No. 19-19002

IN THE
Supreme Court of the United States

Carolina Abel
Petitioner,

v.

Attorney General of the United States
Respondent.

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

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Brief for the Respondent

Team 1020
Counsel for Respondent

QUESTIONS PRESENTED

I. Whether 8 C.F.R. § 208.13(c)(4) is substantially valid considering Congress failed to address what regulations an applicant must follow when applying for asylum in the United States after traveling through a safe third country, thus allowing the Attorney General to create specific regulations based on current exceptions to 8 U.S.C. § 1158?

II. Whether Abel's experiences of being robbed, fined for jaywalking, encountering children who threw rocks and bottles at her, and receiving unfulfilled threats written on the door of her temporary residence compels the conclusion that Abel has a well-founded fear of future persecution in Azteca on account of her membership in Stars and Comets?

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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.

OPINIONS BELOW

The order of the United States Court of Appeals for the Fourteenth Circuit granting appeal from the Board of Immigration Appeals (BIA) is reported in *Abel v. Attorney General of the United States*, No. 1658-7863 (14th Cir. 2019).

The opinion of the United States Court of Appels for the Fourteenth Circuit is reported in *Abel v. Attorney General of the United States*, DC No. 1658-7863 (14th Cir. 2019).

RELEVANT STATUTES

8 C.F.R. § 208.13(c)(4)

The Attorney General can provide additional limitations on eligibility for asylum if they attempt to enter or arrive in the United States through the southern land border on or after July 16, 2019 after transiting through at least one country outside the alien's country of citizenship.

8 C.F.R. § 208.13(c)(4)(i)

An alien can be eligible for asylum if they demonstrate that he or she applied for protection from persecution or torture in at least one country outside the alien's country of citizenship and received a final judgement denying alien protection in such country.

8 C.F.R. § 208.13(c)(4)(iii)

The Attorney General may not deny an alien asylum if the country the alien transited through in route to the United States did not have a bilateral or multilateral treaty with the United States against refugees or inhumane torture.

8 U.S.C § 1158(a)(2)(A)

The Attorney General may remove an alien pursuant to a bilateral of multilateral agreement with a country where the alien's life will not be in danger.

8 U.S.C. § 1158(b)(2)(a)(vi)

The Attorney General my deny asylum if an alien firmly resettles in a third country for an extended period of time prior to arriving in the United States.

8 U.S.C. § 1158(b)(2)(c)

The Attorney General is permitted to establish additional limitations and conditions, under which an alien shall be ineligible for asylum.

8 C.F.R. § 208.13(a)

The burden of proof is on the applicant for asylum to establish that he or she is a refugee as defined in section 101(a)(42) of the Act.

8 C.F.R § 208.13(b)(1)

An applicant who has been found to have established such past persecution shall also be presumed to have a well-founded fear of persecution on the basis of the original claim. That presumption may be rebutted if an asylum officer or immigration judge makes one of the findings described in paragraph (b)(1)(i) of this section.

8 C.F.R. § 208.13(b)(2)(i)

The applicant has a fear of persecution in his or her country of nationality or, if stateless, in his or her country of last habitual residence, on account of race, religion, nationality, membership in a particular social group, or political opinion.

8 C.F.R. § 208.13(c)(4)(iii)

The Attorney General may not deny an alien asylum if the country the alien transited through in route to the United States did not have a bilateral or multilateral treaty with the United States against refugees or inhumane torture.

§ 1101(a)(42)(A)

A refugee is an alien who is unable or unwilling to return to their country of origin because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.

STATEMENT OF THE CASE

The Petitioner, Carolina Abel ("Abel"), is originally from Sainte Michelle, a small island nation in the Caribbean, and has lived there for her whole life. R. at 1, 2. Abel is a member of the Stars and Comets faith and actively participates in its community. R. at 2. Stars and Comets is a religious group that is well-known throughout the world and is notorious in Sainte Michelle because the group is outspoken politically and is critical of other religions. R. at 1.

In the last few years, Stars and Comets have been particularly outspoken against the Sainte Michelle government and has tried to convert as many Sainte Michelle citizens as possible to the Stars and Comets faith. R. at 2. The Sainte Michelle government resents Stars and Comets for these activities and many Sainte Michelle citizens have an unpopular view of the religious group due to their aggressive nature. R. at 2. This strife culminated when a politician running for

office in Sainte Michelle based his platform on expelling all Stars and Comets from the country. R. at 2.

After the election, violence against Stars and Comets members dramatically increased to the point where one member was dying almost every week. R. at 3. Abel experienced some of this violence first-hand. R. at 2. She was verbally confronted for wearing a green headband associated with Stars and Comets and chased by people threatening to beat her to death. R. at 2. In one instance, a man hit her across the face and broke her nose. R. at 2. When Abel reported the incident to police, the officers laughed at her and said she probably deserved it. R. at 2.

Abel decided to flee her home country of Sainte Michelle in fear of further violence. R. at 3. Abel stowed away on a cargo ship heading to Azteca, a large country in North America bordering the southern United States. R. at 3. Once in Azteca, Abel planned to enter the United States as a refugee, since she heard that many Stars and Comets members were living there safely. R. at 3.

On June 17, 2019, Abel reached the US-Azteca border and spent a month in Rancho Pequeno, a town on the Azteca side of the border. R. at 3. Abel never registered for asylum or refugee status in Azteca at any point during her stay. R. at 3. During Abel's time in Azteca, she stayed with a fellow Stars and Comets member, Gabriela Martinez ("Martinez"), and Abel continued to wear her green headband in public. R. at 3.

Throughout her stay, Abel was robbed twice and fined by local police for jaywalking several times. R. at 3. Abel was also harassed by children who threw rocks and bottles at her while shouting verbal insults. R. at 3. When Abel called out for the help of nearby police, they stood by and watched. R. at 3. Almost every day, threatening graffiti was written on Martinez's

apartment door ranging from insults to death threats, which Martinez told Abel that was common. R. at 3.

On July 17, 2019, after Abel's month-long stay in Azteca, Abel applied for asylum in the United States, citing her past persecution and fear of future persecution as a member of a disfavored group as reasons for why her application should be granted. R. at 3-4.

On August 1, 2019, the Immigration Judge (IJ) denied Abel's application for asylum. R. at 4. The IJ found that the incidents in Azteca neither met the persecution standard nor the fear of future persecution standard. R. at 4. Abel was also found ineligible for asylum under 8 C.F.R. § 208.13(c)(4), because she traveled through Azteca before arriving at the southern border. R. at 4.

On September 1, 2019, the Board of Immigration Appeals (BIA) affirmed the IJ's ruling on appeal. R. at 4. The Court of Appeals for the Fourteenth Circuit affirmed the IJ and BIA's ruling citing that Abel was ineligible for asylum. R. at 4. The Court of Appeals ruled that 8 C.F.R. § 208.13(c)(4) is substantially valid and Abel failed to follow its regulations. R. at 9. The court also ruled that Abel's application for asylum applied to Azteca and that she did not experience persecution in Azteca. R. at 10.

SUMMARY OF THE ARGUMENT

This Court should affirm the appellate court's ruling in applying *Chevron* deference to 8 C.F.R. § 208.13(c)(4) and render it substantially valid. Additionally, this Court should also affirm the appellate court in applying 8 C.F.R. § 208.13(c)(4) to this matter thus denying Abel's application for asylum. By applying 8 C.F.R. § 208.13(c)(4), Abel must be able to prove that she experienced persecution in Azteca.

8 C.F.R. § 208.13(c)(4) is substantially valid and applies to this case for the following three reasons. First, Congress did not speak on the issue of whether an asylum seeker can be

granted asylum by traveling through a safe third country. The only discussion of a safe third country in the original statute, 8 U.S.C § 1158, addresses removal of an asylum seeker to a country that can offer safe asylum. Second, 8 C.F.R. § 208.13(c)(4) is based on a permissible interpretation as Congress has granted the Attorney General authority to create additional exceptions towards granting asylum. Lastly, 8 C.F.R. § 208.13(c)(4) is consistent with already established exceptions within the original statute that is neither arbitrary nor capricious.

Since this Court should apply C.F.R. § 208.13(c)(4) to this case, this Court should affirm the appellate court and find that Abel is ineligible for a discretionary grant of asylum because she does not have a well-founded fear of future persecution in Azteca. The evidence does not compel the conclusion that Abel's experiences in Azteca rose to the level of persecution on account of a statutorily protected factor. Furthermore, the evidence does not compel a conclusion that Abel's subjective fear of future persecution in Azteca is objectively reasonable because Stars and Comets is not a targeted group in Azteca and Abel is not subject to a particular risk of targeting. Therefore, the BIA's decision that Abel is ineligible for asylum because the evidence does compel a conclusion that Abel has a well-founded fear of persecution in Azteca.

ARGUMENT

I. 8 C.F.R. § 208.13(c)(4) is substantially valid and should be granted deference as congress has not spoken on the permissible regulations provided by the Attorney General in granting asylum.

The Attorney General's construction and interpretation of 8 C.F.R. § 208.13(c)(4) is entitled to substantial deference. This Court has long recognized, "considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer." *Chevron U.S.A., Inc. v. Natural Resource Defense Council, Inc.* 467 U.S. 837, 844 (1984). This is especially so with respect to the Attorney General's determination of granting

asylum to individuals as an alien can be removed from the United States pursuant to a bilateral or multilateral agreement, to a country where the alien's life will not be threatened. 8 U.S.C. § 1158(a)(2)(A). 8 C.F.R. § 208.13(c)(4) provides further context to this removal rule as the Attorney General can deny asylum to an asylum seeker when they have transited through a safe third country. R. at 6. To determine whether a regulation is valid, courts engage in a two-step inquiry. *Chevron,* 467 U.S. at 842. First, the court must determine "whether Congress has directly spoken to the precise question at issue." *Id.* If a statute is unambiguous regarding the issue presented, the statute's plain meaning controls. *Morgan v. Sebelius*, 694 F.3d 535, 537 (4th. Cir. 2012). Second, if Congress has not spoken on the question at issue, the court must determine whether the agency's regulation is based on a "permissible construction of the statute." *Chevron,* 467 U.S. at 842. If the Attorney General's approach in 8 C.F.R. § 208.13(c)(4) is reasonable and not arbitrary nor capricious under *Chevron,* a court will uphold that permissible interpretation of the statute. *United States v. Mead Corp.*, 533 U.S. 218, 229 (2001).

The Attorney General while retaining ultimate authority, has vested the BIA with power to exercise "discretion and authority conferred upon the Attorney General by law" in the course of considering and determining cases before it. *I.N.S. v. Aguirre-Aguirre*, 526 U.S. 415, 425 (1999). Based on allocation of authority, courts have also accorded *Chevron* deference to the BIA as it applies agency regulations with "concrete meaning through a process of case-by-case adjudication." *Id.* The Fourteenth Circuit Court of Appeals correctly did this when it affirmed the IJ and BIA's denial of asylum to Abel pursuant to 8 C.F.R. § 208.13(c)(4). R. at 13.

The Fourteenth Circuit Court of Appeals' decision should be affirmed as it correctly applied the *Chevron* two-step analysis to determine that Congress has not spoken on the issue of an asylum seeker transiting through a safe third country. In addition, 8 C.F.R. § 208.13(c)(4) is a

permissible interpretation of the original statue that is neither arbitrary nor capricious in its interpretation.

A. Congress has not spoken on the issue of whether an asylum seeker may be denied asylum from transiting to a safe third country before traveling to the United States.

Since *Chevron* deference was first created in 1984, this Court has consistently ruled that an agency's construction and interpretation of a statute is entitled to deference if its reasonable and does not conflict with the expressed intent of Congress. *Chevron*, 467 U.S. at 844-845. The power of an administrative agency to administer a congressionally created program necessarily requires the formation of policy and the making of rules to fill any gaps left, implicitly or explicitly, by Congress. *Id.* at 843; *Morton v. Ruiz*, 415 U.S. 199, 231 (1974). If Congress has left a gap to fill, there is an express delegation of authority to the agency to explain a specific provision of the statute by a regulation. *Chevron*, 467 U.S. at 843. Courts should first ask whether "the statute is silent or ambiguous with respect to the specific issues" before it. *Aguirre-Aguirre*, 526 U.S. at 424.

Congress in this case only addresses the safe third country bar in 8 U.S.C. § 1158(a)(2)(A) as it allows the Attorney General to remove an alien pursuant to a bilateral treaty with the United States. This is the only mention of the safe third country issue within the original statue. Based on the text, Congress has explicitly left open procedures for the Attorney General to create when an alien travels through a safe third country before arriving to the United States. 8 C.F.R. § 208.13(c)(4) is carefully constructed to avoid issues Congress has already addressed. Previous asylum cases involving statutory regulations have always relied on the text first to address the validation of certain regulations and whether Congress has indeed spoken on an issue. *Campos-Hernandez v. Sessions*, 889 F.3d 564, 568 (9th Cir. 2018) (quoting *Chevron*, 467

U.S. at 842). Even if a statute is open for interpretation, the court is likely to rule that Congress has not spoken on the issue. *Campos-Hernandez*, 889 F.3d at 568. Here, there is no ambiguity as 8 U.S.C. § 1158(a)(2)(A) explicitly does not address what regulations an asylum seeker must follow when transiting through a third country. The language of this statute is clear which ends the matter. This Court has cautioned federal courts not to engage in cursory analysis of statutory questions and to always follow the statute's plain language. *Pereira v. Sessions*, 138 S. Ct. 2105, 2120 (2018) (Kennedy, J. concurring) (court interpretation of immigration statutes should accord with constitutional separation of powers). Applying a different analysis will move away from already established court procedures.

The only subsection in question within 8 U.S.C. § 1158 that discusses safe third country is subsection (a)(2)(A). 8 C.F.R. § 208.13(c)(4)(iii) however, allows for that subsection to be read in unison with the original statute. 8 C.F.R. § 208.13(c)(4)(iii) was specifically created to address what regulations must be followed when traveling through a third country. It provides specific application to the safe third country rule. This Court has consistently stated that agency created statutes must fall in line with the original intent of the Congressionally created statute. *King v Burwell*, 135 S. Ct. 2480, 2491 (2015) (when the plain language of the section in question is considered in the context of the statute as a whole, it is evident that federally created statutes are not meaningfully different from state created statutes addressing certain issues). To establish this, courts must read the stationary language of the original statute in relation to its place in the overall statutory scheme. *Id.* at 2489. 8 C.F.R. 208.13(c)(4)(iii) does not clash with the language of 8 U.S.C. § 1158(a)(2)(A) as it focuses on the third country the asylum seeker traveled through. A court's ultimate goal is to determine whether two statutes coincide by construing the statues as

a whole rather than in isolated provisions. *Id.* Subsection (iii) of 8 C.F.R. § 208.13(c)(4) provides the additional context that 8 U.S.C. § 1158(a)(2)(A) does not address.

The Fourteenth Circuit Court of Appeals correctly ruled that Congress did not speak on the issue of allowing the Attorney General to deny an asylum seeker asylum through additional regulations. Accordingly, this Court should agree with the court of appeals and apply the same methods in its *Chevron* step one analysis.

B. 8 C.F.R. § 208.13(c)(4) is based on a permissible interpretation as the Attorney General is tasked with determining certain regulations to grant asylum.

The Attorney General's construction of 8 C.F.R. 208.13(c)(4) is permissible because Congress has consistently granted deference to certain regulations and interpretations to the Attorney General involving asylum issues; Congress also grants the Attorney General authority to administer and enforce asylum statutes, and that each ruling by the Attorney General shall be controlling. *I.N.S. v. Wang*, 450 U.S. 139, 144 (1981); *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 448-449 (1987).

1. 8 C.F.R. § 208.13(c)(4) was created in accordance with 8 U.S.C. § 1158(b)(2)(C) which permits the Attorney General to create additional regulations for asylum.

The ultimate question a court faces when confronted with an agency's interpretation of a statute it administers is always, whether the agency has stayed within the bounds of its statutory authority. *City of Arlington, Tex. v. F.C.C.*, 569 U.S. 290, 291 (2013). An agency's approach must always be consistent with Congress' original intent. *Perez-Guzman v. Lynch*, 835 F.3d 1066, 1080 (9th Cir. 2016).

The Department of Homeland Security and the Department of Justice jointly created 8 C.F.R. § 208.13(c)(4) to address certain issues Congress left open for the Attorney General to

interpret. 8 U.S.C. § 1158(b)(2)(C) permits the Attorney General to "establish additional limitations and conditions, consistent with this section." Regulations such as 8 C.F.R. § 208.13(c)(4)(i) which directs an alien to apply for asylum protection in the transited country or 8 C.F.R. § 208.13(c)(4)(iii) which prevents the Attorney General from removing an alien to that third country if the country does not have a treaty with the United States are permissible interpretations within 8 U.S.C. § 1158(b)(2)(C). Federal courts have consistently ruled that agency interpretations will always be provided with *Chevron* deference if those interpretations hold true with the structure and language from the original statute. *City of Arlington*, 569 U.S. at 306 (applying *Chevron* deference to the agency as Congress unambiguously vested the F.C.C. with general authority to administer the Communications Act). Here, Congress has unambiguously granted the Attorney General authority to administer asylum issues. Any agency interpretation exercised as the result of general authority from Congress is granted *Chevron* deference. *Id.* 8 C.F.R. § 208.13(c)(4) is a proper regulation that was exercised as a result of Congressional authority to the Attorney General.

Congress did not choose to draft 8 U.S.C. § 1158(b)(2)(C) to prevent the Attorney General from creating additional limitations for seeking asylum. To the contrary, Congress mandated that the Attorney General can establish additional limitations and conditions so long as it is consistent with the original statute. Where Congress has established a clear line, the agency cannot go beyond it. *Id.* at 307. The creation of 8 C.F.R. § 208.13(c)(4) was created to provide specific regulations from the original statute. If a court can reasonably determine that the agency's policy is reasonable within the gaps left by Congress, it cannot invalidate the agency's interpretation at *Chevron*'s second step. *Perez-Guzman*, 835 F.3d at 1082 (ruling that the Attorney General's interpretation of two distinct statutes to create a policy decision is reasonable

and must be given deference). The creation of 8 C.F.R. § 208.13(c)(4) did not go beyond Congressional authority and is based on a permissible construction of 8 U.S.C. § 1158(b)(2)(C).

2. The Attorney General promulgated regulations that reasonably interpret the complex web of asylum statutes to establish additional limitations and conditions.

This Court has long recognized that judicial deference to the Executive Branch is especially appropriate in the immigration context where officials like the Attorney General exercise sensitive political functions that implicate questions of foreign relations. *I.N.S. v. Abudu*, 485 U.S. 94, 110 (1988). Per principles of *Chevron*, courts defer to the interpretations of the Attorney General on issues relating to immigration so long as such interpretations does not conflict with the intent of Congress. *Yusupov v. AG of the United States*, 518 F.3d 185, 204 (3rd. Cir. 2008).

Chief Executive officers such as the Attorney General are left to resolve policy choices of competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with everyday realities. *Chevron*, 467 U.S. at 865-866. In enacting 8 U.S.C. § 1158, Congress sought to give the Attorney General sufficient flexibility to provide additional limitations and conditions under which an alien shall be ineligible for asylum. The Attorney General is often provided deference toward asylum decisions if they are both reasonable and demonstrate Congressional intent. *Yusupov*, 518 F.3d at 200 (quoting *Chevron*, 467 U.S. at 843). Courts have seldom second-guessed an Attorney General's interpretation as it is not for the judiciary to "substitute its own construction" but to determine if the approach "is not one that Congress would sanction." *Yusupov*, 518 F.3d at 200. In the present case, 8 C.F.R. § 208.13(c)(4) is not an impermissible interpretation as it provides specific regulations an asylum seeker must follow when they choose to travel to the United States by

going through a third country. This Court has previously relied on additional terms provided by agency experts in adhering to terms from the original statute. *Fernandez-Vargas v. Gonzales*, 548 U.S. 30, 35 (2006) (an alien that is subject to the original statute created by Congress can also seek relief under an agency created statute if the specific provisions applies to the person). 8 C.F.R. § 208.13(c)(4) provides additional regulations which Congress has granted the Attorney General to do. It is thus in line with the other regulations within 8 U.S.C. § 1158.

Because the Attorney General's application of 8 C.F.R. § 208.13(c)(4) are both reasonable and consistent with the statutory text of 8 U.S.C. § 1158, it should be upheld by this Court.

C. 8 C.F.R. § 208.13(c)(4) is not arbitrary nor capricious as it was created pursuant to other exceptions within 8 U.S.C. § 1158.

In addition to the second step of *Chevron* review, courts must also determine whether an agency's interpretation of the original statute is arbitrary and capricious. Even though arbitrary and capricious review is fundamentally deferential – especially with the respect to matters relating to the agency's area of expertise, no deference is owned to an agency action or agency explanation that lacks coherence. *Fox v. Clinton*, 684 F.3d 67, 74-75 (D.C. Cir. 2012). A rule is arbitrary and capricious if it impermissibly heightens the standard of the original intent and runs counter to the evidence before the agency, or it is so implausible based on Congress' original intent. *Motor Vehicles Mfrs. Assn'n v. State Farm Mut. Auto Ins. Co.* 463 U.S. 29, 43 (1983).

1. 8 C.F.R. § 208.13(c)(4) reflects sound and well-supported decision making.

Safe third country bars to asylum have been evidenced in Congressional intent to protect those who would face persecution in all countries they travel through. *Tchitchui v. Holder*, 657 F.3d 132, 137 (2nd Cir. 2011). This bar does not include individuals from being removed to a

country where they are likely to face violence or persecution unless the Attorney General finds it in the public interest to do so. *Id.* A court can only strike down an agency's interpretation if it relied on factors which Congress has not intended it to consider or it entirely failed to consider an important aspect. *East Bay Sanctuary Covenant v. Barr*, 385 F. Supp 3d 922, 953 (N.D. Cal. 2019).

In promulgating 8 C.F.R. § 208.13(c)(4) the Department of Homeland Security and Department of Justice enacted this rule pursuant under the authority of 8 U.S.C. § 1158(b)(2)(C). R. at 7. Within 8 U.S.C. § 1158, there are several exceptions in the general rule which allows an alien to apply for asylum. More specifically the safe third country bar in 8 U.S.C. § 1158(a)(2)(A) provides the necessary foundation for 8 C.F.R. § 208.13(c)(4). The Attorney General is permitted to create additional regulations which asylum seekers must adhere to. Interpretation of 8 U.S.C. § 1158 falls within the Attorney General's role to fill in statutory gaps in a reasonable fashion left open by Congress. *Neguise v. Holder*, 555 U.S. 511, 523 (2009) quoting *National Cable & Telecommunications Assn. v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005). Moreover, 8 C.F.R. 208.13(c)(4) provides specific regulations and procedures asylum seekers must follow when they decide to travel through a safe third country to the United States. This is neither arbitrary nor capricious and does not fall below the exception laid out within the original statute. Abel did not follow this regulation and was correctly denied asylum.

2. The Attorney General's regulation of 8 C.F.R § 208.13(c)(4) does not go against asylum procedures.

This Court can strike down 8 C.F.R. § 208.13(c)(4) only if the Attorney General has relied on factors which Congress has not intended him to consider, failed to consider an important aspect of the problem, or offered an explanation that runs counter to evidence before the Attorney General. *State Farm*, 463 U.S. at 43. 8 C.F.R. § 208.13(c)(4) is in line with the safe

third country bar in 8 U.S.C. § 1158(a)(2)(A) and the firm resettlement bar in 8 U.S.C. § 1158(b)(2)(a)(vi). R at 8. Both provisions allow the Attorney General to either remove an alien to a country similar the United States or deny an alien asylum after settling in a country that can provide proper relief. 8 C.F.R. § 208.13(c)(4) expands the third country discussion as it provides additional resources for the Attorney General to make factual based decisions rather than arbitrary rulings.

Historically, courts have traditionally relied on agency interpretations of a federal statute if that interpretation is reasonable with other provisions. *See State Farm*, 463 U.S. at 43 (reviewing courts should not attempt to supply a reasoned basis for an agency action if that action can be a reasonable interpretation from the original statute). Here, 8 C.F.R. § 208.13(c)(4) is another exception to the long list of exceptions already created from 8 U.S.C. § 1158. If an agency makes a decision, courts may not impose additional procedure requirements upon an agency nor require an agency to consider all policy alternatives in reaching a decision. *Id.* at 51. The Fourteenth Circuit correctly considered this rationale when it denied Abel her claim to asylum as she traveled through a safe third country on her way to the United States.

Chevron deference should be applied to 8 C.F.R. § 208.13(c)(4) and render it substantially valid. As such, Abel's claim for asylum should be limited to her experiences in Azteca.

II. Abel does not have a well-founded fear of persecution in Azteca because she never experienced persecution in Azteca, and her subjective fear of future persecution in Azteca is not objectively reasonable.

The Attorney General has discretion to grant asylum only if an individual meets the definition of a "refugee" set forth in the Immigration and Nationality Act ("INA"). INA § 208(b)(1); 8 U.S.C.§1158(b)(1); *see also Cardoza-Fonseca*, 480 U.S. 421, 428 n. 5 (1987)

(noting that the Attorney General is not required to grant asylum to all aliens who meet the INA's definition of a refugee). The INA defines a "refugee" as an alien who is unable or unwilling to return to their country of origin "because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1101(a)(42)(A). An asylum applicant bears the burden of proving refugee status. 8 C.F.R. § 208.13(a); *D-Muhumed v. U.S. Att'y Gen.*, 388 F.3d 814, 818 (11th Cir. 2004). To meet this burden, the applicant must establish, with specific and credible evidence, (1) past persecution on account of a statutorily enumerated factor, or (2) a "well-founded fear" that a statutorily enumerated factor will cause future persecution. 8 C.F.R. § 208.13(a), (b); *Al Najjar v. Ashcroft*, 257 F.3d 1262, 1287 (11th Cir. 2001).

The appellate court correctly determined that the safe third country bar set forth in 8 C.F.R. § 208.13(c)(4) applies to this matter, making Abel's application for asylum solely based on asylum from Azteca, rather than her home country of Sainte Michelle. R. at 9. Thus, the only relevant inquiry is whether Abel has proven that she is unable or unwilling to return to Azteca because of past persecution or a well-founded fear of future persecution on account of a statutorily enumerated factor.

This Court has held that a BIA decision regarding eligibility for asylum must be upheld if "supported by reasonable, substantial, and probative evidence on the record considered as a whole." 8 U. S. C. § 1105(a)(4); *INS v. Elias-Zacarias*, 502 U.S. 478, 481 (1992). Under this standard, this Court can only reverse the BIA's determination that Abel is ineligible for asylum if the record contains evidence "so compelling that no reasonable factfinder could find" otherwise. *Id.* at 484. Thus, this Court can only find that Abel is eligible for asylum if Abel establishes that

the evidence compels such a conclusion, rather than merely permitting it. *Ghaly v. I.N.S.*, 58 F.3d 1425, 1431 (9th Cir. 1995).

Pursuant to the substantial evidence standard established in *I.N.S. v. Elias-Zacarias*, coupled with the evidence set forth in the record, Abel fails to establish that she is eligible for a discretionary grant of asylum. Accordingly, this Court should affirm the appellate court's decision and find that Abel is ineligible for asylum because she does not have a well-founded fear of persecution in Azteca.

A. The evidence does not compel the conclusion that Abel experienced persecution in Azteca on account of a statutorily protected ground.

If an asylum applicant proves past persecution, then the applicant raises a rebuttable presumption of a well-founded fear of future persecution. 8 C.F.R § 208.13(b)(1); *Singh v. I.N.S.*, 134 F.3d 962, 967 (9th Cir. 1998). In order to establish past persecution, an asylum applicant must prove she has experienced mistreatment that rises to the level of persecution. *Korablina v. I.N.S.*, 158 F.3d 1038, 1044 (9th Cir. 1998). Incidents that rise to the level of persecution must be "on account of race, religion, nationality, membership in a particular social group, or political opinion." *Sanchez Jimenez v. U.S. Att'y Gen.*, 492 F.3d 1223, 1232 (11th Cir. 2007) (quoting 8 U.S.C. § 1101(a)(42)(A)). An applicant is required to prove that the persecution was committed by the government or forces the government is "unwilling or unable" to control. *Korablina* 158 F.3d at 1044.

1. The incidents Abel experienced in Azteca do not rise to the level of persecution because they amount to no more than ordinary criminal activity, harassment, and unfulfilled threats.

Although the INA does not expressly define "persecution" or identify what acts constitute persecution, courts have defined persecution as "the infliction of suffering or harm upon those who differ (in race, religion or political opinion) in a way regarded as offensive." *Desir v.*

Ilchert, 840 F.2d 723, 726-27 (9th Cir. 1988) (quoting *Kovac v. I.N.S.*, 407 F.2d 102, 107 (9th Cir.1969)). Persecution encompasses "punishment or the infliction of suffering or harm," but "harassment or discrimination without more does not rise to the level of persecution." *Ali v. Ashcroft*, 366 F.3d 407, 410 (6th Cir. 2004)*; see Mikhailevitch v. I.N.S.*, 146 F.3d 384, 390 (6th Cir. 1998) (concluding that persecution "requires more than a few isolated incidents of verbal harassment or intimidation, unaccompanied by any physical punishment, infliction of harm, or significant deprivation of liberty.").

Courts have stressed that "persecution is an extreme concept that does not include every sort of treatment our society regards as offensive." *Fatin v. I.N.S.*, 12 F.3d 1233, 1242-43 (3d Cir. 1993). Indeed, cases from various circuit courts indicate the difficulty in proving past persecution. *See id.* (finding that discrimination of feminists in Iran did not amount to "persecution"); *Dandan v. Ashcroft*, 339 F. 3d 567, 573 (7th Cir.2003) (holding that a three-day detention which subjected an applicant to interrogations, beatings, and deprivation of food and water did not prove past persecution); *Nelson v. I.N.S.,* 232 F.3d 258 (1st Cir. 2000) (finding no past persecution where the applicant was physically abused during three incidents of confinement and subjected to surveillance, harassment, and searches); *Mendez-Efrain v. I.N.S.*, 813 F.2d 279, 283 (9th Cir. 1987) (holding that a four-day detention did not rise to the level of persecution).

Here, Abel sets forth four grounds to establish persecution: (1) two instances of being robbed; (2) seven instances of being stopped and fined for jaywalking by local police; (3) three instances of children throwing rocks and bottles at her; and (4) daily graffiti written on Ms. Martinez's front door, ranging from insults to death threats. R. at 3. However, these incidents, considered individually or together, do not constitute past persecution.

The robberies experienced by Abel on two occasions may represent ordinary criminal activity by private individuals, motivated by a desire to obtain finances, rather than crimes motivated by hostility toward Abel personally, or a targeted group. Such ordinary criminal activity does not rise to the level of persecution needed for asylum eligibility. *See Abdille v. Ashcroft*, 242 F.3d 477, 494 (3d Cir. 2001). Furthermore, the record is silent as to the identity of the robbers and if Abel ever reported these incidents to law enforcement. The evidence does not compel the conclusion that Abel was robbed on account of a protected ground by the government or forces the government was unwilling or unable to control.

A similar analysis applies to the jaywalking fines issued to Abel by police in Azteca. Abel claims that the seven occasions she was stopped and fined for jaywalking by local police constitute persecution on account of her "membership in a disfavored group." R. at 3-4. However, Abel fails to establish any nexus between these encounters with the police and her affiliation with Stars and Comets. *See Ali*, 366 F.3d at 410 (finding no persecution when the applicant failed to prove he was arrested for any reason other than his involvement in causing a public disturbance). Abel fails to introduce any evidence that she was stopped and fined for any reason other than repeatedly violating Azteca's jaywalking law. R. at 3. Thus, the evidence does not compel the conclusion that Abel's jaywalking fines amounted to persecution.

Abel further points to three encounters with groups of children who threw rocks and bottles at her while yelling "go home cult freak!" R. at 3. Although this statement supports the conclusion that these incidents were motivated by Abel's affiliation with Stars and Comets, these incidents still do not rise to the level of persecution. *See Lata v. I.N.S.*, 204 F.3d 1241, 1245 (9th Cir. 2000) (finding that the applicant, an Indian Fijian woman, did not suffer persecution when she was chased by ethnic Fijian youths who threw stones at her and possibly threatened her with

assault). Although Abel provides evidence that police were unresponsive during two of her encounters with children, the evidence nevertheless fails to compel the conclusion that these incidents subjected her to harm that rose beyond "mere harassment and discrimination." *See Ashcroft*, 366 F.3d at 410.

The death threats written on the door of Ms. Martinez's apartment where Abel was living did not rise to the level of persecution because the threats were never acted upon. Courts agree that "unfulfilled threats must be of a highly imminent and menacing nature in order to constitute persecution." *Li v. Att'y Gen. of U.S.*, 400 F.3d 157, 164 (3d Cir. 2005). For example, the court in *Boykov v. I.N.S.* held that the asylum applicant had not suffered past persecution despite receiving repeated death threats by government authorities who accused him of being critical of the government. 109 F.3d 413, 416-17 (7th Cir. 1997). Even though the applicant and his family were detained by government authorities overnight, this had no effect on the immanency of the threats and did not rise to the level of persecution necessary to establish asylum eligibility. *Id.* at 417. The court reasoned that unfulfilled threats are more indicative of whether the applicant had a well-founded fear of persecution, rather than establishing past persecution because even unfulfilled threats of death must be highly imminent in order to constitute persecution. *Id.*

Here, similar to the applicant in *Boykov* who received unfulfilled death threats, Abel was subjected to unfulfilled death threats written on Ms. Martinez's apartment, where she was living during her stay in Azteca. R. at 3. Although these threats occurred on a daily basis, the evidence could permit a conclusion that these threats were directed to Ms. Martinez because they were written on the home that she owned and lived in permanently. R. at 3. Consequently, the evidence only permits the conclusion that these threats were directed at Abel, rather than compelling such a conclusion. Furthermore, Ms. Martinez's statement to Abel that these daily

threats are "common," indicates that Ms. Martinez has been living unharmed even after receiving frequent death threats. Therefore, Abel fails to prove that the written death threats are of a highly imminent and menacing nature that constitute persecution.

Accordingly, this Court should honor precedent and find that Abel's experiences in Azteca, considered both individually and cumulatively, do not compel the conclusion that she experienced past persecution in Azteca. Furthermore, because Abel has failed to prove past persecution, she is not entitled to the rebuttable presumption that she has a well-founded fear of future persecution in Azteca.

A. The evidence does not compel the conclusion that Abel's fear of future persecution in Azteca is objectively reasonable.

An applicant's well-founded fear of persecution must be "on account of race, religion, nationality, membership in a particular social group, or political opinion." *Sanchez Jimenez*, 492 F.3d at 1232 (quoting 8 U.S.C. § 1101(a)(42)(A)). An applicant must demonstrate that her fear of persecution is both subjectively genuine and objectively reasonable. *Sael v. Ashcroft*, 386 F.3d 922, 924 (9th Cir. 2004). The subjective component is satisfied by the applicant's credible testimony that she genuinely fears persecution. *Mgoian v. I.N.S.*, 184 F.3d 1029, 1035 (9th Cir.1999). The objective component of the standard requires "credible, direct, and specific evidence in the record of facts that would support a reasonable fear" of persecution. *Rodriguez-Rivera v. U.S. Dept. of Immig. and Naturalization*, 848 F.2d 998, 1002 (9th Cir. 1988).

Here, the subjective component of the well-founded fear determination is not at issue because Abel has established that she fears being harmed in Azteca pursuant to her past experiences and membership in Stars and Comets. R. at 3-4. Thus, in order for Abel to establish that her subjective fear of future persecution in Azteca is objectively reasonable, she must

present sufficient evidence to support a finding of a reasonable fear of persecution in a similarly situated applicant.

1. Abel's subjective fear of future persecution in Azteca is not objectively reasonable because Abel fails to establish that she is a member of a targeted group in Azteca and that she is at particular risk of future persecution.

Where members of a specific group are systematically persecuted, namely, where a pattern or practice of persecution exists, proof of group membership suffices to establish a well-founded fear of persecution. 8 C.F.R. § 208.13(b)(2)(i); *Kotasz v. I.N.S.*, 31 F. 3d 847 852-53 (9th Cir. 1994). However, in the non-pattern or practice cases, an applicant can prove that she is at a particular risk of persecution pursuant to a special role or certain activities in support of a particular group. *Id.* at 853. "Specifically, the more egregious the showing of group persecution—the greater the risk to all members of the group—the less evidence of individualized persecution must be adduced." *Id.* In order to meet this strict standard, an asylum applicant may not "simply prove that there exists a generalized or random possibility of persecution in [her] native country; [she] must show that [she] is at particular risk—that [her] predicament is appreciably different from the dangers faced by [her] fellow citizens." *Id.* at 852.

For example, the court *Halim v. Holder* held that the applicant who was an Indonesian of Chinese ethnicity, was not eligible for a discretionary grant asylum based on his claim of being a member of a disfavored group. *Halim v. Holder*, 590 F.3d 971, 980 (9th Cir. 2009). The court reasoned that the record did not compel the conclusion that he had a well-founded fear of persecution based on membership in a disfavored group due to the weakness of the claim that the ethnic Chinese minority in Indonesia were a disfavored group, the lack of evidence proving government support of the alleged discrimination against the applicant, and the applicant's minimal showing that he was at risk of being individually targeted. *Id.* at 978.

Similar to the applicant in *Halim v. Holder*, who failed to establish he was a member of a targeted group or that he was at particular risk of targeting, Abel fails to establish that Stars and Comets is a disfavored group in Azteca or that she holds a special role in Stars and Comets. The record is devoid of any evidence that other Stars and Comets members have been consistently targeted in Azteca by the government or forces the government fails to control. To the contrary, the record reflects that Abel's friend and fellow Stars and Comets member has been living in Azteca unharmed. R. at 3. Furthermore, much of the incidents Abel cites as alleged persecution was not reported to law enforcement, nor were they carried out by government forces. R. at 3. Abel fails to demonstrate that a reasonable applicant in Abel's position would fear future persecution in Azteca because Abel is at no particular risk of targeting, nor is she a member of a targeted group. Therefore, the evidence does not compel the finding that Abel's subjective fear of future persecution in Azteca is objectively reasonable.

CONCLUSION

For the foregoing reasons, the Attorney General respectfully requests that this Court affirm the appellate court and find that Abel is ineligible for a discretionary grant of asylum.