No. _____

In the
Supreme Court of the United States

DOUGLAS HUMBERTO URIAS-ORELLANA;
SAYRA ILIANA GAMEZ-MEJIA; AND G.E.U.G.,
Petitioners,

v.

MERRICK B. GARLAND, U.S. ATTORNEY GENERAL,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

GREGORY G. GARRE
CHRISTINE C. SMITH
LATHAM & WATKINS LLP
555 Eleventh Street, NW
Suite 1000
Washington, DC 20004

KRISTIAN R. MEYER
KEVIN P. MACMURRAY
MACMURRAY & ASSOCIATES
Two Center Plaza
Suite 605
Boston, MA 02108

NICHOLAS ROSELLINI
Counsel of Record
LATHAM & WATKINS LLP
505 Montgomery Street
Suite 2000
San Francisco, CA 94111
415.395.8165
nick.rosellini@lw.com

S.Y. JESSICA HUI
LATHAM & WATKINS LLP
1271 Avenue of the
Americas
New York, NY 10020

Counsel for Petitioner

QUESTION PRESENTED

The Immigration and Nationality Act (INA) provides that noncitizens on American soil are generally eligible for asylum if they qualify as a "refugee." 8 U.S.C. § 1158(b)(1)(A). A refugee is someone with "a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." *Id.* § 1101(a)(42). Noncitizens are presumptively eligible for asylum if they have "suffered persecution in the past." 8 C.F.R. § 1208.13(b)(1).

If ordered removed by an immigration judge (IJ), noncitizens may appeal the removal order—and with it, the denial of asylum—to the Board of Immigration Appeals (BIA). From there, "judicial review" is available in "an appropriate court of appeals." 8 U.S.C. § 1252(a)(5). The INA mandates judicial deference on "findings of fact" and three other kinds of administrative decisions. *Id.* § 1252(b)(4). The statute also explicitly provides for judicial review of the BIA's decisions on "questions of law," but does not establish a deferential standard of review for such decisions. *Id.* § 1252(a)(2)(D), (b)(9).

The question presented is:

Whether a federal court of appeals must defer to the BIA's judgment that a given set of undisputed facts does not demonstrate mistreatment severe enough to constitute "persecution" under 8 U.S.C. § 1101(a)(42).

RELATED PROCEEDINGS

The following proceedings are directly related to this petition:

Urias-Orellana v. Garland, No. 24-1042, United States Court of Appeals for the First Circuit, judgment entered November 14, 2024 (121 F.4th 327).

Matter of Urias-Orellana, et al., File Nos. A208-691-512, A216-663-245, A216-663-246, Board of Immigration Appeals, decision entered December 7, 2023 (unpublished).

Matter of Urias-Orellana, et al., File Nos. A208-691-512, A216-663-245, A216-663-246, United States Department of Justice, Executive Office for Immigration Review, final order of removal entered March 14, 2022.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Douglas Humberto Urias-Orellana, Sayra Iliana Gamez-Mejia, and their minor child, G.E.U.G., respectfully petition this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case.

OPINIONS AND ORDERS BELOW

The court of appeals' decision (App.1a-17a) is reported at 121 F.4th 327. The decisions of the Board of Immigration Appeals (App.18a-24a) and the immigration judge (App.25a-56a) are unreported.

JURISDICTION

The court of appeals entered judgment on November 14, 2024. App.1a-2a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Relevant statutory and regulatory provisions are reproduced in the petition appendix. App.57a-68a.

INTRODUCTION

This case raises an important and recurring question about the judiciary's role in interpreting and applying asylum protections that Congress has afforded noncitizens fleeing persecution abroad. Administrative officials make the initial decision about whether a noncitizen has experienced persecution within the meaning of the Immigration and Nationality Act (INA), subject to judicial review by a federal court of appeals. The question presented is whether a court of appeals must defer to a determination by the Board of Immigration Appeals (BIA) that a given set of undisputed facts does not establish mistreatment severe enough to constitute "persecution" under 8 U.S.C. § 1101(a)(42).

The circuits are deeply divided on this issue. Five circuits consistently require deference, but published decisions from six others hold the exact opposite. Three circuits have acknowledged this entrenched split, along with numerous other judges and commentators. Two prior petitions for certiorari have asked this Court to settle the proper standard of review once and for all, only for the government to stipulate to dismissal before the petitions could be considered. The question presented deserves an answer—now.

Under the INA's plain text, this Court's precedents, and bedrock principles of appellate review, the right answer is clear: Federal courts must review de novo whether the mistreatment suffered by a noncitizen meets the legal standard for persecution. The INA provision governing judicial review directs courts to defer to four sets of administrative determinations. 8 U.S.C. § 1252(b)(4). What kinds

and degree of harm amount to persecution under Section 1101(a)(42) are not among them, even though the statute explicitly safeguards judicial review of "questions of law"—i.e., the "interpretation and application of constitutional and statutory provisions." 8 U.S.C. § 1252(a)(2)(D), (b)(9). There is thus no textual basis for courts to defer to the BIA's legal judgment on the matter. And such deference effectively preserves *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), in asylum cases, infringing on the judiciary's power to say what persecution means under the law.

Below, the First Circuit rejected pleas for asylum from Petitioners Douglas Humberto Urias-Orellana, Sayra Iliana Gamez-Mejia, and their minor child, G.E.U.G., who fled El Salvador after a cartel sicario pursued a years-long, violent vendetta against their extended family. The sicario shot two of Douglas's half-brothers, while vowing to kill their relatives. Armed cartel members then repeatedly threatened and physically attacked Douglas, pursuing his family across El Salvador. Yet the First Circuit upheld the BIA's judgment that these death threats were somehow insufficiently "menacing" to rise to the level of persecution, citing circuit precedent cabining review to whether substantial evidence supported the BIA's confounding conclusion. App.12a.

Whether that deferential standard of review is correct is an exceptionally important issue. It matters not just for Douglas and his family, but for the thousands of asylum-seekers whose lives and freedom depend on correctly deciding what kinds and degree of mistreatment rise to the level of persecution under Section 1101(a)(42). The atextual deference regime driving the decision below invites inconsistent and

incorrect results, often with life-threatening consequences. If it really "is emphatically the province and duty of the judicial department to say what the law is," interpreting the cornerstone of asylum protections should be no exception. *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 412 (2024) (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)).

Only this Court can resolve the circuit split and restore the judiciary's proper role in ensuring the just and even-handed treatment of asylum-seekers. The petition should be granted.

STATEMENT OF THE CASE

A. Legal Background

1. Consistent with the United States' obligations under international law, the INA establishes certain legal protections against removal for noncitizens fleeing persecution. *See INS v. Stevic*, 467 U.S. 407, 416-22 (1984). One such protection is asylum. *See* 8 U.S.C. § 1158. Noncitizens granted asylum may not be removed from this country and have a path to becoming lawful permanent residents. *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 428 n.6 (1987). Their "spous[es]" and "child[ren]" may "be granted the same status," even when the family members are "not otherwise eligible for asylum" themselves. 8 U.S.C. § 1158(b)(3)(A).

Although a noncitizen's ultimate entitlement to asylum is left to executive discretion, *eligibility* for asylum hinges on a detailed set of legal criteria. *Cardoza-Fonseca*, 480 U.S. at 428 n.6. To be statutorily eligible, a noncitizen must qualify as a "refugee." 8 U.S.C. § 1158(b)(1). A "refugee" is someone "who is unable or unwilling to return to, and

is unable or unwilling to avail himself or herself of the protection of, [his home] country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1101(a)(42).

The term "persecution" means a "threat to the life or freedom of, or the infliction of suffering or harm upon, those who differ in a way regarded as offensive." *Lumataw v. Holder*, 582 F.3d 78, 91 (1st Cir. 2009) (quoting *Matter of Acosta*, 19 I. & N. Dec. 211, 216 (B.I.A. 1985)); *accord Mulyani v. Holder*, 771 F.3d 190, 198 (4th Cir. 2014) (collecting cases). Experiencing "credible threats" can "amount to persecution, especially when the assailant threatens [a noncitizen] with death, in person, and with a weapon." *Sok v. Mukasey*, 526 F.3d 48, 54 (1st Cir. 2008). That holds true even if the threats ultimately went "unfilled" or "were directed primarily toward" family members. *N.L.A. v. Holder*, 744 F.3d 425, 431-32 (7th Cir. 2014); *accord Corpeno-Romero v. Garland*, 120 F.4th 570, 579 (9th Cir. 2024).

The INA further requires that a protected ground be "at least one central reason for" the persecution. 8 U.S.C. § 1158(b)(1)(B)(i); *see, e.g.*, *Lopez-Quinteros v. Garland*, 123 F.4th 534, 543 (1st Cir. 2024) (holding that "there is no question that a family unit constitutes a particular social group" under the INA). And the "harm must either be perpetrated by the government itself or by a private actor that the government is unwilling or unable to control." *Aguilar-Escoto v. Garland*, 59 F.4th 510, 518 (1st Cir. 2023); *see, e.g.*, *Portillo Flores v. Garland*, 3 F.4th 615, 636 (4th Cir. 2021) (acknowledging "significant evidence" that El Salvador's government

is "unable or unwilling to control" violence by "MS-13 gang members"). All told, then, a noncitizen seeking asylum must show: (1) "a certain level of serious harm (whether past or anticipated)"; (2) "a causal connection to one of th[e] statutorily protected grounds"; and (3) "a sufficient nexus between th[e] harm and government action or inaction." *Gonzalez-Arevalo v. Garland*, 112 F.4th 1, 8 (1st Cir. 2024); *accord Guo v. Sessions*, 897 F.3d 1208, 1213 (9th Cir. 2018).

A noncitizen can demonstrate refugee status in two ways. First, a "showing of past persecution 'creates a rebuttable presumption of a well-founded fear of future persecution.'" *Lopez-Quinteros*, 123 F.4th at 539. To rebut this presumption, the government "bear[s] the burden of establishing by a preponderance of the evidence" that either: (1) "[t]here has been a fundamental change in circumstances" in the noncitizen's home country; or (2) the non-citizen "could avoid future persecution by relocating to another part of [that] country" and, "under all the circumstances, it would be reasonable to expect the [noncitizen] to do so." 8 C.F.R. § 1208.13(b)(1)(i)-(ii).

Second, even without showing past persecution, a noncitizen can establish a "well-founded fear of persecution" by demonstrating both "a genuine fear of future persecution" and " an objectively reasonable basis for that fear." *Toloza-Jiménez v. Gonzáles*, 457 F.3d 155, 161 (1st Cir. 2006). "In cases in which the [noncitizen] has not established past persecution"—but *has* demonstrated a reasonable fear of future persecution—the noncitizen, rather than the government, generally "bear[s] the burden of

establishing that it would not be reasonable for him or her to relocate." 8 C.F.R. § 1208.13(b)(3)(i).

2. To commence "removal proceedings, the INA requires that [noncitizens] be provided with 'written notice,'" which usually takes the form of a "notice to appear." *Campos-Chaves v. Garland*, 602 U.S. 447, 451 (2024) (quoting 8 U.S.C. § 1229(a)(1)-(2)). Noncitizens in removal proceedings may request asylum and other relief from removal, claims that an immigration judge (IJ) decides in the first instance.

IJs are appointed by the Attorney General and "subject to" his or her "supervision." 8 C.F.R. § 1001.1(*l*). In removal proceedings, they perform the fact-finding function: IJs may "administer oaths, receive evidence, and interrogate, examine, and cross-examine the [noncitizen] and any witnesses." 8 U.S.C. § 1229a(b)(1). Given that role, IJs must "determine whether or not the [noncitizen's] testimony is credible." *Id.* § 1229a(c)(4)(B)-(C).

Noncitizens ordered removed by an IJ may appeal to the BIA. BIA members, who are likewise "appointed by the Attorney General," "act as the Attorney General's delegates in the cases that come before them." 8 C.F.R. § 1003.1(a)(1). The BIA "function[s] as an appellate body charged with the review" of IJ decisions. *Id.* § 1003.1(d)(1). As such, the BIA must "not engage in de novo review of findings of fact determined by an immigration judge," such as "findings as to the credibility of testimony." *Id.* § 1003.1(d)(3)(i). Rather, the BIA may reverse an IJ's factual findings only when they are "clearly erroneous." *Id.* By contrast, the BIA reviews "questions of law" decided by the IJ "de novo." *Id.* § 1003.1(d)(3)(ii). The BIA considers an IJ's decision on whether "a given set of facts amounts to

persecution" to be "legal in nature"—and thus reviews such decisions de novo. *Xue v. Lynch*, 846 F.3d 1099, 1104-05 & nn.9, 11 (10th Cir. 2017) (citing *Matter of Z-Z-O-*, 26 I. & N. Dec. 586, 591 (B.I.A. 2015)).

If the BIA declines to disturb the IJ's decision, the removal order becomes final and subject to judicial review in "an appropriate court of appeals." 8 U.S.C. § 1252(a)(5); *see id.* § 1252(b)(2). A court of appeals must decide whether to grant the noncitizen's petition for review based "only on the [relevant] administrative record." *Id.* § 1252(b)(4)(A). The INA directs courts to defer to four specified kinds of administrative determinations, including "findings of fact." *Id.* § 1252(b)(4). It also explicitly safeguards judicial review over "constitutional claims" and "questions of law"—which encompasses both the "interpretation *and application* of constitutional and statutory provisions." 8 U.S.C. § 1252(a)(2)(D), (b)(9) (emphasis added). But the statute does not establish deferential judicial review on those legal issues. *Id.* § 1252(a)(2)(D).

B. Factual Background

Petitioners Douglas Humberto Urias-Orellana, Sayra Iliana Gamez-Mejia, and their minor child, G.E.U.G., are citizens of El Salvador. App.2a. They fled their home country after an extended campaign of terror against their family orchestrated by "a 'sicario' (which roughly translates to 'hitman') for a local drug lord." *Id.* at 4a.

The trouble started in 2016, after an argument between the sicario and Douglas's half-brother, Juan, over a romantic relationship between the sicario's mother and Juan's father. *Id.* Enraged, the sicario shot Juan six times. *Id.* Juan survived, but he

"suffered severe injuries from the shooting" and "is now wheelchair-bound." *Id.*

"The shooting apparently did not placate" the sicario, who "vowed to kill Juan's entire family." *Id.* The sicario "turned his crosshairs next" on another of Douglas's half-brothers, Remberto. *Id.* The sicario "ambushed Remberto in a secluded alley, shooting him nine times." *Id.* Remberto, too, miraculously survived. *Id.* Douglas "feared for his and his family's safety," so they fled from their hometown of Sonsonate to Cojutepeque. *Id.* at 4a-5a. There they remained in hiding "for about one year." *Id.* at 4a.

"Believing the worst to be over," Douglas and his family moved to "another town in El Salvador" called "Claudia Lara" to be closer to family. *Id.* at 4a-5a. But the sicario got wind of their new location within "a few months." *Id.* at 5a. Soon afterwards, "two masked men" brandishing weapons approached Douglas, "demanded money," and "warned [Douglas] that they would 'leave [him] like' his half-brothers and possibly kill him if he did not cave to their demands." *Id.* (alteration in original). "About six months later," Douglas "again was threatened at gunpoint by masked men" warning that they would "kill him" if "he did not pay up." *Id.*

Fearing for their lives, Douglas's family moved "again within El Salvador" to "Cara Sucia." *Id.* They successfully remained in hiding there "for two-and-and-a-half years," but it was not to last. *Id.* In December 2020, Douglas and Sayra "returned to visit [Douglas's] family in Sonsonate," where Douglas "was confronted by two masked men on a motorcycle." *Id.* "They threatened [Douglas], assaulted him by striking him three times in the chest, and warned him that they would kill him if he did not pay them." *Id.*

"[O]n their journey" home, Douglas "noticed two men on a motorcycle—whom he believed to be the same men who beat him—following him to Cara Sucia." *Id.* at 5a-6a.

"Fearful that Cara Sucia was unsafe," Douglas's family "return[ed] to Claudia Lara." *Id.* at 6a. But once there, Douglas "noticed that the same men who assaulted him [in Cara Sucia] were patrolling Claudia Lara apparently in search for him." *Id.* Douglas later "overheard two men asking a store employee if there were any newcomers to the area and where they were located." *Id.* So the family fled El Salvador and came here. *Id.* at 3a.

C. Procedural History

Soon after entering the United States, Douglas and his family were served "with Notices to Appear in immigration court" on charges of "removability for being present in the United States without being admitted or paroled." *Id.* In response, the family "admitted their removability" but "noted that they would seek asylum." *Id.*[1]

1. At the hearing before an IJ, Douglas "was the sole witness." *Id.* at 28a. The IJ found that Douglas was "credible," because he was "responsive" and "forthright," and because his answers were "consistent with his documentary evidence" and "written application." *Id.* "Accordingly," the IJ "credit[ed] his testimony" and took as true all the facts Douglas described. *Id.* at 28a-29a.

Nevertheless, the IJ rejected Douglas's plea for asylum—and by extension, his family's. *See id.* at 28a

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[1] The family also sought other kinds of relief from removal, but those requests are not at issue. App.3a & n.2.

(treating Sayra and G.E.U.G.'s asylum claims as "derivative[]"). The IJ held that "the sum of the threats and the one time where [Douglas] was hit three times on the chest does not rise to the level of past persecution." *Id.* at 31a. According to the IJ, the series of threats that Douglas "would end up like his brothers or would be killed" were insufficiently "menacing" because "there was no type of medical evaluation, psychiatric evaluation, social worker evaluation, or other type of psychological or physiological evaluation" stating that the threats "cause[d] significant actual suffering." *Id.* Absent any medically documented "long-lasting physical or mental effects from that mistreatment," the IJ declared, Douglas could not demonstrate past persecution. *Id.* at 32a.

Because Douglas had "not shown past persecution," the IJ determined that he bore "the burden of establishing that it would not be reasonable" to "relocate" within El Salvador. *Id.* at 34a (quoting 8 C.F.R. § 1208.13(b)(3)(i)). In the IJ's view, Douglas could not carry that burden due to "long periods of time[] in which" his family evaded danger within El Salvador. *Id.* And in any event, the IJ continued, Douglas lacked an objectively reasonable fear of future persecution because "other members" of his family had "not been mistreated or harmed by anyone"—putting aside the attempted murder of his two half-brothers. *Id.* at 33a. The IJ also found that the death threats and physical assault suffered by Douglas lacked a sufficient nexus to a statutorily protected ground and were not committed by forces the government of El Salvador was unable or unwilling to control. *Id.* at 36a-42a.

2. The BIA upheld the IJ's removal order. *Id.* at 18a-24a. Accepting the IJ's credibility determination and taking Douglas's testimony as true, the BIA held that the facts of this case, taken "in the aggregate," do not "rise[] to past persecution." *Id.* at 21a (citing *Matter of Acosta*, 19 I. & N. Dec. at 222); *id.* at 19a (observing that the BIA "reviews questions of law . . . de novo"). The BIA reasoned that "[t]he sicario never *personally* threated or harmed [Douglas], his mother, or his sisters." *Id.* at 20a (emphasis added). And "for the reasons set forth by the [IJ]," the BIA agreed that "the threats" Douglas experienced "were not sufficiently menacing or imminent" to qualify as "persecution" under the INA. *Id.* at 19a-21a.

"Next," the BIA "agree[d] with the [IJ]'s determination" that—having failed to show "past persecution"—Douglas "did not carry []his burden" of disproving the reasonable possibility of safely relocating within El Salvador. *Id.* at 21a-22a. In support, the BIA claimed that, after his "half-brother[s] w[ere] shot by the sicario," Douglas "moved away and did not have further problems," except "when he returned to his hometown" of Sonsonate. *Id.* at 22a. The BIA neglected to address the threats Douglas experienced in Claudia Lara and Cara Sucia. *See id.*; *supra* at 9-10.

The BIA recognized that the purported lack of past persecution and the supposed feasibility of internal relocation were "dispositive" on the family's asylum claims. App.20a n.3. Accordingly, the BIA deemed "it unnecessary to address the remaining issues" decided by the IJ and raised by the family on appeal. *Id.*

3. In a published opinion, the First Circuit denied the family's petition for review. *Id.* at 1a-17a. Applying circuit precedent, the First Circuit

"cabin[ed] [its] review to whether" the BIA's "conclusion that [Douglas] had not demonstrated past persecution or a well-founded fear of future persecution was supported by substantial evidence." *Id.* at 10a. Under this highly deferential standard, the First Circuit emphasized, a federal court must accept the BIA's conclusions "as long as they are supported by reasonable, substantial and probative evidence on the record considered as a whole." *Id.* at 9a (quoting *Gomez-Abrego v. Garland*, 26 F.4th 39, 45 (1st Cir. 2022)). That left the First Circuit powerless to "disturb" the BIA's denial of asylum, unless "*any* reasonable adjudicator would be compelled to conclude to the contrary." *Id.* (emphasis added) (quoting *Gonzalez-Arevalo*, 112 F.4th at 8).

The First Circuit held that Douglas and his family could not satisfy this stringent standard. On past persecution, the First Circuit acknowledged that Douglas's "assailants were armed, assaulted him on one occasion, and promised to leave him like his half-brothers if he did not comply" with their demands. *Id.* at 11a. Yet in the court's view, the BIA "reasonably concluded" that these death threats were not sufficiently "menacing" to constitute past persecution because Douglas "did not testify" that the threats "caused significant actual suffering" and the physical attack "did not result in hospitalization." *Id.* at 11a-12a.

As for the risk of future persecution, the First Circuit rested its decision on internal-relocation grounds. "Because [the family] did not establish past persecution," the First Circuit reasoned, "they [we]re not entitled to a presumption of future persecution"—and thus "b[ore] the burden 'to establish that relocation would be unreasonable.'" *Id.* at 14a. The

First Circuit found that "[s]ubstantial evidence supports the [BIA]'s conclusion that internal relocation in El Salvador would be reasonable." *Id.* at 13a-14a.

REASONS FOR GRANTING THE WRIT

This petition readily satisfies all the traditional criteria for certiorari. *See* Sup. Ct. R. 10(a). In the decision below, the First Circuit adhered to circuit precedent mandating deference to the BIA's legal judgment that a given set of undisputed facts does not establish mistreatment severe enough to constitute "persecution" under Section 1101(a)(42). That decision confirms an entrenched circuit split: Five circuits consistently review such determinations for substantial evidence, but published decisions from six circuits hold that de novo review applies instead. Three circuits have acknowledged the split, and numerous federal judges have asked this Court to answer the question presented.

Certiorari is also warranted because the First Circuit has incorrectly resolved an important question of federal law. The INA directs federal courts to defer to a discrete list of administrative determinations, including factual findings. 8 U.S.C. § 1252(b)(4). The BIA's rulings on what kinds and degree of mistreatment qualify as "persecution" under Section 1101(a)(42) are not on that list. This Court should adhere to the INA's text and ensure de novo judicial review in this area, where noncitizens' lives and freedom so often depend on correct application of the law.

The question presented comes up frequently in asylum cases. Unwarranted judicial deference to the BIA's judgment on what qualifies as persecution has

resulted in substantial harm to noncitizens fleeing life-threatening peril. Only this Court can resolve the split, and this case provides an ideal vehicle to do so. The petition should be granted.

I. The Decision Below Solidifies A Deep And Acknowledged Circuit Split

The First Circuit's decision confirms a deep circuit split on whether federal courts must defer to the BIA's judgment that a given set of undisputed facts does not establish mistreatment severe enough to qualify as "persecution" under the INA. The Tenth Circuit has twice acknowledged that "the circuits are split" on the question presented, while lamenting that "the Supreme Court has yet to resolve it." *Matumona v. Barr*, 945 F.3d 1294, 1300 n.5 (10th Cir. 2019); *accord Xue v. Lynch*, 846 F.3d 1099, 1105-06 & n.11 (10th Cir. 2017). The Second and Ninth Circuits have acknowledged the split as well. *See KC v. Garland*, 108 F.4th 130, 134 & n.1 (2d Cir. 2024); *Fon v. Garland*, 34 F.4th 810, 813 n.1 (9th Cir. 2022). And given the circuits' "inconsistent positions," a slew of federal judges have requested "Supreme Court guidance on this important, recurring topic." *Fon*, 34 F.4th at 819 (Graber, J., concurring); *see id.* at 820 (Collins, J., concurring); *Liang v. U.S. Att'y Gen.*, 15 F.4th 623, 628-30 & n.3 (3d Cir. 2021) (Jordan, J., joined by Ambro, J., concurring); *Flores Molina v. Garland*, 37 F.4th 626, 640-41 (9th Cir. 2022) (Korman, J., concurring). This Court should now answer the call.

A. Five Circuits Defer To The BIA's Legal Judgment About What Constitutes Persecution Under The INA

On one side of the split, the First, Fourth, Sixth, Seventh, and Tenth Circuits all hold that a federal court of appeals must defer to the BIA's judgment about what kinds of harm constitute "persecution" under Section 1101(a)(42).

The First Circuit reviews for "substantial evidence" BIA determinations that a given set of undisputed facts do not demonstrate "mistreatment" that was "sufficiently severe to rise to the level of persecution." *Khalil v. Garland*, 97 F.4th 54, 62 (1st Cir. 2024); *see, e.g.*, *Gonzalez-Arevalo v. Garland*, 112 F.4th 1, 8 (1st Cir. 2024); *Gomez-Abrego v. Garland*, 26 F.4th 39, 45 (1st Cir. 2022). That is, the First Circuit uses the substantial-evidence standard that the INA establishes for review of "administrative findings of fact" to assess the BIA's conclusions about what constitutes persecution under the law. 8 U.S.C. § 1252(b)(4)(B). Applying this precedent, the decision below recognized that disagreement with the BIA's interpretation of persecution under Section 1101(a)(42) "is not enough to warrant upsetting" the denial of asylum. App.9a. Rather, deference to the BIA is required, so long as "the record" does "not compel a finding of past persecution." *Id.* at 13a.

The Sixth Circuit, too, applies Section 1252(b)(4)(B)'s substantial-evidence standard when reviewing whether a given set of undisputed facts "rose to the level of 'persecution'" under Section 1101(a)(42). *Kukalo v. Holder*, 744 F.3d 395, 400 (6th Cir. 2011). The Sixth Circuit recognizes that this standard is exceedingly "difficult" to meet. *Id.*;

see, e.g., *Haider v. Holder*, 595 F.3d 276, 287 (6th Cir. 2010) (rare case holding that "the evidence compels a finding of persecution" because the "police physically assaulted" a noncitizen with "a gun" and repeatedly subjected him to "sexual abuse").

Similarly, the Seventh Circuit "review[s] the conclusion that the harm the petitioner may have suffered did not rise to the level of persecution under the substantial evidence standard." *Tarraf v. Gonzales*, 495 F.3d 525, 534 (7th Cir. 2007); *accord Escobedo Marquez v. Barr*, 965 F.3d 561, 565 (7th Cir. 2020).

The Tenth Circuit does as well, reasoning that "the ultimate determination whether an alien has demonstrated persecution is a question of fact, even if the underlying factual circumstances are not in dispute and the only issue is whether those circumstances qualify as persecution" under the law. *Vicente-Elias v. Mukasey*, 532 F.3d 1086, 1091 (10th Cir. 2008); *see, e.g.*, *Witjaksono v. Holder*, 573 F.3d 968, 977 (10th Cir. 2009). And while more recent Tenth Circuit decisions have questioned this rule, they uniformly acknowledge that their court will remain "bound by" it unless "the Supreme Court" decides otherwise. *Matumona*, 945 F.3d at 1300 n.5; *accord Xue*, 846 F.3d at 1105-06 & n.11.

Finally, the Fourth Circuit also defers to the BIA's judgment about what constitutes persecution, but its caselaw is hopelessly confused about the nature and source of that deference. One line of decisions applies the substantial-evidence standard that the INA reserves for reviewing "administrative findings of fact." 8 U.S.C. § 1252(b)(4)(B); *see, e.g.*, *Mirisawo v. Holder*, 599 F.3d 391, 398 (4th Cir. 2010); *Lin-Jian v. Gonzales*, 489 F.3d 182, 191-92 (4th Cir. 2007). But

another strand of cases asks whether the BIA's decision was "manifestly contrary to the law and an abuse of discretion"—a separate standard that the INA prescribes for reviewing the BIA's ultimate "discretionary judgment whether to grant" asylum to a statutorily eligible noncitizen. 8 U.S.C. § 1252(b)(4)(D); *see, e.g.*, *Tairou v. Whitaker*, 909 F.3d 702, 708 (4th Cir. 2018); *Portillo Flores v. Garland*, 3 F.4th 615, 627 (4th Cir. 2021).

B. Published Decisions From Six Circuits Apply De Novo Review Instead

On the other side of the split, published decisions from the Second, Third, Fifth, Eighth, Ninth, and Eleventh Circuits hold that a court of appeals must *not* defer to the BIA's judgment about what constitutes persecution under Section 1101(a)(42). Instead, those decisions hold that courts must review such determinations de novo. While these six circuits also have opinions taking the opposite position, that entrenched confusion only underscores the need for this Court's intervention.

In *Mirzoyan v. Gonzales*, 457 F.3d 217 (2d Cir. 2006), the Second Circuit held that federal courts must "review *de novo*" whether a given set of "facts did not meet the legal definition of persecution in the INA." *Id.* at 220. The Second Circuit has repeatedly reiterated that holding. *See, e.g.*, *Huo Qiang Chen v. Holder*, 773 F.3d 396, 403 (2d Cir. 2014); *Edimo-Doualla v. Gonzales*, 464 F.3d 276, 282 (2d Cir. 2006). And it consistently reviews such BIA determinations de novo. *See, e.g.*, *Sherpa v. Garland*, 2023 WL 6057244, at *1 (2d Cir. Sept. 18, 2023); *Hassan v. Barr*, 821 F. App'x 1, 4 (2d Cir. 2020); *Flores Anyosa v. Whitaker*, 758 F. App'x 88, 89-90

(2d Cir. 2018); *Caci v. Gonzales*, 238 F. App'x 732, 733 (2d Cir. 2007).

True, in *Scarlett v. Barr*, 957 F.3d 316 (2d Cir. 2020), one Second Circuit panel concluded that "substantial evidence" supported a BIA determination that certain undisputed "past conduct did not rise to the level of 'persecution.'" *Id.* at 336. But *Scarlett* simply assumed deference was owed, while ignoring contrary circuit precedent and the panel's own statement that "we review *de novo* all questions of law, *including the application of law to facts*." *Id.* at 326 (emphasis added).

Like the Second Circuit, the Third Circuit has repeatedly held that, when "the facts underlying [a noncitizen's] past-persecution claim" are not in "dispute[]," a federal court must "review the BIA's application of [the INA's] past-persecution standard to those facts de novo." *Herrera-Reyes v. U.S. Att'y Gen.*, 952 F.3d 101, 106 (3d Cir. 2020); *accord Blanco v. U.S. Att'y Gen.*, 967 F.3d 304, 310-11 (3d Cir. 2020); *Espinoza v. U.S. Att'y Gen.*, 2023 WL 8295930, at *2 (3d Cir. Dec. 1, 2023). On other occasions, however, the Third Circuit has applied the "substantial evidence standard to an agency determination that an alien did not suffer harm rising to the level of persecution," even though "the underlying facts" were "undisputed." *Thayalan v. U.S. Att'y Gen.*, 997 F.3d 132, 137 n.1 (3d Cir. 2021); *see, e.g.*, *Voci v. Gonzales*, 409 F.3d 607, 616 (3d Cir. 2005). For this reason, in a concurrence joined by Judge Ambro, Judge Jordan critiqued his circuit's caselaw for not being "clearer and more consistent on this important point." *Liang*, 15 F.4th at 629-30 (Jordan, J., concurring).

The Fifth Circuit has likewise held that whether certain conduct "rises to the level of past-persecution

is a question of law" that courts "review de novo." *Morales v. Sessions*, 860 F.3d 812, 816 (5th Cir. 2017). And that court has often conducted de novo review of the BIA's decisions on this issue. *See, e.g.*, *Caliz v. Wilkinson*, 844 F. App'x 737, 738 (5th Cir. 2021); *Jalloh v. Barr*, 794 F. App'x 418, 421 (5th Cir. 2019). Yet the Fifth Circuit also has contradictory decisions that "use the 'substantial evidence' standard" in assessing what "amount[s] to persecution," including "when the agency determines the alien is credible and accepts his version of the facts." *Gjetani v. Barr*, 968 F.3d 393, 395-96 (5th Cir. 2020); *see, e.g.*, *Eduard v. Ashcroft*, 379 F.3d 182, 186-88 (5th Cir. 2004).

The Eighth Circuit has also repeatedly held that "whether undisputed facts meet the legal definition of persecution" is "a question of law" that must be "review[ed] de novo." *Njong v. Whitaker*, 911 F.3d 919, 923 (8th Cir. 2018); *see, e.g.*, *Padilla-Franco v. Garland*, 999 F.3d 604, 606 (8th Cir. 2021); *Alavez-Hernandez v. Holder*, 714 F.3d 1063, 1066 (8th Cir. 2013). Nevertheless, the Eighth Circuit occasionally reviews the issue for substantial evidence. *See, e.g.*, *Brizuela v. Garland*, 71 F.4th 1087, 1092-93 (8th Cir. 2023); *Tojin-Tiu v. Garland*, 33 F.4th 1020, 1024 (8th Cir. 2022).

Similarly, multiple Ninth Circuit decisions hold that "[w]hether particular acts constitute persecution for asylum purposes is a legal question" that courts must "review de novo." *Boer-Sedano v. Gonzales*, 418 F.3d 1082, 1088 (9th Cir. 2005) (emphasis omitted); *accord Kaur v. Wilkinson*, 986 F.3d 1216, 1221 (9th Cir. 2021). But other Ninth Circuit cases have deferred to the BIA on the matter, even when the noncitizen suffered indisputably "condemnable mistreatment." *Sharma v. Garland*, 9 F.4th 1052,

1059-60 (9th Cir. 2021); *see, e.g.*, *Wakkary v. Holder*, 558 F.3d 1049, 1059 (9th Cir. 2009). The Ninth Circuit has acknowledged that these conflicting holdings on the proper standard of review cannot be reconciled. *See, e.g.*, *Corpeno-Romero v. Garland*, 120 F.4th 570, 577 (9th Cir. 2024); *Singh v. Garland*, 97 F.4th 597, 603 (9th Cir. 2024).

Finally, the Eleventh Circuit has likewise held that a BIA decision on "whether, as a matter of law, what [a noncitizen] endured constitutes past persecution" is "a legal determination" that courts "review *de novo*." *Mejia v. U.S. Att'y Gen.*, 498 F.3d 1253, 1256-57 (11th Cir. 2007); *see, e.g.*, *Medina v. U.S. Att'y Gen.*, 800 F. App'x 851, 855 (11th Cir. 2020) (applying de novo review); *Polanco-Brun v. U.S. Att'y Gen.*, 361 F. App'x 106, 107 (11th Cir. 2010) (same). But the Eleventh Circuit also has opinions reviewing this issue under the substantial-evidence standard instead. *See, e.g.*, *Martinez v. U.S. Att'y Gen.*, 992 F.3d 1283, 1292 (11th Cir. 2021); *Kazemzadeh v. U.S. Att'y Gen.*, 577 F.3d 1341, 1352-53 (11th Cir. 2009).

C. This Court Should Resolve The Split

Only this Court can resolve the disarray described above. Waiting for a resolution in the lower courts is not a feasible option. Absent the Court's intervention, securing uniformity on the question presented would require en banc decisions from six circuits, each (mistakenly) holding that Article III courts must defer to the BIA's judgment about what constitutes "persecution" under Section 1101(a)(42). And achieving a *correct* consensus on the question presented would take en banc decisions from *eleven* circuits, each holding that de novo review applies.

None of that is going to happen—and certainly not anytime soon.

In the Ninth Circuit, for example, judges have made impassioned arguments for every possible rule, including deference to the BIA, de novo review, and something in between. *See, e.g.*, *Flores Molina*, 37 F.4th at 641-42 (VanDyke, J., dissenting) (advocating for "extreme deference"); *id.* at 640-41 (Korman, J., concurring) (defending de novo review); *Fon*, 34 F.4th at 819 (Graber, J., concurring) (supporting a "more nuanced" regime that only sometimes requires deference). And another judge has called the question presented "complicated," while emphasizing the "significant circuit split on this issue" and the Ninth Circuit's own doctrinal "mess" in the area. *Fon*, 34 F.4th at 820, 823 (Collins, J., concurring).

Furthermore, the Eighth and Tenth Circuits have each denied rehearing en banc in cases implicating the question presented—with four Eighth Circuit judges dissenting. *See Xue*, 846 F.3d at 1101 (denying rehearing en banc); *He v. Garland*, 2022 WL 2036976, at *1 (8th Cir. June 7, 2022) (also denying rehearing en banc, with Judges Gruender, Benton, Kelly, and Grasz dissenting). In both cases, the noncitizens sought certiorari on the same standard-of-review issue as this petition. *See* Cert. Pet. i, *Xue v. Sessions*, 583 U.S. 960 (2017) (No. 16-1274); Cert. Pet. i, *He v. Garland*, 143 S. Ct. 2694 (2023) (No. 22-436). And in both cases, the government stipulated to dismissal before the petitions could be considered by this Court. *See* Sup. Ct. R. 46(1).

The extraordinary degree of chaos among, and even within, numerous circuits on this important and recurring question warrants this Court's review.

II. The First Circuit Wrongly Deferred To The BIA's Legal Judgment About What Qualifies As "Persecution" Under Section 1101(a)(42)

Certiorari is also warranted because the INA does not permit judicial deference to the BIA's decision that harm suffered by a noncitizen falls short of "persecution" under Section 1101(a)(42). Numerous federal judges agree. *See, e.g.*, *Gjetani*, 968 F.3d at 400-01 (Dennis, J., dissenting); *Flores Molina*, 37 F.4th at 641 (Korman, J., concurring); *Liang*, 15 F.4th at 627-30 (Jordan, J., joined by Ambro, J., concurring); *see Xue*, 846 F.3d at 1104-06 (acknowledging the forceful arguments in favor of de novo review); *Fon*, 34 F.4th at 821-23 (Collins, J., concurring) (same). So do academic commentators. *See, e.g.*, Charles Shane Ellison, *The Toll Paid When Adjudicators Err: Reforming Appellate Review Standards for Refugees*, 38 Geo. Immigr. L.J. 143, 193-204 (2024). This chorus of criticism rings true: Statutory text, this Court's recent decision in *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024), and established background principles of appellate review all demand de novo review of the BIA's legal judgment in this area.

1. Judicial deference to the BIA's judgment on what rises to the level of "persecution" under Section 1101(a)(42) violates the INA's plain text. Section 1252 establishes a reticulated scheme for judicial review, which directs courts to defer to just four categories of administrative determinations. *First*, "administrative findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary"—i.e., factual findings are reviewed for substantial evidence. 8 U.S.C. § 1252(b)(4)(B); *see id.* § 1252(b)(7)(B)(i)

(similar). *Second*, a "decision that an alien is not eligible for admission to the United States is conclusive unless manifestly contrary to law." *Id.* § 1252(b)(4)(C). *Third*, the ultimate "discretionary judgment whether to grant" asylum to a statutorily eligible noncitizen is "conclusive unless manifestly contrary to the law and an abuse of discretion," *id.* § 1252(b)(4)(D)—and other exercises of executive discretion are not judicially reviewable at all, *id.* § 1252(a)(2)(B). *Fourth*, administrative decisions "with respect to the availability of corroborating evidence" may not be disturbed, "unless the court finds, pursuant to subsection (b)(4)(B), that a reasonable trier of fact is compelled to conclude that such corroborating evidence is unavailable." *Id.* § 1252(b)(4).

These textually enumerated mandates for judicial deference do not encompass the BIA's decisions on what mistreatment rises to the level of "persecution" under Section 1101(a)(42). Such decisions have nothing to do with a noncitizen's "eligib[ility] for admission to the United States." 8 U.S.C. § 1252(b)(4)(C). They involve a noncitizen's "statutory eligibility" for asylum, *Wilkinson v. Garland*, 601 U.S. 209, 218 (2024), not the ultimate "discretionary judgment whether to grant" asylum to an eligible noncitizen, 8 U.S.C. § 1252(b)(4)(D). And they obviously are not determinations "with respect to the availability of corroborating evidence." 8 U.S.C. § 1252(b)(4).

Nor is the BIA's legal judgment that certain mistreatment falls short of the legal standard for persecution an "administrative finding[] of fact." *Id.* § 1252(b)(4)(B). This Court has repeatedly held, while applying Section 1252, that "whether a given

set of facts meets a particular legal standard" is "a legal inquiry"—or otherwise said, a "mixed question of law and fact." *Guerrero-Lasprilla v. Barr*, 589 U.S. 221, 227-28 (2020); *accord Wilkinson*, 601 U.S. at 221; *Patel v. Garland*, 596 U.S. 328, 339 (2022). Even though it may entail "closely examin[ing] and weigh[ing] a set of established facts," interpreting what persecution means "is not a factual inquiry." *Wilkinson*, 601 U.S. at 221.[2] And while the INA explicitly safeguards judicial review of the BIA's decisions on "constitutional claims [and] questions of law"—which it defines to include both the "interpretation *and application* of constitutional and statutory provisions"—the statute nowhere provides for deferential judicial review of those legal issues. 8 U.S.C. § 1252(a)(2)(D), (b)(9) (emphasis added).

Because Section 1252 sets forth a discrete list of administrative decisions that courts must review deferentially, and because the BIA's decisions on what constitutes "persecution" are not on that list, judicial deference to those decisions violates the statute. *See Jennings v. Rodriguez*, 583 U.S. 281, 300 (2018) (observing that "[t]he expression of one thing implies the exclusion of others" under the canon of *expressio unius est exclusio alterius*); Antonin Scalia & Bryan A. Garner, *Reading Law* 107 (2012) (same).

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[2] Indeed, "the BIA itself has concluded" that an IJ's decision on whether "a given set of facts amounts to persecution" is "legal in nature"—and thus subject to de novo review by the BIA. *Xue*, 846 F.3d at 1104-05 & n.9 (citing *Matter of Z-Z-O-*, 26 I. & N. Dec. 586, 589-91 (B.I.A. 2015)); *see* 8 C.F.R. § 1003.1(d)(3)(i) (mandating that the BIA review only an IJ's "findings of fact" for clear error). "It is certainly odd, to say the least, for [a] court to review for substantial evidence" something that the BIA reviews de novo. *Xue*, 846 F.3d at 1105.

There is no textual basis for substantial-evidence review here.

2. This Court's recent decision in *Loper Bright* compels the same conclusion. The Court held that deference to administrative decisions is inappropriate when the relevant statute—there, the Administrative Procedure Act (APA)—"prescribes no deferential standard for courts to employ" when deciding "legal questions." *Loper Bright*, 603 U.S. at 392. A similar "omission is telling" in this case because, as just explained, the INA "*does* mandate that judicial review of agency . . . factfinding be deferential." *Id.*; *see* 8 U.S.C. § 1252(b)(4)(B).

In addition, the "settled pre-APA understanding that deciding [legal] questions was 'exclusively a judicial function'" cuts just as sharply against deference here as it did in *Loper Bright*. 603 U.S. at 392. Before Congress enacted the APA, courts confronted with "factbound statutory determinations" often "simply interpreted and applied the statute before" them, rather than defer to the agency. *Id.* at 389; *see id.* at 431 (Gorsuch, J., concurring) (noting the "time-worn" tradition of de novo review for "so-called mixed questions of law and fact"). And Section 1252 specifically safeguards judicial review to correct the BIA's "misapplication of a legal standard to the facts of a particular case." *Guerrero-Lasprilla*, 589 U.S. at 232. So as with the APA, "Congress surely would have articulated" a "deferential standard applicable to questions of law had it intended to depart from" the tradition of de novo review on such questions. *Loper Bright*, 603 U.S. at 392. "But nothing in the [INA] hints at such a dramatic departure." *Id.* "On the contrary, by directing courts to 'interpret constitutional and statutory provisions'

without differentiating between the two, Section [1252] makes clear that [the BIA's] interpretations of statutes—like [the BIA's] interpretations of the Constitution—are *not* entitled to deference." *Id.*; *see* 8 U.S.C. § 1252(a)(2)(D).

In some ways, substantial-evidence review of how the BIA interprets "persecution" goes further than *Chevron* ever did. Before *Loper Bright*, federal courts frequently applied *Chevron* deference to the BIA's rulings on this issue. *See, e.g.*, *Eusebio v. Ashcroft*, 361 F.3d 1088, 1091 (8th Cir. 2004); *Pitcherskaia v. INS*, 118 F.3d 641, 646 (9th Cir. 1997). But under that now-defunct regime, *Chevron* applied only when "three-member panels" of the BIA issued "precedential decisions." *Joseph v. Holder*, 579 F.3d 827, 832 (7th Cir. 2009); *see, e.g.*, *Quinchia v. U.S. Att'y Gen.*, 552 F.3d 1255, 1258 (11th Cir. 2008). *Chevron* thus didn't come into play for "the vast majority of BIA dispositions," which are "issued by a single Board member" and "nonprecedential." *Marmolejo-Campos v. Holder*, 558 F.3d 903, 922 n.5 (9th Cir. 2009) (Berzon, J. dissenting). By contrast, substantial-evidence review demands deference to non-precedential, single-member BIA decisions—like the one in this case. *See* App.9a, 18a. When applied to the BIA's interpretation of the term "persecution," substantial-evidence review is just *Chevron* deference by another name—only worse.

3. The INA's "statutory prescription" on the "appropriate standard of appellate review" is consistent with bedrock principles governing appellate review of mixed questions of law and fact. *Monasky v. Taglieri*, 589 U.S. 68, 83 (2020). The central importance of properly applying the term "persecution" in this statutory scheme, together with

the need to give uniform guidance to immigration officials, powerfully supports de novo review. That holds true even though determining what kinds and degree of mistreatment constitute persecution may require "plunging into a factual record." *U.S. Bank Nat'l Ass'n ex rel. CWCapital Asset Mgmt. LLC v. Vill. at Lakeridge, LLC*, 583 U.S. 387, 396 n.4 (2018).

Judging whether a given set of undisputed facts establishes mistreatment severe enough to qualify as "persecution" under Section 1101(a)(42) requires, well, *judging*. Federal courts' "role in marking out the limits" of the INA's persecution standard "through the process of case-by-case adjudication is of special"—indeed, paramount—"importance." *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 503 (1984). In enacting the INA, Congress exercised its constitutional power to "establish an *uniform* Rule of Naturalization." U.S. Const. art. I, § 8, cl. 4 (emphasis added); *see Arizona v. United States*, 567 U.S. 387, 394-95 (2012). And Section 1158, in particular, was meant "to conform" this country's "asylum law to the United Nation's Protocol [Relating to the Status of Refugees," which demands even-handed treatment of foreign nationals seeking refuge from persecution here. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 432 (1987).

The term "persecution" must be interpreted consistently to safeguard the system of "uniform naturalization and immigration laws" that the Founders envisioned, Congress enacted, and international law demands. *Hines v. Davidowitz*, 312 U.S. 52, 74 (1941). But a "policy of sweeping deference" to the BIA's judgment about what harms rise to the level of persecution directly undermines these important goals. *Ornelas v. United States*, 517

U.S. 690, 697 (1996). It invites "varied results" for similarly situated noncitizens, which is "inconsistent with the idea of a unitary system of law" for asylum claims. *Id.*

"Independent review is therefore necessary if appellate courts are to maintain control of, and to clarify, the legal principles" governing the protections against persecution that Congress has established, notwithstanding the "multi-faceted" and fact-laden inquiry it sometimes involves. *Ornelas*, 517 U.S. at 697-98. So as with other mixed questions that often require fact-intensive decisionmaking, de novo review is crucial. *See, e.g.*, *id.* (de novo review of a district court's probable-cause determination); *Google LLC v. Oracle Am., Inc.*, 593 U.S. 1, 23-24 (2021) (same for a jury's fair-use determination under the Copyright Act).[3] That is especially true because this case concerns not "which kind of *court*" is "better suited to resolve" an inquiry, but rather whether courts must defer to *administrative officials'* construction of a foundational statutory term. *U.S. Bank*, 583 U.S. at 395 (emphasis added).

Furthermore, for as much as interpreting the meaning of persecution under Section 1101(a)(42)

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[3] *See, e.g.*, *In re Long*, 322 F.3d 549, 553 (8th Cir. 2003) (collecting cases from six circuits holding "that an 'undue hardship' determination" under the Bankruptcy Code related to the discharge of student debt requires "de novo review"); *D.O. ex rel. Walker v. Escondido Union Sch. Dist.*, 59 F.4th 394, 405 (9th Cir. 2023) (reviewing de novo whether a particular condition constitutes a "health impairment" under the Individuals with Disabilities Education Act); *Morrison v. Magic Carpet Aviation*, 383 F.3d 1253, 1254-55 (11th Cir. 2004) (same for whether a given set of facts establishes an employment relationship under the Family Medical Leave Act).

can "immerse courts in case-specific factual issues," it *also* frequently involves "developing auxiliary legal principles for use in other cases." *Id.* at 396. For instance, courts have established a blanket rule that, when a noncitizen "demonstrates that she has suffered an attempted rape, she need not adduce additional evidence of harm—psychological or otherwise—to establish past persecution." *Kaur*, 986 F.3d at 1222. They have also broadly held that "the range of procedures collectively known as female genital mutilation rises to the level of persecution." *Mohammed v. Gonzales*, 400 F.3d 785, 795 (9th Cir. 2005); *accord Niang v. Gonzales*, 492 F.3d 505, 510 (4th Cir. 2007). And they have categorically concluded that "if you are forbidden to practice your religion, that is religious persecution." *Bucur v. INS*, 109 F.3d 399, 405 (7th Cir. 1997); *accord Kazemzadeh*, 577 F.3d at 1354. By "amplifying" and "elaborating on" Section 1101(a)(42)'s "broad legal standard" in this way, courts "expound on the law." *U.S. Bank*, 583 U.S. at 396. That function powerfully confirms the need for de novo review here.

III. The Question Presented Is Exceptionally Important And Merits Review In This Case

Whether courts must defer to the BIA's judgment about what kinds and degree of mistreatment qualify as "persecution" under Section 1101(a)(42) is a critically important issue. The question presented holds grave consequences for asylum-seekers, and this case is an ideal vehicle for answering it.

1. "The stakes" in removal proceedings are always "momentous." *Delgadillo v. Carmichael*, 332 U.S. 388, 391 (1947); *accord Ng Fung Ho v. White*, 259 U.S. 276, 284-85 (1922). But they are "all the more replete

with danger when [a noncitizen] makes a claim that he or she will be subject to death or persecution if forced to return to his or her home country." *Cardoza-Fonseca*, 480 U.S. at 449.

With so much "obviously at stake," asylum cases "are among the most difficult that [courts] face." *Dia v. Aschroft*, 353 F.3d 228, 261 (3d Cir. 2003) (en banc) (Alito, J., concurring in part and dissenting in part). But the "importance of independent judicial review in [this] area"—"where administrative decisions can mean the difference between freedom and oppression and, quite possibly, life and death"—cannot be overstated. *Rodriguez-Roman v. INS*, 98 F.3d 416, 432 (9th Cir. 1996) (Kozinski, J., concurring). Deference to the BIA's decisions about what constitutes persecution under Section 1101(a)(42) often proves dispositive in these life-and-death cases.

Here, for example, the BIA concluded "that the threats experienced by" Douglas were insufficiently "menacing" to constitute persecution. App.11a. Reviewing for substantial evidence, the First Circuit believed it could not disturb the BIA's decision, even though the sicario hunted down Douglas's two half-brothers, shot them both, and "vowed to kill [their] entire family"—and even though armed assailants later pursued Douglas and his family across El Salvador, while repeatedly threatening "to leave him like his half-brothers" unless they were paid off. *Id.* at 4a, 11a. It is inconceivable that the BIA's past-persecution determination would have survived de novo review; it arguably flunked even the substantial-evidence standard (though this petition does not seek to relitigate that dispute). *See N.L.A. v. Holder*, 744 F.3d 425, 434 (7th Cir. 2014) (record compelled a finding of past persecution because the

noncitizen received "a credible threat of imminent harm—one that was backed by the most proof of seriousness that one could require—the actual killing of one family member and kidnapping of another"); *supra* at 8-10; CA1 Petitioners' Br. 9-13.

Douglas and his family's experience with improper deference to the BIA is all too common. *See, e.g.*, *Diallo v. Ashcroft*, 381 F.3d 687, 697 (7th Cir. 2004) (noting that, if review had been "*de novo*, we might be inclined to find" that a noncitizen "was the victim of past persecution"); *Khup v. Ashcroft*, 376 F.3d 898, 903-04 (9th Cir. 2004) (denying relief "[b]ecause reasonable minds could differ on whether" the noncitizen had demonstrated past persecution). The consequences have been devastating: For example, between 2013 and 2019, at least 138 people were murdered after being removed from the United States to El Salvador—and that's just one country. *See* Human Rights Watch, *Deported to Danger: United States Deportation Policies Expose Salvadorans to Death and Abuse* (Feb. 5, 2020), https://www.hrw.org/report/2020/02/05/deported-danger/united-states-deportation-policies-expose-salvadorans-death-and. Whether deference to the BIA is appropriate in cases like this one matters for thousands of noncitizens at risk of a similar fate.

2. Resolving the question presented will also help ensure that asylum claims are not reduced to "a 'sport of chance.'" *Judulang v. Holder*, 565 U.S. 42, 58-59 (2011) (quoting *Di Pasquale v. Karnuth*, 158 F.2d 878, 879 (2d Cir. 1947) (Hand, J.)). For decades, there has been "remarkable variation in decision making" in asylum cases "from one official to the next, from one office to the next, from one region to the next, [and]

from one Court of Appeals to the next." Jaya Ramji-Nogales et. al., *Refugee Roulette: Disparities in Asylum Adjudication*, 60 Stan. L. Rev. 295, 302 (2007) (*Refugee Roulette*); *see* U.S. Gov't Accountability Office, *Asylum: Variation Exists in Outcome of Applications Across Immigration Courts and Judges*, GAO-17-72, at 2 (Nov. 14, 2016), https://www.gao.gov/assets/gao-17-72.pdf. That variation in outcomes cannot be adequately explained by differences in the legal merits of the underlying asylum claims. *Refugee Roulette*, *supra*, 60 Stan. L. Rev. at 301-03.

Substantial-evidence review of the BIA's legal judgment about what constitutes persecution perpetuates these alarming disparities. *See id.* at 387-88. Under that highly deferential standard, irreconcilable BIA decisions regarding what kinds and degree of mistreatment "constitute 'persecution'" must be upheld, save where all "reasonable adjudicator[s] would be compelled to" agree on the result. *Id.* at 389. That reality severely restricts courts' ability to "expound on the law" and establish guiding "legal principles of use in other cases." *U.S. Bank*, 583 U.S. at 396. Mandating de novo review of the BIA's "applications of law to fact" in construing the term "persecution," while keeping judicial deference limited "to formal findings of fact," will help ensure even-handed treatment of similarly situated noncitizens. *Refugee Roulette*, *supra*, 60 Stan. L. Rev. at 389.

Furthermore, the "differences in the circuits' willingness to defer to [the BIA's] applications of law to fact"—i.e., the circuit split at the heart of this petition—will continue to "account for the immense differences" in how federal courts themselves resolve

asylum cases. *Id.* Courts deferring to the BIA's persecution determinations are, by definition, much less likely to disturb those decisions than courts conducting de novo review. *See id.* So the longer this Court waits to address the entrenched circuit split, the longer inconsistency and unfairness will persist. Disarray on the question presented has already festered for far too long.

3. This case is a perfect vehicle for resolving this crucial standard-of-review issue. The outcome here turned entirely on the First Circuit's deference to the BIA's determination that this case's undisputed facts did not rise to the level of persecution. The decision below explicitly "cabin[ed]" its review to whether the BIA's decision on that issue "was supported by substantial evidence." App.10a. And despite compelling evidence of past persecution—including the attempted murder of Douglas's half-brothers, several in-person death threats by armed cartel members, a physical assault, and the sicario's years-long effort to track down Douglas—the First Circuit deferred to the BIA's determination that the threats were somehow insufficiently "menacing." *See id.* at 11a.[4] De novo review would have made all the difference. *See supra* at 31-32.

Douglas and his family have fully preserved their argument that the BIA's "determination of whether a

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[4] The family's purported failure to "establish past persecution" also drove the First Circuit's decision to uphold the BIA's separate "finding that they had no reasonable fear of *future* persecution on the basis that they could internally relocate." App.13a (emphasis added); *see id.* at 14a (holding that, because they supposedly had "not shown past persecution," the family "b[ore] the burden" of proving that "relocation would be unreasonable").

settled fact satisfies a legal standard" should be subject to "*de novo* review." CA1 Petitioners' Br. 7 (citing *Guerrero-Lasprilla*, 589 U.S. at 228). Nothing about that argument turns on disputed facts. Whether courts must defer to the BIA's interpretation of the term "persecution" under Section 1101(a)(42) is a pure question of law. That question is cleanly presented and exceedingly important. It should be resolved in this case.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

GREGORY G. GARRE
CHRISTINE C. SMITH
LATHAM & WATKINS LLP
555 Eleventh Street, NW
Suite 1000
Washington, DC 20004

KRISTIAN R. MEYER
KEVIN P. MACMURRAY
MACMURRAY & ASSOCIATES
Two Center Plaza
Suite 605
Boston, MA 02108

NICHOLAS ROSELLINI
Counsel of Record
LATHAM & WATKINS LLP
505 Montgomery Street
Suite 2000
San Francisco, CA 94111
415.395.8165
nick.rosellini@lw.com

S.Y. JESSICA HUI
LATHAM & WATKINS LLP
1271 Avenue of the
Americas
New York, NY 10020

Counsel for Petitioners

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