

**In the
Supreme Court of the United States**

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

Petitioners,

v.

PAMELA BONDI, U.S. ATTORNEY GENERAL,

Respondent.

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

REPLY BRIEF FOR PETITIONERS

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INTRODUCTION

The question presented concerns the appropriate standard of judicial review for one narrow part of an asylum-eligibility determination. It asks if federal courts must defer to the Board of Immigration Appeals (BIA) on whether a given set of undisputed facts demonstrates mistreatment legally qualifying as “persecution.” The answer is no. In resisting that conclusion, the government sidesteps the question presented. And when the government finally confronts the actual issue before the Court, it *agrees* that de novo review is, at least sometimes, warranted.

The government repeatedly conflates the narrow question of what kinds and degree of harm legally qualify as “persecution” under Section 1101(a)(42) with the BIA’s asylum-eligibility determination as a whole. *See* Resp.Br.5, 14, 17, 20-23, 26, 33, 47. The government then claims that this Court has *already* required across-the-board deference to the BIA’s entire asylum-eligibility decision, while emphasizing the factual nature of various subsidiary issues not covered by the question presented, such as the noncitizen’s credibility and the alleged persecutors’ motives. These arguments defy this Court’s instruction to apply “the appropriate legal standard” to the “separate factual and legal parts” of the decision under review, not bundle them all together under a single standard. *Google LLC v. Oracle Am., Inc.*, 593 U.S. 1, 24 (2021).

The government’s blanket stance is also at odds with its concession that courts should “apply *de novo* review to legal questions about the standard for establishing persecution.” Resp.Br.4. Indeed, the government appears to acknowledge that de novo

review applies to determinations about whether sexual violence, religious discrimination, and—most relevant here—death threats legally qualify as “persecution.” Resp.Br.40-41. The government admits these are all “examples of legal principles that define the bounds” of Section 1101(a)(42)’s “persecution” standard. Resp.Br.40.

That concession gives away the game. These and other legal principles were established by courts applying Section 1101(a)(42)’s “persecution” standard to undisputed facts, not pondering the term in the abstract. Courts must perform that case-by-case interpretive work using their own independent judgment. That conclusion is compelled by the text of the Immigration and Nationality Act (INA). And it independently follows from *U.S. Bank National Ass’n ex rel. CWC Capital Asset Management LLC v. Village at Lakeridge, LLC*, 583 U.S. 387 (2018). Either way, the First Circuit’s deference to the BIA in this case was unjustified. The judgment cannot stand.

ARGUMENT

I. THE GOVERNMENT CONCEDES THAT DECIDING WHAT LEGALLY QUALIFIES AS “PERSECUTION” INVOLVES LEGAL INTERPRETATION

The government now admits that courts should “fully review legal questions regarding the standard for persecution,” without deference to the BIA. Resp.Br.15. That concession all but resolves this case. Legal rules elucidating Section 1101(a)(42)’s “persecution” standard emerge from case-specific applications, not abstract consideration. This process of case-by-case adjudication is the essence of legal interpretation, warranting de novo review.

The government avoids spelling out what it considers “interpretive questions about the definition of persecution” that are concededly “subject to *de novo* review.” Resp.Br.40. But the government acknowledges that courts must exercise independent judgment in establishing “legal principle[s]” for future cases and in assessing whether the BIA committed “legal error” more generally. Resp.Br.40. So apparently, in the government’s view, courts should review *de novo* issues such as whether enduring genital mutilation, intentional economic deprivation, or a forcible ban on practicing one’s religion legally qualifies as “persecution.” Resp.Br.41 (citing Pet.Br.35-37). And most relevant here, the government accepts that *de novo* review applies to the question whether a noncitizen who experienced credible death threats must prove associated psychological trauma or other long-term harm. Resp.Br.40 (collecting cases).

The government’s concession departs from how many courts of appeals have reviewed these kinds of issues—deferentially. *See Fon v. Garland*, 34 F.4th 810, 820-21 (9th Cir. 2022) (Collins, J., concurring) (critiquing similar assessment). For example, the Tenth Circuit believed itself “obligated to reject” a rule that being forced “to practice religion underground” is “itself a form of persecution,” given circuit precedent requiring deference to the BIA’s contrary conclusion. *Xue v. Lynch*, 846 F.3d 1099, 1108-09 (10th Cir. 2017). The Fourth Circuit rejected the requirement that a noncitizen must prove “long-term physical or mental harm” resulting from death threats as “*manifestly* contrary to law,” not on *de novo* review. *Tairou v. Whitaker*, 909 F.3d 702, 708 (4th Cir. 2018) (emphasis added). And here,

“cabin[ed]” by deference to the BIA, the First Circuit took this actual-harm requirement as a given. Pet.App.10a-11a. So at a minimum, the government’s concession warrants a remand for the First Circuit to decide de novo whether that requirement is correct.

More fundamentally, the government is wrong to say that courts have established legal principles refining Section 1101(a)(42)’s “persecution” standard in a special subset of cases raising “purely legal questions.” Resp.Br.40. Those courts did not define the word “persecution” in a vacuum. Nor did they “devise[] some novel multi-factor test” or hold that the BIA “misunderstood the nature of the [‘persecution’] query.” *U.S. Bank*, 583 U.S. at 398 n.7. Rather, like any court applying Section 1101(a)(42)’s “persecution” standard to undisputed facts, they “expound[ed] and interpret[ed]” that legal standard by “apply[ing]” it in “particular cases.” *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

The government contends otherwise by trying to distinguish cases that required courts to “clarify legal principles” (concededly warranting de novo review) from cases that generated “no new law” (purportedly permitting deference). Resp.Br.39. That argument misunderstands the role of case-by-case adjudication in interpreting Section 1101(a)(42)’s “persecution” standard. What qualifies as “persecution” is an “objective, legally grounded inquiry” as to “how a hypothetical person” would view the mistreatment suffered by a particular noncitizen. *Bufkin v. Collins*, 604 U.S. 369, 385 (2025). The term thus “acquire[s] content only through application.” *Id.* And courts help “build[] out principles” for applying this standard *whenever* they decide whether a given set of

undisputed facts demonstrates “persecution” under Section 1101(a)(42). *Id.*

The government’s invented line between cases that do and do not call for clarifying legal principles is also unadministrable. It pegs the proper standard of review to how the court ultimately resolves the case on the merits. That is backwards. There is no coherent way to decide *ex ante* whether a particular case’s disposition will make “new law.” Resp.Br.39.

In short, by conceding that *de novo* review applies to “legal questions about the standard for persecution,” Resp.Br.4, the government confirms that courts must exercise independent judgment when applying Section 1101(a)(42)’s “persecution” standard to undisputed facts. Nothing else the government says—about the INA, *U.S. Bank*, or otherwise—justifies deference on the matter.

II. THE GOVERNMENT’S READING OF THE INA DOES NOT HOLD UP

The government grasps for a textual basis to justify judicial deference to the BIA’s “persecution” determinations, but there is none. Neither this Court’s cases nor the statutory history offers an escape hatch from that textual reality.

A. The Government Misreads The INA’s Text

The government acknowledges that, because the BIA’s “persecution” determinations concern a noncitizen’s eligibility for asylum, they “do[] not fall within” Section 1252(b)(4)(C) or (D)’s express provisions for deference on legal determinations regarding eligibility for *admission* and discretionary *entitlement* to asylum. Resp.Br.32-33. Yet the government insists that the BIA’s determinations on whether a given set of undisputed facts establishes

“persecution” under the law are “findings of fact” subject to substantial-evidence review. Resp.Br.18. That argument fails.

1. The government ignores the plain meaning of the phrase “findings of fact.” 8 U.S.C. § 1252(b)(4)(B). That phrase refers to a “determination” based on “evidence in the record” regarding an “event” or “circumstance” that exists in the real world, “*as distinguished from its legal effect.*” Pet.Br.20 (emphasis added) (quoting *Findings of Fact* and *Fact*, *Black’s Law Dictionary* (7th ed. 1999)). Applying Section 1101(a)(42)’s “persecution” standard to undisputed facts is all about determining the legal effect of those real-world events. It cannot fairly be characterized as a factual finding.

Even the BIA agrees. See *Matter of E-Z-*, 29 I. & N. Dec. 123, 124 (B.I.A. 2025). That is why the BIA refuses to review determinations by an Immigration Judge (IJ) on this issue under the “clearly erroneous” standard that BIA regulations reserve for “findings of fact.” Pet.Br.21 (citing 8 C.F.R. § 1003.1(d)(3)(i)). Rather, the BIA applies de novo review. Pet.Br.21. Courts should too.

The government counters that the BIA’s “decisions about how to structure internal [agency] review do not determine the standard of review that the courts of appeals should apply.” Resp.Br.42. That misses the point. The BIA’s position confirms, as a linguistic matter, that the phrase “findings of fact” does not encompass determinations about whether undisputed facts establish “persecution” under the law. Both Section 1252(b)(4)(B) and the BIA’s regulations use the phrase “findings of fact.” See 8 U.S.C. § 1252(b)(4)(B); 8 C.F.R. § 1003.1(d)(3)(i). It makes no sense for “what is concededly a question of law in

the BIA” to “somehow transmogrif[y] into a question of fact when the case leaves the BIA.” *Fon*, 34 F.4th at 823 (Collins, J., concurring).

The government further contends—contrary to BIA precedent—that the BIA views determinations about what constitutes “persecution” as involving questions of “judgment,” not “law,” under the BIA’s regulations. Resp.Br.43 (quoting 8 C.F.R. § 1003.1(d)(3)(ii)). What matters, though, is that such determinations unquestionably do not turn on disputed questions of “fact.”

2. Small wonder the government stops short of saying that the BIA’s “persecution” determinations are true “findings of fact,” describing them instead as “*predominantly* factual.” Resp.Br.18 (emphasis added). That description is incorrect. *Infra* 18-24. But it also cannot be squared with this Court’s precedent interpreting Section 1252, which has twice “rejected” the notion that even “a primarily factual mixed question is a question of fact.” *Wilkinson v. Garland*, 601 U.S. 209, 225 (2024); see *Guerrero-Lasprilla v. Barr*, 589 U.S. 221, 231 (2020).

The government responds that *Wilkinson* and *Guerrero-Lasprilla* are “inapposite” because those cases addressed Section 1252(a)(2)’s jurisdictional limitations, while relying on the “presumption favoring judicial review” and unique “statutory context.” Resp.Br.34-35. Not so. Even if “the statutory purpose and the constitutional concerns that influenced [the Court’s] statutory construction” of Section 1252(a)(2)(D) “are not present” under Section 1252(b)(4)(B), that “cannot justify” adopting a “different meaning” of statutory text in neighboring subsections. *Clark v. Martinez*, 543 U.S. 371, 380 (2005); see *Taniguchi v. Kan Pac. Saipan, Ltd.*, 566

U.S. 560, 571 (2012). This Court should not embrace an internally contradictory reading of Section 1252.

The government falls back on language in *Guerrero-Lasprilla* and *Wilkinson* suggesting that their “jurisdictional holdings” do not necessarily extend to standard-of-review issues. Resp.Br.35. But neither case presented any “question involving the standard of review.” *Guerrero-Lasprilla*, 589 U.S. at 228; see *Wilkinson*, 601 U.S. at 212. So neither opinion had occasion to explain how mixed questions can simultaneously be questions of law under Section 1252(a)(2)(D) but questions of fact under Section 1252(b)(4)(B). It cannot be both. Section 1252(b)(4)(B)’s text thus permits just one conclusion: The BIA’s decisions on whether undisputed facts establish “persecution” under the law are not “findings of fact” subject to substantial-evidence review.

3. Hemmed in by Section 1252(b)(4)(B)’s text, the government seizes on language added a decade later to a different part of the INA—Section 1158, the substantive provision governing asylum relief. Resp.Br.18-19 (citing 8 U.S.C. § 1158(b)(1)(B)). This argument is a red herring.

The relevant amendments to Section 1158 focused on fleshing out when corroborating evidence is—and is not—necessary to support an asylum claim. In particular, the amendments clarified that:

- “The burden of proof is on the applicant.”
- The applicant’s “testimony” can sustain that burden “without corroboration” if the “trier of fact” finds that it “is credible, is persuasive, and refers to specific facts

sufficient to demonstrate that the applicant is a refugee.”

- The “trier of fact may base a credibility determination” on “all relevant factors.”
- “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.”
- “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.”

8 U.S.C. § 1158(b)(1)(B)(i)-(iii). This, the government contends, demonstrates “Congress’s understanding” that the BIA’s “persecution” determinations “would be subject to substantial-evidence review,” given the provision’s “repeated references to the trier of fact,” “credibility assessments,” “weighing of evidence,” and “factual inferences.” Resp.Br.19. Far from it.

For starters, the IJ, not the BIA, is the “trier of fact” in removal proceedings. IJs “receive evidence” and “examine” witnesses. 8 U.S.C. § 1229a(b)(1). The BIA may “not engage in factfinding.” 8 C.F.R. § 1003.1(d)(3)(iv). So Section 1158(b)(1)(B)’s instructions to the “trier of fact”—that is, the IJ—provide no basis for deference to the BIA. *See* H.R. Rep. No. 109-72 at 167 (2005) (using “Immigration Judges” and “trier of fact” interchangeably).

Furthermore, Section 1158(b)(1)(B) governs the entire asylum-eligibility decision from beginning to end. It is thus unsurprising that the provision discusses “credibility assessments, weighing of

evidence, and factual inferences.” Resp.Br.19. Recall that an asylum applicant must show, in addition to “serious harm” rising to the level of “persecution,” a “causal connection to one of th[e] statutorily protected grounds,” and a relationship to “government action or inaction.” *Gonzalez-Arevalo v. Garland*, 112 F.4th 1, 8 (1st Cir. 2024). So the first-order task for the trier of fact is to determine “who did what, when or where, how [and] why.” *U.S. Bank*, 583 U.S. at 394.

Factual findings about these real-world events are subject to substantial-evidence review under Section 1252(b)(4)(B). Section 1158(b)(1)(B) lays out an evidentiary process for making those findings and then concluding whether or not they establish asylum eligibility, while clarifying that noncitizens must produce sufficient evidence to support their claim.¹ Section 1158(b)(1)(B)’s procedural directives about the entire asylum-eligibility decision shed no light on the proper standard of judicial review on the narrow issue whether a given set of undisputed facts demonstrates mistreatment rising to the level of “persecution” under Section 1101(a)(42).

B. The Government Overstates This Court’s Precedent And The Statutory History

The same core mistake—abstracting up from “persecution” determinations made on undisputed

¹ The government overreads Section 1158(b)(1)(B)(ii)’s references to testimony being “sufficient” to establish asylum eligibility. Resp.Br.18-19, 22, 25. That provision merely clarifies that such testimony alone can “sustain” the noncitizen’s burden “without corroboration” if it is “credible” (i.e., believable and sincere), “persuasive” (i.e., more compelling than any contrary evidence), and “sufficient” (i.e., capable of proving every element of asylum eligibility).

facts to the asylum-eligibility decision as a whole—permeates the government’s account of this Court’s cases and the statutory history. Resp.Br.20-23.

1. Citing *INS v. Elias-Zacarias*, 502 U.S. 478 (1992), the government asserts that, when Congress enacted Section 1252, “this Court had already established that administrative determinations of asylum eligibility were subject to substantial-evidence review” across the board. Resp.Br.20. But the government breezes past all the reasons why that cannot be right. Pet.Br.41-42.

While the government might think it “makes little practical sense” to break the asylum eligibility determination into its component parts, Resp.Br.39, this Court’s cases require exactly that, *U.S. Bank*, 583 U.S. at 393. The INA tracks this established principle. Section 1252(b)(4)—like the predecessor provision addressed in *Elias-Zacarias*—provides for deference to “findings of fact,” not the entire asylum-eligibility decision. See 8 U.S.C. § 1252(b)(4)(B); 8 U.S.C. § 1105a(a)(4) (1988).

Elias-Zacarias did not hold otherwise. Consistent with the then-operative statutory text, the Court applied substantial-evidence review to a “finding of fact” about the alleged “persecutors’ motives.” 502 U.S. at 483. It did not adopt an atextual rule that every aspect of the asylum-eligibility determination must be reviewed deferentially. And the government does not really believe that it did. Despite asserting that a snippet from *Elias-Zacarias* requires deference to the BIA’s entire asylum-eligibility decision, the government concedes that “interpretive” aspects of those decisions are “subject to *de novo* review,” notwithstanding *Elias-Zacarias*. Resp.Br.40.

2. For similar reasons, the government errs in asserting that Congress must have “presumed” when enacting Section 1252(b)(4) that substantial-evidence review would apply to the BIA’s “persecution” determinations. Resp.Br.20-22.

The government maintains that, before Congress enacted Section 1252(b)(4), the courts of appeals “generally” deferred to the BIA on whether undisputed facts demonstrated mistreatment qualifying as “persecution” under the law, “consistent with *Elias-Zacarias*.” Resp.Br.20-22. But the government’s cases largely address different issues, while using similarly overbroad language referring to the asylum-eligibility decision as a whole.² Plus, other pre-1996 decisions reviewed “de novo” the BIA’s determinations on “mixed questions of law and fact,” including “persecution” determinations. *Tarvand v. INS*, 937 F.2d 973, 975 (4th Cir. 1991); *see, e.g., Lazo-Majano v. INS*, 813 F.2d 1432, 1434 (9th Cir. 1987) (reviewing de novo the “persecutory character of [noncitizen’s] treatment”); *Sovich v. Esperdy*, 319 F.2d 21, 26-29 (2d Cir. 1963) (similar).

Most tellingly, the government urged this Court to grant certiorari because of “widespread and entrenched confusion” on the question presented. Cert.Resp.16. This acknowledged disarray cannot be resolved by looking to an off-base, cherry-picked

² *See, e.g., Castillo-Rodriguez v. INS*, 929 F.2d 181, 184 (5th Cir. 1991) (deferring to entire “not eligible” determination, while addressing nexus issue); *Huaman-Cornelio v. BIA*, 979 F.2d 995, 999-1000 (4th Cir. 1992) (nexus and probability of future harm); *Milosevic v. INS*, 18 F.3d 366, 370-72 (7th Cir. 1994) (credibility and probability of future harm); *Perlra-Escobar v. Exec. Off. for Immigr.*, 894 F.2d 1292, 1299 (11th Cir. 1990) (nexus).

snapshot of prior circuit caselaw. Resort to that atextual argument underscores how far the government must stray from Section 1252(b)(4)’s plain meaning to salvage its position.

By extension, the government is mistaken to suggest that Douglas and his family are asking the Court to read Section 1252(b)(4) as “*expanding*” review” of the BIA’s “persecution” determinations. Before and after enacting that provision, Congress limited substantial-evidence review to “findings of fact” made at the administrative level. *See* 8 U.S.C. § 1252(b)(4)(B); 8 U.S.C. § 1105a(a)(4) (1988). The meaning of those words has not changed—and it has never fairly encompassed the BIA’s determinations about whether undisputed facts demonstrate “persecution” under the law.

3. The government fares no better relying on subsequent decisions from this Court.

The government first cites *Nasrallah v. Barr*, 590 U.S. 573 (2020), as establishing that *Elias-Zacarias* remains “good law.” Resp.Br.23. But no one doubts *Elias-Zacarias* remains good law as to what the case actually decided. And *Nasrallah*’s holding—that “factual challenges” to orders denying relief under the Convention Against Torture (CAT) are judicially reviewable—does not control. *See* 590 U.S. at 587.

If anything, *Nasrallah*’s observation that “factual challenges to CAT orders” are reviewed for substantial evidence while “legal challenges” are reviewed de novo undercuts the government’s position. *Id.* at 581. The courts of appeals consistently recognize that the BIA’s determination about “whether a particular course of conduct” legally qualifies as “torture” must be reviewed “de novo.”

Jean-Pierre v. U.S. Att’y Gen., 500 F.3d 1315, 1321 (11th Cir. 2007); see American Gateways Br. 16-17 (collecting cases). The BIA’s determination about whether a particular course of conduct constitutes “persecution” is analogous.

The government next turns to *INS v. Orlando Ventura*, 537 U.S. 12 (2002) (per curiam). The government acknowledges that *Ventura* addressed a distinct issue—i.e., whether the ordinary-remand requirement “compelled a remand to the agency” to assess changed country conditions “in the first instance.” Resp.Br.24. And the government does not dispute that assessing the on-the-ground situation in a foreign country is a factual inquiry. Resp.Br.39. Undeterred, the government insists that *Ventura* establishes that the *entire* “asylum eligibility” determination is “primarily committed to the agency” and thus “reviewable for substantial evidence” across the board. Resp.Br.23. But as with *Elias-Zacarias*, that reading of *Ventura* violates the statutory text, this Court’s precedent, and the government’s own contrary concession. *Supra* 12-13.

Finally, the government characterizes *Garland v. Ming Dai*, 593 U.S. 357 (2021), as “emphasiz[ing] that determinations regarding past or future persecution are subject to substantial-evidence review.” Resp.Br.24. As support, the government notes the parties’ “assumption that everything [t]here turn[ed] on *questions of fact*” about “whether Mr. Dai was persecuted in the past or fears persecution in the future.” Resp.Br.24-25 (quoting *Ming Dai*, 593 U.S. at 362). But assumptions by the parties are not holdings of this Court. And on the facts of *Ming Dai*, the parties’ assumption was correct: Everything turned on whether Mr. Dai’s “later admissions”

undermining his asylum claim outweighed “his initial testimony” supporting it. 593 U.S. at 372. “Faced with conflicting evidence,” this Court explained, “a reasonable adjudicator could find”—as a factual matter—“the unfavorable account more persuasive than the favorable version.” *Id.*

Ming Dai thus involved purely factual disputes about Mr. Dai’s credibility and the underlying “circumstances surrounding” his alleged persecution. *Id.* at 365. The case provides no support for deference to the BIA’s legal determinations as to whether, accepting the “factual accuracy” of a noncitizen’s credible testimony, the undisputed facts demonstrate mistreatment rising to the level of “persecution” under Section 1101(a)(42). *Id.* at 372.

C. The Government Cannot Escape The Importance Of *Loper Bright*

In reaffirming that federal courts “must exercise independent judgment in determining the meaning of statutory provisions,” *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369, 394 (2024), reinforces that courts owe no deference to the BIA when applying Section 1101(a)(42)’s “persecution” standard to undisputed facts. *See* Pet.Br.23-29; Center for Individual Rights Br. 5-15. The government has no persuasive response.

In the government’s telling, “nothing” in *Loper Bright* “calls into question” judicial deference to administrative officials’ “fact-intensive applications of legal standards.” Resp.Br.45. That is a stretch. Yes, *Loper Bright* recognized that, “[o]n occasion,” this Court had “applied deferential review” to agency decisions about “how a broad statutory term applied to specific facts found by the agency.” 603 U.S. at 388.

But *Loper Bright* did not endorse that approach. On the contrary, the Court observed that deference on such questions “was far from consistent.” *Id.* at 388-90. And it emphasized that in many cases involving an “administrative construction” of a statutory term as applied to “particular” facts, the Court decided for itself “the proper construction of the statute.” *Id.* at 390.

The government also warns of exposing “almost all federal agencies” to “second-guessing of virtually every substantive, factbound decision other than discrete findings of historical facts.” Resp.Br.46. That concern is misplaced. All the Court need hold is that “courts must exercise independent judgment in determining the meaning” of Section 1101(a)(42)’s “persecution” standard through the process of case-by-case adjudication that this particular legal standard requires. *Loper Bright*, 603 U.S. at 394. Furthermore, “Congress has often enacted” statutes authorizing agencies “to exercise a degree of discretion” in applying the law. *Id.* at 394-95. It just did not do so here. Quite the opposite: By spelling out *other* administrative determinations that *are* entitled to deference, Section 1252(b)(4) forecloses judicial deference to the BIA’s “persecution” determinations. Pet.Br.18-23. Given the conspicuous absence of any on-point delegation of interpretive authority in the INA, deference is inappropriate under *Loper Bright*.

III. THE GOVERNMENT’S U.S. BANK ARGUMENT IS EQUALLY FLAWED

The Court can rule for Douglas and his family on even narrower grounds. Under *U.S. Bank*, de novo review is required because applying Section

1101(a)(42)’s “persecution” standard to undisputed facts primarily involves legal work, and independent judicial review on this issue is of central importance to the statutory scheme. The government responds by moving the goalposts on the first point and ignoring the second. This Court should not be persuaded.

**A. Applying The Term “Persecution”
Primarily Involves Legal Work**

The government insists that whether undisputed facts demonstrate “persecution” under the law is a primarily factual mixed question subject to deferential review under *U.S. Bank*. Resp.Br.26-32, 38-42. That contention rests on two familiar errors: The government artificially excises the crucial legal work involved in answering this mixed question, while improperly conflating it with distinct, purely factual aspects of asylum-eligibility determinations. Once those errors are set aside, the government’s *U.S. Bank* argument crumbles.

1. The government does not dispute that federal courts applying Section 1101(a)(42)’s “persecution” standard have developed numerous “auxiliary legal principles of use in other cases.” *U.S. Bank*, 583 U.S. at 395-96; see Pet.Br.34-37. The government even concedes that courts should apply de novo review when “elaborating on [Section 1101(a)(42)’s] broad legal standard.” *U.S. Bank*, 583 U.S. at 396. From there, the government tries to gerrymander around judicial decisions doing precisely that, claiming they involved “purely legal questions.” Resp.Br.40. But again, legal principles governing what constitutes “persecution” are established by applying that legal standard to particular facts, not considering the term in the abstract. *Supra* 4-5.

The Ninth Circuit’s gender-violence jurisprudence illustrates the point. In *Lopez-Galarza v. INS*, 99 F.3d 954 (9th Cir. 1996), the court concluded that repeated rapes suffered by a noncitizen qualified as “persecution,” analogizing to “the facts of [a prior] case” where a noncitizen had been “beaten, injured, raped, and enslaved.” *Id.* at 959. Relying on *Lopez-Galarza*, the court held in *Li v. Ashcroft*, 356 F.3d 1153 (9th Cir. 2004) (en banc), that a nonconsensual gynecological exam constituted “persecution,” given its “rape-like” nature. *Id.* at 1158 & n.4 (noncitizen was threatened with “forced abortion,” and her “uterus, vagina, and cervix were probed” for thirty minutes “while she resisted by kicking and screaming in fear”). Later, the Ninth Circuit applied *Li* to hold that “genital mutilation” constitutes “persecution.” *Mohammed v. Gonzales*, 400 F.3d 785, 796 (9th Cir. 2005). And then, drawing on these decisions and another line of cases holding that “attempts to commit” murder or kidnapping can “constitute persecution,” the court held in *Kaur v. Wilkinson*, 986 F.3d 1216 (9th Cir. 2021), that a noncitizen suffered persecution when she narrowly escaped a “gang” of men who “dragged her into the street and ripped off her clothes with the intent of raping her.” *Id.* at 1223, 1227. From that case-specific application of existing precedent emerged the legal rule that “attempted rape almost always constitutes persecution.” *Id.* at 1224 & n.6.

The foregoing is a textbook example of how courts “expound on the law” when deciding whether a given set of undisputed facts establishes “persecution” under the law. *U.S. Bank*, 583 U.S. at 396. Try as it might, the government cannot escape this powerful support for de novo review.

2. The government attempts to stack the deck further against de novo review by conflating “persecution” determinations with distinct, purely factual aspects of the asylum-eligibility inquiry. Specifically, the government says that disputes about a “persecutor’s motives,” “credibility determinations,” “country ‘conditions,’” and “predictive judgments about the likelihood of future persecution” are “virtually always implicated in persecution decisions.” Resp.Br.38-39. This argument misapprehends the question presented.

This Court granted certiorari to decide the narrow question “[w]hether a federal court of appeals must defer to the BIA’s determination that a given set of *undisputed* facts does not demonstrate mistreatment severe enough to constitute ‘persecution’ under 8 U.S.C. § 1101(a)(42).” Pet.Br.i (emphasis added). Motive, credibility, country conditions, and the probability of future harm are all purely factual issues. *See, e.g., W.G.A. v. Sessions*, 900 F.3d 957, 965-66 (7th Cir. 2018) (motive); *Ye v. Lynch*, 845 F.3d 38, 42 (1st Cir. 2017) (credibility); *Nako v. Holder*, 611 F.3d 45, 49 (1st Cir. 2010) (country conditions); *Hui Lin Huang v. Holder*, 677 F.3d 130, 134 (2d Cir. 2012) (probability of future harm). And they are all irrelevant to determining whether undisputed facts demonstrate mistreatment rising to the level of “persecution.”

Specifically, a persecutor’s motives go to whether the alleged persecution was “on account of” a protected ground. 8 U.S.C. § 1101(a)(42). When the facts are undisputed, the noncitizen’s credibility has been resolved. And neither overall country conditions nor the probability of future harm affects whether *past* mistreatment suffered by a *particular* noncitizen

meets Section 1101(a)(42)'s "persecution" standard. By conflating "persecution" determinations made on undisputed facts with other purely factual issues, the government defies *U.S. Bank*'s command that "each" individual "component part[]" of an asylum-eligibility decision must be reviewed "under the appropriate standard of review." 583 U.S. at 393.

The government says little about the component part of asylum-eligibility decisions at issue—i.e., whether the undisputed facts of this case demonstrate mistreatment legally qualifying as "persecution." According to the government, deciding that issue here is primarily factual because it requires "weighing evidence and drawing inferences" from undisputed facts, including that Douglas's "half-brothers were shot" and Douglas himself "was threatened several times" at gun point, whereas his "mother and sister were never targeted," and Douglas and his family "lived in peace for years in other parts of El Salvador." Resp.Br.32, 38. True enough. But that analysis still helps delimit legal principles refining Section 1101(a)(42)'s "persecution" standard, such as the import of: (1) "[v]iolence or threats to one's close relatives," *Baharon v. Holder*, 588 F.3d 228, 232 (4th Cir. 2009); (2) "credible threats" made "in person, and with a weapon," *Sok v. Mukasey*, 526 F.3d 48, 54 (1st Cir. 2008); and (3) the ability to "escape the notice of the persecutors by concealing" oneself, *Muhur v. Ashcroft*, 355 F.3d 958, 960 (7th Cir. 2004). That is "legal work." *U.S. Bank*, 583 U.S. 398.

3. The government falls back on analogizing "persecution" determinations to other mixed questions reviewed deferentially, relying on *Bufkin*, *Wilkinson*, and *U.S. Bank* itself. Resp.Br.26-28. Those comparisons miss the mark.

Bufkin addressed the standard of review for determinations about “whether ‘there is an approximate balance of positive and negative evidence’” on a given record. 604 U.S. at 381-82. Unlike Section 1101(a)(42)’s “persecution” standard, the “approximate balance” test permits no further “elaborat[ion]”; the task is simply to decide whether, on a given record, there is an evidentiary tie. *Id.* Indeed, *Bufkin* acknowledged that this inquiry might be “best characterized” as a pure “factual” finding. *Id.* at 382 & n.3.

Wilkinson stated that “deferential” review applies to determinations about whether a “noncitizen’s removal would result in ‘exceptional and extremely unusual hardship’ to a U.S.-citizen or permanent-resident family member.” 601 U.S. at 211-12. Projecting the uncertain future impact on family members is inescapably predictive—and thus “primarily factual.” *Id.* at 225. Not so for determining whether a specific set of undisputed past events demonstrates mistreatment legally qualifying as “persecution” under Section 1101(a)(42). And unlike “everyday terms” such as “hardship,” “exceptional,” and “unusual,” *id.* at 232 (Alito, J., dissenting), “persecution” is a legal term of art that requires case-by-case elaboration, *supra* 4-5.

Finally, the mixed question in *U.S. Bank* was whether, “when two particular persons entered into a particular transaction, they were (or were not) acting like strangers.” 583 U.S. at 397-98. “Precious little” legal work is involved in applying that “arm’s-length test,” “as shown by judicial opinions addressing the concept,” which “have never tried to elaborate on the established idea of a transaction conducted as between strangers.” *Id.* at 398. But court after court

has elaborated on Section 1101(a)(42)’s “persecution” standard. Pet.Br.35-37.

4. Far better comparisons include decisions on fair use, antitrust conspiracies, overtime benefits, and patent validity. Pet.Br.39-40; *see Google LLC v. Oracle Am., Inc.*, 593 U.S. 1, 24 (2021); *United States v. Gen. Motors Corp.*, 384 U.S. 127, 141 n.16 (1966); *Icicle Seafoods, Inc. v. Worthington*, 475 U.S. 709, 714 (1986); *Graham v. John Deere Co. of Kansas City*, 383 U.S. 1, 17 (1966). The government claims that these statutory determinations are different because they are “open-ended” and “rooted in judicially derived principles that require case-by-case elucidation.” Resp.Br.41. That is incorrect.

Section 1101(a)(42) is *also* an “open-ended statutory inquir[y]” that “require[s] case-by-case elucidation.” Resp.Br.41. Just as courts addressing fair use have held that certain “kinds of market harms” are “not the concern of copyright,” *Google*, 593 U.S. at 24, courts addressing “persecution” have held that certain kinds of harms are not the concern of asylum protections, *see* Pet.Br.36-37. Like with fair use and these other statutory determinations, case-specific applications of Section 1101(a)(42)’s “persecution” standard “provide general guidance for future [asylum] cases.” *Google*, 593 U.S. at 24.

As for the government’s purported distinction between “judicially derived” and pure statutory standards, it concededly does not apply to the Fair Labor Standards Act’s exemption from overtime benefits at issue in *Icicle Seafoods*. Resp.Br.41-42 & n.3. And the government is wrong to say that *Icicle Seafoods* involved a purely legal “dispute about the ‘legal standard’ to apply the undefined term ‘seaman.’” Resp.Br.42 n.3. The “question of law” at

issue was whether, on the facts of the case, employees’ “*particular activities* excluded them from the overtime benefits of the FLSA.” *Icicle Seafoods*, 475 U.S. at 714 (emphasis added). This case likewise calls for de novo review.

B. Independent Judicial Review Is Critically Important To The Statutory Scheme

De novo review also applies here given the “special importance” of federal courts’ role in giving meaning to Section 1101(a)(42)’s “persecution” standard. *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 503 (1984); *see* Pet.Br.37-38. The government does not respond directly to this additional justification for independent judicial review.

The government attacks a purported “comparison” between the BIA’s “persecution” determinations and “constitutional inquiries like probable cause,” noting that the “strong presumption” of de novo review for “constitutional questions” does not apply to “creatures of statute.” Resp.Br.41-42 (quoting *Bufkin*, 604 U.S. at 384-85). But Douglas and his family never claimed the benefit of that presumption. Rather, their point is that the legal standard for “persecution”—a key feature of refugee status—is the cornerstone of statutory asylum protections. Pet.Br.37-38. De novo review is therefore warranted to ensure “a defined ‘set of rules’” to govern this life-and-death inquiry. *Ornelas v. United States*, 517 U.S. 690, 697-98 (1996).

Next, the government suggests that deference to the BIA will help ensure fair and consistent application of Section 1101(a)(42)’s “persecution” standard. Resp.Br.46-47. But deference invites “varied results,” not consistency. *Ornelas*, 517 U.S.

at 697-98.³ Indeed, as the Department of Justice recently confirmed, the BIA’s decisions have suffered from considerable “inconsistency.” 90 Fed. Reg. 15,525, 15,527 (2025). The courts of appeals, too, have lamented the BIA’s tendency to reach “radically different results” on materially identical facts. *Uddin v. U.S. Att’y Gen.*, 870 F.3d 282, 291 (3d Cir. 2017); *see* Immigration Law Professors Br. 16-17 (collecting criticisms). And in this case, 51 former IJs and BIA members urge this Court to require de novo review of the BIA’s “persecution” determinations, warning—based on firsthand experience—that deference “perpetuates inconsistent outcomes and leads to confusion.” Former Executive Office for Immigration Review Judges Br. 23.

The government also tries to leverage the number of asylum claims addressed each year at the agency level. Resp.Br.39. This policy argument cannot justify adopting an erroneous standard of review. Regardless, it inflates the number of cases affected by the question presented. Out of tens of thousands of cases resolved by the courts of appeals in 2024, circuit decisions including both the words “asylum” and “persecution” numbered in the hundreds, according to a Westlaw search. And that figure sweeps in all asylum decisions, not just those assessing whether undisputed facts establish “persecution.” A more developed body of law on that issue will also facilitate

³ Case-in-point: The government’s mystifying attempt to reconcile the treatment of death threats in *N.L.A. v. Holder*, 744 F.3d 425 (7th Cir. 2014), and in this case. The government argues that *N.L.A.* involved “the actual killing of one family member,” Resp.Br.47, whereas this case involves the *attempted* killing of two family members, who miraculously survived after each being shot six-plus times, Pet.App.4a.

“faster and more accurate” decisionmaking. Former Executive Office for Immigration Review Judges Br. 33; *see* Pet.Br.49.

Finally, the government asserts that five circuits’ consistent application of substantial-evidence review “has not stopped” those courts from developing “legal principles” expounding on Section 1101(a)(42)’s “persecution” standard. Resp.Br.41. But deference to the BIA has made that job harder. It precludes courts from establishing legal principles except when overruling the BIA’s most egregious mistakes. Not only does that stunt the development of principles addressing ordinary BIA errors, but it also hamstring courts’ ability to *limit* the breadth of Section 1101(a)(42)’s “persecution” standard. After all, appellate rulings upholding BIA decisions on substantial-evidence review conclude only that the BIA decided the case reasonably, not correctly. Unwarranted deference thus distorts how Section 1101(a)(42)’s all-important “persecution” standard is interpreted and applied in all directions.

CONCLUSION

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

Respectfully submitted,

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