Team 1011

No. 17-17002

IN THE

Supreme Court of the United States

LEILA MARCOS,

Petitioner,

V.

ATTORNEY GENERAL OF THE UNITED STATES OF AMERICA,

Respondent.

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

BRIEF FOR THE RESPONDENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii
STATEMENT OF ISSUES PRESENTED FOR REVIEW v
STATEMENT OF JURISDICTION v
STATEMENT OF THE CASE 1
I. Statement of Facts 1
II. Procedural History 3
SUMMARY OF ARGUMENT 3
STANDARD OF REVIEW 4
ARGUMENT 5
I. THE LOWER COURTS' FINDING OF WELL-FOUNDED FEAR SHOULD BE REVERSED BECAUSE THE DISFAVORED GROUP ANALYSIS SHOULD NOT HAVE BEEN APPLIED, AND PETITIONER DID NOT OFFER EVIDENCE TO SUPPORT A WELL-FOUNDED FEAR 5
A. Applying the Disfavored Group Analysis to Determine Asylum Eligibility Goes Against the Regulatory and Statutory Scheme of the Law 6
B. The Disfavored Group Analysis Impermissibly Lowers the Standard For Asylum Eligibility, Thereby Opening the Floodgates to Eligible Asylum-Seekers 10
II. PETITIONER WAS THE PROPER PARTY TO BEAR THE BURDEN OF REFUTING THE REASONABLENESS OF INTERNAL RELOCATION BECAUSE LIFE INC. WAS NOT GOVERNMENT-SPONSORED AND CHEVRON DEFERENCE WAS INAPPLICABLE 13
A. The Lower Court was Correct in its Interpretation of Government-Sponsored and Determination of Which Party Bore the Burden of Proof Because Chevron Deference was not Applicable 13
B. Remand Is Not Necessary Because the Thirteenth Circuit Appropriately Defined "Government-Sponsored" 18
CONCLUSION 22

TABLE OF AUTHORITIES

United States Supreme Court

Chevron U.S.A., Inc. v. Natural Resources Defense Council,
467 U.S. 837 (1984) 14

INS v. Cardoza-Fonseca,
480 U.S. 421 (1987) 13

Negusie v. Holder,
555 U.S. 511 (2009) 20

United States v. Mead Corp.,
533 U.S. 218 (2011) 14

United States Circuit Courts

Abedini v. INS,
971 F.2d 188 (9th Cir. 1992) 4

Ahmed v. Gonzales,
467 F.3d 669 (7th Cir. 2006) 10, 11

Cabrera v. Sessions,
890 F.3d 153 (5th Cir. 2018) 6

Eka Putra Halim v. INS,
252 Fed. Appx. 350 (2d Cir. 2007) 8

Fenny v. Holder,
538 Fed. Appx. 48 (2d Cir. 2013) 12

Firmansjah v. Gonzalez,
424 F.3d 598 (7th Cir. 2005) 8

Ingmantoro v. Mukasey,
550 F.3d 646 (7th Cir. 2008) 11

Kaharudin v. Gonzales,
500 F.3d 619 (7th Cir. 2007) 11

Khan v. Holder,
727 F.3d 1 (5th Cir. 2013) 18

Kotasz v. INS,
31 F.3d 847 (9th Cir. 1994) 7, 10

Landmark Legal Found. v. IRS,
267 F.3d 1132 (D.C. Cir. 2001) 15, 16

Lie v. Ashcroft,
396 F.3d 530 (3d Cir. 2005) 8

Marmolejo-Campos v. Holder,
558 F.3d 903 (9th Cir. 2009) 14

Martinez-Pérez v. Session,
897 F.3d 22 (1st Cir. 2018) 6

Martiri v. AG of the United States,
159 Fed. Appx. 393 (3d Cir. 2005) 17

Menjivar v. Gonzales,
416 F.3d 918 (8th Cir. 2005) 18, 19

Miranda v. INS,
139 F.3d 624 (8th Cir. 1998) 18

Oryakhil v. Mukasey,
528 F.3d 993 (7th Cir. 2008) 17

Puentes Fernandez v. Keisler,
502 F.3d 337 (4th Cir. 2007) 14

S.E.R.L. v. Att'y Gen. United States,
894 F.3d 535 (3d Cir. 2018) 15

Sael v. Ashcroft,
386 F.3d 922 (9th Cir. 2004) 6

Valioukevitch v. INS,
251 F.3d 747 (8th Cir. 2001) 18, 19

Velasquez-Garcia v. Holder,
760 F.3d 571 (7th Cir. 2014) 14

Wan Chien Kho v. Keisler,
505 F.3d 50 (1st Cir. 2007) 8

Wijaya v. Gonzalez,
227 Fed. Appx. 35 (2d Cir. 2007) 12

Statutes

8 U.S.C § 1158 (2018) 7

8 U.S.C. § 1101(a)(42) (2018) 6

8 U.S.C. § 1153 (repealed 1980) 7

Regulations

8 C.F.R. § 103 (2019) 7

8 C.F.R. § 208.13 (2019) ..... *passim*

8 C.F.R. § 236 (2019) 7

8 C.F.R. § 253 (2019) 7

8 C.F.R. § 3 (2019) 7

Other Authorities

Bridget Tainer-Parkins, *Note: Protection from a Well-Founded Fear: Applying the Disfavored Group Analysis in Asylum Cases*, 65 Wash. & Lee L. Rev. 1749 (2008) 10

Deborah E. Anker, Law of Asylum in the United States (11th ed. 2011) 13, 17

U.S. Dep't of Homeland Security, Office of Immigration Statistics, Annual Flow Report January 2018 (2018) 5

United Nations High Commissioner for Refugees' Guidelines on Internal Protection, 15 Int'l J. Refugee L. 875 (2003) 13

STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. The pertinent regulation states that an asylum applicant must demonstrate a well-founded fear of future persecution by establishing a pattern or practice of persecution of similar individuals, or by demonstrating substantial individual risk. The judicially-created alternative allows an applicant's insufficient claim of individualized risk to be supplemented by their membership in a disfavored group. Did the lower court err in considering Petitioner's membership in a disfavored group when determining her eligibility for asylum?

II. Courts will apply *Chevron* deference when an administrative agency has previously interpreted a statute or regulation. When the persecution is not perpetrated or sponsored by the government, the asylum applicant bears the burden of establishing that it would be unreasonable to internally relocate. Here, neither the IJ nor the BIA had defined "government-sponsored" so *Chevron* deference was inapplicable, leaving the term open for interpretation. Was the lower court correct in interpreting the term "government-sponsored" and was Petitioner the correct party to bear the burden of demonstrating whether future persecution could be avoided by internal relocation?

STATEMENT OF JURISDICTION

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

STATEMENT OF THE CASE

I. Statement of Facts

Leila Marcos (hereinafter "Petitioner") is a citizen of Basag; a two-island nation located near Pulo. (Record of Factual Background, hereinafter "R." 2). Basag is comprised of two separate islands: the Southern island of Isda, and the Northern island of Mayaman. (R. 2). Since its inception in 1964, Basag has boasted magnificent beaches, resorts, and fishing. (R. 2). However, due to its coastal nature, Basag has been significantly affected by global warming. (R. 2). In 1992, the minority population of Timog people began to migrate to the larger island of Mayaman as a result of their rapidly changing environment. (R. 2-3). This changing environment caused rising sea levels which in turn contaminated the country's fresh water wells, inevitably creating a drinking water shortage. (R. 2-3).

In 2012, the President of Basag, Ferdinand Aquinto, nationalized the country's water source in an attempt to address the crisis. (R. 3). A year later, President Aquinto signed a thirty-year concession contract with Life Incorporated (hereinafter "Life Inc.") to maintain and rebuild Basag's wells. (R. 4). The endeavor was successful for the citizens of Mayaman; their economy remained prosperous. (R. 4). However, the citizens of Isda continued to struggle with gaining access to clean drinking water. (R. 4).

In subsequent years, tensions rose among the Idsa population. (R. 4). The citizens were frustrated by President Aquinto and the lack of attention on the water crisis on the island. (R. 4). In 2016, a small group of Timog citizens lodged a protest against Life Inc. and the Basag government. (R. 4). In response, the Basag military forces aided Life Inc. in protecting its facilities. (R. 4). From this protest, a small faction of protestors formed a group called the Water Warriors, whose goal was to encourage the Basag government to re-take control of the country's water

sources. (R. 4). Since the growing tension between the Water Warriors and Life Inc., the concessionary has hired armed guards to protect its facilities and personnel. (R. 5).

Petitioner, an eighteen-year-old Isda citizen and a member of the Timog minority, lived with her husband on the coast of Isda. (R. 5-6). The couple was severely impacted by the water crisis and relied on Life Inc.'s wells as their only water source. (R. 6).

Initially, Petitioner would travel a total of ten miles to retrieve water from a Life Inc. facility (Well 1). (R. 6). On March 6, 2017, Petitioner was harassed by a Life Inc. guard at Well 1; the guard had offered more water in exchange for sex. (R. 6). As a result, Petitioner elected to travel to a different Life Inc. facility over twenty miles away (Well 2). (R. 6-7). Later, when visiting Well 2, Petitioner noticed the harassing guard from Well 1. (R. 7). The harassing guard subsequently whispered to Petitioner, "I am going to have my way with you, honey, whether you want it or not." (R. 7). This exchange frightened Petitioner, who elected to travel to a newly repaired well closer to her home (Well 3). (R. 7). Petitioner obtained her water from Well 3 without consequence for several weeks. (R. 7). Later, record summer temperatures forced Petitioner to limit her travel to a closer well only a mile from her home (Well 4). (R. 7-8). When she traveled to Well 4, however, another guard grabbed Petitioner's backside and whistled. (R. 8). Petitioner informed her husband of this harassment. (R. 8). In response, her husband confronted the harassing guard and was injured. (R. 8).

After Petitioner's husband's injury, the couple traveled to Mayaman for medical treatment. (R. 8). While on Mayaman, the couple stayed with friends who offered them a temporary place to stay, and suggested they find work to stay in Mayaman more permanently. (R. 8).

The water crisis on Mayaman was much more controlled and did not require women to travel to retrieve water. (R. 9). Petitioner tried to overcome this obstacle by finding temporary work at a local shop. (R. 9). In August 2017, the Petitioner had gathered enough money for a plane

ticket to the United States. (R. 9). She arrived on August 7, 2017 and immediately filed an application for asylum. (R. 9-10).

II. Procedural History

At Petitioner's initial hearing, she argued she had a well-founded fear of future persecution at the hands of Life Inc., which warranted asylum in the United States. (R. 10). However, her claim was denied. (R. 10). In its ruling, the Immigration Judge (hereinafter "IJ") stated that Petitioner may be able to demonstrate a well-founded fear of future persecution under the disfavored group analysis, but ultimately denied her claim because internal relocation was a reasonable alternative. (R. 10). Thereafter, Petitioner appealed to the Board of Immigration Appeals (hereinafter "BIA"), who affirmed the denial of asylum for the same reasons. (R. 10).

In March 2018, Petitioner then turned to the Thirteenth Circuit Court of Appeals to challenge the denial of the immigration courts. (R. 10). The Government cross-appealed to challenge the adoption to the disfavored group analysis. (R. 10). The Thirteenth Circuit ultimately affirmed all holdings of the BIA. (Thirteenth Circuit Court of Appeals Opinion hereinafter "COA." 18). This Court granted certiorari on October 12, 2018. (United States Supreme Court writ of Certiorari hereinafter "Cert." 2).

SUMMARY OF ARGUMENT

Applicants seeking asylum in the United States first have to establish their eligibility through offering evidence of past persecution, or a well-founded fear of future persecution. 8 C.F.R. § 208.13(b)(2) (2019). A well-founded fear of future persecution is established with evidence of individualized risk, or pattern or practice of persecution among those similar to the applicant. *Id.* The lower court applied an alternative standard to determine a well-founded fear of future persecution: the disfavored group analysis. This judicially created analysis impermissibly lowers the standard of proof for eligibility and goes against the regulatory and statutory language.

Thus, Petitioner's claim of well-founded fear based on her membership in a disfavored group is invalid.

Further, an asylum applicant will not be eligible for asylum if it is reasonable to relocate internally within her home country. However, internal relocation is deemed to be unreasonable if the persecution is perpetrated by the government or is government-sponsored.

At issue here, is the interpretation of the term "government-sponsored" as found in the regulation. The interpretation, or definition, of the term is determinative in deciding which party bears the burden of proving whether internal relocation is reasonable. When faced with interpreting an ambiguous term, courts should give deference to lower courts or administrative agencies who have already defined the term. This doctrine is commonly referred to as *Chevron* deference. Here, the administrative agencies did not define or interpret "government-sponsored." Thus, there was no definition for the lower court to defer to and the Thirteenth Circuit was correct in offering its own definition of "government-sponsored." This definition excluded Life Inc., therefore, Petitioner was the proper party to bear the burden of rebutting the presumption of reasonable internal relocation.

STANDARD OF REVIEW

Legal questions pertaining to the requirements for establishing eligibility of asylum are reviewed *de novo*. *Abedini v. INS*, 971 F.2d 188, 190 (9th Cir. 1992). Meaning this Court should refer to the lower court to determine the facts of the case but may rule on the evidence and matters of law without giving any deference to the lower court. *Id*. Factual findings, however, are reviewed under the substantial evidence standard. *Id*. This standard only requires that the evidence is enough so that a reasonable person could have reached the same conclusion. *Id*.

ARGUMENT

I. THE LOWER COURTS' FINDING OF WELL-FOUNDED FEAR SHOULD BE REVERSED BECAUSE THE DISFAVORED GROUP ANALYSIS SHOULD NOT HAVE BEEN APPLIED, AND PETITIONER DID NOT OFFER EVIDENCE TO SUPPORT A WELL-FOUNDED FEAR

Asylum law has a humanitarian origin; it offers sanctuary to eligible individuals to escape the persecutions of their native countries. However, as the law stands, some circuits are lessening the standard of eligibility and offering the sanctuary of the United States to applicants whose circumstances do not meet the requirements. This disparity between the circuits has created a confusing, unequal interpretation of the law which demands clarification. The Thirteenth Circuit, among others, has allowed an alternative to proving eligibility that not only goes against the regulatory and statutory scheme, but will open the floodgates to asylum seekers who would not otherwise be eligible. In the interests of protection and respect of the legal framework, this Court should reverse the lower court's ruling on this issue.

This circuit split is particularly pressing considering the upsurge of asylum filings. According to the Office of Immigration Statistics' annual report, an estimated 115,399 asylum applications were filed with the United States Citizen and Immigration Services in 2016. U.S. Dep't of Homeland Security, Office of Immigration Statistics, Annual Flow Report January 2018, 7 (2018). This number is more than a thirty-nine percent increase than the year before and more than a one hundred percent increase since 2014. *Id.* When analyzing this data over the last decade, this is the seventh consecutive annual increase, and the highest since 1995. *Id.* Thus, to maintain the efficiency of the asylum process in the coming years, it is particularly imperative for this Court to clarify the issues raised in this appeal.

The following argument will address first, how the disfavored group analysis is inconsistent with the regulatory and statutory scheme, and second, how the analysis impermissibly lowers the standard for establishing asylum eligibility.

A. Applying the Disfavored Group Analysis to Determine Asylum Eligibility Goes Against the Regulatory and Statutory Scheme of the Law

Asylum is a means by which a refugee requests to remain in the United States for fear of persecution in their native country. 8 U.S.C. § 1101(a)(42) (2018). This persecution, or well-founded fear thereof, must be based on one of the following enumerated categories: (1) race, (2) religion, (3) nationality, (4) membership in a particular social group, or (5) political opinion. *Id. See e.g.*, *Cabrera v. Sessions*, 890 F.3d 153, 162 (5th Cir. 2018) (holding that a feminist activist group qualified as a particular social group). Persecution is the infliction of suffering or harm upon one another. *Sael v. Ashcroft*, 386 F.3d 922, 924 (9th Cir. 2004).

To prove such persecution the asylum applicant must demonstrate that they are the victim of past persecution or have a well-founded fear of future persecution on the same basis. 8 C.F.R § 208.13(b)(2). The level of evidence needed to establish this well-founded fear of future persecution is at the heart of this dispute today.

An applicant's well-founded fear of persecution must be both subjectively genuine, and objectively reasonable. *Sael,* 386 F.3d at 924. The subjective prong is satisfied through genuine, credible testimony, whereas the objective is satisfied through a showing of past or a well-founded fear of future persecution. *Id.* The pertinent regulations state that in establishing a well-founded fear, the applicant must provide evidence of individual, particularized persecution, or that future persecution is likely due to membership in a systematically persecuted group, such as those enumerated above. 8 C.F.R § 208.13(b). *See also Martinez-Pérez v. Sessions*, 897 F.3d 33, 39-40 (1st Cir. 2018) (the persecution must have exceeded mere discriminatory experiences and risen to a level of fairly high seriousness and regularity). However, it is not necessary that the applicant prove an individualized risk if she can prove that there is a pattern or practice of persecution of people in similar circumstances to the applicant. 8 C.F.R § 208.13 (b)(2)(ii)-(ii).

Alternatively, some circuits have held that asylum applicants who are unable to meet the criteria outlined in the regulations are nonetheless able to qualify for asylum by demonstrating they are a member of a disfavored group. *See generally Kotasz v. INS,* 31 F.3d 847 (9th Cir. 1994). Disfavored groups are those that are not targeted for systematic persecution, but whose members are still at an increased risk of persecution in general. *Id.* at 853. In other words, members of a disfavored group, by definition, are *not* subject to a pattern or practice of persecution. *Id.* This alternate standard considers the applicant's membership in a disfavored group to work in tandem with the requirement of individualized risk: the more pervasive the persecution of the disfavored group is, the less evidence of individualized persecution is required for eligibility. *Id.*

This alternative standard cuts against the statutory and regulatory intent. To determine the intentions of the legislative and administrative bodies, this Court must look to the rules that govern asylum procedure in general. In 1952, the legislature passed the Immigration and Naturalization Act (hereinafter "INA"). 8 U.S.C. § 1153 (repealed 1980). The current statutory framework of the INA gives the Attorney General permission to establish asylum procedures and grant asylum to eligible applicants. 8 U.S.C § 1158 (2018). However, the statute gives little explanation to the specific guidelines for determining applicants' eligibility. Thus, it helps very little in resolving the question of the validity of the disfavored group analysis.

Additional sources of rules for asylum claims are found in the body of administrative law. The Immigration and Naturalization Service (hereinafter "INS") promulgated regulations that also govern asylum procedures. *See generally* 8 C.F.R. § 3 (2019); 8 C.F.R. § 103 (2019); 8 C.F.R. § 236 (2019); 8 C.F.R. § 253 (2019). The language of these regulations has been paraphrased above, but specifically uses the term "pattern or practice" of persecution in relation to establishing a well-founded fear of future persecution. 8 C.F.R. § 208.13(b)(2)(iii). The regulation specifically states that courts should not require the applicant to provide evidence of individual risk if the applicant

establishes that there is a "pattern or practice in [their] home country . . . of persecution of a group of persons similarly situated to the applicant . . . ." *Id.*

The precise language of the law shows the intention behind its enactment; the regulatory and statutory scheme were meant to impose a high burden of proof to obtain eligibility for asylum. The language does not allow establishment of well-founded fear to be made up of a combination of insufficient individualized risk and membership in a disfavored group. Therefore, the disfavored group analysis is an inappropriate approach to calculating an applicant's well-founded fear.

The alterations the disfavored group analysis add to the determination of asylum eligibility exceeds the authority granted in the regulations. *Wan Chien Kho v. Keisler*, 505 F.3d 50, 55 (1st Cir. 2007). In *Kho*, an ethnic Chinese Christian from Indonesia challenged his denial of asylum in the United States. *Id.* at 52. On appeal, the asylum seeker argued the lower court should have applied the disfavored group analysis, thereby erring in its finding of insufficient well-founded fear. *Id.* The First Circuit declined to adopt the disfavored group analysis mainly because it went beyond the scope of the court's authority. *Id.* at 55. It held Congress, in the INA, delegated authority to the Attorney General and the Secretary of Homeland Security to establish regulations in the area of refugee and asylum law. *Id.* As such, the statutes made no such delegation of authority to the courts. *Id.* The First Circuit affirmed the lower court's denial of the disfavored group analysis because it determined it would be outside the court's power to accept such an alteration to the statutory and regulatory scheme. *Id.*

In rejecting the disfavored group analysis, the First Circuit joined several other circuits who have done the same. *Id. See also Eka Putra Halim v. INS*, 252 Fed. Appx. 350, 352 (2d Cir. 2007); *Firmansjah v. Gonzalez*, 424 F.3d 598, 607 (7th Cir. 2005); *Lie v. Ashcroft*, 396 F.3d 530, 538 (3d Cir. 2005) (disagreeing with the Ninth Circuit's use of the disfavored group analysis

because it allowed a lower standard for individualized fear absent a pattern or practice of persecution).

Here, use of the disfavored group analysis would impermissibly exceed the scope of authority granted by the statutes and regulations. The Thirteenth Circuit argued it is overburdensome to ask an asylum applicant to prove individual risk of persecution when they belong to a mistreated, or disfavored group. (COA. 11). However, this high standard is precisely what the administrative agencies intended to impose on applicants, as evidenced by the specific language in the regulations.

Petitioner argues that her membership in a disfavored group, the Timog minority, should be sufficient to supplement her lack of individualized risk. (COA. 10). She argues that the occasional persecution of a member of the Timog population is evidence that she herself will face persecution should she return home. (COA. 10). However, if this Court accepts Petitioner's calculations, it will be awarding eligibility to an applicant who does not meet the requirements outlined by the law.

The Timog population is not subject to a pattern or practice of persecution. First, the record notes that seventy-five people on the island of Isda have been killed in the feud with Life Inc. (R. 5). However, these people were not necessarily members of the Timog population. (R. 5). Further, the rumors of abuse among the Timog women did not affect Petitioner personally; she was not related, nor did she know any of the victims of the abuse. (R. 10). Finally, members of the Timog population have found relative security on the larger island of Mayaman. (R. 8-9). This ability to escape the alleged persecution negates any claim by Petitioner of persistent persecution. As such, it is impermissible to accept the lower court's determination of well-founded fear when it was calculated with the disfavored group analysis.

A common illustration cited by advocates of the disfavored group analysis is that of Jews during the Nazi occupation. It states, "[I]t would not have been necessary for each individual Jew to await a personal visit to his door by Nazi storm troopers in order to show a well-founded fear of persecution." *Kotasz*, 31 F.3d at 852. This argument, though memorable, ignores the fact that a Jewish asylum applicant fleeing Nazi rule would likely be able to establish a pattern or practice of persecution in their home country. Although the basis behind the analogy is understandable—one should not be forced to wait for injury before seeking refuge—it is not up to the courts to arbitrarily create an alternative route for applicants to achieve their solace.

In sum, the policy behind asylum law reflects two guiding principles: a humanitarian intention to offer aid to those eligible, and a recognition of the essential need for a uniform and orderly system for adjudication of asylum claims. Bridget Tainer-Parkins, *Note: Protection from a Well-Founded Fear: Applying the Disfavored Group Analysis in Asylum Cases,* 65 Wash. & Lee L. Rev. 1749, 1775 (2008).

B. The Disfavored Group Analysis Impermissibly Lowers the Standard For Asylum Eligibility, Thereby Opening the Floodgates to Eligible Asylum-Seekers

As discussed above, the standard of asylum eligibility was placed intentionally high by the administrative agencies that built the regulatory framework. In order to maintain the regulatory intention behind asylum law, the standard must stay elevated and be adjudicated consistently.

The eligibility standard is high because once a court determines that membership in a disfavored group provides sufficient evidence of persecution, then every member of that disfavored group would necessarily meet the evidentiary standard for well-founded fear. *Ahmed v. Gonzales*, 467 F.3d 669, 675 (7th Cir. 2006). Ahmed was a Somalian asylum applicant, and a member of a minority social clan called the Midgan. *Id.* at 671. In using the pattern or practice standard, the court determined that the Midgan were merely a disfavored group that was the subject of occasional violence. *Id.* Thus, the court emphatically stated that the Midgan were *not* subject to

a pattern or practice of persecution and denied Ahmed's asylum claim. *Id.* at 673. It reasoned that a literal interpretation of the pattern or practice requirement is necessary to stop an onslaught of asylum seekers, and summarily rejected the disfavored group analysis. *Id. See also Kaharudin v. Gonzales*, 500 F.3d 619, 624-25 (7th Cir. 2007*), Ingmantoro v. Mukasey*, 550 F.3d 646, 650 (7th Cir. 2008) (holding that the circuit has expressly adopted a high standard for establishing a well-founded fear).

Here, the risk of onslaught discussed in *Ahmed* is also present. There is no question that the Timog population of Basag face a difficult plight; they face water shortages, economic hardship, and discriminatory conduct. (R. 2-5). However, should this Court determine that the Petitioner is a member of a disfavored group, and this membership is sufficient to establish well-founded fear, then every member of the Timog minority will be eligible for asylum. Utilizing the disfavored group analysis here, similar to the reasoning in *Ahmed,* will create an onslaught of applicants that our country's immigration framework was neither designed, or able to accommodate.

In Basag, there is a whole population of Timog people who may qualify for asylum should the disfavored group analysis be applied. If this Court affirms the adoption of the disfavored group analysis, the Timog people will automatically be able to establish a well-founded fear based simply on their membership in the minority population. This onslaught of asylum seekers is specifically what the Seventh Circuit warned of in *Ahmed.* It is important for this Court to protect this Nation's policy of offering asylum to those *truly* in need. Although there are humanitarian considerations, the overall effectiveness of asylum procedures mandates uniformity and strict standards. The case-by-case nature of adjudication requires clear, bright-line rules for courts to implement.

The majority opinion of the Thirteenth Circuit states that membership in a disfavored group is simply one factor for a court to consider in determining individual risk for an asylum applicant.

(R. 10). The lower court reasoned that the disfavored group analysis does not lower the asylum seeker's evidentiary burden, but instead just takes the applicant's membership as a relevant piece of evidence used to assess whether their fear of persecution reaches the requisite level. (R. 10-11). In other words, it does not lower the ultimate burden, but instead lowers the proportion of individualized evidence needed for eligibility. This argument ignores the fact that a burden *is* being lowered; the "counterbalancing" of the disfavored group analysis lowers the amount of individual risk an applicant must prove. This is precisely what other circuits are concerned about when faced with the option of adopting the alternative standard. *See, e.g.*, *Wijaya v. Gonzalez*, 227 Fed. Appx. 35 (2d Cir. 2007); *Fenny v. Holder,* 538 Fed. Appx. 48 (2d Cir. 2013); *Eka Putra Halim*, 252 Fed. Appx. at 352 (reasoning that any lowering of the evidentiary burden goes against the regulatory requirements for eligibility).

Further, the majority opinion warns of "overburdening" the asylum seeker with the obligation to prove evidence of individual risk. (R. 11). However, abiding by the restrictions written into the language of the regulations is not overburdening, but instead facilitating regularity and uniformity among asylum adjudications.

The grant of asylum to applicants on the basis of a well-founded fear of future persecution is by nature a risk; the applicant is obtaining legal status based on a *probability* of harm. The compromise regarding this act of trust is the United States' ability to retain the strict standard of eligibility. This country should be able to require a high standard when determining who to open its doors to.

In sum, although the overall outcome of Respondent's case was favorable, the adoption of the disfavored group analysis should be reversed. This judicially created alternative works against the regulatory framework established by the administrative agency. Further, the alternative analysis lowers the burden of evidence for an asylum seeker, thereby inviting an onslaught of

asylum applicants. The inconsistency of adjudication of asylum claims among the circuits is resulting in unfair outcomes for applicants, and the communities in which they settle. This Court now has the opportunity to clarify the standard required for well-founded fear and reinforce the high burden of eligibility for asylum in this country.

II. PETITIONER WAS THE PROPER PARTY TO BEAR THE BURDEN OF REFUTING THE REASONABLENESS OF INTERNAL RELOCATION BECAUSE LIFE INC. WAS NOT GOVERNMENT-SPONSORED AND CHEVRON DEFERENCE WAS INAPPLICABLE

Asylum law, in general, is intended to meet the needs of those who have no other alternative for protection. Deborah E. Anker, Law of Asylum in the United States, 61-62 (11th ed. 2011). For this framework to be effective, however, those who can genuinely access domestic protection should be excluded from eligibility. *Id.* This idea of reasonable internal relocation is not only outlined in the regulations, but also endorsed by the United Nations High Commissioner for Refugees. *See generally* UNHCR Guidelines on Internal Protection, 15 Int'l J. Refugee L. 875 (2003); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 438-39 (1987) (this Court has previously turned to the UNHCR guidelines to aid it its analysis, for example, to determine the definition of "refugee"). The internal relocation inquiry is future-oriented; courts must ask not whether the applicant ever had an opportunity to relocate, but whether she currently has one. Anker, *supra*. Thus, an asylum applicant who could reasonably relocate within her home country is ineligible for asylum in the United States, regardless of whether she has a well-founded fear of persecution. *Id.*

The following argument will first address why the Thirteenth Circuit was correct in interpreting the term "government-sponsored" and second, why remand is unnecessary in this case.

A. The Lower Court was Correct in its Interpretation of Government-Sponsored and Determination of Which Party Bore the Burden of Proof Because Chevron Deference was not Applicable

An applicant who establishes a well-founded fear of persecution may still be denied asylum, if it is reasonable for them to relocate within their home country. 8 C.F.R. §

208.13(b)(2)(C)(ii). Reasonable relocation may occur "if the applicant could avoid persecution by relocating to another part of [their] country . . . if under all circumstances it would be reasonable to expect [them] to do so." *Id.* When the applicant is faced with persecution perpetrated or sponsored by the government of their home country, then internal relocation is presumed to be unreasonable. 8 C.F.R. § 208.13(b)(3)(ii). The United States government may rebut this presumption by establishing "by a preponderance of the evidence that . . . it would be reasonable for the applicant to relocate." *Id.* However, if the persecution is by a non-state actor, then internal relocation is presumed reasonable and the burden is on the applicant to prove it was not reasonable for her to relocate. *Id.*

When a court interprets a statute or regulation, the court must first look to Congressional intent, and if the intent is unclear, then look toward the administrative agency's interpretation of the statute. *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842 (1984). These steps are now known as *Chevron* deference. *Id.* With respect to the second step of a *Chevron* analysis, if Congress' intent is unclear and "the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the [administrative] agency's answer is based on a permissible construction of the statute." *Id.* at 843. When an agency has interpreted a statute or defined a term clearly, a court may not ignore the agency's interpretation and create its own meaning. *Id.* Many courts have shown deference to an agency's reasonable interpretation because the agency was given the power to create the regulation and was in a better position to understand its purpose. *Id. See, e.g.*, *United States v. Mead Corp.*, 533 U.S. 218 (2011); *INS v. Aguirre-Aguirre*, 526 U.S. 415 (1999); *Velasquez-Garcia v. Holder*, 760 F.3d 571 (7th Cir. 2014); *Puentes Fernandez v. Keisler*, 502 F.3d 337 (4th Cir. 2007) (holding that the Fourth Circuit was required to afford deference to the BIA's interpretation of term "national of the United States" in the INA); *Marmolejo-Campos v. Holder*, 558 F.3d 903 (9th Cir. 2009) (applying deference to the BIA's

interpretation of the ambiguous terms in the INA); *S.E.R.L. v. Att'y Gen. United States*, 894 F.3d 535 (3d Cir. 2018) (applying *Chevron* deference to the BIA's interpretation of "particular social group" with regard to refugee status).

Chevron deference, however, is inapplicable when an agency has not provided an explanation of a statute or regulation. *Miller v. Clinton*, 687 F.3d 1332, 1342 (D.C. Cir. 2012); *Landmark Legal Found. v. IRS*, 267 F.3d 1132, 1136 (D.C. Cir. 2001). In an event where an agency fails to provide an interpretation of a provision the court then cannot grant it deference because there is no interpretation to defer to. *Id.* Thus, when *Chevron* deference is inapplicable, a reviewing court may proceed to "determine the meaning of the statute in the old-fashioned way: it must decide for itself the best reading." *Miller*, 687 F.3d at 1333.

According to the *Chevron* doctrine, courts are required to show deference when an agency, for instance the BIA, actually defines or interprets part of a statute. *Aguirre-Aguirre*, 526 U.S. at 425. In *Aguirre-Aguirre*, this Court reexamined an asylum petition after it was denied by the BIA and Ninth Circuit. *Id.* at 418. There, the asylum seeker had burned busses, assaulted passengers, and vandalized private property in his home country as an act of political protest. *Id.* at 421. The BIA and Ninth Circuit denied the application because the INA did not protect asylum seekers who had committed "serious nonpolitical crimes." *Id.* at 432. The BIA had previously adopted a definition for the term "serious nonpolitical crime," but the Ninth Circuit failed to adhere to that interpretation. *Id.* at 418. Thus, this Court reversed the case and held that the Ninth Circuit should have utilized *Chevron* deference and applied the BIA's definition of "serious nonpolitical crime." *Id.* at 431.

When an agency fails to provide a clear definition for a phrase found in a statute, *Chevron* deference is inapplicable. *Landmark Legal Found.*, 267 F.3d at 1136. Initially, the court in *Landmark Legal Found.* intended to show deference to the interpreting agency: the IRS. *Id.*

However, upon review, the court noted that the IRS failed to provide any explanation for the ambiguous statutory phrase. *Id.* at 1342. The D.C. Circuit reasoned that because the agency did not provide an explanation, it could not grant deference. *Id.* Accordingly, the court decided for itself the best reading of the statutory phrase in question. *Id.*

Similar to *Landmark Legal Found.*, the lower court found there was no administrative interpretation of a term to apply *Chevron* deference to. Here, to determine which party would bear the burden of providing evidence regarding internal relocation, the Thirteenth Circuit needed to analyze the term "government-sponsored." (COA. 13). In doing so, the Thirteenth Circuit found that neither the IJ nor the BIA had provided any analysis on the ambiguous term. Thus, the Thirteenth Circuit was forced to interpret the term for itself. Though *Landmark Legal Found.* was not focused on asylum law, the application of *Chevron* deference, or lack thereof is relevant to the case at hand.

Furthermore, the Thirteenth Circuit's determination of the proper party to bear the burden was also correct. The Thirteenth Circuit was not required to defer to the administrative agencies thus, it determined Life Inc. did not fit within the definition of government-sponsored. As such, internal relocation was presumed reasonable and it was Petitioner's burden to rebut this presumption.

Petitioner has argued that because Congress what not clear as to the definition of government-sponsored, the lower court should not have interpreted the term for itself. (COA. 15). However, as the majority opinion discusses, the court had no other choice. Had the IJ or BIA defined the term, or offered any explanation at all, the Thirteenth Circuit would have had to adhere to the offered interpretation. As such, the court was free to interpret the term however it saw fit.

Since the term had not been interpreted, the Thirteenth Circuit took the initiative to decide on the best reading of the regulation, thereby establishing a valid interpretation of the term

"government-sponsored." Further, the court's classification of Life Inc. was proper and Petitioner had the burden of proving internal relocation was unreasonable. Though the policy implications of *Chevron* deference are important, the doctrine should not be used when it is not applicable.

Even if this Court were to find that Life Inc. was not government-sponsored, thus placing the burden on the government to prove that internal relocation is reasonable, Petitioner would still not prevail. The Asylum Officer Basic Training Course explains that the internal relocation inquiry is "entirely future-oriented" and the court must look to whether the applicant currently has an opportunity to relocate that is reasonable under all circumstances. Anker, *supra*. When determining reasonable relocation, adjudicators should consider (1) whether internal relocation would be safe, and if so, (2) whether it would be reasonable to expect the applicant to do so. *Oryakhil v. Mukasey*, 528 F.3d 993, 998 (7th Cir. 2008); *Martiri v. AG of the United States*, 159 Fed. Appx. 393 (3d Cir. 2005) (denying asylum because the applicant had already relocated to a safe part of their home country). The reasonableness determination should also consider the whether the applicant would face serious harm in the suggested place of relocation, civil strife within the country, and social and cultural restraints. 8 C.F.R. § 208.13(b)(3).

Here, when reviewing the reasonableness of Petitioner's internal relocation, this Court should look at whether she could find safety in another part of Basag. As evidenced in the record, Petitioner *is* able to relocate to the island of Mayaman within her home country. First, because Mayaman thrives on tourism, the island has a reputation of being safer, and the water scarcity is much more controlled. (R. 8). Thus, Petitioner would not have to travel far to gain access to clean water in fear of being harassed by Life Inc. employees. (R. 8). This Court should further find internal relocation reasonable because Petitioner and her husband were able to successfully travel to Mayaman and find temporary solace. (R. 9). It was only due to Petitioner's inability to find work that her and her husband did not thrive on Mayaman. (R. 9). However, economic hardship

is not a basis for asylum. Finally, in June of 2018 President Aquinto tweeted, "The Beautiful Basag Islands remain prosperous and safe in this ever-changing world," further highlighting that safety is a possibility in Petitioner's home country. (R. 5).

Here, Petitioner has not met her burden in refuting the reasonableness of internal relocation in Basag. The evidence provided does not prove that Petitioner would face serious harm if she relocated to the other island of Mayaman. In fact, Petitioner *was* able to safely relocate to Mayaman for a few months before traveling to the United States in hopes of gaining asylum. The purpose of the asylum system is to provide a haven for individuals who are at risk of persecution and cannot relocate within their home country. However, Petitioner does not fit within these parameters.

B. Remand Is Not Necessary Because the Thirteenth Circuit Appropriately Defined "Government-Sponsored"

As discussed above, to have a valid asylum claim, the applicant must prove she has a well-founded fear of persecution. 8 C.F.R. § 208.13(b)(2). The BIA has defined "persecution" as a harm "to be inflicted either by the government of [a country] or by persons of an organization that the government is unable or unwilling to control." *Valioukevitch v. INS*, 251 F.3d 747, 749 (8th Cir. 2001); *Miranda v. INS*, 139 F.3d 624, 627 (8th Cir. 1998). With regard to "government-sponsored" persecution, some circuits have found that when local authorities have responded to incidents of violence, those incidents of violence are disconnected from the government. *Menjivar v. Gonzales*, 416 F.3d 918, 922 (8th Cir. 2005); *Khan v. Holder*, 727 F.3d 1, 17 (5th Cir. 2013) (finding that because the Pakistani government actively tried to protect the applicant from the Taliban, the persecution was not government-sponsored).

Upon reviewing a claim for asylum, the Eighth Circuit in *Valioukevitch*, found there was no evidence proving that the government was unwilling or unable to control the persecutor, thereby classifying the persecution as not government-sponsored. *Valioukevitch*, 251 F.3d at 748. There, the petitioner applied for asylum because he feared religious persecution in his home country. *Id.*

at 749. However, evidence showed that his home country's constitution had respected citizens' rights to freedom of religion and did not prevent individuals from proselytizing. *Id.* The court explained that "an asylum claim based on actions by non-governmental parties fails where none of the incidents of abuse 'occurred with the imprimatur' of government officials." *Id.* Thus, the court held that the applicant's alleged persecution was not committed or sanctioned by the government. *Id.* As such, internal relocation was presumed to be reasonable. *Id.*

Again, the Eighth Circuit in *Menjivar*, found an asylum seeker's risk of being threatened by gang violence was not a valid claim for asylum because the gang member's actions were not government-sponsored. *Menjivar*, 416 F.3d at 922. There, the asylum seeker suffered an attack at the hands of a lone gang member. *Id.* Thereafter, the applicant sought asylum in the United States claiming she was afraid that her attacker would cause her more harm if she returned home. *Id.* The court found that the applicant had the burden of proof in rebutting the reasonableness of internal relocation because her attacker was a private criminal actor and not the government. *Id.* at 922. Subsequently, her claim was denied because there was no evidence that the government was unwilling or unable to control the attacker's threatening behavior. *Id.*

Here, the Thirteenth Circuit utilized the decisions in *Menjivar* and *Valioukevitch* to determine what constituted government-sponsored persecution. (COA. 14). The court clearly describes "government-sponsored" as being an action that is not conducted by a private criminal actor. (COA. 16). Thus, non-government-sponsored persecution occurs by way of private criminal acts, similar to Life Inc.'s actions here. Like *Menjivar*, Petitioner was persecuted by a private criminal actor rather than a government-sponsored entity. Although the government contracted with Life Inc., the government did not control Life Inc. nor its employees. (COA. 4). Petitioner's harassment was at the hands of privately hired Life Inc. employees, not agents of the Basag government. (R. 5).

As the majority opinion states, "Life Inc. does not have such an extensive reach or such a complete intertwinement with the government that [Petitioner] cannot secure protection in her own country through the proper channels." (R. 17). For instance, Petitioner never sought assistance or investigation by the police force in Basag during her encounters with Life Inc. employees. Had she sought help from the local authorities, perhaps the problem would have been solved.

Further, deeming Life Inc. to be government-sponsored would be over inclusive for the issue at hand. The categorization of Life Inc. as government-sponsored would result in presumably unreasonable relocation for any citizen of Basag who was harassed at the hands of Life Inc. The implications of reversal on this issue expand beyond Petitioner's case. If a concessionary like Life Inc. is deemed government-sponsored then any private corporation that provide services for the public would also be government-sponsored, leading to an expansion of the eligibility for asylum applications.

Petitioner, similar to the dissenting opinion of the Thirteenth Circuit, will likely argue remand is necessary based on the holding of *Negusie v. Holder*, 555 U.S. 511 (2009); (COA. 20). This Court in *Negusie* reaffirmed the principle that remand is necessary when an agency has "not yet exercised its *Chevron* discretion to interpret the statute in question." *Id.* There, this Court remanded because the Fifth Circuit had not applied the proper deference to the BIA to interpret the ambiguous term. *Id.* This Court explained that when the BIA has not interpreted a statute the court should remand in order to give the "the BIA the opportunity to address the matter in the first instance in light of its own expertisc [sic]." *Id.* at 517. Thus, this Court reversed the Fifth Circuit's ruling and remanded to allow for the agency to interpret the statute properly. *Id.*

Unlike *Negusie*, remand is not necessary because the BIA does not need to interpret the term in question. Although "government-sponsored" was deemed ambiguous, the Thirteenth Circuit defined the term. (COA. 20). It stated that "government-sponsored" was conduct *not*

perpetrated by a private criminal actor. Although the dissenting opinion of the Thirteenth Circuit advocates for a "positive" definition of the term, it is not necessary to define so narrowly every term found within a statute or regulation. It is common practice for courts to look to other opinions to build a definition from examples, and conduct a fact-based analysis for its specific case. Definitions like the one offered by the Thirteenth Circuit may still provide guidance to future analyses; a definition does not need to be positive and specific to be valid.

Moreover, the Thirteenth Circuit implemented the technique discussed above for defining the ambiguous term. It relied heavily on holdings from other circuits which were faced with similar issues. (COA. 15-17). Further, the Thirteenth Circuit relied heavily on the factual findings of the IJ and BIA, showing that it considered the potential effects of its determinations. The Thirteenth Circuit properly defined the ambiguous term "government-sponsored" and set a precedent for other agencies and courts to follow in order to prevent any misinterpretation or misapplication of the term in the future.

Remand of this case would be an unnecessary use of the judiciary's resources. The Thirteenth Circuit has already offered a sufficient definition of the ambiguous term that is reasonable and will provide guidance to future courts.

CONCLUSION

For the foregoing reasons, Respondent asks this Court to reverse the holding of the Thirteenth Circuit Court of Appeals as to the adoption of the disfavored group analysis. Further, Respondent asks this Court to affirm the lower court's holding as to internal relocation. Petitioner has not demonstrated a compelling reason for this court to deviate from the strict standards of well-founded fear analysis. Finally, Petitioner was the correct party to bear the burden of providing evidence regarding internal relocation.

Dated: February 1, 2019

Respectfully submitted,

/s/ Team 1011
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