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
THIRTEENTH CIRCUIT COURT OF APPEALS

BRIEF FOR PETITIONER

TEAM 107

Counsel for Petitioner

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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 ISSUES PRESENTED

I. The Board of Immigration Appeals found Marcos established a well-founded fear of persecution using the disfavored group analysis. This analysis considers both individual and generalized risks when assessing an applicant's likelihood of suffering future persecution. The approach was adopted by the BIA, the agency designated by Congress to administer asylum claims, and the interpretation is a reasonable construction of the asylum regulation. Is the disfavored group analysis a valid basis for establishing a well-founded fear?

II. The Board of Immigration Appeals has both the power and responsibility to clearly define the term "government sponsored" as it appears in the Code of Federal Regulations, yet the term remains undefined and ambiguous. Leila Marcos experienced persecution at the hands of Life Inc., which has a symbiotic relationship with the government of Basag. Should the burden have been placed on Marcos to prove that internal relocation within Basag was not reasonable?

STATEMENT OF THE CASE

Statement of the Facts

Basag is a country in the Western Pacific Ocean consisting of two islands; Mayaman and Isda. (ROA.1, 2). The two ethnic groups on Basag are the Hilagan and the Timog, and in 1952 they united to declare independence from the nation of Pulo. *Id.* Historically, the Hilagan people have lived on Mayaman, while the Timog have lived on Isda. *Id.* Many Timog people have moved to Mayaman since 1992, when the island of Isda's fishing industry began to be damaged by the effects of global warming. (ROA.1, 2-3). These Timog migrants to Mayaman were "noticeably poorer" than the Hilagan or Timogs already on Mayaman and had "difficult integrating into the culture." (ROA.1, 3).

In 2011, the problems on Isda became more serious, as rising tides and seasonal floods polluted wells with salt water. *Id*. In 2012, the President of Basag, Ferdinand Aquinto, ordered that all water sources on Basag be nationalized. *Id.* This resulted in government shutdown of polluted wells, relocation of water sources, and desalination. *Id.* In 2013, the government of Basag reached a 30-year agreement with Life Incorporated ('Life Inc.") to give Life Inc. full control over all water facilities in the country. (ROA.1, 3-4). As part of this contract, the government of Basag agreed to provide military aid to Life Inc. controlled water facilities if they were threatened. *Id.* Mayaman has continued to experience a thriving tourist industry, but the problems on Isda have persisted due to flooding and limited access to clean water. *Id.*

Out of this unrest, a group of Basag citizens angry with the government's contract with Life Inc. has formed, called the "Water Warriors." *Id.* The Water Warriors have attacked Life Inc. and government facilities with homemade explosives. (ROA.1, 4–5). Since 2016, Life Inc.'s armed guards and the Basag military have combined to kill over 75 men and women

wrongfully identified as Water Warriors. (ROA.1, 4).

Leila Marcos is an 18 year-old Timog woman who lived on Isda with her husband Bernardo. (ROA.1, 5). Leila and Bernardo were forced to move twice in a span of three years due to sever flooding, and in February 2017, Life Inc. closed the water facility closest to their home. (ROA.1, 6). Marcos was then forced to bike every three days ten miles to a water storage facility. *Id.* On March 6, 2017, during one of these trips, a Life Inc. guard at the facility offered Marcos more water in exchange for sex; Marcos recognized this was a threat as she had recently heard of another Isda woman raped by a Life Inc. guard in similar circumstances. *Id.* In response to this incident, Life Inc. "institute[d]" comprehensive sexual harassment training," although conditions on the island did not change. (ROA.1 9; ROA.2 12).

Due to the March 6 threat, on her next trip to get water, Marcos traveled to an even further storage facility, a total of twenty miles away. (ROA.1, 6). On her way back, at another well, Marcos witnessed a Basag soldier force a pregnant woman to remove her shirt, accusing her of working for the Water Warriors. (ROA.1, 7). The soldier eventually realized she was in fact pregnant, and allowed the woman to leave. *Id.*

On March 12, Marcos returned to the well where the Life Inc. guard had threatened her on March 6. *Id.* The same guard saw her, and told her "I am going to have my way with you, honey, whether you want it or not." *Id.* Marcos feared for her safety, but was forced to continue using the water facilities, and on April 5, a different Life Inc. guard grabbed Marcos' backside at a water facility. (ROA.1, 8)). Marcos told her husband what had happened, and the next evening her husband returned to the facility and pulled a fillet knife out while yelling at a guard. *Id.* He was then shot in the arm and escorted back to his home. *Id.* Upon answering the door, Leila Marcos was again threatened by the same guard, who "winked and made a thrusting

upward gesture with two fingers," at her. *Id.*

That evening, Leila and Bernardo fled to Mayaman to receive medical treatment. *Id.* While in Mayaman, the Marcos' stayed with Bayani Santos ("Bayani") a friend of Bernardo. *Id.* Bayani housed the couple and warned Leila that some of the Life Inc. guards on Mayaman targeted Isda-Timog women like Leila due to their poorer appearance. (ROA.1, 8-9). He mentioned a rumor that an unmarried Isda-Timog woman had become pregnant recently by unknown means. (ROA.1, 9). While in Mayaman, Leila struggled to find a job, and while begging one evening, she hid from several Life Inc. guards. (ROA.1, 9). While they passed by, one said "I cornered her by the well, and hit her until she submitted. Getting sex here is as easy as it is on Isda." *Id.* Leila fled Basag for the United States on August 6, 2017. *Id.*

Upon entering the United States, Leila filed for asylum, arguing there was a well-founded fear of future persecution, "due to a pattern or practice of rape and harassment" against Timog women in Basag. (ROA.1, 9-10). She argued she had a "well-founded fear of future persecution due to a pattern or practice of rape and harassment against similarly situated Timog women in the Basag Islands." (ROA.1, 10).

Procedural History

The Immigration Judge ("IJ") found that Leila did establish an objectively reasonable fear of persecution, but because she could have relocated within Basag to avoid persecution, her application was denied. *Id.* Leila appealed the IJ's decision to the Board of Immigration Appeals ("BIA") and the government cross-appealed to challenge the IJ's determination of well-founded fear. (ROA.1, 10; ROA.2, 7). The BIA summarily affirmed the decision. (ROA.1, 10). Leila appealed the BIA's decision to the United States Court of Appeals for the Thirteenth Circuit. *Id.* The Thirteenth Circuit found that Life Inc. guards regularly mistreat Timog women

at water facilities, and noted two articles: *Water Warriors: Crisis in Basag*, and *Risking Rape to Reach Water,* as evidence of this conclusion. (ROA.2 12). The Thirteenth Circuit ultimately held that: (1) Marcos established eligibility for asylum under the disfavored group analysis; and (2) the IJ correctly placed the burden on Marcos to show it would not be reasonable for her to relocate within Basag, and found she did not meet this burden. (ROA.2, 12,18).

STANDARD OF REVIEW

Review of decisions of the Board of Immigration Appeals are governed by two standards: Factual findings are reviewed under the "substantial evidence" standard—they will be accepted "unless any reasonable adjudicator would be compelled to conclude to the contrary." *Lemus-Arita v. Sessions*, 854 F.3d 476, 480 (8th Cir. 2017). Legal determinations require *de novo* review. *Albathani v. INS*, 318 F.3d 365, 372 (1st Cir. 2003).

SUMMARY OF ARGUMENT

I. The Supreme Court should affirm the Thirteenth Circuit's finding that the BIA's use of the "disfavored group" analysis was proper and Leila Marcos satisfied her burden under the "disfavored group" analysis. First, the current statutory framework supports the disfavored group analysis. The Regulation requires only that an individual's fear is a reasonable possibility, and this has normally been established by looking at an individual's personal risk. Alternatively, general risk evidence that satisfies the "pattern or practice" exception will prevent the IJ or BIA from requiring individualized evidence because the pervasiveness of the "pattern or practice" of group persecution all but proves the applicant faces a reasonable possibility of future persecution. Many courts have subscribed to the belief that these inquiries are mutually exclusive, but this assumption is not supported by the Regulation. The logic behind the pattern or practice exception necessarily assumes that, at some point, the risk of persecution facing a group will become so pervasive that every single member can infer their own risk has become a reasonable possibility. The disfavored group analysis assumes that the same is true, even when the pattern or practice exception is inapplicable. At some point, evidence of group risk is indicative of a group member's risk, and when added to the pre-existing individualized risk that they have, this *can* be sufficient to show a certain individual has a "reasonable possibility" of future persecution. Therefore, the higher the showing of group risk, the less individualized risk necessary to show a "reasonable possibility" exists. Second, the disfavored group analysis does not lower the evidentiary burden for applicants. As discussed above, the objective component requires specificity. The Supreme Court found a 10% chance of persecution is sufficient, but a general risk must

be tied to some kind of group membership. Unrelated conflict does not assist an applicant's showing of a well-founded fear. General existence in a disfavored group is not sufficient either. Third, the Board of Immigration's adoption of the disfavored group analysis requires deference because they are the agency charged with implementing asylum regulations. Court review of the BIA is subject to different standards. Legal determinations are reviewed *de novo*, but deference must be given to the agency's interpretation of the statutes under their charge. The Supreme Court determined that "well-founded fear" is ambiguous, and the BIA and the courts should determine its exact meaning case by case. But gaps left to be filled by an agency should be filled by the agency, and the agency's interpretations should be deferred to. The meaning of "reasonable possibility of suffering such persecution" is also vague, and the disfavored group is not clearly contradictory to the Regulation. Therefore, the BIA's adoption of the disfavored group analysis is a reasonable construction and must be deferred to. Therefore, the "disfavored group" analysis is a valid basis for determining eligibility for asylum, and alternatively, this Court should give deference to the BIA as the agency charged with interpretation of the relevant statutes and regulations.

II. In order to be granted asylum, an applicant must show past persecution or a well-founded fear of future persecution. However, a well-founded fear of future persecution cannot be established if persecution could be avoided by relocating to another part of the applicant's country. There is a burden shifting system for determining whether relocation is reasonable. If the persecution is by a government or government sponsored then there is a presumption that relocation is not reasonable, and the burden is on the service to show that it would in fact be reasonable for the applicant to relocate. On the other hand,

if the persecution is not government sponsored, then the applicant bears the burden of proving it is not reasonable for him or her to relocate. Section 8 of the Code of Federal Regulations is the governing statute in asylum situations. Section 8 does not provide a clear definition of the term government sponsored and the term has not been clearly defined by case law. Therefore the case should be remanded for the BIA to interpret the term since the BIA is the governing body with the authority and discretion to interpret clauses of Section 8. Deference to the BIA is even more important in situations which implicate foreign relations, which all asylum claims do as they involve interactions with the United States and a foreign government. Since the BIA has the authority to interpret asylum statutes, it also has the responsibility to do so with clarity. Under *Chenery Corp.*, a reviewing court must know clearly what it is being asked to interpret. Furthermore, *Tillery* holds that the BIA must clearly explain its decision and provide legal reasoning and explanation. Here, the BIA has done neither; electing instead to summarily affirm the decision of the IJ without a clear explanation of which party bore the burden to show relocation was not reasonable. Regardless of which party bore the burden to show relocation was or was not reasonable, Life Inc. is a government-sponsored organization that is responsible for the well-founded fear of persecution that Marcos experienced on Basag. Under *Hor*, persecution is something a government can be responsible for if they provide ineffectual protection. Additionally, under *Avetova-Elliseva*, if the government is "unwilling or unable" to control the cause of persecution, then a well-founded fear of that persecution can exist. The fear of persecution that Marcos experienced came at the hands of Life Inc. guards, who worked for an organization that had entered into a 30 year contract with the government of Basag to provide water, the most basic necessity of any

person's existence. In that contract, Basag's government pledged to provide military protection to Life Inc. if needed. Together, the Basag government and Life Inc. killed over 75 men and women on the island of Basag. This symbiosis between Life Inc. and Basag's government established the groundwork for the situation Marcos and other Timog women on Isda found themselves in. Marcos was threatened with sexual assault by a guard from Life Inc. on three different occasions. A different guard grabbed her backside as she left a facility that she was forced to go to for water, since Life Inc. was in control of the entire supply on Basag. Additionally, Marcos witnessed a pregnant women being forced to remove her shirt by a Basag soldier, knew of a similar Timog woman being raped at a well, and heard a Life Inc. guard bragging about raping another woman. The IJ and BIA have already recognized that Marcos had an objectively reasonable fear of persecution, but did not grant her asylum based on an unclear and incorrect determination that Life Inc. was not a government sponsored organization. It is, and therefore this court should not follow the Thirteenth Circuit's decision.

ARGUMENT

I. THE "DISFAVORED GROUP" ANALYSIS IS A VALID BASIS FOR DETERMINING WHETHER AN APPLICANT HAS A WELL-FOUNDED FEAR OF PERSECUTION SUFFICIENT TO GRANT ELIGIBILITY FOR ASYLUM

Asylum is governed by section 208(a) of the Immigration and Nationality Act of 1952, added to the Act separately in 1980. 8 U.S.C. § 1158(a). Section 208(a) states, "The Attorney General shall establish a procedure for an alien physically present in the United States or at a land border or port of entry, irrespective of such alien's status, to apply for asylum . . . ." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 423 (1987). Eligibility "depends entirely on the Attorney General's determination that an alien is a 'refugee.'" *Id.* at 423.

A refugee is "any person who is outside any country of such person's nationality . . . and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution *or* a well-founded fear of persecution . . . ." 8 U.S.C. § 1101(a)(42) (emphasis added). Bearing the burden of proof, "the applicant must establish that race, religion, nationality, membership in a particular social group, or political opinion was or will be at least one central reason for persecuting the applicant." 8 U.S.C. § 1158(b)(1)(B)(i). Otherwise undefined, persecution is not limited to "threats to life or freedom," *Aguilar-Solis v. INS*, 168 F.3d 565, 570 (1st Cir. 1999) (citing *INS v. Stevic*, 467 U.S. 407, 428 n.22 (1984)), but it "must rise above unpleasantness, harassment, and even basic suffering." *Nelson v. INS*, 232 F.3d 258, 263 (1st Cir. 2000).

In the absence of past persecution, an applicant will be eligible for asylum by showing "a well-founded fear of future persecution." 8 C.F.R. § 208.13(b). The Regulation explicitly requires only three things to establish this fear:

> (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)(i)(A)–(C). An applicant must provide enough evidence to establish her "fear of persecution" and a "reasonable possibility" that such persecution could occur. 8 C.F.R. § 208.13.

A. Asylum Law's Current Statutory And Procedural Framework Supports Use Of The Integrated "Disfavored Group" Analysis

The Code of Federal Regulations ("the Regulation") allows consideration of an applicant's generalized risk of persecution when determining whether an applicant's individualized risk establishes a "well-founded fear of persecution." 8 C.F.R. § 208.13(b)(2)(i).

A well-founded fear may be established by assessing an applicant's individualized risk of harm or the generalized evidence of "persecution against a group of persons." *Salim v. Holder*, 728 F.3d 718, 722–23 (7th Cir. 2013). One approach allows an applicant to establish a "reasonable possibility" by showing she will personally face persecution if forced to return home. *Id.* at 722–23. An alternate approach was specifically added in 1990 to address situations where applicants suffered group-based persecution but lacked the individualized risk necessary to meet the standards then used by the BIA. *Kotasz v. INS*, 31 F.3d 847, 847–52 (9th Cir. 1994) (noting the BIA's long term practice of requiring evidence that an applicant had been "singled out" or individually targeted until the "pattern or practice" approach was adopted). This alternate approach allows an applicant to establish a "reasonable possibility" by showing evidence that (1) a "pattern or practice of persecution of a group of persons similarly situated to the applicant" exists and (2) the applicant is included in and identifies with the group. 8 C.F.R. § 208.13(b)(2)(iii)(A)–(B). In this scenario, eligibility for asylum is determined solely by

evidence of a generalized risk affecting a group of people. *See* 8 C.F.R. § 208.13(b)(2)(iii) (prohibiting an IJ from requiring evidence showing the applicant would be "singled out"). Although the standard varies, generally "the persecution of a protected group must be a systematic, pervasive, or organized effort." *Salim*, 728 F.3d at 722.

In 1994, the Ninth Circuit reexamined the interplay between personal risk and group risk. *Kotasz*, 31 F.3d at 851–54 (9th Cir. 1994). It recognized that group-based and individualized threats of persecution "co-exist," and while a showing of particularization is required, a heightened group-based threat of persecution inherently raises the likelihood that an individual in the relevant group will be persecuted. *Id.* at 854. More specifically, "'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' to meet the objective prong of a well-founded fear showing." *Wakkary v. Holder*, 558 F.3d 1049, 1063 (quoting *Kotasz*, 31 F.3d at 853).

In *Sugiarto*, the court applied the reasoning behind the "pattern or practice" exception, finding "evidence short of a pattern or practice will enhance an individualized showing of likelihood of a future threat [of persecution]" even if it is insufficient to establish a "reasonable possibility" alone. *Sugiarto v. Holder*, 586 F.3d 90, 97 (1st Cir. 2009). *But see*, *e.g.*, *Sioe Tjen Wong v. Att'y Gen. of U.S.*, 539 F.3d 225, 233 (3d Cir. 2008) (explaining an applicant's burden requires an individualized showing *or* demonstrating a pattern or practice, and failing to consider whether "violence" and "incidents of harassment and discrimination" short of a pattern or practice affected the applicant's individualized risk).

The court in *Wakkary* recognized that the correlation between a pattern or practice of persecution and heightened individual risk still applies when the threat to a particular group falls

short of qualifying as a pattern or practice—such information is "*always* relevant." *Wakkary*, 558 F.3d at 1063 (discussing and quoting *Kotasz*, 31 F.3d at 853). When assessing an applicant's likelihood of being "'singled out' in the future on the basis of his group membership, it is indisputably relevant (though of course not dispositive) how others in his group are treated." *Id.* at 1064.

Like *Kotasz*, *Sugiarto*, and *Wakkary*, where the applicants' individual and group-based risk were relevant to showing a particularized fear of future persecution, here Marcos had an individual risk based on her own particular experiences with Life Inc. guards, and her group, the ethnic Timog-women, faces a general risk of rape and assault from Life Inc. guards. (ROA.2, 4–6). Also similar, considering only the incidents of personal risk does not accurately represent the reasonable possibility of persecution that Marcos faces. Like these cases, her non-pattern group-based risk will not prevent an inquiry to her individualized risk, but it should inform the probability of her risk. But her inclusion as a member of the ethnic-Timog women, all of whom are generally threatened by Life Inc guards and some of whom have been actually persecuted, (ROA.2, 12, 17) and her personal risk, (ROA.2, 12), are sufficient to establish the minimum, ten-percent chance threshold established by the Supreme Court.

As the Ninth Circuit showed in *Kotasz* and other circuits have agreed, the same correlation that establishes the "pattern or practice" exception under the Regulation directly counsels use of the disfavored group analysis. Therefore, the Court should find the disfavored group framework a valid basis for weighing an applicant's individualized risk of persecution.

B. The "Disfavored Group" Analysis Maintains The Same Evidentiary Standard Required By The Code Of Federal Regulations

The "disfavored group" analysis applies the evidentiary standard required by the Code of Federal Regulations ("the Regulation"). Courts agree that an applicant's well-founded fear must

be "subjectively genuine" and "objectively reasonable." *See*, *e.g.*, *Arriaga-Barrientos v. INS*, 937 F.2d 411, 413 (9th Cir. 1991). The requirement of "fear" under subsection (b)(2)(i)(A) emphasizes the subjective component of the inquiry. *Cardoza-Fonseca*, 480 U.S. at 430. The Supreme Court and the Board of Immigration Appeals ("BIA"), agree that "fear" refers to "a subjective condition, an emotion characterized by the anticipation or awareness of danger." Cardoza-Fonseca, 480 U.S. at 430 n.11. Some courts require a "genuine" belief, others apply a "reasonable person" standard, but all require the subjective fear be legitimate. *Faddoul v. INS*, 37 F.3d 185, 188 (5th Cir. 1994); *Arriaga-Barrientos*, 937 F.2d at 413. *See Sioe Tjen Wong*, 539 F.3d at 232 (finding the applicant's subjective fear was satisfied where neither the IJ nor the BIA "questioned the genuine nature of [applicant's] fear of persecution, and focusing on the objective prong).

The subjective test does not change regardless of what evidence is being examined. As in *Sioe Tjen Wong*, where the nature of the applicant's fear was satisfied because it was credible and unquestioned, Marcos' fear, based on her own personal experiences and the general fear facing the group similarly situated to her, was deemed credible and genuine, and it is not at issue. (ROA.2, 3).

The "reasonable possibility" requirement under subsection (b)(2)(i)(B) emphasizes the objective component. *Cardoza-Fonseca*, 480 U.S. at 431. Circuit courts generally require "credible, direct, and specific evidence in the record." *Avetova-Elisseva v. INS*, 213 F.3d 1192, 1196 (9th Cir. 2000). *See also Shoafera v. INS*, 228 F.3d 1070, 1074 (9th Cir. 2000) (finding rape or sexual assault clearly may constitute persecution).

In *Cardoza-Fonseca*, the Supreme Court emphasized the leniency of this standard when it determined a 10% chance of persecution may establish a reasonable possibility. 480 U.S. at

431. *See also Knezevic v. Ashcroft,* 367 F.3d 1206, 1212 (9th Cir. 2009) (supporting the idea that 10% is a sufficient risk for a reasonable possibility). It is not necessary to establish "the situation will probably result in persecution, but it is enough that persecution is a reasonable possibility." *Cardoza-Fonseca*, 480 U.S. at 440 (quoting *Stevic*, 467 U.S. at 424–25).

In *Lolong v. Gonzales*, the Ninth Circuit denied asylum to a Chinese Christian in Indonesia. 484 F.3d 1173, 1175 (9th Cir. 2007). The applicant alleged a well-founded fear based on "the mere fact that some attacks on Chinese or Christians continue to occur." *Id.* at 1179. The applicant's "general, undifferentiated claim" was insufficient, and she did not show that her fears were distinct or that every member in her group had the requisite fear to alleviate the need for an individualized showing. *Id.* at 1179–81.

Like *Lolong*, the disfavored group analysis requires more than generic or unspecific claims of persecution—such a weak group-based risk would require a very high individualized risk. (ROA.2 11). Marcos brought forth evidence of four incidents of personal threats and assaults and supplemented it with evidence that a group of ethnic-Timog women, similarly situated to her, faced "widespread sexual violence." (ROA.2 12). The *Water Warriors* and *Risking Rape* articles all but confirm that her group is subject to discrimination and harassment at best and non-pattern persecution at worst. *Id.* In addition, the fact that conditions have not changed, (ROA.1 9), since Life Inc. "institute[d] comprehensive sexual harassment training" shows how severe the mistreatment is, (ROA.2 12). Nothing in the disfavored group analysis changes the burden as explained in *Cardoza-Fonseca*. Marcos still had to, and did, show her own persecution was a reasonable possibility. *Id.*

Courts have applied this reasoning to general risks of persecution but only those that are indicative of an individual's risk. *See Pulisir v. Mukasey*, 524 F.3d 302, 308–09 (1st Cir. 2008)

(finding "social, cultural, and political forces" are not dispositive but "can lend valuable context to particular incidents," which may affect how those incidents are weighed); *Vatulev v. Ashcroft*, 354 F.3d 1207 (10th Cir. 2003) (finding "order and improving social/political conditions" might attenuate a "reasonable possibility" of future persecution). *See also Ali v. Holder*, 686 F.3d 534, 539 (finding "generally unstable" conditions in a country *unrelated to a specific group* of persons insufficient to establish a personalized, well-founded fear) (emphasis added).

Like *Pulisir*, where societal context can grant some insight into an individual's heightened risk, but unlike *Ali*, where general instability was not connected to or disproportionately affecting one protected group, the general ethnic-Timogs were unliked, disadvantaged, and many were persecuted because of it—some even becoming pregnant after being raped. (ROA.1 9). Marcos's situation is also different than that in *Vatulev*. Her country conditions are not improving but continue to pose a threat to her and similarly situated persons. *Id.*

As established by the courts, the disfavored group analysis still requires a reasonable possibility of persecution to establish a well-founded fear. This includes the applicant's subjective and objective showing of a particularized risk. Maintaining the same burden, the only difference under this approach is a consideration of general risks when assessing the applicant's particularized risk.

C. The Board of Immigration's Use of the "Disfavored Group" Analysis Constitutes a Question of Agency Construction of a Statute Which Requires Deference

Courts review the Board of Immigration's ("BIA") decision as the final agency action, but where the BIA simply adopts and affirms an Immigration Judge's ("IJ") "findings or reasoning," courts "review the IJ's decision as part of the final agency action." *Lemus-Arita v.*

Sessions, 854 F.3d 467, 480 (8th Cir. 2017).

Factual findings are reviewed under the "substantial evidence" standard—they will be accepted "unless any reasonable adjudicator would be compelled to conclude to the contrary." *Id.* at 480. Legal determinations require *de novo* review. *Albathani v. INS*, 318 F.3d 365, 372 (1st Cir. 2003). Asylum eligibility determinations are conclusive "if supported by reasonable, substantial, and probative evidence on the record considered as a whole." *INS v. Elias–Zacarias*, 502 U.S. 478, 481 (1992).

Appropriate deference must be given when an "agency's interpretation of the statutes they are charged with enforcing" is at issue. *Albathani*, 318 F.3d at 372. First, if Congress has directly addressed the exact question at issue, the court must give effect to Congress's unambiguous intent. *Chevron, U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Second, if the exact question is not answered, the court must not "simply impose its own construction of the statute" but should determine whether the agency's determination is "based on a permissible construction of the statute." *Id.* at 843. Where Congress "explicitly le[aves] a gap for an agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation" *Id.* at 843–844.

In *Chevron*, the Supreme Court counseled that gaps in a statute left to be filled by an agency should be given "controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." *Id*. at 844. This includes decisions regarding the meaning or reach of a statute, such as deciding that an evidentiary framework is valid. *Id.* In discussing *Chevron*, the Court specifically demanded deference to the BIA's interpretation of the statute governing asylum:

> There is obviously some ambiguity in a term like "well-founded fear" which can only be given concrete meaning through a process of case-by-case adjudication.

> In that 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 the responsibility for administering the statutory program.

INS v. Cardoza-Fonseca, 480 U.S. 421, 448 (1987). The Court clearly noted that Congress had left the term open and undefined, and called for the courts to "respect the interpretation" of the BIA. *Id.*

In *INS v. Aguirre-Aguirre*, the Supreme Court acknowledged that circuit courts must give deference to the BIA's chosen method of weighing evidence. 526 U.S. 415, 424 (1999). The BIA interpreted a statute similar to the statute governing asylum and employed their own weighing framework. *Id.* The Ninth Circuit overruled the BIA and remanded the case with instructions to alter the framework used. *Id.* This Court found the Ninth Circuit's lack of deference was improper and overruled the Ninth Circuit. *Id.* This Court determined that "[b]ecause the Court of Appeals confronted questions implicating '[the BIA's] construction of the statute which it administers,' the court should have applied the principles of deference" established in *Chevron*. *Id.* This Court emphasized that failure to follow *Chevron* principles to review a BIA decision is error. *Id.* at 425.

The Regulation does not prohibit courts from looking at generalized risks of persecution to inform an individual's personal risk. The *Kotasz* court recognized that the Regulation lacks any provisions prohibiting consideration of group-based threats when assessing an individual's likelihood of future persecution outside of this second approach. *Kotasz*, 31 F.3d at 853 (noting the Regulation is intentionally "far from comprehensive," and courts may determine what "standards govern[] non-pattern or practice cases"). *See also* 8 C.F.R. § 208.13. Too firm a reliance on the "singled out" language overlooks reasonable possibilities of persecution by ignoring a person's particularized risk within a group that is at risk of persecution. *Kotasz*, 31

F.3d at 854 (finding error in the BIA's conclusion that an applicant was not "singled out" where he was arrested with other similarly-protected people).

The BIA decision must be afforded deference. As in *Cardoza-Fonseca*, where the Court determined deference to the agency was necessary, here the courts are required to give deference to their interpretation of the statute. Exactly like *Aguirre-Aguirre*, here the BIA's interpretation must stand if the construction is reasonable. Like *Kotasz*, the BIA impliedly recognized that the Regulation did not require strict adherence to the usual approach taken by the circuit courts. Because there are no facts establishing the construction was unreasonable, it must stand. Taking the responsibility placed upon them by Congress, the IJ and BIA administered a valid analysis to ascertain the likelihood that Marcos would suffer future persecution.

The BIA found Marcos' testimony credible. (ROA.2, 3). The BIA looked at both the individualized experiences that she faced (ROA.2, 7) as well as the risk that was facing all ethnic-Timog women—many of whom were suffering discrimination and some of whom were being regularly persecuted (ROA.2, 17)—and concluded this was enough to satisfy an objectively reasonable fear of persecution (ROA.2, 7). The courts must accept the framework as a reasonable construction of the Regulation, as shown in Section I.A and I.B, under the precedent established in *Chevron*.

II. THE BURDEN FOR DETERMINING WHETHER SUBSTANTIAL EVIDENCE SUPPORTED A FINDING THAT FUTURE PERSECUTION COULD BE AVOIDED BY INTERNAL RELOCATION WAS WRONGFULLY PLACED ON LEILA MARCOS

A. This Court Should Remand This Case To The Board Of Immigration Appeals Because The Term "Government Sponsored" In Section 208 Of The Code Of Federal Regulations Is Both Ambiguous And Undefined

Under Section 8 of the Code of Federal Regulations ("the Regulation"), if an applicant can be granted asylum if he or she has a well-founded fear of persecution. 8 C.F.R.§ 208.13(b).

However, an applicant cannot have a well-founded fear of persecution if they "could avoid persecution by relocating to another part of the applicant's country of nationality." 8 C.F.R. § 208.13(b)(2)(ii).

There are two steps for determining whether internal relocation is reasonable: first "whether an applicant could relocate safely," and second, "whether it would be reasonable to require the applicant to do so." *Kaiser v. Ashcroft,* 390 F.3d 653, 659 (9th Cir. 2004).

In situations in which the persecution is by a government or "government sponsored," "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." 8 C.F.R. § 208.13(b)(2)(ii). Conversely, if the persecution is not by the government or government sponsored, "the applicant shall bear the burden of establishing that it would not be reasonable for him or her to relocate." 8 C.F.R. § 208.13(b)(2)(ii). Therefore, there is a shifting burden for who must prove whether or not it would be reasonable for the applicant to relocate within their home country, depending on if the persecution is government sponsored or not.

i. **Section 208.13 of the Code of Federal Regulations is ambiguous regarding the meaning of "government sponsored"**

Section 208.13 of the CFR itself is ambiguous as to the meaning of government-sponsored persecution since there is not a clear definition from case law, the statute itself or the Board of Immigration Appeals ("BIA"). Therefore, the BIA should have the opportunity to define the term.

Congress has given the responsibility of administering the Immigration and Nationality Act to the Attorney General of the United States. 8 U.S.C. § 1103(a)(1). The Attorney General has given the BIA "the discretion and authority conferred upon the Attorney General by law,"

while "considering and determining cases before it." 8 C.F.R. § 3.1d1 (1998). The BIA is "entitled to deference in interpreting ambiguous provisions of the INA." *Negusie v. Holder*, 555 U.S. 511, 516 (2009). Therefore, the BIA should be given the opportunity to define the term government-sponsored as it appears in 8 C.F.R. § 208.13(b)(2)(ii).

Additionally, "officials must exercise especially sensitive political functions that implicate questions of foreign relations, and therefore the reasons for giving deference to agency decisions on petitions for reopening or reconsideration in other administrative contexts apply with even greater force" in contexts relating to immigration. *INS v. Abudu*, 485 U.S. 94, 110 (1988). Since the granting or denial of asylum to those seeking it from the country of Basag could implicate foreign relations between the United States and Basag, it is all the more imperative that the BIA be given deference in defining the statute.

ii. **Neither the Board of Immigration Appeals nor the Immigration Judge clearly defined the term "government sponsored" and therefore this Court should remand so the BIA has the opportunity to define the term**

Since the BIA has been entrusted with the responsibility of defining ambiguous statutes of the Immigration and Nationality Act, ("INA") the courts have found a necessity for clarity in this definition process. The Supreme Court began to articulate that principal in *SEC v. Chenery Corp.*, stating that "if an administrative action is to be tested by the basis upon which it purports to rest, that basis must be set forth with such clarity as to be understandable." 332 U.S. 194, 196 (1947). Furthermore, "it will not do for a court to be compelled to guess at the theory underlying the agency's action; nor can a court be expected to chisel that which must be precise from what the agency has left vague and indecisive . . . . We must know what a decision means before the duty becomes ours to say whether it is right or wrong." *Id* at 197. *See also Harrington v. Chao,* 280 F.3d 50, 61 (1st Cir. 2002) (holding that vacating and remanding "is a proper remedy when

an agency fails to explain its reasoning adequately").

The principles articulated by the Supreme Court apply just as much today as they did in 1947. Here, the BIA was silent as to its reasoning for its determination that Marcus could have reasonably relocated in Basag, merely stating that "Marcos is denied asylum because she could have reasonably relocated in Basag." (ROA.1, 10). The BIA, the governmental agency tasked with defining the statutes of the INA, has left the court to "guess at the theory underlying the agency's action." The Thirteenth Circuit has taken the bait and defined government sponsored as excluding Life Inc. (ROA.2, 17). This court should exercise judicial deference and return this decision, and all of its political implications, to the governmental agency tasked with statutory definition, the BIA.

The First Circuit has addressed unclear decisions from the BIA even more explicitly than the Supreme Court. In *Tillery v. Lynch*, an alien petitioned for review of a BIA decision that affirmed the IJ's denial of her application under the Violence Against Women Act ("VAWA"). 821 F.3d 182, 183 (1st Cir. 2016). The BIA found that the VAWA requires an alien to prove a good faith marriage to be eligible for special rule cancellation of removal. *Id.* at 185. The First Circuit found that the BIA "did not provide any explanation or legal reasoning for apparently construing the statute in that manner." *Id.* at 186. As a result of this, the court held that "the BIA must clearly exposit its chosen path" and that "this agency responsibility ensures, among other things, that a reviewing court is able to provide intelligent review on issues over which it has appellate jurisdiction." *Id.* at 185.

The instant case is analogous to *Tillery*. Exactly like *Tillery*, here the BIA was tasked with interpreting a statute that articulates which party has the burden of showing that relocation was reasonable or unreasonable in asylum cases. In particular, the BIA needed to define the

meaning of "government sponsored," in order to determine whether or not Life Inc. was sponsored by the government of Basag. It appears the BIA determined that Life Inc. was not government sponsored, since they determined that Marcos could have reasonably relocated. (ROA.1, 10). Yet, just like *Tillery*, the BIA did not provide an explanation or legal reasoning for this interpretation, nor did it make clear its definition of the statute. Instead, it cursorily stated that Marcos could have reasonably relocated. (ROA.1, 10). Therefore, the court should remand the case in order for the BIA to determine a fair and clear explanation of government sponsored.

The Ninth Circuit has also addressed unclear decisions from the BIA in the asylum context. *Afriyie v. Holder,* 613 F.3d 924 (9th Cir. 2010). In *Afriyie,* a citizen of Ghana was denied asylum by both the IJ and the BIA, and appealed to the Ninth Circuit. *Id* at 927. The petitioner, Afriyie, contended that the burden of proving the reasonableness of relocation was improperly placed on him. *Id* at 935. The court could not determine "whether the BIA considered the factors set forth in 8 C.F.R. 1208.13b3" and therefore remanded to the BIA to "apply the proper standards." *Id*. The court also noted that the IJ's reasoning in reaching this determination was contradictory and contained a "lack of clarity." *Id.*

This case is also analogous to *Afriyie*. Just like *Afriyie*, where it was unclear from the record whether the BIA properly considered the statute in determining which party had the burden of proof regarding relocation, here, the BIA has not provided an adequate definition of "government sponsored," which would determine which party has the burden. Additionally, just as there was a lack of clarity in the IJ's decision in *Afriyie*, here, the record is silent as to the IJ's reasoning for its determination that Marcos "could nevertheless have avoided persecution by relocating to another part of Basag." (ROA.1, 10). This general lack of clarity on the part of the IJ and BIA in this case requires this court to remand for further consideration and a

determination of the definition of "government sponsored persecution" by the BIA.

B. LIFE INC. IS A GOVERNMENT SPONSORED ORGANIZATION AND THEREFORE THE BURDEN FOR SHOWING RELOCATION WAS REASONABLE WAS WRONGFULLY PLACED ON MARCOS

Persecution is "something a government does, either directly or by abetting (and thus becoming responsible for) private discrimination, by throwing in its lot with the deeds or by providing protection so ineffectual that it becomes a sensible inference that the government sponsors the misconduct." *Hor v. Gonzales*, 400 F.3d 482, 485 (7th Cir. 2005). Additionally, "Affirmative state action is not necessary to establish a well-founded fear of persecution if the government is unwilling or unable to control those elements of its society responsible for targeting a particular class of individuals." *Avetova-Elliseva v. INS*, 213 F.3d 1192, 1196 (9th Cir. 2000). *See also Valioukevitch v. INS,* 251 F.3d 747, 749 (8th Cir. 2001) (holding that persecution requires a harm "inflicted either by the government" or "by persons or an organization that the government is unwilling or unable to control"). Cumulative incidents can form a basis for a finding of persecution. See *Surita v. INS*, 95 F.3d 814, 819 (9th Cir. 1996) ("While a single incident, in some instances, may not rise to the level of persecution, the cumulative effect of several incidents may constitute persecution."). These definitions provide a foundation for the determination of whether Life Inc. is a government-sponsored entity.

In *Kholyavskiy v. Mukasey*, 540 F.3d 555, 575 (7th Cir. 2008) the court held that persecution the petitioner had faced did not bear the official imprimatur of the government. The court found that the Russian government's official condemnation of anti-Semitism and efforts to stop hate crimes, were evidence that the anti-Semitic persecution the petitioner faced was not endorsed by the government. *Id.*

Unlike *Kholyavskiy*, the record here is silent as to any efforts made by the government to

curtail the persecution women in the country were facing. In fact, a Basag soldier, in the course of his duties representing the government, demanded that a pregnant women remove her shirt in order to receive water. (ROA.1, 7). Coupled with the harassment and assault Marcos experienced by Life Inc. guards on multiple occasions, this undoubtedly added to her well-founded fear of persecution and a culture of mistreatment of women on the island. Rather than making efforts to curtail the violence and fear on the island, the government of Basag has contributed to the killing of 75 citizens alongside Life Inc, mistakenly identified as Water Warriors. (ROA.1, 5).

Another distinguishable case is *Menjivar v. Gonzales,* 416 F.3d 918 (8th Cir. 2005). There, the petitioner claimed the persecution she experienced was sponsored by the government of El Salvador. *Id.* at 922. The court pointed to a timely response to a violent incident by the police, as well as police efforts to find the perpetrator as evidence the government was not "unable or unwilling" to bring an end to the persecution. *Id*.

Unlike *Menjivar*, in this case, the government law enforcement (military) was working hand in hand with the perpetrators of the alleged persecution. The primary people responsible for the well-founded fear of persecution Marcos experienced were Life Inc. guards. One guard grabbed the backside of Marcos on, and another guard threatened her with sexual assault on three occasions. (ROA.1, 6-8). In addition, Marcos had heard of another woman being raped in similar circumstances by a guard from Life Inc. (ROA.1, 6). Rather than show an effort to bring about an end to this persecution, the Basag government's soldiers were working side by side with the Life Inc. Guards, and together the forces had killed over 75 men and women on the island. (ROA.1, 5).

By contrast, in *Mashiri v. Ashcroft*, 383 F.3d 1112 (9th Cir. 2004) the court placed the

burden on the government to prove that relocation within Germany was safe and reasonable since the government was unwilling or unable to control anti-foreigner violence. The petitioner in that case had her home vandalized, was forced to run from a violent mob, and her sons were physically attacked. *Id.* at 1119-20. The police "conducted very limited investigation, if any, and told the aliens that they better try to take care of themselves." *Id.* at 1121. Therefore, the court found that the government had the burden to show that relocation was reasonable. *Id.*

Like in *Mashiri,* on Basag there were also multiple incidents of fear of persecution that Marcos faced. Marcos was threatened by the same guard on three different occasions, and a different guard grabbed her backside on April 6. Additionally, just like in *Mashiri*, the record is silent as to any efforts on the part of the Basag government to curtail the environment of sexual harassment and assault towards women. In fact, in the instance of the pregnant women being forced to take her shirt off by the soldier at the water distribution site, the government appears to have participated, as the soldier represented the government of Basag. (ROA.1, 7).

The actions of Life Inc. and its cooperation with the government of Basag show that the persecution that Marcos endured at the hands of the guards of Life Inc. was in fact sponsored by Basag. Whether Basag was unwilling or simply unable to control this persecution is unclear, but they did not take the steps necessary to solve the issue. Therefore, the burden should not have been on Marcus to prove that internal relocation was not reasonable.

CONCLUSION

I. The "disfavored group" analysis is a valid approach to establishing a well-founded fear of future persecution for the purpose of asylum eligibility. The relevant statutory and procedural framework that governs asylum claims supports the use of the "disfavored group" analysis. The "disfavored group" analysis provides the same evidentiary burden

as the approach employed by other courts; it does not lower it. Alternatively, the BIA is the agency charged with interpreting the statute and regulation that govern asylum, and the courts must defer to the BIA's use of the "disfavored group" analysis, which constitutes the agency's reasonable interpretation of the statute. For these reasons, this Court should affirm the Thirteenth Circuit's decision with respect to the first issue and find the "disfavored group" analysis is a valid basis for establishing a well-founded fear of persecution.

II. The burden for determining if internal relocation was reasonable was wrongfully placed on Leila Marcos. Life Inc. was a government sponsored organization, and therefore the well-founded fear that Marcos experienced as a result of Life Inc. guard's treatment of women was government sponsored as well.

Date: February 2, 2019

Team 107

/s/ *Team 107*

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