc. has taken steps to ensure that their employees do not mistreat any women by requiring sexual harassment training and following Basag law, which criminalizes rape, attempted rape, and other sex offenses like molestation. *See* Basag Pen. Code § 4351 (2018); (R. 5, n. 1; R. 6, n. 2.). Such a weak showing of group mistreatment cannot satisfy the disfavored group theory promulgated in *Kotasz*. Petitioner should not be able to successfully allege a well-founded fear of future persecution using the disfavored group analysis because the harassment of Timog women in Basag is not nearly as egregious as the standard requires. *See Kotasz*, 31 F.3d at 852. Due to the lack of such an egregious showing of persecution, Petitioner would need to prove some individualized risk, which she fails to do.

1. To prevail under the disfavored group analysis, Petitioner first needs to establish her membership in a disfavored group, which she fails to do.

The Thirteenth Circuit relies upon Petitioner's testimony to justify their ruling that she is indeed a member of a disfavored group for purposes of asylum eligibility. However, the experiences faced by Petitioner do not meet the standards set by the circuits that have adopted

this method of analysis. A disfavored group is defined as "'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' but who are 'not threatened by a pattern or practice of systematic persecution.'" *Tampubolon*, 610 F.3d at 1060 (quoting *Wakkary*, 558 F.3d at 1063). Petitioner fails to satisfy any of the three components of this definition.

First, to belong to a disfavored group, the members of that group must share a common, protected characteristic. While Petitioner certainly falls within the category of Timog women living in Basag, the members of this group do not share any characteristic beyond gender. While gender is considered a protected characteristic, it cannot be for purposes of establishing fear based on the disfavored group analysis, as doing so would allow all women to establish fear based on gender alone. Additionally, there has been no showing that the Timog women face mistreatment *because* they belong to that group. In fact, given the threat the Water Warriors pose to the water supply on the island, most mistreatment reported by Petitioner actually stems from the Life Inc. guards' desire to keep the water sources safe against Water Warriors. For example, when Petitioner recalled a guard "mistreating" a pregnant woman, he did so in order to ensure she was not a Water Warrior in disguise, transporting explosives. (R. 7.) Considering the threats created by the Water Warriors, this tactic was not unreasonable. Certainly, it did not amount to sexual harassment, as the guard was simply vetting the woman to make sure she was not a Water Warrior.

Second, the definition of disfavored group provides that *many* of the members of the group must be mistreated. The record simply does not reflect that this is the case for the women on Isda. Petitioner testifies about multiple occasions involving women and Life Inc. guards and

government soldiers, but these few instances do not amount to a wide showing of mistreatment among this group. In fact, Petitioner's account of the situation on Isda is based largely on rumors. (R. 7-10.) The events that Petitioner actually witnessed (as opposed to hearing about after-the-fact from others) only involve herself and the pregnant woman, certainty not enough to show widespread mistreatment. (R. 7-10.)

Even assuming the rumors are true, however, the violence is at most sporadic and rare, and could be avoided simply by changing one's appearance and apparel. In fact, Santos, the friend with whom Petitioner and her husband stayed in Mayaman, assured Petitioner that she would be safe as long as she was not a Water Warrior, and simply suggested that she "clean up and buy some nicer clothing to appear more like a local." (O.B. 9.) Surely, violence that can be avoided simply by changing one's dress cannot amount to such a widespread showing of group mistreatment as required by the disfavored group analysis.

Additionally, using Petitioner's husband's experience to establish a basis for adoption of the disfavored group analysis would be unsuccessful as his status as man would preclude the use of this instance as a showing of mistreatment or persecution against a member of the group in question (namely, Timog *women* in Basag). Of importance here is the fact that Petitioner's husband threatened the Life Inc. guards with a knife. (R. 8.) As their purpose was to protect the water resources from Water Warriors, their reaction to Petitioner's husband's threat is reasonable.

Third, the definition of disfavored group requires that a substantial number of members in the group must be persecuted. As discussed above, "[t]o qualify as persecution, a person's experience must rise above unpleasantness, harassment, and even basic suffering." *Vasili*, 732 F.3d at 88. Even if the rumors regarding rape on the island are true, there is not enough evidence

in the record to find that a substantial number of Timog women in Basag have faced actual persecution beyond unpleasantness, harassment, or basic suffering.

While Respondent does not doubt the truthfulness of the assertions made by Petitioner or the facts found by the IJ and adopted by the BIA, the experiences described by Petitioner simply do not rise to the level of adequately establishing Timog women on Basag as a disfavored group as outlined in the case law on the matter. Because of this, Petitioner is unable to establish a fear of future persecution based on the disfavored group analysis. Should this Court accept her argument, it would essentially be making a general grant of asylum to all Timog women on Basag.

2. Petitioner must balance the lack of group persecution by making an egregious showing of risk of individualized persecution—this, she also fails to do.

The disfavored group analysis uses a balancing test to determine whether or not an asylum applicant meets the burden. As described above, this balancing requires the asylum applicant to show some membership in a disfavored group, accompanied by some degree of individualized persecution. *Sael*, 386 F.3d at 935. As applied, this means that the greater the risk of persecution because of membership in a group, the less extensive the evidence of particularized or "singled-out" persecution. *Wakkary* 558 F.3d at 1063; *see Kotasz*, 31 F.3d at 853. This was the method used by the Ninth Circuit in *Wakkary v. Holder*. There, the petitioner's membership in groups whose members were shown to have been widely targeted for discrimination, and a substantial number of whom were actually persecuted, was deemed relevant by the court in establishing a fear of future persecution. *Wakkary*, 558 F.3d at 1053. Here, however, Petitioner has failed to make a similar showing, falling short in both widespread targeting of Timog women and in claims of actual persecution against a number of them. Thus, by the Ninth Circuit's own reasoning, Petitioner would be required to make up for that by

establishing particularized persecution against her as an individual member of that group. Again, she fails to do this, as any allegations about her personal experience with Life Inc. guards amount simply to harassment, rather than actual persecution.

When an asylum applicant fails to show any individualized risk, as Petitioner does here, her membership in a specific group does not in itself establish the requisite likelihood of future persecution. For example, in *Lolong v. Gonzales*, the Ninth Circuit held that "[a]sylum applicants who attempt to show their eligibility for asylum in part by relying on their membership in a disfavored group must 'prove something more than their status as … members of' that group." *Wakkary*, 558 F.3d at 1066; *see Lolong v. Gonzales*, 484 F.3d 1173, 1181 n. 6 (9th Cir. 2007). There, the petitioner provided no evidence that she had been, or was likely to be, targeted for persecution by any individual or group in her country. *Id.* at 1180. The court reasoned that the petitioner's fear was a subjective one, but that her subjective fear alone was "insufficient to render her eligible for asylum absent an individualized risk of persecution or a pattern and practice of persecution." *Id.* at 1181. Simply put, the petitioner in *Lolong* did not make a showing that her general fear was any more individualized or distinct than from those felt by all other members of the group to which she belonged. *Id.* Had the court accepted her argument, it would have equated to a general grant of asylum to all members of her group. *Id.*

Petitioner's case is similar in that her fear of harassment may indeed be shared by all Timog women on Basag, but that sporadic violence does not rise to the level of establishing a fear of future persecution absent some showing of individualized risk. Petitioner has not proven that her subjective fear is any different from the fears felt by all Timog women. Certainly, Petitioner's personal experience does not meet this standard of showing particularized individual risk of persecution, as her confrontations with Life Inc. guards and soldiers, while unfortunate,

would qualify at most as mere harassment. Notably, all mistreatment alleged by Petitioner personally was at the hands of one specific Life Inc. guard. (R. 6, 7, 8.) It was not until Petitioner told her husband of these incidents that she shared her experiences with anyone, never reporting the incidents to law enforcement. (R. 8.) Had she reported these incidents, Life Inc. presumably would have taken action against this particular guard, pursuant to both the contract and the Basag Penal Code. *See* Basag Pen. Code § 4351 (2018); (R. 5, n. 1; R. 6, n. 2; R. 8; O.B. 17.).

Because Petitioner cannot adequately satisfy the balancing test required by the disfavored analysis, she cannot properly allege a well-founded fear of future persecution. Absent both a showing of widespread group mistreatment and any heightened individual risk of persecution, Petitioner's experiences amount, at most, to sporadic harassment at the hands of guards simply trying to protect Basag's water resources from Water Warriors.

C. Notwithstanding the Disfavored Group Analysis, the IJ Correctly Denied Petitioner's Asylum Application Based on Her Ability to Reasonably Relocate Internally Within Basag.

Finally, Respondent addresses the IJ's denial of Petitioner's asylum application based on the finding that she could have reasonably relocated to another part of Basag, namely Mayaman. Per the Code of Federal Regulations, "[a]n applicant does not have a well-founded fear of persecution if the applicant could avoid persecution by relocating to another part of the applicant's country of nationality […] if under all the circumstances it would be reasonable to expect the applicant to do so." 8 C.F.R. § 208.13(b)(2)(C)(ii). According to the Thirteenth Circuit's decision, "the internal relocation standards asks (1) whether safe relocation is *possible* and (2) whether it would be *reasonable* for the applicant to safely relocate." (O.B. 14.); *see Oryakhil v. Mukasey*, 528 F.3d 993, 998 (7th Cir. 2008)*; see also Melkonian v. Ashcroft*, 320

F.3d 1061, 1069 (9th Cir. 2003) (holding that "it [was] not enough […] for the IJ to find that applicants could escape persecution by relocating internally," the relocation must also be reasonable).

Notably, the Ninth Circuit declined to grant asylum to an asylum applicant who could reasonably relocate within his own country in *Gonzalez-Hernandez v. Ashcroft*. There, the court reasoned that the fact that the petitioner relocated to another city in his country for several months without receiving any threats or letters was highly relevant in determining whether he could have reasonably relocated. 336 F.3d 995, 999 (9th Cir. 2003). Finding that the petitioner would be safe in the new city even if he were to face persecution if he returned to his hometown, the court denied the petition for asylum. *Id.* at 1000-01.

Similarly, here, even if this Court were to determine that Petitioner might face persecution on Isda, the fact that she safely resided in Mayaman before coming to the United States and seeking asylum is pertinent. (R. 8-9.) Most notably, Petitioner *did* relocate with her husband from Isda to Mayaman for four months without incident, remaining there from April 6, 2017 to August 6, 2017, evidencing that relocation is both reasonable and feasible. *Id.* While on Mayaman, Petitioner neither faced nor witnessed any persecution, let alone unpleasantness, harassment, or basic suffering. At worst, Petitioner overheard individuals whom she claimed to be Life Inc. guards comparing "getting sex" on Isda to Mayaman. (R. 9.) Further, even if Petitioner did believe she would be targeted on Mayaman, she could avoid this by changing her clothing and appearance slightly to blend in as a resident of Mayaman. *Id.* Santos, the man who hosted Petitioner and her husband for a short time "suggested [Petitioner] clean up and buy some nicer clothing to appear more like a local," adding that she and her husband would "be safe in

Mayaman as long as they were not Water Warriors." (R. 9.) Because Petitioner could (and did) reasonably relocate within Basag, her petition for asylum should be denied.

We now turn to whether or not the proper party bore the burden of proof in demonstrating if substantial evidence supported a finding that future persecution could be avoided by internal relocation.

II. PETITIONER PROPERLY BORE THE BURDEN OF DEMONSTRATING A FINDING THAT FUTURE PERSECUTION COULD BE AVOIDED BY INTERNAL RELOCATION.

To successfully gain asylum per 8 U.S.C. § 1101(a)(42), the applicant must show that they suffered past persecution or that they have a well-founded fear of future persecution. *Dong Zhong Zheng v. Mukasey*, 552 F.3d 277, 284 (2d Cir. 2009). Since the IJ found Petitioner's experience did not constitute past persecution and Petitioner does not challenge this, only the basis for a well-founded fear of future persecution is at issue here. (R. 9.)

Under 8 C.F.R. 208.13(b)(3), the initial burden of proof is on the asylum applicant to establish a well-founded fear of persecution. *Lopez-Gomez*, 263 F.3d at 445; *Singh v. Sessions*, 727 F. App'x 81, 83 (5th Cir. 2018). If the applicant adequately establishes this, the Immigration and Naturalization Service ("INS") may effectively counter the asylum claim by establishing that the applicant could avoid persecution through internal relocation, and it would be reasonable to do so under all circumstances. *Singh v. Moschorak*, 53 F.3d 1031, 1034 (9th Cir. 1995). To determine whether internal relocation would be reasonable, the court inquires (1) if internal relocation is possible (2) and if it is reasonable to do so based on a number of non-exhaustive factors listed in 8 C.F.R. 208.13(b)(3). *Oryakhil*, 528 F.3d at 998.

The burden of proof in demonstrating the reasonableness of internal relocation depends upon the identity of the persecutor. *Id.* If the persecutor is the government or a government-

sponsored entity, the court presumes that internal relocation is unreasonable and the INS bears the burden of proof of showing otherwise. *Lopez-Gomez*, 263 F.3d at 445. On the contrary, if the persecutor is not a government-sponsored entity, the asylum applicant bears the burden of proving that internal relocation is unreasonable. *Id.*

Respondent respectfully requests this Court affirm in part the decision of the Court of Appeals for the Thirteenth Circuit for the following reasons: first, the IJ and BIA correctly identified Life Inc. as a private, nongovernmental actor resulting in the burden of proof falling on Petitioner to show the reasonableness of internal relocation; second, remand is inappropriate because the lower courts adequately adjudicated the internal relocation issue with respect to the burden of proof; third, *Chevron* deference is inapplicable because the BIA does not interpret the term government-sponsored.

A. Life Inc. Is Not a Government-Sponsored Entity, and Therefore the Burden of Proof Shifts to Petitioner.

What constitutes government-sponsored is not precisely defined. In fact, courts have stayed silent on the matter of defining when governments should be accountable for the conduct of private actors. *Aliyev v. Mukasey*, 549 F.3d 111, 118 (2d Cir. 2008). Thus, it will be analyzed on a case-by-case basis whereby enough evidence is introduced to link private conduct and public responsibility. *Id.* Here, Life Inc. is not a government-sponsored entity because it is a private actor, Basag has not officially supported harassment, and Basag's military acts separately from Life Inc.

Much like *Kholyavskiy v. Mukasey* where the government has not officially condoned discriminatory behavior, the Basag government has not condoned Life Inc.'s harassment of Timog women. In *Kholyavskiy v. Mukasey*, the petitioner's request for asylum was denied by BIA. *Kholyavskiy v. Mukasey*, 540 F.3d 555, 575 (7th Cir. 2008). The petitioner was Jewish,

and born in Soviet Union where he experienced discrimination and anti-Semitism. *Kholyavskiy*, 540 F.3d at 559. The court found that although Jewish people faced prejudice and acts of violence, it was not officially condoned or sponsored by the government. *Id.* at 575. Therefore, there was no well-founded fear of persecution because the private discriminatory actions were not reflective of the government's official views or conduct and the petitioner did not meet his burden of proof. *Id.*

Similarly, Life Inc.'s actions are not reflective of the Basag government because Life Inc. is acting out of a desire to protect its assets from potential damage caused by the Water Warriors. (R. 5.) Life Inc. did not hire armed guards at the behest of the Basag government, but to protect their water resources throughout Basag. (R. 5.) Thus, Life Inc. guards' harassment of Timog women is an independent action that is not officially condoned or sponsored by the Basag government. Petitioner may counter that because the nature of the concession contract is exclusive, it qualifies Life Inc. as government-sponsored entity. (R. 4.) However, Life Inc.'s contract is only for thirty years and represents a business deal between two independent, non-affiliated parties. (R. 3-4.) For example, the existence of an exclusive contract between two businesses does not automatically make either business a sponsor of the other. Similarly, the existence of an exclusive contract between Basag and Life Inc. does not entail that Life Inc. is sponsored by Basag as both parties retain their independence. For this reason, Life Inc. is not a government-sponsored entity and the burden of proof shifts to Petitioner to show whether internal relocation is reasonable.

The existence of private discriminatory acts does not amount to government or government-sponsored persecution. *Ghaly v. I.N.S.*, 58 F.3d 1425, 1427 (9th Cir. 1995). In *Ghaly*, the petitioner, an Egyptian Coptic Christian who feared violent acts based on his minority

status, was denied asylum by the BIA. *Ghaly*, 58 F.3d at 1427. The court affirmed the BIA's legal conclusions because the evidence did not compel a conclusion that the petitioner had a well-founded fear of persecution. *Id.* at 1431. The court found that such discrimination against the minority group was not condoned by the state and it was not a part of the social norms within Egypt. *Id.*

Likewise, the Basag government does not endorse the private behavior of Life Inc. As part of the water concession contract, they require Life Inc. to comply with their laws, which criminalize rape and punish attempted rape. *See* Basag Pen. Code § 4351 (2018); (R. 5, n. 1; R. 6, n. 2.). Petitioner may attempt to argue that Basag government has not taken action against Life Inc. guards. (R. 5.) However, the evidence suggests that if she had reported her experiences, the Basag police and military forces would have investigated her claims and taken action against Life Inc. *See* Basag Pen. Code § 4351 (2018); (R. 5, n. 1; R. 6, n. 2; R. 8; O.B. 17.). Furthermore, there is not a prevailing social norm of discrimination against Timog because Life Inc. changed their employee policies after the rumors of sexual harassment and rape. (R. 6, n. 2.) Not only does their new policy require its employees to undergo sexual harassment training, but they have also made a staunch commitment to immediately terminate any Life Inc. guard suspected of sexual assault. *Id.*

Like the petitioner in *Khan v. Holder*, Petitioner does not adequately show that the source of the persecution is government or government-sponsored. In *Khan*, the court found that the petitioner's argument for a well-founded fear of persecution failed. 727 F.3d 1, 6 (1st Cir. 2013). Because the petitioner was not able to show a connection between his mistreatment and the Pakistani government, he bore the burden of proof in establishing the reasonableness of internal relocation. *Id.* at 7. The court held that although the petitioner showed that the Taliban was

secretly active in Islamabad and Karachi, he also stated that the Taliban did not control those territories, and that his children safely relocated within Pakistan. *Khan*, 727 F.3d at 4-6. The court concluded that the petitioner did not meet his burden of showing the unreasonableness of the relocation within Pakistan given the evidentiary record. *Id.* at 6.

Here, Life Inc. is shown to have an active presence throughout Basag because it was responsible for maintaining and building Basag's water facilities. (R. 4.) Furthermore, Life Inc. had an exclusive contract with the Basag government. *Id.* However, this does not entail that Life Inc. has control over the entirety of the country of Basag because Mayaman is stable and has infrastructure to support the heavy tourism. (R. 4, 8.) Petitioner is able to safely relocate. Petitioner's friend, Santos, admitted that as long as they were not Water Warriors, and spent money on clothes to look like the locals, Petitioner would be safe. (R. 8-9.) Thus, Petitioner could have easily used her money to buy local clothes, rather than fund a one-way ticket to the United States. (R. 9.) Moreover, the source of Petitioner's alleged mistreatment is only linked to an experience with one particular Life Guard Inc., not the entirety of Life Inc. nor Basag's government and military forces. (R. 6-8.) As a result, Petitioner is unable to make a proper connection between her mistreatment by Life Inc. guards and the Basag government, which places the burden of proof on her. Further, she failed to meet the burden of proof in showing that internal relocation is unreasonable given the factual record.

Consequently, the IJ and BIA properly assigned the burden of proof on Petitioner because Life Inc. is not a government agent nor a government-sponsored entity. Life Inc. is a private actor because the military and Basag forces act separately from Life Inc., and the Basag government does not endorse Life Inc.'s misconduct. Thus, the burden of proving that internal relocation is unreasonable falls on Petitioner, not the INS.

B. Remand Is Not Necessary Because the BIA and the IJ Provided a Clear Review of the Issues Grounded in the Factual Record.

Because the BIA sufficiently addressed the matter of burden of proof regarding internal relocation by drawing on their internal expertise, remand is irrelevant here. The BIA is granted broad authority to decide on asylum eligibility. *INS v. Aguirre-Aguirre*, 526 U.S. 415, 424-25 (1999); *INS v. Ventura*, 537 U.S. 12, 16 (2002). Courts have previously remanded cases where the BIA did not assign the burden of proof to the correct party, but it is not common. *Ndonyi v. Mukasey*, 541 F.3d 702, 712 (7th Cir. 2008) (holding that the BIA erroneously shifted the burden to the petitioner and failed to rebut the petitioner's testimony that she could not relocate); *see also Gambashidze v. Ashcroft*, 381 F.3d 187, 193 (3d Cir. 2004) (finding that the BIA's decision was unclear and seemed to incorrectly place the burden on the petitioner); *Khattak v. Holder*, 704 F.3d 197, 207 (1st Cir. 2013) (remanding the BIA's decision because neither the BJ nor the IJ addressed evidence in the record). Thus, the court reviews the IJ's legal determinations de novo, subject to a higher level of deference. *Ornelas-Chavez v. Gonzales*, 458 F.3d 1052, 1055 (9th Cir. 2006).

Unlike *Afriyie v. Holder* where the IJ failed to specify the burden of proof, here the IJ properly assigned the burden proof to Petitioner. In *Afriyie v. Holder*, the court found that BIA's relocation analysis was flawed because they improperly placed the burden of proof on the petitioner. 613 F.3d 924, 934 (9th Cir. 2010). The BIA assumed that the petitioner established past persecution, thus the burden of proof should have automatically shifted to the government, not the asylum applicant, to show that internal relocation would be safe under all circumstances. *Id*. Furthermore, the BIA did not explicitly state who had the burden of proof, and generally agreed with the IJ's findings which were contradictory on this matter. *Id*. at 935. Thus, the court

remanded the case to the BIA to evaluate the issue with the proper burden of proof more clearly. *Afriyie*, 613 F.3d at 935.

In contrast to *Afriyie v, Holder*, neither the BIA or the IJ presumed that Petitioner established past persecution. Her claim is based on a well-founded fear of persecution. Additionally, the BIA affirmed the IJ's findings, which were not contradictory and explicitly assigned the burden of proof to Petitioner. In not classifying Life Inc. as an agent of the government or government-sponsored, the BIA correctly assigned the burden of proof to Petitioner to show the reasonableness of internal relocation.

Furthermore, the lack of an explicit definition of government-sponsored does not impact the court's ability to provide an intelligent review of the issues. Like other administrative agencies, the basis of the BIA's decisions "must be set forth with such clarity as to be understandable." *SEC v. Chenery Corp*., 332 U.S. 194, 196-197 (1947). The BIA affirmed the IJ's decision. In such a situation where the BIA affirms the decision and reasoning of the IJ, the court reviews the IJ's and BIA's decisions jointly. *Wangchuck v. Dep't. of Homeland Sec.*, 448 F.3d 524, 528 (2d Cir. 2006). While it is true that the term government-sponsored was not defined explicitly, the IJ was clear about assigning the burden of proof based on the factual record and clear about how Petitioner did not provide substantial evidence showing it would not be reasonable for her to internally relocate.

Similarly to *Bing Feng Chen v. INS* ("*Chen*"), the BIA did not need to write with explicit detail merely to affirm the IJ's finding of facts. In *Chen*, the petitioner sought judicial review of an order by BIA to deny his request for a waiver of excludability. *Bing Feng Chen v. INS*, 87 F.3d 5, 6-7 (1st Cir. 1996). The court concluded that the appeals board acted within their proper discretionary power because they had given individualized consideration, and their plausible

determination was grounded in the record. *Chen*, 87 F.3d at 8. Explicit and specific reasoning was not deemed necessary because they affirmed the IJ's opinion. *Id.* at 7. In the same way here, the BIA affirmed the IJ's opinion with regards to Petitioner's claim for asylum. The IJ assigned the burden of proof, and provided an adequate basis for internal relocation.

Unlike *Gailius v. INS* where the BIA failed to address the evidence and credibility of information presented, the BIA's decision is stated with sufficient particularity. In *Gailius v. INS*, the BIA rejected the petitioner's claim for asylum and he sought review of the legal decision. 147 F.3d 34, 43 (1st Cir. 1998). The court held that in order to conduct a proper substantial evidential review of the BIA's decision, the BIA's decision itself must clearly state reasons for denial of asylum. *Id.* at 46. The BIA's reasoning was inadequate because it failed to explain why they found certain evidence noncredible, and did not examine closely much of the petitioner's substantial evidence which included testimony and corroboration for that testimony. *Id.* at 47. Thus, the court remanded to the BIA for further proceedings. *Id.* By contrast, the BIA here clearly outlined the reasons for denial by stating that Petitioner could have reasonably relocated in Basag. (R. 10.) Additionally, the BIA's reasoning was adequate here because they examined the factual record closely, finding that subjective fear of persecution was irrelevant because internal relocation was reasonable, and the alleged persecution occurred at the hands of a non-governmental actor.

For these reasons, this Court should affirm the Thirteenth Circuit's adoption of the BIA and IJ's decision to shift the burden of internal relocation to Petitioner.

1. Because the BIA does not interpret government-sponsored within the Immigration and Nationality Act, *Chevron* deference is inapplicable.

Remand should not be given in this case because the BIA addressed the matter of an entity being government-sponsored, given its knowledge in dealing with foreign relations. The

Attorney General has delegated the authority to consider and determine asylum eligibility cases to the BIA. *Aguirre-Aguirre*, 526 U.S. at 424. Here, neither the BIA nor the IJ precisely explained what entities classify as government-sponsored actors.

Petitioner incorrectly believes that statutory ambiguity triggers the application of *Chevron* deference. However, *Chevron* deference is a two-part inquiry addressing any potential tensions between agency interpretation and statutory language. *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 842-44 (1984). Here, the BIA has not provided an administrative interpretation of the meaning of government-sponsored. Since there is no explicit definition, no conflict with the statutory language exists, and thus no deference can be given. In essence, a remand is not necessary.

Furthermore, the BIA has intentionally not defined government-sponsored in order to preserve the efficiency of the asylum system and to properly adjudicate cases. Petitioner erroneously believes that the case should be remanded so that the term government-sponsored may be explicitly characterized. However, the ambiguity of the term is not reason enough to remand the case because the BIA has decided Petitioner's case after evaluating the evidence, and having an informed discussion and analysis. *Negusie v. Holder*, 555 U.S. 511, 517 (2009). Here, the BIA is gradually giving the term government-sponsored meaning through a case-by-case adjudication because there are many sensitive political issues in the context of immigration.

In the way that the Attorney General's decision to grant or deny asylum may impact America's relationships with other countries, similarly the BIA's decisions affect foreign relations. *Aguirre-Aguirre*, 526 U.S. at 425. Therefore, if the BIA were to narrowly define government-sponsored, there is a high likelihood that it would preclude persecution by government agents, making it unnecessarily harder for asylum applicants to pass the standard of

proof. On the contrary, if the BIA were to broadly define government-sponsored, many types of persecutions by government agents would qualify and would unfairly place the burden of proof on the government. For this reason, the BIA does not explicitly define the term government-sponsored as they understand that asylum and immigration cases are complex and require a factual, case-by-case consideration, rather than be limited by a particular characterization of what constitutes government-sponsored. Therefore, the BIA gives the term government-sponsored meaning through a case-by-case basis. Accordingly, this Court should affirm the decision of the Thirteenth Circuit to assign the burden of proof to Petitioner.

CONCLUSION

Respondent disagrees in part and agrees in part with the decision of the Court of Appeals for the Thirteenth Circuit. First, the court erroneously adopted the disfavored group analysis as a method to establish fear of future persecution. Second, the Thirteenth Circuit correctly adopted the decision of the IJ and BIA in identifying with sufficient particularity the Petitioner as the party bearing the burden of proof. Respondent respectfully request that this Court reverse in part and affirm in part the decision of Thirteenth Circuit Court of Appeals.

Dated: February 2, 2019

Respectfully Submitted,

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Team 1020
Counsel for Respondent

PROOF OF SERVICE

I declare that:

I am over the age of eighteen years and not a party to the within action.

On February 2, 2019, I electronically served a copy of the attached BRIEF FOR THE RESPONDENT on the following interested parties:

Counsel for Petitioner

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct and that this Declaration was executed this 2nd day of February, 2019.

Team 1020
Counsel for Respondent