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

COMPETITOR ID 106
COUNSEL FOR PETITIONER

QUESTIONS PRESENTED

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

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

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JURISDICTIONAL STATEMENT

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

STATEMENT OF THE CASE

Leila Marcos is an 18-year old Timog woman from Basag, seeking asylum from the sexual assault, sexual harassment, and threatening and harsh treatment she has endured from the government-contracted company, Life Incorporated (hereinafter "Life Inc."). (R. at 2, 4, 9). Leila grew up on Isda, one of two islands that make up the country of Basag. (R. at 1). Isda is the poorer of the two islands that make up Basag, in large part because of serious environmental and climate challenges that have ruined its once self-sustaining fishing-based economy. (R. at 2-3). Mayaman, its neighboring island, has a more stable economy based on tourism and has not been independently harmed by climate change. (R. at 2-3). For centuries, the two islands were separated along ethnic lines – the Hilagan people lived on Mayaman and the Timog people resided on Isda. In 2011, potable water became scarce due to rising sea levels contaminating fresh-water wells. (R. at 3).

In January 2012, due to the lack of fresh water, the Basag government nationalized all sources of fresh water. Id. In 2013, the government signed a 30-year Concession Contract with Life Inc., assigning them full and exclusive control over all of the country's water resources. (R. at 3-4). Per the contract, Life Inc. became responsible for maintaining and providing water to the population of Basag. (R. at 4). In return, the Basag government promised to provide military support to protect any threatened water facilities. Id. Life Inc.'s contract has a clause that, upon being triggered by breach, would result in substantial liability for Basag, but Life Inc.'s violation of Basag's criminal law, though written into the contract, does not constitute breach. (R. at 5, n.1). Moreover, despite the numerous publicly reported incidents of Isda-Basag women being harmed and Life Inc. and the Basag military's combined 75 mistaken murders, President Aquinto encourages foreigners to visit Basag, tweeting that it remains a prosperous and safe nation. Id.

While life on Mayaman was relatively unaffected, Isda, the poorer and more rural island, was neglected by Life Inc. Some of its inhabitants continue to travel up to twenty miles to get fresh water. (R. at 4-6). By 2016, many Timogs remaining on Isda could not afford to travel to Mayaman or other more habitable areas. (R. at 4). These tense circumstances engendered protests at water facilities, aimed at demanding more attention and concern from President Aquinto for the water shortage on Isda. Id. During a protest in June 2016, Basag military forces assigned to guard the water facility shot into and tear gassed the crowd. Id. After the protest, a small, but highly organized group of Basag citizens formed, creating the Water Warriors. Id. The Water Warriors target water facilities around Basag with homemade explosives. (R. at 4-5). To combat them and further secure their facilities, Life Inc. has hired armed guards, who work alongside the military forces the Basag government provides to Life Inc. (R. at 5). Since July 2016, the Life Inc. guards and Basag military have killed more than 75 people, mistakenly identifying as members of the Water Warriors; the majority of these people were inhabitants of Isda. (R. at 5).

Ms. Marcos must bike 10 miles every three days in order to receive water. (R. at 6). As is typical on Isda, Ms. Marcos gathers water for her home while her husband works locally. Id. The couple have been forced to move twice in the past three years because of severe flooding. Id. Her first experience with harassment by Life Inc.'s guards occurred on March 6, 2017. Id. While she was getting water, a guard said he would give her more than her provision if she had sex with him. (R. at 6). Ms. Marcos knew that this was a threat as just two weeks prior to that time, an Isda woman from a nearby village was similarly approached by a guard meant to be protecting the water facility and he raped her. Id. The government took no action against the guard or Life Inc. Id. Life Inc.'s sole response, after public outcry, was to announce that its employees underwent

sexual harassment training and that any guard who sexually assaulted someone would be fired. Id. No action was taken against the guard. Id. n.2.

Three days later, the next time that Ms. Marcos needed her provision of water, she deliberately traveled to a different water source over twice as far away (a total of 20 miles away), to avoid a similar fate. (R. at 6-7). At another storage facility spotted along her route, she witnessed a guard force a pregnant woman to strip to prove she was not a Water Warrior before allowing her to get her publicly provisioned water. (R. at 7). This well was then destroyed by the Water Warriors, forcing Ms. Marcos to return to the original well where she had been harassed less than a week before. Id. Ms. Marcos was again threatened by the armed security guard, who whispered to her, "I am going to have my way with you, honey, whether you want it or not." Id. She feared for her safety but did not have access to an alternative facility at which to procure water. Id.

A few weeks later, while receiving water at a checkpoint that had been established relatively closer to her village, due to record high, unsafe temperatures, Ms. Marcos was assaulted. (R. at 7-8). An armed Life Inc. guard grabbed her backside and whistled, to the delight of the other guards present, who laughed and whistled at their colleague's harassment (R. at 8). His behavior constitutes molestation, as enforced under Basag Pen. Code § 4350(a)(1). (R. at 5, n.1). The next evening, Ms. Marcos managed to tell her husband what she had suffered the day before and what she had been enduring at the water facilities over the course of the last month. (R. at 8). Her husband then confronted those guards, who shot him when, irate, he pulled out a fillet knife from his pocket. Id. Those guards then escorted her husband back home, seeing where they lived. Id. One of those guards had been Ms. Marcos' harasser on numerous occasions. Id. Before he left, he winked at her and gestured a thrusting motion up with two of his fingers. Id. The couple then moved temporarily to Mayaman for Bernardo to seek medical treatment for his guard-inflicted

injury and to escape future harm. Id. Ms. Marcos conveyed that she truly feared for her safety if they returned to their home in Isda. Id.

As warned by her husband's friend, Ms. Marcos and other similarly situated Isda-Timog women continued to face persecution on Mayaman from the Life Inc. guards, who targeted them specifically. (R. at 8-9). The guards can identify Isda-Timog women from their poorer appearances and inability to buy local clothing that Mayaman women may wear. (R. at 9). Ms. Marcos did not herself witness violence in the few months she stayed on Mayaman. Id. However, she continued to suffer the ramifications of her past experiences as she now felt reluctant to work around men. Id. She was also concerned by rumors circulating about an unmarried Isda-Timog women who had become pregnant from unknown means. Id. Additionally, one evening Leila noticed some of Life Inc.'s armed guards approaching her, in order to access a nearby well to the tourist areas. Id. Thinking instinctively, she hid from them, but clearly overheard one boast, "I cornered her by the well, and hit her until she submitted. Getting sex here is as easy as it is on Isda." Id. Ms. Marcos worked hard to collect money and, in August 2017, was finally able to afford a one-way plane ticket to the United States, where she could stay with relatives until her husband joined her. Id.

There have been many subsequent rumors of Life Inc. guards raping Isda-Timog women. A United Nations report corroborates female accounts of rape by Life Inc. guards from 2013 onwards. (R. at 17). Evidence shows and both parties agree that the Basag government never took any action against Life Inc. or its employed armed guards. Id.

After applying for asylum, an Immigration Judge (hereinafter "IJ") ruled that Ms. Marcos had a reasonable fear of persecution, as established by the disfavored group analysis. (R. at 10). However, the IJ determined that she had not satisfied her evidentiary burden of proof, demonstrating that she could not reasonably relocate within the country, but without specifying

why she had that burden or commenting on. Id. The decision was summarily affirmed by the Bureau of Immigration Appeals (hereinafter "BIA"). Id. The Attorney General and Ms. Marcos cross appealed to the Court of Appeals for the Thirteenth Circuit (hereinafter "Appellate Court"). (R. at 13). The Thirteenth Circuit affirmed the IJ and BIA's approval and use of the disfavored group analysis, but also affirmed their holding as to relocation, reasoning that Life Inc. was not "government-sponsored" and affirming the IJ's assignment of evidentiary burden to Ms. Marcos. Id.

SUMMARY OF THE ARGUMENT

To establish asylum eligibility, an applicant must demonstrate that she suffers a reasonable fear of future persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. In addition, she must show that she cannot reasonably relocate within her country of origin. The applicant bears the burden of showing relocation is unreasonable. Ms. Marcos was determined by the IJ to have a reasonable fear of future persecution based on the disfavored group analysis. Using this analysis, the IJ concluded that the persecution Leila's group was subjected to in addition to the individual instances of persecution satisfied the statutory requirement that she have a reasonable fear of future persecution.

The disfavored group analysis was affirmed by the Appellate Court is consistent with the plain language of the statute. To ignore this test would be stating that the threat of sexual assault inherent to one's being an Isda-Timog women is not persecution. The Attorney General argues that this analysis is a judicial creation that has been rejected by several circuits. This ignores the fact that the statute and every circuit require an assessment of individual persecution which includes persecution that is due to the group the applicant belongs to. Additionally, several Circuit

Courts have begun to reanalyze the analysis acknowledging it maintains the threshold required by the statute.

The IJ's statutory application of the disfavored group analysis should be affirmed because asylum has been deferred to the BIA which has special expertise in the area of immigration and foreign policy. Finally, the disfavored group analysis increases uniformity and efficiency in the immigration system by allowing the BIA to assess persecution to broad groups of people, disallowing case by case variance for applicants in similar circumstances.

The Appellate Court, in affirming the decision of the IJ and the summarily approved decision of the BIA, erred. It incorrectly decided to evade Chevron deference, which required that it defer to the BIA to interpret the meaning of "government-sponsored" persecution through case-by-case adjudication. This interpretation requires agency expertise, as it especially evokes challenging political questions of foreign policy. Moreover, the Appellate Court's independent interpretation of "government-sponsored" is inconsistent with past BIA precedent and federal case law and common law.

Moreover, the IJ erred by characterizing Life Inc.'s conduct as not "government-sponsored" persecution. Its decision, only summarily affirmed by the BIA, does not carry the force of law and is therefore only entitled to deferential review under Skidmore, if at all. In fact, the IJ's legal conclusions were so cursory that any reviewing court would ordinary require it to further develop the record rather than deciding the interpretation of "government-sponsored" *de novo*. These legal errors by the Appellate Court and IJ resulted in an abuse of discretion, which would only be remedied by remanding the case back to the IJ, to use BIJ administrative guidance and law to interpret the meaning of the term and develop why it does or does not apply to Life Inc.'s conduct. Ms. Marcos was wrongfully assigned a burden of proof without the necessary factual and

legal determinations that would enable the Court to require of her an evidentiary showing as to her inability to reasonably relocate elsewhere in Basag. Her asylum request should have never been dismissed on that basis.

ARGUMENT

I. STANDARD OF REVIEW

This Court affords no deference to the Appellate Court's review of the BIA's decision. See Highmark Inc. v. Allcare Health Mgmt. Sys., Inc., 572 U.S. 559, 563 (2014). Review of the BIA's determination is governed by the substantial evidence rule and can only be reverse if the result was not in accordance with law or "unsupported by substantial evidence." See Refrigerated Transp. Co. v. I.C.C., 616 F.2d 748 (5th Cir. 1980). When the BIA summarily affirms the IJ's decision, that decision is reviewed as the BIA's decision. See Al Najjar v. Ashcroft, 257 F.3d 1262, 1284 (11th Cir. 2001).

II. THE DISFAVORED GROUP ANALYSIS IS A VALID BASIS FOR ESTABLISHING MS. MARCOS' WELL-FOUNDED FEAR OF PERSECUTION.

A. The Disfavored Group Analysis Is Not a Judicially Created Alternative Because It Is Simply an Application of the Plain Language Contained in the Statute.

The disfavored group analysis is not an alternative to the statute but rather the most appropriate application of the plain language. In order to establish asylum eligibility an applicant must demonstrate a "well-founded fear of persecution." 8 C.F.R. § 208.13(b)(2). "Well-founded fear" requires both that the applicant has a fear of persecution…on account of race, religion … [or] social group" and "there is a reasonable possibility of suffering such persecution." Id. The statute provides two ways for individuals to demonstrate "reasonable fear": through "a "pattern or practice" of persecution or showing a likelihood of being "individually singled out." Wakkary v. Holder, 558 F.3d 1049, 1062 (9th Cir. 2009) (citing 8 C.F.R. § 208.13(b)(2)). The disfavored group

analysis looks at the fear and possibility of persecution an applicant is subjected to on account of the group to which they belong both generally and specifically. See Tampubolon v. Holder, 610 F.3d 1056, 1060 (9th Cir. 2010).

While the Thirteenth Circuit's conclusion, affirming the IJ's use of the analysis is correct, the characterization of the disfavored group analysis as "a judicially created alternative to the statutory and regulatory scheme" is inaccurate. (R. at 21). To ignore the fear and possibility of persecution all members of a group are subjected to when considering their asylum eligibility would directly contradict the statutes plain language that states a well-founded fear is based on "persecution…on account of…social group." 8 C.F.R. § 208.13(b)(2) (emphasis added). This case demonstrates the necessity of the disfavored group analysis. Ms. Marcos, as an Isda-Timog women is put a higher risk of sexual assault demonstrated by her reports of various incidents of rape and sexual assault and further corroborated by a UN Report. (R. at 6, 14). The result of a rejection of this analysis would completely ignore the increased risk of sexual assault the group is subjected to. To hold Ms. Marcos fear of sexual assault unreasonable because it applies to the whole group of Isda-Timog women directly contradicts Congress's statutory language. The statute requires an account of the persecution that an individual suffers. The disfavored group analysis measures this risk, whether it applies to many individuals or just one, when assessing an applicant's claim under the statute and therefore its use should be affirmed.

i. All Circuits Agree That Determining Whether a Well-Founded Fear Exists Requires Consideration of the Dangers Posed to an Applicant's Group.

Every Circuit recognizes the effect of disfavored group membership when determining whether an applicant meets the well-founded fear requirement. While several circuits have in the past explicitly rejected the disfavored group analysis most acknowledge that persecution suffered by every individual of a group is relevant in the context of measuring an individual's reasonable

fear. See, e.g., Salim v. Holder, 728 F.3d 718, 723 (7th Cir. 2013) ("[W]e often discuss a petitioner's membership in a particular group in the context of assessing an individualized threat of future persecution[.]); Tasya v. Holder, 574 F.3d 1, 4 (1st Cir. 2009) (acknowledging that context surrounding a groups persecution is relevant to establishing reasonable fear); Susilo v. U.S. Atty. Gen., 268 F. App'x 909, 911 (11th Cir. 2008); Lie v. Ashcroft, 396 F.3d 530, 538 (3d Cir. 2005). As the Ninth Circuit succinctly stated disfavored "group membership nonetheless places [the individual] at some risk." Wakkary, 558 F.3d at 1062. This weighs heavily in favor of accepting the disfavored group analysis.

To not credit an applicant with persecution experienced by a group to which they belong is explicitly contrary to statute. By definition any persecution that an entire group is subjected also apples to individuals of the that group. The statute acknowledges this by waiving the individual requirement when the groups persecution constitutes a "pattern or practice". 8 C.F.R. § 208.13(b)(2)(iii). Court's that refuse to credit general group persecution towards the individual requirement when the "pattern or practice" threshold is not met is contrary to the statute's clear intent. Congress included the "pattern or practice" exception to streamline the immigration process for severe cases of systemic persecution not to eliminate from consideration the persecution individuals suffered under slightly less severe circumstances. Accord Knezevic v. Ashcroft, 367 F.3d 1206, 1211 (9th Cir. 2004). To read this exception, which makes asylum easier for groups that are severely persecuted, to bar any consideration of a groups persecution that falls slightly below that threshold in assessing an individual's risk is a gross misinterpretation. "[T]hese two categories of future-fear claims should not be understood to require discrete sorts of evidence." Wakkary, 558 F.3d at 1062.

The analysis explicitly recognition and an attempt at consistently accounting for the group persecution applicants suffer. Ms. Marcos' experience demonstrates the relevance of considering an asylum applicants group. The higher risk of persecution Isda-Timog women are subjected to unfortunately, but necessarily, raises the amount of fear it is reasonable for Ms. Marcos to have. (R. at 1-4). A rejection of the disfavored group analysis would ignore that risk.

ii. The Disfavored Group Analysis' Consideration of Group-Level Persecution Does Not Lower the Burden of Proof.

Circuits that reject the disfavored group analysis because they incorrectly interpret it as an alternative to the statute. E.g. Kho v. Keisler, 505 F.3d 50, 55 (1st Cir. 2007) (the disfavored group analysis "subject[s applicants] to a lower burden of showing an individualized risk" than is required by the statute). The Third Circuit stated "[w]e disagree with the Ninth Circuit's use of a lower standard for individualized fear absent a "pattern or practice" of persecution." Lie v. Ashcroft, 396 F.3d at 538. However, this misunderstands the disfavored group analysis.

Circuits view the disfavored group analysis as lowering the burden required by "reasonable fear"; this is incorrect. E.g. Ingmantoro v. Mukasey, 550 F.3d 646, 652 (7th Cir. 2008) ("the disfavored group analysis a lower threshold of proof based on membership in a 'disfavored group'"). The disfavored group analysis does not lower the threshold required to meet the required "pattern or practice" or the individual showing of persecution. Rather this analysis accounts for risk of persecution posed to an individual that is inherent to an applicant's "race, religion, nationality, membership in a particular social group, or political opinion. 8 C.F.R. § 203.13(b)(2)(i)(A).

The facts of this case illustrate the necessity of taking into account the whole context surrounding the conditions an applicant faced in their home country. Ms. Marcos would not meet the threshold solely because of her group's status. If Ms. Marcos had never been singled out, been

threatened or assaulted but was simply a member of her group she would not meet the threshold. (R. at 8). If, in the alternative, all of Life Inc.'s guards were known for their caring, compassionate, and respectful behavior and there was an isolated incident where one grabbed her bottom the burden would also not be met. Id. To look at the specific without the general or the general without the specific is illogical. Doing so would provide an incomplete assessment of Ms. Marcos' reasonable fear of persecution demonstrating the compatibility between the disfavored group analysis and 8 C.F.R. § 203.13.

iii. Circuit Courts Have Not Actually Rejected the Disfavored Group Analysis After Its Statutory Compatibility Was Clarified in Wakkary.

The Ninth Circuit clarified "what has come to be called—perhaps unfortunately, as the terminology may be misleading—"disfavored group" analysis the term was misleading and that it had been misunderstood by both the BIA and other Circuits." Wakkary, 558 F.3d at 1062. The analysis did not lower the individualized showing required by statute, rather it is "[b]ased on th[e] common-sense evidentiary proposition" that "the more egregious the showing of group persecution—the greater the risk to all members of the group." Id. at 1083. The Court also emphasized that the disfavored group analysis did not lower the burden required for a reasonable fear of persecution required by statute. Id.

Several of the Circuits that have previously explicitly rejected the disfavored group analysis have since implicitly or explicitly endorsed this clarified version. For example, the First Circuit seems to have started to endorse the approach. In Tasya v. Holder, the Court noted that the "disfavored group analysis counsels a contextual approach in assessing persecution claims, we have repeatedly said that such claims are to be examined in the context of the country condition reports." 574 F.3d at 4. In Limani v. Mukasey, the First Circuit implicitly accepted the BIA's use of the approach. 538 F.3d 25, 30 (1st Cir. 2008) (rejecting claim because applicant failed to show

"membership in a disfavored group or a pattern or practice in Algeria of persecution of "non-Islamist Muslims""). The Sixth Circuit has acknowledged the disfavored group analysis requires the equivalent proof as the statute; without explicitly adopting it. Hamzah v. Holder, 428 F. App'x 551, 557 (6th Cir. 2011). The response of the circuits to the disfavored groups analysis clarification in Wakkary demonstrates that this analysis is in accordance with the law and therefore was correctly applied in Ms. Marcos' case.

B. The IJ's Adoption of the Disfavored Group Analysis Should Not Be Disturbed Because of the Deference Accorded Agencies in Interpreting Their Statutory Scheme.

The BIA has accepted the disfavored group analysis and "considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer." Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 844 (1984). The Supreme Court held that "we should not disturb [a construction] unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned." Id. at 845. 8 C.F.R. § 203.13 is a delegation of authority from Congress to the BIA. It gives the BIA the authority to interpret the statute and apply it to asylum applicants. Therefore, the BIA's interpretation should be viewed in light of this delegation and the expertise the agency has in this arena.

Where the BIA summarily affirms the IJ's decision it is reviewed as the BIA's decision. Al Najjar, 257 F.3d at 1284. Therefore, when the IJ's decision is summarily affirmed it should be accorded the deference required by Chevron. The IJ's implementation of the disfavored group analysis clearly constitutes a reasonable construction of a statutory scheme. (R. at 11). As stated above the analysis does not lower the burden required by statute and accurately accounts for all

the persecution suffered by an asylum applicant. Given the deference agency decision making is given it seems clear that this test should not be disturbed because it is in accordance with the law.

C. The Disfavored Group Analysis Provides Needed Uniformity and Promotes Efficiency.

The disfavored group analysis should be adopted because it will reduce variation across asylum cases. America's asylum system is notoriously unfair and has been for decades. Jaya Ramji-Nogales et. al., Refugee Roulette, 60 Stan. L. Rev. 295, 295 (2010) (citing a statement by Attorney General Robert Jackson in 1940). Case outcome is largely dependent on which Immigration Judge is assigned to the case. Judge-by-Judge Asylum Decisions in Immigration Courts FY 2013-2018, https://trac.syr.edu/immigration/reports/judge2018/denialrates.html. The standard deviation in asylum approval rates between judges from 2013-2018 was 27.5%. Id. Asylum approval rates across judges that saw over 100 cases range from 0% to 97%. Id. Additionally, the Immigration Courts are chronically backlogged and it is only getting worse. Don Gonyea, *Government Shutdown Stalls Backlog of Immigration Cases*, NPR, December 29, 2018, https://www.npr.org/2018/12/29/680950638/government-shutdown-stalls-backlog-of-immigration-cases.

A primary goal of the BIA is uniformity because justice requires consistent application of the law. Matter of Cerna, 20 I. & N. Dec. 399, 405 (BIA 1991). Adoption of the disfavored group analysis ensures people from the same group are given consistently recognized for the persecution their group receives. Not only will this reduce case by case variance but it will also speed up the rate at which cases are processed by eliminating need for analysis of persecution posed to a group generally to be calculated repeatedly for each individual by a different judge. Additionally, it allows the BIA to exercise its expertise in determining which groups and to what extent they are disfavored. This aligns with Congressional intent in creating the pattern or practice exception; it

was meant to standardize and create efficiency and in no way prevents a more standard approach being used to assess the dangers posed to groups that fall below the high "pattern or practice" threshold. Therefore, this Court should affirm the Appellate Court's acceptance of the disfavored group analysis.

V. THE COURT OF APPEALS FOR THE THIRTEENTH CIRCUIT ERRED BY INDEPENDENTLY INTERPRETING "GOVERNMENT-SPONSORED."

The Appellate Court erred when it held that "Chevron deference is not relevant," and considered the definition *de novo* for its own interpretation. (R. at 26).

A. Chevron Deference Required the Court of Appeals for the Thirteenth Circuit to Defer to the BIA to Interpret "Government-Sponsored" Persecution Through Case-by-Case Adjudication.

Courts owe Chevron deference to the BIA's interpretation of the immigration laws. See Chevron, 467 U.S. 837 (1984). The principles of Chevron deference are applicable to the Immigration and Nationality Act's (hereinafter "INA") statutory scheme. See INS v. Aguirre-Aguirre, 526 U.S. 415, 425 (1999). Thus, the Court must first ask whether "the statute is silent or ambiguous with respect to the specific issue before it." Chevron at 843. The Court then should whether the agency's answer is based on a permissible construction of the statute. Id.

In the present case, the Immigration Judge derived his conclusions about Ms. Marcos' eligibility for asylum based on his finding that she could have avoided persecution by relocating to another part of Basag. (R. at 10). He held that she failed to meet the burden of establishing that it would not be reasonable for her to relocate—a burden following from his characterization of her persecutor as not "government-sponsored." (R. at 28). See also 8 C.F.R. § 208.13(b)(3)(i). The INA does not specifically define the meaning of "government-sponsored" persecution. 8 U.S.C.S. § 1101.

Under the INA, Congress charged the Attorney General with the "administration and enforcement" of the statute, providing that the "determination and ruling by the Attorney General with respect to all questions of law shall be controlling." 8 U.S.C.S. § 1193(a)(1). The INA also gave the Attorney General the power to delegate authority to establish immigration regulations pursuant to the law and review administrative determinations in immigration proceedings. 8 U.S.C.S. § 1003(g)(2).

Pursuant to this allowance of delegation, the Attorney General has vested the BIA with the power to exercise the "discretion and authority conferred upon the Attorney General by law" in the course of "considering and determining cases before it." 8 C.F.R. § 3.1(d)(1). The BIA should therefore be accorded Chevron deference as it gives ambiguous statutory terms "concrete meaning through a process of case-by-case adjudication." See INS v. Cardoza-Fonseca, 480 U.S. 421 (1987) at 448. In the process of filling "any gap left, implicitly or explicitly, by Congress," the courts must respect the interpretation of the agency to which Congress has delegated responsibility for administering the statute. Morton v. Ruiz, 415 U.S. 199 (1974) at 231. Therefore, the BIA's interpretation of "government-sponsored" in asylum proceedings should be reviewed by the Court deferentially in determining whether it permissibly construes the INA. As whether the IC properly assigned the burden of whether it was reasonable for Ms. Marcos to relocate embodies its interpretation of "government-sponsored," it is entitled to deference. See Singh v. Gonzales, 436 F.3d 484, 487 (5th Cir. 2006).

B. Interpreting Whether Persecution Is "Government-Sponsored" Requires Agency Expertise.

Some scholars believe that, following United States v. Mead Corp., there is a "*Chevron* step zero" requirement for courts to determine whether the Chevron framework applies at all, contingent on whether Congress has delegated authority to the agency generally to promulgate

"rules carrying the force of law." If Congress has delegated general interpretive authority, courts then determine whether the agency has acted with sufficiently formal procedures. In cases where the agency has interpreted particular statutory provisions that do not implicate agency expertise, courts look to whether the agency decision served to fill a particular gap within the scope of the congressional delegation. See Paul Chaffin, Note: Expertise and Immigration Administration: When Does Chevron Apply to BIA Interpretations of the INA?, 69 N.Y.U. Ann. Surv. Am. L. 503, 512-13 & n.42 (2013). See also Mead, 533 U.S. 218, 226-27 (2001). The Chevron framework should allocate interpretive questions between courts and the BIA based on relative institutional competence, as the Supreme Court and lower courts have continued to consider agency expertise as relevant to granting deference in the immigration context. See Negusie v. Holder, 555 U.S. 511, 530 (2009) (Stevens, J., concurring).

The INA is a complex statute that has endured numerous revisions and a long legislative history. Accordingly, the BIA is the interpretive body best positioned to assimilate the text of the INA and its precedential and judicial opinions, as it has the requisite familiarity with its extensive body of judicial and administrative interpretation necessary to create a coherent body of law. See Chaffin at 537-38. Moreover, judicial deference to the Executive Branch is "especially appropriate in the immigration context where officials exercise especially sensitive political functions that implicate questions of foreign relations." Aguirre-Aguirre at 425 (quoting INS v. Abudu, 485 U.S. 94, 110 (1988)). See also Negusie at 517 ("Judicial deference in the immigration context is of special importance."). A decision by the Attorney General to deem that an organization persecuting a social group is government-sponsored may affect international relations with that country. "The judiciary is not well-positioned to shoulder primary responsibility for assessing the likelihood and importance of such diplomatic repercussions." Aguirre-Aguirre at 425.

To the extent that the Court acknowledges the existence of a "*Chevron* step zero" analysis, viewing whether deference is appropriate based on whether the statutory ambiguity implicates questions of agency expertise, the BIA is clearly in a better-informed position to decide the meaning of "government-sponsored" in the INA. Moreover, the BIA's expertise and familiarity with the statute can help it achieve more consistent outcomes for asylum applicants, as opposed to the diverging statutory interpretations offered by Circuit Courts across the country. See Chaffin at 536.

C. The Court of Appeals for the Thirteenth Circuit's Interpretation Is Inconsistent with Past BIA Precedent.

Even if the Court does not agree that the Appellate Court erred by not deferring to the BIA's interpretation of "government-sponsored," the Court must reject the Appellate Court's independent interpretation, as it is inconsistent with past agency precedent. The Chevron Court clarified that an agency's promulgation of its authorizing statute should be given deference so long as it is a reasonable interpretation of the statutory ambiguity. The Court may not substitute it for its own construction of the statutory provision, even if the promulgation would not parallel the Court's statutory interpretation of the same ambiguity. Chevron at 844. Allowing a court's interpretation to override an agency's interpretation would fly in the face of *Chevron*'s premise that it is for agencies rather than courts to fill statutory gaps. See Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 982 (2005). Only a judicial construction holding that the statute unambiguously forecloses the agency's interpretation, and therefore contains no gap for the agency to fill, displaces a conflicting agency construction. Id. at 982-83, 985.

These principles apply with equal force to an agency's interpretation of its regulation, where deference is "even more clearly in order." See Levy v. Sterling Holding Co., LLC, 544 F.3d 493, 502-03 (3d Cir. 2008) (quoting Udall v. Tallman, 380 U.S. 1, 16-17 (1965)). In the present

case, not only does the Appellate Court's interpretation not foreclose that of the BIA, it flies directly in its face and interprets "government-sponsored" persecution incorrectly in light of existing BIA precedent. The Appellate Court stated that the BIA has not yet decided what "government-sponsored" means. It has, however, interpreted this term extensively in precedent, and through case-by-case adjudication, has arrived at a flexible understanding of "government-sponsored" persecution under 8 C.F.R. § 208.13(b)(2)(C)(i)-(ii).

D. Even If the BIA Has Not Yet Interpreted "Government-Sponsored," the Court of Appeals for the Thirteenth Circuit Nonetheless Erred By Not Remanding for Its Interpretation.

Allowing the Appellate Court's interpretation to foreclose the BIA from interpreting "government-sponsored" persecution in a contrary way merely because the Court interpreted it first would produce anomalous results – making Chevron deference turn on the order in which the two interpretations issued. Brand X at 983. See also Garfias-Rodriguez v. Holder, 702 F.3d 504 (9th Cir. 2012) at 516 ("To ignore *Chevron* is to treat the agency decision as though it had issued from the court itself."). Moreover, when overruling its governing precedent, a court may not consult the principles of *stare decisis* it normally attends to (and does much to discourage) but must favor the agency ruling over its own precedent simply because the agency has offered a permissible interpretation. See Gutierrez-Brizeula v. Lynch, 834 F.3d 1142, n.1 (10th Cir. 2016). The fact that agencies, upon offering reasonable interpretations of ambiguous statutory or regulatory provisions, can overrule judicial precedent emphasizes the futility of that court's independent analysis of the provision.

Therefore, when the BIA has not spoken on "a matter that statutes place primarily in agency hands," the Supreme Court's ordinary rule is to remand, to allow the BIA to address the matter in the first instance in light of its own experience and expertise. INS v. Ventura, 537 U.S. 12 (2002)

at 16-17. Rather than engaging in a back-and-forth statutory interpretation exercise with the BIA, a court is recommended to directly remand an interpretation decision to the BIA; its doing so prevents a sequencing issue that courts have struggled with. See Garfias-Rodriguez v. Holder at n.8. The Court defers to the agency not because the agency is better situated to interpret the statutes, but because the Court has determined that Congress created gaps in the statutory scheme that require the exercise of policymaking judgment. See Chevron at 865. See also Brand X at 980.

The "ordinary remand rule" from Gonzales v. Thomas should apply to the present case. In Gonzales, an IJ, summarily affirmed by the BIA, denied applicants for asylum without considering a relevant legal issue (as to whether they were a protected social group under the INA). The Ninth Circuit panel reviewed and subsequently interpreted that ambiguous term, overturning the IJ's decision. Gonzales v. Thomas, 547 U.S. 183, 184-85 (2006). The Gonzales Court found that the Ninth Circuit erred in interpreting that term, "in the first instance and without prior resolution of the questions by the relevant administrative agency." See Negusie at 523-24. This conclusion is especially true when the definition of a statutory term may be influenced by how practical or impractical the standard it creates is when applied to specific cases, as would be the case for "government-sponsored," which can encompass a wide range of conduct and organizations. The agency can and should bring its expertise to bear upon the matter, evaluating the evidence, making an initial determination, and in doing so, through informed discussion and analysis, helping "a court later determine whether its decision exceeds the leeway that the law provides." Negusie at 524 (quoting Ventura at 17).

IV. THE IJ ERRED BY CHARACTERIZING LIFE INC.'S CONDUCT AS NOT "GOVERNMENT-SPONSORED" PERSECUTION.

The IJ that reviewed Ms. Marcos' application for asylum erred when it "characterized" Life Inc. as not "government-sponsored." (R. at 28).

A. The IJ's Decision Does Not Carry the Force of Law and Is Only Entitled to Review, If At All, Under Skidmore.

The BIA does not need to write at length merely to repeat the IJ's findings of fact and reasons for denying the requested relief. Having given individualized consideration to a particular case, it may simply state that it affirms the IJ's decision for the reasons that the IJ sets forth. See Bing Feng Chen v. INS, 87 F.3d 5, 8 (1st Cir. 1996) (joining eight sister circuits in its decision). Following Mead Corp., courts accord Chevron deference only to "agency action promulgated in the exercise of congressionally-delegated authority to make rules carrying the force of law." Mead at 226-27. Courts routinely accord this deference to published decisions of the BIA. See Aguirre-Aguirre at 424. However, federal appellate courts have held that the BIA's summary decisions (approximately 90% of their overall issued opinions) lack the "force of law" that Mead requires. See John S. Kane, Deference as Death Sentence- The Importance of Vigilant Judicial Review of Refugee-Claim Denials, 47 U. Louisville L. Rev. 279, 297 (2008).

In declining to extent Chevron deference to any statutory construction of the INA set forth in a summarily affirmed IJ opinion, the Second Circuit found that such a decision cannot be construed as a rule promulgated by the BIA on behalf of the Attorney General, and that no rule or regulation indicates that the Attorney General ever intended to or in fact actually delegated rule-making authority to the IJs themselves. See Shi Liang Lin. v. United States DOJ, 416 F.3d 184, 189-91 (2d Cir. 2005). See also Miranda-Alvarado v. Gonzales, 449 F.3d 915 (9th Cir. 2006) at 924 ("[A]n IJ decision, although presented as the final agency determination to be reviewed in federal court, is not legally relevant to any future decision-making, including by the very IJ who issued it."). When the BIA issues an affirmance without opinion (hereinafter "AWO"), it does not itself make a statutory interpretation nor does it adopt any statutory interpretation the IJ may have made. 8 C.F.R. § 1003.1(e)(4) (The BIA's approval of the result the IJ reached "does not

necessarily imply approval of all of the reasoning of that decision." § 1003.1(e)(4)(ii)). Because the BIA does not establish any statutory interpretation in an AWO, that ruling has no precedential value and does not invoke Chevron deference. See Miranda Alvarado at 922-23. This is especially true in the present case, as the BIA's AWO did not even reference any factual findings as to whether Life, Inc. is a "government-sponsored" organization, a requisite finding to attach her burden to prove she could not reasonably relocate elsewhere in Basag. Its affirmance of the denial of her asylum application is thus based on a conclusion that lacks reference to any supporting facts, let alone reasoning. (R. at 10). In light of Mead Corp., the "essential factor" in determining whether an agency action warrants Chevron deference is its precedential value, and unpublished decisions are not considered precedent for later, unrelated cases. See De Leon-Ochoa v. AG of the United States, 622 F.3d 341, 350 (3d Cir. 2010). The unpublished summary affirmance by the BIA in this case lacks the force of law required for Chevron deference as to its specific interpretation and application of the INA.

All appellate courts that have actually addressed this issue have affirmatively rejected the application of Chevron deference to unpublished BIA decisions. See Arobelidze v. Holder, 653 F.3d 513, 520 (7th Cir. 2011); Quinchia v. United States Att'y Gen., 552 F.3d 1255, 1258 (11th Cir. 2008) (holding that an unpublished BIA decision that does not rely on BIA or judicial precedent does not receive Chevron deference); Rotimi v. Gonzales, 473 F.3d 55, 57-58 (2d Cir. 2007) (holding that an unpublished BIA decision that does not rely on precedent to define a contested term does not receive Chevron deference); Garcia-Quintero v. Gonzales, 455 F.3d 1006, 1012-14 (9th Cir. 2006) (describing that an unpublished BIA decision does not have the force of law and thereby receive Chevron deference).

Some of these Courts of Appeals have declared that unpublished BIA opinions should be accorded Skidmore deference. See Godinez-Arroyo v. Mukasey, 540 F.3d 848, 850 (8th Cir. 2008) (holding that unpublished BIA opinions may lack the force of law, but may nevertheless be eligible for a lesser form of deference under Skidmore); Carpio v. Holder, 592 F.3d 1091, 1098 (10th Cir. 2010); Barrios v. Holder, 581 F.3d 849, 859 (9th Cir. 2008) (holding an unpublished, nonprecedential BIA decision is entitled to only Skidmore deference). Therefore, agency action that does not qualify for Chevron deference may still deserve a lesser amount of deference under Skidmore. See Skidmore at 140.

B. The IJ's Interpretation of "Government-Sponsored" Is Untenable Under Skidmore.

Under Skidmore, respect is granted to agency action according to its power to persuade. See Skidmore at 140. The agency's power of persuasion is determined by weighing its reasoning, consistency, and application of expertise as to the issue. Id. Its thoroughness, validity, and the consistency of its reasoning are also analyzed. See Godinez-Arroyo at 850-51. In Skidmore analyses conducted by the Courts of Appeals, they examine whether the IJ provided persuasive and discrete reasons for its analysis, references the statute at issue, discussed the issue cursorily rather than at length; they also judge the common sense of the IJ's conclusions and whether the IJ's interpretation and application as to the applicant is consistent with the purpose underlying the statute and workable. See Garcia-Quintero at 1015. See also Sun Wen Chen v. AG of the United States, 492 F.3d 100, 115-17 (2007) ("commonsense is all that is needed [to apply the statute]").

In Shi Liang Lin v. United States DOJ, the Second Circuit found that the IJ decisions before them did not possess any persuasive power, as they "failed . . . to articulate a reasoned basis" for their interpretation of ambiguous statutory language. The IJs could not possibly advance principled – let alone persuasive – reasons to distinguish between statutory interpretations, so they were not

afforded deference under Skidmore. 416 F.3d 184, 191 (2d Cir. 2005). The Court also held that they could not supply their own rationale for the BIA's decision as the Supreme Court does not allows courts "to be compelled to guess at the theory underlying [a particular] agency's action; nor can [they] be expected to chisel that which must be precise from what the agency has left vague and indecisive." Id. at 192 (quoting SEC v. Chenery Corp., 332 U.S. 194, 196-97 (1947). If courts were allowed "to create and assess ex-post justifications for inadequately reasoned agency decisions, courts would, in effect, be conscripted into making policy" where they lack subject matter expertise. Id.

Similarly, in Miranda Alvarado, even assuming that Skidmore should be applied, the Court concluded that the IJ's "brief and conclusory decision," which did not refer to relevant BIA or federal court case law did not adequately exhibit the requisite factors that would give it power to persuade and to warrant deference. Miranda Alvarado at n.6. It lacked evident thoroughness in its consideration of the issue, validity in its reasoning, and consistency with earlier and later pronouncements. Id.

The Skidmore factors, which provide the power to persuade, are not present in the IJ's opinion in this case, as he merely characterized Life Inc. as not "government-sponsored." The IJ did not reference relevant BIA precedent or federal caselaw on the issue – while the IJ's opinion is indeed not in the Record, the Appellate Court's opinion references that the IJ below did not define the term with any real clarity or substance. (R. at 28). The dissenting judge on the Appellate Court's panel specifically observes that "neither the IJ nor the BIA provided any interpretation of the statute [in their opinions]" and "the IJ and BIA never explicitly indicate the type of persecution [whether or not it is "government-sponsored"] occurring in Basag to decide the issue." (R. at 32).

Even if one argues that the IJ should have substantial deference to interpret its regulations, as "government-sponsored" is language directly taken from a regulation rather than a statute, the agency's interpretation has to sensibly conform to the plain reading of the regulation. See Lal v. INS, 255 F.3d 998, 1004 n.3 (9th Cir. 2001). An agency's interpretation of its ambiguous regulations is also not controlling when there is reason to suspect that it does not reflect the agency's fair and considered judgment on the matter in question. See Auer v. Robbins, 519 U.S. 452, 461 (1997). In this line of cases, however, the agency administrators are authorized by law to create regulations in order discharge their duties under those enabling statutes. See Shalala v. Guernsey Mem'l Hosp., 514 U.S. 87, 89 (1995) (Secretary of Health and Human Services); Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 507 (1994) (Secretary of Health and Human Services); Bowles v. Seminole Rock & Sand Co., 325 U.S. 410 (1945) (Administrator of the Office of Price Administration). Their authority pursuant to their enabling statutes to create valid interpretive rules is akin to the Attorney General's responsibility to do the same pursuant to the INA—not to the role or responsibility of IJs. Thus, the Attorney General's, rather than the IJs' interpretations of regulations should be given any such deferential authority.

Though the IJ's interpretation of Life Inc. as "government-sponsored" is untenable, for the aforementioned reasons, the BIA is still in a better position to understand its meaning under the INA than federal appellate courts. It is better informed of how to navigate and cohere a coarse body of administrative and judicial interpretations of the INA and due to its familiarity with the statute and expertise in foreign policy, it can produce more consistent and correct outcomes for asylum applicants. For analogous reasons, the Shi Liang Court remanded the statutory interpretation question to the BIA rather than deciding it *de novo*, asking the BIA to "more

precisely explain its rationale for construing [the statute]" as it did and to "clarify whether, when, and why" its interpretation affected similarly situated applicants. Shi Liang at 192.

Without remand for further investigation, development, and explanation by the BIA, the Court's interpretation of how the ambiguous statutory provision affects Ms. Marcos will be clear error. Its interpretation will substantially determine the legal recourse available to Isda-Timog women like Ms. Marcos, seriously disregard the BIA's legally-mandated role, and independently create potentially far-reaching legal precedent on a highly complex and sensitive matter of diplomatic relations. See Ventura at 16-17. See also Gonzales v. Thomas at 186 ("A court of appeals is not generally empowered to conduct a *de novo* inquiry into the matter being reviewed and to reach its own conclusions based on such an inquiry.) Following the ordinary remand requirement, this Court must remand the interpretation of whether, given the facts established in the record, Life Inc. is "government-sponsored" organization.

CONCLUSION

For the foregoing reasons, this Court should affirm the Appellate Court's acceptance and application the disfavored group analysis, finding that it is a valid basis to establish a well-founded fear of persecution for the purpose of asylum eligibility, and reverse and remand the IJ's assignment of the burden on Ms. Marcos to prove that she could avoid future persecution by relocating elsewhere in Basag.

Respectfully submitted,

/s/

Competitor ID 106

Counsel for Petitioner