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 SUPREME COURT OF THE UNITED STATES COURT OF APPEALS FOR THE THIRTEENTH CIRCUIT

BRIEF FOR PETITIONER

Team 102
Counsel for Petitioner

QUESTIONS PRESENTED

1. Should the Thirteenth Circuit's adoption of the disfavored group analysis as a valid basis for establishing a well-founded fear of persecution be affirmed and does Ms. Marcos qualify for asylum under that analysis based on her identity as an ethnic Isda-Timog woman and the threats of sexual assault she faced in her home nation of Basag; and
2. Under 8 C.F.R. § 1208.13(b)(3), should the burden of demonstrating that future persecution can be avoided by internal relocation shift to the U.S. government when the potential persecutor has exclusive control over water in the country through a contract with the applicant's home government?

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OPINIONS ENTERED BELOW

The opinion of the Board of Immigration Appeals is unreported and does not appear in the record below. The opinion of the United States Court of Appeals is reported and appears in the record below.

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.

STATUTES AND REGULATIONS

8 U.S.C. § 1101(a)(42) (2014): The term "refugee" means (A) any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that 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 C.F.R. § 1208.13(b)(2)(iii) (2018): In evaluating whether the applicant has sustained the burden of proving that he or she has a well-founded fear of persecution, the asylum officer or immigration judge shall not require the applicant to provide evidence that there is a reasonable possibility he or she would be singled out individually for persecution if: (A) The applicant establishes that there is a pattern or practice in his or her country of nationality or, if stateless, in his or her country of last habitual residence, of persecution of a group of persons similarly situated to the applicant on account of race, religion, nationality, membership in a particular social group, or political opinion; and (B) The applicant establishes 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.

8 C.F.R. § 1208.13(b)(3) (2018): *Reasonableness of internal relocation.* For purposes of determinations under paragraphs (b)(1)(i), (b)(1)(ii), and (b)(2) of this section, adjudicators should consider, but are not limited to considering, 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. Those factors may, or may not, be relevant, depending on all the circumstances of the case, and are not necessarily determinative of whether it would be reasonable for the applicant to relocate.

(i): In cases in which the applicant has not established past persecution, the applicant shall bear the burden of establishing that it would not be reasonable for him or her to relocate, unless the persecution is by a government or is government-sponsored.

(ii): In cases in which the persecutor is a government or is government-sponsored, or the applicant has established persecution in the past, it shall be presumed that internal relocation would not be reasonable, unless the Service establishes by a preponderance of the evidence that, under all the circumstances, it would be reasonable for the applicant to relocate.

STATEMENT OF THE CASE

Leila Marcos, an 18-year old ethnic Timog woman from the country of Basag, has been subject to harassment and threats of rape from guards who manage the facilities where she collects water on the island of Isda. Of the two islands that make up the country of Basag, Mayaman is primarily home to ethnic Hilagan residents, while Isda is occupied mainly by ethnic Timog. Facts at 2. Some of the Isda-Timog people have migrated to Mayaman due to coastal flooding, although they are noticeably poorer than the local Mayaman people. Facts at 3.

In 2013, President Aquinto signed a 30-year Concession Contract with Life Inc., assigning them "exclusive rights" (Op. at 4) and full control of the country's water sources. Facts at 3-4. Life Inc. must provide water for Basag's residents, comply with Basag law, and pay annual fees to the Basag government. Facts at 4-5. In return, the Basag government would provide military protection if the water facilities were threatened. Facts at 4. If Basag terminates the contract before the 2043 end date, their breach will result in substantial liability, which "incentivizes Life Inc.'s continued control." Facts at 5. Since 2016, a group called the "Water Warriors" have targeted Life Inc. facilities, and in response Life Inc. hired its own armed guards to protect its facilities in Basag. Facts at 4-5. Life Inc.'s guards and Basag's military have "killed over 75 men and women mistakenly identified was Water Warriors," more than half on the island of Isda. Facts at. 5.

In Basag's culture, women like Ms. Marcos are disproportionately responsible for traveling to collect water in Isda. Facts at 6. On March 6, 2017, while she was at a facility collecting water, a Life Inc. guard told Ms. Marcos that if she had sex with him, he would give her more water. Facts at 6. Having heard from a friend that a woman from a neighboring village was raped by a Life Inc. guard a few weeks prior, Marcos knew this was "actually a threat rather than just harassment." Facts at 6. No action was taken against the guard who committed the alleged rape, however Life Inc. issued a statement publicly announcing a new policy that any guard "suspected

of sexual assault would face immediate termination." Facts at 6. At a different facility ten miles further away on March 12th, she recognized the guard who had solicited sex from her. Facts at 7. As he handed her water, the guard whispered, "I am going to have my way with you, honey, whether you want it or not." Facts at 7. Although she feared for her safety, Ms. Marcos was forced to continue to go to Life Inc. facilities to collect water out of necessity. Facts at 7.

When leaving a different water checkpoint on April 5, 2017, "a different guard grabbed her backside and whistled" and other guards joined in with laughter and whistles of their own. Facts at 8. Ms. Marcos told her husband Bernardo about the incidents at the water facilities, and he went to the checkpoint to "confront the guards." Facts at 8. Bernardo was then shot in the arm after he pulled a knife from his pocket. Facts at 8. One of the guards who escorted Bernardo home was the one who had threatened Ms. Marcos on March 6th, and as he left, he winked at her and made a "thrusting upward gesture with two fingers towards her." Facts at 8.

Ms. Marcos and her husband traveled to Mayaman so Bernardo could receive medical care and, for the approximately four months they spent in Mayaman, stayed with Bernardo's friend Bayani Santos. Facts at 8. He suggested that Ms. Marcos buy some different clothing to blend in with local Mayaman residents. Facts at 8-9. Bayani warned Ms. Marcos that Life Inc. guards tended to target the Isda-Timog women who stood out due to their "poorer appearance," and that he had heard an unmarried Isda-Timog woman had recently become pregnant "by unknown means." Facts at 9.

The Marcos' struggled to find work in Mayaman, due to Bernardo's injury, their Timog ethnicity, and Ms. Marcos' reluctance to work around men based on the assault and past threats of violence she had experienced on Isda. Facts at 9. Ms. Marcos found temporary work at a local shop, although it was not lucrative, (Op. at 6) so she also begged on the streets near the affluent resorts. Facts at 9. While begging one evening Marcos overheard a Life Inc. guard say to another

"I cornered her by the well, and hit her until she submitted. Getting sex here is as easy as it is on Isda." Facts at 9. When she had collected enough money to buy a plane ticket to the United States in August 2017, Ms. Marcos left Basag and filed an application for asylum at a U.S. port of entry. Facts at 9-10. She contended that she had a "well-founded fear of persecution due to a pattern or practice of rape and harassment" against Timog women in Basag, and testified that the instances of rape and her threatening encounter with a Life Inc. guard on April 5, 2017 established a "reasonable fear of future harm." Facts at 10.

The Immigration Judge ("IJ") denied Marcos' application for asylum, finding that she had established a well-founded fear of persecution, but could have reasonably relocated in Basag to avoid persecution. Facts at 10. The IJ based its finding of a well-founded fear on Ms. Marcos' membership in a disfavored group, combined with her evidence of individualized risk. Op. at 7. The IJ found that Life Inc. was not "government-sponsored" and placed the burden of proof on the relocation analysis on Ms. Marcos. Op. at 15. On appeal, the Board of Immigration Appeals ("B.I.A.") affirmed the IJ's decision, summarily stating the same rationale articulated by the IJ. Facts at 10. Marcos appealed the B.I.A.'s decision, and the government cross-appealed. Op. at 7.

SUMMARY OF ARGUMENT

Because the Court of Appeals correctly adopted the disfavored group analysis for establishing a well-founded fear of persecution but improperly placed the burden of proof on the petitioner to show that relocation within her country of origin is unreasonable, this Court should affirm in part the opinion of the Court of Appeals in part and reverse in part.

The disfavored group analysis is a proper test for well-founded fear because it incorporates both of the means of establishing fear codified in the immigration regulations: showing individualized risk and showing a pattern or practice of persecution against similarly situated individuals, 8 C.F.R. § 1208.13(b)(2)(iii) (2018), through use of a sliding scale. *Mgoian v. I.N.S.*, 184 F.3d 1029, 1035 (9th Cir. 1999). The disfavored group analysis recognizes that modern persecution may not fit neatly into either box, and that a more flexible approach may be necessary to ensure that worthy applicants are granted reprieve.

The disfavored group analysis is appropriate because it does not lower the burden of proof that applicants must meet to establish a successful asylum case. Just like the alternative standards, the disfavored group test still requires applicants to demonstrate that they face at least a one in ten chance of persecution. *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 440 (1987). There is also growing support for the disfavored group analysis among the Courts of Appeals, including the Fourth and Eighth Circuits. *See Chen v. I.N.S.*, 195 F.3d 198 (4th Cir. 1999) and *Makonnen v. I.N.S.*, 44 F.3d 1378 (8th Cir. 1995). Ms. Marcos can therefore establish a well-founded fear of persecution by use of the disfavored group analysis because it is a valid basis for establishing a well-founded fear and she is a member of a disfavored group of Isda-Timog women, and faces individualized threats of sexual assault at the hands of Life Inc. guards.

Second, Ms. Marcos improperly bore the burden of proof on the internal relocation analysis. Where the applicant's claim is based on a well-founded fear, the applicant bears the

burden of proof on the issue unless the persecutor is "a government or is government-sponsored." 8 C.F.R. § 1208.13(b)(3)(i) (2018). Life Inc. is "government-sponsored" within the plain meaning of the term because the company is thoroughly intertwined with the Basag government. The Basag government delegated Life Inc. the sole authority to distribute water on Basag until 2043, and the two entities collaborate to defend that critical resource. Facts at 5. Further, Life Inc. employees engaged in widespread abuse of Isda-Timog women without sanction from the Basag government. This interpretation is consistent with other U.S. law and policy, including the Alien Tort Claims Act. *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 92 (2d Cir. 2000).

Even if Ms. Marcos properly bore the burden of proof on the internal relocation question, reversal is still warranted. Considering "all the circumstances," 8 C.F.R. § 1208.13(b)(2)(ii) (2018), no area of Basag is "substantially better" than Ms. Marcos' home island of Isda, the standard required for relocation to be reasonable. *Matter of M-Z-M-R-*, 26 I. & N. Dec. 28, 33 (B.I.A. 2012). Due to her ethnicity and history of threats from Life Inc. guards, Ms. Marcos will be in danger every time she attempts to collect water anywhere on Basag until Life Inc.'s contract expires in 2043.

Reversal of the internal relocation issue is also warranted on the alternative ground that the Thirteenth Circuit erred by failing to remand to the B.I.A. to define "government-sponsored." When a key regulatory term at issue in federal court has not yet been defined by the agency, the courts' ordinary rule is to remand the case to the agency for definition. *I.N.S. v. Orlando Ventura*, 537 U.S. 12, 16-17 (2002). This is consistent with the deferential principle established in *Auer v. Robbins,* 519 U.S. 452 (1997), and *Bowles v. Seminole Rock & Sand Co.* 325 U.S. 410 (1945). The B.I.A. must clarify what it means to be a "government-sponsored" persecutor before federal courts can review its decision. Ms. Marcos meets the legal requirements for asylum and should be granted such status.

ARGUMENT

Questions of law previously considered by the B.I.A. and the IJ are subject to *de novo* review. *Vitug v. Holder*, 723 F.3d 1056, 1062 (9th Cir. 2013). The question of whether to affirm the adoption of the disfavored group analysis is a question of law regarding eligibility for asylum, and therefore is to be reviewed de novo. *Romero-Mendoza v. Holder*, 665 F.3d 1105, 1107 (9th Cir. 2011). Whether Ms. Marcos establishes a well-founded fear of future persecution is a factual finding supporting the lower court's decision reviewed under the under the "substantial evidence" standard, *Kotasz v. I.N.S.*, 31 F.3d 847, 851 (9th Cir. 1994), as is the question of whether internal relocation is reasonable. *Oryakhil v. Mukasey*, 528 F.3d 993, 994 (7th Cir. 2008). The Thirteenth Circuit correctly identified that the proper standard of review on the question of which party bears the burden of proof on an issue is *de novo* because it is a legal question not dependent on factual determinations. Op. at 13.

I. THE THIRTEENTH CIRCUIT PROPERLY ADOPTED THE DISFAVORED GROUP ANALYSIS AS A VALID BASIS FOR ESTABLISHING A WELL-FOUNDED FEAR OF PERSECUTION.

Under the Immigration and Nationality Act, Ms. Marcos must show that she is unwilling or unable to return to Basag "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) (2014). Ms. Marcos seeks to establish a well-founded fear of future persecution. Persecution has been defined as "[T]he infliction of suffering or harm upon those who differ ... in a way regarded as offensive. While a single incident in some cases may not rise to the level of persecution, the cumulative effect of several incidents may constitute persecution." *Singh v. I.N.S.*, 94 F.3d 1353, 1358 (9th Cir. 1996).

Ms. Marcos can establish her well-founded fear of persecution through use of the disfavored group analysis properly adopted by the Thirteenth Circuit. This analysis was properly

adopted because it is consistent with current law by balancing parts of both individualized risk analysis and the pattern or practice group-based analysis through use of a sliding scale, the disfavored group analysis does not prescribe a lower burden of proof standard for applicants, and other circuits have shown support for the analysis or have recognized similar limitations in the current law.

A. The disfavored group analysis is a valid basis for establishing a well-founded fear of persecution because it is consistent with current law for establishing a well-founded fear, other circuits have recognized this analysis or similar limitations in the current law, and the analysis does not prescribe a lower burden of proof standard for applicants.

1. The disfavored group analysis is consistent with the regulation and asylum law because it balances both existing forms of analysis for establishing a well-founded fear.

The disfavored group analysis utilizes both methods of analyzing an objectively reasonable well-founded fear by balancing individualized risk against group-based fear of persecution applied in the pattern or practice form of analysis, an approach consistent with both the regulation itself and asylum law as a whole. To establish a well-founded fear of persecution, Ms. Marcos needs to show that her fear is both subjectively genuine and objectively reasonable. *See Jibril v. Gonzales*, 423 F.3d 1129, 1133 (9th Cir. 2005) and *Ixtlilco-Morales v. Keisler*, 507 F.3d 651, 654 (8th Cir. 2007). Ms. Marcos may satisfy the objective component "by adducing credible, direct, and specific evidence in the record of facts that would support a reasonable fear of persecution." *Ladha v. I.N.S.,* 215 F.3d 889, 897 (9th Cir. 2000) (quoting *Duarte de Guinac v. I.N.S.,* 179 F.3d 1156, 1159 (9th Cir.1999)). Ms. Marcos need not show that it is more likely than not that she will be persecuted, because "even a ten percent chance that the applicant will be persecuted in the future is enough to establish a well-founded fear." *Knezevic v. Ashcroft*, 367 F.3d 1206, 1212 (9th Cir. 2004).

Ms. Marcos can establish an objective fear of persecution through showing either an individualized risk of being singled out for persecution or a pattern or practice of persecution of a group of persons similarly situated. 8 C.F.R. § 1208.13(b)(2)(iii) (2018). Typically, an applicant is required to "provide evidence that there is a reasonable possibility he or she would be singled out individually for persecution." *Id.* Individualized targeting was the primary means of establishing an objectively reasonable well-founded fear until the 1990s, when the I.N.S. adopted a new regulation recognizing a pattern or practice of persecution against a group as a sufficient establishment of a well-founded fear. *Kotasz*, 31 F.3d at 852.

An applicant may therefore also show an objectively reasonable well-founded fear by showing a "pattern or practice in his or her country of nationality or, if stateless, in his or her country of last habitual residence, of persecution of a group of persons similarly situated to the applicant on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 C.F.R. § 1208.13(b)(2)(iii)(A) (2018). The applicant must show "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." 8 C.F.R. § 1208.13(b)(2)(iii)(B) (2018). The bar for establishing a pattern or practice is significantly high, as courts have held that the persecution must be "systemic, pervasive, or organized." *Lie v. Ashcroft*, 396 F.3d 530, 537 (3d Cir. 2005); *see also DiazGarcia v. Holder*, 609 F.3d 21, 29 (1st Cir. 2010) and *Raghunathan v. Holder*, 604 F.3d 371, 377 (7th Cir. 2010). The B.I.A. has adopted this standard, but without further elaboration. *See Matter of A-M-*, 23 I&N Dec. 737, 741 (B.I.A. 2005); *Mufied v. Mukasey*, 508 F.3d 88, 89 (2d Cir. 2007).

Courts using the pattern or practice analysis have acknowledged that it may sometimes be unwarranted and unnecessarily burdensome to provide evidence of individualized targeting when persecution is so pervasive that any member of the group being targeted would be reasonably

afraid of persecution. As Ninth Circuit noted in *Kotasz*, "it 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." 31 F.3d at 852. The pattern or practice analysis recognized that certain forms of persecution, while perfectly valid, were not meeting the previous standards of a well-founded fear of persecution, and therefore new regulations were adopted to reflect the reality of how persecution may be carried out in practice.

A high threshold for establishing a pattern or practice of persecution, however, has created continuing challenges for asylum applicants. The bar for establishing a well-founded fear by means of a pattern or practice of persecution is high because "every member of a group that faces per se persecution is a refugee eligible for a discretionary grant of asylum" without the need to show an individualized risk of persecution. *Mitreva v. Gonzales*, 417 F.3d 761, 765 (7th Cir. 2005). Courts have found, therefore, in the nearly three decades since this regulation was adopted, very few instances that rise to the level of establishing a per se well-founded fear for every member of the group as a pattern or practice. *See Ahmadshah v. Ashcroft*, 396 F.3d 917, 921 (8th Cir. 2005) (finding a pattern or practice of subjecting Christian converts to the death penalty in Afghanistan); *Knezevic*, 367 F.3d at 1213 (Croats had a pattern or practice of ethnically cleansing Serbs); and *Eduard v. Ashcroft*, 379 F.3d 182, 192 (5th Cir. 2004) (there was a pattern or practice of persecution against Christians in Indonesia). Many asylum applicants, therefore, may not be able to show a well-founded fear of persecution based exclusively on being singled out for persecution or solely on group-based persecution, but may still maintain an objectively reasonable well-founded fear based on a combination of these two factors.

The disfavored group analysis articulated by the Ninth Circuit recognizes that the realities of persecution around the world may not fall neatly into an established means of showing an objectively reasonable fear. While members of an oppressed group "are not threatened by

systematic persecution of the group's entire membership, the fact of group membership nonetheless places them at some risk." *Kotasz*, 31 F.3d at 853. To establish membership in a disfavored group not subject to systemic persecution, courts look to:

> (1) the *risk level of membership in the group* (i.e., the extent and the severity of persecution suffered by the group) and (2) the *alien's individual risk level* (i.e., whether the alien ... is more likely to come to the attention of the persecutors making him a more likely target for persecution).

Mgoian, 184 F.3d at 1035 (emphasis added). Unlike the pattern or practice method of analysis, the disfavored group analysis always requires a showing of individualized risk, thereby narrowing the pool of potential asylees from all members of the group to those who are both members of a disfavored group and have shown some level of individualized risk. *See Salim v. Lynch*, 831 F.3d 1133, 1140 (9th Cir. 2016) (affirming that "membership in a disfavored group is not by itself sufficient to demonstrate eligibility for asylum").

Courts have utilized a sliding scale approach to balance group membership and individual risk, where "the more serious and widespread the threat of persecution to the group, the less individualized the threat of persecution needs to be." *Mgoian*, 184 F.3d at 1035; *see also Kotasz*, 31 F.3d at 853 and *Sael v. Ashcroft*, 386 F.3d 922, 925 (9th Cir. 2004). This approach utilizes both widespread methods of analyzing an objective fear by balancing individualized risk against group-based fear of persecution applied in the common pattern or practice form of analysis. The sliding scale for which form of fear needs the stronger showing recognizes the reality of how varied persecution may be in practice around the world, and that a combination of both factors may more accurately reflect the experience of many asylum applicants.

The disfavored group analysis, by recognizing the relevance of both individualized risk and group-based risk, is consistent with how both the regulation itself and asylum law as a whole

interpret a well-founded fear of persecution. When Congress passed The Refugee Act of 1980, the Attorney General was delegated the authority of establishing the regulations and procedures necessary to establish how claims of asylum were to be adjudicated. Asylum and Withholding of Deportation Procedures, 55 Fed. Reg. 30,674, 30,675 (July 27, 1990). In furtherance of this instruction, the I.N.S. adopted methods of establishing a well-founded fear. *Id.* at 30,678.

In discussing the adoption of group-based risk, the I.N.S. stated only that "it is not necessary to prove [an applicant] would be singled out if he can establish that there is a pattern or practice of persecuting the group of persons similarly situated, and that he can establish inclusion in/identification with such group." *Id.* This explanation affirms that applicants who have established a pattern or practice of persecution do not need to show individualized risk, however, the explanation does not purport to disclaim an establishment of a well-founded fear using a combination of both factors. An analysis that combines both factors to more accurately reflect the reality of persecution around the world, in addition to not being explicitly rejected, serves to further the two guiding principles of the regulation: "A fundamental belief that the granting of asylum is inherently a humanitarian act … and a recognition of the essential need for an orderly and fair system for the adjudication of asylum claims." *Id.* at 30,675.

Further examination of The Refugee Act of 1980 provides additional insight into how asylum law interprets a well-founded fear of persecution. In adopting the phrase "well-founded fear," and in passing the Refugee Act as a whole, this Court found that Congress intended "to bring United States refugee law into conformance with the 1967 United Nations Protocol Relating to the Status of Refugees." *Cardoza-Fonseca*, 480 U.S. at 436. In that case, this Court looked further to the Office of the United Nations High Commissioner for Refugees, Handbook on Procedures and Criteria for Determining Refugee Status ("Handbook") to interpret the definition and threshold requirements of a well-founded fear. *Id.* at 439-40. This Court noted that "the Handbook provides

significant guidance in construing the Protocol, to which Congress sought to conform." *Id*. at 439 n.22; *see also Perkovic v. I.N.S.*, 33 F.3d 615, 621 (6th Cir. 1994) ("according to the Court, it is appropriate to refer to international law on the treatment of refugees in considering the meaning of [an] asylum provision.")

The same source is relevant in this case; the Handbook explains that an objectively reasonable well-founded fear of persecution "need not necessarily be based on the applicant's own personal experience. What, for example, happened to his friends and relatives and other members of the same racial or social group may well show that his fear that … he also will become a victim of persecution is well-founded." Office of the United Nations High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status*, Ch. II B(2)(a)(43) (Geneva, 1979). The disfavored group analysis directly furthers this interpretation by considering an applicant's individual risk and the heightened risk of persecution they might face as a member of a disfavored group.

Respondent may argue that the disfavored group analysis puts forth an entirely new and unrecognized form of establishing a well-founded fear not recognized by current law. However, as Ninth Circuit noted in *Kotasz* when articulating the disfavored group analysis, "the regulation [for a well-founded fear] is, deliberately, far from comprehensive: it does not purport to cover the *entire range* of persecution related to group membership. Rather, the regulation leaves the standards governing non-pattern or practice cases to be developed through case law, as before." 31 F.3d at 853 (emphasis added). The Ninth Circuit's interpretation of the regulation's intent is supported by the history of the regulation itself and its 1990 adoption of the pattern or practice means of establishing a well-founded fear. Given the intent of the regulation to provide asylum as a humanitarian act with a *fair* system for processing claims of asylum and asylum law's recognition of the relevance of both individual and group-based risk, the disfavored group analysis' attempt to

more accurately reflect the reality of how persecution is carried out around the world is consistent with how both the regulation itself and asylum law as a whole interpret a well-founded fear of persecution.

2. The disfavored group analysis does not prescribe a lower burden of proof standard for applicants because the overall burden for establishing a well-founded fear remains the same.

The disfavored group analysis does not prescribe a lower burden for applicants, but allows applicants to satisfy the same overall burden by balancing the showing of both individual and group-based risk. The First, Third, and Seventh Circuits have rejected the disfavored group analysis on the grounds that it lowers the standard of proof required by the existing individualized targeting or pattern or practice standards. *Kho v. Keisler*, 505 F.3d 50, 55 (1st Cir. 2007) (The regulations establish a threshold for relieving the need for an individualized showing; the disfavored group analysis creates a different threshold, and we reject it."); *see also Lie*, 396 F.3d at 538 (We 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.") and *Firmansjah v. Gonzales*, 424 F.3d 598, 607 (7th Cir. 2005) ("This circuit has not recognized a lower threshold of proof based on membership in a "disfavored group.").

However, the disfavored group analysis does not lower the standard of proof, as all applicants still need to show that they face at least a ten percent chance of persecution to establish a well-founded fear. *Cardoza-Fonseca*, 480 U.S. at 440. The Ninth Circuit clarified that the disfavored group analysis' "lesser or comparatively low burden ... refers not to a lower ultimate standard, but to the lower proportion of specifically individualized evidence of risk, counterbalanced by a greater showing of group targeting, that an applicant must adduce to meet that ultimate standard under the regulations' individually singled out rubric." *Wakkary,* 558 F.3d at 1064 (internal quotation marks omitted). Instead of lowering the standard of proof, the

disfavored group analysis allows applicants to balance both methods of showing an objective fear and requires higher or lower showings of one depending on the strength of evidence of the other.

3. Other circuits have shown support for the disfavored group analysis or have recognized the limitations of the current forms of analysis.

The limitations of the regulation were previously acknowledged with the adoption of the pattern or practice regulation to expand the fulfilment of the well-founded requirement, and the disfavored group analysis acknowledges the continuing challenges in showing an objectively reasonable fear. Other courts have followed the Ninth Circuit's lead in recognizing the need for flexibility to alleviate the challenges posed by the limitations of the existing regulation. The disfavored group analysis has certainly been used most consistently and frequently by the Ninth Circuit, but the Fourth and Eighth Circuits have shown support for the disfavored group analysis as a valid possible alternative to pattern or practice persecution. *See Chen*, 195 F.3d at 203–04 (noting that individualized targeting and systemic persecution may not represent distinct theories, and that an "applicant will typically demonstrate some combination of the two to establish a well-founded fear of persecution") and *Makonnen*, 44 F.3d 1378 (remanding an Ethiopian petitioner's case to the B.I.A. for failure to consider the possibility of non-pattern-and-practice persecution, citing the 9th Circuit's disfavored group analysis as a possible alternative).

Although one of the disfavored group analysis' most prominent critics, the First Circuit has also expressed the possibility of a sliding scale approach for establishing a well-founded fear, and that "in evaluating each claim on its facts, it may be that evidence short of a pattern or practice will enhance an individualized showing of likelihood of a future threat to an applicant's life or freedom." *Kho*, 505 F.3d at 55. The First Circuit, like the Ninth Circuit, acknowledges the limitations of the current two methods of establishing a well-founded fear. The realities of persecution around the world may not clearly fulfil solely the individualized targeting or pattern

or practice standard, but some combination of both may be sufficient to demonstrate a well-founded fear of persecution.

The Third Circuit, also outspoken in its criticism of the disfavored group analysis, has also acknowledged limitations of the well-founded fear analysis, specifically the difficulties involved in satisfying both the subjective and objective components. The Third Circuit has permitted asylum applicants to satisfy the objective component using only their own credible testimony, recognizing "that often an alien would be unable to offer anything more than his testimony in support of his claim that his fear of persecution is objectively reasonable." *Chavarria v. Gonzalez*, 446 F.3d 508, 520 (3d Cir. 2006). Establishing a well-founded fear of persecution can be difficult, not for a lack of persecution, but because an applicant cannot provide evidence other than testimony or satisfy solely either method of determining an objectively reasonable fear. The disfavored group analysis acknowledges the continuing challenges involved in establishing a well-founded fear by recognizing that applicants may have an objectively reasonable well-founded fear through a combination of individual and group-based risk, and other circuits have shown support for this analysis or similar solutions to the limitations of the current regulatory scheme.

B. Marcos establishes a well-founded fear of persecution under the disfavored group analysis because she is a member of a disfavored group of Isda-Timog women and has demonstrated an individualized risk.

Ms. Marcos has demonstrated that because Isda-Timog women are subject to regular mistreatment and harassment from Life Inc. guards and there have been several Isda-Timog women who have been raped, she is a member of a disfavored group with a comparatively high risk level. Ms. Marcos has also demonstrated that she can meet her therefore comparatively low burden of showing that she faces an individualized risk of persecution if she returns to Basag. Given the highly deferential standard applied to the proper decisions made by the IJ, B.I.A. and the Thirteenth Circuit that Ms. Marcos has established a well-founded fear as a member of a

disfavored group, the evidence Ms. Marcos has provided does not compel a reversal of the lower court's opinion, and her establishment of a well-founded fear should therefore be affirmed. *See Abedini v. I.N.S.*, 971 F.2d 188, 191 (9th Cir. 1992), as amended (Sept. 9, 1992) (finding that the decision could only be reversed only if the evidence presented to the lower court compelled a reversal because no reasonable factfinder could rule otherwise).

1. Members of the disfavored group of Isda-Timog women face a high risk of persecution.

Marcos establishes an objectively reasonable fear of persecution as a member of a disfavored group of Isda-Timog woman. The Ninth Circuit has defined a disfavored group as "a group of individuals in a certain country or part of a country, all of whom share a common, protected characteristic, many of whom are mistreated, and a substantial number of whom are persecuted." *Wakkary*, 558 F.3d at 1052. The Ninth Circuit has found similar situations of widespread violence and discrimination can establish a disfavored group. *See Avetova–Elisseva v. I.N.S.*, 213 F.3d 1192, 1201–02 (9th Cir. 2000) (harassment against ethnic Armenians in Russia constituted a disfavored group) and *Salim*, 831 F.3d at 1140 (Christians in Indonesia who experienced widespread violence and discrimination represented a disfavored group). Similarly, the mistreatment and harassment of Isda-Timog women demonstrates that they are a disfavored group in Basag. Isda-Timog women represent a group with a shared gender and ethnicity who are disproportionately burdened by the need to collect water, which exposes them to mistreatment and sexual harassment from guards. Facts at 6. As the Thirteenth Circuit noted, the media has corroborated the regular mistreatment of Timog women using Life Inc. water facilities. Op. at 12.

Courts have found sexual violence to be a valid basis for establishing a disfavored group. In *Avetova-Elisseva*, the Ninth Circuit considered the rape of a person similarly situated to the applicant as evidence of their shared group's status as disfavored. 213 F.3d at 1197. Additionally, the Ninth Circuit has also found that acts of torture can establish a disfavored group, *Hoxha v.*

Ashcroft, 319 F.3d 1179, 1183 (9th Cir. 2003), and rape is considered a form of torture. *Zubeda v. Ashcroft*, 333 F.3d 463, 472 (3d Cir. 2003). Marcos testified that she heard of an Isda woman who was raped by a Life Inc. guard in a nearby village. Facts at 6. Following the alleged rape, Life Inc. issued a public statement on their new policy to terminate any guards suspected of sexual assault. Facts at 6. When Marcos and her husband traveled to Mayaman, a friend warned her of another Isda-Timog woman who became pregnant by unknown means. Facts at 9. Additionally, while begging on the streets of Mayaman and hiding from passing Life Inc. guards, Ms. Marcos overheard a guard brag about beating a woman into submission and raping her. Facts at 9. This is supported by an independent report that found an increase in the number of women who have been attacked in Basag as a result of the water shortage. Op. at 12. Given the regular sexual harassment Isda-Timog women face throughout Basag from Life Inc. guards, as well as the several instances of rape noted in the record, the lower courts correctly found that Isda-Timog women are a disfavored group with a comparatively high risk level.

2. Marcos has a comparatively low burden to demonstrate an individualized risk, and she satisfies that burden.

Ms. Marcos has a comparatively low burden for establishing her individualized risk, and she has satisfied this burden based on the harassment and multiple threats of rape and violence she experienced at the hands of Life Inc. guards in Basag. When establishing the disfavored group analysis in *Kotasz*, the Ninth Circuit explained that "the more egregious the showing of group persecution—the greater the risk to all members of the group—the less evidence of individualized persecution must be adduced. 31 F.3d at 853. As there is significant evidence that Isda-Timog women represent a disfavored group with a high risk level, Ms. Marcos' required showing of an individualized risk is comparatively lower. *Mgoian*, 184 F.3d at 1035.

Ms. Marcos has testified to several incidents of previous threats of rape and violence, which can "give rise to a well-founded fear of future persecution because they portend a likelihood of

future physical harm." *C.J.L.G. v. Sessions*, 880 F.3d 1122, 1140 (9th Cir.), reh'g en banc granted, 904 F.3d 642 (9th Cir. 2018). Ms. Marcos was harassed by the same guard on several occasions at a water facility near her village. On March 6, 2017, the guard solicited sex from Marcos, followed by a threat of rape on March 12, 2017. Facts at 6-7. The same guard also made a threatening gesture at Ms. Marcos when escorting her husband home on April 6, 2017. Facts at 8. Marcos was also forcibly touched by a different guard on April 5, 2017 when fetching water from a checkpoint outside her village. Facts at 8.

The Ninth Circuit has previously held that evidence of past threats and violence can meet the burden of an individualized risk when it is comparatively lower based on a strong showing of group-based risk, as is the case for Ms. Marcos' claim. *See Avetova–Elisseva.*, 213 F.3d at 1201–02. As Ms. Marcos was threatened on more than one occasion and was also physically assaulted by a Life Inc. guard, she can meet this burden. Ms. Marcos has demonstrated her membership in a disfavored group that is subject to regular mistreatment and harassment and has a high level of risk of persecution, supported by the number of instances in the record of women who were raped by Life Inc. guards. Given the comparatively high group-based risk level for Isda-Timog women, Ms. Marcos has satisfied her comparatively low burden through her testimony of the harassment and threats of rape and violence she experienced at the hands of Life Inc. guards. Marcos has therefore established a well-founded fear of persecution under the disfavored group analysis.

II. THE THIRTEENTH CIRCUIT ERRONEOUSLY PLACED THE BURDEN ON PETITIONER MARCOS TO PROVE THAT RELOCATION WITHIN BASAG WAS UNREASONABLE.

Which party properly bears the burden of proof on the relocation issue depends on whether Life Inc. is a "government-sponsored" persecutor within the meaning of 8 C.F.R. § 1208.13(b)(3)(ii) (2018). Under the regulation, when a persecutor is "a government or is government-sponsored" the applicant is entitled to a presumption that internal relocation is

unreasonable and it falls to the government to rebut. 8 C.F.R. § 1208.13(b)(3)(ii) (2018). By contrast, when the applicant does not demonstrate that a government or government-sponsored entity is the persecutor, "[he/she] 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 v. Ashcroft*, No. 00-60891, 2001 WL 950959 (5th Cir. 2001). This burden shifting scheme affects the way that the record is developed in the lower tribunals, and ultimately, the applicant's opportunity to receive asylum.

The Thirteenth Circuit erred in its consideration of this issue in three ways: first, it failed to find Life Inc. to be "government-sponsored" within the term's plain meaning; second, it failed to consider compelling evidence in the record establishing that no area of Basag is reasonably safe for Ms. Marcos to relocate to; and third, in the alternative, it failed to remand the issue to the B.I.A. to define the ambiguous term "government-sponsored" pursuant to the principle of *Auer/Seminole Rock* deference.

A. The Court of Appeals committed reversible error because it failed to characterize Life Inc. as a "government-sponsored" persecutor within the meaning of 8 C.F.R. 1208.13(b)(3) and grant Ms. Marcos a presumption that internal relocation is unreasonable.

The burden was wrongly shifted to Ms. Marcos on the internal relocation issue because Life Inc., through its contractual monopoly on water provision in the country of Basag and its ability to commit crimes against the Isda-Timog women of Basag without sanction from the government, falls squarely within the public meaning of the term "government-sponsored." This interpretation is consistent with other U.S. law that holds actors accountable for the human rights abuses that they commit abroad.

1. In the asylum context, "government-sponsored" persecution is not limited to government officials carrying out official state policies.

Due to the nature of Life Inc.'s contract with the government of Basag, the company is "government-sponsored" within the plain meaning of the term. *U.S. v. Bucher*, 374 F.3d 929, 932 (9th Cir. 2004) ("To interpret a regulation, we look first to its plain language."); *Forest Watch v. U.S. Forest Service*, 410 F.3d 115, 117 (2d Cir. 2005) (holding that the plain meaning of a rule should be controlling unless it leads to an absurd result); *Moskal v. United States*, 498 U.S. 103, 108 (1990) (endorsing the preference for plain meaning in the statutory context). According to the Cambridge Dictionary, "government-sponsored" means "relating to activities that are "supported or paid for by a government." *Government-sponsored*, Cambridge Business English Dictionary (2011). Under this definition, agents of the state and other unofficial actors who carry out government policies are government-sponsored persecutors. In *Lina Liu v. Holder*, the Ninth Circuit attributed beatings the applicant endured from fellow inmates in a Chinese prison to the Chinese government because they were "inflicted at the suggestion of the government, and the government did nothing to stop the beatings." 571 F. App'x 629, 632 (9th Cir. 2014). The court noted that given these facts, it was irrelevant that the government did not directly inflict the persecution. *Id.* A non-government actor that implements a policy of the state enjoys that state's support, so is correctly categorized as "government-sponsored."

The state also impliedly supports the actions of its agents when it turns a blind eye to their misconduct. The state is responsible when its agents "engage in abusive conduct, violate the rights of individuals, or otherwise enhance their power without fear of any sanction," even when that conduct is not effectuated pursuant to any official state policy. Deborah E. Anker, *Law of Asylum in the United States* § 4.9 (2018). The Ninth Circuit's holding in *Boer-Sedano v. Gonzales* illustrates this point. 418 F.3d 1082, 1086 (9th Cir. 2005). In *Boer-Sedano*, a Mexican police officer repeatedly detained, threatened, and abused the applicant because of his homosexuality,

even though homosexuality was not illegal in the country at the time. *Id.* The Court of Appeals reversed the B.I.A.'s decision that the government was not responsible for the persecution and denied that the existence of a "personal problem" between an applicant and a government agent could excuse the government from its responsibility to protect. *Id.* at 1087. Similarly, in *Krastev v. I.N.S.*, the Tenth Circuit found a well-founded fear of persecution where Bulgarian "security forces [were] not sufficiently accountable to Parliament or to society and … the resultant climate of impunity [was] a major obstacle to ending police abuses." 292 F.3d 1268, 1276 (10th Cir. 2002). Abuses committed by agents of the state are considered government supported persecution whether they are committed to further state policy or for personal gain.

In drafting 8 C.F.R. 1208.13(b)(3), the agency chose not to limit the burden-shifting scheme to instances of persecution by the government, but to broaden the application to include persecution by "government-sponsored" organizations as well. Statutes should be read "so that effect is given to all its provisions, so that no part will be inoperative or superfluous." *Hibbs v. Winn*, 542 U.S. 88, 101 (2004). If "government-sponsored" is limited to only actions by state employees, its inclusion in the text would be entirely redundant. It is therefore proper to broaden this category to entities that enjoy the support or financial backing of governments.

2. Life Inc. is an agent of the Basag state, so it is a "government-sponsored" persecutor for the purposes of 8 C.F.R. § 1208.13(b)(3).

By signing a 30-year Concession Contract with Life Inc., Basag delegated a government function, the provision of water, to the company. The contract between Life Inc. and the Basag government is essentially unbreakable for its duration, because breach would result in "substantial liability" for the country. Facts at 5. The United Nations recognized that clean drinking water is "an integral component of the realization of all human rights" and resolved that providing water to all is a normative responsibility of governments. G.A. Res. 64/292, at 2-3 (July 28, 2010). Life Inc.'s task was to implement the official policy of providing water to Basag occupants. Facts at 3-

4. In fulfilling its contractual duties, Life Inc. acted more like a government than a private company. The organization managed exclusive rights to the provision of a nationalized resource which is critical for sustaining human life. Facts at 4. Like other government entities, Life Inc. enjoyed the protection of the national military. Facts at 4. Furthermore, Life Inc. guards worked directly with the Basag military to quash protests in the country. Facts at 5 (noting that "Basag military and Life Inc. guards have killed over 75 men and women mistakenly identified as Water Warriors"). Like the inmates in *Lina Liu*, Life Inc. employees carried out the will of the government by enacting its official policies. These close connections and concerted actions between Basag and Life Inc. suggest that Life Inc.'s actions are "supported" by the government.

The Basag state is also supportive of Life Inc.'s misconduct because it allowed Life Inc. employees to commit severe human rights abuses in a "climate of impunity." *Krastev*, 292 F.3d at 1276. Although the government's contract with Life Inc. allows civil and criminal remedies against Life Inc. for violations of Basag law, there is strong evidence that this clause is meaningless. Life Inc. guards are so unafraid of facing penalties in Basag that they brag openly about their sexual abuses on the islands. Facts at 9 (recounting Ms. Marcos' credible memory of a guard saying "I cornered her by the well, and hit her until she submitted. Getting sex here is as easy as it is on Isda"). "No action was taken" in response to at least one alleged rape by a Life Inc. guard. Facts at 6. These abuses by Life Inc. employees are so rampant that the IJ and B.I.A. found Ms. Marcos' fear of rape to be objectively reasonable based in part on the pervasiveness of sexual threats against ethnic Isda-Timog women. Facts at 10. As in *Krastev*, the Basag state has created a climate in which Life Inc. guards can commit crimes with no fear of sanction.

3. Treating Life Inc. as a government-sponsored entity is consistent with the purpose of the American asylum system and other U.S. law.

Public policy supports the proposition that Life Inc. should be treated as a government-sponsored entity. U.S. participation in human rights treaties, including the Convention Against

Torture (CAT) and the International Covenant on Civil and Political Rights (ICCPR), as well as the U.S. policy of granting asylum to individuals persecuted abroad, establishes that U.S. policy disavows the perpetration of human rights abuses abroad. It would hardly be in line with these policies to allow abusive foreign governments to escape international censure merely by working through private contractors instead of official state agents.

Furthermore, the Alien Tort Claims Act (ATCA), a federal law that creates a cause of action in U.S. courts for survivors of human rights abuses committed abroad, recognizes that abuses committed by private actors, including corporations, can constitute state action. For instance, a complaint brought by two Nigerian citizens against petroleum companies Royal Dutch Petroleum and Shell Transport and Trading alleging that the companies, in concert with the Nigerian government, imprisoned, tortured, and killed members of the Ogoni minority group survived a motion to dismiss under the ATCA. *Wiwa*, 226 F.3d 88, 92. Nigerian security forces suppressed opposition to the companies' activities and the District Court determined that this close relationship with the government rendered Unocal's abuses state action. *Id.* In another ATCA case, the D.C. Circuit listed indicators for when a corporation's work on a state project rises to the level of state action: the state (1) provided funds and other resources to the project; (2) made decisions in respect to the assignment of personnel and technology to the project; (3) monitored, determined and audited the activities of the project; or (4) made decisions regarding labor relations on the project. *Bao Ge v. Li Peng*, 201 F. Supp. 2d 14, 21 (D.C. Cir. 2002); *see also* Natalie L. Bridgeman, *Human Rights Litigation Under the ATCA as a Proxy for Environmental Claims,* 6 Yale Hum. Rts. & Dev. L.J. 1, 9 (2003) (discussing various other ATCA state action tests used by federal circuits). Many if not all of the D.C. Circuit's factors apply to the relationship between Life Inc. and the Basag government: the government offered military resources to Life Inc. (similar to the military protection the abusive company enjoyed in *Wiwa*) and determined the scope and criteria of the

project through its contractual relationship with the company. Though this Court recently narrowed the application of the ATCA to private companies, the Court did not preclude ATCA claims against U.S. corporations like Life Inc., which is incorporated in Delaware. *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1368, 1403 (2018); Facts at 4. Given the nature of Life Inc.'s relationship with the Basag government, it would be consistent with U.S. law, both international and domestic, to treat it as a government-sponsored actor.

B. Ms. Marcos is eligible for asylum because evidence in the record compels the conclusion that she cannot reasonably relocate within Basag.

Even if Ms. Marcos is found to have properly bore the burden of proof on the internal relocation issue based on the plain meaning of "government-sponsored," the Thirteenth Circuit erred in finding internal relocation to be reasonable because evidence in the record compels the opposite conclusion. *See I.N.S. v. Elias-Zacarias*, 502 U.S. 478, 481 (1992) (holding that to reverse a finding of fact under the substantial evidence standard, "we must find that the evidence not only supports that conclusion, but compels it"). Courts evaluate the reasonableness of international relocation under "all the circumstances," 8 C.F.R. § 1208.13(b)(2)(ii) (2018), considering factors such as "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 gender, health, and social and familial ties." 8 C.F.R. § 1208.13(b)(3) (2018). For internal relocation to be reasonable, there must be an area of the applicant's home country where they do not have a well-founded fear of persecution, *Lukwago v. Ashcroft*, 329 F.3d 157, 181 (3d Cir. 2003), and where conditions are "*substantially better* than those giving rise to a well-founded fear of persecution on the basis of the original claim") (emphasis added). *Matter of M-Z-M-R-*, 26 I. & N. Dec. at 33. The fact that an applicant has lived safely in an area in the past is not sufficient to show that the area is safe for them to return to. *Kaiser v. Ashcroft*, 390 F.3d 653, 659-660 (9th Cir. 2004) (concluding "although

it is true that Petitioners lived peacefully in Lahore, Kashmir, and Rawalpindi . . . we are convinced there is no area in Pakistan where Petitioners would be free from persecution").

The internal relocation requirement is not meant to bar otherwise qualified applicants from receiving asylum. The B.I.A. noted that the regulation "must be carefully applied" because "it should not be a routine basis for denying protection to refugees just because they cannot produce evidence to negate every possibility of internal relocation." *In Re C-A-L-,* 21 I. & N. Dec. 754, 759 (B.I.A. 1997). The purpose of the rule is to identify the few applicants whose persecution is truly local, "not to require an applicant to stay one step ahead of persecution in the proposed area." *Matter of M-Z-M-R-*, 26 I. & N. Dec. at 33. The agency's cautious approach to internal relocation demonstrates there is a high bar to disqualify applicants on these grounds.

Requiring Ms. Marcos to relocate within Basag would subject her to unreasonable risk because the conditions that created Ms. Marcos' well-founded fear are ongoing and pervasive across the Basag nation. The contract between the Basag government and Life Inc. is not set to expire until January 2043 (Facts at 5), and for the duration of the agreement Life Inc. will maintain "exclusive rights" to Basag's water facilities. Op. at 4. This means that regardless of where in Basag Ms. Marcos lives, for the next quarter of a century she will be required to subject herself to the mercy of Life Inc. guards each and every time she seeks her ration of this biologically necessary and non-substitutable resource. The fact that an applicant's feared persecutors had access to "opposite sides of Pakistan" was determinative to the holding that relocation was unreasonable in *Kaiser*. 309 F.3d at 660. Similarly, here, there is no area of Basag that Life Inc. guards are not stationed. This threat is compounded by the psychological trauma that Ms. Marcos has already suffered. *See* Facts at 9 (explaining that due to her history of enduring sexual threats, Ms. Marcos no longer feels safe working near men). Ms. Marcos' risk of persecution cannot be allayed by sending her husband, Bernardo, to collect water in her place. In Basag culture it is customary for

women to carry out this task (Facts at 6), and the regulation specifically does not require applicants to modify their cultural practices to avoid persecution. 8 C.F.R. § 1208.13(b)(3) (2018).

Although Ms. Marcos survived on the island of Mayaman for approximately four months after Bernardo's attack (Facts at 8-9), Mayaman is not a viable permanent home for her because conditions there are not "substantially better" than they are on Isda. *Matter of M-Z-M-R*, 26 I. & N. Dec. at 33. In finding that a Somali applicant could not reasonably relocate, the Eighth Circuit gave heavy weight to the fact that the applicant's clan membership made her conspicuous in areas other than her home region. *Awale v. Ashcroft*, 384 F.3d 527, 532 (8th Cir. 2004). Analogously, Isda-Timog women are readily identifiable on Mayaman due to their "poorer appearance." Facts at 9. Locals believe that Life Inc. guards stationed on Mayaman recognize certain women as Isda-Timog and single them out for abuse, so Ms. Marcos' family friend advised her to attempt to hide her ethnic identity during her time there. Facts at 9. Ms. Marcos' ethnicity also contributed to her inability to find permanent work on Mayaman and her need to beg for charity on the streets. Facts at 9. It is also likely that the guard who promised to "have [his] way" with Ms. Marcos, Facts at 7, has access to Mayaman. Ms. Marcos overheard a Life Inc. guard bragging that rape was equally easy on both Basag islands, suggesting that the guards travel between them. Facts at 9. Because Ms. Marcos' fear of persecution is based on abuses perpetrated by Life Inc. guards who are stationed throughout Basag and will be for the foreseeable future, the Thirteenth Circuit errored in holding that it would be reasonable for Ms. Marcos to internally relocate.

C. Alternatively, the Court of Appeals erred by violating the principle of *Auer/Seminole Rock* deference and should remand the case to the B.I.A. to clarify the definition of "government-sponsored" persecutors within 8 C.F.R. § 1208.13(b)(3).

Under longstanding administrative law principles, federal courts afford significant deference to executive agencies' interpretations of statutes and regulations. When, as in the present case, the agency has not yet defined an ambiguous term in a regulation, federal courts ordinarily

remand the question to the agency for clarification. Because the B.I.A. has never defined "government-sponsored," this case warrants a remand.

1. It is well established under the *Auer/Seminole Rock* principle that it is the responsibility of executive agencies, not federal courts, to clarify ambiguities in regulatory language.

The Thirteenth Circuit erred in dismissing Ms. Marcos' administrative deference argument. Under the principle of *Auer/Seminole Rock* deference, courts defer to an agency's interpretation of its own ambiguous regulations unless that interpretation is "plainly erroneous or inconsistent with the regulation." *Auer*, 519 U.S. at 46; *see also Seminole Rock & Sand Co.*, 325 U.S. at 414 (finding that when the meaning of a regulation's text is in doubt, the "ultimate criterion" for interpretation is the administrative construction of the regulation). The Supreme Court labeled this practice "*Chevron* deference applied to regulations rather than statutes," and the two principles operate the same in practice. *Decker v. Northwest Environmental Defense Center*, 568 U.S. 597, 617 (2013) (Scalia, J., concurring in part and dissenting in part). Just as the *Auer/Seminole Rock* principle commands deference to an agency's understanding of its own regulations, the *Chevron* doctrine holds that when Congress is silent on the meaning of a statute, "the court does not simply impose its own construction," but instead defers to the agency's interpretation as long as it is "permissible." *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc*., 467 U.S. 837, 104 (1984).

The B.I.A. has the sole authority to define the regulatory term at issue in the present case. 8 C.F.R. § 1208.13(b)(3) falls within the immigration regulations codified in Sections 1000-1399 of Title 8 of the Code of Federal Regulations, which are published by the B.I.A.'s parent agency, the Executive Office for Immigration Review within the Department of Justice. *See I.N.S. v. Aguirre-Aguirre*, 526 U.S. 415, 416 (1999) (explaining this delegation of authority in the statutory context). The B.I.A. is better placed than courts to interpret immigration guidelines because "filling the gaps" in statutes or regulations "involves difficult policy choices that agencies are better

equipped to make than courts." *National Cable & Telecommunications Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005). Unlike appellate courts, the B.I.A. "can bring its expertise to bear upon the matter; it can evaluate the evidence; it can make an initial determination; and, in doing so, it can . . . help a court later determine whether its decision exceeds the leeway that the law provides." *Orlando Ventura*, 537 U.S. at 17. This deference to executive agencies is particularly salient in the asylum and immigration contexts, where decisions implicate "especially sensitive political functions" and "questions of foreign relations." *Aguirre-Aguirre*, 526 U.S. at 416. Because this case raises questions of regulatory interpretation, the Thirteenth Circuit erred by interpreting the term itself rather than remanding to the agency.

2. The Court should follow its ordinary rule and remand the case to the B.I.A. to make a first instance determination of the meaning of "government-sponsored" within 8 C.F.R. § 1208.13(b)(3).

In the *Chevron* context, the Supreme Court has consistently held that the B.I.A. must define ambiguous statutory terms *before* federal courts can properly consider a case that turns on that interpretation. This remand rule "giv[es] the B.I.A. the opportunity to address the matter in the first instance in light of its own expertise." *Orlando Ventura*, 537 U.S. at 16-17. As one Court of Appeals explained, "We must know what [an agency] decision means before the duty becomes ours to say whether it is right or wrong." *Tillery v. Lynch*, 821 F.3d 182, 185 (1st Cir. 2016). Three recent Supreme Court rulings in the immigration context illustrate this principle in practice. In a 2006 decision, the Court reversed the Ninth Circuit's ruling that the family of a white South African foreman constituted a particular social group. *Gonzales v. Thomas*, 547 U.S. 183, 185 (2006). It held that "the matter requires determining the facts and deciding whether the facts as found fall within a statutory term" so barring "special circumstances" the Court of Appeals should have remanded to the agency. *Id.* at 187. Similarly, the Court held that a Court of Appeals overstepped by determining the significance of changed country conditions in the absence of a

B.I.A. holding on the question. *Orlando Ventura*, 537 U.S. at 12. In doing so, the lower court "seriously disregarded the agency's legally mandated role" and "independently created potentially far-reaching legal precedent about the significance of political change in Guatemala, a highly complex and sensitive matter." *Id.* at 17. Finally, and most recently, this Court found that the B.I.A. was not bound to follow the common law rule that motive and intent are irrelevant to the persecutor bar, reasoning "whether the statute permits such an interpretation based on a different course of reasoning must be determined in the first instance by the agency." *Negusie v. Holder*, 555 U.S. 511, 523 (2009). The jurisprudence from the nation's highest court is unambiguous; remand for definition is necessary when a cryptic term needs clarification. In Ms. Marcos' case, the Court of Appeals had no agency definition of "government-sponsored" to apply to the facts of this case, Op. at 13, so had no guidance in determining whether the adjudicators below were "right or wrong." *Tillery*, 821 F.3d at 185. This case should be remanded to the B.I.A. to clarify the meaning of the ambiguous term "government-sponsored" pursuant to the Court's ordinary remand rule.

It is critical that the burden of proof on the issue of internal relocation is not erroneously placed on the applicant because the decision can be outcome determinative. Courts regularly reverse and remand asylum cases when the IJ erroneously failed to explain its reasoning for shifting the burden of proof on the internal relocation issue. *Matter of D-I-M-*, 24 I. & N. Dec. 448, 451 (B.I.A. 2008) (remanding to the IJ for failure to "explicitly apply the presumption" and shift the burden of proof to DHS to show that relocation within Kenya would permit the applicant to avoid future persecution); *see also Afriyie v. Holder*, 613 F.3d 924, 935 (9th Cir. 2010) (remanding because the record did not make clear whether the B.I.A. improperly placed the burden of the relocation analysis on the petitioner). In this case, the IJ placed the burden of proof on Ms. Marcos to show that internal relocation with Basag was unreasonable after finding that Life Inc. is not "government-sponsored," but did not provide any reasoning for its determination. Op. at 15 ("the

IJ did not explain why Marcos was the correct party"). The B.I.A. summarily affirmed, also without clear explanation. Facts at 10. For Ms. Marcos' case to be evaluated in accordance with procedures, it must be clear why the burden of proof was shifted from the default. Without an agency definition of "government-sponsored," that clarity eludes the reviewing courts.

CONCLUSION

This Court should affirm the Thirteenth Circuit's adoption of the disfavored group analysis and reverse its determination that Ms. Marcos properly bore the burden of proof on the internal relocation analysis. The disfavored group analysis is consistent with the regulatory requirements for establishing a well-founded fear of persecution. It also consistent with the public policy behind the regulation because it reflects the realities of persecution around the world today. The disfavored group analysis requires the same burden of proof as alternative standards and is increasingly coming into favor with Courts of Appeals across the country. Ms. Marcos has a well-founded fear of future persecution because she both belongs to the disfavored group of ethnic Isda-Timog women, and because she faces individualized risk as a member of that group.

Additionally, the Thirteenth Circuit erred by not finding that Life Inc. is a government-sponsored persecutor within the meaning of 8 C.F.R. § 1208.13(b)(3) by the plain meaning of the term because its contract to provide a government service on the island renders it intractably interconnected with the Basag government. Further, the record compels the conclusion that forcing Ms. Marcos to relocate within Basag would put her at unreasonable risk because of Life Inc.'s extensive reach throughout the country. In the alternative, because the question of which party bears the burden of proof for the internal relocation question depends on a regulatory term that the B.I.A. has never defined, the Thirteenth Circuit erred by not remanding the case to the agency for clarification consistent with the principle of *Auer/Seminole Rock* deference. For these reasons, petitioner Marcos is eligible for and should be granted asylum in the United States.