No. 24-777

In the Supreme Court of the United States

DOUGLAS HUMBERTO URIAS-ORELLANA, ET AL.,
PETITIONERS

v.

PAMELA BONDI, ATTORNEY GENERAL

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

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases: Page

Cases—Continued: Page

Cases—Continued: Page

Treaty, statutes, and regulations:

Statutes and regulations—Continued: Page

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OPINIONS BELOW

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

JURISDICTION

The judgment of the court of appeals was entered on November 14, 2024. The petition for a writ of certiorari was filed on January 17, 2025, and granted on June 30, 2025. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Pertinent statutory and regulatory provisions are reproduced in the appendix to this brief. App., *infra*, 1a-18a.

INTRODUCTION

Under the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq*., whether to grant asylum is a discretionary decision, often made by the Attorney General, acting through immigration judges and the Board of Immigration Appeals (Board or BIA), with only limited judicial review by the courts of appeals. Congress has specified that an asylum applicant bears "[t]he burden of proof" to "satisf[y] the trier of fact" that the evidence provides "specific facts sufficient to demonstrate that the applicant is a refugee" and thus eligible for such relief. 8 U.S.C. 1158(b)(1)(B)(i)-(ii). That burden includes demonstrating that the alien was subjected to persecution or has a "well-founded fear of persecution" on account of a protected ground in his country of nationality. 8 U.S.C. 1101(a)(42)(A). Congress further prescribed a substantial-evidence standard for court-of-appeals review of the agency's factual determinations, providing 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).

The question here is whether the agency's determination that an alien has failed to meet his burden of proof to establish persecution should be reviewed as a primarily factual determination under the substantial-evidence standard or instead as a legal question under a *de novo* standard. The text and history of the statutory framework make clear that substantial-evidence

review applies. The agency's evaluation of an applicant's allegations of persecution resembles the sorts of primarily factual tasks that are routinely entrusted to juries and that, under the INA, are channeled to administrative proceedings.

The statute demonstrates that Congress understood the inquiry is a predominantly factual one for the "trier of fact," and when Congress adopted the substantial-evidence provision, this Court and the courts of appeals had long been applying substantial-evidence review to persecution determinations. Consistent with that text and background, this Court has consistently recognized that persecution determinations are largely committed to the Board subject to substantial-evidence review by courts of appeals. And even if the statute and this Court's decisions were less clear, this Court has frequently held that standard-of-review provisions for factual determinations—like the one for "administrative findings of fact" in 8 U.S.C. 1252(b)(4)(B)—generally extend to mixed questions that turn on a primarily factual inquiry. That is clearly true of determinations that an applicant failed to show persecution: Those decisions turn on assigning weight to evidence, drawing inferences, making credibility determinations, and balancing a multitude of facts. Congress entrusted that task primarily to the agency with expertise and long experience considering factual allegations of persecution. While courts of appeals may give *de novo* review to questions about the applicable legal standard, they may not substitute their own judgments for the agency's weighing of evidence against that standard.

Petitioners' arguments that Congress required the court of appeals to determine independently whether an alien failed to meet the burden of proof to show perse-

cution cannot be reconciled with the statute's language and history. Those arguments depend to a large degree on strained inferences from inapplicable provisions that cannot overcome the most natural reading of the statute. Although petitioners rely on this Court's recent decision holding that the courts of appeals have jurisdiction under the INA to review a mixed question of law and fact, that same decision recognized that the standard of appellate review is distinct from the question of jurisdiction and further recognized that the agency's decision about a "mixed question [that] is primarily factual" will receive "deferential" review. *Wilkinson* v. *Garland*, 601 U.S. 209, 225 (2024).

Petitioners' argument that no-persecution findings are primarily legal ignores the obviously factual nature of those findings, which courts of appeals are ill-equipped to handle. The task of weighing evidence—which even petitioners admit is central here—is a quintessential inquiry for factfinders. More than 200,000 asylum decisions are made each year. The vast majority of those decisions turn on factual assessments, not on making new law about the legal standard. And contrary to petitioners' warnings, the courts of appeals can and do apply *de novo* review to legal questions about the standard for establishing persecution, whether or not they apply substantial-evidence review to applications of that standard to the myriad facts before the agency.

As a last alternative, petitioners suggest that courts of appeals may *never* apply substantial-evidence review to applications of law to facts absent a clear indication from Congress—even when the inquiry is primarily factual. But that contravenes this Court's longstanding approach to applying standard-of-review provisions and is based on a misunderstanding of principles regarding ju-

dicial review of purely legal agency interpretations of law, a question not at issue here. In any event, Congress clearly contemplated substantial-evidence review of asylum eligibility determinations under the statute. And contrary to petitioners' policy arguments, Congress made the judgment that committing those decisions to the agency, with limited judicial review, is the best way to promote uniformity and efficiency in asylum determinations. Petitioners' approach would disrupt that system and mire the courts of appeals in inherently factual work for which they are ill-suited.

STATEMENT

A. Statutory Background

1. Under the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, the Attorney General or the Secretary of Homeland Security may, in her discretion, grant asylum to an alien in the United States who is determined to be unable or unwilling to return to his country of nationality "because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. 1101(a)(42)(A); see 8 U.S.C. 1158(b)(1)(A). An alien generally may apply for asylum either by filing an affirmative application that will be considered by an asylum officer in U.S. Citizenship and Immigration Services in the Department of Homeland Security (DHS), see 8 U.S.C. 1158(a), or by applying before an immigration judge (IJ) in the Department of Justice after removal proceedings have been initiated, see 8 U.S.C. 1229a. A grant of asylum prevents removal of the asylee to his country of nationality, 8 U.S.C. 1158(c)(1)(A), and an accompanying spouse or child may be granted the same status, 8 U.S.C. 1158(b)(3)(A).

To be eligible for asylum, an applicant bears "[t]he burden of proof" before the administrative "trier of fact" "to establish that the applicant is a refugee." 8 U.S.C. 1158(b)(1)(B)(i)-(ii). That burden requires the applicant to demonstrate past subjection to, or a well-founded fear of, injury, pain, or distress that is so extreme as to constitute "persecution." See, *e.g.*, *Santos Garcia* v. *Garland*, 67 F.4th 455, 461 (1st Cir. 2023) ("Persecution goes beyond 'unpleasantness, harassment, and even basic suffering.'") (citation omitted); *KC* v. *Garland*, 108 F.4th 130, 135 (2d Cir. 2024) (persecution "is an extreme concept" and does not include "mere harassment") (citations omitted); *Gilaj* v. *Gonzales*, 408 F.3d 275, 285 (6th Cir. 2005) (per curiam) (similar). Unfulfilled threats of harm are generally insufficient. See, *e.g.*, *Brizuela* v. *Garland*, 71 F.4th 1087, 1093 (8th Cir. 2023) ("Threats alone 'constitute persecution in only a small category of cases.'") (citation omitted); *Hayrapetyan* v. *Mukasey*, 534 F.3d 1330, 1337 (10th Cir. 2008) (persecution "must entail more than just * * * threats to life and liberty") (citation omitted); *KC*, 108 F.4th at 135 ("'unfulfilled threats alone' rarely qualify as persecution") (citation omitted); Pet. App. 11a.

The applicant also bears the burden to demonstrate that the persecution is attributable to the foreign government. *In re Acosta*, 19 I. & N. Dec. 211, 222 (B.I.A. 1985), overruled in part on other grounds by *In re Mogharrabi*, 19 I. & N. Dec. 439 (B.I.A. 1987). And the applicant must establish that the persecution was or would likely be "on account of" a statutorily protected ground. 8 U.S.C. 1101(a)(42)(A). See, *e.g.*, Pet. App. 6a; *Gonzalez-Arevalo* v. *Garland*, 112 F.4th 1, 9 (1st Cir. 2024). Demonstrating past persecution requires "direct or circumstantial" evidence that the persecutor knew of

the protected characteristic and was motivated by it. *INS* v. *Elias-Zacarias*, 502 U.S. 478, 483 (1992); 8 U.S.C. 1158(b)(1)(B). The applicant must also show that a protected ground is "at least one central reason" for the claimed persecution. 8 U.S.C. 1158(b)(1)(B)(i). An applicant who proves that he has suffered past persecution is presumed to have a well-founded fear of future persecution, though that presumption can be rebutted. 8 C.F.R. 1208.13(b)(1).

The INA addresses how the administrative "trier of fact" may make a finding about asylum eligibility. See 8 U.S.C. 1158(b)(1)(B). To "determin[e] whether the applicant has met the applicant's burden," the administrative "trier of fact may weigh [the applicant's] credible testimony along with other evidence of record." 8 U.S.C. 1158(b)(1)(B)(ii). "The testimony of the applicant may be sufficient to sustain the applicant's burden without corroboration, but only if the applicant satisfies the trier of fact that the applicant's testimony is credible, is persuasive, and refers to specific facts sufficient to demonstrate that the applicant is a refugee." *Ibid.* And "[w]here the trier of fact determines that the applicant should provide evidence that corroborates otherwise credible testimony, such evidence must be provided unless the applicant does not have the evidence and cannot reasonably obtain the evidence." *Ibid.* The statute also spells out requirements for credibility determinations. See 8 U.S.C. 1158(b)(1)(B)(iii).

If, after assessing the evidence, an IJ finds an alien ineligible for asylum and orders removal, the alien may appeal to the Board of Immigration Appeals (Board or BIA). See 8 C.F.R. 1003.1(b). Before 2002, the Board reviewed all IJ determinations *de novo*, but it now reviews factual determinations under a "clearly errone-

ous" standard and gives *de novo* review to "determinations of matters of law" and "the application of legal standards, in the exercise of judgment or discretion." *Board of Immigration Appeals: Procedural Reforms To Improve Case Management*, 67 Fed. Reg. 54,878, 54,889-54,890 (Aug. 26, 2002). Under that standard, the Board reviews *de novo* "judgments as to whether the facts established by a particular alien amount to 'past persecution' or a 'well-founded fear of future persecution.'" *Id.* at 54,890; see 8 C.F.R. 1003.1(d)(3)(ii).

An asylum applicant who does not prevail before the Board may file a petition for review by a court of appeals. 8 U.S.C. 1252(b)(2). When adjudicating such a petition, the court of appeals must treat "the administrative findings of fact [as] conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary." 8 U.S.C. 1252(b)(4)(B).

B. Prior Proceedings

1. Petitioners—the lead petitioner (hereinafter, petitioner), his wife, and their minor child—are natives of El Salvador who entered the United States without authorization in 2021. Pet. App. 2a-3a. DHS placed petitioners in removal proceedings. *Id.* at 3a; see 8 U.S.C. 1182(a)(6)(A)(i). Petitioners conceded their removability and applied for asylum. Pet. App. 3a, 26a-27a.

At a hearing before the IJ and in an affidavit, petitioner claimed that he was subjected to threats and physical harm on three occasions by unknown men whom he believed were working for a "sicario" (hitman) named Wilfredo operating in Sonsonate, a city in western El Salvador where petitioner lived with his family. Pet. App. 3a-6a. Petitioner testified that the father of his two maternal half-brothers and the mother of the sicario were in a relationship of which the sicario did not

approve. *Id.* at 4a. According to petitioner, around February 2016, the sicario got into a bar fight with one of his half-brothers, Juan, and shot Juan multiple times, leaving him wheelchair-bound. *Ibid.* Upon learning that Juan had survived, the sicario "vowed to kill Juan's whole family." *Id.* at 29a; see *id.* at 4a. In August 2016, the sicario ambushed petitioner's other half-brother, Remberto, and shot him multiple times. *Id.* at 4a.

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

Petitioners then relocated to Cara Sucia, in far western El Salvador, where they lived for about two and a half years "without any harassment or complaints or threats." Pet. App. 5a. In December 2020, while visiting relatives back in Sonsonate, petitioner was again confronted by two masked men, who said that petitioner "was lucky to escape" the "previous time[s]," that "he still must pay," and that "they wouldn't forgive him the next time he didn't have the money or they'd kill him or whoever else he was with." *Id.* at 30a. The men then hit petitioner three times on the chest and left. *Ibid.*

After returning to Cara Sucia, petitioner claimed he saw a motorcycle with two men "constantly following them." Pet. App. 30a. Petitioners again relocated to Claudia Lara, and a couple of months later, in February or March 2021, petitioner overheard in a store that men had been asking about "any newcomers to the area." *Ibid.* Petitioners then decided to leave El Salvador and come to the United States. *Ibid.*

2. a. In petitioners' removal proceedings, the IJ denied their application for asylum, finding petitioner's testimony credible but concluding that petitioner failed to establish either past persecution or a well-founded fear of future persecution. Pet. App. 25a-44a.[1]

Considering the entirety of petitioner's testimony, the IJ found that "the sum of the threats and the one time where [petitioner] was hit three times on the chest" did not rise to the level of persecution. Pet. App. 31a. The IJ explained that the threats accompanied demands for money. *Ibid.* And the IJ noted that, under applicable circuit precedent, death threats constitute persecution "only when the threats are 'so menacing as to cause significant actual suffering or harm.'" *Ibid.* (quoting *Bonilla* v. *Mukasey*, 539 F.3d 72, 77 (1st Cir. 2008)). Here, the IJ observed, petitioner submitted no evidence to suggest that the threats caused him significant suffering or harm. *Ibid.* And the record contained no indication that petitioner experienced "long-lasting

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[1] Petitioner also sought statutory withholding of removal and protection under regulations implementing U.S. obligations under Article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), *adopted* Dec. 10, 1984, S. Treaty Doc. No. 20, 100th Cong., 2d Sess. (1988), 1465 U.N.T.S. 85. Pet. App. 2a-3a & nn.1-2. Those claims are not at issue in this Court.

physical or mental effects" from the time he was struck on the chest. *Id.* at 32a; see *id.* at 31a-32a.

The IJ also determined that petitioners had not met their burden to establish a well-founded fear of future persecution. Pet. App. 32a-36a. The IJ observed that petitioners "had successfully relocated within El Salvador" to escape danger and that the risk recurred only when or after petitioner returned to his hometown or nearby areas. *Id.* at 34a; see *id.* at 34a-35a. The IJ noted that petitioner's half-brothers (the victims of the sicario's shootings) had also successfully relocated without further harm. *Id.* at 35a. And the IJ observed that other members of petitioner's immediate family, including his mother and sisters, had never been threatened or harmed by the sicario. *Id.* at 32a-33a.

In addition, the IJ determined that petitioners had not established two other requirements of asylum eligibility. First, they had not proved the required nexus between the harm and petitioner's claimed protected characteristic (his "membership in a particular social group," 8 U.S.C. 1101(a)(42)(A), defined by his family). Pet. App. 36a; see *id.* at 36a-39a. The IJ observed that the men extorting petitioner appeared to be motivated by financial gain, not a desire to harm his family. *Id.* at 36a-38a. Second, petitioners failed to establish that any persecution was or would be inflicted by the government of El Salvador or by a group the government was or would be unwilling to control, as petitioner had never attempted to report the threats to the police and had not shown that doing so would be futile. *Id.* at 39a-40a.

b. Petitioners' appeal of the denial of their asylum claim to the Board was unsuccessful. Pet. App. 18a-24a. The Board found no clear error in the IJ's subsidiary factual findings, and it agreed with the IJ's ultimate

finding that petitioner failed to show that he "suffered past harm in the aggregate rising to the level of persecution." *Id.* at 21a; see *id.* at 20a-21a.

The Board also upheld the IJ's finding that petitioner had not shown that he would be unable to avoid future persecution by relocating within El Salvador. Pet. App. 21a-22a. Because petitioner had not shown past persecution, petitioner bore the "burden of establishing that it would not be reasonable for the applicant to relocate, unless the persecution is by a government or is government-sponsored." *Id.* at 21a. The Board agreed that petitioner "did not carry this burden," emphasizing that petitioner had "moved away" several times and "did not have further problems" until "he returned to his hometown." *Id.* at 22a. The Board also highlighted that petitioner's "stepfather," "mother," and "his sisters" had "not [been] threatened or harmed." *Ibid.* And although petitioner's brother "was held for 3 hours by someone," "it may not have been someone associated with the sicario." *Ibid.*

Since those issues were "dispositive," the Board did not reach the IJ's alternative bases for denying the asylum claim. Pet. App. 20a n.3.

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

The court of appeals noted that persecution "requires proof of a certain level of serious harm," which transcends "unpleasantness, harassment, and even basic suffering." Pet. App. 10a (citations and internal

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

The court of appeals determined that the record evidence—which it summarized as showing that "over a four-year period," petitioner "was threatened only three times by unknown assailants who demanded money and, on one occasion, struck him in the chest"—does not compel such a finding. Pet. App. 11a-12a. The court observed that petitioner provided no testimony "about the immediate impact, if any, that [the] threats had on him." *Id.* at 11a (citation and internal quotation marks omitted). In particular, the court observed that the one physical assault on petitioner did not result in hospitalization, which "bears on the nature and extent of a petitioner's injuries and is certainly relevant to the ultimate determination of persecution." *Id.* at 12a (brackets, citation, and internal quotation marks omitted). The court also noted the absence of evidence that the threats were "'credible' threats of death as opposed to threats intended to frighten [petitioner] into paying, especially given the lack of severity of the one assault." *Id.* at 11a (citation omitted). Because a reasonable adjudicator could reasonably weigh the evidence and determine that the "sequence of events did not involve threats or actions so menacing as to cause significant actual suffering," the court held that "substantial evidence supports the Agency's no-past-persecution finding." *Ibid.*

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

SUMMARY OF ARGUMENT

Congress entrusted persecution determinations in removal proceedings to immigration judges and the Board of Immigration Appeals, subject to substantial-evidence review in the courts of appeals under 8 U.S.C. 1252(b)(4)(B). It did not permit courts of appeals to engage in *de novo* review and substitute their judgments for the agency's.

A. Statutory text and context make clear that Congress treated the question of asylum eligibility as a predominantly factual question for the "trier of fact." 8 U.S.C. 1158(b)(1)(B)(i)-(ii). And the history confirms that point: When Congress adopted the substantial-evidence provision in 1996, this Court and the courts of appeals had long applied substantial-evidence review to questions of asylum eligibility. Nothing in the statute departs from that practice. Indeed, Congress's choice of language largely tracked this Court's then-recent description of substantial-evidence review in asylum-eligibility cases. See *INS* v. *Elias-Zacarias*, 502 U.S. 478, 481 (1992).

Consistent with those statutory features, this Court has repeatedly acknowledged that the INA largely commits asylum-eligibility questions to the agency, with substantial-evidence review in the courts of appeals to

police the outer bounds. For example, in *INS* v. *Orlando Ventura*, 537 U.S. 12 (2002) (per curiam), the Court explained that courts of appeals are "not generally empowered to conduct a *de novo* inquiry" as to asylum eligibility. *Id.* at 16 (citation omitted). And in *Garland* v. *Ming Dai*, 593 U.S. 357 (2021), it described persecution as a "question[] of fact" and emphasized that questions of evidentiary "persuasiveness" and "sufficiency" are primarily committed to the Board. *Id.* at 362, 372.

Even if the statute were less clear, this Court has long held that provisions for deferential review of factual determinations generally apply to mixed questions of fact and law that require primarily factual work—including under the INA. See *Wilkinson* v. *Garland*, 601 U.S. 209, 225 (2024). That is the case here. The determination that an applicant has failed to demonstrate past persecution, or a well-founded fear of future persecution, is overwhelmingly factual—requiring credibility determinations, weighing of facts, and balancing of frequently conflicting inferences to determine whether an applicant's evidence sufficiently demonstrates persecution. Congress entrusted such inherently factual determinations to the BIA and IJs, who have expertise in making such inquiries and are closest to the facts. Although courts of appeals may fully review legal questions regarding the standard for persecution, they may not substitute their own judgment for the agency's weighing of the evidence against that standard.

B. Petitioners contend that Congress required *de novo* review of administrative determinations regarding persecution, but that contention cannot be squared with the relevant provisions' language and history. Instead, petitioners primarily rely on dubious inferences from inapplicable provisions. Those inferences cannot

overcome the most natural reading of the statute, which is that persecution determinations are fact-intensive inquiries reviewable for substantial evidence.

Petitioners' attempts to portray persecution determinations as primarily legal are equally unpersuasive. The fact-intensive work of inferring and weighing a multitude of facts presented to the factfinder, such as conditions and political situations in foreign countries, cannot reasonably be described as primarily legal. And decades of experience belie petitioners' concern that only *de novo* review can ensure development of the law.

As a last alternative, petitioners make the novel suggestion that courts of appeals may *never* apply substantial-evidence review to mixed questions of law and fact absent a clear indication from Congress—even if those questions predominantly involve factual work. As petitioners acknowledge (Br. 44-45), that argument contravenes this Court's longstanding interpretation and approach to provisions governing standards of review. And it rests on a misunderstanding of principles governing judicial review of agency interpretations of statutes that this Court articulated in *Loper Bright Enterprises* v. *Raimondo*, 603 U.S. 369 (2024). This case concerns fact-bound applications of law to facts, not pure legal questions. In any event, the INA clearly requires substantial-evidence review here.

Petitioners' policy arguments fare no better. Congress has already made the judgment that substantial-evidence review promotes uniformity and efficiency in asylum decisions. Petitioners' criticisms of the BIA and the decision in this case only underscore the variation arising from innumerable permutations of facts in hundreds of thousands of asylum proceedings each year. That reality highlights the need to enforce Congress's

decision to place asylum-eligibility decisions in the hands of the agency, subject to judicial review for substantial evidence.

ARGUMENT

A. The BIA's Determination That An Alien Did Not Establish Past Persecution Or A Well-Founded Fear Of Persecution Is Subject To Substantial-Evidence Review

The Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, creates the framework for considering requests for asylum in removal proceedings. Initial determinations are made within a multi-tiered administrative-review system, followed by limited judicial review in the courts of appeals. See 8 U.S.C. 1158(a), 1225(b), 1229a, 1252(a)(1), (b)(2), (b)(9); 8 C.F.R. 1003.1(b). That framework resembles others in which an "agency effectively fills in for the district court, with the court of appeals providing judicial review." *Axon Enter., Inc.* v. *FTC*, 598 U.S. 175, 185 (2023). In the INA, Congress has prescribed "the substantial-evidence standard" for review of factual findings, *Nasrallah* v. *Barr*, 590 U.S. 573, 584 (2020)—a common standard in administrative law, see, *e.g.*, 5 U.S.C. 706(2)(E). In particular, Congress has directed a court of appeals reviewing an order of removal to accept "administrative findings of fact" as "conclusive," unless "any reasonable adjudicator would be compelled to conclude to the contrary." 8 U.S.C. 1252(b)(4)(B).

The question here is how a court of appeals should review an administrative determination that an applicant's evidence did not demonstrate persecution. The applicable legal standard defining persecution is not in dispute here. The question is solely whether the agency's weighing of the evidence to determine if it demonstrates persecution should be treated as a legal

question subject to *de novo* review or instead as encompassed within the "administrative findings of fact" reviewed for substantial evidence. 8 U.S.C. 1252(b)(4)(B). Statutory text and history, this Court's cases, and the nature of the determination all demonstrate that substantial-evidence review applies to that predominantly factual finding.

1. The INA treats persecution determinations as predominantly factual questions subject to substantial-evidence review

The INA's text and history make clear that Congress understood determinations about past or future persecution to be predominantly factual questions. When Congress described the way in which an applicant can "sustain the applicant's burden" to "establish that the applicant is a refugee"—including establishing persecution or a well-founded fear of persecution—it repeatedly described the inquiry as one for the "trier of fact." 8 U.S.C. 1158(b)(1)(B)(i)-(ii).

In particular, in amendments to the INA in 2005, Congress specified that "[i]n determining whether the applicant has met the applicant's burden, the trier of fact may *weigh* the credible testimony along with other evidence of record" to determine whether the applicant has demonstrated that he is a refugee. 8 U.S.C. 1158(b)(1)(B)(ii) (emphasis added); see REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, § 101(a)(3), 119 Stat. 303. An applicant may meet that burden with testimony alone, but only if the applicant "satisfies the trier of fact that the applicant's testimony is credible, is persuasive, and refers to specific facts sufficient to demonstrate that the applicant is a refugee." 8 U.S.C. 1158(b)(1)(B)(ii). And if the "trier of fact"—weighing the evidence—"determines that the applicant should

provide evidence that corroborates otherwise credible testimony, such evidence must be provided unless the applicant does not have the evidence and cannot reasonably obtain the evidence." *Ibid.*

Congress further specified the factors to be considered in making credibility determinations, highlighting their centrality to the inquiry. Under the statute, the "trier of fact" must "[c]onsider[] the totality of the circumstances, and all relevant factors," including (among others) "the demeanor, candor, or responsiveness of the applicant or witness, the inherent plausibility of the applicant's or witness's account," "the consistency" of the testimony both internally and in relation to other evidence, and any "inaccuracies or falsehoods." 8 U.S.C. 1158(b)(1)(B)(iii).

The statute thus "requires the alien to satisfy *the trier of fact*" of the historical facts and that the evidence is "persuasive" and "sufficient" to show persecution. *Garland* v. *Ming Dai*, 593 U.S. 357, 371 (2021) (emphasis added). Congress's repeated references to the trier of fact "emphasize[] * * * that the determination is for the [agency] to make." *Pierce* v. *Underwood*, 487 U.S. 552, 559 (1988). And from start to finish, Congress's description of the inquiry demonstrates that the determination involves credibility assessments, weighing of evidence, and factual inferences to determine whether an applicant has provided sufficient evidence to meet the legal definition of a refugee.

The statute's history reinforces Congress's understanding that persecution findings would be subject to substantial-evidence review. The provision requiring substantial-evidence review of "administrative findings of fact," 8 U.S.C. 1252(b)(4)(B), was added to the INA by the Illegal Immigration Reform and Immigrant Re-

sponsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, § 306(a)(2), 110 Stat. 3009-608. At that time, this Court had already established that administrative determinations of asylum eligibility were subject to substantial-evidence review. See *INS* v. *Elias-Zacarias*, 502 U.S. 478, 481, 483-484 (1992).

In *Elias-Zacarias*, the Court applied the then-applicable substantial-evidence review provision for "findings of fact," 8 U.S.C. 1105a(a)(4) (1988), to "[t]he BIA's determination that [an applicant is] not eligible for asylum," explaining that the decision "must be upheld if 'supported by reasonable, substantial, and probative evidence,'" 502 U.S. at 481 (quoting 8 U.S.C. 1105a(a)(4) (1988)). Thus, an asylum applicant seeking "judicial reversal of the BIA's determination" had to "show that the evidence he presented was so compelling that no reasonable factfinder could fail to find the requisite fear of persecution." *Id.* at 483-484; see *id.* at 481 (explaining that the ineligibility determination could be reversed "only if the evidence presented * * * was such that a reasonable factfinder would have to conclude that the requisite fear of persecution existed").

Notably, the *Elias-Zacarias* Court's discussion of the standard of review was not merely made in passing, but formed a key part of its reasoning and reflected disagreement with the dissent. See 502 U.S. at 481 n.1 (stating that the dissent's argument was "beside the point" because "[t]o reverse the BIA finding we must find that the evidence not only *supports* [the dissent's] conclusion, but *compels* it"); *id.* at 483-484. And consistent with *Elias-Zacarias*, before IIRIRA, the courts of appeals generally applied substantial-evidence review to determinations that an applicant had not estab-

lished past persecution or a well-founded fear of future persecution.[2]

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[2] See, *e.g.*, *Ipina* v. *INS*, 868 F.2d 511, 513 (1st Cir. 1989) ("The threshold finding of whether the alien has established a well-founded fear of persecution * * * is reviewed under the substantial evidence test"); *Melendez* v. *U.S. Department of Justice*, 926 F.2d 211, 218 (2d Cir. 1991) ("[T]he threshold finding of fact of whether the alien has established a well-founded fear of persecution * * * is reviewable under the substantial evidence test."); *Huaman-Cornelio* v. *Board of Immigration Appeals*, 979 F.2d 995, 999 (4th Cir. 1992) ("[S]ubstantial evidence supports the BIA's denial of eligibility."); *Castillo-Rodriguez* v. *INS*, 929 F.2d 181, 184 (5th Cir. 1991) ("We review the Board's factual finding that an alien is not eligible for consideration for asylum only to determine whether it is supported by substantial evidence."); *Klawitter* v. *INS*, 970 F.2d 149, 151 (6th Cir. 1992) ("In reviewing the factual determinations of the Board regarding an alien's eligibility for asylum * * * , this court must apply the substantial evidence standard of review."); *Milosevic* v. *INS*, 18 F.3d 366, 370 (7th Cir. 1994) ("We review the Board's determination that an alien is ineligible for asylum under the 'substantial evidence' test."); *Yacoub* v. *INS*, 999 F.2d 1296, 1298 (8th Cir. 1993) (per curiam) ("[T]he BIA's finding that [the applicant] lacked a well-founded fear of religious persecution is supported by substantial evidence on the record."); *Del Valle* v. *INS*, 776 F.2d 1407, 1412 (9th Cir. 1985) ("The determination of whether an alien has a well-founded fear of persecution * * * is based upon factual findings and accordingly is reviewed for substantial evidence."); *Kapcia* v. *INS*, 944 F.2d 702, 707 (10th Cir. 1991) ("We review the Board's factual findings of whether an alien is a refugee under the substantial evidence standard."); *Perlera-Escobar* v. *Executive Office for Immigration*, 894 F.2d 1292, 1296 (11th Cir. 1990) (per curiam) ("A factual determination by the BIA that an alien is statutorily ineligible for asylum or withholding is reviewed under the substantial evidence test."); *Gutierrez-Rogue* v. *INS*, 954 F.2d 769, 772 (D.C. Cir. 1992) ("Whether an alien has a well-founded fear of persecution is a question of fact, and we review the Board's determination only for substantial evidence."); cf. *Janusiak* v. *INS*, 947 F.2d 46, 47 (3d Cir. 1991) (applying abuse-of-discretion review).

In enacting IIRIRA in 1996, Congress is presumed to have been "aware of this Court's relevant precedent[]" in *Elias-Zacarias*, *supra*, *Bartenwerfer* v. *Buckley*, 598 U.S. 69, 80 (2023) (citation omitted)—as well as of the longstanding practice of the courts of appeals under the prior version of the INA. Nothing in IIRIRA or the INA's text suggests that Congress sought to depart from that settled understanding. To the contrary, Congress's description of the standard of review closely tracks this Court's own language. Compare 8 U.S.C. 1252(b)(4)(B) ("[T]he administrative findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary"), with *Elias-Zacarias*, 502 U.S. at 481 (stating that the substantial-evidence standard required an applicant to "show that the evidence he presented was so compelling that no reasonable factfinder could fail to find the requisite fear of persecution"); see *Dia* v. *Ashcroft*, 353 F.3d 228, 248 (3d Cir. 2003) (explaining that Congress "codifie[d] the language the Supreme Court used in *Elias-Zacarias* to describe the substantial evidence standard in immigration cases") (citation omitted); accord *Palucho* v. *Garland*, 49 F.4th 532, 539 (6th Cir. 2022). And Congress's later amendments stating that the "trier of fact" determines asylum eligibility—both by "weigh[ing]" the evidence and by determining whether it is "sufficient," 8 U.S.C. 1158(b)(1)(B)(i)-(ii)—confirm that Congress agreed that whether an applicant is a refugee is principally a question of fact for the agency.

The inference that Congress accepted and ratified the practice of substantial-evidence review for such questions is particularly strong here because IIRIRA made judicial review "significantly more restrictive" in various ways, such as by eliminating review over vari-

ous discretionary decisions. *Reno* v. *American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 475 (1999); see *id.* at 486 (noting that limiting judicial review of discretionary decisions "can fairly be said to be the theme of the legislation"); see also, *e.g.*, 8 U.S.C. 1252(a)(2), (b)(4). Thus, had Congress in IIRIRA wanted to *expand* judicial review of asylum-eligibility findings by subjecting them to *de novo* judicial review rather than substantial-evidence review, one would expect that it would have said so explicitly. Instead, IIRIRA's text points conclusively in the opposite direction.

2. This Court has repeatedly recognized that asylum-eligibility determinations must be reviewed for substantial evidence

Consistent with the statute's text and history, this Court has continued to cite *Elias-Zacarias* as good law when explaining Section 1252(b)(4)(B)'s standard for reviewing administrative findings of fact. See *Nasrallah* v. *Barr*, 590 U.S. 573, 584 (2020); *INS* v. *Orlando Ventura*, 537 U.S. 12, 16 (2002) (per curiam). And the Court has repeatedly recognized that asylum eligibility is a question primarily committed to the agency and reviewable for substantial evidence.

For instance, in *Orlando Ventura*, the Court explained that the INA does not permit courts of appeals to engage in a "*de novo* inquiry" about asylum eligibility. 537 U.S. at 16 (citation omitted). There, the Court considered the Ninth Circuit's decision to resolve in the first instance a question of asylum eligibility (whether a fear of persecution was well-founded in light of country conditions). *Id.* at 13-14. Citing its earlier application of the substantial-evidence standard in *Elias-Zacarias*, the Court explained that "[w]ithin broad limits the law entrusts the agency to make the basic asylum eligibility

decision." *Id.* at 16. Accordingly, "[a] court of appeals 'is not generally empowered to conduct a *de novo* inquiry into the matter being reviewed and to reach its own conclusions based on such an inquiry.'" *Ibid.* (citation omitted). Under the statute, "a 'judicial judgment cannot be made to do service for an administrative judgment'" because "[t]he agency can bring its expertise to bear upon the matter" and is better suited to "evaluate the evidence." *Id.* at 16-17.

The Court in *Orlando Ventura* thus emphasized the importance of Congress's decision to entrust asylum-eligibility questions primarily to the immigration courts. In that case, those principles compelled a remand to the agency. 537 U.S. at 13-14. But they equally counsel against *de novo* review of routine persecution determinations. Just as courts of appeals should not decide such questions in the first instance, they should not "conduct a *de novo* inquiry" and substitute their own judgment for the agency's weighing of facts and drawing of inferences. *Id.* at 16 (citation omitted).

In *Ming Dai*, *supra*, the Court similarly emphasized that determinations regarding past or future persecution are subject to substantial-evidence review. 593 U.S. at 362-365. In that case, the Court rejected a Ninth Circuit rule that assumed the "persuasiveness" and "sufficiency" of an applicant's testimony "in the absence of an explicit adverse credibility determination." *Id.* at 359-360, 371-372. At issue were BIA decisions that one applicant's prior conviction amounted to a "particularly serious crime" and that another applicant was ineligible for asylum. *Id.* at 360, 362. As to the latter, the Court noted that the parties "proceeded on the assumption that everything here turns on *questions of fact*—whether Mr. Dai was persecuted in the past or fears

persecution in the future." *Id.* at 362 (emphasis added); see Tr. of Oral Arg. at 74, *Ming Dai*, *supra* (No. 19-1155) (describing the parties' assumption that the persecution question would control the outcome). The Court then explained that "[t]he Ninth Circuit's rule has no proper place in a reviewing court's analysis." *Ming Dai*, 593 U.S. at 365. "Congress has carefully circumscribed judicial review of BIA decisions," and "[w]hen it comes to questions of fact—such as the circumstances surrounding [a] prior conviction or * * * alleged persecution—the INA provides that a reviewing court must accept 'administrative findings' as 'conclusive,'" subject to the "highly deferential" substantial-evidence standard under Section 1252(b)(4)(B). *Ibid.* (citations omitted).

Ming Dai thus recognized that questions about whether an applicant "was persecuted in the past or fears persecution in the future" are predominantly "questions of fact" subject to substantial-evidence review. 593 U.S. at 362. And that recognition did not just extend to underlying historical facts found by the BIA. The applicant in that case had testified about facts that "cut both ways"—some suggesting persecution and others suggesting primarily economic reasons for coming to the United States. *Id.* at 363. The Court held that the Ninth Circuit had improperly supplanted the BIA's judgment in weighing those facts—not just about credibility but also in its determination that the evidence was not "persuasive or *sufficient* to meet [the applicant's] burden on essential questions." *Id.* at 372 (emphasis altered). Under the INA, those questions are for the IJ and the Board to decide subject to substantial-evidence review. *Ibid.*

3. Determinations that past events rise to the level of persecution primarily entail factual inferences and weighing of evidence

Even if the text and history were less clear that asylum-eligibility questions are subject to substantial-evidence review under the INA, this Court has frequently held that standards of review for factual questions apply to "mixed questions" requiring application of law to facts when the inquiry requires "primarily * * * factual" work. *U.S. Bank N.A.* v. *Village at Lakeridge, LLC*, 583 U.S. 387, 396 (2018); see, *e.g.*, *Bufkin* v. *Collins*, 604 U.S. 369, 383 (2025).

a. As in the INA, there is often no rule or provision expressly stating the standard of review for a mixed question of law and fact. Nonetheless, the context can reveal whether a standard of review for factual findings reaches a mixed question. In assessing the context, this Court considers "the nature of the mixed question" at issue and which decisionmaker "is better suited to resolve it." *U.S. Bank*, 583 U.S. at 395. When the mixed question ordinarily "involves developing auxiliary legal principles," the standard of review for legal questions may be appropriate. *Id.* at 396. But "when the initial decisionmaker is 'marshaling and weighing evidence' and 'making credibility judgments,'" then "its work is fact intensive" and the "deferen[tial]" standard for factual determinations typically applies. *Bufkin*, 604 U.S. at 383 (quoting *U.S. Bank*, 583 U.S. at 396) (brackets omitted).

Thus, for example, this Court held in *Bufkin* that the statutory "clear error" standard that applies to the Veterans Court's review of fact questions also applies to a mixed question of law and fact—there, the Department of Veterans Affairs' administrative determination that

"there is an approximate balance of positive and negative evidence" regarding a claimant's disability claim. 604 U.S. at 372 (citation omitted). The standard of review for factual questions applies to that determination because "[a]ssigning weight to evidence * * * is an inherently factual task" and the weighing of "case-specific, fact-bound issues about the existence and severity of symptoms" is "unlikely to generate guidance for the [agency] or future courts." *Id.* at 382-383, 385.

This Court has similarly held that whether a transaction was "arm's-length" under the Bankruptcy Code is a primarily factual mixed question subject to clear-error review. *U.S. Bank*, 583 U.S. at 394-398. That is because determining "whether the historical facts found satisfy the legal test" requires a decisionmaker to "take[] a raft of case-specific historical facts, consider[] them as a whole, [and] balance[] them one against another." *Id.* at 394, 397. The results of that fact-intensive inquiry will "not much clarify legal principles," which means it is not the kind of issue "that appellate courts should take over." *Id.* at 398; see *Monasky* v. *Taglieri*, 589 U.S. 68, 84 (2020) (applying the same principles).

Consistent with that approach, the Court has already recognized that "mixed question[s]" that are "primarily factual" are subject to "deferential" review under the INA. *Wilkinson* v. *Garland*, 601 U.S. 209, 225 (2024); see *id.* at 221-222 (citing *U.S. Bank*, 583 U.S. at 395-396). In *Wilkinson*, the Court held that a mixed question could qualify as a "question of law" that is exempt from the bar on judicial review under 8 U.S.C. 1252(a)(2)(D), but it observed that, when a "mixed question requires a court to immerse itself in facts," that "suggests a more deferential standard of review." *Id.* at 222. Thus, while the Court held that the court of ap-

peals had jurisdiction to review an administrative determination that an alien had failed to show that his removal would cause an "'exceptional and extremely unusual hardship' to a U.S.-citizen or permanent-resident family member," *id.* at 211-212 (citation omitted), it was careful to explain that "[b]ecause this mixed question is primarily factual, that review is deferential," *id.* at 225.

b. A finding that an asylum applicant has not shown persecution "is about as factual sounding as any mixed question gets." *U.S. Bank*, 583 U.S. at 397. Persecution "is an extreme concept," *KC* v. *Garland*, 108 F.4th 130, 135 (2d Cir. 2024) (citation omitted), which "goes beyond 'unpleasantness, harassment, and even basic suffering.'" *Santos Garcia* v. *Garland*, 67 F.4th 455, 461 (1st Cir. 2023) (citation omitted). The inquiry whether past physical injury or suffering rises to that level under the totality of the circumstances is thus "heavily fact-dependent." *Sharma* v. *Garland*, 9 F.4th 1052, 1061 (9th Cir. 2021) (citation omitted); see *Thayalan* v. *Attorney Gen.*, 997 F.3d 132, 137 n.1 (3d Cir. 2021) ("whether a particular fact pattern rises to the level of persecution is largely fact-driven"). And "the difference between harassment and persecution is necessarily one of degree that must be decided on a case-by-case basis." *KC*, 108 F.4th at 135 (brackets and citation omitted).

As in other contexts where factual standards of review also apply to mixed questions, that assessment of degree inherently requires assessing credibility and "[a]ssigning weight to evidence—whether individual pieces of evidence or collections of it." *Bufkin*, 604 U.S. at 382. The decisionmaker "must categorize the evidence based on whether it supports or undermines the [applicant's] claim," and then "compare[] the relative strength and persuasiveness of the evidence on each

side." *Id.* at 381-382. Nearly all cases "really require[]" the decisionmaker to draw "'factual inference[s] from * * * basic facts.'" *U.S. Bank*, 583 U.S. at 397 (quoting *Commissioner* v. *Duberstein*, 363 U.S. 278, 291 (1960)). For example, a decisionmaker assessing past persecution must closely weigh and draw inferences from myriad facts such as the intensity and manner of any attack, the gravity of any injury, the nature and motivations behind any attack or threat, the number of incidents, and the time elapsed between incidents. Similarly, the related predictive judgment about the likelihood of future persecution is necessarily a fact-intensive inquiry requiring inferences and weighing of numerous circumstances, including country conditions and whether seeking aid from local police would be futile.

Those inquiries present "an inherently factual task," *Bufkin*, 604 U.S. at 382—one that Congress entrusted primarily to the agency. The task is akin to those that, in other contexts, are routinely entrusted to juries. See *Air Wis. Airlines Corp.* v. *Hoeper*, 571 U.S. 237, 258-259 (2014) (explaining that a "mixed question" was of the kind that "typically" is "resolved by juries" because it "entail[ed] delicate assessments of the inferences a reasonable decisionmaker would draw from a given set of facts and the significance of those inferences to him and [was] therefore peculiarly one for the trier of fact") (citation and internal quotation marks omitted).

This case is a typical example. The IJ cited circuit precedent regarding the standard for demonstrating persecution and then weighed and drew inferences about the strength of petitioner's evidence of past harm. Pet. App. 31a-36a. As to past persecution, the IJ weighed the fact that petitioner's "mistreatment was approximately three threats, all of which demanded"

payment of money, against the fact that in "[o]ne instance" he had been "hit in the chest." *Id.* at 31a. And the IJ weighed testimony about that physical assault against the absence of any "psychological or physiological evaluation that the threats were so menacing as to cause significant actual suffering or harm." *Ibid.* As to a well-founded fear of future persecution, the IJ weighed the fact that petitioner's two half-brothers had been shot years earlier against the fact that the rest of petitioner's family—including his mother and sister—were never targeted. *Id.* at 33a. And the IJ weighed the attacks against petitioner's half-brothers and the fact that petitioner had been threatened against the length of time that had elapsed between incidents, the "record evidence" that seeking the aid of local police "would not have been futile in El Salvador," and the evidence that petitioner and his family members had resided in other parts of El Salvador undisturbed for years. *Id.* at 34a-36a.

c. "Just to describe that inquiry" shows that it is primarily factual and that the agency is "better suited" to address it. *U.S. Bank*, 583 U.S. at 395, 398; see *Miller* v. *Fenton*, 474 U.S. 104, 114 (1985). When compared with the court of appeals, the agency has "the closest and the deepest understanding of the record," *U.S. Bank*, 583 U.S. at 398, as well as greater experience evaluating asylum claims. IJs and the BIA have "examined more of these cases than any court ever has or ever can." *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 460 (1987) (Powell, J., dissenting). The agency "has experience with the sort of facts that recur in immigration cases," *Ming Dai*, 593 U.S. at 367, and can "bring its expertise to bear" on those issues, *Orlando Ventura*, 537 U.S. at 16-17. For example, the past-persecution inquiry can

require the agency to assess past events or conditions in a foreign state. Similarly, the related inquiry whether the applicant has a well-founded fear of future persecution frequently requires the agency to assess "the significance of political change," "a highly complex and sensitive matter." *Id.* at 17; see *INS* v. *Abudu*, 485 U.S. 94, 110 (1988) (noting that the BIA "exercise[s] especially sensitive political functions that implicate questions of foreign relations").

Conversely, courts of appeals are ill-equipped for such determinations. "[E]ven where the [agency's] full knowledge of the factual setting can be acquired by the appellate court, that acquisition will often come at unusual expense, requiring the court to undertake the unaccustomed task of reviewing the entire record" to draw inferences and weigh facts itself. *Pierce*, 487 U.S. at 560. That kind of weighing is typically committed to the agency under the substantial-evidence standard, which "forbids a court to 'make its own appraisal of the testimony, picking and choosing for itself among uncertain and conflicting inferences.'" *FTC* v. *Indiana Fed'n of Dentists*, 476 U.S. 447, 454 (1986) (citation omitted).

Moreover, the "mine-run cases" simply require the decisionmaker to apply settled legal standards to infinitely variable permutations of facts. *Bufkin*, 604 U.S. at 381. The vast majority of the hundreds of thousands of asylum applications pending and made each year require the agency "merely to state the requirement * * * and then to do the fact-intensive job of exploring whether, in a particular case," the requirement is met. *U.S. Bank*, 583 U.S. at 398. This case is an example: The IJ and the BIA recited applicable standards, but the rest of their analyses consisted of weighing facts. See Pet. App. 20a-22a, 31a-36a. Nothing in the INA suggests

that Congress expected courts of appeals to "take over" such inquiries by conducting the fact-finder's paradigmatic task of weighing evidence and drawing inferences. *U.S. Bank*, 583 U.S. at 398.

B. Petitioners' Contrary Arguments Lack Merit

Petitioners contend that Congress required *de novo* review of persecution decisions, that such decisions are primarily legal, and that substantial-evidence review may never apply to mixed questions—even when they are primarily factual. Those arguments contravene the clear import of the INA, this Court's cases, and the fact-bound realities of assessing claims of persecution.

1. The INA's text, as construed by this Court, does not support petitioners' reading

a. Petitioners primarily contend (Br. 18-23) that Congress has implicitly required *de novo* review of determinations regarding persecution by enumerating deferential review for only certain decisions—such as a discretionary judgment about whether to grant asylum or a determination that an alien is ineligible for admission. See 8 U.S.C. 1252(b)(4)(C)-(D). Petitioners reason that Congress's silence about the standard of review for asylum-eligibility decisions "implies" that *de novo* review applies. Br. 23 (citation omitted).

That chain of reasoning has myriad flaws. In the provision adjacent to the two subparagraphs on which petitioners focus, Congress expressly provided that "administrative findings of fact" are subject to substantial-evidence review. 8 U.S.C. 1252(b)(4)(B). The question is whether determinations about past persecutions and predictive judgments about the likelihood of future persecution fall within Subparagraph (B). Statutory context, history, and the nature of the inquiry all show

that they do. See pp. 18-32, *supra*. It is beside the point that the persecution determination does not fall within Subparagraphs (C) or (D).

In any event, even if the statute could be construed as silent on the question, petitioners' inference is wholly unwarranted. The far-more-likely inference is that Congress did not explicitly mention the standard of review for asylum eligibility decisions because courts (including this one) were *already* treating them as factual and applying substantial-evidence review. See pp. 19-23, *supra*. Congress therefore did not need to make any change. And the fact that Congress explicitly limited review over certain other decisions only makes petitioners' interpretation even more far-fetched. It makes little sense to assume that when Congress amended the INA by expressly *limiting* judicial review of certain immigration decisions, it was simultaneously, but only implicitly, *expanding* review of all the other kinds of decisions that it did not expressly identify.

b. Petitioners next contend (Br. 29-32) that Congress subjected *all* mixed questions—even those that are primarily factual—to *de novo* review. At the outset, nothing in Congress's 1996 amendments to the INA even remotely suggests that Congress intended such a drastic expansion of the scope of judicial review. But even on their own terms, petitioners' inferences are unpersuasive.

Petitioners begin by asserting (Br. 20) that the substantial-evidence standard for "findings of fact" in 8 U.S.C. 1252(b)(4)(B) can refer only to historical facts, and never to mixed questions. But that contention contravenes numerous decisions of this Court and ignores that, when Congress adopted that provision, this Court had already applied a substantial-evidence provision to

asylum-eligibility questions about "fear of persecution." See *Elias-Zacarias*, 502 U.S. at 481 & n.1 (citation omitted). See pp. 19-28, *supra*.

Petitioners rely (Br. 30) on this Court's recent interpretations of the scope of jurisdiction under the INA's limitations on judicial review in 8 U.S.C. 1252(a)(2). Interpreting those provisions, the Court has held that courts' jurisdiction over "questions of law" includes jurisdiction to review mixed questions of law and fact. See *Wilkinson*, 601 U.S. at 225; *Guerrero-Lasprilla* v. *Barr*, 589 U.S. 221, 231-232 (2020). In petitioners' view (Br. 30), if "questions of law" include mixed questions for purposes of the jurisdiction of the courts of appeals, then the INA must treat mixed questions as legal questions in every context, including for purposes of the standard of review. But the Court in both of those cases expressly disclaimed the notion that its jurisdictional holding would determine the appropriate standard of review. See *Wilkinson*, 601 U.S. at 222, 225; *Guerrero-Lasprilla*, 589 U.S. at 228.

A closer look at this Court's holdings about jurisdiction under Section 1252(a)(2) makes clear why that provision is inapposite. Subparagraphs (B) and (C) of Section 1252(a)(2) bar judicial review of removal orders against certain criminal aliens as well as certain denials of discretionary relief. 8 U.S.C. 1252(a)(2)(B)-(C). After this Court held that habeas relief nonetheless remained available in district court, see *INS* v. *St. Cyr*, 533 U.S. 289, 313 (2001), Congress enacted Subparagraph (D) to allow courts of appeals to review "constitutional claims or questions of law," while simultaneously enacting other language that bars habeas relief in district courts. *Guerrero-Lasprilla*, 589 U.S. at 231-233 (citation omitted).

In *Guerrero-Lasprilla*, the Court held that the jurisdictional grant over "questions of law" in Section 1252(a)(2)(D) permits the courts of appeals to review mixed questions of law and fact when considering petitions for review of removal orders. 589 U.S. at 227-228. The Court based that holding on a presumption favoring judicial review, statutory context suggesting that the phrase did not "necessarily exclude[]" mixed questions, and the fact that Congress had intended the provision to provide an "adequate substitute" for habeas corpus (which ordinarily covers mixed questions). *Id.* at 229, 230, 232 (citation omitted); see *id.* at 227-234. The Court thus concluded that a court of appeals had jurisdiction to review a mixed question regarding an alien's diligence. *Id.* at 224-226. Last year in *Wilkinson*, the Court applied the rule from that decision to hold that a court of appeals could also review a mixed question about whether an alien had shown that his removal would cause an "'exceptional and extremely unusual hardship' to a U.S.-citizen or permanent-resident family member." 601 U.S. at 211-212 (quoting 8 U.S.C. 1229b(b)(1)(D)).

In both of those opinions, however, the Court made clear that its jurisdictional holdings did *not* mean that *de novo* review applies to all mixed questions, no matter how factual they are. Instead, in *Wilkinson*, the Court emphasized that when a "mixed question is primarily factual, [judicial] review is deferential." 601 U.S. at 225; see *id.* at 222. And in *Guerrero-Lasprilla*, the Court noted that it was not addressing "the standard of review." 589 U.S. at 228. Even so, it acknowledged that—unlike the question of jurisdiction to review a mixed question—"the proper standard for appellate review of * * * [an] agency decision" involving a mixed question

could "turn on practical considerations." *Ibid.* (citing *U.S. Bank*, 583 U.S. at 396).

Accordingly, those cases do not support petitioners' reading of the statute. Indeed, *Wilkinson* expressly stated that deferential (rather than *de novo*) review applies to primarily factual questions under the INA. See 601 U.S. at 225. Moreover, under *Guerrero-Lasprilla*'s reasoning, whether a particular provision's reference to questions of law or fact also applies to a mixed question depends on the particular context and history of that provision. Here, statutory context and history demonstrate that persecution determinations are primarily factual questions subject to the substantial-evidence standard that applies to "administrative findings of fact." 8 U.S.C. 1252(b)(4)(B); see pp. 18-23, *supra*.

c. In support of their argument that Congress treated all mixed questions as questions of law, petitioners advance a far-fetched comparison (Br. 31) to the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214, which they contend is relevant because Congress enacted it some months before the INA substantial-evidence provision at issue here. The AEDPA provision on which they rely bars federal habeas corpus relief to certain "person[s] in custody pursuant to the judgment of a State court" "unless" the state court decision (1) "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" or (2) "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. 2254(d). Petitioners reason (Br. 31) that the 1996 Congress must have considered all mixed questions to be legal questions because that AEDPA provi-

sion included the phrase "unreasonable application of[] clearly established Federal law" in the same sentence as "contrary to * * * clearly established Federal law" (rather than in the sentence regarding "unreasonable determination of the facts").

Petitioners' strained inference fails on several levels. As an initial matter, that AEDPA provision bears wholly different language, structure, background, and subject matter, so it does not warrant any clear inference about the language or structure of the INA provisions governing the standard of review for administrative asylum decisions—particularly given the latter's statutory text and history, see pp. 18-23, *supra*. In addition, AEDPA's mention of the application of law to facts can equally suggest that such questions are not clearly subsumed within the phrase "contrary to law." At most, the provision confirms that applications of law to fact are often neither purely legal questions nor purely factual questions, but mixed questions.

Petitioners' argument is even more implausible because, on its face, the AEDPA provision does not attempt to draw a line between mixed questions and factual ones; instead, it merely ensures that federal habeas relief will reach mixed questions as well as purely legal and factual questions under certain circumstances. See 28 U.S.C. 2254(d). The provision plainly does not even distinguish between the standards of review for mixed and for factual questions, since it permits habeas relief both for "unreasonable application[s] of" clearly established law and for "unreasonable determination[s] of the facts." *Ibid.*

2. Whether an applicant has shown persecution is not a primarily legal question

a. In the alternative, petitioners contend (Br. 33-38) that whether an applicant met his burden of proof to show past persecution is a primarily legal question and therefore must be reviewed *de novo*.

Petitioners recognize, however, that questions are primarily factual when they require decisionmakers to "marshal and weigh evidence, make credibility judgments, and otherwise address" facts that "resist generalization." Br. 33 (quoting *U.S. Bank*, 583 U.S. at 396). That is clearly the case here. If *de novo* review applied in this case, for example, the court of appeals itself would have to assign weight, draw inferences from, and balance a multitude of facts—weighing, among others, the fact that petitioner was threatened several times and struck in the chest against the facts that he had no record of serious injury and that most of the threats against him sought money. See Pet. App. 31a-32a. So, too, the court of appeals would have to weigh, on the one hand, the fact that petitioners' half-brothers were shot, and on the other, the time that has elapsed since those incidents, the fact that petitioners' mother and sister were never targeted, and the fact that petitioner lived in peace for years in other parts of El Salvador. See *id.* at 32a-35a. And the logic of petitioners' argument also implausibly suggests that the court of appeals would have to engage in *de novo* predictive judgments about the likelihood of future persecution to assess whether petitioner meets the statutory requirement of having a "well-founded fear of persecution." 8 U.S.C. 1101(a)(42). Those questions cannot reasonably be described as primarily legal in nature.

Petitioners strain (Br. 41-43) to distinguish this Court's prior cases recognizing that substantial-evidence review should apply to persecution questions, but their distinctions only underscore that persecution questions present inherently factual inquiries. Thus, petitioners say that *Elias-Zacarias* involved questions about the "persecutors' motives," that *Orlando Ventura* involved an assessment of country "conditions," and that *Ming Dai* involved "credibility determinations"—all determinations that, in petitioners' view, would qualify as factual. Br. 42-43 (brackets and citations omitted). But those sorts of questions are virtually always implicated in persecution decisions, and petitioners' efforts to separate those admittedly factual inquiries from the inferences and weighing that follow them makes little practical sense.

b. Petitioners admit that those questions are fact-intensive, but they nevertheless urge (Br. 34-37) that *de novo* review is needed to allow the courts of appeals to clarify legal principles that are necessary for the development of the law. But in "mine-run cases," the application of settled standards to variegated facts will produce no new law. *Bufkin*, 604 U.S. at 381; *U.S. Bank*, 583 U.S. at 398. In recent years, the immigration courts have made more than 200,000 annual decisions about asylum claims. Executive Office for Immigration Review, *Adjudication Statistics: Total Asylum Applications* (July 31, 2025), https://perma.cc/7JQJ-G97V. And well over two million asylum requests are still pending. Executive Office for Immigration Review, *Adjudication Statistics: Asylum Decisions* (July 31, 2025), https://perma.cc/B4Y2-GSSZ. As this case illustrates, Pet. App. 20a-22a, 31a-36a, the overwhelming majority of those requests will require agency adjudicators only

"to state the requirement * * * and then to do the fact-intensive job" of weighing the evidence. *U.S. Bank*, 583 U.S. at 398. When a mixed question routinely boils down to a "factual question" in that way, it "presents a task for factfinding courts, not appellate courts." *Monasky*, 589 U.S. at 84.

In any event, as this Court has explained, applying substantial-evidence review to mixed questions that involve primarily factual work does not mean that purely legal questions about the appropriate standard will never arise. See *U.S. Bank*, 583 U.S. at 398 n.7. Just as such questions arise about the standards that juries should apply even though a jury's application of a standard is reviewed deferentially, there are interpretive questions about the definition of persecution that are subject to *de novo* review. If, for example, a "legal error infect[ed]" the BIA's analysis, or the BIA "devised some novel" legal principle, the court of appeals would review those questions *de novo*. *Ibid.* That kind of review is not uncommon. See *Monasky*, 589 U.S. at 71 (considering the proper legal standard despite holding that deferential review applied); *Pierce*, 487 U.S. at 563 (same). Petitioners themselves cite (Br. 47) cases in which courts of appeals overturned BIA decisions for applying an incorrect legal standard even though substantial-evidence review applied. See *Tairou* v. *Whitaker*, 909 F.3d 702, 707-708 (4th Cir. 2018); *N.L.A.* v. *Holder*, 744 F.3d 425, 431 (7th Cir. 2014).

Moreover, practice belies petitioners' concern that, without *de novo* review, legal standards about persecution will go undeveloped. As petitioners have acknowledged (Pet. 14-18), while several circuits currently have internally inconsistent case law regarding the applicable standard of review, "[five circuits" have consistently

applied substantial-evidence review to persecution questions for many decades. That has not stopped purely legal principles from being developed in those circuits. Indeed, petitioners have cited decisions from those same circuits as examples of legal principles that define the bounds of "persecution." Compare Pet. 16 (noting that "the First, Fourth, Sixth, Seventh, and Tenth Circuits" consistently apply substantial-evidence review), with Pet. Br. 35-37 (citing legal principles in decisions by those same circuits). Here, too, the IJ applied numerous principles from First Circuit precedents when applying the legal standard for persecution. See Pet. App. 31a-36a.

c. Petitioners draw analogies (Br. 39-40) to other questions that are subject to *de novo* review, but they are inapposite. For example, petitioners point (Br. 39), to questions of fair use in copyright cases and conspiracy in antitrust suits. But, unlike here, those open-ended statutory inquiries are rooted in judicially derived principles that require case-by-case elucidation. *Google LLC* v. *Oracle Am., Inc.*, 593 U.S. 1, 24 (2021) (explaining that fair use doctrine "was originally a concept fashioned by judges"); *Leegin Creative Leather Prods., Inc.* v. *PSKS, Inc.*, 551 U.S. 877, 899 (2007) (noting that "the Court has treated the Sherman Act as a common-law statute"); see *Graham* v. *John Deere Co.*, 383 U.S. 1, 15-17 (1966) (explaining the outgrowth of patent-validity standards from "judicial precedents").

Petitioners' comparison (Br. 33-34) to constitutional inquiries like probable cause or the voluntary nature of a confession also fails. As this Court has repeatedly explained, *de novo* review applies to those questions because of "a strong presumption" that constitutional questions are subject to *de novo* review. *Bufkin*, 604

U.S. at 384; *U.S. Bank*, 583 U.S. at 396 n.4. Those features are absent where, as here, the determination is a "creature of statute." *Bufkin*, 604 U.S. at 385.[3]

Moreover, those different contexts do not present the INA's statutory context or its sound reasons for entrusting primarily factual decisions to the agency.

d. Petitioners seek to buttress their argument that no-persecution findings are legal by noting (Br. 21) that applicable regulations allow the BIA itself to review an IJ's conclusions about persecution *de novo*. But the agency's decisions about how to structure internal review do not determine the standard of review that the courts of appeals should apply, which is determined by statute and constrained by the role of appellate courts under the statute. Before 2002, the Board had regulatory authority to conduct *de novo* review of *all* questions, including purely factual ones. See *Board of Immigration Appeals: Procedural Reforms To Improve Case Management*, 67 Fed. Reg. 54,878, 54,889-54,890 (Aug. 26, 2002). But nobody would suggest that the courts of appeals could also have engaged in *de novo* review of purely factual findings, as that would be contrary to the statute. See 8 U.S.C. 1252(b)(4)(B). Just as the Board's previous regulatory authority to review questions of fact *de novo* did not affect the standard for *judicial* review, the Attorney General's decision to provide asylum applicants with *broader* intra-agency review of some mixed questions about persecution does

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[3] Petitioners also rely on *Icicle Seafoods, Inc.* v. *Worthington*, 475 U.S. 709 (1986), but that case concerned a dispute about the "legal standard" to apply the undefined term "seaman" under the Fair Labor Standards Act, 29 U.S.C. 201 *et seq.*, see *Icicle Seafoods*, 475 U.S. at 713 (citation omitted); *id.* at 715 (Stevens, J., dissenting). No similar dispute about a legal standard is present here.

not allow the courts of appeals to evade the INA's substantial-evidence standard when they review the agency's final administrative decision.

In any event, a proper understanding of BIA review dispels petitioners' suggestion that it shows that primarily factual questions about persecution are legal inquiries. In 2002, the Attorney General promulgated a regulation prescribing a "clearly erroneous" standard for BIA review of factual findings, thus "eliminating the duplication of resources involved in successive *de novo* factual determinations, first by immigration judges and then the Board." 67 Fed. Reg. at 54,890. But under that regulation, the Board retained *de novo* review over "determinations of matters of law" and over "the application of legal standards, in the exercise of judgment or discretion." *Ibid.* Under that standard, the Board has applied *de novo* review to an IJ's exercise of "judgment[] as to whether the facts established by a particular alien amount to 'past persecution' or a 'well-founded fear of future persecution.'" *Ibid.* While the BIA has previously referred in shorthand fashion to such questions as "legal determination[s]," *In re Z-Z-O-*, 26 I. & N. Dec. 586, 591 (B.I.A. 2015), the regulation classifies them as questions of "judgment," 8 C.F.R. 1003.1(d)(3)(ii); see 67 Fed. Reg. at 54,890. And the BIA's ability to review an IJ's "judgment" weighing whether evidence meets the legal standard for persecution does not make that determination any more a legal one than is an IJ's exercise of "discretion," which is equally subject to the Board's *de novo* review under the same regulation. *Ibid.*

Petitioners also contend (Br. 40-41) that BIA decisions should be reviewed *de novo* because the Board reviews IJ decisions on a "cold paper record." But the

court of appeals reviews the agency's decision as a whole, which includes the input of the IJs who were closest to the record. And there is nothing anomalous about allowing the Board to perform *de novo* review of predominantly factual IJ decisions, while courts of appeals apply more deferential review. As this Court has recognized, the Board, unlike the courts of appeals, "is well positioned" to review an IJ's factual inferences and weighing *de novo* because of its extensive "experience with the sort of facts that recur in immigration cases." *Ming Dai*, 593 U.S. at 367; *Orlando Ventura*, 537 U.S. at 17 (noting the BIA's "expertise").

3. Petitioners are wrong that substantial-evidence review can never apply to mixed questions

As a last alternative, petitioners suggest (Br. 23-29, 43-45) that the courts of appeals may *never* apply substantial-evidence review to mixed questions. Petitioners reason (Br. 26) that this Court's decision in *Loper Bright Enterprises* v. *Raimondo*, 603 U.S. 369 (2024), requires courts to "decide legal questions by applying their own judgment," *id.* at 392, and they construe that principle to mean that courts must apply *de novo* review to all mixed questions of fact and law coming from agency proceedings—even when they are predominantly factual. Accordingly, petitioners suggest (Br. 45) that "it is at best unclear" whether this Court's usual test to determine the appropriate standard of review for mixed questions should "govern[] the standard of review that an Article III court must apply to administrative officials' decision[s]."

As petitioners recognize (Br. 25, 44-45), their suggestion is contradicted by this Court's precedents—including decisions after *Loper Bright*. The Court has repeatedly explained that substantial-evidence review

is appropriate when a court reviews a primarily factual administrative application of law to fact that involves weighing evidence or drawing factual inferences. See pp. 26-28, *supra*; *Wilkinson*, 601 U.S. at 225; see also *Guerrero-Lasprilla*, 589 U.S. at 228 (noting that the standard-of-review question "may turn on practical considerations"). Petitioner is thus relegated to arguing (Br. 44) that "the Court has never reconciled [those decisions] with *Loper Bright*."

Petitioners' assertions betray a fundamental misunderstanding of *Loper Bright*. That decision addressed how courts should review legal questions about "agency interpretations of the statutes those agencies administer," 603 U.S. at 378—questions that are not at issue here. When questions about the legal standard for showing persecution arise, a court of appeals should review those questions *de novo*. See pp. 40-41, *supra*. But nothing in *Loper Bright*—which never even mentions the substantial-evidence standard—calls into question this Court's repeated conclusion that the substantial-evidence standard applies to fact-intensive applications of legal standards. To the contrary, as petitioner notes (Br. 25), the Court acknowledged that "the Court [has] applied deferential review" "where application of a statutory term was sufficiently intertwined with the agency's factfinding" to make it "factbound," and the Court explained that that practice does "not disturb the traditional rule" that legal questions are for the Judicial Branch to decide. 603 U.S. at 388-389. Thus, *Loper Bright* itself indicates that applying substantial-evidence review to fact-intensive mixed questions is consistent with its reasoning.

Petitioners observe (Br. 25) that every application of law to fact requires interpretation in some sense. But

as this Court has recognized, some applications of law "will not much clarify legal principles or provide guidance" when "[t]he stock judicial method is merely to state the requirement * * * and then to do the fact-intensive job of exploring whether, in a particular case," the requirement is met. *U.S. Bank*, 583 U.S. at 398. Those kinds of determinations have long been properly reviewed under deferential standards of review that apply to factual questions. Doing so respects Congress's design and leaves factual work to the BIA's expertise and the IJ's "close[]" and "deep[] understanding of the record." *Ibid.* Petitioners' contention that such questions must nonetheless be reviewed *de novo* would subject not just the Board, but almost all federal agencies, to second-guessing of virtually every substantive, fact-bound decision other than discrete findings of historical facts. Nothing in *Loper Bright* requires that unworkable result, which would force courts of appeals to engage in inherently factual inquiries that they are poorly equipped to make and undermine Congress's effort to "promote the uniform application of * * * statute[s]" through the substantial-evidence standard. *Consolo* v. *Federal Mar. Comm'n*, 383 U.S. 607, 620 (1966).

In all events, petitioners make clear (Br. 27) that their objection does not apply if "Congress wanted deferential review" and provided for it by statute. As explained, that is the case here. See pp. 18-23, *supra*.

4. Policy considerations do not support petitioners' reading

Petitioners' remaining policy arguments are misguided. Petitioners assert (Br. 46) that *de novo* review of persecution questions by the courts of appeals would aid uniformity and fairness. But Congress has determined that those goals are best served by "entrust[ing]

the agency to make the basic asylum eligibility decision" within "broad limits." *Orlando Ventura*, 537 U.S. at 16. Congress's "deliberate" choice to require substantial-evidence review of final administrative determinations is designed to "free[] the reviewing courts of the time-consuming and difficult task of weighing the evidence," "give[] proper respect to the expertise of the administrative tribunal," and "promote the uniform application of the statute." *Consolo*, 383 U.S. at 620. Petitioners' approach—which would require the courts of appeals to assess independently whether each asylum applicant's evidence met the burden of proof—would impose an unworkable burden on the courts that Congress never intended. See *Pierce*, 487 U.S. at 560 (noting that *de novo* review of fact-intensive applications of law "come[s] at [an] unusual expense" for courts of appeals that are "unaccustomed" to such inquiries).

Petitioners' attempts (Br. 47) to portray the BIA decision in this case as inconsistent with a handful of circuit decisions only underscore the fact-dependent nature of the persecution question. Petitioners rely on cases stating that "a credible 'threat of death alone constitutes persecution,'" *ibid.* (quoting *Tairou*, 909 F.3d at 707-708); that "attempted rape" can constitute persecution, *ibid.* (citing *Kaur* v. *Wilkinson*, 986 F.3d 1216, 1225 (9th Cir. 2021)); and that "'the actual killing of one family member and kidnapping of another' * * * established 'persecution,'" *ibid.* (quoting *N.L.A.*, 744 F.3d at 434-435). But a central question in this case is whether the threats that petitioner received were credible threats of serious injury, rather than mere intimidation to extort money. See Pet. App. 11a. And this case involves neither attempted rape nor the killing of a family member. The differences among these cases are all

about the facts, not the law. To the extent that petitioners challenge the principle that threats alone do not establish persecution absent a showing of "significant actual suffering," Br. 47 (quoting Pet. App. 11a-12a), their disagreement lies with the legal standard adopted by the First Circuit and numerous other courts of appeals (not with the agency's decision). See, *e.g.*, Pet. App. 10a-11a (citing cases); *KC*, 108 F.4th at 135-137; *Li* v. *Attorney Gen.*, 400 F.3d 157, 164 (3d Cir. 2005).

Petitioners further assert (Br. 48) that there is variation in the Board's own decisions. Even if true, that is a product of the variegated nature of this factual inquiry, which "resist[s] generalization." *U.S. Bank*, 583 U.S. at 396 (citation omitted). In all events, petitioners can only speculate that circuit panels would be any more consistent in their weighing of evidence and inferences. Indeed, they concede variation "from one Court of Appeals to the next." Br. 48 (citation omitted).

In recent years, the immigration courts have been deciding well over 200,000 asylum applications annually. See pp. 39-40, *supra*. The sheer number of cases and subtle factual variations among them mean that totality-of-the-circumstances conclusions are necessarily case-specific. But that is all the more reason to enforce Congress's decision to entrust those fact-intensive inquiries primarily to the BIA and to the IJs, who have "the closest and the deepest understanding of the record," *U.S. Bank*, 583 U.S. at 398, as well as expertise born of vast "experience with the sort of facts that recur in immigration cases," *Ming Dai*, 593 U.S. at 367.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

TABLE OF CONTENTS

APPENDIX

1. 8 U.S.C. 1101(a)(42) provides:

Definitions

(a) As used in this chapter—

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

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

2. 8 U.S.C. 1158(a)-(b) provides in pertinent part:

Asylum

(a) Authority to apply for asylum

(1) In general

Any alien who is physically present in the United States or who arrives in the United States (whether or not at a designated port of arrival and including an alien who is brought to the United States after having been interdicted in international or United States waters), irrespective of such alien's status, may apply for asylum in accordance with this section or, where applicable, section 1225(b) of this title.

* * * * *

(b) Conditions for granting asylum

(1) In general

(A) Eligibility

The Secretary of Homeland Security or the Attorney General may grant asylum to an alien who has applied for asylum in accordance with the requirements and procedures established by the Secretary of Homeland Security or the

Attorney General under this section if the Secretary of Homeland Security or the Attorney General determines that such alien is a refugee within the meaning of section 1101(a)(42)(A) of this title.

(B) Burden of proof

(i) In general

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

(ii) Sustaining burden

The testimony of the applicant may be sufficient to sustain the applicant's burden without corroboration, but only if the applicant satisfies the trier of fact that the applicant's testimony is credible, is persuasive, and refers to specific facts sufficient to demonstrate that the applicant is a refugee. In determining whether the applicant has met the applicant's burden, the trier of fact may weigh the credible testimony along with other evidence of record. Where the trier of fact determines that the applicant should provide evidence that corroborates otherwise credible testimony, such evidence

must be provided unless the applicant does not have the evidence and cannot reasonably obtain the evidence.

(iii) Credibility determination

Considering the totality of the circumstances, and all relevant factors, a trier of fact may base a credibility determination on the demeanor, candor, or responsiveness of the applicant or witness, the inherent plausibility of the applicant's or witness's account, the consistency between the applicant's or witness's written and oral statements (whenever made and whether or not under oath, and considering the circumstances under which the statements were made), the internal consistency of each such statement, the consistency of such statements with other evidence of record (including the reports of the Department of State on country conditions), and any inaccuracies or falsehoods in such statements, without regard to whether an inconsistency, inaccuracy, or falsehood goes to the heart of the applicant's claim, or any other relevant factor. There is no presumption of credibility, however, if no adverse credibility determination is explicitly made, the applicant or witness shall have a rebuttable presumption of credibility on appeal.

(2) Exceptions

(A) In general

Paragraph (1) shall not apply to an alien if the Attorney General determines that—

(i) the alien ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion;

(ii) the alien, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of the United States;

(iii) there are serious reasons for believing that the alien has committed a serious nonpolitical crime outside the United States prior to the arrival of the alien in the United States;

(iv) there are reasonable grounds for regarding the alien as a danger to the security of the United States;

(v) the alien is described in subclause (I), (II), (III), (IV), or (VI) of section 1182(a)(3)(B)(i) of this title or section 1227(a)(4)(B) of this title (relating to terrorist activity), unless, in the case only of an alien described in subclause (IV) of section 1182(a)(3)(B)(i) of this title, the Attorney General determines, in the Attorney General's discretion, that there are not reasona-

ble grounds for regarding the alien as a danger to the security of the United States; or

(vi) the alien was firmly resettled in another country prior to arriving in the United States.

(B) Special rules

(i) Conviction of aggravated felony

For purposes of clause (ii) of subparagraph (A), an alien who has been convicted of an aggravated felony shall be considered to have been convicted of a particularly serious crime.

(ii) Offenses

The Attorney General may designate by regulation offenses that will be considered to be a crime described in clause (ii) or (iii) of subparagraph (A).

(C) Additional limitations

The Attorney General may by regulation establish additional limitations and conditions, consistent with this section, under which an alien shall be ineligible for asylum under paragraph (1).

(D) No judicial review

There shall be no judicial review of a determination of the Attorney General under subparagraph (A)(v).

* * * * *

3. 8 U.S.C. 1229a(a)-(b)(1) provides in pertinent part:

Removal proceedings

(a) Proceeding

(1) In general

An immigration judge shall conduct proceedings for deciding the inadmissibility or deportability of an alien.

* * * * *

(b) Conduct of proceeding

(1) Authority of immigration judge

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

4. 8 U.S.C. 1252(a) and (b)(4) provide:

Judicial review of orders of removal

(a) Applicable provisions

(1) General orders of removal

Judicial review of a final order of removal (other than an order of removal without a hearing pursuant to section 1225(b)(1) of this title) is governed only by

chapter 158 of title 28, except as provided in subsection (b) and except that the court may not order the taking of additional evidence under section 2347(c) of such title.

(2) Matters not subject to judicial review

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

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

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

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

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

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

(B) Denials of discretionary relief

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241

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

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

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

(C) Orders against criminal aliens

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, and except as provided in subparagraph (D), no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed a criminal offense covered in section 1182(a)(2) or 1227(a)(2)(A)(iii), (B), (C), or (D) of this title, or any offense covered by section 1227(a)(2)(A)(ii) of this title for which both predicate offenses are, without regard to their date of commission, otherwise covered by section 1227(a)(2)(A)(i) of this title.

(D) Judicial review of certain legal claims

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

(3) Treatment of certain decisions

No alien shall have a right to appeal from a decision of an immigration judge which is based solely on a certification described in section 1229a(c)(1)(B) of this title.

(4) Claims under the United Nations Convention

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, a petition for review filed with an appropriate court of appeals in accordance with this section shall be the sole and exclusive means for judicial review of any cause or claim under the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman, or Degrading Treatment or Punishment, except as provided in subsection (e).

(5) Exclusive means of review

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, a petition for review filed with an appropriate court of appeals in accord-

ance with this section shall be the sole and exclusive means for judicial review of an order of removal entered or issued under any provision of this chapter, except as provided in subsection (e). For purposes of this chapter, in every provision that limits or eliminates judicial review or jurisdiction to review, the terms "judicial review" and "jurisdiction to review" include habeas corpus review pursuant to section 2241 of title 28, or any other habeas corpus provision, sections 1361 and 1651 of such title, and review pursuant to any other provision of law (statutory or nonstatutory).

(b) Requirements for review of orders of removal

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

* * * * *

(4) Scope and standard for review

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

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

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

(C) a decision that an alien is not eligible for admission to the United States is conclusive unless manifestly contrary to law, and

(D) the Attorney General's discretionary judgment whether to grant relief under section 1158(a) of this title shall be conclusive unless man-

ifestly contrary to the law and an abuse of discretion.

No court shall reverse a determination made by a trier of fact with respect to the availability of corroborating evidence, as described in section 1158(b)(1)(B), 1229a(c)(4)(B), or 1231(b)(3)(C) of this title, unless the court finds, pursuant to subsection (b)(4)(B), that a reasonable trier of fact is compelled to conclude that such corroborating evidence is unavailable.

5. 8 C.F.R. 1003.1(d) provides in pertinent part:

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

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

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

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

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

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

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

(iv) Except for taking administrative notice of commonly known facts such as current events or the contents of official documents, the Board will not engage in factfinding in the course of deciding cases. A party asserting that the Board cannot properly resolve an ap-

peal without further factfinding must file a motion for remand. If new evidence is submitted on appeal, that submission may be deemed a motion to remand and considered accordingly. If further factfinding is needed in a particular case, the Board may remand the proceeding to the immigration judge or, as appropriate, to DHS.

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6. 8 C.F.R. 1208.13(a)-(b) provides:

Establishing asylum eligibility.

(a) *Burden of proof.* The burden of proof is on the applicant for asylum to establish that he or she is a refugee as defined in section 101(a)(42) of the Act. The testimony of the applicant, if credible, may be sufficient to sustain the burden of proof without corroboration. The fact that the applicant previously established a credible fear of persecution for purposes of section 235(b)(1)(B) of the Act does not relieve the alien of the additional burden of establishing eligibility for asylum.

(b) *Eligibility.* The applicant may qualify as a refugee either because he or she has suffered past persecution or because he or she has a well-founded fear of future persecution.

(1) *Past persecution.* An applicant shall be found to be a refugee on the basis of past persecution if the applicant can establish that he or she has suffered persecution in the past in the applicant's country of nationality or, if stateless, in his or her country of last habitual residence, on account of race, religion, nationality, membership in a particular social group, or political opinion, and is unable or unwilling to return to, or avail himself

or herself of the protection of, that country owing to such persecution. An applicant who has been found to have established such past persecution shall also be presumed to have a well-founded fear of persecution on the basis of the original claim. That presumption may be rebutted if an asylum officer or immigration judge makes one of the findings described in paragraph (b)(1)(i) of this section. If the applicant's fear of future persecution is unrelated to the past persecution, the applicant bears the burden of establishing that the fear is well-founded.

(i) *Discretionary referral or denial.* Except as provided in paragraph (b)(1)(iii) of this section, an asylum officer shall, in the exercise of his or her discretion, refer or deny, or an immigration judge, in the exercise of his or her discretion, shall deny the asylum application of an alien found to be a refugee on the basis of past persecution if any of the following is found by a preponderance of the evidence:

(A) There has been a fundamental change in circumstances such that the applicant no longer has a well-founded fear of persecution in the applicant's country of nationality or, if stateless, in the applicant's country of last habitual residence, on account of race, religion, nationality, membership in a particular social group, or political opinion; or

(B) The applicant could avoid future persecution by relocating to another part of the applicant's country of nationality or, if stateless, another part of the applicant's country of last habitual residence, and under all the circumstances, it would be reasonable to expect the applicant to do so.

(ii) *Burden of proof.* In cases in which an applicant has demonstrated past persecution under paragraph (b)(1) of this section, the Service shall bear the burden of establishing by a preponderance of the evidence the requirements of paragraphs (b)(1)(i)(A) or (B) of this section.

(iii) *Grant in the absence of well-founded fear of persecution.* An applicant described in paragraph (b)(1)(i) of this section who is not barred from a grant of asylum under paragraph (c) of this section, may be granted asylum, in the exercise of the decision-maker's discretion, if:

(A) The applicant has demonstrated compelling reasons for being unwilling or unable to return to the country arising out of the severity of the past persecution; or

(B) The applicant has established that there is a reasonable possibility that he or she may suffer other serious harm upon removal to that country.

(2) *Well-founded fear of persecution.* (i) An applicant has a well-founded fear of persecution if:

(A) The applicant has a fear of persecution in his or her country of nationality or, if stateless, in his or her country of last habitual residence, on account of race, religion, nationality, membership in a particular social group, or political opinion;

(B) There is a reasonable possibility of suffering such persecution if he or she were to return to that country; and

(C) He or she is unable or unwilling to return to, or avail himself or herself of the protection of, that country because of such fear.

(ii) An applicant does not have a well-founded fear of persecution if the applicant could avoid persecution by relocating to another part of the applicant's country of nationality or, if stateless, another part of the applicant's country of last habitual residence, if under all the circumstances it would be reasonable to expect the applicant to do so.

(iii) In evaluating whether the applicant has sustained the burden of proving that he or she has a well-founded fear of persecution, the asylum officer or immigration judge shall not require the applicant to provide evidence that there is a reasonable possibility he or she would be singled out individually for persecution if:

(A) The applicant establishes that there is a pattern or practice in his or her country of nationality or, if stateless, in his or her country of last habitual residence, of persecution of a group of persons similarly situated to the applicant on account of race, religion, nationality, membership in a particular social group, or political opinion; and

(B) The applicant establishes his or her own inclusion in, and identification with, such group of persons such that his or her fear of persecution upon return is reasonable.

(3) *Reasonableness of internal relocation.* For purposes of determinations under paragraphs (b)(1)(i) and (ii) and (b)(2) of this section, adjudicators should consider the totality of the relevant circumstances regarding an applicant's prospects for relocation, including the size of the country of nationality or last habitual residence, the geographic locus of the alleged persecution, the size, numerosity, and reach of the alleged per-

secutor, and the applicant's demonstrated ability to relocate to the United States in order to apply for asylum.

(i) In cases in which the applicant has not established past persecution, the applicant shall bear the burden of establishing that it would not be reasonable for him or her to relocate, unless the persecution is by a government or is government-sponsored.

(ii) In cases in which the persecutor is a government or is government-sponsored, it shall be presumed that internal relocation would not be reasonable, unless the Department of Homeland Security establishes by a preponderance of the evidence that, under all the circumstances, it would be reasonable for the applicant to relocate.

(iii) Regardless of whether an applicant has established persecution in the past, in cases in which the persecutor is not the government or a government-sponsored actor, or otherwise is a private actor, there shall be a presumption that internal relocation would be reasonable unless the applicant establishes, by a preponderance of the evidence, that it would be unreasonable to relocate.

(iv) For purposes of determinations under paragraphs (b)(3)(ii) and (iii) of this section, persecutors who are private actors-including persecutors who are gang members, officials acting outside their official capacity, family members who are not themselves government officials, or neighbors who are not themselves government officials shall not be considered to be persecutors who are the government or government-sponsored absent evidence that the government sponsored the persecution.