No. 17-17002

In The

Supreme Court of the United States

Leila Marcos
Petitioner,

v.

Attorney General of the United States
Respondent.

BRIEF FOR RESPONDENT

Team 1013
Counsel of Record

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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.

QUESTIONS PRESENTED

1. Whether the disfavored group analysis is a valid basis to establish a well-founded fear of persecution for the purposes of asylum eligibility;

2. Whether the proper party bore the burden of demonstrating if substantial evidence supported a finding that future persecution could be avoided by internal relocation?

STATEMENT OF THE CASE

I. Introduction.

Petitioner Leila Marcos claims to have a well-founded fear of future persecution upon return to her native country of Basag due to a pattern or practice of rape and harassment against similarly situated Timog women in the Basag Islands. Her claim fails under both a pattern or practice analysis and the invalid "disfavored group" analysis applied by the Thirteenth Circuit. The harassment Marcos testified to experiencing while collecting water for her and her husband, Bernardo, on the island of Isda does not rise to the level of persecution. However, even so, Marcos's asylum claim fails because, as Respondent Attorney General of the United States urges, Marcos cannot meet the burden she bears—on account of Life Incorporated ("Life Inc.") not being "government-sponsored"—of proving that she could not escape persecution by internally relocating within Basag.

The Court should find that the "disfavored group analysis" is not a valid basis to establish a well-founded fear of persecution for the purposes of asylum eligibility because the analysis: 1) erroneously lowers an asylum seeker's ultimate burden of proof—which public policy requires; and 2) runs counter to asylum standards codified by the body charged with administering and enforcing immigration and naturalization laws—the Department of Homeland Security. Further, the Court should affirm the Thirteenth Circuit's determination that Life Inc. is not "government-sponsored" because it is an independent organization acting under contract with the Basag government that can be punished by the government for its private criminal acts. Finally, given the safety of her husband in Basag and the opportunity for Marcos to live on the island of Mayaman upon return to Basag, it is reasonable for Marcos to internally relocate.

II. Factual Background.

While living on Isda—one of two islands comprising the country of Basag—Petitioner Leila Marcos biked a total of ten miles every three days in order to obtain water for her and her husband Bernardo. Factual Background, 6. Traveling such distances to obtain water is common on the island of Isda. *Id.* In fact, all of the island's dwellers do so because the Basag government nationalized all water sources in response to "water on Isda becom[ing] markedly scarce as the rising tides and seasonal floods began polluting wells with salt water." *Id.* at 3. These changes resulted from "effects of global warming," *id.* at 2, which caused a number of Timog people residing on Isda—one of Basag's two ethnic groups, *id.*—to move to Mayaman—the other island of Basag, *id.* at 3. Thus, the Government took necessary steps "to protect the entire country's water source." *Id.* at 3.

To continue its efforts to salvage Isda's water supply, Basag's president signed a 30-year Concession Contract, terminating January 1, 2043, with Life Incorporated ("Life Inc.") "assigning full control of all water facilities to the international corporation." *Id.* at 4. The contract includes clauses outlining both Basag's and Life Inc.'s liability upon breach of contract, *id.* at 5, or, in Life Inc.'s case, violation of Basag law, *see id.* (discussing section of the liability clause outlining Basag law and Life Inc.'s requirement to comply with it). Per the contract's terms, the Basag government would provide military aid upon threat to the water facilities, and "Life Inc. [is] required to pay annual fees to the government." *Id.* But even with this deal, climate change continued to cause Isda residents to struggle "with limited access to clean water and flooding." *Id.* This struggle inevitably led to "a small group of Timogs" to protest outside of a Life Inc. water facility, demanding the Basag government to solve the water shortage. *Id.*

To respond to the problem, the Government sent Basag military forces to protect the water facility. *Id.* With a crowd gathered, the military forces "shot into the crowd and tear gassed protesters to disperse them." *Id.* The public unrest ultimately inspired the creation of the "Water Warriors": "a small but highly skilled group of Basag citizens" who target various Life Inc. and government facilities to shift water resource control back to the government. *Id.* at 4–5. To protect water facilities from the Water Warriors' damage, Life Inc. hired armed guards, many of which are Hiligan, *id.*—Basag's other ethnic group, *id.* at 2. Through their protection efforts, "Basag Military and Life Inc. guards have killed over [seventy-five] men and women mistakenly identified as Water Warriors throughout Basag." *Id.* at 5. Though the Water Warriors violently urge for the government to reinstate control over water resources, contractual obligations require Life Inc. to "remain in control until the [contract's] effective end date." *Id.*

Marcos's claim for asylum arises from the guards hired by Life Inc. allegedly harassing her in her efforts to get this water. *Id.* at 10. On March 6, 2017, a Life Inc. guard told Marcos she could get more water if she had sex with him. *Id*. at 6. Marcos perceived this statement as a threat but neither the Life Inc. guard nor she took any further action after this statement was made, and nothing further was said between the parties. *Id*. On March 9, 2017, Marcos biked a total of twenty miles to get her water from a different storage facility to avoid the Life Inc. guard she perceived as a threat. *Id.* at 6–7. On her way back from the facility, where she faced no issues, she noticed that there was another well about fifteen miles away from her home in the opposite direction from the well she visited on March 6th. *Id.* at 7. When she visited the fifteen miles away facility, she witnessed a Basag soldier harassing a pregnant woman. *Id*. He accused the woman of being a Water Warrior and carrying explosives under her shirt. *Id.* When the

pregnant woman proved that she was not carrying explosives, the soldier let her go. *Id.* Marcos herself faced no harassment at the site and nothing further occurred. *Id.*

During a heatwave, a water checkpoint was set up one mile away from Marcos's village. *Id.* For about two weeks starting on March 27, 2017, Life Inc. required everyone from Marcos's village to gather water between 8 am and 9 am. *Id.* at 8. On April 5, 2017, as Marcos was leaving the water checkpoint, a different guard from the one who had initially verbally harassed her grabbed Marcos's backside and whistled. *Id.* The other guards laughed and whistled as well. *Id.* The next night, Marcos told her husband about what had happened at the water facility. *Id.* When he went to confront the guards, they shot his arm after he pulled out a fillet knife. *Id.* When the guards brought her husband home, Marcos recognized one of the guards carrying him as being the same guard who verbally harassed her on March 6th. *Id.* The guard winked at Marcos and made a thrusting gesture with his fingers but did not say or do anything else. *Id.* That night, Marcos and her husband left to Mayaman to receive medical treatment for the gunshot wound. *Id.* After receiving treatment, the couple stayed with a friend, Bayani Santos. *Id.* Santos offered a temporary place to stay and suggested the couple look for work. *Id.* Santos informed the couple that women did not have to travel far to get water on Mayaman. *Id.* He suggested to Marcos that she buy nicer clothes to fit in with the locals. *Id.* at 9. He also noted that he had not seen any violence towards Timog women on Mayaman. *Id.*

After a month, Marcos found work at a local shop and started begging on the streets near the resorts. *Id.* Marcos refused to apply for work in the resorts because she was reluctant to work near men. *Id.* While begging one evening, Marcos hid as she saw several Life Inc. guards near a well and heard one say "I cornered her by the well, and hit her until she submitted. Getting sex here is as easy as it is on Isda." *Id.* The guards did not see Marcos, and nothing was

said or done to her. *Id.* Marcos left Basag on August 6, 2017 with a one-way ticket to the United States where she planned to stay with her husband's distant relatives until her husband could join her. *Id.* At a port of entry on August 7, 2017, Marcos filed an application for asylum. *Id.* at 9-10.

III. Decisions Below.

Marcos's application for asylum claimed that her situation established a well-founded fear of future persecution due to a pattern or practice of rape and harassment against similarly situated Timog women in the Basag Islands. *Id.* at 10. Following a hearing, the Immigration Judge denied Marcos's application. *Id.* The IJ held that, even though she had "established an objectively reasonable fear of future persecution," *id.*, "because of her disfavored group status as a Timog woman living in Basag who collects water from her family," *Marcos v. Att'y Gen. of the U.S.*, No. 18-0512, 1, 3 (13th Cir. filed Mar. 12, 2018), it is reasonable for her to avoid such persecution by relocating within Basag. Factual Background at 10. Marcos appealed to the Board of Immigration Appeals ("BIA"). *Id.* The BIA affirmed. *Id.*

Marcos then petitioned to the United States Court of Appeals for the Thirteenth Circuit. *Id.* The government cross-appealed to the Thirteenth Circuit "to challenge the validity of the BIA's well-founded fear analysis." *Id.* On appeal, the court heard the following issues: 1) whether Marcos has a well-founded fear of persecution; and 2) "[w]hether the proper party bore the burden of demonstrating if substantial evidence supported a finding that future persecution could be avoided by internal relocation." *Marcos*, No. 18-0512 at 2. The Thirteenth Circuit held that under a disfavored group analysis Marcos had a well-founded fear of persecution, *id.* at 12, but that, because Life Inc. is not a "government-sponsored" entity, and is instead more

comparable to a private criminal actor, *id.* at 16, Marcos bore the burden to "prove it would be reasonable for her to internally relocate," which she failed to do, *id.* at 18.

This Court granted certiorari to decide 1) whether the disfavored group analysis is a valid basis to establish a well-founded fear of persecution for the purposes of asylum eligibility; and 2) whether the proper party bore the burden of demonstrating if substantial evidence supported a finding that future persecution could be avoided by internal relocation.

STANDARD OF REVIEW

Because the Board of Immigration Appeals affirmed the Immigration Judge's decision without "opinion procedure," a court should review the IJ's decision as if it were that of the BIA's. *Lemus-Arita v. Sessions*, 854 F.3d 476, 480 (8th Cir. 2017). Thus, the Court is limited to those claims raised before the BIA: 1) Marcos's asylum claim arising from a "disfavored group analysis"; and 2) the reasonable relocation analysis, including whether the proper party bore the burden of demonstrating if Marcos could avoid persecution by relocating within the country of Basag.

I. Disfavored group analysis.

A court reviews questions of law pertaining to an asylum applicant's eligibility *de novo*. *Albathani v. INS*, 318 F.3d 365, 372 (1st Cir. 2003); *see also Alvarado-Carillo v. INS*, 251 F.3d 44, 49 (2d Cir. 2001) (internal quotations omitted) (concluding that a circuit court reviews "the BIA's application of legal principles" in determining whether an applicant was eligible for asylum *de novo*"). Factual findings supporting the IJ's decision concerning whether an applicant has established eligibility for asylum are reviewed under the "substantial evidence" standard. *Abedini v. INS*, 971 F.2d 188, 190 (9th Cir. 1992).

II. Reasonable Relocation analysis.

A court should apply *de novo* review to: 1) determine whether the factual findings of the IJ support the proposition that an applicant can avoid persecution by internal relocation, *Zhou Hua Zhu v. United States AG*, 703 F.3d 1303, 1312 (11th Cir. 2013) (citing 67 Fed. Reg. 54, 890); and 2) interpret terms in which the BIA nor the IJ have defined. *See Chevron U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842–45 (1984) (requiring a court to defer to an agency's interpretation of an ambiguous statute if that interpretation is reasonable).

ARGUMENT

I. The disfavored group analysis is not a valid basis to establish a well-founded fear of persecution for the purposes of asylum eligibility.

The Court should reject the Thirteenth Circuit's adoption of the Ninth Circuit's judicially-created "disfavored group analysis" because it is not a valid basis to establish a well-founded fear of persecution for the purposes of asylum eligibility. The applicant bears the burden of establishing that at least one central reason for a party persecuting the applicant would be on account of the applicant's race, religion, nationality, membership in a particular social group, or political opinion. 8 U.S.C. § 1158(B)(i) (2009). For an applicant's experience to constitute persecution, it "must rise above unpleasantness, harassment, and even basic suffering." *Nelson v. INS*, 232 F.3d 258, 263 (1st Cir. 2002).

To carry the applicant's burden, the applicant is required "to provide evidence that there is a reasonable possibility that he or she would be singled out individually for persecution." 8 C.F.R. § 1208.13(b)(2)(iii) (2018). The applicant can avoid needing to provide such evidence by establishing 1) "that there is a pattern or practice [in the relevant country] . . . of persecution of a group of persons similarly situated to the applicant" on account of one of the protected grounds, *id.* § 1208.13(b)(2)(iii)(A); and 2) "his or her own inclusion in, and identification with, such

group of persons such that his or her fear of persecution upon return is reasonable," § 1208.13(b)(2)(iii)(B). For the persecution inflicted on the group of persons similarly situated to the applicant to constitute a pattern or practice of persecution, it must be "a systematic, pervasive, or organized effort to kill, imprison, or severely injure members of the protected group, and this effort must be perpetrated or tolerated by state actors." *Davidescu v. Lynch*, 641 Fed. App'x 579, 582 (7th Cir. 2016) (internal citation omitted) (internal quotations omitted).

A. The disfavored group analysis erroneously lowers an asylum seeker's ultimate burden of proof.

The disfavored group analysis lowers an applicant's ultimate burden of proof in establishing his or her eligibility for asylum in the United States. The Ninth Circuit "has crafted a judicially created alternative to the statutory and regulatory scheme," *Kho v. Keisler*, 505 F.3d 50, 55 (1st Cir. 2007), describing its disfavored group analysis as an alternative to establishing a "pattern or practice of persecution," *Sael v. Ashcroft*, 386 F.3d 922, 925 (9th Cir. 2004). But the disfavored group analysis alters the procedural requirements for asylum by requiring applicants to meet a "lower burden." *Kho*, 505 F.3d at 55. (citing *Sael v. Ashcroft*, 386 F.3d 922, 925 (9th Cir. 2004)); *see Firmansjah v. Gonzales*, 424 F.3d 598, 607 n.6 (7th Cir. 2005) (concluding that the Seventh Circuit "has not recognized a lower threshold of proof based on membership in a 'disfavored group'"); *Lie v. Ashcroft*, 396 F.3d 530, 538 n.4 (3d Cir. 2005), *superseded on Nexus Grounds by REAL ID Act*, (rejecting the Ninth Circuit's "establishment of a 'disfavored group' category" that requires "evidence of mistreatment that is less pervasive and less severe than would be required to establish a 'pattern or practice' of persecution").

For example, the Ninth Circuit has held that an applicant "has established a well-founded fear of future persecution on account of her Chinese ethnicity . . . [by] demonstrat[ing] that Indonesians of Chinese descent are a disfavored group and that she is particularly at risk, based

on past threats and acts of violence against her." *Sael*, 386 F.3d at 923. The court reasoned that "[b]ecause the record establishes that ethnic Chinese are significantly disfavored in Indonesia, [the applicant] must demonstrate a 'comparatively low' level of individualized risk in order to prove that she has a well-founded fear of future persecution." *Id.* at 927; *see also Avetova–Elisseva v. INS*, 213 F.3d 1192, 1201–02 (9th Cir.2000) (illustrating the Ninth Circuit's low burden requirement by recognizing that past threats and violence may establish a sufficient individualized risk, even if they did not rise to the level of persecution). The Ninth Circuit reached its reasoning by concluding that, although the court agreed with the BIA that statements in a State Department report signaling ethnic tolerance in Indonesia "could undermine an asylum applicant's claim that there is a 'pattern or practice' of persecution . . . the statements [did] not diminish [the applicant's] claim of the general persecution of ethnic Chinese . . . ." *Sael*, 386 F.3d at 929. The court concluded that such "general persecution" was "sufficient to characterize their status as 'disfavored' in Indonesia." *Id.*

In comparison, the First Circuit "has narrowly defined 'pattern or practice' to encompass only the systematic or pervasive persecution of a particular group based on a protected ground, rather than generalized civil conflict or a pattern of discrimination." *Sugiarto v. Holder*, 586 F.3d 90, 97 (1st Cir.2009) (refusing to adopt the Ninth Circuit's "disfavored group analysis" and affirming the BIA's determination that an applicant did not establish a well-founded fear of future persecution in Indonesia on account of her Christian religion because 1) there was no "pattern or practice" of such persecution in Indonesia; and 2) she did not provide evidence of individual targeting based on a protected ground).

The preexisting pattern or practice standard already accounts for widespread persecution of a group, without lowering an applicant's burden of proof. *See Chen v. INS*, 195 F.3d 198, 203

(4th Cir. 1999) (recognizing how it "[c]ertainly, . . . 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" (quoting *Kotasz v. INS,* 31 F.3d 847, 852 (9th Cir.1994))). In fact, "[t]he idea behind the 'pattern or practice' exception to the individualized proof requirement is that, where the persecution of a group on the basis of a protected ground is sufficiently widespread, a 'reasonable possibility' of persecution is evident and evidence of individualized targeting becomes unnecessary." *Sugiarto*, 586 F.3d at 97.

The Life Inc. guards' alleged treatment of Timog woman living in Basag who collect water for family does not rise above unpleasantness, harassment, or even basic suffering. But in applying the Ninth Circuit's disfavored group analysis, the Thirteenth Circuit misconstrues the level of harm required to constitute persecution. Similar to the applicant in *Sael*, the experience of Timog women living in Basag embodies generalized harassment. However, under the disfavored group analysis, the Thirteenth Circuit lowered Marcos's burden by constituting her membership in a group experiencing generalized discrimination sufficient to establish eligibility for a well-founded fear of persecution. Moreover, seeing as the purpose of the pattern or practice exception is to account for situations of widespread persecution, that is the analysis that should have been applied in determining whether Marcos meets asylum eligibility requirements.

Finally, the court's legal error is made clearer upon examining whether Life Inc. guards can even fairly be said to have been mistreating Timog women because it recognized them as a part of that group. Based on the factual record, Life Inc. guards' rumored mistreatment was not directed at Timog women—the group the Thirteenth Circuit erroneously affirms to be "disfavored." Marcos's husband's friend, Santos, suggested such an idea. But the rumored targeting could also be linked to *any* woman who appears to have a poorer status, and therefore

vulnerable. This proposition is substantiated by a Life Inc. guard discussing cornering a woman, not an ethnic Timog. Though discrimination and harassment of any human is morally unacceptable, under a claim for asylum, the alleged generalized instances of Life Inc. guards targeting all women, and Life Inc. requiring sexual harassment training—not cultural competency training—do not rise to a level of persecution. Holding otherwise under a disfavored group analysis wrongly permits an applicant to string together disjointed events, create a motive, and claim that those instances show that a group is "disfavored."

1. Public policy supports maintaining a higher ultimate burden for asylum seekers.

When an applicant opts to avoid providing evidence of there being a reasonable possibility that he or she would be singled out individually for persecution, a higher burden to establish asylum eligibility is required to prevent the United States from receiving an excessive amount of asylum seekers that it cannot provide for. In this case, the Thirteenth Circuit is correct to note that "the U.S. courts of appeals have generally emphasized that the term 'pattern or practice' should be narrowly defined and that the relief is available only in extreme cases." *Marcos*, No. 18-0512 at 9 (citing *Diaz-Garcia v. Holder*, 609 F.3d 21, 29 (1st Cir. 2010). However, "[o]nce the court finds that a group was subject to a pattern or practice of persecution, every member of the group is eligible for asylum." *Ahmed v. Gonzales*, 467 F.3d 669, 675 (7th Cir. 2006). Thus, a "narrow interpretation of this ground for asylum"—rather than the broader disfavored group analysis—is needed because it "stops an onslaught of asylum seekers." *Id.*

In this case, if the Court were to adopt the lower standard, then baseless claims would flood immigration courts and asylum offices. The United States does not currently have the resources to take-on such frivolous claims, and doing so would distract from those applicants

with meritorious claims. As discussed further below, if Congress wished to have permitted a lower standard, it would have legislated accordingly, or the agency charged with administering and enforcing immigration laws would have regulated accordingly.

B. The disfavored group analysis runs counter to asylum standards codified by the Department of Homeland Security.

Because the disfavored group analysis improperly modifies asylum law's statutory scheme, particularly the Department of Homeland Security's authority to administer and enforce laws pertaining to the immigration and naturalization of citizens, the Court should not adopt the disfavored group analysis.

> The Secretary of Homeland Security shall be charged with the administration and enforcement of this chapter and all other laws relating to the immigration and naturalization of aliens, except insofar as this chapter or such laws relate to the powers, functions, and duties conferred upon the President, Attorney General, the Secretary of State, the officers of the Department of State, or diplomatic or consular officers: *Provided, however,* That determination and ruling by the Attorney General with respect to all questions of law shall be controlling.

8 U.S.C. § 1103 (2009). Through regulations the Department of Homeland Security has promulgated—for example, 8 C.F.R. § 1208.13 ("Establishing Asylum Eligibility")—it has established a standard requiring individuals who wish to avoid showing that he or she would be "singled out individually for persecution" to instead establish that there is a "pattern or practice of persecution" in the country relevant to the applicant's claim. § 1208.13(b)(2)(iii). Additionally, the regulations, *id.*; 8 C.F.R. § 208.13 (2018), "already contemplate the effect of group membership on an individual's circumstances by enumerating the five statutory categories" of asylum eligibility. *See Kho*, 505 F.3d at 55 (discussing "the effect of group membership on an individual's circumstances by enumerating the five statutory categories of withholding eligibility"). "Beyond that, the regulations do not require the agency to credit

automatically discrimination experienced by a group toward an individual's case in removal proceedings." *Id.*

The Thirteenth Circuit presents the disfavored group analysis as "an alternative to the 'pattern-or-practice' claim." *Marcos*, No. 18-0512 at 10. But the regulations already outline an alternative to the pattern or practice claim that does not consist of an applicant establishing membership in a disfavored group. 8 C.F.R. § 1208.13(b)(2)(iii). That alternative is providing evidence "that there is a reasonable possibility that he or she would be singled out individually." *Id.*; *see also Kho*,505 F.3d at 55 ("The regulations establish a threshold for relieving the need for an individualized showing."). However, as previously discussed, *see supra* Argument Part I.A, the Ninth Circuit's "disfavored group analysis creates a different threshold," by asserting that members of disfavored groups "are not threatened by systematic persecution of the group's entire membership," *Kotasz v. INS*, 31 F.3d 847, 853 (9th Cir. 1994).

Notably, Congress did not grant the courts the power to craft another "alternative" to the pattern-or-practice claim. *See* 8 U.S.C. § 1103 (granting the power to administer and enforce immigration laws not to the courts, but to the Secretary of Homeland Security and the Attorney General). The Thirteenth Circuit overstepped its role when it adopted the Ninth Circuit's disfavored group analysis. Rather than applying the law already set forward by the Department of Homeland Security, the court chose to take on the role of policymaker by attempting to solve the alleged issue of "many asylum applicants [being] unable to provide sufficient evidence of systematic persecution to prove a reasonable fear of future persecution." *Marcos*, No. 18-0512, at 9–10. Though the Thirteenth Circuit framed the disfavored group analysis as simply "an alternative," *id.* at 10, such a characterization is erroneous. By adopting a standard concluding that "the more serious and widespread the threat to the group in general, the less individualized

the threat of persecution needs to be," *Sael*, 386 F.3d at 925, the lower court did not select "an alternative," but instead adopted an analysis requiring less proof—i.e., a lower burden—pertaining to the applicant's individualized threat of persecution. Seeing as Congress has not amended Section 1103, it is not for the courts to adopt an analysis that runs counter to the intentions of those entrusted with the relevant area of law.

II. Because the "disfavored group" analysis is not a valid basis for an applicant to establish a well-founded fear of persecution for the purposes of asylum eligibility, the Immigration Judge's finding that Marcos established a well-founded fear of persecution was unsupported by substantial evidence.

Because the Immigration Judge considered evidence pertaining to whether Marcos belonged to a disfavored group—an invalid basis for an applicant to carry his or her burden—in determining Marcos's asylum eligibility, the IJ's finding that Marcos established a well-founded fear of persecution fails to meet the substantial evidence standard. On appeal from a decision of the BIA, a circuit court "review[s] the factual findings underlying the BIA's determination" regarding whether an alien met his or her "burden of proof to qualify for asylum . . . under the substantial evidence standard." *Diallo v. INS*, 232 F.3d 279, 287 (2d Cir. 2000). Substantial evidence is "more than a mere scintilla . . . [i]t means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Melgar de Torres v. Reno*, 191 F.3d 307, 312–13 (2d Cir. 1999).

The Thirteenth Circuit agreed with the IJ that "[b]ecause there is substantial evidence that ethnic Timog women are treated as a disfavored group within Mayaman, Marcos must also demonstrate a 'comparatively low' level of individualized risk." *Marcos*, No. 18-0512 at 12. But because the disfavored group analysis is invalid, substantial evidence must support that there exists a "pattern or practice" of persecution against ethnic Timog women. Marcos did not and could not provide such evidence. Further, because the court noted that Marcos needed to

only demonstrate a "comparatively low" level of individualized risk, substantial evidence does not support the record for Marcos to base her well-founded fear of future persecution in the pre-existing alternative to a "pattern or practice" claim: "to provide evidence that there is a reasonable possibility that he or she would be singled out individually for persecution." 8 C.F.R. § 1208.13(b)(2)(iii). In fact, Marcos's experience living on the island of Mayaman shows otherwise. While on Basag's other island, Marcos was able to clean herself up to present herself in a way in which she would not be singled out individually. Even while begging on the streets near resorts, Life Inc. guards, or anyone else, did not harass or target her. And, though she allegedly overheard a Life Inc. guard discussing assaulting a woman—whose ethnicity was not mentioned—Marcos was not singled out individually during that experience.

III. Because Life Inc. is not a "government-sponsored" persecutor, the Thirteenth Circuit was correct in holding that Marcos bears the burden of establishing that internal relocation is not possible.

Marcos's persecutor, Life Inc., is not "government-sponsored." If the persecution is not inflicted by a government or is not government-sponsored, "the applicant shall bear the burden of establishing that it would not be reasonable for him or her to relocate . . . ." 8 C.F.R. § 208.13(b)(3)(i). As such, the Thirteenth Circuit was correct in concluding that the burden of proof was properly placed on Marcos. *See Marcos*, No. 18-0512 at 9. Had Life Inc. been found to be a government-sponsored persecutor, then the burden would have correctly been on the government to show that, despite the presumption formed that Marcos would not be able to relocate, and given substantial evidence and the totality of the circumstances, it would in fact be reasonable for her to relocate. Because Life Inc. is not a government-sponsored persecutor, this Court does not need to consider substantial evidence regarding the circumstances that would rebut this presumption. Because the presumption does not exist, the burden should remain on

Marcos to prove that she cannot relocate internally in Basag. *See Lopez-Gomez v. Ashcroft*, 263 F.3d 442 (5th Cir. 2001); *Etugh v. INS,* 921 F.2d 36, 39 (3d Cir. 1991); *Matter of A-E-M-,* 21 I&N 1157, 1177 (BIA 1998); *see also Matter of H-*, 21 I&N Dec. 337, 349 n.7 (BIA 1996).

In *Singh v. Ashcroft,* 83 F. App'x 640, 642 (5th Cir. 2003), the Court found that the applicant had not met his initial burden of proving that the persecution he faced as a Sikh man in India was government-sponsored. The Fifth Circuit noted that, "aside from this testimony, there is no evidence in the record which suggests that any persecution of Sikhs in Punjab was sponsored by the national government of India." *Id.* As such, the court noted that the burden remained on the applicant to prove that he could not relocate reasonably within any other part of the country—a burden he failed to carry. Here too, there is not substantial evidence to suggest that Life Inc. is a government-sponsored entity. The available evidence in the record points to Life Inc. being an independent organization simply under a specific contractual obligation with the Basag government. Therefore, the burden rightly remains on Marcos to demonstrate that she cannot safely relocate elsewhere in Basag. Marcos has not met this evidentiary burden.

In *Lopez-Gomez v. Ashcroft*, 263 F.3d 442 (5th Cir. 2001), the court found that the persecutor in the case of the Guatemalan applicant was not a government actor and so the applicant bore the burden of showing that internal relocation was not possible. The court then held that, "in cases where the applicant does not show past persecution, when the applicant for asylum does not demonstrate that a national government is the persecutor, the applicant bears the burden of showing that the persecution is not geographically limited in such a way that relocation within the applicant's country of origin would be unreasonable." *Lopez-Gomez*, at 445. The court than found that the applicants had failed to meet their burden of showing that they would be unable to relocate within Guatemala safely. The Court noted that the threats directed at

the applicants which formed the basis for their well-founded fear argument did not imply that they would face harm if they relocated to another part of Guatemala.

In this case, Marcos had the burden of proof in demonstrating that she could not reasonably relocate within Basag because Life Inc. is not a government actor. Marcos failed to prove that she would be unsafe anywhere else in Basag given the fact that she was living and earning a living safely while residing in Mayaman and the only threat she faced from the Life Inc. guards while in Mayaman was to overhear a pair of them talking about their alleged mistreatment of a woman on the island. Marcos has no evidence to prove that what the guards were discussing was true and took place, and the guards never spoke to or implied improper behavior towards Marcos herself while she was living in Mayaman. Thus, internal relocation within Basag is possible for Marcos, and she should not be granted asylum. *See also Setiadi v. Gonzalez*, 437 F.3d 710, 714 n.3 (8th Cir. 2006) (finding that the applicant who claimed asylum as a Christian fearing persecution could relocate within Indonesia.); *Yakovenko v. Gonzalez*, 477 F.3d 631, 637 (8th Cir. 2007) (petitioner failed to show it would be unsafe or unreasonable to relocate within Ukraine where the BIA and the IJ found a lack of evidence to corroborate that anti-Semitism was "sanctioned, supported, or tolerated by the Ukrainian government").

IV. The Court should affirm the Thirteenth Circuit's finding that Life Inc. is not a government-sponsored entity.

A. *Chevron* deference is not a relevant consideration here

Because neither the BIA nor the IJ defined "government-sponsored," *Chevron* deference is not applicable in this case and the definition should be determined instead by this Court. Had the BIA given a definition to "government-sponsored" this Court would have had to use that definition in its analysis. However, because the BIA did not define the term, this Court, like the

Thirteenth Circuit, should analyze the case *de novo* to determine whether Life Inc. is a government-sponsored persecutor.

B. Life Inc. is an independent organization acting under contract with the government.

Life Inc. is an independent and international company incorporated in the United States that has the exclusive obligation of maintaining water works in Basag. Life Inc.'s contract with Basag terminates in thirty years. Under the contract, Life Inc. is required to pay annual fees to the Basag government. While the government of Basag has incentive to keep Life Inc. under contract because of a liability clause, it can terminate the contract before the thirty years have elapsed. As such, though the Basag government hired Life Inc. and the parties entered into a contractual relationship, Life Inc. and its employees are not "government-sponsored." The fact that Life Inc. has to pay annual fees to the Basag government further undermines any notion that the government is sponsoring or condoning the actions of any Life Inc. employees. It underlines the fact that Life Inc. is an independent third party in Basag whose only relationship with the government of Basag is a contractual obligation to maintain the water works in the country.

Furthermore, while the contract also includes a provision stating that the Basag government would provide military aid if the water facilities managed by Life Inc. were threatened, in June 2016, after the formation of the "Water Warriors," Life Inc. hired its *own* armed guards to protect its water resources throughout Basag. It was these guards hired by Life Inc., who happened to largely be ethnically Hiligan, who have been part of the documented incidents of harassment towards Leila Marcos.

Even if Life Inc. had not hired its own guards to protect its water resources, the fact that the government of Basag agreed to provide military support if the water facilities were threatened does not imply government-sponsorship. Instead, it shows that the Basag government

is willing to provide its own military to protect the water that is going to go to its own people. It is in the government's best interest to protect the water facilities that service and supply the entire country. But that does not imply government-sponsorship of Life Inc., or the condoning of any of its actions not stipulated in the contract. *See Setiadi v. Gonzalez,* 437 F.3d 710, 714 n.3 (8th Cir. 2006) (finding petitioner failed to show government condoned the private conduct, or at least demonstrated a complete helplessness to protect the victims).

C. Life Inc.'s employees can be punished by the government of Basag

The behavior of the Life Inc. guards at issue here is punishable under Basag law. Basag Penal Code § 4350 (a)(1) criminalizes molestation and defines it as "any person who commits an act that subjects or exposes another person to unwanted or improper sexual advances or activity." Though the Basag government took no action under the country's laws that criminalize rape when it was rumored that a Life Inc. guard raped a female Isda, Life Inc. made all of its employees undergo comprehensive sexual harassment training. Additionally, it issued a public policy statement saying that any Life Inc. guards suspected of sexual assault would face immediate termination. Though the Basag government did not penalize the Life Inc. guards for the rumored rape, Marcos herself has only heard of the rumored rape by the Life Inc. employee. The rumor has not been confirmed, and the victim has not brought forth any evidence to prove that the rape took place with the government's knowledge.

Additionally, Marcos never reported the incidents of harassment and unwanted sexual advances made towards her by the Life Inc. guards. Had she done so, according to the statute in place and Life Inc.'s own public statement, the particular guards at issue would have been immediately terminated by Life Inc. and had criminal charges brought against them by the Basag police. Because Marcos chose not to report any of the incidents in which she was mistreated,

she cannot say with any substantial evidence that the Basag police force would not have enforced the country's laws. If Life Inc. had truly been a government-sponsored persecutor, the police would not have investigated any reports of molestation, rape or other forms of sexual assault. But because Marcos never reported the alleged crimes of Life Inc. guards, she cannot say with certainty that the crimes would not have been investigated.

D. Life Inc.'s "persecutory" actions are private criminal acts, and not government-sponsored.

The Life Inc. guards Marcos alleges to have made unwanted sexual comments towards her are not acting on behalf of Life Inc.—the company that hired them—and are certainly not acting on behalf of or sponsored by the Basag government. The guards Life Inc. hired were hired only to protect the other Life Inc. employees and water facilities. They are not the military provided by the Basag government, and are not part of the contract Life Inc. made with the Basag government. The guards are an independent third party and those making sexual advances are acting criminally as private actors, not as government-sponsored actors. The Thirteenth Circuit was correct in concluding that "Life Inc. is more comparable to a collection of private actors such as a gang of criminals, as opposed to the government itself." The actions of the guards hired by Life Inc. are not endorsed by Life Inc. itself, which has issued a public statement warning of termination for anyone in its company found to be behaving in that way. It follows that if Life Inc. is not endorsing or sponsoring the actions of some of its employees, and the government of Basag is not sponsoring Life Inc., then the government of Basag is also not sponsoring or endorsing the actions of the Life Inc. guards.

V. Because Leila Marcos has not met her burden of proof in showing that internal relocation is not possible, she should not be granted asylum.

The Thirteenth Circuit upon review of the factual determination of the IJ concluded that Marcos did not meet her burden of proof in establishing that internal relocation was not possible. Even if the disfavored group analysis is found to be a valid basis to establish a well-founded fear of persecution for asylum eligibility, because Marcos clearly did not meet her burden of proof in showing that internal relocation is not possible, she should not be granted asylum.

IV. In the alternative, if Life Inc. was found to be a government actor or "government-sponsored," under the totality of the circumstances, it is still reasonable for Marcos to relocate within Basag to avoid persecution.

Even if this Court finds that Life Inc. is a government actor or sponsored by the government, the presumption that follows that internal relocation would be reasonable is rebuttable.

A. Marcos could have reasonably relocated to Mayaman to avoid persecution.

Given the totality of the circumstances, it would not be unreasonable for Marcos to relocate to Mayaman to avoid persecution. In *Matter of M-Z-M-R*, 26 I&N Dec. 28, 33 (BIA 2012), the BIA held that for an applicant to be able to internally relocate safely, "there must be an area of the country where the circumstances are substantially better than those giving rise to a well-founded fear of persecution on the basis of the original claim." For Marcos, the area that is substantially better for her to reside in within Basag is Mayaman. When Marcos fled to Mayaman with her husband, they were offered a safe stay with Bayani Santos. Santos being a Mayaman local, suggested that Marcos purchase better clothing to fit in with the locals and assured the couple that they would be safe as long as they were "not Water Warriors." While Marcos was not able to find a permanent job, she was able to find temporary work and earn an income which was substantially better than what she was earning while living in Isda where she was not working or earning an income at all. Her husband Bernardo was not able to find work

due to his injury but his injury is not permanent. His injury will eventually heal and make him employable again.

Marcos could have found more sustainable work had she not been reluctant to work around men in the nearby resorts. It would not be unreasonable for Marcos to change her mind and work at the resorts especially considering her fear is of the Life Inc. guards, and not of all men in Basag. Women do not have to travel far to obtain water in Mayaman which is substantially better than having to bike ten to twenty miles every few days to get water as she had to on Isda. By not having to travel far for water, Marcos would be at a greatly reduced risk of encountering Life Inc. guards who may harass her. While living in Mayaman, Marcos only saw and had to hide from Life Inc. guards on one occasion. Even then she has never had to directly interact with them. This too is substantially better than how Marcos had to interact with the guards frequently while residing on Isda. Additionally, Marcos only sighted and subsequently had to hide from the Life Inc. guards because she was begging on the streets near the resorts. If Marcos decided she wanted to work inside the resorts instead, which would be reasonable for her to do, her chances of encountering Life Inc. guards would be even lower given the high tourist population in the resorts.

The Fourth Circuit held that an individual had not reasonably relocated during intermittent parts of a "four-year period in which she was in hiding, constantly fearing for her life." *Essohou v. Gonzales*, 471 F.3d 518, 522 (4th Cir. 2006). Here, Marcos was not in constant hiding while living in Mayaman or constantly fearing for her life. In fact, she was living in the open, begging on the streets near the resorts in order to capitalize off of altruistic tourists. Marcos was not concealing her identity or trying to hide in any way while working. During her entire time in Mayaman, Marcos had to hide only once from Life Inc. guards passing by her. *See*

Gomes v. Gonzales, 429 F.3d 1264, 1267 (9th Cir. 2005) (finding that because petitioners relocated to Dhaka and lived there without incident prior to entering the United States, they did not prove with compelling evidence that internal relocation was not possible).

The test for internal relocation includes balancing the factors set out in 8 C.F.R. § 1208.13(b)(3) which include: "whether the applicant would face other serious harm in the place of suggested relocation; any ongoing civil strife within the country; administrative, economic, or judicial infrastructure; geographical limitations; and social and cultural constraints, such as age, gender, health, and social and familial ties." The Executive Office for Immigration Review defined "other serious harm" as "harm that may not be inflicted on account of race, religion, nationality, membership in a particular social group, or political opinion, but is so serious that it equals the severity of the persecution." EOIR, New Rules Regarding Procedure for Asylum and Withholding of Removal, 63 Fed. Reg. 31945, 31947 (June 11, 1998). The only harm Marcos might face if she were to relocate to Mayaman would be the social and cultural constraints because of her Timog ethnicity and poor socioeconomic status. However, as Marcos's friend Bayani Santos suggested, simply purchasing and wearing clothing to fit in more with the affluent Mayaman people would help Marcos fit in more comfortably with the Mayaman community. The fact that Marcos can fix her potential social constraints by simply purchasing clothing means she would likely not face other serious harm in Mayaman. Whatever "harm" she might face would not rise to the level of being so serious that it would equal the severity of persecution, and as such, would not factor against her ability to reasonably relocate within Basag.

While there is ongoing civil strife in both Mayaman and Timog due to the activities of the Water Warriors, the Water Warriors are targeting Life Inc. facilities, and not native Timogs or Isda residents. Marcos would not face individual risk from the Water Warriors should she

relocate to Mayaman. Marcos has not faced risk or persecution from the Water Warriors while she resided on Isda and, because of this, it is unlikely that she would face persecution from them if she were to relocate to Mayaman. The economic infrastructure of Mayaman is superior to Isda and her husband Bernardo is currently residing in Mayaman, not Isda. It would not be unreasonable given these factors for Marcos herself to relocate to Mayaman within Basag.

Additionally, Bernardo has been residing alone in Mayaman without facing harm since Marcos arrived to the United States. In *Matter of A-E-M-*, 21 I&N Dec. 1157 (BIA 1998), the BIA held that, "the reasonableness of an alien's fear of persecution is reduced when his family remains in his native country unharmed for a long period of time after his departure." The fact that Bernardo has been living safely in Mayaman for the entire period Marcos has been away underscores the fact that Marcos herself would be safe in Mayaman and that it would be reasonable for her to relocate there.

CONCLUSION

For the foregoing reasons, the Court should: 1) reject the "disfavored group analysis" as a valid basis to establish a well-founded fear of persecution for purposes of asylum eligibility; 2) affirm the Thirteenth Circuit's finding that Life Inc. is not "government-sponsored" and, therefore, the proper party—Marcos—bore the burden of proving that internal relocation was unreasonable; and 3) hold that Marcos failed to carry her burden and is therefore not eligible for asylum.

Respectfully submitted,

[signed]
Team No. 1013
Counsel for Respondent