No. 21-211328

IN THE SUPREME COURT OF THE UNITED STATES

NIKEL KUZMA, PETITIONER

V.

ATTORNEY GENERAL OF THE UNITED STATES, RESPONDENT

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTEENTH CIRCUIT

BRIEF FOR THE PETITIONER

Team # 4

Counsel for Petitioner

QUESTIONS PRESENTED

I. Did Petitioner suffer "extraordinary circumstances" that justify an asylum application in being untimely by merely three days?

II. Should this Court affirm duress as an exception to the persecutor bar and apply it to Petitioner?

TABLE OF CONTENTS

QUESTIONS PRESENTED i

OPINIONS ENTERED BELOW 1

STANDARD OF REVIEW 1

JURISDICTIONAL STATEMENT 1

STATEMENT OF THE CASE 2

1. Statement of Facts 2

2. Procedural History 3

SUMMARY OF ARGUMENT 4

ARGUMENT 6

I. This Court Should Excuse Nikel Kuzma's Untimely Asylum Application in Accordance with the Extraordinary Circumstances Exception 6

1. The One-Year Bar Applied to Asylum Applications Balances Congress' Intent to Deter Fraudulent Applications While Encouraging Legitimate Ones 6

2. A Reasonable Factfinder Would Find that Ms. Kuzma's Circumstances Rise to a "Similar Nature or Seriousness" as Those Listed, Thereby Meeting the Intent of the Legislature 8

3. The Circumstances Were Not Intentionally Created by Ms. Kuzma and They Were Both Directly Related to Her Failure to File the Application and Reasonable 11

A. The Circumstances Were Not Intentionally Created by Ms. Kuzma Through Her Own Action or Inaction 12

B. The Circumstances Were Directly Related to Ms. Kuzma's Failure to File 12

C. Ms. Kuzma's Delay in Filing was Reasonable Under the Circumstances 13

II. This Court Should Acknowledge Duress as Exempting an Asylee from the Persecutor Bar and Apply That Exception to Ms. Kuzma 14

1. The Fourteenth Circuit Erred in Rejecting Duress as Exempting an Asylee from the Persecutor Bar and in Finding That Ms. Kuzma Assisted or Participated in Persecution 15

2. Ms. Kuzma's Circumstances of Duress Exempt Her from the Persecutor Bar 25

CONCLUSION 31

TABLE OF AUTHORITIES

Case Authority

UNITED STATES SUPREME COURT

BedRoc Ltd. LLC. v. United States,
541 U.S. 176 (2004) 15

Chevron, *U.S.A., Inc v. Nat'l Res. Def. Council*,
467 U.S. 837 (1984) 19, 20

C.I.R. v. Engle,
464 U.S. 206 (1984) 15, 16

Fedorenko v. United States,
449 U.S. 490 (1981) 23

I.N.S. v. Cardoza-Fonseca,
480 U.S. 421 (1987) 20, 22

I.N.S. v. Aguirre-Aguirre,
526 U.S. 415 (1999) 20, 22

I.N.S. v. Elias-Zacarias,
502 U.S. 478 (1992) 1, 7

Kasten v. Saint-Gobain Performance Plastics Co.,
563 U.S. 1 (2011) 16

Murray v. The Schooner Charming Betsy,
6 U.S. (2 Cranch) 64 (1804) 20

Negusie v. Holder,
555 U.S. 511 (2009) ..... *passim*

Pierce v. Underwood,
487 U.S. 552 (1988) 1

Robinson v. Shell Oil Co.,
519 U.S. 337 (1997) 16

Ross v. Blake,
578 U.S. 632 (2016) 15

Smith v. United States,
508 U.S. 223 (1993) 19

TABLE OF AUTHORITIES CONT'D

United Sav. Assn. of Tex. v. Timbers of Inwood Forest Associates, Ltd.,
484 U.S. 365 (1988) 19

United States v. Menasche,
348 U.S. 528 (1955) 18

United States v. Monsanto,
491 U.S. 600 (1989) 16

Wooden v. United States,
142 S. Ct. 1063 (2022) 16, 19, 24

UNITED STATES CIRCUIT COURT OF APPEALS

Al Ramahi v. Holder,
725 F.3d 1133 (9th Cir. 2013) 9

Alquijay v. Garland,
40 F.4th 1099 (9th Cir. 2022) 9

Alvarado v. Whitaker,
914 F.3d 8 (1st Cir. 2019) 24

Antonio-Martinez v. I.N.S.,
317 F.3d 1089 (9th Cir. 2003) 9

Bah v. Ashcroft,
341 F.3d 348 (5th Cir. 2003) 16, 17

Balachova v. Mukasey,
547 F.3d 374 (2d Cir. 2008) 15, 26, 28, 29

Castaneda-Castillo v. Gonzales,
488 F.3d 17 (1st Cir. 2007) 24

Chen v. U.S. Att'y Gen.,
513 F.3d 1255 (11th Cir. 2008) 25

Khan v. Filip,
554 F.3d 681 (7th Cir. 2009) 7

TABLE OF AUTHORITIES CONT'D

Gasparyan v. Holder,
707 F.3d 1130 (9th Cir. 2013) 8, 11, 12

Hernandez v. Reno,
258 F.3d 806 (8th Cir. 2001)..... 24

Husyev v. Mukasey,
528 F.3d 1172 (9th Cir. 2008) 13

In re Koenig Sporting Goods, Inc.,
203 F.3d 986 (6th Cir. 2000)..... 16

Kumar v. Holder,
728 F.3d 993 (9th Cir. 2013)..... 15, 26, 27

Miranda Alvarado v. Gonzales,
449 F.3d 915 (9th Cir. 2006)..... *passim*

Ntamack v. Holder,
372 F. App'x 407 (4th Cir. 2010)..... 16, 17

Petkiewytsch v. I.N.S.,
945 F.2d 871 (6th Cir. 1991)..... 21

Toj-Culpatan v. Holder,
612 F.3d 1088 (9th Cir. 2010) 9, 12

Viridiana v. Holder,
646 F.3d 1230 (9th Cir. 2011) 9, 10, 11

Vukmirovic v. Ashcroft,
362 F.3d 1247 (9th Cir. 2004) 25

Weng v. Holder,
562 F.3d 510 (2d Cir. 2009)..... 15, 26, 27, 28

Xie v. I.N.S.,
434 F.3d 136 (2d Cir. 2006)..... 25

UNITED STATES DISTRICT COURTS

United States v. Mitchell,
691 F. Supp. 2d. 665 (E.D. Va. 2010)..... 16

TABLE OF AUTHORITIES CONT'D

Statutes

8 U.S.C. § 1101(a)(42)(B) 14, 16, 17, 18

8 U.S.C. § 1231(b)(3)(B)(i) 14

8 U.S.C. § 1158(a)(2)(B) 6

8 U.S.C. § 1158(a)(3) 7

8 U.S.C. § 1158(b)(1)(A) 14

8 U.S.C. § 1158(b)(2)(A)(i) 16, 17, 18

8 U.S.C. § 1182(a)(6)(A)(i) 2

8 U.S.C. § 1182(a)(9)(B)(i)(II) 2

8 U.S.C. § 1252(b)(4)(B) 1

An Act to amend the Immigration and Nationality Act to exclude from admission into, and to deport from, the United States all aliens who persecuted any person on the basis of race, religion, national origin, or political opinion, under the direction of the Nazi government of Germany, and for other purposes, Pub. L. No. 95-549, 92 Stat. 2065 (1980) 21

Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 21

Other Legislative Sources

144 Cong. Rec. 1635 (daily ed. Aug 3, 1995) 6, 9, 10

142 Cong. Rec. S11840, S11850 (daily ed. Sept 30, 1996) 6

Code of Federal Regulations

65 Fed.Reg. 76121-01 (Dec. 6, 2000) 13

8 C.F.R. § 1208.4(a)(5) 8, 11, 12, 13

8 C.F.R. § 1003.1(e)(4) 7

TABLE OF AUTHORITIES CONT'D

International Authorities

United Nations Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 150 22

Secondary Sources

Brief Amicus Curiae of the Office of the United Nations High Commissioner for Refugees in Support of Petitioner, *Negusie v. Holder*, 555 U.S. 211 (2009) (No. 07-499) 22

Brief for Amici Curiae Human Rights First et al. in Support of Petitioner, *Negusie v. Holder*, 555 U.S. 211 (2009) (No. 07-499) 18, 22

Brief for Scholars of International Refugee Law as Amicus Curiae in Support of Petitioner, *Negusie v. Holder*, 555 U.S. 211 (2009) (No. 07-499) 18

David Romanow, Note, *Recalibrating the Scales: Balancing the Persecutor Bar*, 61 Boston Coll. L. Rev. 385 (2020) 27, 28

Immigration and Naturalization Services, *Asylum Officer Training Manual – Lesson Plan Overview: One Year Filing Deadline* (Nov. 2001) 9

Joanna R. Mareth, *New Word, Same Problems: Entry, Arrival and the One-Year Deadline for Asylum Seekers,* 82 Wash. L. Rev. 149 (February 2007) 9

Karen Musalo and Marcelle Rice, *The Implementation of the One-Year Bar to Asylum*, 31 Hastings Int'l Comp. L. Rev. 693 (2008) 7

Leena Khandwala et al., *The One-Year Bar: Denying Protection to Bona Fide Refugees, Contrary to Congressional Intent and Violative of International Law*, Immigr. Briefings, (August 2005) 7

Lori K. Walls, Comment, *The Persecutor Bar in U.S. Immigration Law: Toward a More Nuanced Understanding of Modern "Persecution" in the Case of Forced Abortion and Female Genital Cutting*, 16 Pac. Rim. L. & Pol'y. J. 227, (2007) 20, 21

Martine Forneret, Note, *Pulling the Trigger: An Analysis of Circuit Court Review of the "Persecutor Bar"*, 113 Columbia L. Rev. 1007 (2013) ..... *passim*

National Immigration Justice Center et. al., *The One-Year Asylum Deadline and the BIA: No Protection, No Process: An Analysis of Board of Immigration Appeals Decisions, 2005-2008* (October 2010). 6, 7

OPINIONS ENTERED BELOW

The opinion of the Board of Immigration Appeals (BIA) is unreported and does not appear in the record below. The opinion of the United States Court of Appeals for the Fourteenth Circuit is reported and can be found on pages 4 – 18 of the record.

STANDARD OF REVIEW

Federal courts review questions of law *de novo. Pierce v. Underwood*, 487 U.S. 552, 558 (1988). They also evaluate factual findings procured during removal proceedings under the substantial evidence standard, to be treated as "conclusive unless any reasonable adjudicator would be compelled to conclude otherwise." 8 U.S.C. § 1252(b)(4)(B); *I.N.S v. Elias-Zacarias*, 502 U.S. 478, 481 (1992). There is no factual dispute as to the length of time Petitioner, Nikel Kuzma, has stayed in the United States before filing for asylum, her circumstances, and the events in which she provided translation services for the Rielan military. (O.B. 9, 11 – 12.) Therefore, this Court should review both questions presented *de novo*.

JURISDICTIONAL STATEMENT

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

STATEMENT OF THE CASE

1. Statement of Facts

Nikel Kuzma is a thirty-two-year-old woman from Matava, a country struggling to defend itself in a war against its neighboring country, Riela. (O.B. 5.) Many Matavan border towns have been seized by Rielan forces. (O.B. 5.) Citizens of towns under Rielan occupation are arrested and subject to terrible conditions for simple acts of resistance. (O.B. 5.)

Ms. Kuzma was a baker residing in a border town. (O.B. 5.) Per Matavan tradition, she was not conscripted into the military when the conflict began. (O.B. 5.) In 2019, she was awoken at five in the morning by Rielan soldiers. (O.B. 5.) Despite her protests, the soldiers forced Ms. Kuzma at gunpoint into a car and transported her three hours away to a Rielan prison imprisoning Matavans in the middle of the forest. (O.B. 5 – 6.) Due to her fluency in Rielan and Matavan, she was forced to serve as an interpreter for Rielan captors as they questioned Matavan prisoners. (O.B. 5 – 6.) The soldiers threatened Ms. Kuzma with torture and imprisonment if she did not obey. (O.B. 6.) She translated on three occasions and witnessed torture by Rielan forces in each. (O.B. 6.) The night following the interrogations, fearing for her safety and worried that she would be forced to interpret again, she fled Matava for the United States. (O.B. 6.)

Ms. Kuzma entered without inspection through the southern border. (O.B. 6.) There, she came across a flyer that advertised in Matavan: "HELP FOR REFUGEES." (O.B. 6.) The flyer asserted that a local non-government organization, the Nation of the Ideal Many (NOIM), was offering to help refugees with the resettlement process. (O.B. 6.) Unbeknownst to Ms. Kuzma, NOIM was an "anti-immigrant church" dedicated to reducing the number of immigrants in its community. (O.B. 7.) While NOIM offered resettlement assistance to those who recently crossed the border, it misinformed and misled them about immigration referrals. (O.B. 7.)

Ms. Kuzma called the number on the flyer and was connected to a representative. (O.B. 6.) The representative told Ms. Kuzma that she would be transported to Myrtle's Orchard, a small rural island community in the northern United States, where she would receive a job and housing while NOIM would supposedly refer her to an immigration agency. (O.B. 6.) Believing the representative, Ms. Kuzma agreed. (O.B. 6.)

In Myrtle's Orchard, Ms. Kuzma worked as a dishwasher. (O.B. 6.) After a month of not receiving any updates, she called NOIM to follow up. (O.B. 6.) A representative lied to Ms. Kuzma, assuring her she would have "plenty of time to get her immigration status sorted out." (O.B. 6.) After not hearing for another month, Ms. Kuzma called again, but received the same assurance. (O.B. 6.) A month later, Ms. Kuzma called one last time, but no one answered, as NOIM had halted operations shortly after relocating Ms. Kuzma (O.B. 7.)

Unable to speak much English beyond what was required for her job, Ms. Kuzma kept mostly to herself. (O.B. 7.) While Myrtle's Orchard had two immigration attorney offices, neither advertised in Matavan, leaving Ms. Kuzma unaware of their services. (O.B. 7.) Because the rural town's Matavan community was very small, its city government did not offer services in Matavan. (O.B. 7.) Ms. Kuzma ended up overstaying her one-year lawful immigration period. (O.B. 9.) A year and three days after her arrival, she was stopped by immigration authorities, who questioned and detained her before initiating removal proceedings. (O.B. 7.)

2. Procedural History

The Department of Homeland Security issued a Notice to Appear and charged Ms. Kuzma with removal for illegal entry and stay pursuant to 8 U.S.C. § 1182(a)(6)(A)(i) and 8 U.S.C. § 1182(a)(9)(B)(i)(II). (O.B. 7.) In response, Ms. Kuzma promptly filed for asylum and withholding of removal, which was denied by an Immigration Judge (IJ) (O.B. 7.)

While acknowledging that Ms. Kuzma was otherwise eligible, the IJ found her application untimely and the persecutor bar applicable. (O.B. 7.) Upon appeals, the BIA upheld the IJ's decision, which was in turn affirmed by the Fourteenth Circuit. (O.B. 8 – 9, 13.) Ms. Kuzma now appeals to this Court to reverse the opinions below. (O.B. 8.)

SUMMARY OF ARGUMENT

This Court should excuse Ms. Kuzma's untimely filing because of extraordinary circumstances. Governed by 8 U.S.C. § 1158, aliens must file for asylum within one year of entering the United States. This one-year bar exists to deter fraudulent claims for asylum. However, realizing that legitimate claims for asylum should not be eliminated because of technical difficulties, the one-year bar is accompanied by the extraordinary circumstance's exception. An untimely filing is excused if an applicant can prove they were unable to file within one year of entering the United States because of circumstances outside of their control. These circumstances must be (1) not created by their own action or inaction; (2) be directly related to the failure to file; and (3) have created a reasonable delay under the circumstances.

While the statute lists a series of circumstances to be considered as extraordinary, an applicant may also demonstrate that their experience rises to a similar nature or seriousness as those listed, thereby qualifying for the exception. Courts demand a predicate level of seriousness to guarantee that only the most extreme cases meet this standard, thereby favoring legitimate claims over fraudulent ones. Courts have reflected this sentiment, holding that circumstances common to the immigrant experience do not qualify, while extreme circumstances uncommon to most in the asylum process rise to the level of extraordinary.

Ms. Kuzma's experience is a "perfect storm" of immigration fraud and deceit. She was purposely misled by an organization which presented itself as a resource to asylum seekers and

hid its true agenda to rid its community of immigrants. Ms. Kuzma was relocated, isolated, and lied to by NOIM, resulting in her untimely asylum filing. Her experience rises to a similar nature as the listed circumstances, and her application for asylum should not be denied because of technical issues. Because the circumstances of Ms. Kuzma's delay were completely out of her control, directly linked to her untimely filing, and a mere three days past the one-year deadline, her untimely filing should be excused.

Ms. Kuzma's claim of a duress exception to the persecutor bar should also prevail. The persecutor bar precludes asylum seekers that have "ordered, incited, assisted or otherwise participated in the persecution" of a person based on race, faith, nationality, or socio-political affiliation from entry into the United States. However, it is ultimately silent on whether an exception to that bar exists due to lack of culpable intent. A notable number of circuits have acknowledged duress and coercion as potentially exempting the application of the persecutor bar. Most have decided cases based on a "particularized evaluation," accounting for the totality of the case-specific circumstances. However, in applying the persecutor bar against Ms. Kuzma and rejecting a duress exception, the Fourteenth Circuit misinterpreted the bar. Regarding the text itself, failing to recognize an exception overemphasizes the word "persecution." This is deleterious to the provision's full meaning and ignores an alternative plain meaning that underscores the basis of the persecutory act. Additionally, the persecutor bar's legislative purposes, *Chevron* deference, and interpretive parameters set by case law all weigh in favor of recognizing an exception. Therefore, Ms. Kuzma petitions this Court to adopt the particularized evaluation adopted by a number of circuits and affirm a role for duress as an exception.

Furthermore, if Ms. Kuzma did persecute or assist in persecution by translating, the circumstances surrounding her asylum claim make the persecutor bar inapplicable. Ms. Kuzma

was not "actively" involved in the persecutory acts committed. She translated at gunpoint for only three occasions within a day, which "deviated markedly" from her ordinary routine. Her failure to resist is also too "tangential" to the overall persecution waged by the Rielan captors. Finally, Ms. Kuzma's circumstances differ vastly from those in *Miranda Alvarado v. Gonzales.*

ARGUMENT

I. This Court Should Excuse Nikel Kuzma's Untimely Asylum Application in Accordance with the Extraordinary Circumstances Exception.

1. The One-Year Bar Applied to Asylum Applications Balances Congress' Intent to Deter Fraudulent Applications While Encouraging Legitimate Ones.

An application for asylum must be "filed within 1 year of an alien's arrival into the United States." 8 U.S.C. § 1158(a)(2)(B). After the passage of this deadline, they must "demonstrate to the satisfaction of the Attorney General that they … [experienced] extraordinary circumstances related to the delay in filing an application [within one year]." *Id*.

This one-year bar reflects a juxtaposition between Congress' dueling intents of encouraging legitimate asylum claims while dissuading fraudulent ones. Centered in this balance is this exception. Spoken about by Representative Bob Franks, the one-year bar was enacted as part of the Illegal Immigration Reform and Immigrant Responsibility Act tasked with deterring asylum fraud. *See* 141 Cong. Rec. E1635 (daily ed. Aug. 3, 1995) (statement of Rep. Bob Franks). Appealing an asylum decision carries an inherent heavy risk. Coupled with the BIA's commitment to confidentiality, weaker claims are more readily denied while legitimate claims are more favored to get successfully appealed. *See generally,* National Immigration Justice Center, et. al., *The One-Year Asylum Deadline and the BIA: No Protection, No Process: An Analysis of Board of Immigration Appeals Decisions 2005-2008,* (October 2010).

Many asylum seekers who miss the filing deadline choose to "decline to apply because they are advised by legal counsel that unsuccessful affirmative asylum applications result in referral to removal proceedings." National Immigration Justice Center, et. al., *The One-Year Asylum Deadline and the BIA: No Protection, No Process: An Analysis of Board of Immigration Appeals Decisions 2005-2008,* 7 (October 2010). Despite the harsh consequences faced with denial, the BIA provides only summary analyses in the supermajority of cases. *Id*. (asserting that the BIA provides no substantive analysis of denials in 68 percent of the study's filing deadline cases). Many of these cases are "affirmances without opinion, as the BIA simply states that the [IJ's] conclusion was correct and provides no commentary." *Id.*; *See* 8 C.F.R. § 1003.1(e)(4). In other cases, with no substantive analysis, the "BIA offer[ed] only conclusory statements endorsing the [IJ's] findings," leaving asylum seekers blind to what factors were considered. National Immigration Justice Center, et. al., *The One-Year Asylum Deadline and the BIA: No Protection, No Process: An Analysis of Board of Immigration Appeals Decisions 2005-2008,* 7 (October 2010).

Further, Congress has limited the federal courts' jurisdiction over filing deadline issues to "questions of law and constitutional issues," further narrowing what cases get successfully appealed. 8 U.S.C. § 1158(a)(3); *See Khan v. Filip*, 554 F.3d 681, 684 (7th Cir. 2009) (finding no jurisdiction over "factual" and "discretionary" issues related to the filing deadline, such as whether the applicant applied within one year). Accordingly, there is little judicial guidance available for asylum seekers (and their counsel) who wish to evoke this exception. Therefore, the severity of the circumstances required is artificially increased.

On the other side of the scale is the intention that the United States remain a safe haven for *legitimate* asylum seekers. Leena Khandwala et al., *The One-Year Bar: Denying Protection*

to Bona Fide Refugees, Contrary to Congressional Intent and Violative of International Law, Immigr. Briefings, 4 (Aug 2005) (emphasis added) (citing 142 Cong. Rec. S11840 (daily ed. Sept. 30. 1996) (Comments of Rep. McCollum on Pork)) ("Our bill will eliminate the one-year deadline thereby preserving the ability of persons seeking refuge to be granted safe haven."). Because filing deadlines affect approximately one in five asylum applicants, Congress felt it important to create an exception to ensure that "legitimate claims of asylum [would not] be returned to persecution, particularly for technical difficulties." Karen Musalo & Marcelle Rice, *The Implementation of the One-Year Bar to Asylum*, 31 Hastings Int'l Comp. L. Rev. 693, 695 (2008); *see also* 142 Cong. Rec. S11838, S11840 (daily ed. Sept. 30, 1996) (statement of Sen. Hatch). It is at this balance this Court must recognize the legitimacy of Ms. Kuzma's appeal.

2. A Reasonable Factfinder Would Find that Ms. Kuzma's Circumstances Rise to a "Similar Nature or Seriousness" as Those Listed, Thereby Meeting the Intent of the Legislature.

It is clear that Ms. Kuzma's circumstances rise to a similar nature or seriousness as to meet Congress' intent. Extraordinary circumstances are defined as "events or factors directly related to the failure to meet the one-year filing deadline." 8 C.F.R. § 208.4(a)(5). These circumstances must not be "intentionally created by the alien through his or her own action or inaction," must be "directly related to the alien's failure to file the application within the 1-year period," and "reasonable under the circumstances." *Id*. The regulation provides a non-exhaustive list of circumstances, including serious illness or mental disability, legal disability, and ineffective assistance of counsel. *Id.* One may also qualify for the exception if they can demonstrate that their circumstances rise to a "similar nature or seriousness" as those listed. *Gasparyan v. Holder*, 707 F.3d 1130, 1135 (9th Cir. 2013). These circumstances include "severe family or spousal opposition, extreme isolation within a community, steep language barriers, or

profound difficulties in cultural acclimation." Immigration and Naturalization Services, *Asylum Officer Training Manual – Lesson Plan Overview: One Year Filing Deadline*, 20 (March 23, 2009). The balance between preventing legitimate asylum requests from being denied due to technical difficulties while seriously safeguarding against fraud is fundamental to this exception. Joanna R. Mareth, *New Word, Same Problems: Entry, Arrival and the One-Year Deadline for Asylum Seekers*, 82 Wash. L. Rev. 149, 153 (February, 2007).

Adhering to both congressional intent and the guidelines administered by the Immigration and Naturalization Services, courts have held circumstances common to the asylum experience as not excusing an untimely application. These circumstances include the inability speak English, difficulty finding legal advice, stress associated with fleeing one's home country, and ignorance of the law. *Toj-Culpatan v. Holder*, 612 F.3d 1088, 1091 (9th Cir. 2010); *Al Ramahi v. Holder*, 725 F.3d 1133, 1139 (9th Cir. 2013); *Alquijay v. Garland,* 40 F.4th 1099, 1104 (9th Cir. 2022); *Antonio-Martinez v. I.N.S.,* 317 F.3d 1089, 1093 (9th Cir. 2003). This is because most asylum seekers would then qualify for the exception, opening the door to fraudulent claims and working against congressional intent. 141 Cong. Rec. E1635 (daily ed. Aug. 3, 1995) (statement of Rep. Bob Franks). However, immigration fraud has been recognized as a circumstance of "similar nature or seriousness," as those listed in 8 C.F.R. § 1208.4(a)(5), thereby meeting Congress' intents. *See Viridiana v. Holder*, 646 F.3d 1230 (9th Cir. 2011).

In *Viridiana*, an Indonesian asylee was purposely misled and taken advantage of by Benny Muaja, an immigration consultant. *Id.* at 1232. Despite giving assurances and collecting a fee, Muaja never filed her asylum application. *Id*. Viridiana argued that the fraudulent mishandling of her asylum application resulted in its untimely filing, qualifying her for the extraordinary circumstances exception. *Id*. at 1234. The Ninth Circuit held that Viridiana's

appeal presented a "compelling case" in which her vulnerable position was exploited. *Viridiana*, 646 F.3d. at 1238. Because she had been diligent in checking her application, and had reasonably relied on Muaja, an individual who "spoke her native language and presented himself as someone who regularly prepared asylum applications," the court found Viridiana's circumstances as "similar in [their] nature or seriousness" as the listed circumstances in 8 C.F.R. § 1208.4(5). *Id*. at 1238.

Like Viridiana, Ms. Kuzma was misled by an organization she reasonably believed would assist her. (O.B. 6.) NOIM lulled Ms. Kuzma into a false sense of security to rid its community of immigrants (O.B. 6 – 7.) Just like Muaja, NOIM exploited Ms. Kuzma's inability to speak English, advertising in her native Matavan to take advantage of her vulnerable position and to mislead her. *Viridiana*, 646 F3d at 1238; (O.B. 6.) Even more compelling than *Viridiania,* Ms. Kuzma was *purposely* isolated by NOIM, to such an extent that she was completely unaware that NOIM, the agency responsible for her relocation, had been dissolved. (O.B. 6.) Her only social interactions were traveling to her job as a dishwasher and living in a town with hardly any other fellow Matavans. (O.B. 7.) Her extreme isolation should make her eligible for the exception, notwithstanding fraud. Combined with her inability to speak English, these circumstances rise to a similar nature or seriousness as to excuse her untimely filing. (O.B. 7.)

Furthermore, the Fourteenth Circuit's distinction between Viridiana's case and Ms. Kuzma's on the basis of her supposed passivity directly contravenes the broader purposes of the extraordinary circumstances exception. 141 Cong. Rec. E1635 (daily ed. Aug. 3, 1995) (statement of Rep. Bob Franks). It is against the purpose of the statute to decide one's eligibility upon something so technical as phone calls. (O.B. 10.); *Id*. Measuring an asylee's claim on something as trivial as the number of phone calls they made is a prime example of technical

issues superseding a legitimate asylum application. Ms. Kuzma's application should not be dictated by calls, especially if they would not have impacted her status anyways.

While Viridiania called Muaja "five or six times," these calls were related to actual appointments, and resulted in meetings with her supposed immigration consultant. *Viridiana*, 626, at 1238. Here, Ms. Kuzma attempted to call twice, but was met with the same answer by the receptionist. (O.B. 6.) The third time she called, no one answered because NOIM had halted its operation mere months after they had resettled her to Myrtle's Orchard. (O.B. 7.) Whereas Viridiana had a false basis that her application would be filed, Ms. Kuzma could have continued to call but would have been greeted with the same silence on the other end. No amount of phone calls or initiative-taking by Ms. Kuzma could have reversed this futile state of affairs.

Throughout this process, Ms. Kuzma was told misleading facts which instilled a false sense of security. (O.B. 7.) This ensured that she would not independently seek assistance for her immigration status as there was "plenty of time" to get it sorted out. She was isolated, misinformed, and mislead. (O.B. 7.) Quoting Judge Wen, Ms. Kuzma's circumstances presented a "perfect storm" in which she had an extremely difficult time filing her asylum application. (O.B. 16.) This "perfect storm" was extraordinary, making Ms. Kuzma's claim legitimate.

3. <u>The Circumstances Were Not Intentionally Created by Ms. Kuzma and They Were Both Directly Related to Her Failure to File the Application and Reasonable.</u>

Upon determining that a claimant's circumstances are extraordinary, adjudicators must assess whether the extraordinary circumstances excuse an untimely asylum application. *Gasparyan*, 707 F.3d at 1135. To be excused, the applicant must prove that the circumstances were not intentionally created by their own action or inaction, that were directly related to the untimely filing; and that the delay was reasonable under the circumstances. 8 C.F.R. § 1208.4(a)

(5); *Gasparyan*, 707 F.3d at 1135. Only after these elements have been established can the exception to the one-year bar be applied. 8 C.F.R. §1208.4(a)(5).

A. The Circumstances Were Not Intentionally Created by Ms. Kuzma Through Her Own Action or Inaction.

If an asylum seeker unintentionally creates the circumstances that delay their application, they are not at fault, satisfying the first element. 8 C.F.R. § 208.4(a)(5). Concurrently, the circumstances cannot be intentionally created by their own action or inaction. *Id*. Examples of intentionally created circumstances recognized by the courts include moving from one state to another and the voluntary decision to live with ones who rekindle emotional trauma. *See Toj-Culpatan*, 612 F.3d at 1092; *Gasparyan*, 707 F.3d at 1135. These circumstances were directly created *by* the applicant, and therefore warranted a denial.

Ms. Kuzma satisfies this factor. She experienced circumstances that were out of her control. While seeking NOIM's assistance was intentional, there was no way for Ms. Kuzma to know NOIM's true intentions. Ms. Kuzma in turn relied on NOIM's misrepresentation to not seek alternative legal assistance, which may have worsened her situation. But, regulations demand that the asylee not intentionally *create* their own circumstances. 8 C.F.R. § 1208.4(a)(5). Therefore, both of Ms. Kuzma's decisions meet this burden of proof.

B. The Circumstances Were Directly Related to Ms. Kuzma's Failure to File.

After extraordinary circumstances have been established, an applicant must prove that the circumstances were directly related to their untimely filing. 8 C.F.R. § 1208.4(a)(5). *See Toj-Culpatan*, 612 F.3d at 1091 (finding that petitioner's transfer of his case from Arizona to California, which delayed his asylum hearing, did not prevent him from filing a timely application because he did not need to wait for a hearing).

Here, Ms. Kuzma's untimely application for asylum was directly related to NOIM's fraudulent portrayal. (O.B. 7.) NOIM informed her that it would refer her to an immigration agency. (O.B. 6.) The organization was entirely responsible for the delay because they did not provide immigration referrals. (O.B. 7.) Therefore, NOIM's misrepresentation clearly prevented Ms. Kuzma from filing her asylum application, thereby fulfilling the second element.

C. Kuzma's Delay in Filing was Reasonable Under the Circumstances.

Finally, the delay in filing must be reasonable. 8 C.F.R. § 1208(a)(5). Generally, asylum seekers are expected to apply as soon as possible, but a delay may be reasonable on a case-by-case basis. *Husyev v. Mukasey*, 528 F.3d 1172, 1181 (9th Cir. 2008) (quoting 65 Fed.Reg. 76121-01 at 761123). It is expected that an asylee "apply for asylum… within a very short period of time after the expiration of [their] status… waiting six months or longer after expiration or termination of status would not be considered reasonable." 65 Fed.Reg. 76121-01, 76123 (Dec. 6, 2000). As a result, one year after an asylee's lawful nonimmigrant status has expired has been held to not be reasonable. *Husyev*, 528 F.3d at 1181.

Clearly, Ms. Kuzma meets this requirement. Her delay in filing was just three days after her lawful nonimmigrant status expired. (O.B. 7.) Well below the six-month standard established as unreasonable, Ms. Kuzma's short filing delay is clearly reasonable under the circumstances. She was isolated by an organization aimed at defrauding her, whose actions directly resulted in this delay. Accordingly, her delay in filing was reasonable under the circumstances, satisfying the final requirement of the exception.

Therefore, because an IJ has otherwise found that Ms. Kuzma was eligible for asylum, her untimely filing should be excused because of her extraordinary circumstances rather than being dismissed for technical issues.

II. This Court Should Acknowledge Duress as Exempting an Asylee from the Persecutor Bar and Apply That Exception to Kuzma.

This Court should recognize duress as an exemption from the persecutor bar and hold that it does not apply to Ms. Kuzma's asylum claim. If an alien is determined to be a "refugee[,]" they may be granted asylum. 8 U.S.C. § 1158(b)(1)(A). However, an asylum applicant that "ordered, incited, assisted or otherwise participated in the persecution of any person on the account of race, religion, nationality, membership in a particular social group, or political opinion" is not considered a "refugee." 8 U.S.C. § 1101(a)(42)(B). If this "persecutor bar" applies, the asylum seeker is denied asylum and subject to removal. 8 U.S.C. § 1231(b)(3)(B)(i).

The relevant statutes are silent on whether an asylee being under duress has any bearing on if they persecuted or "assisted" in persecution. *See Negusie v. Holder*, 555 U.S. 511, 517 – 18 (2009) ("We conclude that the statutes have an ambiguity . . . The silence is not conclusive."). As a result, a notable share of circuit courts has rightly interpreted a role for duress, coercion, or lack of culpability in exempting an asylum applicant from the persecutor bar. *See generally* Martine Forneret, Note, *Pulling the Trigger: An Analysis of Circuit Court Review of the "Persecutor Bar"*, 113 Columbia L. Rev. 1007, 1018 – 38 (2013). This Court has also rejected the notion that "an alien's motivation and intent are irrelevant to . . . whether [they] assisted in persecution." *Negusie*, 555 U.S. at 516. Thus, when the Fourteenth Circuit held that "duress is not an exception in [sic] application to the persecutor bar," it erred in statutory interpretation. (O.B. 13 – 14.)

Even if Ms. Kuzma did assist in persecution by providing translation services, her duress-driven circumstances exempt her from the persecutor bar. Surveying pertinent circuit court decisions, Ms. Kuzma's circumstances demonstrate that she (1) was "not actively involved in the persecutive acts taken[;]" (2) only engaged in the alleged persecutory activity three times, which "deviated markedly" from her ordinary routine; and (3) acted in ways "tangential to the

oppression" or immaterial to be "sufficient to constitute assistance." *Kumar v. Holder*, 728 F.3d 993, 998 – 99 (9th Cir. 2013); *Weng v. Holder*; 562 F.3d 510, 514 (2d Cir. 2009); *Balachova v. Mukasey*, 547 F.3d 374, 387 (2d Cir. 2008). Additionally, Ms. Kuzma's circumstances differ starkly to those present in a definitive case that applied the persecutor bar to a translator for interrogations. *Miranda Alvarado v. Gonzales*, 449 F.3d 915, 918 – 20 (9th Cir. 2006).

1. The Fourteenth Circuit Erred in Rejecting Duress as Exempting an Asylee from the Persecutor Bar and in Finding that Ms. Kuzma Assisted or Participated in Persecution.

The Fourteenth Circuit erred in concluding that "there is no exception for duress in [sic] application of the persecutor bar[.]" (O.B. 13.) Rather, as observed and interpreted by this Court and a predominant number of circuit courts, an asylee's state of mind *can* be considered, often within a holistic view of the circumstances, in exempting their conduct. *See Negusie*, 555 U.S. at 516 (holding that it was a misapplication of the persecutor bar to find motive and intent as "irrelevant"); *see also* Forneret, *supra*, at 1017 – 18 ("[T]he asylum applicant's level of involvement in the . . . persecutory conduct . . . is situated within . . . two competing methods of statutory interpretation. . . A holistic analysis . . . considers a . . . duress exception . . . and evaluates . . . the alleged persecutor, the persecutory act, and any extenuating circumstances.").

Statutory interpretation "begins with the text" of the statute and ends "if the text is unambiguous." *Ross v. Blake*, 578 U.S. 632, 638 (2016); *BedRoc Ltd., LLC. v. United States*, 541 U.S. 176, 183 (2004). If the statute is ambiguous, courts must find the interpretation "which can most fairly be said to be embedded in the statute, in the sense of being most harmonious with its scheme and with the general purposes that Congress manifested." *C.I.R. v. Engle*, 464 U.S. 206, 217 (1984). This inquiry looks into "the broader context" behind the statute, including not just "other sections of the statute[,]" but also "[its] purpose . . . ," any "precedents or authorities that inform the analysis[,]" and "any applicable interpretive canons." *Kasten v. Saint-Gobain*

Performance Plastics Co., 563 U.S. 1, 7 (2011); *Robinson v. Shell Oil Co.*, 519 U.S. 337, 345 (1997); *United States v. Monsanto*, 491 U.S. 600, 611 (1989); *In re Koenig Sporting Goods, Inc.*, 203 F.3d 986, 988 – 989 (6th Cir. 2000); *United States v. Mitchell*, 691 F. Supp. 2d. 665, 668 (E.D. Va. 2010). Legislative history may also be "particularly relevant to this inquiry[.]" *Engle*, 464 U.S. at 217 – 18. Once a court "employs all of the tools" of statutory interpretation, it "will almost always reach a conclusion about the best interpretation" of the law at issue. *Wooden v. United States*, 142 S. Ct. 1063, 1075 (2022) (Kavanaugh, J., concurring).

Starting at the text itself, the IJ, the BIA, and the Fourteenth Circuit all seem to have interpreted that, by translating for Rielan torturers, Ms. Kuzma plainly "assisted or otherwise participated in the persecution of" captive Matavans. (O.B. 8, 11 – 12.); § 1101(a)(42)(B); § 1158(b)(2)(A)(i). They are not alone in textually interpreting the persecutor bar as articulating no clear exception for duress, coercion, or lack of culpable intent. *See* Forneret, *supra*, at 1017 – 18 ("[T]he asylum applicant's level of involvement in . . . persecutory conduct . . . is situated within . . . two competing methods of statutory interpretation. A narrow textual analysis . . . emphasizes the absence of an explicit duress exception."). A small minority of circuit courts have crafted an "objective effects test" that looks solely to whether persecution was "objectively further[ed,]" regardless of "personal motivation[.]" *Bah v. Ashcroft*, 341 F.3d 348, 351 (5th Cir. 2003); *Ntamack v. Holder*, 372 F. App'x. 407, 411 (4th Cir. 2010); *see also* Forneret, *supra*, at 1032 ("These cases apply an objective effect test, considering only the ultimate outcome . . .").

In *Bah,* the asylee was a former soldier in Sierra Leone's Revolutionary United Front (RUF). 341 F.3d at 349. After RUF soldiers attacked his hometown and murdered his family, they gave him a Sophie's choice: join them or be killed. *Id.* Upon being forcibly recruited, the asylee was commanded to shoot a prisoner and maim civilians before finally escaping. *Bah*, 341

F.3d at 349. Ignoring the asylee's clear duress, the Fifth Circuit applied the persecutor bar against him, reasoning that the "syntax of the statute suggests that the alien's personal motivation is not relevant." *Id.* at 351. Similarly, in *Ntamack*, the Fourth Circuit applied the persecutor bar against a former member of Cameroon's gendarmerie and judicial police. *Ntamack*, 372 F. App'x at 410 – 11, 413. The court examined "whether the applicant's conduct objectively furthered the persecution of others[.]" *Id.* at 411. The asylee had demonstrated restraint against "using the violent interrogation tactics employed by his colleagues" and unsuccessfully begged his unit to refrain from violence during a student demonstration. *Id.* at 409. He generally opposed the two organizations' human rights violations through an "unwillingness to engage in repressive conduct," and justified his continued membership in the groups as means to support his family. *Id.* at 408. Despite all of this, the Fourth Circuit found the asylee to have dispositively and "objectively furthered persecution[.]" *Id.* at 408 – 09, 411. The court held that "[w]hile he may have demonstrated . . . hesitation about repressive action and his participation [was] less forceful than that of others, the fact remains that . . . he participated in . . . beating students. . . Ntamack furthered persecution *simply by his participation* in what appears to be a phalanx or show of force by the gendarmerie against the students." *Id.* at 411 (emphasis added).

However, the textually-based reasoning underpinning the "objective effects test" makes an equal, if not greater, oversight by failing to consider at least two different plain readings. The text of the persecutor bar states that a person who "ordered, incited, assisted or otherwise participated in the persecution of any person on the account of" race, faith, nationality, or socio-political affiliation is not eligible for asylum. § 1101(a)(42)(B); § 1158(b)(2)(A)(i). However, considering "*only* the objective existence of 'persecution' . . . effectively read[s] the additional language out of the persecutor bar provisions," namely that the person must have also 'ordered, incited, assisted,

or otherwise participated in' the harm in question." Brief for Scholars of International Refugee Law as Amicus Curiae in Support of Petitioner, at 8 – 9, *Negusie v. Holder*, 555 U.S. 211 (2009) (No. 07-411) (emphasis added). Those additional words in the persecutor bar demand "at a minimum, . . . consideration of intent and exculpatory defenses." *See id.* at 9. ("'ordered' and 'incited' call for an overt manifestation of intent . . . having 'assisted' in a wrongful act similarly correlates . . . the 'otherwise assisted' language . . . should also be understood to require *culpable* participation."). Furthermore, "otherwise participated in" implicates "forms of conduct different in form from ordering, inciting, or assisting, but [are] equally voluntary." Brief of Amici Curiae Human Rights First et al. in Support of Petitioner, at 7, *Negusie v. Holder*, 555 U.S. 211 (2009) (No. 07-499). Importantly, this Court has canonized the judicial "duty to give effect, if possible, to every clause and word of a statute." *United States v. Menasche*, 348 U.S. 528, 538 – 39 (1955) (internal quotations omitted). "To implicate the persecutor bar[,]" therefore, it simply is "not enough that 'persecution' for a protected reason have occurred." Brief for Scholars of International Refugee Law as Amicus Curiae in Support of Petitioner, *supra*, at 8.

Further, the "objective effects test" also relies on a textual reading that does not consider an alternative plain meaning. The persecutor bar's text states that an asylee is excluded if they "assisted or otherwise participated in the persecution of any person *on the account of* race, religion, nationality, membership in a particular social group, or political opinion." § 1101(a)(42)(B); § 1158(b)(2)(A)(i) (emphasis added). By looking solely to the end result of persecution, an "objective effects" interpretation does not connect the persecutory act to whether it was done "on the account of" race, religion, nationality, or socio-political association. *See* Forneret, *supra*, at 1021 ("Under the [Fifth Circuit]'s analysis, the persecutor's motives did not have to be linked to the persecutory act."). For example, in *Bah*, the asylee could be said to have

acted not "on the account of" his victims' race, faith, nationality, or socio-political affiliation, but rather due to duress: a legitimate fear for his life. *See* Forneret, *supra*, at 1021. By failing to consider this plain reading, an "objective effects test" interpretation falls well short from "the best interpretation" of the persecutor bar. *Wooden*, 142 S. Ct. at 1075 (Kavanaugh, J., concurring).

The Fourteenth Circuit acknowledged some ambiguity in that "Congress is silent as to whether a duress exception exists" for the persecutor bar. (O.B. 13.) It appears to have relied on the statutory construction canon that "[j]ust as a single word cannot be read in isolation, nor can a single provision of a statute." *Smith v. United States*, 508 U.S. 223, 233 (1993). "A provision that seems ambiguous in isolation is often clarified by the remainder of the statutory scheme . . . the same terminology . . . used elsewhere . . . makes its meaning clear." *United Sav. Assn. of Tex. v. Timbers of Inwood Forest Associates, Ltd.,* 484 U.S. 365, 371 (1988). In that spirit, the Fourteenth Circuit moved to compare the persecutor bar's language to two similar but ultimately different neighboring provisions: the material support bar and the bar against Communist or totalitarian party members. (O.B. 13 – 14.) Finding that the former did not have an explicit duress exception, while the latter did, the court below ultimately ruled out a duress exception. *Id.*

However, while the Fourteenth Circuit did rely on an established statutory interpretation principle, it did so while running afoul of another: *Chevron* deference. In *Chevron*, *U.S.A., Inc. v. Nat'l Res. Def. Council*, this Court held that "where Congress has not addressed the precise question at issue, the court does not simply impose its own construction on the statute" nor "substitute its own construction of a statutory provision for a reasonable interpretation made by . . . an agency." 467 U.S. 837, 843 – 44 (1984). Instead, when "the statute is silent or ambiguous with respect to the specific issue, . . . considerable weight should be accorded to an executive

department's construction of a statutory scheme it is entrusted to administer, and the principle of deference to administrative interpretations." *Chevron*, 467 U.S. at 844. Currently, the Attorney General is reconsidering the BIA's limited duress exception to the persecutor bar. (O.B. 12.) The Fourteenth Circuit acknowledged this agency activity, but then proceeded to dispense with *Chevron* deference, holding that there is no duress exception in the name of providing "clarity." (O.B. 13.) Such a ruling directly cuts against the precepts articulated in *Chevron. See* 467 U.S. at 843 – 84. Because the statute is ambiguous "with respect to whether an alien who was coerced to assist in persecution is barred from obtaining asylum . . . the agency is entitled to answer [and] an opportunity to clarify . . ." *Negusie*, 555 U.S. at 525 (Scalia, J., concurring).

Most glaringly, the Fourteenth Circuit completely ignores the legislative purposes behind the persecutor bar. Legislative history of the persecutor bar's codification, affirmed thrice by this Court, elucidates the broader goals sought by Congress. *See Negusie*, 555 U.S. at 520; *see also I.N.S. v. Aguirre-Aguirre*, 526 U.S. 415, 427 (1999); *see also I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 436 (1987). The canon of construction that a statute "ought never to be construed to violate [international agreements] if any other possible construction remains, and . . . to violate . . . rights . . . further than is warranted by [them]" is also illuminating here. *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804).

The persecutor bar has its roots in the 1978 Holtzman Amendment. *See generally* Lori K. Walls, Comment, *The Persecutor Bar in U.S. Immigration Law: Toward a More Nuanced Understanding of Modern "Persecution" in the Case of Forced Abortion and Female Genital Cutting*, 16 Pac. Rim. L. & Pol'y. J. 227, 229 – 31 (2007). The amendment intended to remedy a loophole: the Immigration and Nationality Act of 1952 (INA) did not address war criminals and persecutors who had already legally entered the United States and were neither covered by the

Displaced Persons Act of 1948 (DPA) nor the Refugee Relief Act of 1953 (RRA). *Petkiewytsch v. I.N.S.*, 945 F.2d 871, 876 (6th Cir. 1991); *see also* Walls, *supra*, at 230 ("The Holtzman Amendment . . . was intended to respond to the difficulty of prosecuting [those] who had come into the country under INA provisions other than the DPA and RRA . . . [they] could be deported only if they . . . were excludable . . . due to fraud or misrepresentation."). This made it difficult to prosecute or exclude such aliens without demonstrating concealment, misrepresentation, or fraud. *Id.* To rectify this oversight, the INA was amended to state that any alien who "ordered, incited, assisted, or otherwise participated in the persecution of any person because of race, religion, national origin, or political opinion" was to be "excluded from admission." An Act to amend the Immigration and Nationality Act to exclude from admission into, and to deport from, the United States all aliens who persecuted any person on the basis of race, religion, national origin, or political opinion, under the direction of the Nazi government of Germany, and for other purposes, Pub. L. No. 95-549, sec. 103, § 241(a), 92 Stat. 2065 (1980) (repealed and revised at 8 U.S.C. § 1227(a)(4)(D)). This precursor language was ultimately codified under the Refugee Act of 1980 to cover all refugees, as understood today. Pub. L. No. 96-212, sec. 201, § 101(a), 94 Stat. 102 (codified as amended at 8 U.S.C. § 1101); *see also* Walls, *supra*, at 231 ("With the Refugee Act of 1980, Congress sought to provide a comprehensive . . . approach to defining 'refugee.' . . . [and] excluded those who had participated in persecution.").

Simultaneously, the 1980 Refugee Act was "designed to provide a general rule for the ongoing treatment of all refugees and displaced persons." *Negusie*, 555 U.S. at 520. To that effect, "one of Congress' primary purposes" in passing the legislation was "to implement the principles agreed to in the 1967 United Nations Protocol Relating to the Status of Refugees [and] the United Nations Convention Relating to the Status of Refugees . . ." *Negusie*, 555 U.S. at 520

(internal quotations omitted); *Aguirre-Aguirre*, 526 U.S. at 427; *Cardoza-Fonseca*, 480 U.S. at 436. Both the Protocol and the Convention incorporate the principle that refugees "guilty of very serious wrongdoing" are to be excluded. Brief of Amici Curiae Human Rights First et al. in Support of Petitioner, *supra*, at 6. In particular, Article 1F of the Convention provides three classifications in which refugee protections "shall not apply[:]" those who have (1) "committed a crime against peace, a war crime, or a crime against humanity[;]" (2) "committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;" or (3) "has been guilty of acts contrary to the purposes or principles of the United Nations." United Nations Convention Relating to the Status of Refugees, art. 1F(a) – (c), July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 150. The clear denoting of "crime" and "guilt" in Article 1F's exclusion clauses strongly suggests they are "based on criminal violations[.]" Brief Amicus Curiae of the Office of the United Nations High Commissioner for Refugees in Support of Petitioner, at 12, *Negusie v. Holder*, 555 U.S. 211 (2009) (No. 07-499). As a result, "principles of criminal law are applicable in assessing whether a refugee is excludable . . . In accordance with fundamental principles of criminal law, exclusion . . . requires a determination of individual responsibility before any of the delineated grounds can be found to be applicable." *Id.* at 12 – 13 (internal quotations omitted). Thus, to fully effectuate the 1980 Refugee Act's legislative aims criminal law principles, including duress and coercion as potential defenses, must be applicable to the persecutor bar. *See id.* at 6 ("Congress intended that exclusion from asylum and withholding of removal be applied in a manner consistent with United States international law obligations under the 1951 Convention and 1967 Protocol.").

This Court's case law also supports the interpretation of a duress exception for the persecutor bar. In *Negusie v. Holder*, this Court was prompted to answer, "whether an alien who

was compelled to assist in persecution can be eligible for asylum . . .” *Negusie*, 555 U.S. at 516. While *Negusie* did not directly address that question, it established key interpretive parameters for the persecutor bar and a potential exception for duress or coercion. *Id.* at 517, 523.

First, *Negusie* reversed a lower court that held that “the persecutor bar applies even if the alien’s assistance in persecution was coerced or otherwise the product of duress.” *Id.* at 514. Rather, “mandating that an alien’s motivation and intent are irrelevant to the issue [sic] whether an alien assisted in persecution [is] a mistaken legal premise.” *Id.* at 516. The Court emphatically disagreed with the contention that “[t]he statutory text . . . answers that . . . there is no exception for conduct that is coerced because Congress did not include one.” *Id.* at 518. In holding otherwise, the Fourteenth Circuit directly contravened the *Negusie* Court’s directives. Second, *Negusie* confirmed the significance of legislative purpose in interpreting the persecutor bar. The *Negusie* Court highlighted a key difference between “the [DPA’s] statutory scheme in *Fedorenko* [*v. United States*]” and “the design of the [persecutor bar] as a whole . . . to its object and policy.” *Id*. at 519. While Congress intended the DPA to “address not just the postwar refugee problem but also the Holocaust and its horror,” the persecutor bar was “enacted as part of the Refugee Act of 1980 . . . to provide a general rule for the ongoing treatment of all refugees and displaced persons.” *Negusie*, 555 U.S at 520; *see generally Fedorenko v. United States*, 449 U.S. 490, 495 (1981). The *Negusie* Court thus found that these authorities “illustrate why *Fedorenko*, which addressed a different statute enacted for a different purpose, does not control the . . . interpretation of th[e] persecutor bar.” *Negusie*, 555 U.S. at 520 (internal quotations omitted). *Negusie* thus warns courts that any persecutor bar interpretation that ignores its broader legislative purposes and over-compares it to intrinsically different codes, as the Fourteenth

Circuit did, fails to provide "the best interpretation" of it. *Wooden,* 142 S. Ct. at 1075 (Kavanaugh, J., concurring); *see also Negusie*, 555 U.S. at 518 – 20; (O.B. 13 – 14.)

To answer the central question posed by the *Negusie* Court of "whether the statutory text mandates that coerced actions must be deemed assistance in persecution[,]" a predominant number of circuit courts have promulgated tests that have recognized a role for duress, coercion, or lack of culpable intent as exceptions in persecutor bar analysis. *Negusie*, 555 U.S. at 518; *see also* Forneret *supra* at 1043 ("The Fifth Circuit, a strict adherent to the objective effects test, is increasingly outnumbered by circuits that have opted for a more individualized evaluation.").

While some circuits simply acknowledge involuntariness and lack of culpable intent as negating any participation or assistance, others holistically examine an asylee's conduct and the totality of its case-specific circumstances. Of the former, the First Circuit's test for the persecutor bar consists of two conjunctive elements: "knowingly *and willingly* aided in persecution . . ." *Alvarado v. Whitaker*, 914 F.3d 8, 13 (1st Cir. 2019) (emphasis added). The court found that "the term 'persecution' strongly implies *both* scienter *and illicit motivation*." *Castaneda-Castillo v. Gonzales*, 488 F.3d 17, 20 (1st Cir. 2007) (emphasis added).

Examples for the latter abound. In determining "whether particular conduct can be considered assisting in persecution of civilians," the Eighth Circuit ruled that courts facing such "difficult line-drawing problems . . . should engage in a particularized evaluation in order to determine whether an individual's behavior was culpable to such a degree that he could be fairly deemed to have assisted or participated in persecution." *Hernandez v. Reno*, 258 F.3d 806, 813 (8th Cir. 2001) (internal quotations omitted). The Ninth Circuit agreed with the Eighth Circuit on a more "individualized assessment" to determine if an asylee's conduct was "culpable" enough to truly "have assisted or participated in persecution." *Vukmirovic v. Ashcroft*, 362 F.3d 1247,

1252 (9th Cir. 2004). The court ruled that "determining whether a petitioner 'assisted in persecution' requires a particularized evaluation of both personal involvement and purposeful assistance in order to ascertain culpability." *Miranda Alvarado*, 449 F.3d at 927. The Eleventh Circuit's "standard for determining whether an asylum applicant is ineligible for asylum and withholding of removal due to assistance or participation in persecution" is also a "particularized, fact-specific inquiry[.]" *Chen v. U.S. Att'y Gen.*, 513 F.3d 1255, 1259 (11th Cir. 2008). It concerns "whether the applicant's personal conduct was merely indirect, peripheral, and inconsequential association or was active, direct, and integral to the underlying persecution." *Id.* Similarly, the Second Circuit looks "not to the voluntariness of the person's actions [alone], but to his behavior *as a whole*" in assessing "the character of the individual's conduct[.]" *Xie v. I.N.S*, 434 F.3d. 136, 142 – 43 (2d Cir. 2006) (emphasis added). "Where the conduct was active and had direct consequences for the victims," the court concludes that it was "assistance in persecution." *Id.* at 143. "Where the conduct was tangential to the acts of oppression and passive in nature," it declines to hold that it "amounted to such assistance." *Id.*

Ms. Kuzma requests this Court to endorse the particularized evaluation test already adopted by a predominant number of circuit courts. In doing so, the Court corrects erroneous textual interpretations that have precluded duress and coercion from exempting an asylee from the persecutor bar. It also reconciles competing canons of construction and better effectuates the broader goals Congress had in mind in enacting the persecutor bar.

2. Ms. Kuzma's Circumstances of Duress Exempt Her from the Persecutor Bar.

If Ms. Kuzma had "assisted or otherwise participated in" persecution, the persecutor bar still does not apply because her circumstances of duress have commonalities with cases where it did not apply. Surveying circuits, the persecutor bar did not apply to asylees that (1) were "not

actively involved in the persecutive acts[;]" (2) committed alleged persecutory acts only a limited few times while "deviat[ing] markedly" from their ordinary routine; or (3) contributed "tangential[ly] to the oppression" or immaterially to "sufficient[ly] constitute assistance." *Kumar*, 728 F.3d at 998 – 99; *Weng*, 562 F.3d at 514; *Balachova*, 547 F.3d at 387. Ms. Kuzma's circumstances share these patterns and differ starkly to those in a defining case that applied the persecutor bar to a translator for interrogations. *Miranda Alvarado*, 449 F.3d at 915, 918 – 20.

Ms. Kuzma's circumstances demonstrate that she was not "actively" involved in the torture within the Rielan prison. In *Kumar v. Holder*, the asylee, Kumar, was a constable charged to keep watch and guard over an intelligence agency facility. 728 F.3d at 995. The facility was used to detain and interrogate suspected Khalistan Sikh separatists. *Id.* Throughout his six-month service, 19 days of which he served as head constable, Kumar repeatedly witnessed torture and murder of prisoners and their family members. *Id.* at 995, 997. Kumar consistently complained to superiors about the mistreatment but was met with death threats before he fled India for his safety. *Id.* at 995 – 97. The Ninth Circuit found, upon a "particularized evaluation of both personal involvement and purposeful assistance to ascertain culpability[,]" that Kumar's conduct was not "active" involvement in persecution. *Id.* at 999. Emphasizing Kumar's position "as a constable, the lowest rung[,]" the court concluded that Kumar "did not arrest or physically harm any prisoners[,]" conveyed "no indication that he prevented prisoners from escaping[,]" and did not "disciplin[e] the prisoners" at all. *Id.* The court underscored that "[a]n employee's work may be integral to a prison facility, but not to the persecution that occurs within it." *Id.*

Ms. Kuzma's forced interpreting similarly cannot be characterized as "active" involvement in the Rielan military's persecution. First, she only interpreted for the Rielan military in three total instances, much less than Kumar's six-month, repeated exposure to torture

and murder. *Kumar*, 728 F.3d at 995, 997; (O.B. 6) Additionally, Ms. Kuzma served as a mere translator, did not physically harm prisoners, was not involved in any disciplinary conduct, and did not prevent any prisoners from escaping. (O.B. 5 – 6.) Paraphrasing the Ninth Circuit, while Ms. Kuzma's translations were perhaps integral to the military unit that held her captive, she was not integral to the persecution that the unit committed in its prison. *See Kumar*, 728 F.3d at 999.

In addition, Ms. Kuzma's translations for the Rielan interrogations were only committed over a single day and represented a marked deviation from her typical course of life and business. In *Weng v. Holder*, the asylum seeker, Weng, was previously a nurse's assistant at a Chinese public hospital. 562 F.3d at 512. Her duties included helping to provide care, registering patients, recording vital signs, and maintaining patient files. *Id.* One day, Weng was assigned to watch over five pregnant women who were forcibly brought to the hospital to undergo abortions and detained in her duty room. *Id.* Upon a desperate plea, she helped a woman escape. *Id.* at 512 – 13. Weng was then fired, beaten, and threatened with arrest by local government officials, precipitating her asylum application. *Id.* at 513. The Second Circuit held, upon examining her behavior "as a whole," that Weng's "guarding of patients awaiting forced abortions" could not be considered "sufficiently direct, active, or integral" to the persecutory practice of forced abortions. *Id.* at 515. Crucial to the analysis was that "guarding such victims on one occasion" was in "departure of Weng's typical duties" and "did not routinely occur at the hospital." *Weng*, 562 F.3d at 515; David Romanow, Note, *Recalibrating the Scales: Balancing the Persecutor Bar*, 61 Boston Coll. L. Rev. 385, 401 (2020). Because "Weng's conduct that evening deviated markedly from her routine duties[,]" the court held that, "considered in its entirety," Weng's actions were "at most, tangential, passive accommodation, of conduct of others and . . . do not trigger the persecutor bar." *Weng*, 562 F.3d at 515 (internal quotations omitted).

Here, Ms. Kuzma's circumstances are similar. Weng guarded the women awaiting forced abortions for only one night and Ms. Kuzma only translated for a single day. *Weng,* 562 F.3d at 512 – 13; (O.B. 6.) A baker by trade, Ms. Kuzma engaged in conduct that "deviated markedly from her routine duties" when she was forced to interpret for the Rielan military. *Weng,* 562 F.3d at 515; (O.B. 5.) Although Ms. Kuzma was fluent in both Matavan and Rielan, translating was an activity "in departure of [her] typical duties" as a baker. Romanow, *supra,* at 401. Furthermore, Ms. Kuzma's translating "did not contribute to" the torture of imprisoned Matavans in a "direct" or "active" way. *Weng*, 562 F.3d at 515. Just as "the prohibited conduct was the forced abortion" in *Weng*, the "prohibited conduct" here is the torture, not the translating. *Id.* Ms. Kuzma "neither caused" the torture, "made it easier[,]" nor "more likely that [it]would occur." *Id.* Thus, Ms. Kuzma's actions, also viewable as "passive accommodation" of the persecutory "conduct of others[,]" should not "trigger the persecutor bar." *Id.*

Third, even Ms. Kuzma's failures to resist her captors or to prevent the torturous interrogations were too tangential to the overall persecution. In *Balachova v. Mukasey*, Krasnoperov, an appellant asylee, was a military student ordered to assist Russian soldiers as "peacekeepers" between neighboring Armenians and Azerbaijanis in conflict. 547 F.3d at 378. Accompanying a Russian unit that broke into a house, he was ordered to seize two girls present in the house. *Id.* at 378 – 79. When Krasnoperov reached out to one of the girls, who retreated from his grasp, the unit's captain ordered him to hit her, which he refused to do. *Id.* at 379. As the unit proceeded to sexually assault the girls, Krasnoperov was ordered to join in. *Id.* When he again refused, he was disarmed, bound, beaten, and threatened. *Id.* at 379, 387. Upon returning to the academy, Krasnoperov reported the incident and was subsequently expelled. *Balachova*, 547 F.3d at 379, 387. The Second Circuit found that while "rape is sufficiently serious to constitute

persecution[,] Krasnoperov's actions in connection with the rape were few." *Balachova*, 547 F.3d at 387. His "sole act of reaching out for the girls but stopping when they drew away . . . was tangential to the oppression and had no direct consequences for the victims." *Id*. "[I]t was [also] hard to see how he could have acted to prevent the rapes[,]" having been bound and disarmed. *Id*.

Similarly, Ms. Kuzma's failures to resist and to prevent the tortures should not be held to have assisted in persecution. (O.B. 5 – 6.) Her translation alone did not have direct consequences for the Matavan captors; the Rielan captors were the ones who inflicted the painful consequences of confinement and torture. (O.B. 6.) As a Matavan woman, Ms. Kuzma received no military training or background. (O.B. 5.) Like Krasnoperov, she had no means to resist. *See Balachova*, 547 F.3d at 387. Furthermore, Rielan soldiers forced Kuzma at gunpoint to serve as an interpreter and threatened her with imprisonment and torture if she did not obey. (O.B. 6.) Such compulsion is hardly different to being bound; her hands were figuratively, if not literally, tied from resisting or preventing anything. *See Balachova* 547 F.3d at 378.

Finally, Ms. Kuzma's circumstances are vastly distinguished from those present in *Miranda Alvarado v. Gonzales*, a definitive case that directly addressed whether providing translation services for interrogations constituted "assisting" in persecution. 449 F.3d at 925. There, the Ninth Circuit affirmed the application of the persecutor bar against Miranda, the asylee. *Id.* at 918. A "native speaker of Quechua as well as Spanish," Miranda served as a Peruvian Civil Guard (PCG) interpreter for "officers who interrogated suspected Shining Path [guerillas]." *Id.* "During interrogations, suspects were . . . subjected to . . . torture and beaten . . ." *Id.* "In his role as interpreter, Miranda materially aided the persecution process" because he was "a necessary part of the interrogation." *Id.* at 928. "Without his services as . . . interpreter, the

interrogations could not proceed. With his services, they did . . . [w]ithout the translation, there would have been no reason for the torture to occur . . .” *Miranda Alvarado*, 449 F.3d at 329.

However, there are innumerable key differences pertaining to Ms. Kuzma’s circumstances. First and foremost, there is nothing that suggests that the Rielan military would have been precluded from interrogating and torturing imprisoned Matavans without Ms. Kuzma. (O.B. 5 – 6.) Rather, the torture and violence against Matavans by the Rielan military may have continued unabated, for they had been occupying Matavan border towns, incarcerating Matavans for simple acts for resistance, and subjecting them to terrible conditions for some time before they ever arrived on Ms. Kuzma’s doorstep. (O.B. 5.) Second, while Miranda willfully joined the PCG, Kuzma was forced at gunpoint into the service of the Rielan military. *Miranda Alvarado*, 449 F.3d at 918; (O.B. 5). Miranda’s professed reason for not refusing to translate was because “that would have been against [his] superiors[,]” which would have “affected [his] performance rating and [he] would not have been promoted.” *Miranda Alvarado*, 449 F.3d at 918. Under threat of torture and imprisonment, Ms. Kuzma could have only dreamt of such quaint concerns. (O.B. 6.) Additionally, while Ms. Kuzma only translated for the Rielan military three times in a single day, Miranda regularly carried out his translating duties multiple times a month over seven years. *Miranda Alvarado*, 449 F.3d at 918; (O.B. 6) Furthermore, Miranda willfully engaged in other activities unrelated to translating that can conceivably be found to have assisted in persecution: he requested and received “anti-terrorist and survival training” and actively helped capture guerillas that attacked the training camp. *Miranda Alvarado*, 449 F.3d at 919. Ms. Kuzma only engaged in interpretation activities and, rather than expand her role with the Rielan military, quickly fled in fear when she could. (O.B. 6.) Finally, Miranda never asserted that “his actions were motivated by self-defense or . . . extenuating circumstances,” such as duress.

Miranda Alvarado, 449 F.3d at 929. Here, it is a central thrust undergirding Ms. Kuzma's appeal. (O.B. 8.) Therefore, the circumstances behind her translation services are dramatically different from Miranda's, which were "integral" to the persecution. *Miranda Alvarado*, 449 F.3d at 928.

CONCLUSION

This Court should recognize Nikel Kuzma's experience as extraordinary and find that her circumstances appropriately excuse her untimely filing. A victim of fraud and deceit, Ms. Kuzma was taken advantage of by an anti-immigrant organization through isolation and misinformation. These circumstances align with congressional intent to deter fraud while ensuring that legitimate claims do not get eliminated for technical issues. She did not create the circumstances which directly related to her failure to file, nor was her delay unreasonable. Furthermore, the Fourteenth Circuit's rejection of a duress exception to the persecutor bar reflects statutory interpretation that is textually deficient and ignores legislative purpose, agency deference, and case law. Adopting a case-specific, particularized evaluation of the circumstances resolves this. Even if Ms. Kuzma "assisted or participated in" persecution, the persecutor bar still should not apply to her. Comparing to cases in which the persecutor bar did not apply, Ms. Kuzma was not "actively" involved in the actual persecution, "deviated markedly" from her routine duties, and acted only three times in a single day in ways tangential and immaterial to the overall persecution. Her circumstances are also vastly distinguished from those in *Miranda Alvarado*. Therefore, Ms. Kuzma respectfully asks this Court to reverse the decision of the Fourteenth Circuit below.

Dated: February 10th, 2023

Respectfully Submitted,
s/ *Counsel for Petitioner*