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

BRIEF FOR PETITIONERS

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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," *id.* § 1252(a)(2)(D), but does not establish a deferential standard of review for legal determinations made in connection with asylum-eligibility decisions.

The question presented is:

Whether a federal court of appeals must defer to the BIA's determination 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 A208-691-512, A216-663-245, A216-663-246, Board of Immigration Appeals, decision entered December 7, 2023 (unpublished).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, order of removal entered March 14, 2022.

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OPINIONS BELOW

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

JURISDICTION

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

STATUTORY PROVISIONS INVOLVED

Relevant statutory provisions are reproduced in the addendum (Add.1a-22a).

INTRODUCTION

At stake in this case is the Judiciary's proper role in interpreting and applying asylum protections that Congress has afforded noncitizens fleeing persecution abroad. Under the Immigration and Nationality Act (INA), noncitizens who have experienced persecution in their home countries are presumptively eligible for asylum. In removal proceedings, administrative officials—first an immigration judge (IJ) and then the Board of Immigration Appeals (BIA)—make the initial asylum-eligibility decision, subject to review by a federal court of appeals. The question presented is whether a court of appeals must defer to the BIA's legal determination that a given set of undisputed facts falls short of "persecution" within the meaning of 8 U.S.C. § 1101(a)(42). The answer is no.

The INA directs courts to resolve "questions of law" and provides for judicial deference to administrative decisions on a discrete subset of issues. 8 U.S.C. § 1252(a)(2)(D); *see id.* § 1252(b)(4). Nowhere, however, does the statute provide for deference on whether the mistreatment endured by a noncitizen meets the legal standard for "persecution." The INA entrusts administrative officials with assessing the underlying facts bearing on a noncitizen's claim of "persecution," as long as their "findings of fact" are supported by substantial evidence. *Id.* § 1252(b)(4)(B). But their legal conclusion on whether the established facts satisfy the statutory standard for "persecution" is a classic mixed question of law and fact—not a finding of fact entitled to deference under the INA. And while the statute provides for deference to the BIA's legal conclusions about a noncitizen's statutory eligibility for *admission* and ultimate discretionary *entitlement*

to asylum, there is no comparable provision for legal conclusions about a noncitizen's statutory eligibility for asylum. *See id.* § 1252(b)(4)(C)-(D).

The INA's "disparate inclusion" of express language requiring deference as to some administrative decisions—but not asylum-eligibility decisions—requires federal courts to review de novo whether a given set of undisputed facts legally qualifies as "persecution." *Kucana v. Holder*, 558 U.S. 233, 249 (2010). At a minimum, there is no textual basis for federal courts to defer to the BIA's legal determinations about the meaning of "persecution." Permitting such deference nonetheless would effectively resurrect *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), in asylum cases, even though this Court repudiated *Chevron* deference in *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024). That cannot be right. Given the lack of any express direction from Congress mandating deference, federal courts must exercise their own independent judgment in interpreting and applying Section 1101(a)(42)'s legal standard for "persecution."

De novo review is also required under background principles for determining the proper standard of review for mixed questions of law and fact in the absence of congressional direction. Interpreting and applying the statutory term "persecution" requires courts to "expound on the law." *U.S. Bank Nat'l Ass'n ex rel. CWCapital Asset Mgmt. LLC v. Vill. at Lakeridge, LLC*, 583 U.S. 387, 396 (2018). The courts of appeals have regularly established "auxiliary legal principles" for "use in other cases" applying Section 1101(a)(42), including rules regarding religious discrimination, sexual violence, and economic harm.

Id. That quintessentially legal work is "of special importance" to this statutory scheme's central aim of protecting noncitizens from "persecution" and treating them evenhandedly. *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 503 (1984). Courts must perform that work without being hamstrung by unwarranted deference to the BIA.

Below, the First Circuit rejected claims for asylum from Petitioners Douglas Humberto Urias-Orellana, Sayra Iliana Gamez-Mejia, and their minor child, G.E.U.G. Pet.App.1a-17a. The family fled their home country of El Salvador after a cartel sicario (or hitman) pursued a years-long, violent vendetta against their extended family. *Id.* at 3a-6a. The sicario shot two of Douglas's half-brothers, while vowing to kill their relatives. *Id.* at 4a. Armed cartel members then repeatedly threatened and physically attacked Douglas, pursuing his family across El Salvador for several years. *Id.* at 4a-6a. The First Circuit refused to exercise its own independent judgment in deciding whether these undisputed facts legally qualified as "persecution," given circuit precedent requiring deference to the BIA's determination on the issue. *Id.* at 12a-13a. On that basis, the First Circuit upheld the BIA's conclusion that the death threats and physical assault Douglas experienced did not constitute "persecution" for want of evidence showing "significant actual suffering," such as documentation from a physician or psychiatrist. *Id.* at 11a-12a.

The atextual deference regime driving the decision below invites inconsistent and incorrect results, often with life-threatening consequences. This Court should enforce the INA's text and restore the Judiciary's proper role in asylum cases. Federal

courts must exercise their own independent judgment in deciding what constitutes "persecution" under the law. Because the First Circuit did not do so, its judgment must be vacated and the case remanded for further proceedings.

STATEMENT OF THE CASE

A. Legal Background

1. Consistent with the United States' treaty obligations, the INA establishes various legal protections against removal for noncitizens fleeing persecution abroad. *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 "spouse[s]" 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 statutory 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). 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 or her 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." *Id.* § 1101(a)(42).

The term "persecution" is widely understood to mean 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, 222 (B.I.A. 1985)); *see also 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 went "unfulfilled" 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—i.e., race, religion, nationality, political opinion, or membership in a particular social group—be "at least one central reason for" the persecution. 8 U.S.C. § 1158(b)(1)(B)(i); *see id.* § 1101(a)(42). As relevant here, the First Circuit has held that "a family unit constitutes a particular social group" under the INA. *Lopez-Quinteros v. Garland*, 123 F.4th 534, 543 (1st Cir. 2024). In addition, 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 the government of El Salvador 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 noncitizen "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" within his or her home country. 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 IJ decides in the first instance.

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

Noncitizens ordered removed by an IJ may appeal to the BIA. Members of the BIA, 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, 589-91 (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 explicitly provides for judicial review over both "constitutional claims" and "questions of law." *Id.* § 1252(a)(2)(D).

The INA directs courts to defer to four specified kinds of administrative determinations, including "findings of fact" and findings about the "availability of corroborating evidence." *Id.* § 1252(b)(4). And while the INA provides that both an administrative "decision that an alien is not eligible for admission to the United States" and the ultimate "discretionary judgment whether to grant" asylum are "conclusive unless manifestly contrary to the law," *id.* § 1252(b)(4)(C)-(D), there is no comparable provision directing such deference to administrative decisions about a noncitizen's statutory eligibility for asylum.

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. *See* Pet.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.* They remained in hiding there "for about one year." *Id.*

"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 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.* Warning

that Douglas had been "lucky to escape" the "previous time[s]," *id.* at 30a, the men "assaulted him by striking him three times in the chest" and threatened "that they would kill him if he did not pay them," *id.* at 5a. On the way 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.* Given the ongoing threat to their lives, Douglas and his family fled El Salvador and came to the United States. *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," in addition to other kinds of relief from removal that are no longer at issue. *Id.*; *see id.* at 3a & n.2.

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 of the facts Douglas described. *Id.* at 28a-29a.

Nevertheless, the IJ rejected Douglas's claim for asylum—and by extension, his family's. *See id.* at 28a (treating Sayra and G.E.U.G.'s asylum claims as "derivative[]"). The IJ acknowledged that a "family may constitute a particular social group" for asylum purposes. *Id.* at 36a. But the IJ held that "the sum of the threats and the one time where [Douglas] was hit three times on the chest [did] 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" did not qualify as persecution under the law 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 under Section 1101(a)(42). *Id.* at 32a.

Because Douglas had "not shown past persecution," the IJ determined that he, not the government, 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, apart from the attempted murder of his two half-brothers, "other members" of his family had "not been mistreated or harmed by

anyone." *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; *see id.* at 19a (observing that the BIA "reviews questions of law . . . de novo"). The BIA reasoned that "[t]he sicario never *personally* threatened 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 did not 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 did not address the threats Douglas experienced in Claudia Lara and Cara Sucia. *See id.*; *supra* at 9-11.

The BIA concluded that the purported lack of past persecution and the supposed feasibility of internal relocation were "dispositive" of the family's asylum claims. Pet.App.19a-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.* at 20a n.3.

3. 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 application of Section 1101(a)(42)'s "persecution" standard, 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 did not legally qualify as 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 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 13a-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 14a.

SUMMARY OF ARGUMENT

I. Under the INA, federal courts must exercise independent judgment in deciding what constitutes "persecution" under the law. Section 1252 provides for judicial deference on four specified categories of administrative decisions: (1) "findings of fact"; (2) decisions "with respect to the availability of corroborating evidence"; (3) decisions about a noncitizen's "eligib[ility] for admission"; and (4) the ultimate "discretionary judgment whether to grant" asylum. 8 U.S.C. § 1252(b)(4). None of these express mandates for deference encompasses the BIA's determinations about what constitutes "persecution" under the law. Whether a given set of undisputed facts legally qualifies as "persecution" under Section 1101(a)(42) is a classic mixed question of law and fact, "not a factual inquiry," *Wilkinson v. Garland*, 601 U.S. 209, 221 (2024), and it obviously has nothing to do with the availability of corroborating evidence. Nor do the BIA's decisions on the matter concern a noncitizen's statutory eligibility for *admission* or ultimate *entitlement* to asylum; they bear instead on a noncitizen's statutory eligibility for asylum. Congress acted "intentionally and purposely in the disparate inclusion" of language in Section 1252 requiring judicial deference. *Kucana v. Holder*,

558 U.S. 233, 249 (2010). Federal courts must therefore review de novo the BIA's interpretations of Section 1101(a)(42)'s "persecution" standard.

The Court's decision in *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024), reinforces this reading of the INA. *Loper Bright* held that courts must "decide legal questions by applying their own judgment," unless Congress has provided for deference within "constitutional limits." *Id.* at 390-92, 395. That principle, properly understood, extends to statutory determinations made by the BIA as to whether a given set of undisputed facts qualifies as "persecution" under the law. *See id.* at 395. And just as the Administrative Procedure Act does not support the deference regime established in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the INA provides no defensible basis for judicial deference to the BIA's legal determinations on that issue. Because Section 1252 contains no express delegation of interpretive authority to the BIA, federal courts must interpret and apply Section 1101(a)(42)'s "persecution" standard for themselves.

II. De novo review is also warranted under background principles for determining the appropriate standard of review for mixed questions in the absence of congressional direction. *See U.S. Bank Nat'l Ass'n ex rel. CWCapital Asset Mgmt. LLC v. Vill. at Lakeridge, LLC*, 583 U.S. 387, 396 (2018). As this Court explained in *U.S. Bank*, the "standard of review for a mixed question" when the statute does not provide one largely depends "on whether answering [the question] entails primarily legal or factual work." *Id.* That test—which addresses "which kind of *court*" is "better suited to resolve" a mixed question—

arguably does not apply in the administrative context. *Id.* at 395 (emphasis added). But this Court need not resolve that issue. Assuming *U.S. Bank* applies, it strongly favors de novo review.

Deciding whether a given set of undisputed facts constitutes persecution under Section 1101(a)(42) is, "by its nature," an inquiry that "courts refine over time, building out principles that 'acquire content only through application.'" *Bufkin v. Collins*, 145 S. Ct. 728, 740 (2025). The courts of appeals have done just that. They have frequently "develop[ed] auxiliary legal principles of use in other cases" addressing Section 1101(a)(42)'s standard for "persecution," such as rules regarding religious discrimination, sexual violence, and economic harm. *See U.S. Bank*, 583 U.S. at 396. Giving meaning to the term "persecution" through case-by-case adjudication is also of central importance to the statutory scheme. And it promotes evenhanded treatment of noncitizens, consistent with the constitutional design of a "uniform Rule of Naturalization." U.S. Const. art. I, § 8, cl. 4. All of these considerations call for courts to exercise their own independent judgment in applying the law here.

III. 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). De novo review will help ensure fair and consistent application of Section 1101(a)(42)'s legal standard for "persecution," while fostering the development of clear legal rules that will streamline asylum-eligibility decisions. Simply put, there is no

defensible basis for judicial deference to the BIA's legal determinations about what qualifies as "persecution" under the law.

ARGUMENT

I. UNDER THE INA, FEDERAL COURTS MUST EXERCISE INDEPENDENT JUDGMENT IN DECIDING WHAT LEGALLY QUALIFIES AS "PERSECUTION"

It "is emphatically the province and duty of the judicial department to say what the law is." *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 385 (2024) (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)). Interpreting the cornerstone of statutory asylum protections is no exception.

A. The INA Does Not Provide For Judicial Deference To The BIA's Interpretation Of "Persecution" Under Section 1101(a)(42)

The INA's text and structure provide no sound basis for judicial deference to the BIA's legal determinations about what constitutes "persecution" under Section 1101(a)(42). Section 1252 sets forth a reticulated scheme for judicial review that directs courts to decide "questions of law," 8 U.S.C. § 1252(a)(2)(D), and expressly provides for deference on a discrete set of administrative determinations, *id.* § 1252(b)(4)(B)-(D). But Section 1252 does not establish any deferential standard of review for legal determinations made by the BIA in connection with assessing a noncitizen's statutory eligibility for asylum. That legislative choice must be respected. De novo review therefore applies.

1. Section 1252 provides for judicial deference on four specified categories of administrative decisions.

First, Section 1252 directs that "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. *Id.* § 1252(b)(4)(B); *see id.* § 1252(b)(7)(B)(i) (same for factual findings about a criminal "defendant's nationality"). *Second*, findings "with respect to the availability of corroborating evidence," like factual findings generally, may not be disturbed unless "a reasonable trier of fact is compelled to conclude" to the contrary. *Id.* § 1252(b)(4). *Third*, 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). *Fourth*, the ultimate "discretionary judgment whether to grant" asylum to a statutorily eligible noncitizen is likewise "conclusive unless manifestly contrary to the law and an abuse of discretion," *id.* § 1252(b)(4)(D), while other exercises of executive discretion are not judicially reviewable at all, *id.* § 1252(a)(2)(B).

These textually enumerated mandates for judicial deference do not encompass the BIA's legal determinations about the meaning of "persecution" under Section 1101(a)(42). And under settled principles of statutory construction, it must be presumed that Congress acted "intentionally and purposely in the disparate inclusion" of language in Section 1252 providing for deferential review. *Kucana v. Holder*, 558 U.S. 233, 249 (2010); *see also* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 107 (2012) ("The expression of one thing implies the exclusion of others (*expressio unius est exclusio alterius*)."). When the BIA determines that a noncitizen is statutorily

ineligible for asylum on the ground that the undisputed facts do not constitute "persecution" under the law, it "thus 'remains the responsibility of the court to decide whether [Section 1101(a)(42)] means what the agency says.'" *Loper Bright*, 603 U.S. at 392 (quoting *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 109 (2015) (Scalia, J., concurring in the judgment)).

2. To begin with, the BIA's determinations about what legally qualifies as "persecution" are not "findings of fact." 8 U.S.C. § 1252(b)(4)(B). A "finding of fact" is a "determination by a judge, jury, or administrative agency of a fact supported by the evidence in the record." *Finding of Fact, Black's Law Dictionary* (7th ed. 1999). And the term "fact" refers to an "event" or "circumstance" that exists in the real world, "as distinguished from its legal effect, consequence, or interpretation." *Fact, Black's Law Dictionary* (7th ed. 1999). Factual findings thus concern "who did what, when or where, how or why." *U.S. Bank Nat'l Ass'n ex rel. CWCapital Asset Mgmt. LLC v. Vill. at Lakeridge, LLC*, 583 U.S. 387, 394 (2018); *see also Thompson v. Keohane*, 516 U.S. 99, 110 (1995).

Consistent with this textual understanding, this Court has repeatedly held that "whether a given set of facts meets a particular legal standard" is a "mixed question of law and fact"—which Section 1252 treats as "a legal inquiry." *Guerrero-Lasprilla v. Barr*, 589 U.S. 221, 227-28 (2020); *accord Wilkinson v. Garland*, 601 U.S. 209, 221 (2024). Even though resolving a mixed question may require "closely examin[ing] and weigh[ing] a set of established facts," applying a legal standard to undisputed facts "is not a factual inquiry." *Wilkinson*, 601 U.S. at 221. Rather, it

involves interpreting a "rule of law as applied" to a particular case. *Pullman-Standard v. Swint*, 456 U.S. 273, 289 n.19 (1982).

The BIA's own regulations recognize that a determination on whether a given set of undisputed facts legally qualifies as "persecution" under Section 1101(a)(42) is not a "finding of fact." Those regulations provide that the BIA "will not engage in *de novo* review of findings of fact determined by an immigration judge," and instead will review an IJ's factual findings only for "clear[] erro[r]." 8 C.F.R. § 1003.1(d)(3)(i). The BIA has long recognized that this "clearly erroneous standard" does "not apply to the application of legal standards," including "whether the facts established by an alien 'amount to past persecution.'" *Matter of A–S–B–*, 24 I. & N. Dec. 493, 496-97 (B.I.A. 2008) (cleaned up), *overruled in part on other grounds by Matter of Z–Z–O–*, 26 I. & N. Dec. 586, 589-91 (B.I.A. 2015); *accord Matter of R–A–F–*, 27 I. & N. Dec. 778, 779 (U.S. Att'y Gen. 2020). "It is certainly odd, to say the least," for a federal court "to review for substantial evidence a determination the BIA itself has concluded is legal in nature" and thus subject to de novo review. *Xue v. Lynch*, 846 F.3d 1099, 1105 (10th Cir. 2017); *accord Vargas Panchi v. Garland*, 125 F.4th 298, 308 n.7 (1st Cir. 2025).

Because the BIA's legal determination about the meaning of "persecution" is not a "finding[] of fact," 8 U.S.C. § 1252(b)(4)(B)—nor, for that matter, a finding about "the availability of corroborating evidence," *id.* § 1252(b)(4)—substantial-evidence review does not apply.

3. Nor do the deferential standards established by Sections 1252(b)(4)(C) and (D). Those provisions govern legal determinations made in connection with

two discrete sets of administrative decisions. Section 1252(b)(4)(C) provides that "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). And Section 1252(b)(4)(D) similarly provides that 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). The BIA's determinations about what legally qualifies as "persecution" under Section 1101(a)(42) do not fall into either category.

The BIA's interpretation of the term "persecution" goes to a noncitizen's "statutory eligibility" for asylum. *Wilkinson*, 601 U.S. at 218. But being eligible for asylum is a separate and distinct status from being "eligible for admission," 8 U.S.C. § 1252(b)(4)(C), since obtaining "asylum" does "not require [lawful] admission," *Sanchez v. Mayorkas*, 593 U.S. 409, 416 (2021). So asylum-eligibility decisions—including determinations about whether a noncitizen has suffered "persecution" under Section 1101(a)(42)—are not subject to deferential judicial review under Section 1252(b)(4)(C).

As for Section 1252(b)(4)(D), the BIA's threshold asylum-eligibility decision is distinct from the ultimate "discretionary judgment whether to grant" asylum to a statutorily eligible noncitizen. The former determination hinges on whether the noncitizen legally qualifies as a "refugee" fleeing "persecution" under Section 1101(a)(42)—and thus is nondiscretionary. *Cf.* 8 U.S.C. § 1231(b)(3)(A) (similar standard for mandatory withholding of removal). The latter, by contrast, is "committed to the Attorney General's discretion," *INS v. Aguirre-*

Aguirre, 526 U.S. 415, 420 (1999), subject only to deferential review under Section 1252(b)(4)(D). Section 1252(b)(4)(D) thus cannot support judicial deference to the BIA's legal determinations about what constitutes "persecution" within the meaning of Section 1101(a)(42).

More than that, Section 1252(b)(4)(C) and (D) squarely foreclose such deference. By providing that administrative decisions about a noncitizen's statutory eligibility for *admission* (but not asylum) and ultimate *entitlement* to asylum (but not statutory eligibility) are "conclusive unless manifestly contrary to law," these provisions establish that no comparable standard applies to the BIA's decisions on a noncitizen's eligibility for asylum. 8 U.S.C. § 1252(b)(4)(C)-(D). The existence of two "express exception[s]" to de novo review of legal issues on a pair of related administrative decisions "implies" that no additional, unstated exception exists. *Jennings v. Rodriguez*, 583 U.S. 281, 300 (2018); *see supra* at 19-20. If Congress had wanted to extend judicial deference to the BIA's asylum-eligibility decisions, "Congress could easily have said so" expressly, as it did for admission-eligibility and asylum-entitlement decisions. *Kucana*, 558 U.S. at 248. But Congress chose not to, and that choice must be respected.

B. *Loper Bright* Confirms That De Novo Review Applies

Loper Bright reinforces that federal courts must review de novo the BIA's determinations about whether a given set of undisputed facts constitutes persecution under the law. In *Loper Bright*, this Court held that courts must "decide legal questions by applying their own judgment," unless Congress has

expressly empowered administrative officials "to give meaning to a particular statutory term" or otherwise provided for judicial deference within "constitutional limits." 603 U.S. at 391-92, 394-95. The Court therefore overruled the deference regime established in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), as inconsistent with the Administrative Procedure Act (APA). The INA, like the APA, does not delegate such interpretive authority to administrative officials. So under *Loper Bright*, federal courts must not give *Chevron*-like deference to the BIA's construction of the term "persecution."

1. As *Loper Bright* explained, "the final 'interpretation of the laws'" is "the proper and peculiar province of the courts." 603 U.S. at 385 (quoting The Federalist No. 78, at 525 (A. Hamilton) (J. Cooke ed., 1961)). "The Framers appreciated that the laws" enacted by Congress "would not always be clear" and that "their meaning" would therefore need to be "settled 'by a series of particular discussions and adjudications'" in the courts. *Id.* at 384-85 (quoting The Federalist No. 37, at 236 (J. Madison) (J. Cooke ed., 1961)).

Under this "traditional understanding" of the judicial function, "agency determinations of *fact*" are generally "binding on the courts," but "agency resolutions of questions of *law*" do not enjoy "similar deference." *Id.* at 387. And while the "informed judgment of the Executive Branch" is often "entitled to 'great weight,'" the "interpretation of the meaning of statutes" remains "exclusively a judicial function." *Id.* at 387-88 (quoting *United States v. Am. Trucking Ass'ns, Inc.*, 310 U.S. 534, 544, 549 (1940)).

Interpreting the law often involves more than just deciding pure legal questions. This Court has long recognized that "[t]hose who apply [a legal] rule to particular cases, must of necessity expound and interpret that rule." *Marbury*, 5 U.S. at 177. The "application of [statutory] text to particular circumstances" thus regularly "entails interpretation." Scalia & Garner, *supra*, at 53. It follows that, when deciding a mixed question of law and fact requires statutory interpretation, federal courts are "duty bound to exercise independent judgment in applying the law" to the facts before them. *Perez*, 575 U.S. at 122 (Thomas, J., concurring in the judgment).

"On occasion, to be sure, the Court [has] applied deferential review" to agency decisions on certain mixed questions of law and fact. *Loper Bright*, 603 U.S. at 388; *see also id.* at 431 (Gorsuch, J., concurring). But the Court has been "far from consistent in reviewing deferentially even such factbound statutory determinations"—and has often "simply interpreted and applied the statute before it" in cases where deciding a mixed question requires interpreting a key statutory term. *Id.* at 389 (majority opinion); *see, e.g.*, *Davies Warehouse Co. v. Bowles*, 321 U.S. 144, 156 (1944) (declining to "defer[]" to administrative determination that a particular warehouse legally qualified as a "public utility"); *Garland v. Cargill*, 602 U.S. 406, 410 (2024) (same for regulation providing that "a semiautomatic rifle" equipped with a "bump stock" constitutes a "machinegun" under 26 U.S.C. § 5845(b)). When applying the law involves an exercise in statutory interpretation, federal courts must conduct that interpretation themselves.

2. These principles are no less important in the immigration context. Indeed, the Court's analysis in *Loper Bright* maps directly onto the INA.

The "settled pre-APA understanding that deciding [legal] questions was 'exclusively a judicial function'" cuts just as sharply against deferring to legal determinations made by the BIA as those made by the National Marine Fisheries Service (or other agencies). *Loper Bright*, 603 U.S. at 392. For the INA, no less than other statutes, the "judicial role" is "to 'interpret the act of Congress, in order to ascertain the rights of the parties.'" *Id.* at 385 (quoting *Decatur v. Paulding*, 39 U.S. (14 Pet.) 497, 515 (1840)).

As discussed, the INA "prescribes no deferential standard for courts to employ" when deciding what legally qualifies as "persecution" under Section 1101(a)(42). *Id.* at 392; *see supra* at 18-23. That "omission" is just as "telling" here as it was in *Loper Bright* because the INA, like the APA, "*does* mandate that judicial review of agency . . . factfinding be deferential." 603 U.S. at 392. Here too, "Congress surely would have articulated" a "deferential standard applicable to questions of law" in the INA where "it intended to depart" from the tradition of de novo review over administrative officials' legal determinations. *Id.* Congress did just that by providing that administrative officials' legal determinations about a noncitizen's statutory eligibility for admission and ultimate entitlement to asylum are "conclusive unless manifestly contrary to law." 8 U.S.C.§ 1252(b)(4)(C)-(D). But Section 1252 has no comparable delegation of interpretative authority for asylum-eligibility decisions.

That omission precludes deference here. The INA does not "'expressly delegate[]' to [the BIA] the

authority to give meaning" to the statutory term "persecution." *Loper Bright*, 603 U.S. 394-95 & n.5 (first alteration in original). Unlike terms such as "appropriate" or "reasonable," the word "persecution" does not inherently "leave[] [the BIA] with flexibility'" to expound on its meaning. *Id.* at 395 & n.6. And this Court may not presume Congress wanted deferential review based merely on a belief that deciding what legally qualifies as "persecution" is a task best "suited for political actors rather than courts." *Id.* at 403.

3. Without any express textual basis for deference, mandating substantial-evidence review of the BIA's persecution determinations—or any other form of deference—would effectively "resurrect[] *Chevron* under [an] alias." *Lopez v. Bondi*, 2025 WL 2435222, at *2 (9th Cir. Aug. 25, 2025) (Bumatay, J., dissenting from the denial of rehearing en banc). *Chevron* "required courts to defer to 'permissible' agency interpretations of the statutes those agencies administer." *Loper Bright*, 603 U.S. at 377-78. This Court rejected *Chevron* deference in *Loper Bright* on the ground that it "makes no sense to speak of a 'permissible' interpretation that is not the one the court, after applying all relevant interpretive tools, concludes is best." *Id.* at 400. Applied to the BIA's legal determinations about what constitutes "persecution," substantial-evidence review imposes the same impermissible inquiry.

Take the decision below. Substantial-evidence review forced the First Circuit to "cabin" its analysis to deciding whether the BIA "reasonably concluded" that the undisputed facts of this case did not constitute "persecution" under Section 1101(a)(42). Pet.App.10a-11a. There is no meaningful difference between reviewing that determination for

"reasonabl[eness]" under the substantial-evidence standard and affording it *Chevron* deference. So the central teaching of *Loper Bright* controls: If the BIA's interpretation of the term "persecution" is "not the best" reading of Section 1101(a)(42), "it is not permissible." 603 U.S. at 400. Under *Loper Bright*, the First Circuit should have reached its "own independent conclusion about the best reading of [the] statute rather than seeing if the interpretation offered by the Executive branch [wa]s acceptable." *Lopez*, 2025 WL 2435222, at *6 (Bumatay, J., dissenting from the denial of rehearing en banc).

Substantial-evidence review of how the BIA construes "persecution" actually goes further than *Chevron* ever did. Before *Loper Bright*, federal courts sometimes 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); *see also Japarkulova v. Holder*, 615 F.3d 696, 700 (6th Cir. 2010) (Kethledge, J.) (noting that *Chevron* deference would apply to a precedential BIA decision concluding that a given "death threat" was "not of the sort that would qualify as past persecution"). 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).

Chevron thus did not come into play for "the vast majority" of BIA dispositions, *N.Y. Legal Assistance Grp. v. Bd. of Immigr. Appeals*, 987 F.3d 207, 208 (2d Cir. 2021), which are "non-precedential" and "issued by a single BIA member," *Baptiste v. U.S. Att'y Gen.*, 841 F.3d 601, 606 (3d Cir. 2016); *see also* 8 C.F.R. § 1003.1(e). In 2022, for example, the

BIA issued single-member dispositions more than 99.9% of the time, and many of those rulings "simply affirm[ed] the IJ's decision without opinion." Charles Shane Ellison, *The Toll Paid When Adjudicators Err: Reforming Appellate Review Standards for Refugees*, 38 Geo. Immigr. L.J. 143, 189-90 & n.337 (2024). Substantial-evidence review demands deference to interpretations of "persecution" made by single BIA members, as this case illustrates. Pet.App.9a, 18a. When applied to the BIA's construction of Section 1101(a)(42)'s legal standard for "persecution," substantial-evidence review is just *Chevron* deference by another name—only worse.

C. The Government's Textual Argument Does Not Hold Up

The government is wrong to reject de novo judicial review of what constitutes "persecution" under Section 1101(a)(42) in favor of a camouflaged form of *Chevron* deference. Although the government's cert-stage response acknowledges the need for an express textual hook to justify judicial deference to the BIA, *see* Resp.12-13, the government's sole attempt to find one fails.

1. The government offers just one purported textual basis for deference: Section 1252(b)(4)(B)'s substantial-evidence standard for "administrative findings of fact." *Id.* at 9. But even the government concedes that the BIA's determination "that a series of events and circumstances does not constitute persecution may not be one of pure historical fact." *Id.* at 12. That concession is correct. As explained, the term "findings of fact" refers to determinations about real-world "event[s]" or "circumstance[s]"—not their "legal effect." *Fact, Black's Law Dictionary*

(7th ed. 1999); *see supra* at 20-21. Whether "an established set of facts" demonstrates "persecution" under Section 1101(a)(42) "is a quintessential mixed question of law and fact." *Wilkinson*, 601 U.S. at 212.

Despite that acknowledged textual reality, the government insists that the phrase "'findings of fact' encompasses what this Court has called 'mixed questions' of law and fact that are of a 'primarily . . . factual' nature." Resp.12 (quoting *U.S. Bank*, 583 U.S. at 396). This Court has "already rejected" that argument. *Wilkinson*, 601 U.S. at 225. In *Wilkinson* and *Guerrero-Lasprilla*, the government claimed that "a primarily factual mixed question" is essentially "a question of fact" under Section 1252—and in both cases, this Court disagreed. *Id.*; *see Guerrero-Lasprilla*, 589 U.S. at 231. In the realm of statutory interpretation, the third time is not the charm.

The government 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" throughout Section 1252. *United States v. Santos*, 553 U.S. 507, 523 (2008); *see also Clark v. Martinez*, 543 U.S. 371, 386 (2005). Indeed, the Court has specifically emphasized the need to give the complementary phrase "questions of law" the "same meaning across" Section 1252. *Guerrero-Lasprilla*, 589 U.S. at 231. Because "the application of a legal standard to established facts" is "not a factual inquiry" under Section 1252(a)(2)(D), *Wilkinson*, 601 U.S. at 221, the same must also be true under Section 1252(b)(4)(B).

2. Another statute enacted around the same time as Section 1252's relevant text confirms that Congress's use of the phrase "findings of fact" does not encompass the BIA's determinations on mixed questions, primarily factual or otherwise. *See, e.g.*, *Sec. Indus. Ass'n v. Bd. of Governors of the Fed. Rsrv. Sys.*, 468 U.S. 137, 151 (1984) (relying on Congress's use of the term "security" in the Securities Act to interpret same word in the Glass-Steagall Act).

In September 1996, the 104th Congress enacted Section 1252 as part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009-546, 607. Just five months earlier, the same Congress enacted the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214. AEDPA requires federal courts to defer both to state courts' findings of fact and to their legal determinations—and explicitly defines legal issues as encompassing mixed questions. Specifically, AEDPA provides that federal courts may grant habeas relief to state prisoners only if a state court's decision (1) "was based on an unreasonable determination of the facts," or (2) "was contrary to, *or involved an unreasonable application of*, clearly established Federal law." 28 U.S.C. § 2254(d) (emphasis added). So under AEDPA, the phrase "determination[s] of the facts" plainly does *not* encompass the "application" of law to those facts. *Id.*; *see also Rice v. Collins*, 546 U.S. 333, 342 (2006).

There is no basis to believe the same Congress that enacted AEDPA in April 1996 used the materially identical phrase "findings of fact" to mean something different when it enacted IIRIRA the following September. The 104th Congress "knew how to

distinguish" between findings of fact and applications of law. *DHS v. MacLean*, 574 U.S. 383, 394 (2015). And in IIRIRA, as in AEDPA, Congress "chose not to" lump those two distinct concepts together. *Id.*

* * *

By expressly providing for judicial deference on four specified kinds of administrative decisions but not asylum-eligibility decisions, Section 1252 directs federal courts to exercise their own independent judgment in deciding what constitutes "persecution" under Section 1101(a)(42). At a minimum, Section 1252 does not expressly require deference to the BIA's "persecution" determinations. And under *Loper Bright*, judicial deference on that issue is inappropriate in the absence of an explicit delegation of interpretive authority that complies with constitutional limits. Federal courts must therefore review de novo whether a given set of undisputed facts legally qualifies as "persecution" under the law.

II. DE NOVO REVIEW IS ALSO WARRANTED UNDER *U.S. BANK*

The INA's text resolves this case. But the Court can alternatively rule for Douglas and his family under the background principles this Court laid out in *U.S. Bank* for determining the standard of review for mixed questions of law and fact in the absence of congressional direction. To be sure, those principles address "which kind of *court*" is "better suited to resolve" a mixed question, *U.S. Bank*, 583 U.S. at 395 (emphasis added), and thus arguably do not apply in the administrative context, *see infra* at 43-45. But assuming those principles do apply, they require de novo review here.

A. Deciding What Constitutes "Persecution" Under The Law Is A Primarily Legal Inquiry

As this Court explained in *U.S. Bank*, the appropriate "standard of review for a mixed question" in the absence of congressional direction depends "on whether answering [the question] entails primarily legal or factual work." 583 U.S. at 396. Because deciding whether a given set of undisputed facts constitutes "persecution" under Section 1101(a)(42) falls in the former category, de novo review applies.

1. Under *U.S. Bank*, appellate courts confronted with a mixed question of law and fact must break the issue "into its separate factual and legal parts, reviewing each according to the appropriate legal standard"—i.e., de novo for legal questions and deferential review for factual issues. *Google LLC v. Oracle Am., Inc.*, 593 U.S. 1, 24 (2021). "But when a [mixed] question can be reduced no further," courts should assess whether "answering it entails primarily legal or factual work." *Id.* If that task requires courts to "expound on the law" or "develop[] auxiliary legal principles of use in other cases," review is de novo. *U.S. Bank*, 583 U.S. at 396. But if they must "marshal and weigh evidence, make credibility judgments, and otherwise address" facts that "resist generalization," deference usually applies. *Id.*

That said, de novo review often remains appropriate when "answering a mixed question primarily involves plunging into a factual record." *Id.* at 396 n.4. "In the constitutional realm," for example, the sheer importance of "marking out the limits" of a legal "standard through the process of case-by-case adjudication" demands de novo review of highly

fact-intensive determinations, such as "probable cause" for a search or the "voluntariness" of a confession. *Id.*; *see Ornelas v. United States*, 517 U.S. 690, 697 (1996); *Miller v. Fenton*, 474 U.S. 104, 115-16 (1985). Many statutory schemes similarly depend on courts giving meaning to a broad legal standard through fact-specific applications. For instance, even though fair-use determinations under the Copyright Act hinge on a case-by-case balancing of several fact-intensive factors, such determinations are reviewed de novo. *See Google*, 593 U.S. at 23-24; *see, e.g.*, *United States v. Gen. Motors Corp.*, 384 U.S. 127, 141 n.16 (1966) (same for whether a set of "undisputed facts" amounts to a "conspiracy in violation of the Sherman Act").

2. Judging whether a given set of undisputed facts qualifies as "persecution" under Section 1101(a)(42) primarily involves legal work that is best suited for appellate courts. De novo judicial review is therefore appropriate.

When a noncitizen seeks asylum, several key "subsidiary factual questions" must be resolved, *Google*, 593 U.S. at 23-24, including what mistreatment the noncitizen suffered, who inflicted it, and why. *See* 8 U.S.C. § 1101(a)(42). But the "ultimate '[persecution]' question" under Section 1101(a)(42) is a textbook mixed question of law and fact that "primarily involves legal work." *Google*, 593 U.S. at 24. It is an "objective, legally grounded inquiry" as to "how a hypothetical person" would view the alleged harm or mistreatment at issue. *Bufkin v. Collins*, 145 S. Ct. 728, 740 (2025); *see supra* at 6. That test is, "by its nature, one that courts refine over time, building out principles that 'acquire content

only through application.'" *Bufkin*, 145 S. Ct. at 740 (quoting *Ornelas*, 517 U.S. at 697).

Judicial experience bears this out. The courts of appeals have regularly "develop[ed] auxiliary principles of use in other cases" when interpreting and applying Section 1101(a)(42)'s "persecution" standard. *U.S. Bank*, 583 U.S. at 395-96. To name just a few examples, circuits have held that "persecution" is "an extreme concept" requiring the infliction of "suffering or harm." *Duran-Rodriguez v. Barr*, 918 F.3d 1025, 1028 (9th Cir. 2019); *see, e.g.*, *Ruiz v. Gonzales*, 479 F.3d 762, 766 (11th Cir. 2007). They have observed that "an ongoing pattern of harm" is "more likely" to establish "persecution" than "sporadic incidents." *Sharma v. Garland*, 9 F.4th 1052, 1061 (9th Cir. 2021); *see, e.g.*, *Hernandez-Martinez v. Garland*, 59 F.4th 33, 38 (1st Cir. 2023); *Blanco v. U.S. Att'y Gen.*, 967 F.3d 304, 311 (3d Cir. 2020). They have cautioned "that physical abuse is not an absolute prerequisite to a finding of persecution." *Japarkulova*, 615 F.3d at 700; *see, e.g.*, *Arita-Deras v. Wilkinson*, 990 F.3d 350, 359 (4th Cir. 2021); *Li v. U.S. Att'y Gen.*, 400 F.3d 157, 164-65 (3d Cir. 2005). And they have adopted "the legal rule" that courts must "take [a] child's age into account" in cases where the noncitizen was "a child at the time of the alleged persecution." *Portillo Flores v. Garland*, 3 F.4th 615, 628-29 (4th Cir. 2021); *see, e.g.*, *Mazariegos-Rodas v. Garland*, 122 F.4th 655, 676 (6th Cir. 2024); *Kholyavskiy v. Mukasey*, 540 F.3d 555, 571 (7th Cir. 2008); *Zhang v. Gonzales*, 408 F.3d 1239, 1247 (9th Cir. 2005).

In addition, the courts of appeals have held that certain kinds of harm or mistreatment categorically qualify as "persecution." For instance, several

circuits have held that "some forms of physical violence are so extreme that even *attempts* to commit them constitute persecution." *Kaur v. Wilkinson*, 986 F.3d 1216, 1222-24 (9th Cir. 2021) (attempted rape); *see, e.g.*, *Karki v. Holder*, 715 F.3d 792, 805 (10th Cir. 2013) (attempted murder). Others have 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); *see, e.g.*, *Niang v. Gonzales*, 492 F.3d 505, 510 (4th Cir. 2007); *Kone v. Holder*, 620 F.3d 760, 765 n.5 (7th Cir. 2010). Still more have concluded that being forced to "practice [one's] religion in secret" constitutes "persecution." *Muhur v. Ashcroft*, 355 F.3d 958, 960-61 (7th Cir. 2004); *see, e.g.*, *Kazemzadeh v. U.S. Att'y Gen.*, 577 F.3d 1341, 1354 (11th Cir. 2009). And follow-on decisions frequently rely on "auxiliary legal principles" like these to decide subsequent cases. *U.S. Bank*, 583 U.S. at 396; *see, e.g.*, *Benyamin v. Holder*, 579 F.3d 970, 976 (9th Cir. 2009) (rejecting "the BIA's attempt to parse the distinction between differing forms of female genital mutilation" as "counter to our circuit precedent"); *Velasquez-Banegas v. Lynch*, 846 F.3d 258, 262 (7th Cir. 2017) (relying on religious-persecution cases to hold that having to hide one's "sexual orientation" to avoid "potential tormentors" is enough to show "persecution").

The courts of appeals have also established legal rules for what kinds and degree of harm do *not* rise to the level of "persecution" under Section 1101(a)(42). "Economic deprivation," for instance, falls short unless "the resulting conditions" are especially "severe." *Daneshvar v. Ashcroft*, 355 F.3d 615, 624 n.9 (6th Cir. 2004); *see, e.g.*, *Rangel v. Garland*, 100 F.4th

599, 605 (5th Cir. 2024); *Yong Gao v. Barr*, 950 F.3d 147, 153 (1st Cir. 2020). So too with "mere harassment or discrimination." *Lapadat v. Bondi*, 145 F.4th 942, 952 (9th Cir. 2025); *see, e.g.*, *Mitreva v. Gonzales*, 417 F.3d 761, 764 (7th Cir. 2005); *Ali v. Ashcroft*, 366 F.3d 407, 410 (6th Cir. 2004). These additional legal rules provide equally important "guidance for future cases." *Google*, 593 U.S. at 24.

The numerous "judicial opinions addressing" the "concept" of "persecution" demonstrate that applying Section 1101(a)(42)'s standard involves a great deal of "legal work," even though it may also require carefully examining "case-specific historical facts." *U.S. Bank*, 583 U.S. at 397-98. Decisions in this area routinely "elaborat[e] on [Section 1101(a)(42)'s] broad legal standard," while "developing auxiliary principles of use in other cases." *Id.* at 395-96. That is the bread-and-butter work of appellate courts. They should be free to perform it, unencumbered by unwarranted deference to the BIA.

3. Furthermore, federal courts' "role in marking out the limits" of Section 1101(a)(42)'s "persecution" standard "through the process of case-by-case adjudication" is "of special importance" to this statutory scheme. *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 the INA's asylum protections were meant "to conform" this country's "asylum law to the United Nations' Protocol [Relating to the Status of Refugees]." *INS v. Cardoza-Fonesca*, 480 U.S. 421, 432 (1987). The "definition of 'refugee'" established by

that treaty and adopted by Congress is the cornerstone of those protections. *Id.* Consistent interpretation of the term "persecution" is therefore necessary to safeguard the "uniform" system of "naturalization and immigration laws" that the Framers envisioned and Congress enacted. *Hines v. Davidowitz*, 312 U.S. 52, 74 (1941).

Applying "de novo review tends to unify precedent" and aid in the development of "a defined 'set of rules'" that promotes clarity, stability, and consistency. *Ornelas*, 517 U.S. at 697-98 (quoting *New York v. Belton*, 453 U.S. 454, 458 (1981)). By contrast, "sweeping deference" to the BIA's determinations about what legally qualifies as "persecution" directly undermines those important goals. *Id.* at 697. It invites "varied results" for similarly situated noncitizens, which are "inconsistent with the idea of a unitary system of law" for asylum claims. *Id.*; *see infra* at 46-49. That reality confirms de novo review applies under *U.S. Bank*.

B. The Government's *U.S. Bank* Argument Is Unpersuasive

The government's application of the *U.S. Bank* test misunderstands the proper inquiry, ignores the important legal work performed by courts in this area, and overlooks crucial aspects of the BIA's role. On top of all that, the government's position rests on a misreading of this Court's immigration cases and the questionable assumption that *U.S. Bank* applies in the administrative context.

1. The government insists that determining whether a given set of undisputed facts legally qualifies as "persecution" is "a mixed question of a primarily factual in nature" simply because the

inquiry can be "heavily fact-dependent" and often "must be decided on a case-by-case basis." Resp.12-13 (first quoting *Sharma*, 9 F.4th at 1061; then quoting *KC v. Garland*, 108 F.4th 130, 135 (2d Cir. 2024)). That argument oversimplifies the inquiry under *U.S. Bank*. What matters is whether answering the "ultimate question" involves "amplifying or elaborating on a broad legal standard" or instead merely drawing "factual inference[s]" from the record. *U.S. Bank*, 583 U.S. at 395-97; *see, e.g.*, *id.* at 397-98 (assessing whether transacting parties "were (or were not) acting like strangers" calls for a factual inference). Properly understood, the *U.S. Bank* test calls for de novo review of many fact-intensive statutory determinations, including this one.

Consider fair use under the Copyright Act. Even though fair-use determinations involve a slew of "subsidiary factual questions," the "ultimate 'fair use' question primarily involves legal work." *Google*, 593 U.S. at 24. Courts routinely spell out "legal interpretations of the fair use provision" that govern "future cases," such as by "describing kinds of market harms that are not the concern of copyright" and enumerating certain types of copying that are "presumptively unfair." *Id.* De novo review therefore applies in the fair-use context. *Id.*

Likewise, a trial court's "ultimate conclusion" as to whether, on a given set of "undisputed facts," an antitrust defendant's actions constitute a "conspiracy in violation of the Sherman Act" is "not to be shielded" by deferential appellate review. *Gen. Motors*, 384 U.S. at 141 n.16. So too for a trial court's decision on whether employees' "particular activities exclude[] them from the overtime benefits" of the Fair Labor Standards Act. *Icicle Seafoods, Inc. v. Worthington*,

475 U.S. 709, 714 (1986); *see also Graham v. John Deere Co. of Kansas City*, 383 U.S. 1, 17 (1966) (same for "ultimate question of patent validity"). For these and other statutory issues, "[i]ndependent review" is "necessary" for courts "to maintain control of, and to clarify, the legal principles" at play, despite the case-specific and fact-intensive inquiry that applying the law requires. *Ornelas*, 517 U.S. at 697-98.

The government's argument not only sidesteps the nub of the *U.S. Bank* test. It glosses over the numerous judicial decisions developing "auxiliary legal principles" and providing "guidance" for future cases interpreting Section 1101(a)(42). *U.S. Bank*, 583 U.S. at 396, 398. It undersells the "special importance" of giving meaning to the term "persecution" under this statutory scheme. *Bose*, 466 U.S. at 503. And it ignores that removing meaningful judicial oversight over the BIA's "persecution" determinations invites divergent and inequitable outcomes. *See Ornelas*, 517 U.S. at 697-98.

The government's *U.S. Bank* argument is also inconsistent with the realities of the BIA's role. What makes the original factfinder the best decisionmaker on primarily factual mixed questions is that the factfinder "presided over the presentation of evidence," "heard all the witnesses," and "has both the closest and the deepest understanding of the record." *U.S. Bank*, 583 U.S. at 398. None of that is true of the BIA. IJs "administer oaths, receive evidence, and interrogate, examine, and cross-examine" witnesses, 8 U.S.C. § 1229a(b)(1), whereas the BIA is specifically prohibited from "engag[ing] in factfinding," 8 C.F.R. § 1003.1(d)(3)(iv). Operating on a cold paper record, the BIA is no closer to the facts than a court of appeals. So unless the government believes that

federal courts (and the BIA) must defer to *the IJ's* decisions about what legally qualifies as "persecution" under Section 1101(a)(42), the logic of the government's *U.S. Bank* argument collapses.

2. In an effort to shore up its position, the government resorts to overreading three of this Court's immigration precedents.

First, the government contends that *INS v. Elias-Zacarias*, 502 U.S. 478 (1992), already resolved this case by requiring deference to the BIA's decisions about what constitutes "persecution" under Section 1101(a)(42). Resp.9-11. Not so. *Elias-Zacarias* concerned a purely factual issue about the alleged persecutors' state of mind—and thus does not dictate the answer to the question presented. *See Xue*, 846 F.3d at 1106 n.11.

At issue in *Elias-Zacarias* was whether an "attempt to coerce a person into performing military service necessarily constitutes 'persecution *on account of* [the person's] political opinion.'" 502 U.S. at 479 (emphasis altered). In answering no to that nexus question, the Court stated 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.'" *Id.* at 481 (quoting 8 U.S.C. § 1105a(a)(4) (1988)). The government claims this language establishes that a BIA decision deeming a noncitizen "ineligible for asylum"—including all of its component parts—must be reviewed for substantial evidence. Resp.9-10. That is incorrect. Mixed questions of law and fact must be broken down into their "separate factual and legal parts," with each reviewed "according to the appropriate legal standard," rather than lumped into one indivisible inquiry subject to a single standard of

review. *Google*, 593 U.S. at 24. And Section 1252(b)(4)(B) provides for substantial-evidence review of "administrative findings of fact," not the BIA's asylum-eligibility determination as a whole.

The government's reading of *Elias-Zacarias* also forgets that "the language of an opinion" should not "be parsed" like the "language of a statute." *Brown v. Davenport*, 596 U.S. 118, 141 (2022). *Elias-Zacarias* concerned a true finding of fact—the BIA's finding that alleged "persecutors' motives" were something other than the respondent's purported "political opinion." 502 U.S. at 483; *see Pullman-Standard*, 456 U.S. at 287-88 (subjective "intent" is "a pure question of fact"); *Matter of N–M–*, 25 I. & N. Dec. 526, 532 (B.I.A. 2011) (similar). The Court thus "had no reason to pass on the argument" that courts must review de novo the BIA's determination that a given set of undisputed facts falls short of the legal standard for "persecution" under Section 1101(a)(42). *Brown*, 596 U.S. at 141.

Second, in a similar vein, the government quotes language from *INS v. Ventura*, 537 U.S. 12 (2002) (per curiam), stating that "'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.'" Resp.11 (alteration in original) (quoting 537 U.S. at 16). But again, an asylum-eligibility decision must be broken down into its "separate factual and legal parts," not treated as one indivisible inquiry. *Google*, 593 U.S. at 24.

The government also takes this language from *Ventura* out of context. The Court was describing the "ordinary remand requirement," which prohibits courts from deciding "in the first instance" issues that

an agency "has not considered." *Ventura*, 537 U.S. at 17; *see also Gonzales v. Thomas*, 547 U.S. 183, 186 (2006) (per curiam). That rule has no bearing on the proper standard of review for issues the BIA has *already* decided. And in *Ventura* as well, the underlying dispute—whether "conditions in Guatemala had improved to the point where no realistic threat of persecution currently existed"—was purely factual. 537 U.S. at 13.

Third, the government cherry-picks one sentence from *Garland v. Ming Dai*, 593 U.S. 357 (2021), claiming the Court "described the questions 'whether [the asylum applicant] was persecuted in the past or fears persecution in the future' as 'questions of fact.'" Resp.10 (alteration in original) (quoting 593 U.S. at 362). But *Ming Dai* used "questions of fact" to refer to the underlying "circumstances surrounding" a noncitizen's "alleged persecution," not the textbook mixed question of whether those circumstances legally qualify as "persecution." 593 U.S. at 365. And as in both *Elias-Zacarias* and *Ventura*—but unlike in this case—the dispute in *Ming Dai* concerned "credibility determination[s]," which are pure findings of fact about "which version of events" should be believed, not mixed questions. *Id.* at 359-60.

3. There is an even more fundamental problem with the government's position: The *U.S. Bank* test governs "which kind of *court*" is "better suited to resolve" a mixed question of law and fact. 583 U.S. at 395 (emphasis added); *see also Miller*, 474 U.S. at 114 (analyzing which "judicial actor" is "better positioned" to decide a mixed question). It is not designed to select the best decisionmaker as between an administrative agency and an Article III court. And given the history of Article III courts reviewing

de novo certain "factbound statutory determinations" made by administrative officials, *Loper Bright*, 603 U.S. at 389-90, it is debatable whether the *U.S. Bank* framework carries over to administrative contexts like this one.

The government points out that, on occasion, this Court has suggested that the *U.S. Bank* test applies when administrative officials, rather than a trial court, decide mixed questions of law and fact. Resp.12-14. But the Court has never reconciled that view with *Loper Bright*, the historical tradition 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).

In *Guerrero-Lasprilla* and *Wilkinson*, this Court suggested that "the proper standard for appellate review" over an "agency decision" hinges on the "practical considerations" outlined in *U.S. Bank*. *Guerrero-Lasprilla*, 589 U.S. at 228; *see Wilkinson*, 601 U.S. at 225. But both *Guerrero-Lasprilla* and *Wilkinson* "present[ed] no such question involving the standard of review." *Guerrero-Lasprilla*, 589 U.S. at 228; *see Wilkinson*, 601 U.S. at 212 ("The question in this case is whether the IJ's hardship determination is reviewable under § 1252(a)(2)(D)."). The Court thus "had no reason to pass on" whether the *U.S. Bank* test applies in the administrative context. *Brown*, 596 U.S. at 141. Statements in *Guerrero-Lasprilla* and *Wilkinson* touching on the subject cannot "justify an outcome inconsistent with this Court's reasoning and judgment[]" in *Loper Bright*. *Id.*

As for *Bufkin*, that case addressed the standard of review that "the Veteran's Court, an Article I tribunal," should apply to a finding by the

Department of Veterans Affairs (VA) "that the evidence" on a "claim for service-related disability benefits" is "in approximate balance." 145 S. Ct. at 733-34. The Court held that such a finding is "a predominantly factual determination reviewed only for clear error." *Id.* at 733. But no party in *Bufkin* argued that *Loper Bright* precluded deference, presumably because there was no Article III court involved. *See id.*; 38 U.S.C. § 7292(d)(2) (providing that the Federal Circuit "may not review" any "challenge to a law or regulation as applied to the facts of a particular case," unless "a constitutional issue" is presented). And this Court explicitly acknowledged that the VA's approximate-balance determination may be "best characterized" as a pure "factual" finding, since it is just an assessment of "whether the evidence" supporting each side is "roughly equal." *Bufkin*, 145 S. Ct. at 739 & n.3.

* * *

All told, it is at best unclear whether, in the absence of congressional direction, *U.S. Bank* governs the standard of review that an Article III court must apply to administrative officials' decision on a mixed question of law and fact. The government's *U.S. Bank* argument goes nowhere unless the answer to that question is yes. But the Court need not decide that far-reaching issue in this case. Assuming the *U.S. Bank* test applies, it cashes out in favor of de novo review. One way or another, federal courts must exercise their own independent judgment in deciding what constitutes "persecution" under Section 1101(a)(42).

III. INDEPENDENT JUDICIAL REVIEW IS A CRITICALLY IMPORTANT SAFEGUARD IN THIS LIFE-AND-DEATH CONTEXT

"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. 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) leads to deeply incongruous results. And it inhibits the development of legal rules that promote fairness, consistency, and efficiency.

1. Take this case. After a cartel sicario hunted down Douglas's two half-brothers, shot them both, and "vowed to kill [their] entire family," armed assailants pursued Douglas and his family across El Salvador and repeatedly threatened "to leave him like his half-brothers" unless they were paid off. Pet.App.4a, 11a. The IJ concluded that these undisputed facts fell short of "persecution" because Douglas did not provide a "psychological or physiological evaluation" showing the threats "cause[d] significant actual suffering or harm." *Id.* at 31a. The BIA affirmed on that basis. *Id.* at 19a-20a. Constrained by circuit precedent requiring substantial-evidence review, the First Circuit held

that the IJ and BIA "reasonably" denied relief, given the purported lack of proof of "significant actual suffering." *Id.* at 11a-12a.

The BIA's conclusion would not have survived independent judicial review by the First Circuit. For example, the Fourth Circuit has held that a credible "threat of death alone constitutes persecution," and that a noncitizen is "*not* required to additionally prove long-term physical or mental harm." *Tairou v. Whitaker*, 909 F.3d 702, 707-08 (4th Cir. 2018) (emphasis added); *cf. Kaur*, 986 F.3d at 1225-27 (analogous conclusion for attempted rape). And the Seventh Circuit has similarly held that "a credible threat of imminent harm" against a noncitizen that "was backed by the most proof of seriousness that one could require"—i.e., "the actual killing of one family member and kidnapping of another"—established "persecution," without any additional proof of harm. *N.L.A. v. Holder*, 744 F.3d 425, 434-35 (7th Cir. 2014). The First Circuit's unwarranted deference to the BIA resulted in a decision here that cannot be reconciled with these cases.

Douglas and his family's all-too-common experience with improper deference to the BIA is deeply troubling. The consequences of incorrect asylum decisions are often devastating. From 2013 to 2019, at least 138 people were murdered after being removed from the United States to El Salvador—some just days after returning. *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; Kevin Sieff, *When Death Awaits Deported Asylum Seekers*, Wash. Post

(Dec. 26, 2018), https://www.washingtonpost.com/graphics/2018/world/when-death-awaits-deported-asylum-seekers. That disturbing figure represents just one country over a single five-year period. Independent judicial review is necessary to protect other noncitizens at risk of a similar fate.

2. De novo review 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); *see also* U.S. Gov't Accountability Off., *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 cannot be explained by differences in the legal merit of the underlying asylum claims. *See* Ramji-Nogales et al., *supra*, at 301-03.

Substantial-evidence review of the BIA's legal determinations about what constitutes persecution perpetuates these alarming disparities. *Id.* at 387-88. Under that highly deferential standard, irreconcilable BIA decisions regarding what "constitute[s] 'persecution'" must be upheld, save where all "reasonable adjudicator[s] would be compelled to" agree on the result. *Id.* at 388-89. That dynamic leads to inconsistent and unjust results at both the agency and circuit levels. *Id.*

Deference also restricts courts' ability to "expound on the law" and establish guiding "legal principles of use" in future cases. *U.S. Bank*, 583 U.S. at 396. Besides helping ensure fair and consistent outcomes, such principles promote efficiency. By encouraging the development of clear legal rules about what does (and does not) constitute "persecution" under Section 1101(a)(42), de novo review will streamline the decisionmaking for IJs and the BIA alike. *See Salve Regina Coll. v. Russell*, 499 U.S. 225, 231 (1991) ("Independent appellate review of legal issues best serves the dual goals of doctrinal coherence and economy of judicial administration.").

So too in the courts of appeals. With so much "obviously at stake," asylum cases "are among the most difficult that [courts] face." *Dia v. Ashcroft*, 353 F.3d 228, 261 (3d Cir. 2003) (en banc) (Alito, J., concurring in part and dissenting in part). Courts accordingly devote considerable time and attention to deciding these cases, regardless of the applicable standard of review. A well-developed body of law will reduce those burdens. And even more importantly, it will fulfill federal courts' duty "to say what the law is." *Loper Bright*, 603 U.S. at 385 (quoting *Marbury*, 5 U.S. at 177). This Court has long championed that duty. The life-and-death decisions involved in asylum cases are no place to abdicate it.

3. Glossing over the foregoing considerations, the government counters that deference is appropriate because the BIA has expertise in "evaluating the sorts of fact patterns that frequently arise in asylum claims" and exercises "sensitive political functions that implicate questions of foreign relations." Resp.11 (quoting *Negusie v. Holder*, 555 U.S. 511, 517 (2009)). These arguments cannot carry the day.

The mere fact that agencies "have subject matter expertise regarding statutes they administer" does not justify deference, even in highly "technical" contexts. *Loper Bright*, 603 U.S. at 401-02. Judges have the upper hand in their "proper and peculiar province" of interpreting and applying the law. *Id.* at 385 (quoting The Federalist No. 78, *supra*, at 525). If federal courts must decide for themselves what legally qualifies as a "protein" under the Public Health Service Act, a "distinct population segment[]" under the Endangered Species Act, or a "stationary source[]" of air pollution under the Clean Air Act, *id.* at 452-53 (Kagan, J., dissenting), they must likewise exercise independent judgment in deciding what legally qualifies as "persecution" under the INA. Furthermore, by making the ultimate decision to grant asylum to a statutorily eligible noncitizen discretionary, Congress has *already* afforded the Executive Branch ample room to address foreign policy concerns. 8 U.S.C. § 1158(b)(1)(A).

More fundamentally, federal courts interpreting and applying Section 1101(a)(42) 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 (majority opinion). The BIA's role and expertise call for appropriate respect, not legal deference. *See id.* When deciding whether a given set of undisputed facts constitutes "persecution" under Section 1101(a)(42), federal courts must do what courts do best—exercise independent judgment in applying the law to the case before them.

CONCLUSION

The First Circuit's judgment should be vacated and the case remanded for further proceedings.

Respectfully submitted,

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ADDENDUM

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U.S. Const. art. I

Section 8. The Congress shall have Power . . .

* * *

To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;

* * *

8 U.S.C. § 1101

§ 1101. Definitions

(a) As used in this chapter—

* * *

(42) The term "refugee" means (A) any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion, or (B) in such special circumstances as the President after appropriate consultation (as defined in section 1157(e) of this title) may specify, any person who is within the country of such person's nationality or, in the case of a person having no nationality, within the country in which such person is habitually residing, and who is persecuted or who has a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. The term "refugee" does not include any person who ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion. For purposes of determinations under this chapter, a person who has been forced to abort a pregnancy or to undergo involuntary sterilization, or who has been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive

population control program, shall be deemed to have been persecuted on account of political opinion, and a person who has a well founded fear that he or she will be forced to undergo such a procedure or subject to persecution for such failure, refusal, or resistance shall be deemed to have a well founded fear of persecution on account of political opinion.

* * *

8 U.S.C. § 1158

§ 1158. Asylum

* * *

(b) Conditions for granting asylum

(1) In general

(A) Eligibility

The Secretary of Homeland Security or the Attorney General may grant asylum to an alien who has applied for asylum in accordance with the requirements and procedures established by the Secretary of Homeland Security or the Attorney General under this section if the Secretary of Homeland Security or the Attorney General determines that such alien is a refugee within the meaning of section 1101(a)(42)(A) of this title.

(B) Burden of proof

(i) In general

The burden of proof is on the applicant to establish that the applicant is a refugee, within the meaning of section 1101(a)(42)(A) of this title. To establish that the applicant is a refugee within the meaning of such section, the applicant must establish that race, religion, nationality, membership in a particular social group, or political opinion was or will be at least one central reason for persecuting the applicant.

(ii) Sustaining burden

The testimony of the applicant may be sufficient to sustain the applicant's burden without corroboration, but only if the applicant satisfies the trier of fact that the applicant's testimony is credible, is persuasive, and refers to specific facts sufficient to demonstrate that the applicant is a refugee. In determining whether the applicant has met the applicant's burden, the trier of fact may weigh the credible testimony along with other evidence of record. Where the trier of fact determines that the applicant should provide evidence that corroborates otherwise credible testimony, such evidence must be provided unless the applicant does not have the evidence and cannot reasonably obtain the evidence.

(ii) Credibility determination

Considering the totality of the circumstances, and all relevant factors, a trier of fact may base a credibility determination on the demeanor, candor, or responsiveness of the applicant or witness, the inherent plausibility of the applicant's or witness's account, the consistency between the applicant's or witness's written and oral statements (whenever made and whether or not under oath, and considering the circumstances under which the statements were made), the internal consistency of each such statement, the consistency of such statements with other evidence of record (including the reports of the Department of State on country conditions), and any inaccuracies or falsehoods in such

statements, without regard to whether an inconsistency, inaccuracy, or falsehood goes to the heart of the applicant's claim, or any other relevant factor. There is no presumption of credibility, however, if no adverse credibility determination is explicitly made, the applicant or witness shall have a rebuttable presumption of credibility on appeal.

* * *

8 U.S.C. § 1229a

§ 1229a. Removal proceedings

* * *

(b) Conduct of proceedings

(1) Authority of immigration judge

The immigration judge shall administer oaths, receive evidence, and interrogate, examine, and cross-examine the alien and any witnesses. The immigration judge may issue subpoenas for the attendance of witnesses and presentation of evidence. The immigration judge shall have authority (under regulations prescribed by the Attorney General) to sanction by civil money penalty any action (or inaction) in contempt of the judge's proper exercise of authority under this chapter.

* * *

8 U.S.C. § 1252

§ 1252. Judicial review of orders of removal

(a) Applicable provisions

(1) General orders of removal

Judicial review of a final order of removal (other than an order of removal without a hearing pursuant to section 1225(b)(1) of this title) is governed only by chapter 158 of title 28, except as provided in subsection (b) and except that the court may not order the taking of additional evidence under section 2347(c) of such title.

(2) Matters not subject to judicial review

(A) Review relating to section 1225(b)(1)

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, no court shall have jurisdiction to review—

(i) except as provided in subsection (e), any individual determination or to entertain any other cause or claim arising from or relating to the implementation or operation of an order of removal pursuant to section 1225(b)(1) of this title,

(ii) except as provided in subsection (e), a decision by the Attorney General to invoke the provisions of such section,

(iii) the application of such section to individual aliens, including the determination made under section 1225(b)(1)(B) of this title, or

(iv) except as provided in subsection (e), procedures and policies adopted by the Attorney General to implement the provisions of section 1225(b)(1) of this title.

(B) Denials of discretionary relief

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, and except as provided in subparagraph (D), and regardless of whether the judgment, decision, or action is made in removal proceedings, no court shall have jurisdiction to review—

(i) any judgment regarding the granting of relief under section 1182(h), 1182(i), 1229b, 1229c, or 1255 of this title, or

(ii) any other decision or action of the Attorney General or the Secretary of Homeland Security the authority for which is specified under this subchapter to be in the discretion of the Attorney General or the Secretary of Homeland Security, other than the granting of relief under section 1158(a) of this title.

(C) Orders against criminal aliens

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, and except as provided in subparagraph (D), no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed a

criminal offense covered in section 1182(a)(2) or 1227(a)(2)(A)(iii), (B), (C), or (D) of this title, or any offense covered by section 1227(a)(2)(A)(ii) of this title for which both predicate offenses are, without regard to their date of commission, otherwise covered by section 1227(a)(2)(A)(i) of this title.

(D) Judicial review of certain legal claims

Nothing in subparagraph (B) or (C), or in any other provision of this chapter (other than this section) which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section.

* * *

(b) Requirements for review of orders of removal

With respect to review of an order of removal under subsection (a)(1), the following requirements apply:

* * *

(4) Scope and standard for review

Except as provided in paragraph (5)(B)—

(A) the court of appeals shall decide the petition only on the administrative record on which the order of removal is based,

(B) the administrative findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary,

(C) a decision that an alien is not eligible for

admission to the United States is conclusive unless manifestly contrary to law, and

(D) the Attorney General's discretionary judgment whether to grant relief under section 1158(a) of this title shall be conclusive unless manifestly contrary to the law and an abuse of discretion.

No court shall reverse a determination made by a trier of fact with respect to the availability of corroborating evidence, as described in section 1158(b)(1)(B), 1229a(c)(4)(B), or 1231(b)(3)(C) of this title, 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.

(5) Treatment of nationality claims

(A) Court determination if no issue of fact

If the petitioner claims to be a national of the United States and the court of appeals finds from the pleadings and affidavits that no genuine issue of material fact about the petitioner's nationality is presented, the court shall decide the nationality claim.

(B) Transfer if issue of fact

If the petitioner claims to be a national of the United States and the court of appeals finds that a genuine issue of material fact about the petitioner's nationality is presented, the court shall transfer the proceeding to the district court of the United States for the judicial district in which the petitioner resides for a new hearing on the nationality claim and a decision on that claim as if an action had been brought

in the district court under section 2201 of title 28.

(C) Limitation on determination

The petitioner may have such nationality claim decided only as provided in this paragraph.

(6) Consolidation with review of motions to reopen or reconsider

When a petitioner seeks review of an order under this section, any review sought of a motion to reopen or reconsider the order shall be consolidated with the review of the order.

(7) Challenge to validity of orders in certain criminal proceedings

(A) In general

If the validity of an order of removal has not been judicially decided, a defendant in a criminal proceeding charged with violating section 1253(a) of this title may challenge the validity of the order in the criminal proceeding only by filing a separate motion before trial. The district court, without a jury, shall decide the motion before trial.

(B) Claims of United States nationality

If the defendant claims in the motion to be a national of the United States and the district court finds that—

(i) no genuine issue of material fact about the defendant's nationality is presented, the court shall decide the motion only on the administrative record on which the removal

order is based and the administrative findings of fact are conclusive if supported by reasonable, substantial, and probative evidence on the record considered as a whole; or

(ii) a genuine issue of material fact about the defendant's nationality is presented, the court shall hold a new hearing on the nationality claim and decide that claim as if an action had been brought under section 2201 of title 28.

The defendant may have such nationality claim decided only as provided in this subparagraph.

(C) Consequence of invalidation

If the district court rules that the removal order is invalid, the court shall dismiss the indictment for violation of section 1253(a) of this title. The United States Government may appeal the dismissal to the court of appeals for the appropriate circuit within 30 days after the date of the dismissal.

(D) Limitation on filing petitions for review

The defendant in a criminal proceeding under section 1253(a) of this title may not file a petition for review under subsection (a) during the criminal proceeding.

(8) Construction

This subsection—

(A) does not prevent the Attorney General, after a final order of removal has been issued, from detaining the alien under section 1231(a) of this title;

(B) does not relieve the alien from complying with section 1231(a)(4) of this title and section 1253(g)[1] of this title; and

(C) does not require the Attorney General to defer removal of the alien.

(9) Consolidation of questions for judicial review

Judicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States under this subchapter shall be available only in judicial review of a final order under this section. Except as otherwise provided in this section, no court shall have jurisdiction, by habeas corpus under section 2241 of title 28 or any other habeas corpus provision, by section 1361 or 1651 of such title, or by any other provision of law (statutory or nonstatutory), to review such an order or such questions of law or fact.

* * *

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1 See References in Text note below.

8 C.F.R. § 1003.1
Title 8. Aliens and Nationality
Chapter V. Executive Office for Immigration Review, Department of Justice
Subchapter A. General Provisions
Part 1003. Executive Office for Immigration Review
Subpart A. Board of Immigration Appeals

§ 1003.1. Organization, jurisdiction, and powers of the Board of Immigration Appeals.

* * *

(d) *Powers of the Board*—(1) *Generally*. The Board shall function as an appellate body charged with the review of those administrative adjudications under the Act that the Attorney General may by regulation assign to it. The Board shall resolve the questions before it in a manner that is timely, impartial, and consistent with the Act and regulations. In addition, the Board, through precedent decisions, shall provide clear and uniform guidance to DHS, the immigration judges, and the general public on the proper interpretation and administration of the Act and its implementing regulations.

(i) The Board shall be governed by the provisions and limitations prescribed by applicable law, regulations, and procedures, and by decisions of the Attorney General (through review of a decision of the Board, by written order, or by determination and ruling pursuant to section 103 of the Act).

(ii) Subject to the governing standards set forth in paragraph (d)(1)(i) of this section, Board members shall exercise their independent judgment and discretion in considering and determining the cases coming before the Board, and a panel or Board member to whom a case is assigned may take any action consistent with their authorities under the Act and the regulations as necessary or appropriate for the disposition or alternative resolution of the case. Such actions include administrative closure, termination of proceedings, and dismissal of proceedings. The standards for the administrative closure, dismissal, and termination of cases are set forth in paragraph (l) of this section, 8 CFR 1239.2(c), and paragraph (m) of this section, respectively.

(2) *Summary dismissal of appeals*—(i) *Standards*. A single Board member or panel may summarily dismiss any appeal or portion of any appeal in any case in which:

(A) The party concerned fails to specify the reasons for the appeal on Form EOIR-26 or Form EOIR-29 (Notices of Appeal) or other document filed therewith;

(B) The only reason for the appeal specified by the party concerned involves a finding of fact or a conclusion of law that was conceded by that party at a prior proceeding;

(C) The appeal is from an order that granted the party concerned the relief that had been requested;

(D) The Board is satisfied, from a review of the record, that the appeal is filed for an improper purpose, such as to cause unnecessary delay, or that the appeal lacks an arguable basis in fact or in law

unless the Board determines that it is supported by a good faith argument for extension, modification, or reversal of existing law;

(E) The party concerned indicates on Form EOIR-26 or Form EOIR-29 that he or she will file a brief or statement in support of the appeal and, thereafter, does not file such brief or statement, or reasonably explain his or her failure to do so, within the time set for filing;

(F) The appeal does not fall within the Board's jurisdiction, or lies with the Immigration Judge rather than the Board;

(G) The appeal is untimely, or barred by an affirmative waiver of the right of appeal that is clear on the record; or

(H) The appeal fails to meet essential statutory or regulatory requirements or is expressly excluded by statute or regulation.

(ii) *Action by the Board*. The Board's case management screening plan shall promptly identify cases that are subject to summary dismissal pursuant to this paragraph. An order dismissing any appeal pursuant to this paragraph (d)(2) shall constitute the final decision of the Board.

(iii) *Disciplinary consequences*. The filing by a practitioner, as defined in § 1003.101(b), of an appeal that is summarily dismissed under paragraph (d)(2)(i) of this section, may constitute frivolous behavior under § 1003.102(j). Summary dismissal of an appeal under paragraph (d)(2)(i) of this section does not limit the other grounds and procedures for disciplinary action against attorneys or representatives.

(3) *Scope of review*. (i) The Board will not engage in *de novo* review of findings of fact determined by an immigration judge. Facts determined by the immigration judge, including findings as to the credibility of testimony, shall be reviewed only to determine whether the findings of the immigration judge are clearly erroneous.

(ii) The Board may review questions of law, discretion, and judgment and all other issues in appeals from decisions of immigration judges *de novo*.

(iii) The Board may review de novo all questions arising in appeals from decisions issued by DHS officers.

(iv) Except for taking administrative notice of commonly known facts such as current events or the contents of official documents, the Board will not engage in factfinding in the course of deciding cases. A party asserting that the Board cannot properly resolve an appeal without further factfinding must file a motion for remand. If new evidence is submitted on appeal, that submission may be deemed a motion to remand and considered accordingly. If further factfinding is needed in a particular case, the Board may remand the proceeding to the immigration judge or, as appropriate, to DHS.

(4) *Rules of practice*. The Board shall have authority, with the approval of the Director, EOIR, to prescribe procedures governing proceedings before it.

(5) *Discipline of practitioners and recognized organizations*. The Board shall have the authority pursuant to § 1003.101 *et seq.* to impose sanctions upon practitioners who appear in a representative capacity before the Board, the Immigration Courts, or

DHS, and upon recognized organizations. The Board shall also have the authority pursuant to § 1003.107 to reinstate disciplined practitioners to appear in a representative capacity before the Board and the Immigration Courts, or DHS, or all three authorities.

(6) *Identity, law enforcement, or security investigations or examinations.* (i) The Board shall not issue a decision affirming or granting to an alien an immigration status, relief or protection from removal, or other immigration benefit, as provided in 8 CFR 1003.47(b), that requires completion of identity, law enforcement, or security investigations or examinations if:

(A) Identity, law enforcement, or security investigations or examinations have not been completed during the proceedings;

(B) DHS reports to the Board that the results of prior identity, law enforcement, or security investigations or examinations are no longer current under the standards established by DHS and must be updated; or

(C) Identity, law enforcement, or security investigations or examinations have uncovered new information bearing on the merits of the alien's application for relief.

(ii) Except as provided in paragraph (d)(6)(iv) of this section, if identity, law enforcement, or security investigations or examinations are necessary in order to adjudicate the appeal or motion, the Board will provide notice to both parties that the case is being placed on hold until such time as all identity, law enforcement, or security investigations or examinations are completed or updated and the

results have been reported to the Board. The Board's notice will notify the noncitizen that DHS will contact the noncitizen with instructions, consistent with § 1003.47(d), to take any additional steps necessary to complete or update the identity, law enforcement, or security investigations or examinations only if DHS is unable to independently update the necessary identity, law enforcement, or security investigations or examinations. The Board's notice will also advise the noncitizen of the consequences for failing to comply with the requirements of this section. DHS is responsible for obtaining biometrics and other biographical information to complete or update the identity, law enforcement, or security investigations or examinations with respect to any noncitizen in detention.

(iii) In any case placed on hold under paragraph (d)(6)(ii) of this section, DHS shall report to the Board promptly when the identity, law enforcement, or security investigations or examinations have been completed or updated. If DHS obtains relevant information as a result of the identity, law enforcement, or security investigations or examinations, or if the noncitizen fails to comply with the necessary procedures for collecting biometrics or other biographical information after receiving instructions from DHS under paragraph (d)(6)(ii) of this section, DHS may move the Board to remand the record to the immigration judge for consideration of whether, in view of the new information, or the noncitizen's failure to comply with the necessary procedures for collecting biometrics or other biographical information after receiving instructions from DHS under paragraph (d)(6)(ii) of this section, immigration relief or protection should be denied,

either on grounds of ineligibility as a matter of law or as a matter of discretion. If DHS fails to report the results of timely completed or updated identity, law enforcement or security investigations or examinations within 180 days from the date of the Board's notice under paragraph (d)(6)(ii) of this section, the Board may continue to hold the case under paragraph (d)(6)(ii) of this section, as needed, or remand the case to the immigration judge for further proceedings under § 1003.47(h).

(iv) The Board is not required to hold a case pursuant to paragraph (d)(6)(ii) of this section if the Board decides to dismiss the respondent's appeal or deny the relief or protection sought.

(v) The immigration relief or protection described in § 1003.47(b) and granted by the Board shall take effect as provided in § 1003.47(i).

(7) *Finality of decision.* (i) The decision of the Board shall be final except in those cases reviewed by the Attorney General in accordance with paragraph (h) of this section. The Board may return a case to DHS or an immigration judge for such further action as may be appropriate without entering a final decision on the merits of the case.

(ii) In cases involving voluntary departure, the Board may issue an order of voluntary departure under section 240B of the Act, with an alternate order of removal, if the noncitizen requested voluntary departure before an immigration judge, the noncitizen's notice of appeal specified that the noncitizen is appealing the immigration judge's denial of voluntary departure and identified the specific factual and legal findings that the noncitizen

is challenging, and the Board finds that the noncitizen is otherwise eligible for voluntary departure, as provided in 8 CFR 1240.26(k). In order to grant voluntary departure, the Board must find that all applicable statutory and regulatory criteria have been met, based on the record and within the scope of its review authority on appeal, and that the noncitizen merits voluntary departure as a matter of discretion. If the record does not contain sufficient factual findings regarding eligibility for voluntary departure, the Board may remand the decision to the immigration judge for further factfinding.

* * *