No. 17-17002

IN THE SUPREME COURT OF THE UNITED STATES

October Term 2019

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 PETITIONER

Team # 105

QUESTIONS PRESENTED

I. Is disfavored group analysis, which requires an asylum applicant to establish both group membership and an individualized risk of future persecution, a valid basis to establish a well-founded fear of persecution for the purposes of asylum eligibility?

II. Should the government, or Marcos – an eighteen-year-old immigrant - have born the burden of demonstrating that Marcos could have avoided future persecution through internal relocation?

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The Immigration Judge (IJ) denial of Petitioner's application for asylum is unreported. The Board of Immigration Appeals' (BIA) affirmance of the IJ order is unreported.

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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.

RELEVANT STATUTORY PROVISIONS

8 U.S.C. § 1158(b)(1)(B)(i)

The burden of proof is on the applicant to establish that the applicant is a refugee, within the meaning of section 1101(a)(42)(A) of this title.

8 U.S.C. § 1101(a)(42)(A)

The term "refugee" means (A) any person who is outside any country of such person's nationality [...] 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. § 208.13(b)(2)(A)-(C)

An applicant has a well-founded fear of persecution if: (A) The applicant has a fear of persecution in his or her country of nationality [...] on account of race, religion, nationality, membership in a particular social group, or political opinion; (B) There is a reasonable possibility of suffering such persecution if he or she were to return to that country; and (C) He or she is unable or unwilling to return to, or avail himself or herself of the protection of, that country because of such fear.

8 C.F.R. § 208.13(b)(2)(C)(ii)

An applicant does not have a well-founded fear of persecution if the applicant could avoid persecution by relocating to another part of the applicant's country of nationality or, if stateless, another part of applicant's country of last habitual residence, if under all the circumstances it would be reasonable to expect the applicant to do so.

8 C.F.R. § 208.13(b)(3)

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.

8 C.F.R. § 208.13(b)(3)(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.

8 C.F.R. § 208.13(b)(3)(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

I. Statement of Facts

Petitioner Leila Marcos is an 18-year-old woman seeking asylum from her native Basag. Factual Background at 5 ("Background"). The nation of Basag is comprised of two islands, Isda and Mayaman. Background at 2. Marcos resided in Isda with her husband. Background at 5. Though both islands were affected a water crisis in Basag, Mayaman's infrastructure and higher tourism rates insulated it from the widespread shortage and violence experienced by residents of Isda. Thirteenth Circuit Opinion at 6 ("Opinion").

Responding to this crisis in 2013, President Ferdinand Aquinto signed a contract with Delaware-based international corporation Life Incorporated ("Life Inc.") giving it exclusive rights and obligations to maintain Basag's water facilities. Opinion at 4. The contract, which does not end until January 2043, requires Life Inc. to source and provide water to all people in Basag. Opinion at 4. Life Inc. employed armed guards at these facilities. Background at 5.

Life Inc.'s assignment is not explicitly referred to as "government-sponsored." Opinion at 4. However, per the contract, the Basag government will provide military assistance if the water facilities are threatened, and Life Inc. is required to pay annual fees to the government for the assignment. Opinion at 4. Additionally, the Basag military is "heavily involved" with combating the Water Warriors, a group of activists who seek to undermine Life Inc.'s management of the water facilities through targeted attacks using homemade explosives. Background at 5. This has created a "unique relationship" between Life Inc. and the Basag government. Opinion at 4.

Marcos, like most other similarly situated women in Isda, had to travel miles each way to fetch water for her family. Opinion at 4. She routinely rode her bike five miles each way to the nearest water storage facility. Opinion at 4. Rumors of Life Inc. guards sexually harassing and

assaulting women at these facilities surfaced between 2013 and 2017, and were corroborated by a United Nations report. Opinion at 4.

Marcos experienced this harassment firsthand on March 6, 2017, when a Life Inc. guard promised her more water in exchange for sex. Opinion at 4. Days later, she traveled to a well seven miles from her home, where she encountered that same guard. Opinion at 4. As she took her water from him, he whispered, "I am going to have my way with you, honey, whether you want it or not." Opinion at 5. On April 5, 2017, yet another guard physically grabbed her by the backside and whistled at her. Opinion at 5. The other guards present who witnessed the assault provided Marcos with no assistance, instead laughing and joining in whistling. Opinion at 5.

Marcos shared her experiences with her husband, who confronted the guards. Opinion at 5. Her husband took a knife from his pocket during the confrontation, at which point Life Inc. guards shot him and then brought him home rather than securing medical attention. Opinion at 5. Among the guards who took him home was the guard who had originally solicited and threatened Marcos. Opinion at 6. As he left her home, he winked at her and made an obscene sexual gesture towards her. Opinion at 6. Marcos and her husband then traveled to Mayaman to obtain medical care. Opinion at 6.

Once in Mayaman, Marcos and her husband secured temporary housing with a friend and began seeking employment. Opinion at 6. Less than a month after moving to Mayaman, Marcos overheard a Life Inc. guard telling the story of another guard who had cornered and beat a woman seeking water. Opinion at 6. She heard the guard comment, "Getting sex here is as easy as it is on Isda." Opinion at 6. This caused Marcos to believe she was unsafe and at risk of attack on either island. Opinion at 6. Marcos left Basag on August 6, 2017 and petitioned for asylum on August 7 upon her arrival in the United States. Opinion at 6.

II. Procedural History

Petitioner initially presented with an expired passport at a port of entry after her arrival to the United States via airplane. Opinion at 3. She requested asylum from a correctional facility, based on her fear of future persecution in Basag. Opinion at 3. An Immigration Judge (IJ) ruled that Marcos had a credible fear of future persecution based on her membership in a disfavored group. Background at 10. The judge, however, also ruled that she could have avoided that future persecution through relocation within Basag. Background at 10.

Marcos appealed to the Board of Immigration Appeals (BIA) for review of the IJ decision, and the government cross-appealed, challenging the finding that Marcos had a well-founded fear. Opinion at 7. The BIA summarily affirmed the IJ's decision, agreeing with both the conclusion that Marcos had established a fear of future persecution and that she could have avoided that persecution by internal relocation. Background at 10. Petitioner appealed the denial of her application to the Thirteenth Circuit Court of Appeals. Background at 10.

The Thirteenth Circuit granted review to clarify the meanings of the disfavored group analysis, and the term "government-sponsored." Opinion at 3. On review, the Thirteenth Circuit adopted the disfavored group analysis, and affirmed the finding that Petitioner had established a well-founded fear. Opinion at 11-12. The court refused to apply *Chevron* deference, instead applying its own interpretation of the term "government-sponsored," under which Life, Inc. was not included. Opinion at 15-17.

Finally, the court found that the IJ was sufficiently specific regarding the burden of proof of the reasonableness of internal relocation, and that Marcos presented insufficient evidence to carry it. Opinion at 15, 18. On Marcos' Petition for Writ of Certiorari to the Thirteenth Circuit Court of Appeals, this Court granted review.

STANDARD OF REVIEW

This case requires an exploration of legal principles as its primary endeavor. Although there is some question as to how the law is applied to the stipulated facts, those facts are not, in themselves, subject to inquiry. Pure questions of law such as this are reviewed *de novo*. *Highmark Inc. v. Allcare Health Management System, Inc*., 572 U.S. 559, 563 (2014).

However, *de novo* review is not solely reserved for pure questions of law. A mixed question of law and fact, which requires the expounding of legal principles for use on future cases, is also appropriate for *de novo* review. *U.S. Bank Nat. Ass'n ex rel. CWCapital Asset Management LLC v. Village at Lakeridge, LLC*, 138 S.Ct. 960, 966–67 (2018).

This case primarily involves the interpretation of legal principles and statutory language, as well as the clarification of how those principles and that language are to be applied to generalizable facts. Ergo, the applicable standard of review is *de novo* whether the Court determines that the case is a pure question of law or one of mixed law and fact.

SUMMARY OF THE ARGUMENT

Leila Marcos is a young woman seeking refuge from persecution and harm that has been committed against women similarly situated to her in Basag, as well as threatened against her personally. The IJ, BIA, and Thirteenth Circuit Court of Appeals all properly found that Marcos' fear was subjectively reasonable. This determination was based on her membership in a disfavored social group, combined with evidence put forth by Marcos that she has an individual risk of being singled out.

Disfavored group analysis is wholly consistent with the asylum eligibility requirements provided in the Immigration and Naturalization Act ("INA"). An applicant is required to establish the reasonableness of her fear by showing either past persecution or an individualized risk of future persecution. Disfavored group analysis considers the applicant's membership in a disfavored social group, while still requiring a showing of individualized risk. It does not lower or contravene the evidentiary burden on the applicant, but instead provides a supplemental framework for analyzing evidence that is already relevant to her eligibility. As such, it is a valid basis to determine the reasonableness of an applicant's fear.

The failure of the lower court to remand for agency clarification constitutes reversible error. The IJ and BIA committed reversible error for failing to clarify which party bore the burden of proof of establishing the reasonableness of internal relocation, and for failing to consider the statutorily dictated factors in the reasonableness analysis. Further, the ordinary remand rule states that, when an agency has not come to a determination on a term within its statutory framework, the case must be remanded to the agency.

The court also unnecessarily adopted a new test for determining "government-sponsorship." Under the widely accepted "unwilling or unable to control" test, Life, Inc. should be considered "government-sponsored," shifting the burden to the government. However, even with the burden on Marcos, her testimony was sufficient to prove that relocation was neither safe nor reasonable on a consideration of the relevant factors.

ARGUMENT

I. MARCOS HAS A WELL-FOUNDED FEAR OF FUTURE PERSECUTION BASED ON HER MEMBERSHIP IN A DISFAVORED SOCIAL GROUP AND INDIVIDUALIZED RISK OF BEING SINGLED OUT FOR PERSECUTION.

The Immigration and Nationality Act ("INA") provides that the Attorney General may grant asylum to any alien who is a refugee. *Chen v. INS*, 195 F. 3d 198, 201 (4th Cir. 1999) (citing 8 U.S.C. § 1158(b)). For this purpose, a refugee is "a person unable or unwilling to return to his home country because of […] a well-founded fear of persecution […]." *Id.* (internal quotation marks omitted).

To be considered well-founded, the applicant's fear "must be subjectively genuine and objectively reasonable." *Knezevic v. Ashcroft*, 367 F.3d 1206, 1213 (9th Cir. 2004). The "applicant's credible testimony that [she] genuinely fears persecution" satisfies the subjective element of the well-founded fear test. *Id.* The objective element is satisfied by "credible, direct, and specific evidence in the record that would support a reasonable fear of persecution." *Id.*

The Federal Rules of Evidence do not apply to asylum or other administrative proceedings. 5 U.S.C. § 556(d). In such proceedings, "[a]ny oral or documentary evidence may be received," and the agency is only required to exclude evidence that is "irrelevant, immaterial, or unduly repetitious." *Id.* This allows evidence that would otherwise be inadmissible in a non-administrative court. Specific to removal proceedings, an "immigration judge may receive in

evidence any oral or written statement that is material and relevant to any issue in the case[.]" 8 C.F.R. § 1240.7(a).

While there is no rigid statutory formulation for determining the objective reasonableness of an applicant's fear, an applicant is usually required to establish that she "faces a particularized threat of persecution" or, in other words, is likely to be "singled out" for persecution. *Kotasz v. INS*, 31 F.3d 847, 851 (9th Cir. 1994); 8 C.F.R. § 208.13(b)(2)(B). The persecution need not be certain, or even more likely than not. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 431 (1987). As little as a 10% chance of future persecution is enough to support a well-founded fear. *Knezevic*, 367 F.3d at 1212 (citing *Al-Harbi v. INS*, 242 F.3d 882, 888 (9th Cir. 2001)).

An applicant who cannot establish a risk of being singled out may still establish the objective reasonableness of her fear by demonstrating a pattern or practice of persecution "of groups of persons similarly situated" to herself. 8 C.F.R. § 208.13(b)(2)(i). Such persecution must be "systematic, pervasive, or organized" and committed by the government or forces the government is either 'unable or unwilling' to control." *Lie v. Ashcroft*, 396 F.3d 530, 537 (3rd Cir. 2005). Pattern or practice is narrowly defined, and such claims are available only in extreme cases. *Diaz-Garcia v. Holder*, 609 F.3d 21, 29 (1st Cir. 2010).

Marcos makes no such pattern or practice claim in this case. Rather, her objectively reasonable fear is supported by credible, direct, and specific evidence in the record both of her membership in the disfavored group of ethnic Isda-Timog women, and of her individualized risk of being singled out personally for persecution. The Thirteenth Circuit properly applied disfavored group analysis to Marcos' application, and properly found her fear of future persecution to be well-founded.

A. Disfavored Group Analysis is a Valid Basis to Establish a Well-Founded Fear of Future Persecution for the Purposes of Asylum Eligibility

A disfavored group consists of "individuals […] who share a common, protected characteristic, many of whom are mistreated, and a substantial number of whom are persecuted." *Wakkary v. Holder*, 558 F.3d 1049, 1052 (9th Cir. 2009). A two-prong test establishes a well-founded fear by a member of a disfavored group. *Sael v. Ashcroft*, 386 F.3d 922, 925 (9th Cir. 2004). The applicant must establish that she is a member of such a group, and that "she, in particular, is likely to be targeted as a member of that group." *Id.*

The evidence considered within disfavored group analysis is relevant to determining the objective reasonableness of an applicant's subjective fear. *Kotasz*, 31 F.3d at 853. Group membership, and evidence of actual mistreatment and persecution of that group, is evidence of an applicant's higher risk of persecution. *Id.* If such evidence, combined with a showing of individualized risk, is found "credible, direct, and specific" sufficient to "support a reasonable fear of persecution," the applicant's fear is well-founded. *Knezevic*, 367 F.3d at 1213.

Additionally, establishing membership in a disfavored group does not lower the level of individualized risk an applicant must show to demonstrate a well-founded fear. *Wakkary*, 558 F.3d at 1064. An applicant "must always show that [she] faces at least a ten percent chance of future persecution." *Id.* If persecution against the group is "haphazard and rare," an even higher showing of individualized targeting risk is required. *Chen*, 195 F.3d at 204. Accordingly, disfavored group analysis does not alter or contravene the asylum eligibility requirements set forth by Congress in the INA.

1. Evidence of Membership in a Disfavored Group Risk is Relevant to the Objective Reasonableness of an Applicant's Fear

An applicant must establish their eligibility for asylum by demonstrating a well-founded fear of future persecution, requiring both a subjective fear and the objective reasonableness of that fear. *Knezevic*, 367 F.3d at 1213. The subjective requirement may be satisfied by the "applicant's credible testimony that [she] genuinely fears persecution," while the objective component requires "credible, direct, and specific evidence in the record that would support a reasonable fear of persecution." *Id.*

Disfavored group analysis is "an evidentiary concept that applies when a petitioner attempts to show that she will be singled out individually for persecution." *Tampubolon v. Holder*, 610 F.3d 1056 (9th Cir. 2010). In asylum proceedings, which are not governed by the Federal Rules of Evidence, an "immigration judge may receive in evidence any oral or written statement that is material and relevant to any issue in the case[.]" 8 C.F.R. § 1240.7(a).

As recognized by the Ninth Circuit Court of Appeals, "one's chances of being singled out from the general population and subjected to persecution is often strongly correlated with the frequency with which others who share the same disfavored characteristics are mistreated and persecuted." *Wakkary*, 558 F.3d at 1063 (citing *Kotasz*, 31 F.3d at 853). Accordingly, proof of persecution "against a group to which [the applicant] belongs is […] *always* relevant." *Kotasz*, 31 F.3d at 853. Such proof's relevance is rooted in the "common-sense evidentiary proposition" that it "says something about the chances that [the applicant], as a member of that group, will be persecuted." *Wakkary*, 558 F.3d at 1063.

No circuit court that has declined to adopt disfavored group analysis has done so on the basis that it is not relevant to the applicant's reasonable fear – to the contrary, many have

considered the analysis but declined to formally adopt it based on the applicant's inability to establish an individual risk and therefore prevail in those cases. *See Halim v. INS*, 252 Fed.Appx. 350, 352 (2nd Cir. 2007) ("The Ninth Circuit has declined to apply disfavored group analysis where there is no individual risk."); *Sugiarto v. Holder*, 586 F.3d 90, 98 (1st Cir. 2009) (declining to apply disfavored group analysis where the applicant could not establish an individualized risk); *Hamzah v. Holder*, 428 Fed. Appx. 551, 557 n.3 (6th Cir. 2011) (declining to adopt disfavored group analysis where the applicant could not establish an individualized risk); *Ingmantoro v. Mukasey*, 550 F.3d 646, 651 n.7 (7th Cir. 2008) (declining to adopt disfavored group analysis where the applicant could not establish an individualized risk). To the extent that the evidence contained within a disfavored group analysis is found credible and probative to the issue of reasonable fear, there is no basis for disregarding it.

2. There is no Overlap Between Disfavored Group Analysis and Pattern or Practice Claims

Where an applicant has suffered past persecution, a presumption exists that her fear of future persecution is well-founded. If the applicant has not suffered past persecution, she must either demonstrate that there is a pattern or practice of persecution "of groups of persons similarly situated" to herself *or* show an individualized risk of being singled out in the future (rising to at least a ten percent chance). 8 C.F.R. § 208.13(b)(2)(i). Disfavored group analysis is a method of assessing the likelihood that the applicant will suffer persecution, and is completely unrelated to pattern or practice claims. While it includes the applicant's membership in a disfavored social group within its considerations, it does not lower the evidentiary burden on the applicant to establish her individualized risk.

The Seventh Circuit found that there was "no reason to adopt" disfavored group analysis because it was "needless in light of the pattern or practice regulation." *Pupella v. Gonzales*, 207

Fed. Appx. 683, 686 (7th Cir. 2006). In so holding, the court evinced a fundamental misunderstanding of the purpose and effect of disfavored group analysis. There is no practical overlap between disfavored group analysis, which seeks to assess the *extent* of an applicant's individual risk, and pattern or practice analysis, which seeks to establish a well-founded fear *in the absence* of individual risk. Because these analyses apply in mutually exclusive factual circumstances, no redundancy exists between them.

3. Disfavored Group Analysis Does Not Lower the Evidentiary Burden for Asylum Eligibility Set by Congress in the Immigration and Nationality Act

The perception that disfavored group analysis creates a lower evidentiary burden appears to originate from *Kotasz.* 31 F.3d at 853. There, the Ninth Circuit described the operation of the two prongs as correlational, explaining 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." *Id.* However, though the two prongs of disfavored group analysis "operate in tandem," a member of a disfavored group must *always* still be able to demonstrate that there is at least a ten percent chance that she will be singled out for persecution as a member of that group. *Chen*, 195 F.3d at 204. In some cases, this operation places a *higher* evidentiary burden on an applicant. For example, if persecution against the group is "haphazard and rare," an even greater showing of individualized targeting risk is required. *Id.*

The First Circuit found that disfavored group analysis "works a subtle alteration of the usual standards of review" and is therefore invalid, as courts are "bound by the standards Congress sets" on matters of asylum eligibility. *Wan Chien Kho v. Keisler*, 505 F.3d 50, 55 (1st Cir. 2007). Even so, however, the *Kho* court remained open to an applicant prevailing under factual circumstances that would comprise a valid disfavored group claim. *Id.* ("We note 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."). In so finding, the First Circuit disavows in name what it acknowledges is permissible in practice.

The first opinion to criticize disfavored group analysis based on its allegedly lower standard came from the Third Circuit in 2005. *Lie v. Ashcroft*, 396 F.3d at 537. In *Lie*, the petitioner's applications for asylum and withholding of removal were denied because the court found that she did not have a subjective fear of future persecution, and as such there was no need to determine whether her fear was well-founded. *Id.* Given those facts, Lie's contention that she was eligible for asylum under disfavored group analysis would have failed regardless. Though it had no need to address the applicability of disfavored group analysis, the *Lie* court did so in a footnote, stating, "We disagree with the Ninth Circuit's use of a lower standard for individualized fear absent a pattern or practice of persecution[.]" *Id.* at 538 n.4. This fundamentally mischaracterizes the purpose and effect of disfavored group analysis.

Though *Lie* informed the basis for other circuits' rejection of the analysis, no court has ever claimed that a member of a disfavored group has an objectively lower evidentiary threshold as related to her individual risk, and the Ninth Circuit has expressly refuted this claim. *See Kho*, 505 F.3d at 55; *Firmansjah v. Gonzales*, 424 F.3d 598, 607 n.6 (7th Cir. 2005). *But see Wakkary*, 558 F.3d at 1064 ("[T]he '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[.]"). The claim that disfavored group analysis contravenes congressional intent by altering the asylum eligibility standards in the INA is, therefore, without merit.

B. There is a Reasonable Possibility that Marcos Will Suffer Future Persecution if She Returns to Basag.

Marcos does not claim that her previous experiences in Basag rise to the level of past persecution, not does she claim a pattern or practice of persecution against individuals similarly situated to herself. Instead, Marcos' well-founded fear of future persecution is based on her membership in a disfavored group (ethnic Isda-Timog women) and the risk that "she, in particular, is likely to be targeted as a member of that group." *See Sael*, 386 F.3d at 925.

Both the Immigration Judge initially considering Marcos' asylum application and the Thirteenth Circuit hearing her appeal acknowledged the disfavored status of ethnic Isda-Timog women in Basag, and recognized her individualized risk of being singled out. Opinion at 11. These factual findings should remain undisturbed, as there is substantial evidence in the record to support them. *See Abedini v. INS*, 971 F.2d 188, 190 (9th Cir. 1992).

1. Marcos is an Ethnic Isda-Timog Woman, a Disfavored Group in Basag.

A disfavored group consists of "individuals […] who share a common, protected characteristic, many of whom are mistreated, and a substantial number of whom are persecuted." *Wakkary*, 558 F.3d at 1052. Women face frequent harassment, mistreatment, and assault at the hands of Life Inc. guards, "the majority of which are ethnic Hilagan." Due to the water shortage in Basag, the burden of fetching water falling primarily on Isda-Timog women and girls. Marcos (an ethnic Isda-Iimog woman) and those similarly situated to her must travel miles to Life Inc. facilities every day to provide water to their families. This "exposes them to a routine harassment, as well as an increased risk of sexual violence.

The risk to Isda-Timog women is not speculative or remote. Complaints of sexual assault by Life Inc. employees are so prevalent that Life Inc. was obligated to institute sexual harassment training all its employees. *Water Warriors: Crisis in Basag*, THE BASAG MAGAZINE

(Jan. 14, 2017). Additionally, an independent report corroborated the prevalence of these attacks, noting the increase in attacks against women similarly situated to Marcos following the Basag water shortage. *Risking Rape to Reach Water*, THE PACIFIC WORLDLY, at 20 (Jul. 18, 2017).

2. Marcos has an Individualized Risk of Being Singled Out.

Once Marcos' membership in a disfavored group is established, she must also demonstrate an individualized risk that she will be singled out for persecution as a member of that group. Marcos met this burden by describing the numerous instances of personal threats and harassment suffered during March and April of 2017, and her credibility as related to these instances was not questioned. Opinion at 3.

Marcos was sexually harassed on March 6th by a Life Inc. guard who told her that he would give her more water if she had sex with him. Opinion at 4. Marcos left and did not engage with the guard further. That same guard threatened her with rape only one week later, stating, "I am going to have my way with you, honey, whether you want it or not." Opinion at 5. Marcos then began retrieving water from another facility in an attempt to avoid that guard. Opinion at 5.

On April 5th, a different Life Inc. guard moved past mere threats and physically grabbed her backside while whistling at her. Opinion at 5. The next day, her husband confronted the Life Inc. guards who had been harassing her, and was shot in the arm. Opinion at 12. When they brought her injured husband home, Marcos recognized the guard who had threatened to rape her. Opinion at 6. At that time, the guard winked at Marcos and made an obscene sexual gesture towards her. Opinion at 6.

Marcos does not merely claim that she is generally at-risk as an ethnic Isda-Timog woman. Her well-founded fear is rooted in the prevalence of harassment and attacks against similarly situated women, in tandem with the pervasive, consistent experiences she herself

suffered in a relatively short span of time. For these reasons, Marcos has met her burden of establishing a well-founded fear of future persecution and is therefore eligible for asylum.

II. MARCOS' APPLICATION SHOULD BE REMANDED DUE TO REVERSIBLE ERROR, THE INCONSISTENT INTERPRETATION OF A STATUTORY TERM, AND A DEFICIENT ANALYSIS OF THE SAFETY AND REASONABLENESS OF RELOCATION.

Petitioner's application for asylum was the subject of reversible error at each stage of the judicial process. The IJ failed to offer the requisite explanation of the burden of proof, the BIA failed to clarify the IJ's deficient opinion, and the Thirteenth Circuit failed to ask the agency to interpret an essential statutory term before deciding the case.

The Circuit Court also applied a conflicting definition of the term "government-sponsored." Many cases, for decades, have adhered to a particular definition, and to apply anything else to this section of the statute would lead to unnecessary confusion. However, regardless of the placement of the burden, or the definition of the term, it was not safe for Marcos anywhere in Basag. Relocation would not only have been unsafe, it would be unreasonable for the courts to ask of her.

A. The Decision of the Thirteenth Circuit Should be Vacated and Remanded to the BIA for the Correction of Reversible Error.

The Immigration Judge failed to specify which party bore the burden of proving that internal relocation was or was not reasonable. This is required to ensure that a reviewing court has enough information to determine whether the IJ applied the correct standard in its consideration of the case. Had the IJ been clearer as to the placement of the burden, remand would still be appropriate due to the failure of both immigration authorities to evaluate the statutorily required factors regarding internal relocation.

The court also failed to afford due deference to the agency. The *Chevron* doctrine of agency deference arose in order to allow agencies to bring to bear their expertise on a particular issue, thereby giving the courts a greater breadth of knowledge upon which to base decisions. Courts have traditionally remanded questions back to the agency that have not first been passed on by that agency, and for which deference would likely be required.

1. Remand is Necessary Because the IJ's Language Was Insufficient to Specify Which Party Should Bear the Burden of Proof, and the IJ Did Not Demonstrate That it Considered the Relevant Statutory Reasonableness Factors.

In order to ensure that a case has been evaluated in accord with the proper burden of proof and evidentiary offering requirements, the courts must remand when it is unclear which party was given the burden. *Afriyie v. Holder*, 613 F.3d 924, 935 (9th Cir. 2010). This follows logically from the statute, as the placement of the burden greatly affects whether the applicant is required to present any evidence at all of whether internal relocation is reasonable.

In *Afriyie*, the IJ in the underlying case offered conflicting statements as to who suffered the burden, and the BIA simply expressed agreement with the IJ's conclusions. *Id.* This was enough to remand the action back to the BIA.

According to the Thirteenth Circuit, the IJ statement that "Marcos must prove that, under all the circumstances, it would be reasonable for her to relocate" was sufficient to show where the burden was placed. Opinion at 15. However, this statement could as easily have been the result of the false assumption that the burden was always Marcos' to bear, and says nothing of the analysis that led to that conclusion. The Thirteenth Circuit further states that the IJ characterized Life, Inc. as "not 'government-sponsored.'" *Id.* However, no reasoning is provided

for either of the IJ's conclusions, and the BIA failed to offer any clarification in its summary affirmance. Background at 10.

Because the IJ failed to adequately explain that Marcos was given the burden of proof, and because no reasoning at all was offered for the characterization of Life, Inc. as "not 'government-sponsored'" - critical to determining if a shift of the burden is required - the case should be remanded to the BIA for clarification.

Additionally, it is impossible to determine from the record whether the IJ and the BIA considered the appropriate factors relevant to determining the reasonableness of internal relocation; remand is required when this occurs. *Afriyie*, 613 F.3d at 935. (stating that the courts and judges are bound by the statute to take into account certain factors relating to internal relocation); *See also Knezevic*, 367 F.3d at 1214–15 (finding the IJ's relocation determination deficient because it failed to take into account the statutory reasonableness factors).

The requisite factors from the statute do not appear in the record until the fourteenth page of the Thirteenth Circuit's opinion. Even then, they are simply recited, and never applied to the facts. Opinion at 14. The lower court seems quite certain that the burden was shifted to Marcos to prove the unreasonableness of relocation. *Id.* at 15. Unfortunately, the same attention was not paid to her full testimony, which is never mentioned in the same sentence as the statutory factors.

Without guidance from the proceedings of the immigration authorities, neither the parties nor a reviewing body are able to effectively consider if error was committed. Because the record is unclear as to where the burden of proof of the reasonableness of internal relocation was placed, as well as to whether the statutorily dictated factors were considered by the IJ or BIA, the case should be remanded to the BIA for *de novo* consideration of those issues.

2. Remand is Also Necessary Because the Court of Appeals Failed to Give the Agency the Opportunity to Interpret a Term in the Statute that was Integral to the Court's Decision.

This Court's precedent states that courts should defer to agencies' "reasonable formulation of policy in response to an explicit or implicit congressional delegation of authority." *Negusie v. Holder*, 555 U.S. 511, 530 (2009). The BIA was explicitly granted the authority of the Attorney General, by statute, to provide guidance through adjudicatory interpretation of the provisions of the INA. 8 C.F.R. § 1003.1.

The Thirteenth Circuit does not dispute the authority of the IJ and the BIA to define the term "government-sponsored," but rather asserts that it is the role of the courts to define terms in the absence of a prior agency determination. Opinion at 13.

The principle of agency deference has been specifically applied to BIA interpretation of ambiguous statutory terms through the process of case-by-case adjudication. *I.N.S. v. Aguirre-Aguirre*, 526 U.S. 415, 425 (1999). (holding that the Ninth Circuit failed to accord due deference in rejecting the agency's interpretation of the term "serious non-political crime.").

In direct contradiction to the assertion of the Thirteenth Circuit, this Court has held that a case should be remanded "to an agency for decision of a matter that the statutes place primarily in agency hands." *I.N.S. v. Orlando Ventura*, 537 U.S. 12, 16–17 (2002). In *Orlando Ventura*, the Ninth Circuit took it upon itself to decide whether circumstances in the applicant's home country had significantly changed rather than remanding to the BIA to make a decision in the first instance. *Id.* at 14. This Court reversed the Ninth Circuit, and emphasized the importance of allowing the agency to make initial determinations - especially on matters with potentially far-reaching consequences. *Id.* at 16-17.

In *Negusie*, the Court quoted a 1991 DC Circuit opinion joined by current Justice Ginsburg stating that, even when an agency has declared statutory wording to be clear, it is the courts' duty to remand to the agency if they determine, nonetheless, that ambiguity exists. *Negusie v. Holder*, 555 U.S. 511, 523 (2009) (quoting *Cajun Elec. Power Cooperative, Inc. v. FERC*, 924 F.2d 1132, 1136 (C.A.D.C., 1991)).

This goes much farther than simply deferring to agency interpretations. Indeed, it is highly preferred that an agency first make a determination on an issue of ambiguity before the courts consider that issue. Whereas in *Negusie*, the Court remanded so that the agency could more comprehensively define the term "persecution" consistent with case law, in the instant case no agency interpretation is even attempted. *Negusie,* 555 U.S. at 524.

At times, even a deficient agency interpretation requires remand, but the Thirteenth Circuit, here, failed to ask the agency to bring to bear its expertise on the issue even in the complete absence of an initial determination. Such clear misapplication of the law requires *vacatur*.

B. The Life, Inc. Guards were "Government-Sponsored," According to Existing Case Law, Shifting the Burden of Proof to the Government.

The Code of Federal Regulations states, in pertinent part, that where the persecutor of an asylum applicant is the government, or is government-sponsored, the burden of proof that internal relocation would be reasonable lies with the government. 8 C.F.R. § 208.13 (b)(3)(ii).

According to the Thirteenth Circuit, neither the BIA nor the IJ have provided a definition of the term "government-sponsored." Opinion at 13. Instead of asking for clarification, the court employed a "comparable to a private criminal actor" test to reject Petitioner's argument that Life, Inc. is "government-sponsored." Opinion at 16-17. In footnote 5 of the Thirteenth Circuit's

opinion, the court notes that they will rely on applicable case law to make a determination, as opposed to policy. Opinion at 16, n.5.

This suggests that supporting law exists, but the court offers no authority for the "comparable to a private actor" standard that it espouses. In fact, a similar notion has previously been denounced. In *Angoucheva v. I.N.S.*, an IJ dismissed sexual assault by a government officer as an individual action, but the Seventh Circuit rejected that treatment of the claim and ordered a more extensive examination of the issue by the BIA. *Angoucheva v. I.N.S.*, 106 F.3d 781, 790 (7th Cir. 1997).

As in Marcos' case, the government in *Angoucheva* seemed to imply that because the sexual assaults were not officially sanctioned by the home-government, and were secretive, the applicant could not claim that the attack was "government-sponsored." *Id.* This explanation was insufficient in the Seventh Circuit, and should be rejected here as well.

The "consistent meaning" canon of statutory construction dictates that a term should be applied with the same meaning throughout a statutory framework.[1] The application of different meanings to the same term within a statute is inefficient, and could lead to confusion. Petitioner urges this Court to apply the canon, and adopt the "unwilling or unable" standard used by the courts to analyze the meaning of "government-sponsored" in the context of finding a well-founded fear of persecution.

At least as far back as 1981, the courts have equated government persecution with the unwillingness or inability of the government to control a persecuting group within the immigration and refugee context. *McMullen v. Immigration and Naturalization Service*, 658 F.2d

[1] John F. Manning & Matthew C. Stephenson, LEGISLATION AND REGULATION: CASES AND MATERIALS, 3RD EDITION 289-294 (2017).

1312, 1315 (9th Cir. 1981) (listing the requirements for withholding of removal); *See also Arteaga v. I.N.S.*, 836 F.2d 1227, 1231 (9th Cir. 1988) (explaining that threats of forced conscription from anti-government guerrillas that the government cannot or will not control suffice to meet the standard for asylum).

In 1999, the Ninth Circuit ruled in favor of a Kurdish-Muslim applicant whose family was targeted in Armenia. *Mgoian v. I.N.S.*, 184 F.3d 1029, 1036–37 (9th Cir. 1999). The Armenian government turned a blind eye to repeated attacks by private actors against the Mgoian family, and the courts recognized that the applicant in that case had shown with unrebutted evidence that the government was unable or unwilling to control the violence, qualifying for asylum. *Id*. *See also Avetova-Elisseva v. I.N.S.*, 213 F.3d 1192, 1196 (9th Cir. 2000) (holding that the applicant demonstrated a well-founded fear because the Russian government was unable or unwilling to control harassment of Armenians).

If there have been reports, the courts will look to how the police or government responded to those requests for protection in determining if the government was acquiescent. *Bringas–Rodriguez v. Sessions*, 850 F.3d 1051, 1063 (9th Cir. 2017). Marcos did not report the incidents to police herself, but such a report is not required to meet the standard. *Id.* at 1066–67. The lack of a report simply leaves "a gap in proof about how the government would respond if asked, which the petitioner may attempt to fill by other methods." *Id*. See also *Rahimzadeh v. Holder*, 613 F.3d 916, 922 (9th Cir. 2010) (noting the validity of the "gap filling" method of proving the government was unable or unwilling to control persecution).

In these cases, gaps in proof can be filled, *inter alia*, by providing evidence that reports would be frivolous, establishing that the abuses are widespread but control has not been exerted

by the government, or by demonstrating that the country's laws or customs preclude access to redress. *Id.*

Marcos has provided evidence through credible testimony that the Basag military and Life, Inc. guards have both made attacks on the Timog population. Background at 4-5. Both of the entities have killed men and women who were not so-called Water Warriors. Background at 5. Further, the Life, Inc. contract imposes serious penalties on the government for breach, whereas Life, Inc. guards may break the laws of Basag without breaching the contract. Background at 5, n.1. A woman was raped in a nearby village, but no legal action was taken, even though it is permissible within the liability clause of the contract to hold the guard responsible. Background at 5-6, n.2. This was happening all over Basag, and there is no evidence in the record of guards suffering consequences. Background at 7-9.

Even if there had been arrests, that is not always enough to signal that the government is willing and able to control rogue elements of society. *Singh v. I.N.S.*, 94 F.3d 1353, 1357 (9th Cir. 1996). The Ninth Circuit, in *Singh*, noted that a Hindu couple escaping violence in Fiji qualified for asylum; the existence of a few arrests in high-profile persecution cases was not government control, as it was unclear if the penalties for those parties amounted to any more than a slap on the wrist. *Id.*

In Basag, an alleged rape was dealt with by simply requiring sexual harassment training and issuing a new company policy. Background at 6, n.2; Opinion 4-5. For a rape victim, this is of little solace, and demonstrates the futility of reporting abuses perpetrated by Life, Inc. guards.

This Court should adopt the already well-worn "unable or unwilling to control" test, in order to determine "government-sponsorship." The "consistent meaning" canon of construction

is appropriate, and its application will allay concerns of conflicting applications of the same term within the immigration context prospectively.

The Basag government was complacent as to the persecution of Timog women. Reports were met with only token responses. Marcos' credible testimony provided ample proof to fill the gaps left by a lack of her own personal police report. Ergo, the persecution of Timog women by Life, Inc. guards was "government-sponsored."

C. Even if Petitioner Properly Bore the Burden of Proof, Her Testimony Established that Internal Relocation was Neither Safe Nor Reasonable.

Marcos' testimony was deemed credible, so it must be taken as true. Petitioner's testimony provided evidence that internal relocation was not safe, anywhere in Basag. The only potential option, relocating to Mayaman, was not safe as Marcos could be distinguished, and therefore targeted, based on her appearance.

Notwithstanding the unavailability of safety, relocation was not reasonable to ask of Marcos. The government suggested no specific place for the court to analyze, but, assuming that such a place existed, the relevant factors counsel against requiring relocation.

1. Safe Internal Relocation was Not Possible, Based on Petitioner's Credible Testimony.

The statute at issue states that an asylum applicant's credible testimony may be enough, on its own, to establish certain facts without any corroboration. 8 C.F.R. § 208.13(a). If the IJ expressly finds credibility, and the BIA does not dispute this finding, then courts must accept the testimony of the applicant as true. *Mgoian*, 184 F.3d at 1033. If the IJ dismisses the testimony of the credible applicant, the IJ must provide a full explanation of why corroboration is required, and why the applicant's attempts are inadequate. *Oryakhil v. Mukasey*, 528 F.3d 993, 999 (7th

Cir. 2008) (holding that it was improper for the IJ to ask for more evidence of Oryakhil's contentions after he had already found Oryakhil credible).

According to the Thirteenth Circuit, "the IJ found Marcos to be a credible witness. There were no questions concerning her credibility." Opinion at 3. Therefore, her testimony should have been taken as true, as there were no requests for corroboration of any part of the testimony evident in the record, and so no signal of deficiency.

The internal relocation analysis has two parts. First, it must be possible for the applicant to achieve safety by relocation within the applicant's country. 8 C.F.R. § 208.13 (b)(1)(i)(B). *See also Oryakhil*, 528 F.3d at 998; *Gambashidze v. Ashcroft*, 381 F.3d 187, 191 (3rd Cir. 2004). Logically, if it is not possible to find safety in another part of the country, it is not reasonable to ask the applicant to internally relocate in order to find safety.

Marcos credibly testified that the abuses perpetrated by Life, Inc. guards were known on both of the Basag islands. Background at 6-9. Marcos was forced to go to multiple water stations on Isda, but continued to witness and suffer harassment and threats. Background at 6-8. Upon relocating to Mayaman after her husband was shot, she was told that Isda-Timog women were targeted on Mayaman as well, and she was warned to buy nicer clothes to appear Hilagan. Background at 9. Marcos also heard a Life. Inc. guard stating that he had beaten a woman until she acquiesced to sex with him, and that it was as easy to perpetrate such acts on Mayaman as it was on Isda. Background at 9.

This testimony, taken as true, shows that it was not safe to simply relocate within Basag, neither on Isda nor Mayaman. Petitioner has distinguishing characteristics that make her unlikely

to assimilate into Mayaman society. Marcos' relative poverty makes her more likely to be targeted, as her clothing signals her Isda-Timog heritage. Background at 9.

In a decision later affirmed by the Ninth Circuit, a California District Court considered that the religious dress of an applicant would cause him to be readily identifiable wherever he went within India. *Singh v. Ilchert*, 801 F.Supp. 313, 321 (N.D. Cal. 1992).

Even in a country as big as India, the courts accepted that an individual could be distinguishable based on his appearance. *Singh v. Ilchert*, 63 F.3d 1501, 1511 (9th Cir. 1995). Although we do not have the exact size statistics of Basag's islands, it is safe to assume that the islands are not as large as India. Basag is a nation of two islands, made up primarily of two ethnicities. Background at 2. India, on the contrary, is a nation of at least 6 prevalent religions, 22 different major languages, all spread across 35 states or territories.[2]

If Singh could show that he was a potential target even amidst over 1 billion inhabitants of a multi-ethnic country simply by his dress, then Marcos too has a legitimate claim that her poorer appearance amidst a wealthier populace will effectively give away her identity and make her a target.

Marcos' credible testimony established that there was no safe place on either Isda or Mayaman for relocation. Relocating to Mayaman would place Petitioner at risk of being targeted due to her distinguishing relative poverty. As such, it was not safe to relocate within Basag.

[2] *Ethnicity of India*, INDIA.GOV.IN ARCHIVE, https://archive.india.gov.in/knowindia/culture_heritage.php (Jan. 22, 2010).

2. No Place of Safe Relocation was Posited by the Government, but, Even if Such a Place Existed, Relocation would Not be Reasonable to Ask of Petitioner.

According to the statute, "adjudicators should consider … whether the applicant would face other serious harm in the *place of suggested relocation*." 8 CFR § 208.13 (b)(3) (emphasis added). The language of the statute implies that the government must suggest such a place. After determining that it would be safe to relocate to some part of the country, the court can then analyze the reasonableness of requiring relocation. *Knezevic*, 367 F.3d at 1214 (stating that because there is evidence that the Serb-held parts of Bosnia-Herzegovina would be safe, the court should then look to the reasonableness of relocation.).

The IJ did not provide reasoning, nor did the BIA, for the conclusion that safe relocation to another part of Basag was possible. Neither suggested any place within Isda or Mayaman for relocation. This is necessary in order to determine if the burden of proof was carried as to reasonableness. If the burden was rightly placed on Marcos, as suggested by the lower court, she would be incapable of demonstrating the unreasonableness of relocating to an unnamed place.

Petitioner assumes, *arguendo*, that such a place does exist. Once a safe area of relocation is suggested, the applicant with the burden of proof must show that relocation is unreasonable. 8 C.F.R. § 208.13 (b)(3)(ii).

When assessing reasonableness, the court looks to several factors: ongoing civil unrest, sufficiency of infrastructure, and social and cultural constraints such as family ties. 8 C.F.R. § 208.13 (b)(3). *See also Knezevic*, 367 F.3d at 1214. In *Knezevic*, the court considered the difficulty of finding employment and the difficulty of starting a life from nothing. *Id.* Ultimately, the Ninth Circuit concluded that asking anyone to do that would be exceptionally harsh, and remanded the case back to the BIA for further consideration. *Id.* at 1214-1215.

Marcos testified to the existence of a country-wide water shortage. Background at 3. This speaks to a lack of essential infrastructure. She testified to the continued existence of a terror organization strategically targeting the most precious resource on Basag, fresh water. Background at 4-5. She has already moved twice within three years due to severe flooding. Background at 6. Further, if Marcos had family in Mayaman, it is likely she would have sought their assistance after her husband was shot, and she was forced to beg in the streets. Background at 8-9. Like in *Knezevic*, asking Marcos to relocate would be asking her to start again with nothing, rather than allowing her to stay with her husband's relatives in the United States.

It is impossible for Petitioner to show the court that relocation is unreasonable without a suggested location. However, assuming safe internal relocation is possible, Marcos' testimony proves that it is unreasonable to ask of her.

CONCLUSION

The IJ, BIA, and Thirteenth Circuit Court of Appeals all agreed that Marcos has a reasonable and well-founded fear of future persecution. She credibly demonstrated her membership in the disfavored social group of Isda-Timog women, and her own individualized risk of harm. Disfavored group analysis is a valid and appropriate method for determining an asylum applicant's well-founded fear of suffering future persecution. This analysis supplements, but does not alter, the statutory eligibility requirements set forth in the INA. It does so only using evidence that is already relevant to the determination. Petitioner accordingly asks this Court to adopt disfavored group analysis.

On the matter of the burden of proof, and internal relocation, the lower courts failed to employ the necessary legal standards. The IJ's and BIA's placement of the burden of proof was unclear, and unexplained, and the court's defining of "government-sponsorship" was improper.

The case should be remanded for clarification on these issues, so as to provide the best possible record upon which to make an informed decision.

If the Court wishes to reach the merits here, Petitioner asks this Court to adopt the "unwilling or unable to control" test, which is well-accepted and has been applied in innumerable other cases regarding "government-sponsorship" in the persecution context. This Court should find that Life, Inc. was indeed "government-sponsored," shifting the burden to the government. However, in the alternative, the Court should deem Marcos' credible testimony sufficient to carry that burden, as she provided ample evidence to demonstrate unreasonableness, per the statutory factors.