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 FORMER EXECUTIVE OFFICE FOR IMMIGRATION REVIEW JUDGES AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

CONSTITUTIONAL PROVISIONS

STATUTES

REGULATIONS

OTHER AUTHORITIES

INTEREST OF *AMICI CURIAE* [1]

Amici curiae are fifty-one (51) former immigration judges (IJs) and members of the Board of Immigration Appeals (BIA or Board). A complete list of signatories can be found in the Appendix of *Amici Curiae*.

Amici have dedicated their careers to the immigration court system and to upholding the immigration laws of the United States. Each is intimately familiar with the immigration court system and its procedures. Together, they have a distinct interest in ensuring that claims duly asserted in immigration cases are afforded the level of Article III judicial review required by law.

Under the Immigration and Nationality Act (INA), IJs and the BIA make the initial determination whether a noncitizen fleeing persecution abroad is eligible for asylum protections, subject to Article III review by a federal court of appeals. The INA directs courts of appeals to base their review decisions "only on the [relevant] administrative record" and instructs them to defer to several types of administrative determinations, including "findings of fact." 8 U.S.C. § 1252(b)(4). But the INA does not require judicial deference to agency "interpretation and application of constitutional and statutory provisions." *Id.* § 1252(b)(9). Although agency actors are uniquely situated to develop the factual record, and should accordingly receive deference in that sphere, it is the duty of Article III courts to say what the law is. In

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[1] Pursuant to this Court's Rule 37.6, *amici* state that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amici*, its members, or its counsel made a monetary contribution intended to fund the preparation or submission of this brief. Counsel of record for the parties received timely notice of *amici*'s intent to file this brief.

amici's experience, this two-tiered approach recognizes that Congress allowed for some executive discretion in factfinding while assigning nondiscretionary interpretive questions of immigration law to Article III courts.

SUMMARY OF ARGUMENT

To qualify for asylum under the INA, an applicant must establish that he or she qualifies as a "refugee" because he or she has suffered "persecution" or holds "a well-founded fear of persecution" based on "race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1101(a)(42); *see also* 8 C.F.R. § 1208.13(b) (applicant can establish refugee status by way of past persecution or well-founded fear of future persecution). Thus, an IJ's conclusion that an applicant has suffered past persecution is a significant step in establishing refugee status. If an IJ holds that an applicant has faced past persecution, the applicant "shall also be presumed to have a well-founded fear of [future] persecution on the basis of the original claim," shifting the burden to the government to disprove the presumption of future persecution. 8 C.F.R. § 1208.13(b)(1).

Congress drew clear boundaries in the INA about the respective roles of IJs, the BIA, and the courts in adjudicating noncitizens' asylum claims. The INA empowers IJs to develop the factual record based on their firsthand experience with applicants through conducting evidentiary hearings. *See* 8 U.S.C. § 1229a(b)(1). Under the REAL ID Act, passed in 2005, an applicant's testimony alone is sufficient to establish eligibility for asylum if the "testimony is credible, is persuasive, and refers to specific facts sufficient to demonstrate that the applicant is a

refugee." *Id.* § 1158(b)(1)(B)(ii). The Act squarely identifies the IJ as the "trier of fact" with the obligation to determine the applicant's credibility. *Id.* § 1158(b)(1)(B)(iii); *see also id.* § 1229a(c)(4)(B)–(C) (empowering the IJ to "determine whether or not the [applicant's] testimony is credible").

For citizens ordered removed by the IJ, the INA permits the BIA and, ultimately, the courts of appeals to review the IJ decision for legal error, while requiring deference to certain enumerated items, including factual determinations. *Id.* §§ 1252(b)(4), (9). The courts of appeals are deeply divided, however, on whether an IJ's determination that the established facts constitute "persecution" under Section 1101(a)(42) is a factual determination deserving deference or a legal conclusion that does not get reviewed deferentially. *See* Pet. 15–21; Resp. 15–16.

Petitioners advocate for deference to IJs on findings of fact, consistent with the statutory and regulatory scheme, while preserving the traditional role of the courts of appeals as arbiters of the law, including whether a given set of facts amounts to "persecution." *See* Pet. Br. 18–23; Pet. 23–30. Petitioners' interpretation respects the careful balance struck by Congress in the INA.

First, Petitioners' view reflects the unique institutional competencies of administrative immigration courts and Article III courts of appeals. IJs are specifically designated to develop the factual record and to assess applicants' credibility when making their overall removability determination, *see* 8 U.S.C. §§ 1229a(b)(1), (c)(4), and both the BIA and courts of appeals are limited in their review of IJs' factual findings, but remain empowered to review legal conclusions without deference, *see* 8 C.F.R.

§ 1003.1(d)(1), (d)(3) (BIA review); 8 U.S.C. § 1252(a)(2)(D), (5), (b)(2), (9) (Article III review). This approach respects the separation of powers and preserves "the strong presumption that Congress intends judicial review of administrative action." *Smith v. Berryhill*, 587 U.S. 471, 483 (2019) (quoting *Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 670 (1986)). "When a statute is 'reasonably susceptible to divergent interpretation, [the Court] adopt[s] the reading that accords with traditional understandings and basic principles: that executive determinations generally are subject to judicial review.'" *Kucana v. Holder*, 558 U.S. 233, 251 (2010) (quoting *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 434 (1995)). Indeed, "[s]eparation-of-powers concerns" militate "against reading legislation, absent clear statement, to place in executive hands authority to remove cases from the Judiciary's domain." *Id.* at 237; *see also Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948) ("[S]ince the stakes are considerable for the individual, we will not assume that Congress meant to trench on his freedom beyond that which is required by the narrowest of several possible meanings of the words used.").

Second, courts of appeals should review without deference whether a set of facts constitutes "persecution" under 8 U.S.C. § 1101(a)(42) because this question is primarily legal. *See Guerrero-Lasprilla v. Barr*, 589 U.S. 221, 227 (2020) ("Nothing in that [statute] precludes the conclusion that Congress used the term 'questions of law' to refer to the application of a legal standard to settled facts" (citation omitted)). The Court has recognized this approach to breaking down mixed questions of law and fact, and determining the appropriate standard of review, in other contexts. *See, e.g.*, *Google LLC v.*

Oracle Am., Inc., 593 U.S. 1, 24 (2021). And the courts of appeals have almost universally adopted this framework and not deferred to the agency in reviewing a related question of immigration law: whether the "particular social group" in which a noncitizen claims membership—and on the basis of which the noncitizen claims to face "persecution"—has sufficient characteristics that make it cognizable under the immigration laws. *See infra*, at 18–19. The same, non-deferential approach should apply when courts of appeals review agency decisions on the inextricably linked question of whether adjudicated facts establish "persecution" as a matter of law.

Third, Petitioners' interpretation best promotes the efficient operation of the immigration court system. Given crippling case backlogs, IJs' required focus on making the factual record, and administrative pressure on IJs and the BIA, it is inevitable that IJs occasionally will err on the law. Substantive Article III review of those administrative decisions is vital to ensuring faithful application of the law as Congress intended. IJs and the BIA rely also on the precedential decisions of courts of appeals to develop the law and to clarify difficult, recurring issues they face. Far from creating additional work for IJs and the BIA, Article III review provides guidance for future cases and aids the immigration courts in navigating their caseloads.

ARGUMENT

I. Treating Past Persecution As A Legal Issue Accords With The Careful Balance Struck By Congress In The INA.

A. Reserving factual determinations for IJs while maintaining nondeferential judicial review for legal determinations accords with the respective institutional roles of IJs, the BIA, and the federal courts.

When the Immigration and Naturalization Service revised its "analytical approach to deciding cases" in 2002 to adjust authority between IJs and the Board, the agency "focuse[d] on the qualities of adjudication that best suit the different decisionmakers." Board of Immigration Appeals: Procedural Reforms to Improve Case Management, 67 Fed. Reg. 54,878, 54,890 (Aug. 26, 2002). As the agency explained, IJs "are better positioned to discern the credibility and assess the facts with the witnesses before them; the Board is better positioned to review the decisions from the perspective of legal standards and exercise of discretion." *Id.* Congress has established a similar balance between the expertise of agency decision-makers and the courts of appeals.

The REAL ID Act, 119 Stat. 302 (2005), specifically designates IJs as the "trier[s] of fact." 8 U.S.C. §§ 1158(b)(1)(B)(ii), (iii)*; Garland v. Ming Dai*, 593 U.S. 357, 373 (2021) ("[T]he factfinder—here the IJ—makes findings of fact, including determinations as to the credibility of particular witness testimony."). To that end, the REAL ID Act confers upon IJs initial authority to determine whether "the applicant is a

refugee," and requires that if the applicant elects to rely only on his own testimony, that "the applicant satisf[y] the trier of fact that the applicant's testimony is credible, persuasive, and refers to specific facts sufficient to demonstrate that the applicant is a refugee." 8 U.S.C. §§ 1158(b)(1)(B)(i)–(ii). Further highlighting the fact-finding responsibilities of the IJs, the Act empowers IJs to "weigh the credible testimony along with other evidence of record" and to require that an applicant provide further corroborating evidence "unless the applicant does not have the evidence and cannot reasonably obtain the evidence." *Id.* § 1158(b)(1)(B)(ii). Adverse credibility determinations should be made "explicitly" on the record to overcome a "rebuttable presumption of credibility on appeal" to the BIA. *Id.* § 1158(b)(1)(B)(iii); *see also Ming Dai*, 593 U.S. at 367 (the statutory credibility presumption "encourages" IJs to make "specific findings about credibility").

As the Court has already noted, "[t]he IJ—who actually observes the witness—is best positioned to assess the applicant's credibility in the first instance." *Ming Dai*, 593 U.S. at 367. First-hand exposure to applicants and institutional knowledge grants IJs a "unique advantage among all officials involved in the process" and, hence, places them in the best position to "discern, often at a glance, whether a question that may appear poorly worded on a printed page was, in fact, confusing or well understood by those who heard it; whether a witness who hesitated in a response was nevertheless attempting truthfully to recount what he recalled of key events or struggling to remember the lines of a carefully crafted 'script'; and whether inconsistent responses are the product of innocent

error or intentional falsehood." *Zheng v. U.S. INS*, 386 F.3d 66, 73 (2d Cir. 2004), *overruled on other grounds by Shi Liang Lin v. U.S. Dep't of Justice*, 494 F.3d 296 (2d Cir. 2007). Put simply, an IJ, "by virtue of his acquired skill," is "uniquely qualified" to assess the facts as presented by a witness in immigration cases. *Sarvia-Quintanilla v. INS*, 767 F.2d 1387, 1395 (9th Cir. 1985); *see also* H.R. Rep. No. 109-72, at 167 (2005) (Conf. Rep.) (IJs bring special "expertise" to the "task" of assessing witness credibility).

IJs' responsibilities for overseeing the creation of the factual record extend far beyond assessing the credibility of witnesses. All courts of appeals to have reached the question have unanimously held that IJs have an affirmative, positive "obligation to establish and develop the record." *Islam v. Gonzales*, 469 F.3d 53, 55 (2d Cir. 2006); *see also Quintero v. Garland*, 998 F.3d 612, 623 & n.9 (4th Cir. 2021) (collecting cases). For instance, the IJs "shall administer oaths, receive evidence, and interrogate, examine, and cross-examine the [applicant] and any witness." 8 U.S.C. § 1229a(b)(1). They may also "issue subpoenas for the attendance of witnesses and presentation of evidence." *Id.* These statutory commands are consistent with the Court's observation that an administrative law judge (ALJ) typically "acts as an examiner charged with developing the facts." *Richardson v. Perales*, 402 U.S. 389, 410 (1971); *see also Sims v. Apfel*, 530 U.S. 103, 111 (2000) (ALJ has a "duty to investigate the facts").

The statutes' grant of factfinding authority to IJs makes practical sense—they have the experience and training to adequately weigh evidence. IJs hear testimony, review documents, and consider an

applicant's testimony before "evaluating conflicting evidence to make a judgment about what happened." *Patel v. Garland*, 596 U.S. 328, 341 (2022). IJs often accrue "significant knowledge from their experience involving the conditions in numerous countries." *Matter of S-M-J-*, 21 I. & N. Dec. 722, 728 (BIA Jan. 31, 1997). Their institutional role and experience puts them in the best position to assess, for example, whether a particular event was motivated by political animus, how many attackers were involved in an incident and the dangerousness of weapons used. These issues are typical of the factfinding IJs regularly confront.

Different from the IJs, the BIA is the designated agency arbiter of law, and it is "confine[d]" to "deciding whether the facts as found by an [IJ] justify a particular legal conclusion about persecution." *Liang v. Att'y Gen.*, 15 F.4th 623, 627 (3d Cir. 2021) (Jordan, J., concurring); *see also* 8 C.F.R. § 1003.1(d)(1) ("The Board shall function as an appellate body charged with review of [IJs'] administrative adjudications under the [INA] . . . ."). Agency regulations prohibit the BIA from engaging in further factfinding when reviewing a determination of an IJ and significantly proscribes the BIA's review of IJ factfinding under a clear error standard. *See* 8 C.F.R. § 1001.1(d)(3)(i), (iv). If the BIA is to determine that "further factfinding is needed in a particular case," it "may remand the proceedings to" the IJ to conduct that analysis. *Id.* § 1001.1(d)(3)(iv).

The Board is empowered to review questions of law de novo, 8 C.F.R. § 1003.1(d)(3)(ii), and it has expressly held that whether a given set of undisputed facts amounts to past persecution is a question of law

that gets reviewed de novo. *See Matter of A-S-B-*, 24 I. & N. Dec. 493, 496–97 (BIA May 8, 2008), *overruled in part on other grounds by Matter of Z-Z-O-*, 26 I. & N. Dec. 586, 589–91 (BIA May 26, 2015); *see also* 67 Fed. Reg. at 54890 ("The 'clearly erroneous' standard does not apply to determinations of matters of law" including "whether the facts established by a particular [applicant] amount to 'past persecution'"). As several courts of appeals have remarked, "[i]t is certainly odd, to say the least, for [the courts of appeals] to review for substantial evidence a determination the BIA itself has concluded is legal in nature." *Xue v. Lynch*, 846 F.3d 1099, 1105 (10th Cir. 2017); *see also, e.g., Aguilar-Escoto v. Garland*, 59 F.4th 510, 520 (1st Cir. 2023); *Fon v. Garland*, 34 F.4th 810, 823 (9th Cir. 2022) (Collins, J., concurring).

The upshot is that credibility determinations and adjudicative facts are important predicates to the subsequent legal determination whether an applicant has sufficiently proven that he has suffered past persecution. Because these predicate factual issues are best suited for resolution by IJs, Congress "expressly afford[ed] IJs discretion" over evidentiary matters subject to "review for substantial evidence." *Singh v. Bondi*, 139 F.4th 189, 201 (2d Cir. 2025); *see also* 8 U.S.C. § 1252(b)(4)(B). The same cannot be said for questions of law, which require substantive judicial review from Article III courts.

Indeed, structural separation of powers grants Article III courts the final word on issues of law. There is a "well-settled" and "strong" presumption "favoring judicial review of administrative action." *Guerrero-Lasprilla*, 589 U.S. 221, 229 (2020) (first quoting *McNary v. Haitian Refugee Ctr., Inc.*, 489 U.S.

479, 496, 498 (1991); and then quoting *Kucana*, 558 U.S. at 251). And that presumption extends equally to "statutes that may limit" the scope of judicial review. *Cuzzo Speed Techs. v. Com. for Intellectual Prop.*, 579 U.S. 261, 273 (2016). The Court has "consistently" applied this presumption to "legislation regarding immigration" and requires a "clear and convincing" statement from Congress to disregard it. *Kucana*, 558 U.S. at 251, 252.

Furthermore, "reviewing courts remain bound by traditional administrative law principles" when reviewing the determinations of the BIA, *Ming Dai*, 593 U.S. at 369—which necessarily includes the "traditional understanding that questions of law were for courts to decide," *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 387 (2024); *see also id.* at 431 (Gorsuch, J., concurring) (noting that courts traditionally reviewed "so-called mixed questions of law and fact" without deference). This structure is important because Article III judges are independent, and their responsibilities over a wide range of cases, including other areas of administrative law, provides them a broad interpretive perspective that the BIA lacks. *See Salve Regina College v. Russell*, 499 U.S. 225, 231–233 (1991) (discussing appellate courts' "institutional advantages" in giving legal guidance).

The INA preserves these general administrative law principles favoring independent judicial review. It states that "***administrative findings of fact are conclusive*** unless any reasonable adjudicator would be compelled to conclude to the contrary." 8 U.S.C. § 1252(b)(4)(B) (emphasis added). Beyond provisions proscribing review of the executive's discretionary functions, *see id.* § 1252(a)(2)(B), (b)(4)(C)–(D), the

clear text of the statute limits judicial review only of factual findings, not legal determinations, *see, e.g.*, *Fon*, F.4th at 822–23 (Collins, J., concurring); *Flores Molina v. Garland*, 37 F.4th 626, 641 (9th Cir. 2022) (Korman, J., concurring). In fact, Section 1252 explicitly preserves judicial review "of constitutional claims or questions of law," including "interpretation and application of constitutional and statutory provisions," but does not proscribe the scope of that review. *Id.* § 1252(a)(2)(D), (b)(9).

Had Congress intended to curtail judicial review under the INA, it would have "articulated" a "deferential standard applicable to questions of law" to depart from the foundational maxim "that courts decide legal questions by applying their own judgment." *Loper Bright*, 603 U.S. at 392. Indeed, Congress is presumed to be aware of existing law when it passes legislation, *see Hall v. United States*, 566 U.S. 506, 516 (2012), and the courts have long distinguished between pure questions of law, mixed questions of law and fact, and pure factual findings, *see Pullman-Standard v. Swint*, 456 U.S. 273, 288–90 & n.19 (1982). Yet, the INA nowhere limits the applicable standard of review for anything but a pure finding of fact. *See* 8 U.S.C. § 1252(b)(4)(B).[2]

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[2] Some courts of appeals have erroneously viewed Section 1252(b)(4)(B) as mandating substantial evidence review for the existence of past persecution by carrying forth the Court's analysis under a predecessor statute in *INS v. Elias-Zacarias*, 502 U.S. 478 (1992). *See, e.g.*, *Dia v. Ashcroft*, 353 F.3d 228, 247–48 & n.17 (3d Cir. 2003) (en banc); *Gjetani v. Barr*, 968 F.3d 393, 396–97 & n.2 (5th Cir. 2020); *He v. Garland*, 24 F.4th 1220, 1224 (8th Cir. 2022), *cert. denied*, 143 S. Ct. 2694 (2023). But *Elias-*

B. Article III courts should review whether an applicant faced past persecution without deference because it is an application of law to an established set of facts that requires primarily legal work.

This Court has established a clear framework for determining whether a mixed question of law and fact should be reviewed without deference on appeal: break the question down into its smallest constituent parts, and if answering the question requires primarily legal work, then it should be reviewed without deference. *See Google*, 593 U.S. at 24. Under that approach, the determination of "ultimate facts," which involve the application of a legal standard to a set of established predicate facts, is typically considered to involve primarily legal work. Whether an applicant suffered past persecution is precisely such a question of law: the IJ decides whether a set of predicate facts (which the IJ previously established) satisfies the legal doctrine codified under the term "persecution." *See Liang*, 15 F.4th at 627 (Jordan, J., concurring). This question should be reviewed without deference to be consistent with this Court's treatment of similar questions on related issues.

Zacarias narrowly concerned a disputed predicate fact (a persecutor's motivation for persecution, *see* 502 U.S. at 482) and is thus inapplicable to cases (like this one) where the courts of appeals are asked to review whether undisputed facts satisfy the ultimate legal question of "persecution," *see Gjetani*, 968 F.3d at 400–01 (Dennis, J., dissenting). Indeed, the Court has long recognized that intent, such as a persecutor's subjective motivations, is a question of fact. *See Pullman-Standard*, 456 U.S. at 287–88 (whether the defendant possessed "an intent to discriminate on account of race" is "a pure question of fact"); *see also id.* at 288 (collecting cases that "treat[] issues of intent as factual matters").

i. Nondeferential review of whether an established set of facts constitutes past persecution aligns with this Court's treatment of similar questions in the immigration context and in other fields of law.

The process for deciding whether appellate courts should review a particular question that involves both factual and legal considerations without deference is well-defined: courts should determine what type of analysis the question primarily requires, and if it is primarily legal, the question should be reviewed without deference. To begin, when dealing with a "mixed question of law and fact[] . . . a reviewing court should try to break such a question into its separate factual and legal parts, reviewing each according to the appropriate legal standard." *Google LLC v. Oracle Am., Inc.*, 593 U.S. at 24.

Questions of fact involve "marshal[ling] and weigh[ing] evidence, mak[ing] credibility judgments, and otherwise address[ing] what [courts] have . . . called 'multifarious, fleeting, special, narrow facts that utterly resist generalization,'" and they are typically treated with deference to the lower court. *U.S. Bank Nat'l Ass'n ex rel. CWCapital Asset Mgmt. LLC v. Vill. at Lakeridge, LLC*, 583 U.S. 387, 396 (2018) (quoting *Pierce v. Underwood*, 487 U.S. 552, 561–562 (1988)). Questions of law, by contrast, "requir[e] courts to expound on the law, particularly by amplifying or elaborating on a broad legal standard." *Id.* And when a question that involves both factual and legal considerations "can be reduced no further," the reviewing court should determine the standard of review based "on whether answering it entails primarily legal or factual work." *Google*, 593 U.S. at 24 (quoting *U.S. Bank*, 583 U.S. at 396).

One type of question that has been commonly understood to entail primarily "legal inquiry" is the "application of a legal standard to undisputed or established facts." *Guerrero-Lasprilla*, 589 U.S. at 227. Courts have recognized, for decades, that deference may not be appropriate for these types of legal conclusions, or "ultimate facts." *See, e.g.*, *United States v. One Twin Engine Beech Airplane, FAA Reg. No. N-9826Z Serial No. AF-305*, 533 F.2d 1106, 1108 (9th Cir. 1976) ("At some point in the process of abstracting 'ultimate facts' from 'basic facts', the trial court crosses the line from making findings of fact to making conclusions of law."). *Cf. Williams v. Mehra*, 186 F.3d 685, 690 (6th Cir. 1999) ("Whether the doctors were deliberately indifferent is . . . an issue of ultimate fact as distinguished from subsidiary or basic fact. . . . [which] requires [the court] to compare the doctors' conduct with a legal standard of deliberate indifference. . . . [I]n accord with the established standards of appellate review. . . we treat mixed questions as legal questions rather than as factual questions." (citing *Whitney v. Brown*, 882 F.2d 1068, 1071 (6th Cir. 1989)).

This Court has also treated questions that require a court to determine if a collection of facts satisfies a legal threshold as involving primarily legal work. For example, in *Ornelas v. United States*, the Court held that "independent appellate review of the[] ultimate determinations" of whether "historical facts [that] are admitted or established . . . satisfy the relevant statutory or constitutional standard . . . of reasonable suspicion and probable cause is consistent with the position we have taken in past cases." 517 U.S. 690, 696–97 (1996) (cleaned up). In *Google*, the Court held

that "the ultimate 'fair use' question [in copyright cases] primarily involves legal work," even though it may "involve determination of subsidiary factual questions[.]" 593 U.S. at 24. And the Court explained in *Mitchell v. Forsyth* that, even though "the resolution of th[e] legal issues [of whether a defendant is entitled to qualified immunity] will entail consideration of the factual allegations that make up the plaintiff's claim for relief," the same is true of other situations in which appellate courts do not defer to lower court conclusions. 472 U.S. 511, 528 (1985) (listing as examples "whether a prosecution is barred by a claim of former jeopardy or whether a Congressman is absolutely immune from suit").

This Court has affirmed this general approach when construing statutes circumscribing the availability of Article III review under the immigration laws. First, in *Guerrero-Lasprilla*, the Court considered whether a provision of the INA that limited the availability of Article III review of BIA decisions to "constitutional claims or questions of law," 8 U.S.C. § 1252(a)(2)(D), barred "the application of law to established facts"—specifically, whether the facts established that Mr. Guerrero-Lasprilla "acted diligently" in pursuing his claim. 589 U.S. at 224, 230. In concluding that the INA permitted Article III review, the Court held that the ultimate question of whether a noncitizen acted diligently was "a questio[n] of law within the meaning of § 1252(a)(2)(D)." *Id.* at 228. In so doing, the Court looked not only at the text and history of § 1252, but also to the general meaning of "questions of law" as explained in the Court's precedent in other areas, finding that the preexisting "judicial usage"

establishes "that the term [questions of law] can reasonably encompass questions about whether settled facts satisfy a legal standard." *Id.* at 227–28 (citing *Mitchell*, 472 U.S. at 528 n.9).

And last year, the Court addressed a similar issue in *Wilkinson v. Garland*. There, the Court considered statutory language that permitted cancellation of a removal that would result in "exceptional and extremely unusual hardship," and the issue was whether application of that language to a given set of facts constituted a question of law under § 1252(a)(2)(D). 601 U.S. 209, 211–12 (2024). The Court held that such a determination is "a quintessential mixed question of law and fact" that is reviewable under § 1252. *Id.* at 212. Relevant here, the Court rejected the argument that "the application of a 'statutory standard'" is not a question of law under the statute. *Id.* at 223 (citing *Pullman-Standard*, 456 U.S. at 289 n.19; *Ornelas*, 517 U.S. at 696–97; *U.S. Bank*, 583 U.S. at 394).

Whether a given set of undisputed facts demonstrates mistreatment severe enough to constitute "persecution" under 8 U.S.C. § 1101 is such a mixed question that requires primarily legal work. To make that determination, an IJ must look at all of the evidence, including testimony and documentary evidence, about the treatment the noncitizen claims to have suffered, to ascertain what actually happened, and why (including by determining whether the noncitizen is credible). Each of these determinations is entitled to deference. Then the IJ must decide whether this set of established facts, collectively, constitutes "persecution"—a statutory term of art.

See Cruz-Hernandez v. Att'y Gen., 659 F. App'x 719, 722 (3d Cir. 2016) ("'[P]ersecution' itself is a legal term of art, and whether harm rises to the level of persecution is a legal question that the BIA reviews de novo.").

The courts of appeals have, by and large, not deferentially reviewed whether a lower tribunal has correctly applied a legal term of art to a given set of facts. *See, e.g.*, *Avdeeva v. Tucker*, 138 F.4th 641, 645 (1st Cir. 2025) ("[T]he term 'prevailing party' is a 'legal term of art' . . . . We review a determination of 'prevailing party' status de novo."); *Duncan v. Barr*, 919 F.3d 209, 215 (4th Cir. 2019) ("[T]he BIA reviews de novo the IJ's legal conclusion as to whether this future mistreatment amounts to 'torture,' which is 'a term of art under the CAT . . . .'"). One particularly salient example is the question of whether a given set of facts satisfies the legal term "particular social group" ("PSG"). *Kotasz v. INS*, 31 F.3d 847, 852 n.7 (9th Cir. 1994). A noncitizen may be eligible for asylum if they can establish that they have been, or fear being, persecuted on the basis of their membership in a PSG. 8 U.S.C. § 1101(a)(42). And the courts of appeals are almost universal in reviewing de novo whether the PSG claimed by the individual has sufficient characteristics—*i.e.*, facts—that make it "cognizable" under the immigration laws.[3] This unusual degree of circuit court alignment

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[3] *See Hernandez-Mendez v. Garland*, 86 F.4th 482, 490 (1st Cir. 2023); *Erraez-Montano v. Bondi*, 2025 WL 600974, at *1 (2d Cir. Feb. 25, 2025); *Avila v. Att'y Gen.*, 82 F.4th 250, 257 (3d Cir. 2023); *Guardado v. Bondi*, __ F.4th __, 2025 WL 2213217, at *2 (4th Cir. Aug. 5, 2025); *Alvarado-Ruiz v. Garland*, 845 F. App'x

is particularly instructive in construing whether a determination of past persecution should be reviewed independently because both "persecution" and "particular social group" are legal predicates (with alternatives) within the same statutory definition of "refugee," *see* 8 U.S.C. § 1101(a)(42), which is the status a noncitizen must satisfy to be eligible for asylum, *id.* § 1158(b)(1)(A). *See generally Leocal v. Ashcroft*, 543 U.S. 1, 2 (2004) ("[T]he Court construes language in its context and in light of the terms surrounding it."). Indeed, even courts that treat the question of past persecution with deference recognize the distinction between historical facts and "ultimate fact[s]," placing the past persecution determination in the latter category. *See, e.g.*, *Lama-Tamang v. Holder*, 392 F. App'x 631, 632 (10th Cir. 2010).

The courts of appeals that review the question of persecution with deference have, however, misapplied this Court's instructions from the cases resolving ancillary but related questions. There is no question that, under *Guerrero-Lasprilla* and *Wilkinson*, the question of "persecution" under 8 U.S.C. § 1101 should be viewed as a question of law, or, at minimum, as a mixed question of law and fact.

355, 356 (5th Cir. 2021); *Mazariegos-Rodas v. Garland*, 122 F.4th 655, 664 (6th Cir. 2024); *Sumba-Yunga v. Garland*, 2024 WL 4930396, at *3 (7th Cir. Dec. 2, 2024); *Lemus-Coronado v. Garland*, 58 F.4th 399, 402 (8th Cir. 2023); *Morales-Gomez v. Sessions*, 722 F. App'x 693, 693 (9th Cir. 2018); *Miguel-Pena v. Garland*, 94 F.4th 1145, 1160 (10th Cir. 2024); *Siqueira v. U.S. Att'y Gen.*, 2024 WL 4590031, at *2 (11th Cir. Oct. 28, 2024). *But see Hernandez v. McHenry*, 2025 WL 354985, at *1 (5th Cir. Jan. 31, 2025).

And several factors the Court has looked to when determining the deference due to a lower court decision indicate that the question of past persecution constitutes legal work for which nondeferential review is both appropriate and necessary. For example,

- The "question is important and appears likely to recur." *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 257 (1981) (articulating reasons for deciding to review unpreserved issue *de novo* rather than for plain error). *Cf. Buford v. United States*, 532 U.S. 59, 65 (2001) (holding that deferential review was appropriate for the question of whether a prior conviction was "consolidated" for sentencing purposes in part because it is "a minor, detailed, interstitial question of . . . law, buried in a judicial interpretation of an application note," not "a generally recurring . . . interpreti[on of] a set of legal words," like those in "an individual guideline"). As one former official has noted, "'persecution' [is] the most critical element in the definition of 'refugee.'" Luke T. Lee, Director of Plans and Programs, Office of the U.S. Coordinator for Refugee Affairs, *The Right to Compensation: Refugees and Countries of Asylum*, 80 Am. J. Int'l L. 532, 539 (1986).

- As explained above, *see supra* § I.A, one of the core reasons to grant plenary review is institutional competence. While IJs are uniquely suited to establish the factual record, Article III courts are well-positioned to provide guidance on these issues given their expertise and exposure to a wide range of legal issues.

- It is simply "[t]radition[]" that "decisions on 'questions of law' are 'reviewable *de novo*.'" *Highmark Inc. v. Allcare Health Mgmt. Sys., Inc.*, 572 U.S. 559, 563 (2014).

- Nondeferential review is "essential" when a primary purpose of review is to ensure "uniform precedent" that will "provide [officials] with a defined set of rules which, in most instances, makes it possible to reach a correct determination." *Bufkin v. Collins*, 145 S. Ct. 728, 740 (2025) (quoting *Ornelas*, 517 U.S. at 697) (cleaned up); *see also U.S. Bank*, 583 U.S. at 396 ("[W]hen applying the law involves developing auxiliary legal principles of use in other cases—appellate courts should typically review a decision *de novo*"); *Thompson v. Keohane*, 516 U.S. 99, 114–15 (1995) (holding independent review appropriate for "'in custody' determinations" because they guide future decisions). One of Congress' core reasons for providing for judicial review of BIA decisions in the first place is to create a uniform body of law of key issues so that immigration judges can make correct decisions without a substantial need for error correction. *See* H.R. Rep. 109-72, at 174 (2005) (Conf. Rep.) (stating that the changes to 8 U.S.C. § 1252 will "restor[e] uniformity and order to the law").

- And deferential review that may be appropriate for the application of a term that is familiar or within the practical human experience is not appropriate for a statutory term of art like the application of past persecution to a given set of facts. In some cases in which this Court held

> review of the application of a legal term to a given set of facts should be deferential, the Court specifically identified that the terms being applied were familiar to the human experience. *See, e.g.*, *U.S. Bank*, 583 U.S. at 397–98 (deciding the standard of review for the question of whether two parties are behaving as "strangers," which is a "familiar term"); *Comm'r v. Duberstein*, 363 U.S. 278, 288–89 (1960) (concluding that whether property received is a "gift" is a question of fact due to "nontechnical nature of the statutory standard, the close relationship of it to the date of practical human experience" and other factors). By contrast, "persecution" is a "legal term of art" that poses "translational difficult[ies]," *Singh v. INS*, 292 F.3d 1017, 1022 (9th Cir. 2002), and has origins in international law, *see Pitcherskaia v. INS*, 118 F.3d 641, 648 (9th Cir. 1997) (construing the definition of persecution in accordance with 1967 Protocol Relating to the Status of Refugees and the United Nations High Commissioner for Refugees, Handbook on Procedures and Criteria for Determining Refugee Status); *see also INS v. Cardoza-Fonseca*, 480 U.S. 421, 439 n.22 (1987) ("[T]he Handbook provides significant guidance in construing the Protocol, to which Congress sought to conform.").

In sum, there is no sound basis in purpose or precedent to deviate from these holdings and review a question that undisputably involves legal work with deference to an administrative agency.

ii. Application of Nondeferential Review to Petitioner's Claims Illustrates Why Independent Review is Necessary and Appropriate to the Question of Whether an Applicant Has Suffered Past Persecution.

The undue deference the First Circuit applied to the question of whether Mr. Urias-Orellana suffered past persecution limits its utility for future immigration judges facing similar underlying facts. The court below acknowledged that "[c]redible, specific threats," especially "death threats," can amount to past persecution if they are severe enough. Pet. App. 10a–11a (quoting *Montoya-Lopez v. Garland*, 80 F.4th 71, 80 (1st Cir. 2023)). Yet it reasoned that even a "record [that] *supports* a conclusion contrary to that reached by the [Agency] is not enough to warrant upsetting" the decision below. Pet. App. 9a (emphasis in original). As a result, the court did not actually decide whether the facts in this case *could* support a finding of past persecution. Instead, the only guidance it provided is "that the record here did not compel a finding of past persecution." Pet. App. 13a.

But the circumstances in Mr. Urias-Orellana's case contain many of the same hallmarks in which persecution has been found. There are several critical facts that the IJ determined had actually transpired—each of which would be clearly entitled to deference—that show the record might at least have been susceptible to a finding of past persecution. For example,

- Mr. Urias-Orellana's two half-brothers were shot multiple times by the same "hitman" who

had "vowed to kill [his brothers'] entire family," resulting in "severe[] injur[ies]" to both of them. Pet. App. 3a–4a.

- After these shootings, Mr. Urias-Orellana fled his hometown out of "fear[] for his and his family's safety." Pet. App. 4a.

- Despite moving to a nearby town, Mr. Urias-Orellana continued to receive warnings or threats, one by masked men "warn[ing] him that they would 'leave [him] like' his half-brothers and possibly kill him," and another by masked men "threaten[ing] to kill him," if he did not concede to their demands. So, Mr. Urias-Orellana moved again. Pet. App. 5a.

- When Mr. Urias-Orellana returned to his hometown to visit his mother, masked men again "threatened him" and "warned him that they would kill him" if he did not give in to their demands, and they "assaulted him by striking him three times in the chest." Pet. App. 5a.

Other courts of appeals have found that a similar record *compelled* a finding of past persecution. *See, e.g.*, *Ahmed v. INS*, 32 F. App'x 282, 283 (9th Cir. 2002) (concluding that a past persecution finding was compelled by the evidence based on testimony that noncitizen "and his family were beaten, shot at, and threatened with kidnaping and death on numerous occasions"); *Tairou v. Whitaker*, 909 F.3d 702, 708–09 (4th Cir. 2018) (death threats constitute past persecution). But because of the deferential standard of review, the court below did not even address

whether these facts *could support* a finding of past persecution, leaving immigration judges within the First Circuit in the dark about whether findings of this type would support a conclusion of "persecution."

The difference in these two outcomes highlights the stark need for a standard of review that will promote consistency in the law. As it stands, it is simply luck of the draw whether an Immigration Judge deciding the case of a petitioner who has received "death threats," Pet App. 7a, been assaulted, and had family members shot multiple times—will treat that matter consistently with other, similar matters. The deferential review of these decisions, in turn, perpetuates inconsistent outcomes and leads to confusion by immigration judges about how to handle the hundreds or thousands of cases with similar, established facts that all circuits—*if* required to provide clear guidance on the issue—would agree could show past persecution. The diverse outcomes regarding what set of facts constitute persecution defy the very purpose of the asylum scheme (protecting "refugees") and the legislative judgment to allow judicial review of orders of removal (to ensure consistent application of law). As this Court explained in *Ornelas*,

> A policy of sweeping deference would permit, "[i]n the absence of any significant difference in the facts," "the Fourth Amendment's incidence [to] tur[n] on whether different trial judges draw general conclusions that the facts are sufficient or insufficient to constitute probable cause." Such varied results

> would be inconsistent with the idea of a unitary system of law. This, if a matter-of-course, would be unacceptable.

517 U.S. at 697 (quoting *Brinegar v. United States*, 338 U.S. 160, 171 (1949)) (alterations in original) (citation omitted).

II. Nondeferential Judicial Review Of Past Persecution Aids Agency Decision-Making And Furthers Efficient Resolution Of Immigration Cases.

IJs and the BIA are overburdened with an ever-expanding case backlog, and nondeferential review aids in correcting erroneous legal conclusions resulting from unavoidable errors. The immigration courts' backlog has increased exponentially since the early 2010s, with 3,797,662 active cases as of July 2025. Executive Office for Immigration Review Adjudication Statistics: Pending Cases, New Cases, and Total Completion (2025) (hereinafter "Adjudication Statistics"). Thus far, the number of *pending* cases stands at a little over nine times the number of *new* cases that the immigration courts received this year (448,019 cases). *Id.* And while IJs have made an admirable effort to close out their pending cases, their current closure rate of 588,128 cases per year makes little headway against the ever-growing backlog. *Id.* In recent years, the court's backlog has spilled over into other areas of the immigration apparatus, and has resulted in substantial wait times for immigration court

respondents whose cases languish for over 1,000 days, on average, before being fully adjudicated.[4]

For the BIA, the story is equally concerning. Following a 2025 reduction to the size of the Board by the DOJ, the BIA now stands at only 15 members. Reducing the Size of the Board of Immigration Appeals, 90 Fed. Reg. 15,525 (Apr. 14, 2025) (to be codified at 8 C.F.R. pt. 1003). But, as of July 2025, 186,473 appeals remain pending with the BIA, with another 72,200 appeals filed and only 23,889 closed this year. Adjudication Statistics, *supra*. Combined with the recent reduction in BIA membership, the DOJ's efforts thus far have done little to increase the BIA's efficiency or decrease its case backlog. In fact, the BIA's adjudication statistics this year are not substantively different from those in 2019, when the BIA received 63,325 new appeals and closed 26,271 pending cases. *Id.* But, even while some adjudication statistics remain relatively unchanged, the BIA's backlog of pending cases has not; indeed, the BIA's backlog has more than *doubled* from 91,952 cases in 2019 to 186,471 cases this year. *Id.*

Given the unique institutional setup of the immigration courts, their growing backlogs are likely to exacerbate errors in judicial decision-making. IJs lack the robust tenure protections that characterize

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[4] Transactional Records Access Clearinghouse (TRAC), *Immigration Court Processing Time by Outcome*, TRAC Reports, https://tracreports.org/phptools/immigration/court_backlog/court_proctime_outcome.php#:~:text=Fiscal%20Year%202023&text=State%20%3D%20California&text=State%20%3D%20California%2C%20Court%20Location,Entire%20 (last visited Sept. 1, 2025).

ALJs and Article III judges. *See* Kent H. Barnett & Russell Wheeler, *Non-ALJ Adjudicators in Federal Agencies: Status, Selection, Oversight, and Removal*, 53 Ga. L. Rev. 1, 83–84 (2018) (ALJs); U.S. Const. art. III, § 1 (Article III judges). Rather, they are quasi-judicial bodies that operate under the purview of and are overseen by the Department of Justice and the Attorney General. Stephen H. Legomsky, *Restructuring Immigration Adjudication*, 59 Duke L.J. 1639, 1641–44 (2010). This relationship—whereby, for instance, IJs can be disciplined for failing performance reviews or may be removed by the Attorney General without a hearing—has led some scholars to characterize IJs as mere "bureaucrats in judges' robes." *See generally* Robert S. Kahn, *Other People's Blood: U.S. Immigration Prisons in the Reagan Decade* (1996).[5]

Here, IJs' dual roles as judge and "bureaucrat" place them in a difficult position: they must satisfy goals that are frequently, if not fundamentally, in tension. As judicial actors, IJs must uphold due process rights for those who come before them. However, as administrators, they are incentivized to comply with the wishes of their principals, who may be more inclined to reward production volume than

[5] The recent decision to bolster IJs' ranks with military and civilian attorneys from the Department of Defense, apparently with no regard for whether they have training or experience in immigration law, further underscores the Executive Branch's discretion over IJs' appointment and tenure—and the need for nondeferential review of legal issues decided by IJs and the agency. *See* Idrees Ali & Phil Stewart, *US military lawyers to serve as temporary immigration judges*, Reuters (Sept. 2, 2025), https://www.reuters.com/legal/government/us-military-lawyers-serve-temporary-immigration-judges-2025-09-03/.

quality legal decision-making. This combination of growing backlogs and top-down pressure to clear their backlogs means that IJs often have less time to engage substantively with complex legal issues.

In fact, external pressures to complete cases quickly can easily "get in the way" of getting cases "right." For example, since it is less time-consuming to issue a removal order and close out a case than to issue a continuance, IJs are strongly incentivized to opt for the former rather than the latter in order to meet "[their] numbers." Alice Yiqian Wang, *Presidential Power and the Politics of Immigration Reform*, dissertation, Stanford University (2025). As one IJ explained, "wanting to *do* [their] job [correctly] is hard to reconcile with wanting to *keep* [their] job" due to upper management's emphasis on judicial expediency (emphasis added). *Id.* One IJ bluntly described her experience on the bench as nothing less than "nightmarish," and explained that she had only "about half a judicial law clerk and less than one full-time legal assistant to help [her]" through her "pending caseload [of] about 4,000 cases."[6]

The BIA is similarly resource-constrained. According to Executive Office for Immigration Review (EOIR) statistics, docket pressures have led BIA members to spend a "mere one hour adjudicating each appeal." Faiza W. Sayed, *The Immigration Shadow Docket*, 117 Nw. U.L. Rev. 893, 945 (2023). And like

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6 *Amid "Nightmarish" Case Backlog, Experts Call for Independent Immigration Courts*, A.B.A. News (Aug. 9, 2019), https://www.americanbar.org/news/abanews/aba-news-archives/2019/08/amid-_nightmarish-case-backlog--experts-call-for-independent-imm/.

IJs who opt to close a case rather than prolong it (even if a continuance is warranted), BIA members have also increasingly turned to mechanisms by which they can affirm an IJ's conclusion with minimal analysis. For instance, BIA members may opt for an Affirmance Without Opinion (AWO).[7] Following a September 2019 Rule, AWOs issued by the BIA are "presumed to have considered all of the parties' relevant issues and claims of error on appeal regardless of the type of the BIA's decision." Board of Immigration Appeals: Affirmance Without Opinion, Referral for Panel Review, and Publication of Decisions as Precedents, 84 Fed. Reg. 31463 (July 2, 2019) (to be codified at 8 C.F.R. pts. 1003, 1292). With this Rule, BIA members may now issue a two-sentence opinion endorsing the IJ's decision and rely on a regulatory presumption of regularity, regardless of the underlying record.

Due to both time pressures and external incentives to "cut corners," "[c]onsistency and accuracy across this staggering number of decisions may be impossible to achieve." Sayed, *supra*, at 944. "[T]he time and resource shortfalls that afflict agency decision-making may make its adjudicators more error-prone, while federal judges' comparative surfeit of both improves their relative capacity to decide cases

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[7] Arnold & Porter, *2019 Update Report: Reforming the Immigration System: Proposals to Promote Independence, Fairness, Efficiency, and Professionalism in Adjudication of Removal Cases*, UD 3–7 (Mar. 2019), https://www.americanbar.org/content/dam/aba/publications/commission_on_immigration/2019_reforming_the_immigration_system_volume_2.pdf.

accurately."[8] On this issue, social science research has cautioned time and time again that "[t]he accuracy of human judgments decreases under time pressure."[9]

These mistakes are not merely theoretical. Increased pressures on the immigration court system have already resulted in significant factual errors and oversights, which Article III courts have sought to correct. *See, e.g.*, *Ssali v. Gonzales*, 424 F.3d 556, 563 (7th Cir. 2005) (remanding a case where a "very significant mistake suggests that the Board was not aware of the most basic facts of [petitioner's] case and deprives its ruling of a rational basis"); *Niam v. Ashcroft*, 354 F.3d 652, 656 (7th Cir. 2004) (noting that "the remainder of the immigration judge's opinion is riven with errors as well . . . and these were not noticed by the [B]oard . . . ."); *Argueta-Hernandez v. Garland*, 87 F.4th 698, 703 (5th Cir. 2023) (concluding that "the BIA misapplied prevailing case

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[8] Jonah B. Gelbach & David Marcus, *Rethinking Judicial Review of High Volume Agency Adjudication*, 96 Tex. L. Rev. 1097, 1111 (2018); *see also Courts in Crisis: The State of Judicial Independence and Due Process in U.S. Immigration Courts: Hearing Before the Subcomm. on Immigration and Citizenship of the H. Comm. on the Judiciary*, 116th Cong. 2 (2020) ("Despite their best efforts, immigration judges struggle to deliver just and timely decisions. Many judges lack the necessary resources and staff to maximize their productivity, as reports indicate that clerical and support staff haven't been hired at the same pace as new judges.").

[9] Anne Edland & Ola Svenson, *Judgment and Decision Making Under Time Pressure Studies and Findings*, in Time Pressure and Stress in Human Judgment and Decision Making 29, 35–36 (Ola Svenson & A. John Maule eds., 1993); *see also* Eberhard Feess & Roee Sarel, Judicial Effort and the Appeals System: Theory and Experiment, 47 J. Legal Stud. 269, 270–71 (2018).

law, disregarded crucial evidence, and failed to adequately support its decisions."); *Arita-Deras v. Wilkinson*, 990 F.3d 350, 358 (4th Cir. 2021) (criticizing several IJ and BIA as clearly "err[oneous] as a matter of law" and "flawed," with "no plausible basis . . . in violation of the Board's precedent"); *Quinteros v. U.S. Att'y Gen.*, 945 F.3d 772, 791 (3d Cir. 2019) (McKee, J., concurring) (highlighting that "[t]here are numerous examples of [the BIA's] failure to apply the binding precedent of this Circuit," including "in the two years since we explicitly emphasized its importance.").

With this dynamic in mind, it becomes clear that Article III appellate review serves as a critical device to correct past mistakes and avoid future ones. Since 2014, the courts of appeals have remanded more than 10,000 cases back to the BIA. During this same time period, the courts of appeals have issued remands in approximately 16 to 20 percent of all BIA appeals (with a remand rate of around 20 percent in 2024).[10] Because Article III judges do not face the same time pressures or resource limitations as their IJ and BIA counterparts, they are better positioned to engage meaningfully with and analyze the legal principles at hand. Judge John M. Walker Jr. of the Second Circuit echoed this sentiment when he noted that "[o]ne of [his] court's problems with the BIA is that it *rarely seems to adjudicate the outstanding legal issues in a*

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[10] U.S. Courts, Federal Judicial Caseload Statistics: 2024, https://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2024 ("BIA appeals accounted for 80 percent of administrative agency appeals and constituted the largest category of administrative agency appeals filed in each circuit except the DC Circuit.").

case, no doubt because the judges lack the time to do so" (emphasis added).[11] In other words, Article III courts play a critical role in ensuring that Executive Branch productivity mandates do not override the obligation to give due attention to a case and that "crowded dockets or a backlog of cases" do not "allow an IJ or the BIA to dispense with an adequate explanation . . . merely to facilitate or accommodate administrative expediency." *Valarezo-Tirado v. Att'y Gen.*, 6 F.4th 542, 549 (3d Cir. 2021).

Moreover, independent review of the past persecution question by Article III courts not only serves as a backstop for IJs and the BIA but also helps to develop the body of immigration law and, thereby, to increase judicial efficiency. For example, in situations where IJs and the BIA have spent insufficient time considering a case, or failed to write out complete reasoning for a decision, Article III courts may step in and fill the gap left by agency adjudicators. By articulating clear and uniform binding legal principles applicable to a broad set of cases, the courts of appeals equip IJs and the BIA to make faster and more accurate future determinations about whether a given set of facts amounts to persecution. Review by Article III courts thus ultimately leads to more efficient adjudication and fewer errors as IJs and the BIA work through their existing backlogs.

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[11] *Immigration Litigation Reduction: Hearing Before S. Comm. on the Judiciary*, 109th Cong. 5 (2006) (Statement of Hon. John M. Walker, Jr., Chief Judge of the United States Court of Appeals for the Second Circuit).

CONCLUSION

For the reasons stated above and in Petitioners' brief, the judgment below should be reversed, and the case should be remanded for further proceedings not inconsistent with this Court's judgment.

Respectfully submitted,

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September 3, 2025

APPENDIX

Table of Contents

Page

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1. **The Honorable Steven Abrams** served as an Immigration Judge at the Varick Street and Queens Wackenhut Immigration Courts in New York, NY, from 1997 until 2013.

2. **The Honorable Terry A. Bain** served as an Immigration Judge in New York, NY, from 1994 until 2019.

3. **The Honorable Sarah M. Burr** served as an Immigration Judge, and then as Assistant Chief Immigration Judge, in New York, NY, from 1994 until 2012.

4. **The Honorable Sarah Cade** served as an Immigration Judge in Boston, MA, from 2021 until 2025.

5. **The Honorable Jeffrey S. Chase** served as an Immigration Judge in New York, NY, from 1995 until 2007. Along with Deborah E. Anker, he is co-author of *Law of Asylum in the United States* (2025 ed.).

6. **The Honorable Joan V. Churchill** served as an Immigration Judge from 1980 until 2005 in Washington, D.C., and Arlington, VA, including five terms as a Temporary Member of the Board of Immigration Appeals.

7. **The Honorable Raisa Cohen** served as an Immigration Judge in New York, NY, from 2016 until 2024.

8. **The Honorable Matthew D'Angelo** served as an Immigration Judge in Boston, MA, from 2003 until 2018.

9. **The Honorable Chloe Dillon** served as an Immigration Judge in San Francisco, CA, from 2022 until 2025.

10. **The Honorable Bruce J. Einhorn** served as an Immigration Judge in Los Angeles, CA, from 1990 until 2017.

11. **The Honorable Cecelia M. Espenoza** served as a Member of the Board of Immigration Appeals from 2000 until 2003.

12. **The Honorable Carla Espinoza** served as an Immigration Judge in Chicago, IL, from 2023 until 2025.

13. **The Honorable Noel A. Ferris** served as an Immigration Judge in New York, NY, from 1995 until 2013. She previously served as Chief of the Immigration Unit at the U.S. Attorney's Office for the Southern District of New York from 1987 until 1990.

14. **The Honorable James R. Fujimoto** served as an Immigration Judge in Chicago, IL, from 1990 until 2019.

15. **The Honorable Annie S. Garcy** served as an Immigration Judge in Newark, NJ, and Philadelphia, PA, from 1990 until 2023.

16. **The Honorable Alberto E. Gonzalez** served as an Immigration Judge in San Francisco, CA, from 1995 until 2005.

17. **The Honorable John F. Gossart, Jr.** served as an Immigration Judge in Baltimore, MD, from 1982 until 2013.

18. **The Honorable Paul Grussendorf** served as an Immigration Judge in Philadelphia, PA, and San Francisco, CA, from 1997 until 2004.

19. **The Honorable Miriam Hayward** served as an Immigration Judge in San Francisco, CA, from 1997 until 2018.

20. **The Honorable Megan Herndon** served as an Assistant Chief Immigration Judge in Richmond, VA, from 2021 until 2025.

21. **The Honorable Sandy Hom** served as an Immigration Judge in New York, NY, from 1993 until 2018.

22. **The Honorable Charles M. Honeyman** served as an Immigration Judged in New York, NY, and Philadelphia, PA, from 1995 until 2020.

23. **The Honorable Rebecca Jamil** served as an Immigration Judge in San Francisco, CA, from 2016 until 2018.

24. **The Honorable William P. Joyce** served as an Immigration Judge in Boston, MA, from 1996 until 2002.

25. **The Honorable Edward F. Kelly** served as a Member of the Board of Immigration Appeals from 2017 until 2021. He previously served as Assistant Chief Immigration Judge and then Deputy Chief Immigration Judge from 2011 to

2013 and 2013 to 2017, respectively, at the Executive Office for Immigration Review Headquarters in Falls Church, VA.

26. **The Honorable Carol King** served as an Immigration Judge in San Francisco, CA, from 1995 until 2017. She also served as a Temporary Member of the Board of Immigration Appeals for six months between 2010 and 2011.

27. **The Honorable Eliza C. Klein** served as served as an Immigration Judge in Miami, FL, Boston, MA, and Chicago, IL, from 1994 until 2015. She then served as a Senior Immigration Judge in Chicago, IL, from 2019 until 2023.

28. **The Honorable Elizabeth A. Lamb** served as an Immigration Judge in New York, NY, from 1995 until 2018.

29. **The Honorable Donn L. Livingston** served as an Immigration Judge in Denver, CO, and New York, NY, from 1995 until 2018.

30. **The Honorable Dana Leigh Marks** served as an Immigration Judge in San Francisco, CA, from 1987 until 2021.

31. **The Honorable Margaret McManus** served as an Immigration Judge in New York, NY, from 1991 until 2018.

32. **The Honorable Steven Morley** served as an Immigration Judge in Philadelphia, PA, from 2010 until 2022.

33. **The Honorable Irma Perez** served as an Immigration Judge in Los Angeles, CA, Santa Ana, CA, and West Los Angeles, CA, from 2023 until 2025.

34. **The Honorable George Proctor** served as an Immigration Judge in Los Angeles, CA, and San Francisco, CA, from 2003 until 2008.

35. **The Honorable Laura L. Ramirez** served as an Immigration Judge in San Francisco, CA, from 1997 until 2018.

36. **The Honorable Carmen Maria Rey Caldas** served as an Immigration Judge in Lumpkin, GA, and New York, NY, from 2022 until 2025.

37. **The Honorable John W. Richardson** served as an Immigration Judge in Phoenix, AZ, from 1990 until 2018.

38. **The Honorable Lory D. Rosenberg** served as a Member of the Board of Immigration Appeals from 1995 until 2002.

39. **The Honorable Susan G. Roy** served as an Immigration Judge in Newark, NJ, from 2008 until 2010.

40. **The Honorable Andrea Saenz** served as a Member of the Board of Immigration Appeals from 2021 until 2025.

41. **The Honorable Paul W. Schmidt** served as a Member and then Chairperson of the Board of Immigration Appeals from 1995 until 2003. He then served as an Immigration Judge in Arlington, VA, from 2003 until 2016. Prior to

his service on the Board and as an Immigration Judge, he served as Deputy General Counsel of the former Immigration & Naturalization Service from 1978 until 1987. He was also the Acting General Counsel from 1979 until 1981 and 1986 until 1987.

42. **The Honorable Douglas B. Schoppert** served as an Immigration Judge in New York, NY, from 1997 until 2024.

43. **The Honorable Noelle Sharp** served as an Assistant Chief Immigration Judge in Houston, TX, from 2021 until 2025.

44. **The Honorable Patricia M. B. Sheppard** served as an Immigration Judge in Boston, MA, from 1993 until 2006.

45. **The Honorable Ilyce S. Shugal** served as an Immigration Judge in San Francisco, CA, from 2017 until 2019.

46. **The Honorable Helen Sichel** served as an Immigration Judge in New York, NY, from 1997 until 2020.

47. **The Honorable Andrea Hawkins Sloan** served as an Immigration Judge in Portland, OR, from 2010 until 2017.

48. **The Honorable A. Ashley Tabaddor** served as an Immigration Judge in Los Angeles, CA, from 2005 until 2021.

49. **The Honorable Robert D. Vinikoor** served as an Immigration Judge in Chicago, IL, from 1984 until 2017.

50. **The Honorable Robert D. Weisel** served as an Immigration Judge and then Assistant Chief Immigration Judge in New York, NY, from 1989 until 2016.

51. **The Honorable Elizabeth Young** served as an Immigration Judge, Assistant Chief Immigration Judge, and then Regional Deputy Immigration Judge in San Francisco, CA, from 2016 until 2025.