No. 17-17002

In the Supreme Court of the United States

Leila Marcos,
Petitioner

v.

Attorney General of the United States,
Respondent

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

BRIEF FOR THE:
RESPONDENT

TEAM #1017

QUESTIONS PRESENTED

1. Under the Immigration and Nationality Act, can a petitioner seeking asylum use the disfavored group analysis to gain asylum when it impermissibly interferes with the Congressional delegated authority of the Attorney General and Department of Homeland Security, when even if so, the petitioner fails to meet their burden that they are a member of a disfavored group?

2. Whether Petitioner properly bore the burden of demonstrating by substantial evidence that her internal relocation was unreasonable, when her alleged persecutor was a nongovernmental entity under the relevant regulation?

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JURISDICTIONAL STATEMENT

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

STATEMENT OF THE CASE

Basag, Petitioners home nation, is a two-island nation located in the Western Pacific Ocean separated by the Panlalak Bay. (R.2). Basag gained its independence in 1952, the two ethnic groups, the Hilagan and the Timong united and declared independence. (R.2). For centuries, the two-islands were divided among these ethnic groups. (R.2). The Hilagan people lived on Mayaman, which is home to resorts and beaches and relies on tourism to mainly fuel its economy. (R.2). While the Timong people have inhabited Isda, whose main economic force is fishing. (R.2). These fishing industries were hindered when years of global warming affected Isda's villages through torrential storms, tide movement, and extreme flooding. (R.2). Due to the fishing industries decline, some Isda-Timong moved to Myaman to find other work. (R.3). The relocated Isda-Timong were not met with disapproval, but some had trouble with the new culture. (R.3). Due to the rising tides the President of Basag, Ferdinand Aquinto, nationalized the water sources in January of 2012. (R.3). This led many people on Isda to move inward or toward Panlalak Bay (which seperates the islands) to access fresh water. (R.3). A year later on the first

day of January, 2013, the President agreed to privatize the countries water needs through a 30-year concession contract with Life Incorporated (Life inc.), which gave the corporation full control of all water facilities. (R.4). Life inc. is incorporated in Deleware, United States of America. (R.4). During the life of the contract Life inc. is responsible for providing water to the Basag islands, further, if the water facilities are threatened Basag will provide military aid. (R.4). The agreement provides that Life inc. will pay annual fees to the government of Basag. (R.4).

In June of 2016, a group of Timongs held a protest against the President at a Life inc. water facility. (R.4). The Basag military forces guarding the water facility fired into the crowd and deployed tear gas to disperse them. (R.4). After this protest, a highly organized group of Basag citizens, who oppose the Presidents contract with Life inc., created the "Water Warriors" whose goal is to target Life inc. and government facilities with homemade explosives. (R.5). While the majority of Basag people do not agree with the Water Warriors, Life inc. employed armed guards to defend the water facilities. (R.5). These guards are mainly made up of ethnic Hilgan, and since July of 2016 the Life inc. guards combined with the Basag military have killed over 75 people whom they thought were Water Warriors, more than half were killed on Isda. (R.5).

Leila Marcos, the Petitioner, 18 years of age who is married to Bernardo, 24, have moved twice in the past three years due to flooding. (R.6). They are from northern Isda, where the women primarily gather water because the men are involved in the fishing industry. (R.5). Life inc. contractors are rebuilding the water infrastructure in northern Isda, but water can be found through scattered wells or through Life inc.'s storage facilities. (R.6). The Water Warriors are active in the area. (R.6). The Petitioner relies on encounters with two Life inc. guards which she claims rise to a level of persecution. (R.6,7). On March 6, 2017, The Petitioner was approached

by a guard who said if she had sex with him she could have more water. (R.6). The petitioner had heard rumors that a friend in a nearby village was raped two weeks prior. (R.6). On March 9th, 2017, the Petitioner traveled to a different water facility without incident, and noticed a new well fifteen miles from her home. (R. 6,7). When she went to the well a Basag soldier threatened a pregnant woman whom he assumed was carrying explosives under her clothing because he believed she was a Water Warrior, when the soldier realized she was pregnant she received her water and went on her way with no further incident. (R.7). On March 12, 2017, the Petitioner went back to the same well and discovered the Water Warriors destroyed the well. (R.7). The petitioner then traveled back to a storage facility where she recognized the guard who made an advance on her, the same guard whispered to her that he was going to have his way with her, which threatened the Petitioner. (R.7). On March 14, 2017, the damaged well had been repaired however the heat hindered her ability to travel. (R.7). On April 5, 2017, the Petitioner was grabbed by her backside and the guard whistled. (R.8). On April 6, 2017 the Petitioner informed her husband about the incident and he went to the checkpoint, while there he pulled a filet knife and the guards shot him in the arm. (R.8). The guards escorted the Petitioners husband home, and one of the guards who harassed her made a gesture. (R.8). To receive treatment the Petitioner and her husband traveled to Mayaman to find work. (R.8). After saving up enough money the Petitioner bought a one-way ticket to the United States and applied for Asylum.

PROCEDURAL HISTORY

Leila Marcos filed an application for asylum at a port of entry in the United States on August 7, 2017. (R. 9). The Peitioner argued that she had a well-founded fear of persecution based on her identity as a Timog woman. (R. 10). The Petitioner claimed her fear stemmed from a pattern or practice of rape and harassment against similarly situated Timog women in her home

nation of Basag. (R.10). The Petitioner claimed she did not personally know any victims of rape or harassment, but a personal encounter and rumors of rape led to her fear. (R. 10).

The Petitioner had a hearing in front of an Immigration Judge ("IJ"), where her application was denied on the grounds that she could have avoided persecution by relocating to another part of Basag. (R. 10). The IJ noted that The Peitioner had established an objectively reasonable fear of future persecution. (R. 10).

The Petitioner appealed to the Board of Immigration Appeals ("BIA"), which summarily affirmed the IJ's decision. (R. 10). The Applicant appealed to the United States Court of Appeals for the Thirteenth Circuit for review of the BIA's denial of her application for asylum. (R. 10). The government cross-appealed for review of the BIA's well-founded fear analysis. (R. 10).

The Thirteenth Circuit affirmed the IJ's decision, finding the Applicant had established a well-founded fear of future persecution, but not carried her burden of showing that internal relocation was unreasonable (13th Cir. 18). This Court granted a writ of certiorari on October 12, 2018. (13th Cir. 2)

STANDARD OF REVIEW

In issues of first impression, mainly whether this Court should accept the "disfavored group" standard, a legal question will be reviewed *de novo*. *Albathani v. INS,* 318 F.3d 365, 372 (1st Cir. 2003). Questions of fact are reviewed under the "substantial evidence standard," including whether the applicant has demonstrated a well-founded fear of future persecution. *Abedini v. INS*, 971 F.2d 188, 190 (9th Cir. 1992). When the Bureau of Immigration Affairs "summarily affirm[s] the Immigration Judge's (IJ) decision without opinion, we review the IJ's order as the final agency determination." *Elzor v. Ashcroft*, 378 F.3d 1143, 1150 (10th Cir. 2004).

SUMMARY OF THE ARGUMENT

The Thirteenth Circuit Court of Appeals erred when it applied the "disfavored group" standard to the Petitioners claims. The Ninth Circuit has employed this test while three circuits have declined to follow. Two other circuits have discussed the standard but not have fully adopted it. If this Court were to adopt the Ninth Circuit standard it would run afoul to the principles of separation of powers. Congress delegated its authority to the Attorney General and the Department of Homeland Security. If this court were to overstep its judicial role and move into a legislative one it would step on the Attorney General and the Department of Homeland Security from doing their jobs as they best know how. Further, even if this Court were to adopt this new rule, the Petitioner fails to meet the standard and still should not be granted asylum. The Government sympathizes with the Petitioners experiences however asylum should be left to those who need it most. The Petitioner should go through the proper authorities in her home country to press criminal charges.

The Petitioner properly bore the burden of proof in the lower courts because Life Inc. is a nongovernmental entity. *Chevron* deference does not apply in this case, because it can be resolved using the traditional canons of statutory interpretation. When the traditional canons can resolve an issue, *Chevron* deference is unnecessary.

A plain text reading of the term "government-sponsored" does not include Life Inc. The plain meaning of the terms government and sponsor synthesize to create a term meaning a group supported and patronized by the government. Life Inc. had a contract with the government that definitively stated each party's obligations and privileges. The Basag government's support of Life Inc. was limited to military personnel necessary to protect water assets. Life Inc.'s hiring of its own security forces served to sever any sponsorship by the government.

Life Inc.'s involvement is more akin to that of a large gang or criminal organization than a government body. A government need not be perfect at protecting its citizens to avoid being associated with persecutors. When the government is willing and able to protect its citizens, the actions of a persecutor cannot be imputed to the government. The Petitioner never reported any incidents she observed to the authorities. Other incidents that were reported were investigated by the Basag police force. Life Inc.'s contract with Basag requires their employees to comply with all Basag laws. There is no evidence to support the claim that Life Inc. was supported or protected by the government.

ARGUMENT

I. THE THIRTEENTH CIRCUIT COURT OF APPEALS ERRONEOUSLY GRANTED THE ASYLUM SEEKERS PETITION WHEN THE APPLICANT WAS HELD TO A LOWER STANDARD OF INDIVIDUALIZED FEAR WHEN THE THIRTEENTH CIRCUIT ADOPTED THE DISFAVORED GROUP ANALYSIS, AND EVEN IF APPLIED, THE PETITIONER DOES NOT MEET THAT STANDARD.

This Court should not adopt a "disfavored group" standard which would usurp the properly delegated authority of the Attorney General and the Department of Homeland Security to effectuate rules that they themselves are best suited to put into practice, and if this Court were to adopt such a standard, the Petitioner still cannot meet the requirements necessary under that standard to be granted asylum in the United States. The Immigration and Nationality Act (INA), provides the framework for which an alien can be granted asylum, the Attorney General is vested with the power, and can grant asylum to those who qualify as a "refugee". *Yong Hao Chen v. United States INS*, 195 F.3d 198, 201 (4th Cir. 1999) (quoting 8 U.S.C. § 1158(b) (2018). In order to be granted Asylum in the United States an alien must show they are unwilling or unable to return to their home country, "because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political

opinion." 8 U.S.C. § 1101(a)(42)(A)(2000). For those applicants who cannot meet the burden of proving a well-founded fear of individualized persecution, they can use the alternative "pattern or practice" route, this route allows applicants to establish a well-founded fear by showing a pattern exists "of persecution of a group of persons similarly situated to the applicant" in the applicable country, on account of one of the five enumerated grounds. 8 C.F.R. § 1208.12(b)(2)(iii)(A). This Court should deny the Petitioner asylum for two reasons, First, by adopting the Ninth Circuit's "disfavored group" standard, the Court would change the statutory and regulatory language of the statute as written, and second, even if this Court adopts the "disfavored group" standard, the Petitioner's claim still fails because she fails to meet that lower standard.

A. Establishing an Alternative to the Immigration and Nationality Acts "Pattern or Practice of Persecution" Standard Would Change the Statutory and Regulatory Scheme of the Act as Enacted into Law.

This Court should not adopt the "disfavored group" rule because Congress delegated their authority to create regulations to the Attorney General and the Secretary of Homeland Security. The First Circuit is the latest circuit court of appeals to join the Third, and Seventh Circuit denying relief on the "disfavored group" rule, the First Circuit stated, "[t]he regulations already contemplate the effect of group membership on an individual's circumstances by enumerating the five statutory categories of withholding eligibility." *Wan Chien Kho v. Keisler*, 505 F.3d 50, 55 (1st Cir. 2007) (citing U.S.C. § 1101(a)(42)(A); 8 C.F.R. § 208.16(b)). The court made clear "[t]he regulations establish a threshold for relieving the need for an individualized showing; the disfavored group analysis creates a different threshold, and we reject it." *Id.* Another Circuit, the Third, is also unwilling to adopt a new rule, stating, "[w]e disagree with the Ninth Circuit's use of a lower standard for individualized fear absent a 'pattern or practice' of persecution and,

similarly, we reject the establishment of a 'disfavored group' category." *Lie v. Ashcroft*, 396 F.3d 530, 538, n.4 (3d Cir. 2005). The Seventh Circuit also agreed with *Lie*, "[t]his circuit has not recognized a lower threshold of proof based on membership in a 'disfavored' group." *Firmansjah v. Gonzales*, 424 F.3d 598, 607, n.6 (7th Cir. 2005).

In 1994, the Ninth Circuit adopted a new standard and created the "disfavored group" rule, the court characterized this new group as "one that is not targeted for systematic persecution within a given country, but whose members are at an increased risk of non-systematic persecution." *Kotasz v. INS*, 31 F.3d 847, 853 (9th Cir. 1994). The court in later years continued to distinguish this category, and described the "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). The Fourth, and Eighth Circuit, have supported the Ninth Circuit's approach, the Fourth Circuit when discussing the Ninth Circuits approach cited *Kotasz,* "[t]he more egregious the showing of group persecution . . . the less evidence of individualized persecution must be adduced." *Chen*, 195 F.3d 198, 204 (4th Cir. 1999) (citing *Kotasz,* 31 F.3d at 853). The court continued by stating, "[c]onversely, a stronger showing of individual targeting will be necessary where the underlying basis for the applicant's fear is membership in a diffuse class against whom actual persecution is haphazard and rare." *Id.* Further, the Eighth Circuit has also discussed the Ninth Circuits reasoning for broadening their interpretation of the BIA, 8 C.F.R. § 208.13(b)(2)(i) "does not purport to cover the entire range of persecution related to group membership . . . [r]ather, the regulation leaves the standards governing non-pattern or practice cases to be developed through case law." *Makonnen v. INS*, 44 F.3d 1378, 1383 (8th Cir. 1995).

The First Circuit properly denied the adoption of the "disfavored group" rule by not allowing a new threshold to be judicially administered when Congress had delegated the

authority to establish regulations to other agencies. *see Kho*, 505 F.3d at 55. In *Kho*, the court reasoned that the Ninth Circuit's "disfavored group" rule, allows "asylum applicants who have not shown a pattern or practice of persecution under section 208.16(b)(2), but have shown membership in a group that is disfavored are subject to a lower burden of showing an individualized risk of threats to their lives and freedom." *Kho v. Keisler,* 505 F.3d 50, 55 (2007) (citing *Sael,* 386 F.3d at 925).

While the United States Government greatly sympathizes with the Petitioner, asylum needs to be saved for those who need it the most. Protecting the process by keeping the burden high allows for those who meet the threshold to gain entry into the country. The current system that is used to determine whether an applicant is granted asylum is not too high of a burden to allow those who can show they are indeed in danger of like in this case, future persecution. If we were to adopt the Ninth Circuit's new "disfavored group" rule, it would allow for not only the person who meets that standard to enter the country, but every other person that is a member of that group. This would over burden our asylum system and create more problems for those who truly need asylum the most. The main goal of asylum is humanitarian, and if the United States is so over whelmed by entire swaths of countries attempting to gain entry, those individuals who are in need will be held in a log jam. Further, if this standard was implemented the BIA and Immigration Courts would go through years of difficulty in trying to effectuate this standard. The immigration officials that conduct the initial interview would have no ability or guidance on how to implement this new standard. Congress delegated their authority for a reason, the proper channels to effectuate new standards would allow for more time to train and educate these individuals on the front lines. Also, these individuals are the ones with the most experience in dealing with asylum affairs. The BIA is the authority and while this Court does have the ability

to create this standard, it should be cautious in creating a nationwide standard that would lower the burden of asylum seekers attempting to prove their well-founded fear of future persecution based on a pattern or practice. The Thirteenth Circuit Court of Appeals dissenting Justice Edlin is correct is asserting that this "disfavored group" analysis is an improper modification of the statutory and procedural scheme for asylum law. (R.8). If this Court were to adopt this "disfavored group" rule, it would usurp the concepts of the separation of powers and would assume those duties traditionally left to Congress. With the enumeration of the five statutory protected grounds, Congress has already contemplated group persecution. And Congress intentionally delegated authority to those who can give the BIA the tools it needs to properly screen applicants for asylum. Therefore, this Court should not adopt the "disfavored group" rule, and find that according to the INA as currently written and effectuated by Congress, that the Petitioner is not eligible for asylum.

B. Even if This Court Agrees to Create a "Disfavored Group" Standard for Asylum Seekers, the Petitioner Fails to Meet that Standard to be Granted Asylum.

This Court should deny the Petitioners asylum claim and hold that she does not meet the "disfavored group" because the Petitioner fails to prove that Timong women are so widely victimized to rise to a level that would make the Petitioner's claims of individualized persecution sufficient to be granted asylum. In the Ninth Circuit, the "disfavored group" standard has been described as, "[a] concept [that] simply describes the basic evidentiary proposition that an asylum applicant's membership in a group whose members are shown to have been widely targeted for discrimination . . . is relevant evidence in assessing whether [her] fear of being personally targeted for persecution in the future rises to the requisite level of objective reasonableness." *Wakkary v. Holder,* 558 F.3d 1049, 1064 (9th Cir. 2009). To decide whether an applicant is a member of a disfavored group, the court looks at the level group persecution

against the evidence of individualized persecution, "[t]he more egregious the showing of group persecution the less evidence of individualized persecution must be adduced." *Kotasz,* 31 F.3d at 852. On the other hand, if the asylum seeker is a part of a group where the persecution is rare, there would need to be more evidence of individual targeting. *Id.*

The "disfavored group" category has been used by the Ninth Circuit to decide whether a petitioner's membership in a group would rise to the level as balanced against their individual persecution. In *Kotasz,* the applicant was arrested and beaten by the Hungarian police because he opposed the Hungarian communist government. *Kotasz,* 31 F.3d 847. During his time opposing the communist government the applicant was forced to serve at a labor camp for over a year and half. *Id.* He was forced into labor because of his refusal to serve in the military, he was arrested at peaceful demonstrations on multiple occasions where he was struck in the stomach and kidneys, every time he was arrested he was subjected to that same treatment for one or two days then released. *Id.* The court found that the applicant was a member of a disfavored group, and remanded the case to the BIA to use the correct standard so the applicant could establish a particularized threat of persecution. *Id.* The applicants' wife, who also had applied for asylum was denied. *Id.* Her claim centered around her claimed status as a gypsy, the court held that the Hungarian government did not systematically persecute gypsies and denied her application for asylum. *Id.*

The petitioner asserts that her encounters with a life in guard on multiple occasions rise to the requisite level of individualized fear when contrasted with the groups persecution. In this case one Life, Inc. guard was responsible for the majority of the petitioner's assaults. This guard was taking advantage of his position over the water, and subjected the petitioner to multiple assaults. Further when the petitioner's husband was shot, he was brandishing a knife. While the

petitioners husband was attempting to stand up for his wife, the guards easily could have mistaken him for a "water warrior." This along with the fact that the petitioner nor her husband contacted local authorities or police in an attempt to have the men responsible held accountable. Even if this new standard is applied to the petitioner, she fails to meet the threshold necessary to prove that her individualized persecution is enough when the group persecution is so low. In this case, the petitioner claims that Timong women are the ones who are widely victimized, when in fact it is possible that poorer women are the ones being victimized. The country of Basag should be the best suited to deal with criminal acts and should punish the guards who are abusing their power accordingly. The immigration judge found that her experiences did not rise to a level of past persecution, if the Petitioners past experiences do not rise to that level, then her individualized persecution should not meet this disfavored group standard. Therefore, this Court should find that even with the "disfavored group" standard applied, the Petitioner still should not be granted asylum.

II. PETITIONER PROPERLY BORE THE BURDEN OF DEMONSTRATING THAT FUTURE PERSECUTION COULD NOT BE AVOIDED BY INTERNAL RELOCATION, BECAUSE LIFE INC. IS A NON-GOVERNMENT ENTITY.

Petitioner properly bore the burden of proof because Life Inc. is a nongovernment entity. An asylum seeker has no well-founded fear of persecution when it is reasonable for them to relocate within their home nation. 8 C.F.R. § 208.13(b)(2)(ii) (2018). This regulation creates a burden-shifting component. If the asylee is persecuted by a government or government-sponsored entity, internal relocation is presumed to be unreasonable, unless the United States Customs and Immigration Service ("the Service") establishes by the preponderance of the evidence that relocation within the asylee's home nation is reasonable. 8 C.F.R. § 208.13 (b)(3)(ii) (2018). If, however, the asylee is persecuted by a nongovernment entity, the burden of

proof rests with the asylee to demonstrate that relocation would be unreasonable. 8 C.F.R. § 208.13(b)(3)(i) (2018).

A. *CHEVRON* Deference is Inappropriate in this Case.

The Thirteenth Circuit correctly noted that *Chevron* deference does not apply in this case. (Cir. R. 15-6). A reviewing court should apply *Chevron* deference only when there is an ambiguous statute and the agency has provided a permissible construction to resolve the ambiguity. *Chevron, U.S.A., Inc. v. Nat'l Res. Def. Council, Inc.*, 467 U.S. 837 (1984). This Court recently stated in *Epic Sys. Corp. v. Lewis*, that *Chevron* deference is only to be applied if the traditional canons of statutory interpretation cannot resolve the issue. *Epic Sys. Corp. v. Lewis*, 138 S.Ct. 1612, 1630 (2018) (citing *Chevron*, 467 U.S. at 843, n. 9). "Where, as here, the canons supply an answer, '*Chevron* leaves the stage.'" *Epic Sys. Corp.*, 138 S.Ct. at 1630 (quoting *NLRB v. Alternative Entertainment, Inc.*, 858 F.3d 393, 417 (6th Cir. 2017)).

1. Life Inc. is not a "Government-Sponsored" Entity Within the Plain Meaning of that Phrase.

A plain text reading of the term "government-sponsored" precludes the inclusion of a company such as Life Inc. When interpreting a potentially ambiguous phrase, words should be given "their ordinary, contemporary, common meaning." *Sandifer v. U.S. Steel Corp.*, 571 U.S. 220, 227 (quoting *Perrin v. United States*, 444 U.S. 37 (1979)). A reviewing court may look to a number of different sources when attempting to elucidate this common meaning including dictionaries, logical inferences, and even Dr. Seuss. *See Encino Motorcars, LLC v. Navaro*, 138 S.Ct. 1134, 1140 (2018); *Sebelius v. Cloer*, 569 U.S. 369, 376-77 (2013); *Yates v. United States*, 135 S.Ct. 1074, 1091 (2015) (Kagan, J., dissenting). Whatever the source, the plain meaning can clear ambiguities before any level of deference need apply.

In the present case, there is no plain meaning by which Life Inc. may be considered a "government-sponsored" entity. Black's Law Dictionary defines "government" as "An organization through which a body of people exercises political authority; the machinery by which sovereign power is expressed." *Government*, BLACK'S LAW DICTIONARY (5th ed. 2016). Black's also defines "sponsor" as "Someone who voluntarily intervenes for another without being requested to do so." *Sponsor*, BLACK'S LAW DICTIONARY (5th ed. 2016). Miriam-Webster Online Dictionary lists a number of synonyms for sponsor including backer, guarantor, patron, and surety. *Sponsor*, Miriam-Webster.com, http://www.miriam-webster.com/dictionary/sponsor#synonyms (last visited Jan. 30, 2019).

Synthesizing these definitions together, the plain meaning of a government-sponsored entity is one that receives patronage or surety from the political authority of the people. Life Inc. does not meet such a definition. The concession contract between Life Inc. and Basag promised military support only "if the assigned water facilities were threatened." (R. 4). This is protection of an investment by a nation in crisis, not the actions of a government seeking to patronize a multi-national corporation.

Furthermore, Basag has hired its own private security to protect its assets in Basag. If Life Inc. were ever to be considered a government-sponsored organization, it eliminated that designation of its own accord by making the government sponsorship redundant. If the measure of government-sponsorship is the military assistance provided to Life Inc. for protection of its water resources, the private security hired by Life Inc. served to sever that sponsorship.

It is also worth noting, as the Thirteenth Circuit did in their opinion, that there is no indication that the police and military of Basag were unwilling or unable to assist Marcos. There was no evidence presented that Marcos ever reported the incidents in question to the authorities

or sought recompense through official channels. Therefore, the question remains whether the government would have taken action against Life Inc. or its private security forces for the harms alleged by Marcos. Had the incidents been reported, Marcos may have been protected or relocated by the government of Basag. All of these factors taken together demonstrate that Life Inc. is not a government-sponsored entity under the plain meaning of that term.

2. Life Inc. is More Similarly Situated to a Private Criminal Actor.

The actions of Life Inc.'s private security forces are more closely related to that of a large gang or criminal organization than a government-sponsored entity. A foreign government need not be completely effective at preventing all acts of violence against a protected class in order to prevent themselves from being associated with that violence. *See Kholyavskiy v. Mukasey*, 540 F.3d 555, 575 (7th Cir. 2008). When police and other government agencies are willing and able to investigate alleged acts of violence and persecution against a protected class, it can be inferred that the persecutors are acting on their own, without the sanction of the government or its tacit support. *Menjivar v. Gonzales*, 416 F.3d 918, 922 (8th Cir. 2005).

In *Kholyavskiy*, the asylee was a Russian Jew who lived in Soviet Russia for many years before was granted refugee status in the United States. *Kholyavskiy*, 540 F.3d at 559-560. Kholyavskiy suffered from anxiety attacks from his persecution in Russia and eventually developed a criminal record that led to removal proceedings. *Id.* at 560. Kholyavskiy feared a return to persecution if he was removed to Russia, as a large portion of his mistreatment was suffered at the hands of the state. *Id.* at 561. The Seventh Circuit found grounds for past persecution, but denied relief relating to a well-founded fear of future persecution. *Id.* at 575. The Seventh Circuit noted that conditions in Russia had changed, and that persecution at the hands of the state was unlikely. *Id.* at 575.

In *Manjivar*, the asylee was a young woman from El Salvador. *Manjivar*, 416 F.3d at 919-20. A gang member began following her and asking her to be his girlfriend, becoming more aggressive and violent each time he would ask. *Id.* at 920. Manjivar's testimony was deemed "generally credible" before the IJ, but her petition for asylum was denied. *Id.* at 920. Manjivar relied on a theory of police neglect, but could not offer substantial evidence to support such a claim. *Id.* at 922. The Eighth Circuit noted that Manjivar failed to report some incidents of violence by her persecutor, and when she did, the police arrived as quickly as possible. *Id.* at 922.

In the present case, there is nothing to suggest that Life Inc.'s private security forces acted with the official seal or tacit acceptance of the government of Basag. The DHS testified before the IJ that the Basag police force investigated reports of crimes perpetrated by Life Inc.'s private security forces. (Cir. R. 17). Furthermore, Marcos never reported any of the incidents that she observed or went through. If Marcos had reported the incidents, it is likely that the Basag police would have investigated and prosecuted the perpetrators.

Additionally, Life Inc. has a policy in place to combat impropriety on the part of their employees. After public outcry regarding the incidents involving their security forces, Life Inc. instituted a public policy that "any Life Inc. guard suspected of sexual assault would face immediate termination." (R. 6, n.2). Had Marcos reported the incidents, it is possible that the perpetrators would have been terminated from their positions, investigated by the police, and prosecuted under Basag's penal codes for Rape, Attempted Rape, and Molestation.

The purpose of asylum law is to protect those within our own borders who cannot be protected within their own. However, we cannot insist on taking in those who do not meet the criteria of true need. There are delicate matters of foreign relations and international policy to

consider, and the United States cannot admit an asylee without publicly stating that their country is unwilling or unable to protect them. When avenues are available for an asylee to seek help within their own country, we must ask them to attempt to do so, or show good cause why they cannot. In the case of Ms. Marcos, she did not avail herself of those options and did not meet her burden of proof in this case.

B. APPLYING *CHEVRON* DEFERENCE, LIFE INC. IS A NONGOVERNMENTAL ENTITY.

Should this Court choose to apply *Chevron* deference, Life Inc. would still be a nongovernmental entity. Petitioner and the dissenting Judge at the Thirteenth Circuit erroneously make the argument that an application of *Chevron* requires a remand of this case to the BIA. (Cir. R. 15, 19). This, however, is not true. *Chevron* deference is a method by which a reviewing court defers to an agency's interpretation of a statute. *Chevron*, 467 U.S. at 842-44. Final agency decisions on issues properly delegated to that agency are to given deference. *Id.* Petitioner and the dissent argue that the BIA has not announced an explicit definition of "government-sponsored" as it relates to 8 C.F.R. § 208.13(b)(3)(ii), and that reviewing courts should allow them to do so in the first instance. (Cir. R. 15, 19). With respect to Petitioner and the dissenting judge, this analysis is flawed. A reviewing court is to review the final agency decision in immigration appeals. *Vasquez v. Holder*, 635 F.3d 563, 565 (1st Cir. 2011) (citing 8 C.F.R. 1003.1(e)(4) (2018)). When the BIA summarily affirms the decision of the IJ, adopting the IJ's findings or reasoning, courts review the IJ's decision as the final agency decision. *Id.* In this instance then, the IJ's decision is the final agency decision regarding Petitioner's application for asylum. If *Chevron* is to apply, then it applies to the IJ's determination in this case. Applying the *Chevron* two-step framework to this decision, Life Inc. is not a government entity under 8 C.F.R. 208.13(b)(3)(ii).

In a *Chevron* analysis, a reviewing court must ask two questions: (1) Has Congress spoken directly to the issue at hand, announcing their intent? and (2) If not, was the agency interpretation a reasonable construction of the statute? *Chevron*, 467 U.S. at 842-43. If Congress has spoken directly to the issue, a reviewing court "must give effect to the[ir] unambiguously expressed intent..." *Id.* If Congress has not spoken to the issue or there is an ambiguity in the statute, a reviewing court will defer to the agency's interpretation, so long as that interpretation is a "permissible construction of the statute." *Id.* at 843. An agency's interpretation will be presumed valid unless it is "arbitrary, capricious, or manifestly contrary to the statute." *Id.* at 844.

Both sides concede that Congress has not spoken directly to the definition of "government-sponsored" within 8 C.F.R. 208.13(b)(3)(ii). However, the IJ has created a working definition of the "government-sponsored" in this case that is a permissible construction of the regulation. The dissent argues that the definition is simply "not Life Inc." While this is a reductive analysis of the IJ's decision, even if it were true, that would be a permissible construction of the regulation. When future courts look to the issue of whether a persecution is sponsored by the government, they can compare the actions of the persecutor to those of Life Inc. and draw conclusions how they see fit.

The definition provided by the IJ, however, is far more comprehensive than Petitioner and the dissent give it credit for. This definition may be drawn from the evidence used by the IJ in making its decision. The IJ heard testimony from Petitioner that Life Inc. has become so intertwined with the government of Basag as to be inseparable. Petitioner also claimed that Life Inc.'s control over such an important resource, given to the company by the government of Basag, creates an inability to escape her persecution. The government put forward evidence that

Life Inc.'s guards are private employees and have nothing to do with the government. Furthermore, Life Inc.'s contract requires it to comply with the laws of Basag at all times. Finally, reports were submitted of Basag police investigating allegations of rape and molestation when they were reported.

Using this information, the IJ's findings and reasoning, summarily adopted by the BIA, could be said to exclude Life Inc. from the definition of "government-sponsored" in 8 C.F.R. 208.13(b)(3)(ii). In future cases, parties will be able to analogize the facts of their cases to those of this case when determining whether persecution was suffered at the hands of a "government-sponsored" entity. The fact that the definition does not create bright lines should not detract from the fact that a reasonable interpretation of the statute was made. Nothing about this decision by the IJ is arbitrary, capricious, or manifestly contrary to the statute. A permissible interpretation need not be the most detailed or explicit. As more cases come along, the definition of "government-sponsored" will become more nuanced and adaptable. For the time being, the IJ has made a decision on a statute delegated to their authority. Should this Court decide that *Chevron* deference applies, it should adopt the definition of "government-sponsored" created by the IJ below. As a result, Life Inc. is to be considered a nongovernmental entity, Petitioner did not carry her burden, and the Thirteenth Circuit's order should be affirmed.

CONCLUSION

The Petitioner should be denied asylum in the United States of America because the "disfavored group" standard would usurp Congressional delegation authority, even if this Court adopts the "disfavored group" standard she still cannot meet the threshold of individualized persecution contrasted with the low group mistreatment.