No. 24-777

In the Supreme Court of the United States

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

v.

PAMELA BONDI, U.S. ATTORNEY GENERAL,
Respondent.

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

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF

The Solicitor General agrees that the question presented merits review and urges this Court to grant certiorari in this case. The Court should do so.

1. The Solicitor General acknowledges that "the decision below implicates division in the courts of appeals that warrants resolution by this Court." Resp. 15. The First, Sixth, Seventh, and Tenth Circuits have uniformly deferred to the BIA's judgment about what kinds and degree of harm constitute "persecution" under 8 U.S.C. § 1101(a)(42). *See* Pet. 16-18. By contrast, the Second, Third, Fourth, Fifth, Eighth, Ninth, and Eleventh Circuits have issued published decisions holding that a federal court of appeals must *not* defer to the BIA's judgment on the matter. *See id.* at 18-21; Resp. 16 (citing *Sorto-Guzman v. Garland*, 42 F.4th 443, 447-48 (4th Cir. 2022)). As the Solicitor General explains, the added "intra-circuit splits" on the proper standard of review only exacerbate the "confusion," creating a "widespread and entrenched" state of disarray that demands "this Court's intervention." Resp. 16.

The Solicitor General further recognizes that the split in the lower courts has been acknowledged in opinions from multiple circuits and in separate writings from several judges. *Id.*; *see* Pet. 15. Indeed, after the petition was filed, the Ninth Circuit reiterated that the circuits "are split as to the standard of review applicable" to "past-persecution determinations" made on undisputed facts—and stated that federal courts "ought to" review such determinations de novo. *Lapadat v. Bondi*, 128 F.4th 1047, 1055 (9th Cir. 2025). The Tenth Circuit also emphasized the split once again, while echoing

"serious doubt" that treating what kinds and degree of harm constitute persecution "as a fact question" is the "right approach." *Singh v. Bondi*, 130 F.4th 848, 860 n.12 (10th Cir. 2025).

The Solicitor General is correct that "this Court's intervention would be appropriate without awaiting further percolation." Resp. 17. There is no practical way "[f]or the conflict to dissipate" on its own, given the need for "multiple circuits" to "grant rehearing en banc and definitively resolve the question" presented the same way. *Id.*; *see* Pet. 21-22. Indeed, two circuits have explicitly "declined to grant rehearing en banc" on the question presented, including the Eighth Circuit just a few years ago. Resp. 17; *see* Pet. 22. The disarray plaguing the lower courts will persist until this Court intercedes.

As the Solicitor General recognizes, the status quo is intolerable. After all, "this standard-of-review question is both important and frequently recurring." Resp. 17. Disputes about what kinds and degree of mistreatment qualify as "persecution" under Section 1101(a)(42) arise all the time, all across the country. Pet. 16-21, 32. Deference to the BIA's judgment on the matter often makes all the difference. *Id.* at 30-32. And for asylum seekers, the stakes could not be higher. *Id.* This Court's review on the question presented is urgently needed.

2. This case, as the Solicitor General explains, is an ideal vehicle for answering it. Resp. 17-18. There is no dispute that Douglas and his family "preserved their argument regarding the standard of review in the court of appeals." *Id.* at 17. All agree that the decision below directly implicates the circuit split described above: The First Circuit "expressly relied on the substantial-evidence standard" in upholding

the BIA's conclusion that the death threats Douglas endured were somehow insufficiently menacing to constitute persecution under Section 1101(a)(42). *Id.* And the Solicitor General does not raise any jurisdictional problem or other impediment to review—because there is none.

The Solicitor General also concedes that there are no "alternative grounds for affirmance at this stage." *Id.* at 18 n.3. Although both the First Circuit and the BIA (incorrectly) concluded that Douglas and his family "could reasonably relocate within El Salvador," that conclusion was "not independent of the question presented." *Id.* at 17-18 (explaining that, without "a finding of past persecution," Douglas and his family were "not entitled to a presumption" of asylum eligibility and thus "bore the burden of establishing" that it would be unreasonable for them to relocate); *see* Pet. 34 & n.4; 8 C.F.R. § 1208.13(b)(3)(i). And because the BIA "did not reach" the IJ's "two additional reasons" for denying asylum, those (equally erroneous) grounds cannot be relied upon now. Resp. 18 n.3; *see, e.g.*, *James v. Garland*, 16 F.4th 320, 321 n.1 (1st Cir. 2021) (citing *SEC v. Chenery Corp.*, 318 U.S. 80, 94 (1943)).

3. Having recognized that review is warranted, the Solicitor General devotes much of his response to defending the decision below. Resp. 9-15. Douglas and his family will save a more fulsome rebuttal for the merits stage, if the Court accepts the parties' mutual request to grant certiorari. For now, a few key points bear emphasis.

First, the Solicitor General's sole textual argument does not hold up. "Section 1252(b)(4)(B)'s coverage of 'administrative findings of fact,'" he insists, "encompasses what this Court has called

'mixed questions' of law and fact that are of a 'primarily . . . factual' nature." *Id.* at 12. But this Court has "already rejected" the argument that "a primarily factual mixed question is a question of fact." *Wilkinson v. Garland*, 601 U.S. 209, 225 (2024); *accord Guerrero-Lasprilla v. Barr*, 589 U.S. 221, 231 (2020). Even though it may at times require "closely examin[ing] and weigh[ing] a set of established facts," determining what qualifies as persecution under the law "is not a factual inquiry." *Wilkinson*, 601 U.S. at 221; *cf. Garland v. Ming Dai*, 593 U.S. 357, 365 (2021) (observing that the underlying "circumstances surrounding" alleged persecution present "questions of fact"). So BIA determinations on the matter cannot be "findings of fact" subject to substantial-evidence review under Section 1252(b)(4)(B).[1]

The Solicitor General counters that *Wilkinson* and *Guerrero-Lasprilla* "did not interpret the language of Section 1252(b)(4)(B)," but instead interpreted the phrase "constitutional claims or questions of law" for purposes of "appellate-court *jurisdiction* under Section 1252(a)(2)." Resp. 14. True enough. But this Court must "maintain the consistent meaning of words in statutory text" across *all* of Section 1252. *United States v. Santos*, 553 U.S. 507, 523 (2008); *accord Clark v. Martinez*, 543 U.S. 371, 386 (2005). Because "the application of a legal standard to established facts" is "not a factual inquiry" under

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[1] Nor do they qualify as "factual determination[s]" under the regulations governing the BIA's own review, as the Solicitor General concedes. Resp. 15. Try as he might to explain away the obvious "tension" between that reality and the government's position, multiple circuits have acknowledged it. *Vargas Panchi v. Garland*, 125 F.4th 298, 308 n.7 (1st Cir. 2025); *accord Xue v. Lynch*, 846 F.3d 1099, 1105 n.11 (10th Cir. 2017).

Section 1252(a)(2), *Wilkinson*, 601 U.S. at 221, the same must also be true under Section 1252(b)(4)(B).

Second, the Solicitor General does not cite this Court's seminal decision in *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024), much less grapple with how the Court's textual analysis of the Administrative Procedure Act maps directly onto the Immigration and Nationality Act. *See* Pet. 26-27. Nor does he address the fact that, historically, courts confronted with "factbound statutory determinations" by administrative officials "simply interpreted and applied the statute," without deferring to the agency. *Loper Bright*, 603 U.S. at 389. Substantial-evidence review of the BIA's judgment about what constitutes persecution under the law is just *Chevron* deference by another name. Pet. 27. But whether the agency is the Environmental Protection Agency (as in *Chevron*), the National Marine Fisheries Service (as in *Loper Bright*), or the BIA (as here), federal courts have a "duty" to "say what the law is." *Loper Bright*, 603 U.S. at 385 (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)).

Third, the Solicitor General relies heavily on background principles of appellate review governing "which kind of *court*" is "better suited to resolve" a mixed question. *U.S. Bank Nat'l Ass'n ex rel. CWCapital Asset Mgmt. LLC v. Vill. at Lakeridge, LLC*, 583 U.S. 387, 395 (2018) (emphasis added). While some of this Court's cases have suggested that the same framework applies in the administrative context, *see* Resp. 14, none has reconciled that view with *Loper Bright*, the history on which that decision relied, or the separation-of-powers concerns underlying it. *See* 603 U.S at 384-89; *id.* at 430-31 (Gorsuch, J., concurring). Regardless, the Solicitor

General ignores the myriad reasons why those background principles, if applied, confirm the need for de novo review in this context. *See* Pet. 27-30.

More specifically, the federal courts' "role in marking out the limits" of what constitutes persecution under Section 1101(a)(42) "through the process of case-by-case adjudication is of special importance," *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 503 (1984), especially given the constitutional need for a "uniform" system of "naturalization and immigration laws," *Hines v. Davidowitz*, 312 U.S. 52, 74 (1941). Courts "expound on the law" by "amplifying" and "elaborating on" Section 1101(a)(42)'s "broad legal standard" for persecution. *U.S. Bank*, 583 U.S. at 396. In so doing, they have "develop[ed] auxiliary legal principles of use in other cases," such as those involving religious persecution and sexual violence. *Id.*; *see* Pet. 29-30. That function powerfully supports de novo review.

Glossing over all of this, the Solicitor General argues that courts must defer to the BIA's persecution determinations simply because the issue can at times be "heavily fact dependent." Resp. 12 (quoting *Sharma v. Garland*, 9 F.4th 1052, 1061 (9th Cir. 2021)). Not so. For example, even though fair-use determinations under the Copyright Act hinge on a case-by-case balancing of four highly fact-intensive factors, such determinations are reviewed de novo on appeal. *See Google LLC v. Oracle Am., Inc.*, 593 U.S. 1, 23-24 (2021). That is because, underneath all the "subsidiary factual questions" that courts must examine along the way, the "ultimate 'fair use' question primarily involves legal work." *Id.* at 24; *see* Pet. 29. So too of the ultimate "persecution" question under Section 1101(a)(42).

Fourth, the Solicitor General cites *INS v. Elias-Zacarias*, 502 U.S. 478 (1992), for the proposition that a BIA decision deeming a noncitizen "ineligible for asylum"—including all of its component parts—must be reviewed deferentially across the board. Resp. 9. But Section 1252(b)(4)(B) provides for substantial-evidence review of "findings of fact," not the BIA's asylum-eligibility determination as a whole. And *Elias-Zacarias* applied that deferential standard to a bona fide factual finding—namely, the BIA's determination that the alleged persecutors' "motive" was something other than the respondent's "political opinion." 502 U.S. at 481.

True, in places *Elias-Zacarias* states that "[t]he BIA's determination" that a noncitizen is "not eligible for asylum must be upheld if 'supported by reasonable, substantial, and probative evidence.'" 502 U.S. at 481 (quoting 8 U.S.C. § 1105a(a)(4) (1988)). But "[t]his Court has long stressed that 'the language of an opinion is not always to be parsed'" like the "language of a statute." *Brown v. Davenport*, 596 U.S. 118, 141 (2022) (quoting *Reiter v. Sonotone Corp.*, 442 U.S. 330, 341 (1979)). *Elias-Zacarias* "had no reason to pass on the argument" that Douglas and his family "present[] today." *Id.* It does not control the distinct question presented in this case. *See Xue*, 846 F.3d at 1106 n.11.

Finally, the Solicitor General touts the BIA's "expertise" in immigration matters and notes the area's potential implications for "foreign relations." Resp. 11 (citations omitted). These policy arguments cannot carry the day. The mere fact that agencies "have subject matter expertise regarding statutes they administer" does not justify judicial deference, even in highly "technical" contexts. *Loper Bright*, 603

U.S. at 401-02. And by making the ultimate decision to grant asylum discretionary, Congress has *already* afforded the Executive Branch ample room to address foreign policy concerns. *See* 8 U.S.C. § 1158(b)(1)(A). Plus, in applying the eligibility criteria set forth in the statute, courts can and should "go about [the] task with the [BIA]'s 'body of experience and informed judgment'" in mind. *Loper Bright*, 603 U.S. at 402.

In any event, the Solicitor General's merits arguments in no way diminish the need for this Court's review, as his own recommendation—that certiorari be granted—underscores.

4. The Solicitor General concludes by noting that "another pending petition seek[s] review of a similar question." Resp. 18; *see Maldonado-Magno v. Bondi*, No. 24-805 (filed Jan. 24, 2025). Despite urging the Court to deny *Maldonado-Magno* outright, the Solicitor General acknowledges that the Court "might consider holding [that] case pending the Court's disposition" here. BIO 13, *Maldonado-Magno v. Bondi*, No. 24-805 (filed May 16, 2025). The latter course would be appropriate, given the related question presented in *Maldonado-Magno*.[2] Whatever

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[2] If the Court were to grant both cases, rather than simply hold *Maldonado-Magno*, it would be important to order separate briefing and argument to ensure that their distinct issues are fully aired. *See, e.g.*, *Lindke v. Freed*, 601 U.S. 187 (2024); *O'Connor-Ratcliff v. Garnier*, 601 U.S. 205 (2024) (*per curiam*). As the Solicitor General recognizes, these cases involve different "subcomponents" of an asylum-eligibility decision. Resp. 11. And, unlike this case, the "nexus finding[]" in *Maldonado-Magno* turns on the "persecutors' motivations," *Maldonado-Magno* BIO 9, making it more plausibly described as a "finding[] of fact" under Section 1252(b)(4)(B) than the BIA's legal conclusion on the textbook mixed question at issue here.

happens in that case, though, it is clear the Court should take this one—as the Solicitor General agrees.

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The petition for a writ of certiorari should be granted.

Respectfully submitted,

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