No. 24-777

In the Supreme Court of the United States

DOUGLAS HUMBERTO URIAS-ORELLANA, ET AL.,
Petitioners,

v.

PAMELA BONDI, ATTORNEY GENERAL,
Respondent.

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

BRIEF OF LEGAL SERVICES PROVIDERS AMERICAN GATEWAYS, CENTER FOR GENDER AND REFUGEE STUDIES, ET AL. AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

Amicus Curiae American Gateways is a non-profit legal services provider in Central Texas advocating for low-income immigrants, refugees, and survivors of persecution, torture, conflict, and human trafficking. Created in 1987 to serve communities escaping war in Central America, American Gateways has since broadened its mission to ensure that refugees from all over the globe have a path to immigration relief.

Amicus Curiae Center for Gender & Refugee Studies ("CGRS") is a non-profit organization dedicated to the study, advancement, and fair implementation of refugee and human rights law. For twenty-five years, CGRS has played a central role in the development of asylum law and policy through litigation, scholarship, and policy advocacy. CGRS also provides expert technical assistance to attorneys representing asylum seekers nationwide, reaching over 8,400 unique asylum cases at all levels of the immigration and federal court systems in the past year alone. The question before the Court relates directly to CGRS's core mission to ensure that humanitarian protections under U.S. law comport with our international obligations.

Amicus Curiae the National Immigration Project of the National Lawyers Guild ("National Immigration Project") is a nonprofit legal advocacy and mem-

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[1] No counsel for any party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No entity or person, aside from *amici curiae* and their counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

bership organization of attorneys, advocates, legal organizations, and community organizations working to defend and extend the rights of immigrants and to ensure access to immigration relief for those who are entitled to it. The National Immigration Project hosts continuing legal education seminars on the rights of noncitizens, is the author of numerous practice advisories, and provides technical assistance to our members on a range of topics including asylum and fear-based relief. Through its membership network and its litigation, the National Immigration Project is acutely aware of the importance of federal courts applying the correct legal standard to its review of agency decisions on asylum, withholding of removal, and Convention against Torture protection–all forms of immigration relief that particularly impact immigrants of color and others who are systematically disadvantaged by the immigration system.

Amicus Curiae the National Immigrant Justice Center ("NIJC") is a non-profit corporation headquartered in Chicago, Illinois. NIJC is dedicated to ensuring human rights protections and access to justice for all immigrants, refugees, and asylum-seekers. By partnering with more than 1,000 attorneys from the nation's leading law firms, NIJC provides direct legal services to approximately 8,000 individuals annually. NIJC's experience in representing noncitizens in removal proceedings, and assisting other attorneys in similar representation, informs NIJC's advocacy, litigation, and educational initiatives, as it promotes human rights on a local, regional, national, and international stage. NIJC has a substantial interest in the issue now before the Court, both as an advocate for

the rights of asylum-seekers generally and as the leader of a network of *pro bono* attorneys who regularly represent them.

Amicus Curiae Center for Immigrant & Refugee Advancement ("CIRA") is the largest not-for-profit legal service provider for immigrants and refugees residing in Nebraska and western Iowa. CIRA's mission is to empower immigrants and refugees to live confidently and to create welcoming communities. As such, CIRA has extensive experience representing applicants for asylum and related protections before the Omaha Immigration Court. CIRA also represents clients before the Board of Immigration Appeals and the United States Court of Appeals for the Eighth Circuit to advocate for the proper application of the laws and regulations surrounding asylum and related humanitarian protections.

Amicus Curiae the Florence Immigrant & Refugee Rights Project ("Florence Project") provides free legal and social services to adults and children detained in immigration custody in Arizona. Every year, the Florence Project provides free legal services to thousands of noncitizens facing removal, including thousands who are seeking asylum or withholding of removal. Since our founding in 1989, the Florence Project has sought to ensure that all people facing removal have access to counsel, understand their rights, and are treated fairly and humanely.

Amici have an interest in the sound development of immigration and asylum law and present this brief to advocate for a more fair and administrable immigration system. *Amici* hope that this brief can highlight the importance of asylum relief, as well as other

fear-based protection, and the need to ensure the proper balance of authority between administrative immigration courts and federal courts of appeals.

INTRODUCTION AND SUMMARY OF ARGUMENT

1. This case raises an important question for review: whether courts of appeals review *de novo* the BIA's determination that established facts do not rise to the level of persecution. This critical determination is often outcome-determinative, and the stakes are life-or-death.

Fortunately, this Court's existing precedent provides the answer. In *U.S. Bank National Association* v. *Village at Lakeridge, LLC*, this Court addressed the standard of review to be applied to "mixed" questions of law and fact. 583 U.S. 387, 394 (2018). This Court explained that the proper standard of review for mixed questions—i.e., questions about whether historical facts "satisfy [a] statutory standard"—depends upon "the nature of the mixed question" and "which kind of court * * * is better suited to resolve it." *Id.* at 394–95. Under that framework, mixed questions should be reviewed *de novo* if they "require courts to expound on the law, particularly by amplifying or elaborating on a broad legal standard" and "developing auxiliary legal principles of use in other cases." *Id.* at 396. But where the question "immerse[s] courts in case-specific factual issues—compelling them to marshal and weigh evidence, make credibility judgments, and otherwise address * * * 'multifarious, fleeting, special, narrow facts that utterly resist generalization,'" review is more deferential. *Ibid.* Thus, the

standard of review depends "on whether answering [the question] entails primarily legal or factual work." *Ibid.*

Applying the *U.S. Bank* framework, the question of whether an established set of facts rises to the level of persecution under the Immigration and Nationality Act involves primarily legal work. Congress did not define "persecution," so courts have been left to develop its meaning. Courts have consistently recognized that persecution means some form of serious harm—such as "the credible threat of death, torture, or injury to one's person or liberty." *Matul-Hernandez* v. *Holder*, 685 F.3d 707, 711 (8th Cir. 2012). But because of the incredible variation in harms and circumstances across cases, courts have been called upon to develop auxiliary legal principles to determine what kinds of harm rise to the level of persecution. See, *e.g.*, *Kaur* v. *Wilkinson*, 986 F.3d 1216, 1222–25 (9th Cir. 2021) (explaining that rape and torture are "*a fortiori* conduct that reaches the level of persecution"); *Ali* v. *U.S. Att'y Gen.*, 931 F.3d 1327, 1334 (11th Cir. 2019) ("An applicant is a victim of religious persecution when he cannot practice his religion openly."). Courts have also provided guidance for *how* such conduct must be evaluated, such as by requiring that the applicant's experiences be considered in the "aggregate." *Saban-Cach* v. *Att'y Gen.*, 58 F.4th 716, 728–31 (3d Cir. 2023). Through this "evolutionary process of common-law adjudication," the meaning of persecution has come to be defined by a "complex set of rules" that are most properly regarded as legal in nature. Charles Shane Ellison, *The Toll Paid When Adjudicators Err: Reforming Appellate Review Standards for*

Refugees, 38 Georgetown Immig. L. J. 144, 198–99 (2024).

2. Despite the importance of the issue, circuit court decisions have been contradictory and confusing about the standard of review to be applied to determinations regarding persecution. Decisions that apply substantial evidence review to determine whether established facts constitute persecution are contrary to *U.S. Bank*'s guidance on mixed questions. In those decisions, which include the First Circuit's decision under review, courts usually commence the persecution inquiry by reciting a series of prototypical circumstances that have defined the contours of "persecution" in prior cases. See, *e.g.*, Pet.App. 10a-11a ("[C]redible, specific threats can amount to persecution if they are severe enough—particularly if they are death threats * * *"). By invoking precedents that have set these factual guideposts, courts tacitly acknowledge that previous judges' applications of the persecution standard to settled facts provide legal guidance for the cases at bar. Put differently, such precedents have "amplif[ied] or elaborat[ed] on a broad legal standard" in a way that is "of use in other cases." *U.S. Bank*, 583 U.S. at 396. The application of settled legal principles is itself legal work requiring *de novo* review.

Likewise, many courts improperly rely on this Court's decision in *INS* v. *Elias-Zacarias*, 502 U.S. 478 (1992) to justify substantial evidence review. This misapprehension stems from a single sentence in *Elias-Zacarias*, where the Court noted that "[t]he BIA's determination that [an applicant] was not eligi-

ble for asylum must be upheld" if supported by substantial evidence. 502 U.S. at 481. From that sentence, some courts have inferred that "*the ultimate question of past persecution* * * * as well as the findings underlying that determination, are judicially reviewed under the substantial evidence standard that applies to agency findings of fact." *He* v. *Garland*, 24 F.4th 1220, 1224 (8th Cir. 2022) (emphasis added). But that inference overreads *Elias-Zacarias*, which concerned disputed facts regarding the alleged persecutors' motive—not the primarily legal question of whether a given set of facts amounts to persecution under the INA. 502 U.S. at 482–84.

Considered in context, *Elias-Zacarias* is perfectly consistent with the Court's *U.S. Bank* framework, and does not cast doubt on the application of *de novo* review. Substantial evidence review was appropriate in *Elias-Zacarias* because the Court was reviewing factual findings—it considered the evidence to determine what motivated the guerillas to seek Elias-Zacarias out and did not find compelling evidence that it was his political opinion. 502 U.S. at 482–84. But when the facts are undisputed, and the sole question is whether those facts meet the legal standard of persecution, the question is appropriately reviewed *de novo*.

But relying on deferential circuit court precedent is problematic for another reason: because the government cannot appeal an adverse BIA decision, circuit courts generally cannot affirm immigration judges or the BIA's holdings in favor of noncitizens that facts establish persecution. See 8 U.S.C. §1252(b). The result is a lopsided picture of the meaning of persecu-

tion—on the one hand, circuit court decisions affirming the BIA's finding of no persecution abound, while on the other hand, BIA decisions finding that persecution is established never reach the circuit courts.

The problem is compounded when immigration judges and the BIA apply circuit-court precedent as if circuit courts were expounding on the law. When immigration officials are deciding whether a given set of facts rises to the level of persecution in the first instance, they frequently consult circuit court precedent. *Infra* II.D. But by comparing facts in a given case to the deferential holdings of circuit courts, the result is a "a "one-way upward ratchet for the standard." *Plaza-Ramirez* v. *Sessions*, 908 F.3d 282, 285 n.1 (7th Cir. 2018). That is because deferential decisions "are not necessarily reliable or even sufficient guides" on the meaning of persecution, and only show that the underlying immigration decisions are not so clearly unreasonable as to warrant reversal under the substantial evidence standard. *Ibid.*

Applying *de novo* review to whether established facts satisfy the legal standard of persecution will help to correct that lopsided view of the law and allow courts to provide guidance on the legal principles governing persecution for application by administrative immigration officials in other cases.

The Court should reverse, and hold that whether an established set of facts rises to the level of harm for "persecution" is a primarily legal determination subject to *de novo* review.

ARGUMENT

I. Application of the proper standard of review is critical to ensure fairness in removal proceedings for immigration legal services providers like *Amici* and the noncitizens they represent.

The stakes in asylum proceedings are extremely high, as asylum is often the difference between life and death. Since Congress passed the Refugee Act of 1980, U.S. asylum laws have protected noncitizens who are "unable or unwilling to return to" their country of origin "because of persecution or a well-founded fear of [future] persecution on account of" one or more protected grounds. Refugee Act of 1980, Pub. L. 96-212, §201(a), 94 Stat. 102, 102 (1980) . Courts have consistently recognized that persecution means some form of serious harm—such as "the credible threat of death, torture, or injury to one's person or liberty on account of a protected ground." *Matul-Hernandez* v. *Holder*, 685 F.3d 707, 711 (8th Cir. 2012); *Morales* v. *Sessions*, 860 F.3d 812, 816 (5th Cir. 2017) (persecution includes "threats to life, confinement, torture, and economic restrictions so severe that they constitute a threat to life or freedom") *Fon* v. *Garland*, 34 F.4th 810, 813 (9th Cir. 2022) ("persecution is an extreme concept that does not include every sort of treatment our society regards as offensive"). Thus, by definition, persecution determinations involve the risk of severe physical or psychological harm.

Given the stakes in an asylum proceeding, standards of review take on a heightened importance. Judges uniformly agree that "[s]tandards [of review] matter." *Hernandez* v. *Garland*, 66 F.4th 94, 104 (2d

Cir. 2023) (Pooler, J. dissenting). "Standards of review are critical to the business of judging, and can often be outcome-determinative." *Evans* v. *Sec'y, Dep't of Corrs.*, 703 F.3d 1316, 1336 (11th Cir. 2013). Particularly in the asylum context, where erroneous denials "risk condemning an individual" to persecution or death, standards of review are critically important. *Mingh Shi Xue* v. *BIA*, 439 F.3d 111, 113–14 (2d Cir. 2006).

Indeed, judges routinely lament that under a less deferential standard of review for persecution, noncitizens would be entitled to protection. See *Gjetani* v. *Barr*, 968 F.3d 393, 401 (5th Cir. 2020) (Dennis, J. dissenting) (arguing that had the court applied "*de novo* review," the noncitizen "made a sufficient showing to establish past persecution under our precedents"); *Diallo* v. *Ashcroft*, 381 F.3d 687, 697 (7th Cir. 2004) ("Were we reviewing Diallo's claim *de novo*, we might be inclined to find that * * * Diallo was the victim of past persecution[.]"); *Don* v. *Gonzales*, 476 F.3d 738, 743 (9th Cir. 2007) ("[T]he dissent makes a number of points that may well have led a majority of this panel to conclude differently than the [immigration judge], were we reviewing the matter *de novo*."). Judicial review should minimize the risk of erroneous denial, and *de novo* review of the legal meaning of undisputed facts serves that purpose.

While Congress has prescribed the standard of review for administrative findings of fact, it has not prescribed a standard of review for mixed questions of law and fact. 8 U.S.C. §1252(b)(4)(B) ("administrative findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the

contrary"). Accordingly, courts must determine based on background principles what the appropriate standard of review is.

Noncitizens and immigration legal services providers depend on a fair review of asylum determinations. As just one example, American Gateways serves over 1,000 noncitizens each year, and advises on the asylum process and the likely outcome of an asylum claim. But judicial deference to immigration judges and the Board of Immigration Appeals means that decisions with similar facts can result in different outcomes, and courts of appeals cannot correct erroneous decisions or provide consistency through uniform rules. Moreover, consistency helps organizations like *Amici* to advise clients on the likely outcome of immigration proceedings. *De novo* review of important mixed questions, such as whether established facts show that the harm suffered rises to the level of persecution, helps provide predictability.

II. Whether certain facts rise to the level of persecution is more of a legal question than a factual one, and thus should be reviewed *de novo*.

A. Under this Court's *U.S. Bank* test, the question here entails primarily legal work.

In *U.S. Bank National Association* v. *Village at Lakeridge, LLC*, this Court addressed the standard of review that applies to "mixed" questions of law and fact—i.e., questions about whether historical facts "satisfy [a] statutory standard." 583 U.S. 387, 394

(2018) (quoting *Pullman–Standard* v. *Swint*, 456 U.S. 273, 289 n.19 (1982)). The Court explained that the proper standard of review for such questions depends on "the nature of the mixed question" and "which kind of court * * * is better suited to resolve it." *Id.* at 395.

Specifically, a mixed question should be reviewed *de novo* if it "require[s] courts to expound on the law, particularly by amplifying or elaborating on a broad legal standard" and "developing auxiliary legal principles of use in other cases." *Id.* at 396. On the other hand, a mixed question should be reviewed using the standard applicable to factual determinations if it "immerse[s] courts in case-specific factual issues—compelling them to marshal and weigh evidence, make credibility judgments, and otherwise address * * * 'multifarious, fleeting, special, narrow facts that utterly resist generalization.'" *Ibid.* (quoting *Pierce* v. *Underwood,* 487 U.S. 552, 561–62 (1988)). Put differently, the applicable standard of review depends on whether answering the mixed question "entails primarily legal or factual work." *Ibid.*

Applying the *U.S. Bank* framework, primarily legal work is required when deciding what conduct amounts to "persecution," so this question should be reviewed *de novo*. After all, this inquiry typically requires delineating which categories of harm are sufficiently severe, as a matter of law, to satisfy the persecution standard. Courts in asylum cases have determined that sexual assaults, death threats, economic deprivations, severe psychological harm, and various other forms of conduct rise to that level. See, *e.g.*, *Kaur* v. *Wilkinson*, 986 F.3d 1216, 1222–25 (9th Cir. 2021); *Hernandez-Avalos* v. *Lynch*, 784 F.3d 944, 949 (4th

Cir. 2015); *Huo Qiang Chen* v. *Holder*, 773 F.3d 396, 404–06 (2d Cir. 2014). Courts have also provided guidance for *how* such conduct must be evaluated, such as by requiring that the applicant's experiences be considered in the "aggregate," *Saban-Cach* v. *Att'y Gen.*, 58 F.4th 716, 728–31 (3d Cir. 2023), and that harms to children be weighted more heavily, *Portillo Flores* v. *Garland*, 3 F.4th 615, 629 (4th Cir. 2021). Further, courts have determined that certain types of harm are almost always persecution. See, *e.g.*, *Hassan* v. *Gonzales*, 484 F.3d 513, 517 (8th Cir. 2007) (noting female genital mutilation rises to the level of persecution); *Ali* v. *U.S. Att;y Gen.*, 931 F.3d 1327, 1334 (11th Cir. 2019) ("An applicant is a victim of religious persecution when he cannot practice his religion openly."). Through this "evolutionary process of common-law adjudication," the meaning of persecution has come to be defined by a "complex set of rules" that are most properly regarded as legal in nature. Charles Shane Ellison, *The Toll Paid When Adjudicators Err: Reforming Appellate Review Standards for Refugees*, 38 Georgetown Immig. L. J. 144, 198–99 (2024) (quoting *Bose Corp.* v. *Consumers Union of U.S. Inc.*, 466 U.S. 485, 502 (1984)). The continued application of those rules in a given case "will undoubtedly lead to developing additional auxiliary principles that will help guide future adjudications in the direction of greater uniformity." *Id.* at 198.

Furthermore, there is no reason to believe that the agency is "better suited" than are appellate courts to resolve the question of whether particular facts rise to the level of persecution. See *U.S. Bank*, 583 U.S. at

395. Although an immigration judge may have an advantage in assessing credibility and finding facts, "no such advantage remains when the facts are undisputed, and the only question is whether the facts found" meet the standard of persecution. Ellison, *supra*, at 199. To the contrary, courts of appeals have their own "institutional advantage" in ensuring uniform guidance in the development of the law. *Ibid.* This principle is recognized by the BIA itself, which, as Petitioners point out, reviews *de novo* an immigration judge's determinations as to whether certain conduct amounts to persecution. Pet.Br. 8–9, 21 (quoting *Matter of A-S-B-*, 24 I. & N. Dec. 493, 496–97 (B.I.A. 2008)).

To be sure, primarily factual work is required when finding the "underlying facts," *Padilla-Franco* v. *Garland*, 999 F.3d 604, 607 (8th Cir. 2021), such as "whether certain events [occurred or] will * * * occur," *Huo Qiang Chen*, 773 F.3d at 403. But appellate disputes over the persecution element "rarely turn" on such questions. Ellison, *supra*, at 161. In this case, for example, the immigration judge found Mr. Urias-Orellana's testimony to be credible, and the operative facts (regarding past violence and threats in El Salvador) are uncontested. See Pet.App. 3a-6a. Accordingly, the remaining question to be answered is whether those facts rise to the level of persecution, which should be reviewed *de novo* under the *U.S. Bank* framework.

B. Decisions applying substantial-evidence review are inconsistent with the *U.S. Bank* framework.

Although various circuit courts have applied substantial-evidence review when addressing whether established facts rise to the level of persecution, those courts' own analyses reveal why such deferential review is inappropriate. In those decisions, which include the First Circuit's decision under review, courts usually commence the persecution inquiry by reciting a series of prototypical circumstances that have defined the contours of "persecution" in prior cases. See, *e.g.*, Pet.App. 10a-11a ("[C]redible, specific threats can amount to persecution if they are severe enough—particularly if they are death threats * * * ."); *Mirisawo* v. *Holder*, 599 F.3d 391, 396 (4th Cir. 2010) ("[E]conomic persecution" occurs when the harm "threatens the life or freedom of the applicant."); *Kukalo* v. *Holder*, 744 F.3d 395, 400 (6th Cir. 2011) (Persecution can take the form of "detention, arrest, interrogation, prosecution, imprisonment, illegal searches, confiscation of property, surveillance, beatings, or torture."); *Escobedo Marquez* v. *Barr*, 965 F.3d 561, 565 (7th Cir. 2020) (Threats can constitute persecution "if the perpetrators attempt to follow through on the threat[s].").

By invoking precedents that have set these factual guideposts, courts tacitly acknowledge that previous judges' applications of the persecution standard to settled facts provide legal guidance for the cases at bar. Put differently, such precedents have "amplif[ied] or elaborat[ed] on a broad legal standard" in a way that is "of use in other cases." *U.S. Bank*, 583 U.S. at 396;

see Ellison, *supra*, at 199 (observing that the "evolutionary process" of interpreting the persecution requirement has produced rules that cannot "be regarded any longer as purely factual"). It defies reason to accept that a *prior* panel's analysis has this effect, while suggesting that a court's *own* application of the persecution standard to undisputed facts is necessarily a narrow factual determination warranting deference to the BIA.

The better approach is embodied in decisions of courts applying *de novo* review, which likewise rely on the lines drawn in previous cases, while also accepting that their own conclusions may guide application of the persecution standard in the future. See, *e.g.*, *Kaur*, 986 F.3d at 1222–25 (applying a broad principle that "attempted rape almost always constitutes persecution"); *Huo Qiang Chen*, 773 F.3d at 404–06 (holding that "imposition of a * * * fine does not, by itself" constitute past persecution as a matter of law).

Indeed, some of the *same* courts that have applied substantial-evidence review to such persecution determinations—including the First Circuit—review *de novo* the analogous question of "[w]hether a particular act constitutes torture" for purposes of protection under the Convention Against Torture ("CAT"). *Hernandez-Martinez* v. *Garland,* 59 F.4th 33, 40 (1st Cir. 2023); accord *Manuel-Soto* v. *Att'y Gen.,* 121 F.4th 468, 472 (3d Cir. 2024); *Yar* v. *Garland,* 94 F.4th 1077, 1078 (8th Cir. 2024); *Arostegui-Maldonado* v. *Garland,* 75 F.4th 1132, 1144 & n.8 (10th Cir. 2023); *Jean-Pierre* v. *U.S. Att'y Gen.,* 500 F.3d 1315, 1316, 1321–22 (11th Cir. 2007). These courts apparently agree that "primarily legal work" is involved in determining

whether certain facts amount to "torture." See *U.S. Bank*, 583 U.S. at 396. There is no principled reason for courts to take the opposite approach when asking whether conduct rises to the level of "persecution" for purposes of asylum—especially given that applicants commonly seek asylum and CAT relief in tandem.

C. *INS* v. *Elias-Zacarias* does not mandate substantial evidence review for mixed questions of law and fact.

Some courts have held that substantial evidence review applies to a determination that established facts do not rise to the level of persecution because of an erroneous interpretation of this Court's opinion in *INS* v. *Elias-Zacarias*, 502 U.S. 478 (1992). See, *e.g.*, *Ravindran* v. *INS*, 976 F.2d 754, 758–59 (1st Cir. 1992) (concluding that *Elias-Zacarias* requires substantial evidence review of persecution determinations); *Nazaraghaie* v. *INS*, 102 F.3d 460, 463 n.2 (10th Cir. 1996) (holding that *Elias-Zacarias* "foreclose[s] any argument" for application of a "standard less deferential than substantial evidence").

This misapprehension stems from a single sentence in *Elias-Zacarias*, where the Court noted that "[t]he BIA's determination that [an applicant] was not eligible for asylum must be upheld" if supported by substantial evidence. 502 U.S. at 481. From that sentence, some courts have inferred that "*the ultimate question of past persecution* *** as well as the findings underlying that determination, are judicially reviewed under the substantial evidence standard that applies to agency findings of fact." *He* v. *Garland*, 24 F.4th 1220, 1224 (8th Cir. 2022) (emphasis added); see

also *Lumataw* v. *Holder*, 582 F.3d 78, 91 (1st Cir. 2009) (noting that the court's "authority to disturb the agency's determination" that undisputed facts "did not rise to the level of past persecution" was "constrained by [the] deferential 'substantial evidence' standard of review"); *Medhin* v. *Ashcroft*, 350 F.3d 685, 688–89 (7th Cir. 2003) (citing *Elias-Zacarias* for proposition that substantial evidence standard applies to persecution determinations). But that inference overreads *Elias-Zacarias*, which concerned disputed facts regarding the alleged persecutors' motive—not the primarily legal question of whether a given set of facts amounts to persecution under the INA. 502 U.S. at 482–84. See *Xue* v. *Lynch*, 846 F.3d 1099, 1105 n.11 (10th Cir. 2017) (circuits rely "uncritically" on *Elias-Zacarias*).

In *Elias-Zacarias*, this Court addressed whether "acts of conscription by a nongovernmental group constitute persecution on account of political opinion." 502 U.S. at 480. Elias-Zacarias was a native of Guatemala who was apprehended for entering the United States without inspection. *Id.* at 479. He requested asylum, and during his immigration proceedings he testified that prior to his departure from Guatemala, two armed, masked guerillas came to his house and asked him and his parents to join their group. *Ibid.* He and his parents refused, and the guerillas told them that they would be back. *Ibid.* Fearing their return, Elias-Zacarias fled to the United States. *Id.* at 480. He testified that he did not want to join the guerillas because he was afraid that the government would retaliate against him and his family. *Ibid.* On appeal from

the denial of asylum relief, the Ninth Circuit concluded that conscription by a guerilla organization "necessarily constitutes 'persecution on account of * * * political opinion.'" *Id.* at 481.

This Court reversed. The Court's analysis centered on resolving disputed facts regarding whether the guerillas sought to conscript Elias-Zacarias on account of his political opinion, and held that they did not. The Court noted that acts of conscription were not necessarily persecution on account of political opinion because one's motive for resisting recruitment could be as simple as "fear of combat, [or] a desire to remain with one's family and friends," rather than any political opinion held by the petitioner. *Id.* at 482. Applying the substantial evidence standard, this Court concluded that the evidence did not "compel[] the conclusion" that Elias-Zacarias would be persecuted "*because of* [his] political opinion." *Id.* at 483 (emphasis in original). Indeed, the court observed that the evidence indicated that Elias-Zacarias was not expressing any political opinions at all—his refusal stemmed from fear of retaliation. *Ibid.* (emphasis in original).

Substantial evidence review was appropriate in *Elias-Zacarias* because the Court was reviewing factual findings—it considered the evidence to determine whether the guerillas persecuted Elias-Zacarias on account of his political opinion and did not find compelling evidence that Elias-Zacarias's political opinion motivated the harm. A persecutor's subjective motives are a "classic factual question." *Crespin-Valladares* v. *Holder*, 632 F.3d 117, 127–28 (4th Cir. 2011). Nothing in the *Elias-Zacarias* analysis implies that the substantial evidence standard extends to every aspect of

the asylum eligibility determination, which includes both questions of fact and questions of law. See *Singh* v. *Ilchert*, 63 F.3d 1501, 1507 (9th Cir. 1995) (noting that *Elias-Zacarias*'s holding that the substantial evidence standard of review applies to a certain factual finding "does not mean that every review of an asylum eligibility determination involves only questions of fact, nor does it alter [the] application of *de novo* review to questions of law"); *Google LLC* v. *Oracle Am., Inc.*, 593 U.S. 1, 24 (2021) (requiring courts to "break" mixed questions into "separate factual and legal parts, reviewing each according to the appropriate standard" until they "can be reduced no further").

In other words, *Elias-Zacarias* does not mandate substantial evidence review for cases such as this one where the facts are undisputed. In such a scenario, a reviewing court need not weigh the facts because they are established. It need only determine whether the facts presented fit within the legal guideposts of what is and is not persecution. See*, e.g.*, *Padilla-Franco*, 999 F.3d at 607–08 (finding no past persecution because threats alone typically cannot constitute persecution). That is "primarily legal * * * work," warranting *de novo* review. *U.S. Bank*, 583 U.S. at 396.

Finally, it bears noting that *Elias-Zacarias* predates the creation of the statutory standards of review in the INA in 1996. See Act of Sept. 30, 1996, Pub.L. 104-208, 110 Stat 3009 (1996). Indeed, the INA adopted some language from *Elias-Zacarias*. The Court had explained in a footnote that "[t]o reverse [a] BIA finding we must find that the evidence not only supports that conclusion, but *compels* it." *Elias-Zacarias*, 502 U.S. at 481. Similarly, the INA provides that

"administrative findings of fact are conclusive unless any reasonable adjudicator would be *compelled* to conclude to the contrary." 8 U.S.C. §1252 (1996) (emphasis added). Notably, Congress cabined this standard of review to the agency's findings of fact—not to mixed questions of law and fact or legal questions. *See* Ellison, *supra*, at 155 (discussing the codification of language from *Elias-Zacarias* in the INA). Had Congress intended legal decisions or mixed questions to be reviewed under the same deferential substantial evidence standard, it would have said so expressly.

D. Reviewing persecution determinations under *de novo* review would comport with the way immigration judges frequently view circuit court authority and correct imbalances in precedent.

In addition to the reasons above, there is a practical reason for *de novo* review: immigration judges and the BIA frequently treat circuit court decisions as authoritative legal determinations on the level of harm required to establish persecution. *Abdulai* v. *Ashcroft*, 239 F.3d 542, 553 (3d Cir. 2001) ("The BIA is required to follow court of appeals precedent within the geographical confines of the relevant circuit.").

As a practical matter, immigration judges frequently treat circuit court decisions as *de novo* determinations of whether the facts rise to the level of persecution, rather than decisions affirming on substantial evidence grounds. For example, one American Gateways client's immigration judge decision relied upon Fifth and Third Circuit decisions reviewing for substantial evidence to conclude that certain harm did not rise to the level of persecution:

> Here, there is no indication that Respondent's arrest and detention, in and of itself, was "excessive or arbitrary." In *Tesfamichael* [v. *Gonzales*], the Fifth Circuit held that the applicant's "unpleasant and unduly prolonged" one month detention did not rise to the level of persecution. 469 F.3d [109, 117 (5th Cir. 2006)]; see also *Chen* v. *Ashcroft,* 381 F.3d 221, 234 – 35 (3rd Cir. 2004) (finding that a beating by an official that did not require medical attention did not rise to the level of persecution).[2]

Yet the Fifth Circuit's decision in *Tesfamichael* did not "hold" that a one-month detention is legally insufficient to constitute persecution. 469 F.3d at 117. Rather, the Fifth Circuit merely concluded that "substantial evidence supports the BIA determination that [the noncitizen] did not experience past persecution." *Ibid.* Under that deferential standard of review, the Fifth Circuit may have just as easily affirmed had the BIA reached the opposite conclusion. Likewise, the Third Circuit's decision in *Chen* merely concluded that the BIA's finding that the noncitizen's experiences "did not rise to the level of persecution" was not so wrong that "any reasonable adjudicator would be compelled to conclude to the contrary." 381 F.3d at 235.

Similarly, another immigration judge determined that a beating with a bat that resulted in several stitches was not adequately severe based on deferential circuit court decisions:

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[2] Decision on file with American Gateways.

> Even assuming arguendo that the 2019 beating of the Respondent was related to a protected ground, such as his political opinion, this single incident of physical harm does not rise to the level necessary to demonstrate past persecution. See *Abdel-Masieh* v. *INS*, 73 F.3d 579, 584 (5th Cir. 1996) (finding that the applicant did not suffer persecution where he was "arrested, twice detained, and beaten on both occasions" because he did not "characterize the beatings he received as 'severe' nor [did] he demonstrate that his detentions were 'excessive or arbitrary'"); *Ozdemir* v. *INS*, 46 F.3d 6, 7 (5th Cir. 1994) (concluding that the [noncitizen] did not suffer persecution where he was detained for 3 days and beaten); *Hussain* v. *Holder*, 567 F. App'x 223 (5th Cir. 2014) (unpublished) (holding several instances of physical assault, denial of college admission, threats to life, and calling of names was insufficient to support a finding of past persecution); *Gjetani* v. *Barr*, 968 F.3d 393, 398 (5th Cir. 2020) (collecting cases).[3]

All of those decisions relied upon by the immigration judge applied deferential substantial evidence review. *Abdel-Masieh*, 73 F.3d at 583–84 (applying the "substantial evidence standard" to the BIA's "finding that Abdel has not suffered past persecution"); *Ozdemir*, 46 F.3d at 8 ("We conclude that substantial evidence exists to support the BIA's conclusion of no past persecution on account of political opinion.");

[3] Decision on file with American Gateways.

Hussain, 567 F. Appx. at 227 ("On the record before us, we cannot say that the evidence is so compelling that no reasonable factfinder could determine that the harms suffered by the Hussains did not rise to the level of persecution."); *Gjetani*, 968 F.3d at 397 (applying substantial evidence review). Thus, those decisions provide little guidance about the meaning of persecution for use in the first instance.

The confusion of immigration officials applying circuit court precedent is understandable given that the primary duty of circuit judges is to decide legal issues. *Marbury* v. *Madison*, 5 U.S. 137, 177, 1 Cranch 137 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is."). Indeed, courts have an "institutional advantage" in ensuring uniform guidance in the development of the law. Ellison, *supra*, at 199. Thus, applying *de novo* review at the circuit level of whether established facts meet the definition of "persecution" will provide appropriate guidance to immigration judges and the BIA.

Relying on deferential precedents is especially problematic because circuit courts generally cannot review cases in which the immigration judge or BIA found past persecution. Circuit courts have jurisdiction to review orders of removal, but do not have jurisdiction to review grants of asylum. 8 U.S.C. §1252(b). The result is a lopsided picture of the meaning of persecution—on the one hand, circuit court decisions affirming the BIA's finding of no persecution abound, while on the other hand, BIA decisions holding that persecution is established never reach the circuit courts.

Thus, continued deferential review on the meaning of persecution results in a "one-way upward ratchet for the standard." *Plaza-Ramirez* v. *Sessions*, 908 F.3d 282, 285 n.1 (7th Cir. 2018). When immigration officials apply circuit court precedent in the first instance, those deferential precedents generally affirm findings of no persecution. *Ibid.* However, those deferential decisions "are not necessarily reliable or even sufficient guides" on the meaning of persecution. *Ibid.*

Applying *de novo* review to whether established facts satisfy the legal standard of persecution will help to correct that lopsided view of the law and allow courts to provide guidance on the meaning of persecution, i.e., "to expound on the law, particularly by amplifying or elaborating on a broad legal standard." *U.S. Bank*, 583 U.S. at 396.

CONCLUSION

The Court should reverse, and hold that whether an established set of facts rises to the level of harm for "persecution" is a primarily legal determination subject to *de novo* review.

Respectfully submitted.

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