No. 24-777

In the Supreme Court of the United States

DOUGLAS HUMBERTO URIAS-ORELLANA, ET AL.,
PETITIONERS

v.

PAMELA BONDI, ATTORNEY GENERAL

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

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

Whether the court of appeals correctly reviewed for substantial evidence the agency's finding that the threats and physical mistreatment that the lead petitioner allegedly experienced in El Salvador did not rise to the level of "persecution" under 8 U.S.C. 1101(a)(42)(A).

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OPINIONS BELOW

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

JURISDICTION

The judgment of the court of appeals was entered on November 14, 2024. The petition for a writ of certiorari was filed on January 17, 2025. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Under the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, the Attorney General or the Secretary of Homeland Security may, in her discretion,

grant asylum to an alien determined to be unable or unwilling to return to his country of origin "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)(A); see 8 U.S.C. 1158(b)(1)(A). An individual may seek asylum either by filing an affirmative application that will be considered by an asylum officer in United States Citizenship and Immigration Services in the Department of Homeland Security (DHS), see 8 U.S.C. 1158(a), or by asserting eligibility for asylum before an immigration judge (IJ) in the Department of Justice after removal proceedings have been initiated, see 8 U.S.C. 1229a. A grant of asylum prevents the removal of the asylee to his country of nationality. 8 U.S.C. 1158(c)(1)(A). An accompanying spouse or child of an asylee is entitled to the same status. 8 U.S.C. 1158(b)(3)(A).

For purposes of asylum eligibility, "persecution" refers to harm or suffering that is inflicted upon an individual to punish him for possessing a protected belief or characteristic. *In re Acosta*, 19 I. & N. Dec. 211, 222 (B.I.A. 1985), overruled in part on other grounds by *In re Mogharrabi*, 19 I. & N. Dec. 439 (B.I.A. 1987). The determination of whether an applicant has experienced persecution involves assessing degrees of alleged physical injury, pain, or distress. See, *e.g.*, *Santos Garcia* v. *Garland*, 67 F.4th 455, 461 (1st Cir. 2023) ("Persecution goes beyond 'unpleasantness, harassment, and even basic suffering.'") (citation omitted); *KC* v. *Garland*, 108 F.4th 130, 135 (2d Cir. 2024) (persecution "is an extreme concept" and does not include "mere harassment") (citations omitted); *Gilaj* v. *Gonzales*, 408 F.3d 275, 285 (6th Cir. 2005) (per curiam) (similar). Unful-

filled threats of harm are generally insufficient. See, *e.g.*, *Brizuela* v. *Garland*, 71 F.4th 1087, 1093 (8th Cir. 2023) ("Threats alone 'constitute persecution in only a small category of cases.'") (citation omitted); *Hayrapetyan* v. *Mukasey*, 534 F.3d 1330, 1337 (10th Cir. 2008) (persecution "must entail more than just * * * threats to life and liberty") (citation omitted); *KC*, 108 F.4th at 135 ("'unfulfilled threats alone' rarely qualify as persecution") (citation omitted); Pet. App. 11a. In addition, the mistreatment must be at the hands of the foreign government or groups or individuals that the foreign government is unable or unwilling to control. *In re Acosta*, 19 I. & N. Dec. at 222.

An alien who has been found ineligible for asylum and is ordered removed by an IJ may appeal to the Board of Immigration Appeals (Board or BIA). See 8 C.F.R. 1003.1(b). If the appeal is unsuccessful, the individual may file a petition for review in the court of appeals for the judicial circuit in which the IJ completed the proceedings. 8 U.S.C. 1252(b)(2); see 8 U.S.C. 1252(a)(1). The INA provides that, when adjudicating such a petition for review, the court of appeals must treat "the administrative findings of fact [as] conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary." 8 U.S.C. 1252(b)(4)(B).

2. Petitioners—the lead petitioner (hereinafter, petitioner), his wife, and their minor child—are natives of El Salvador who entered the United States without authorization in 2021. Pet. App. 2a-3a. DHS placed petitioners in removal proceedings. *Id.* at 3a; see 8 U.S.C. 1182(a)(6)(A)(i). Petitioners conceded their removability and applied for asylum. Pet. App. 3a, 26a-28a.

At a hearing before the IJ and in an affidavit, petitioner testified that he was subjected to threats and

physical harm by unknown men who he believed were working for a "sicario" (hitman) operating in Sonsonate, a city in western El Salvador where petitioner lived with his family. Pet. App. 3a-6a. Petitioner testified that the sicario's mother and the father of petitioner's two maternal half-brothers were in a relationship of which the sicario did not approve. *Id.* at 4a. According to petitioner, around February 2016, the sicario got into a bar fight with one of the half-brothers, Juan, and shot Juan multiple times, leaving him wheelchair-bound. *Ibid.* Upon learning that Juan had survived, the sicario "vowed to kill Juan's whole family." *Id.* at 29a; see *id.* at 4a. In August 2016, the sicario ambushed petitioner's other half-brother, Remberto, and shot him multiple times. *Id.* at 4a.

In response, petitioners moved out of Sonsonate. Pet. App. 4a, 29a. They first relocated to Cojutepeque, a city in central El Salvador, where they lived in peace for a period of time. *Id.* at 4a. In February or March 2017, they moved to Colonia Claudia Lara, a town that is closer to Sonsonate (about a 30-minute drive), to live with petitioner Sayra Iliana Gamez-Mejia's family. *Id.* at 4a-5a. Petitioner testified that while in Claudia Lara, he was confronted by two masked and armed men who demanded money; when petitioner did not pay, the men said that "if he refused to comply with their demands, he would end up like his two brothers." *Id.* at 30a. About six months later, petitioner was again confronted by masked and armed men demanding money. *Ibid.* The men told petitioner that next time, they would kill him. *Ibid.*

Petitioners then relocated to Cara Sucia, in far western El Salvador, where they lived "without any harassment or complaints or threats" for about two and a half

years. Pet. App. 5a. In December 2020, while visiting relatives back in Sonsonate, petitioner was again confronted by two masked men. *Ibid.* The men said that petitioner "was lucky to escape" the "previous time[s]," that "he still must pay," and that "they wouldn't forgive him the next time he didn't have the money or they'd kill him or whoever else he was with"; the men then hit petitioner three times on the chest and left. *Id.* at 30a.

After returning to Cara Sucia following that visit, petitioner saw a motorcycle with two men "constantly following them." Pet. App. 30a. Petitioners moved to Claudia Lara again, and a couple of months later, in February or March 2021, petitioner overheard in a store that men had been asking about "any newcomers to the area." *Ibid.* "Because of the attacks on [petitioner's] brothers, and death threats, and extortion attempts," petitioners decided to leave El Salvador and come to the United States. *Ibid.*

3. a. The IJ denied petitioners' application for asylum, finding that they failed to establish either past persecution or a well-founded fear of future persecution. Pet. App. 25a-44a.[1]

Considering the entirety of petitioner's testimony, the IJ found that "the sum of the threats and the one time where [petitioner] was hit three times on the chest" did not rise to the level of persecution. Pet. App.

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[1] Petitioner also sought withholding of removal under 8 U.S.C. 1231(b)(3)(A) and protection under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), *adopted* Dec. 10, 1984, S. Treaty Doc. No. 20, 100th Cong., 2d Sess. (1988), 1465 U.N.T.S. 85. Pet. App. 2a-3a & nn.1-2. He abandoned his withholding claim, see *id.* at 3a n.2, and the agency and the court of appeals rejected his CAT claim, see *id.* at 2a-3a, 15a-17a. Petitioners do not renew either of those claims in this Court.

31a. The IJ explained that the threats accompanied demands for money. *Ibid.* And the IJ noted that the First Circuit had previously determined that death threats may constitute persecution "only when the threats 'are so menacing as to cause significant actual suffering or harm.'" *Ibid.* (quoting *Bonilla* v. *Mukasey*, 539 F.3d 72 (1st Cir. 2008)). Here, the IJ observed, petitioner had submitted no evidence, such as a psychological or physiological evaluation, to suggest that the threats caused him significant suffering or harm. *Ibid.* And the evidentiary record likewise contained no indication that petitioner experienced "long lasting physical or mental effects" from the time he was struck on the chest. *Id.* at 32a; see *id.* at 31a-32a.

The IJ also determined that petitioners had not established a well-founded fear of future persecution. Pet. App. 32a-36a. The IJ observed that petitioners "had successfully relocated within El Salvador" to escape danger in the past and that the risk recurred only when or after petitioner returned to his hometown or nearby areas. *Id.* at 34a; see *id.* at 34a-35a. The IJ noted that petitioner's half-brothers (the victims of the sicario's shootings) had also successfully relocated without further harm. *Id.* at 35a. And the IJ observed that other members of petitioner's immediate family, including his mother and sisters, had not been threatened or harmed by the sicario. *Id.* at 32a-33a.

In addition, the IJ determined that petitioners had not established two other requirements of asylum eligibility. First, they had not proved the required nexus between petitioner's claimed protected characteristic (his membership in a "particular social group," 8 U.S.C. 1101(a)(42)(A), defined by his family) and the harm. Pet. App. 36a; see *id.* at 36a-39a. The IJ observed that

the men extorting petitioner appeared to be motivated by criminal financial gain, not by a desire to harm his family. *Id.* at 36a-38a. Second, petitioners had failed to establish that any persecution was or would be inflicted by the El Salvador government or by a group the government was or would be unwilling to control, as petitioner had never attempted to report the threats to the police and had not shown that doing so would be futile. *Id.* at 39a-40a.

b. The Board dismissed petitioners' appeal of the denial of their asylum claim. Pet. App. 18a-22a. The Board found no clear error in the IJ's subsidiary factual findings, and it agreed with the IJ's ultimate finding that petitioner failed to show that he "suffered past harm in the aggregate rising to the level of persecution." *Id.* at 21a; see *id.* at 20a-21a. The Board also upheld the IJ's finding that petitioner had not shown that he would be unable to avoid future persecution by relocating within El Salvador. *Id.* at 21a-22a. Because those issues were "dispositive," the Board did not reach the IJ's alternative bases for denying the asylum claim. *Id.* at 20a n.3.

4. Petitioners sought review by the court of appeals, which denied their petition for review. Pet. App. 1a-17a. With respect to petitioners' asylum claim, the court stated that it would review the agency's legal conclusions de novo and the agency's factual findings—including the finding that petitioner had not suffered persecution in the past—for substantial evidence. *Id.* at 9a-10a.

The court of appeals noted that persecution under the INA "requires proof of a certain level of serious harm," which transcends "unpleasantness, harassment, and even basic suffering." Pet. App. 10a (citations and internal quotation marks omitted). The court further explained (consistent with the IJ's analysis) that under

First Circuit precedent, credible death threats can amount to persecution only when such threats are "so menacing as to cause significant actual suffering or harm." *Id.* at 11a (citation omitted); see *id.* at 10a-11a. And the court explained that under the substantial-evidence standard, its review was limited to evaluating whether "the record compelled a finding" that the threats and one instance of physical harm that petitioner experienced rose to that level. *Id.* at 11a.

The court of appeals determined that the record evidence—which it summarized as showing that "over a four-year period," petitioner "was threatened only three times by unknown assailants who demanded money and, on one occasion, struck him in the chest"—did not compel such a finding. Pet. App. 11a-12a. The court observed that petitioner had provided no testimony "about the immediate impact, if any, that [the] threats had on him." *Id.* at 11a (citation and internal quotation marks omitted). The court also noted the absence of evidence that the threats were "'credible' threats of death as opposed to threats intended to frighten [petitioner] into paying, especially given the lack of severity of the one assault." *Ibid.* (citation omitted).

The court of appeals next upheld, as supported by substantial evidence, the agency's finding that petitioners did not have a well-founded fear of future persecution. Pet. App. 13a-15a. The court agreed that petitioner had failed to establish that he would be unable to avoid persecution by relocating within El Salvador, observing that petitioner "was able to live in towns across El Salvador for years without harassment," and that "members of his family who [the sicario] would presumably also want dead * * * have lived across El Salvador unscathed." *Id.* at 15a.

DISCUSSION

Petitioners contend (Pet. 23-30) that the court of appeals erred in reviewing for substantial evidence the agency's finding that the lead petitioner did not experience past persecution in El Salvador. The court correctly applied the substantial-evidence standard to the factual finding at issue. Nevertheless, as petitioners observe (Pet. 15-22, 30-35), the circuits are inconsistent in their approaches to the question presented, which is important and frequently recurring. This case is a suitable vehicle to resolve that question. The Court should accordingly grant the petition for a writ of certiorari.

1. The court of appeals correctly reviewed for substantial evidence the Board's determination that the threats and one instance of physical harm that petitioner allegedly experienced did not constitute persecution. Pet. App. 10a.

a. Through an amendment to the INA in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546, Congress directed that a court of appeals reviewing an order of removal must accept "administrative findings of fact" as "conclusive," unless "any reasonable adjudicator would be compelled to conclude to the contrary." 8 U.S.C. 1252(b)(4)(B).

In doing so, Congress echoed this Court's determination in *INS* v. *Elias-Zacarias*, 502 U.S. 478 (1992), that, under an earlier version of the statute, an asylum applicant who "seeks to obtain judicial reversal of the BIA's determination" that he is ineligible for asylum "must show that the evidence he presented was so compelling that no reasonable factfinder could fail to find the requisite fear of persecution." *Id.* at 483-484; see *id.* at 481 (explaining that "[t]he BIA's determination that

Elias-Zacarias was not eligible for asylum must be upheld if 'supported by reasonable, substantial, and probative evidence'") (quoting 8 U.S.C. 1105a(a)(4) (1988)); *ibid.* (explaining that the ineligibility determination could be reversed "only if the evidence presented * * * was such that a reasonable factfinder would have to conclude that the requisite fear of persecution existed"). Section 1252(b)(4)(B) reflects "the substantial-evidence standard," *Nasrallah* v. *Barr*, 590 U.S. 573, 584 (2020), which is common throughout administrative law, see, *e.g.*, 5 U.S.C. 706(2)(E) (providing that a "reviewing court shall * * * hold unlawful and set aside agency action, findings, and conclusions found to be * * * unsupported by substantial evidence * * * reviewed on the record of an agency hearing provided by statute").

This Court has since reiterated that that aspect of *Elias-Zacarias* remains good law. In *Nasrallah*, the Court cited *Elias-Zacarias* in explaining Section 1252(b)(4)(B)'s standard for reviewing administrative findings of fact. 590 U.S. at 584. In *Garland* v. *Ming Dai*, 593 U.S. 357 (2021), the Court described the questions "whether [the asylum applicant] was persecuted in the past or fears persecution in the future" as "questions of fact." *Id.* at 362; see *id.* at 365 (citing *Elias-Zacarias* to explain Section 1252(b)(4)(B)'s substantial-evidence standard).[2] And in *INS* v. *Orlando Ventura*,

[2] Specifically, the Court in *Ming Dai* noted that "the parties have proceeded on the assumption that everything here turns on questions of fact—whether Mr. Dai was persecuted in the past or fears persecution in the future—and we do the same." 593 U.S. at 362. In noting the parties' shared "assumption," the Court was referencing agreement about the extent to which those questions would control the outcome of Mr. Dai's asylum claim, not deferring to the parties about whether those were questions of fact. See, *e.g.*, Oral Arg. Tr. at 74, *Ming Dai*, *supra* (No. 19-1155); see also *Ming Dai*, 593 U.S.

537 U.S. 12 (2002) (per curiam), the Court determined that the question whether an alien has a well-founded fear of future persecution—which turned, in that case, on an assessment of country conditions—is a finding that must be made by the agency in the first instance, not by a court de novo. See *id.* at 13-14, 16-17. As the Court explained, "[w]ithin broad limits the law entrusts the agency to make the basic asylum eligibility decision here in question," and "[i]n such circumstances, a 'judicial judgment cannot be made to do service for an administrative judgment.'" *Id.* at 16 (citation omitted).

Deferential judicial review accordingly reflects the reality that IJs and the Board have "examined more of these cases than any court ever has or ever can." *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 460 (1987) (Powell, J., dissenting); see *Ming Dai*, 593 U.S. at 367 (noting that the BIA "has experience with the sort of facts that recur in immigration cases"). The agency is therefore uniquely suited to evaluating the sorts of fact patterns that frequently arise in asylum claims. See *Orlando Ventura*, 537 U.S. at 16, 17 (explaining that the INA "entrusts the agency to make the basic asylum eligibility decision" in part because it can "bring its expertise to bear" on those issues). Moreover, judicial deference to the determinations relevant to asylum relief is appropriate because immigration officials "exercise especially sensitive political functions that implicate questions of foreign relations." *Negusie* v. *Holder*, 555 U.S. 511, 517 (2009) (citation omitted); see *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 425 (1999) (citation omitted) (same).

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at 365 (describing "Mr. Dai's alleged persecution" as a "question[] of fact").

An agency finding that a series of events and circumstances does not constitute persecution may not be one of pure historical fact. But Section 1252(b)(4)(B)'s coverage of "administrative findings of fact" encompasses what this Court has called "mixed questions" of law and fact that are of a "primarily * * * factual" nature. *U.S. Bank N.A.* v. *Village at Lakeridge, LLC*, 583 U.S. 387, 396 (2018); see *Bufkin* v. *Collins*, 145 S. Ct. 728, 737-739 (2025).

As this Court has explained, "[m]ixed questions are not all alike." *U.S. Bank*, 583 U.S. at 395-396. Although all involve the application of a "legal test" to "historical facts," *id.* at 394, some "entail[] primarily legal * * * work," while others entail primarily "factual work," *id.* at 396; see *Bufkin*, 145 S. Ct. at 738-739. When a question falls within the latter category, the answer should be treated, for purposes of appellate review, as a finding of fact. See *U.S. Bank*, 583 U.S. at 396. Put differently, where a determination requires a "*factual inference* from undisputed basic facts," deferential review is appropriate. *Id.* at 395 (emphasis added; brackets and citation omitted); see *Bufkin*, 145 S. Ct. at 739 (a mixed question qualifies as a factual finding when "the tribunal below is 'immerse[d]' in facts and compelled to 'marshal and weigh evidence'") (citation omitted; brackets in original).

Whether a given set of events and circumstances amounts to persecution is at most a mixed question of a primarily factual nature. As the analyses of that question in this case show, see Pet. App. 10a-13a, 20a-21a, 31a-32a, "[t]he inquiry is 'heavily fact-dependent.'" *Sharma* v. *Garland*, 9 F.4th 1052, 1061 (9th Cir. 2021) (citation omitted); see *Thayalan* v. *Attorney Gen.*, 997 F.3d 132, 138 n.1 (3d Cir. 2021) (explaining that "wheth-

er a particular fact pattern rises to the level of persecution is largely fact-driven"). In cases like petitioners', "the difference between harassment and persecution is necessarily one of degree that must be decided on a case-by-case basis." *KC* v. *Garland*, 108 F.4th 130, 135 (2d Cir. 2024) (brackets and citation omitted). Given that the agency "has both the closest and the deepest understanding of the record"—as well as greater experience evaluating asylum claims—that determination "is not of the kind that appellate courts should take over." *U.S. Bank*, 583 U.S. at 398; see *Miller* v. *Fenton*, 474 U.S. 104, 114 (1985) (when an "issue falls somewhere between a pristine legal standard and a simple historical fact," the standard of review often reflects which "actor is better positioned" to make the decision).

b. Petitioners' counterarguments lack merit. They primarily contend (Pet. 23-26) that application of the substantial-evidence standard to past-persecution findings is contrary to the text of 8 U.S.C. 1252(b)(4)—because (in their view) that provision sets forth an exclusive list of circumstances in which deferential review is appropriate and persecution determinations are not specifically listed.

But as discussed, a no-persecution finding is an "administrative finding[] of fact" subject to substantial-evidence review under 8 U.S.C. 1252(b)(4)(B). See pp. 9-12, *supra*. In claiming otherwise, petitioners ignore this Court's decision in *Elias-Zacarias*, as well as the Court's similar treatment of agency findings of asylum ineligibility in *Orlando Ventura* and *Ming Dai*.

Instead, petitioners contend that a no-persecution determination is a "mixed question of law and fact." Pet. 25 (citation omitted). But the statutory phrase "finding of fact" readily encompasses mixed questions

of a primarily factual nature. Indeed, this Court recently held in *Bufkin*, *supra*, that a standard of review applicable to "finding[s] of material fact," 38 U.S.C. 7261(a)(4), applies to mixed questions that are "predominantly factual." 145 S. Ct. at 742; see *id.* at 737-741.

Petitioners also rely (Pet. 25) on this Court's decisions in *Guerrero-Lasprilla* v. *Barr*, 589 U.S. 221 (2020), and *Wilkinson* v. *Garland*, 601 U.S. 209 (2024). But *Guerrero-Lasprilla* and *Wilkinson* did not interpret the language of Section 1252(b)(4)(B). Rather, they addressed the scope of appellate-court *jurisdiction* under Section 1252(a)(2), which prohibits judicial review of certain removal orders and denials of discretionary relief except with respect to "constitutional claims or questions of law." 8 U.S.C. 1252(a)(2)(D); see *Gjetani* v. *Barr*, 968 F.3d 393, 397 n.2 (5th Cir. 2020) (distinguishing *Guerrero-Lasprilla*).

In that context, this Court held only that the statutory phrase "questions of law" in Section 1252(a)(2)(D) includes mixed questions. See *Guerrero-Lasprilla*, 589 U.S. at 228; *Wilkinson*, 601 U.S. at 225. In both decisions, the Court differentiated the question of appellate jurisdiction from the appropriate standard of review. The Court in *Guerrero-Lasprilla* expressly observed that no standard-of-review question was before it. 589 U.S. at 228. And in *Wilkinson*, the Court explained that "deferential" review is appropriate when examining the agency's resolution of a "primarily factual" "mixed question." 601 U.S. at 225; see *id.* at 222.

Petitioners next suggest (Pet. 25 n.2) that the court of appeals' use of the substantial-evidence standard conflicts with the Board's use of a de novo standard when reviewing persecution findings by IJs. But the Board's standard of review is governed by an internal

agency regulation, not by Section 1252(b)(4)(B). The regulation provides that the "[f]acts determined by the immigration judge * * * shall be reviewed [by the Board] only to determine whether the findings of the immigration judge are clearly erroneous," while further providing that the Board "may review questions of law, discretion, and judgment * * * in appeals from decisions of immigration judges de novo." 8 C.F.R. 1003.1(d)(3)(i) and (ii). For purposes of the regulation, a finding of no past persecution is considered a question of judgment, to be reviewed de novo, rather than a factual determination. 67 Fed. Reg. 54,878, 54,890 (Aug. 26, 2002).

What counts as a "finding[] of fact" rather than a "question[] of * * * judgment" for purposes of the regulation is a function of the respective authorities that the Attorney General has chosen to delegate to the Board and to IJs. 8 C.F.R. 1003.1(d)(3)(i) and (ii); see 67 Fed. Reg. at 54,890-54,891. The dividing line need not correspond with the meaning of the statutory phrase "administrative finding[] of fact" in Section 1252(b)(4)(B), and there is nothing anomalous about giving the Board greater latitude when reviewing an intra-agency determination than appellate courts have when they review the agency's ultimate finding. See *He* v. *Garland*, 24 F.4th 1220, 1224 (8th Cir. 2022), cert. dismissed, 143 S. Ct. 2694 (2023).

2. Although the court of appeals correctly determined that the agency's finding that there was no past persecution should be reviewed only for substantial evidence, the decision below implicates division in the courts of appeals that warrants resolution by this Court.

At least six courts of appeals—including the First, Fifth, Sixth, Seventh, Eighth, and Tenth Circuits—have

held in published opinions that a no-past-persecution finding is one of fact, subject only to substantial-evidence review. See Pet. App. 10a-13a (1st Cir.); *Gjetani*, 968 F.3d at 396-397 & n.2 (5th Cir.); *Kukalo* v. *Holder*, 744 F.3d 395, 399-400 (6th Cir. 2011); *Escobedo Marquez* v. *Barr*, 965 F.3d 561, 565 (7th Cir. 2020) (per curiam); *He*, 24 F.4th at 1224 (8th Cir.);*Vicente-Elias* v. *Mukasey*, 532 F.3d 1086, 1091 (10th Cir. 2008).

Five circuits, however, have at times reviewed such findings de novo. See *Mirzoyan* v. *Gonzales*, 457 F.3d 217, 220 (2d Cir. 2006) (per curiam); *Herrera-Reyes* v. *Attorney Gen.*, 952 F.3d 101, 108-112 (3d Cir. 2020); *Sorto-Guzman* v. *Garland*, 42 F.4th 443, 447-448 (4th Cir. 2022); *Kaur* v. *Wilkinson*, 986 F.3d 1216, 1221 (9th Cir. 2021); *Mejia* v. *U.S. Att'y Gen.*, 498 F.3d 1253, 1257-1258 (11th Cir. 2007). As petitioners acknowledge (Pet. 17-21), each of those circuits also has decisions applying the substantial-evidence standard. See *Scarlett* v. *Barr*, 957 F.3d 316, 328 (2d Cir. 2020); *Thayalan*, 997 F.3d at 137 n.1 (3d Cir.); *Mirisawo* v. *Holder*, 599 F.3d 391, 397 (4th Cir. 2010); *Sharma*, 9 F.4th at 1063 (9th Cir.); *Martinez* v. *U.S. Att'y Gen.*, 992 F.3d 1283, 1291-1292 (11th Cir. 2021); cf. *He*, 24 F.4th at 1224 (8th Cir.) (explaining that "the majority of Eighth Circuit opinions" have applied the substantial-evidence standard).

Although intra-circuit splits would not ordinarily warrant this Court's review, see *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam), the widespread and entrenched confusion on the issue makes unanimity unlikely in the absence of this Court's intervention. Several lower-court decisions and separate writings have acknowledged a conflict or intra-circuit conflict. See *KC*, 108 F.4th at 134 & n.1; *Corpeno-Romero* v. *Garland*, 120 F.4th 570, 577 (9th Cir. 2024);

Fon v. *Garland*, 34 F.4th 810, 813 n.1 (9th Cir. 2022); *He*, 24 F.4th at 1224 n.3; *Matumona* v. *Barr*, 945 F.3d 1294, 1300 n.5 (10th Cir. 2019); *Xue* v. *Lynch*, 846 F.3d 1099, 1105 n.11 (10th Cir. 2016), cert. dismissed, 583 U.S. 960 (2017); see also *Fon*, 34 F.4th at 816, 819 (Graber, J., concurring); *id.* at 820-823 (Collins, J., concurring); *Liang* v. *Attorney Gen.*, 15 F.4th 623, 628-630 (3d Cir. 2021) (Jordan, J., concurring).

As petitioners explain (Pet. 30, 32), this standard-of-review question is both important and frequently recurring. For the conflict to dissipate, multiple circuits would potentially need to grant rehearing en banc and definitively resolve the question. Since the last time this Court denied certiorari on the question, see *Fernandez* v. *Garland*, 142 S. Ct. 1677 (2022) (No. 21-6551), a circuit has declined to grant rehearing en banc, see Pet. 22, and additional lower-court opinions have issued asking for this Court's guidance, see *Fon*, 34 F.4th at 819 (Graber, J., concurring); *id.* at 820, 823 (Collins, J., concurring). In these unusual circumstances, this Court's intervention would be appropriate without awaiting further percolation.

3. This case is a suitable vehicle for addressing the question presented. Petitioners adequately preserved their argument regarding the standard of review in the court of appeals. See Pet. C.A. Br. 7. And that court expressly relied on the substantial-evidence standard in affirming the agency's no-persecution finding. See Pet. App. 10a-13a.

While the court of appeals additionally determined (correctly) that petitioners failed to establish a well-founded fear of *future* persecution—because they could reasonably relocate within El Salvador, see Pet. App. 13a-15a—that holding is not independent of the ques-

tion presented here. Because the record did not compel a finding of past persecution, petitioners were not entitled to a presumption of future persecution, and they accordingly bore the burden of establishing future persecution. *Id.* at 13a-14a; 8 C.F.R. 1208.13(b)(1)(i) and (ii). Moreover, the court of appeals also reviewed for substantial evidence the agency's future-persecution finding—an approach that could be called into question were the Court to reverse on the specific question presented here.[3]

This case also presents a favorable vehicle in comparison with another pending petition seeking review of a similar question. See Pet., *Maldonado-Magno* v. *Bondi*, No. 24-805 (filed Jan. 24, 2025). The Tenth Circuit in *Maldonado-Magno* rejected asylum claims solely on the basis that those petitioners had not shown the required nexus between a protected ground and the harm that they allegedly suffered. See *Maldonado-Magno* v. *Garland*, No. 23-9604, 2024 WL 4692214, at *3 (10th Cir. Nov. 6, 2024). Although the Tenth Circuit correctly treated the nexus determination as a finding of fact subject to substantial-evidence review, see *ibid.*, the *Maldonado-Magno* petitioners have not identified a split of authority on that issue. See Br. in Opp. at 9-11, *Maldonado-Magno* v. *Bondi*, No. 24-805 (filed May 16,

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[3] As noted, the IJ determined that the asylum claim failed for two additional reasons: (1) petitioner's failure to establish the required nexus between the claimed protected ground (his membership in a social group defined by his family ties) and the claimed persecution, and (2) petitioner's failure to establish that the El Salvador government was or would be unwilling to protect him. See pp. 6-7, *supra*. Those additional findings were also correct and would independently foreclose asylum eligibility. Because the Board did not reach those findings, see Pet. App. 20a n.3, the government does not assert them as alternative grounds for affirmance at this stage.

2025).[4] In addition, the *Maldonado-Magno* petitioners did not preserve any challenge to the standard of review in the court of appeals and instead affirmed that the substantial-evidence standard applied. See *id.* at 11.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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MAY 2025

[4] We have served petitioners with a copy of the government's brief in opposition to certiorari in *Maldonado-Magno*.