

**SUPREME COURT
OF THE UNITED STATES**

IN THE SUPREME COURT OF THE UNITED STATES

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DOUGLAS HUMBERTO URIAS-ORELLANA,)
ET AL.,)
 Petitioners,)
 v.) No. 24-777
PAMELA BONDI, ATTORNEY GENERAL,)
 Respondent.)

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1 P R O C E E D I N G S

2 (11:48 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear
4 argument next in Case 24-777, Urias-Orellana
5 versus Bondi.

6 ORAL ARGUMENT OF NICHOLAS ROSELLINI
7 ON BEHALF OF THE PETITIONERS

8 MR. ROSELLINI: Thank you, Mr. Chief
9 Justice, and may it please the Court:

10 Deciding whether undisputed facts
11 qualify as persecution under the law involves
12 legal interpretation, not fact finding. Even
13 the BIA agrees. It treats the issue as a
14 question of law subject to de novo review.
15 That should not change when a case reaches
16 federal court.

17 Indeed, the government concedes that
18 courts must exercise independent judgment when
19 establishing auxiliary legal principles for use
20 in future cases. They concede that courts owe
21 no deference in interpreting the INA's
22 persecution standard. And courts have
23 repeatedly established auxiliary legal
24 principles on things like sexual violence,
25 religious persecution, economic deprivation,

1 and beyond.

2 But courts did not establish those
3 principles by pondering the term "persecution"
4 in the abstract. They interpreted the law by
5 applying the persecution standard to particular
6 sets of undisputed facts.

7 The government wants you to hold that
8 de novo review applies anytime a case
9 supposedly would make new law in some sense but
10 substantial evidence review when it wouldn't.
11 There's no principled way to draw that line,
12 and this Court has never tried in similar
13 circumstances.

14 For instance, de novo review applies
15 to all fair use determinations made on
16 undisputed facts and all antitrust
17 determinations made on undisputed facts, not
18 just some special subset. The government's
19 contrary rule here would invite further
20 confusion and collateral litigation.

21 Better instead to just require de novo
22 review and let judges get to judging. The
23 courts of appeals are well equipped for the
24 job. Several of them already have experience
25 reviewing de novo the B -- the BIA's

1 persecution determinations, and they generally
2 review the analogous question whether
3 undisputed facts demonstrate torture --
4 demonstrate torture under the Convention
5 Against Torture. The sky has not fallen.

6 Under both the INA's text and U.S.
7 Bank, courts should decide for themselves
8 whether undisputed facts establish persecution
9 under the law. Section 1252(b) explicitly
10 provides for legal deference on closely related
11 issues but not this one. And decades of
12 experience confirms that courts perform crucial
13 legal work in applying the INA's persecution
14 standard. Deference to the BIA is unwarranted.

15 I welcome the Court's questions.

16 JUSTICE THOMAS: Elias-Zacarias was
17 also a persecution case, and that was reviewed
18 deferentially. How is this different?

19 MR. ROSELLINI: Because Elias-Zacarias
20 concerned a different element of the asylum
21 eligibility analysis. The -- Elias-Zacarias,
22 the disputed issue there was about
23 the persecutor's subjective motive, their
24 intent. That is a classic pure question of
25 fact. And so Elias-Zacarias was absolutely

1 right to review that factual determination for
2 substantial evidence.

3 The statute before the Court in
4 Elias-Zacarias, which was the predecessor to
5 Section 1252(b)(4), also -- it didn't say the
6 asylum eligibility determination across the
7 board. It applied only to findings of fact.
8 And that's what this statute says as well. So
9 we think the government is just over-reading
10 that decision. And the government doesn't
11 really --

12 JUSTICE SOTOMAYOR: I think you may be
13 under-reading it. There was no factual dispute
14 in that case. Everyone agreed on what the
15 guerrillas said to the petitioner. There was
16 no dispute about what was said or what
17 happened. Instead, the question was whether
18 those undisputed facts met the standard of
19 persecution "because of" political opinion. So
20 I don't see how that's not a mixed question of
21 law and fact and mostly a factual question.

22 MR. ROSELLINI: No, Justice Sotomayor.
23 The -- the dispute in that case was about
24 whether the -- as you said, was whether the
25 persecution was done on account of the

1 non-citizen's political opinion or something
2 else. That is a question about what was in --

3 JUSTICE SOTOMAYOR: But there was no
4 dispute about the facts.

5 MR. ROSELLINI: The --

6 JUSTICE SOTOMAYOR: What was said was
7 undisputed. And so the question was did that
8 meet the level of "because of".

9 MR. ROSELLINI: No, Justice Sotomayor.
10 The -- the facts of the case, what was said,
11 what was done, as Justice Gorsuch pointed out
12 in the earlier argument, subjective intent is
13 something that you infer from facts on the
14 ground. So, in a murder case, you might know
15 exactly what happened, who showed up when, who
16 fired first. But I don't think anyone would
17 say that the facts are undisputed in that
18 murder case if we haven't figured out whether
19 the defendant had the intent to kill or not.
20 And that was the same issue in Elias-Zacarias.

21 JUSTICE SOTOMAYOR: So what's
22 different between what was said or done is
23 undisputed in this case, what he was told, and
24 the question is, did he have a fear for his
25 life? How is that any different from -- than

1 what happened in Elias-Zacarias?

2 MR. ROSELLINI: Because that's
3 actually not the question in this case. This
4 is a -- this is a past persecution case.
5 The -- under the INA, a non-citizen is
6 presumptively eligible for asylum if they have
7 suffered persecution in the past. It's not
8 this forward-looking inquiry about whether they
9 have a well-founded fear of persecution going
10 forward. That's a -- that's a different kind
11 of inquiry. And I agree with Your Honor that
12 it goes to -- it goes to their state of mind.
13 It involves the calculation of a future
14 probability.

15 And so the case for a substantial
16 evidence review would be much stronger there.
17 But, here, where -- where -- the facts of what
18 happened to my client are undisputed. The --
19 the immigration judge took his testimony as
20 credible and true and found that the -- that
21 the death threats he experienced were -- were
22 indeed credible and menacing but nevertheless
23 held that, under the law, they did not rise to
24 the level of persecution.

25 CHIEF JUSTICE ROBERTS: Well, but you

1 just said they involve credibility findings. I
2 mean, they're the sort of findings that we --
3 we typically leave to a district court or
4 another fact finder involving credibility,
5 weighing of facts, and all that sort of thing,
6 to -- to reach a particular determination. It
7 seems to me a prototypical case for the BIA.

8 MR. ROSELLINI: No, Your Honor. First
9 of all, the BIA doesn't view it that way. If
10 this were all about, you know, determining
11 whose -- whose testimony to believe or not,
12 figuring out what happened, deference would be
13 owed to the immigration judge, and the BIA
14 would do the same. That's not how the BIA
15 views this issue.

16 And the reason for that is credibility
17 is not in dispute here. My client was found
18 credible. Whenever you have a set of
19 undisputed facts, credibility has been resolved
20 one way or the other. So we know exactly what
21 happened to my client, and the sole dispute in
22 this case is what is the legal effect of those
23 events. Did it qualify as -- as "persecution"
24 within the meaning of Section 1101(a)(42), or
25 did it not? That boils down to a legal

1 inquiry.

2 JUSTICE JACKSON: So, if I agree with
3 you that we're talking about a question of law
4 to the extent that what is at issue here is the
5 application of the persecution standard to a
6 known set of facts, all right, I guess what I
7 don't understand about your argument is why the
8 statute doesn't prescribe the standard of
9 review in this situation.

10 I appreciate that you say in your
11 brief that you read (c), which definitely
12 requires deference to certain legal
13 determinations, you say, but this is not one of
14 them. And I guess I don't understand that.

15 The -- the language of (c) says a
16 decision that an alien is not eligible for
17 admission to the United States is conclusive
18 unless manifestly contrary to the law. And in
19 this case, I understood the agency to have
20 determined that your client was not eligible
21 for admission because he had not satisfied the
22 requirements for asylum. So it seems to me to
23 be heartland (c), and, therefore, the statute
24 tells us what the standard of review is
25 supposed to be.

1 MR. ROSELLINI: No, Your Honor, (c) is
2 about eligibility for admission. That's a
3 distinct inquiry for eligibility for asylum.

4 JUSTICE JACKSON: I don't think so.
5 Help me to understand that. I mean, it seems
6 to me that there are different grounds for
7 admission, and one of them would be because you
8 satisfied the asylum criteria, and that was
9 what your client was trying to do.

10 So what Congress, I think, is covering
11 here by this broader scope of review or
12 standard of review paragraph is all the kinds
13 of determinations that the agency would need to
14 make related to the eligibility for admission.
15 This is a subset of that.

16 MR. ROSELLINI: No, Justice Jackson.
17 I mean, number one, the government has not made
18 this argument. They've conceded that (c) and
19 (d) do not apply. They do not capture this
20 case --

21 JUSTICE JACKSON: I understand. But
22 I'm not the government. I'm reading the
23 statute.

24 MR. ROSELLINI: Fair -- fair enough,
25 Justice Jackson.

1 JUSTICE JACKSON: And my question is
2 why does (c) -- it seems to me that when you
3 look at this provision 4, it seems as though
4 Congress was really trying to cover the
5 waterfront of determinations that the agency
6 makes regarding admissibility.

7 I mean, it says, in terms of telling
8 the courts what you're supposed to do relative
9 to what the agency has determined, it says look
10 at the administrative record, only the record
11 that was before the agency.

12 It says all of their findings of fact
13 are conclusive, which I agree with you this --
14 there's no finding of fact at issue here. It
15 says their determinations about whether or not
16 this person is eligible for admission is also
17 conclusive as -- unless it violates the law.
18 That's the matter-of-law provision.

19 They even go so far as to instruct the
20 courts about the agency's determination with
21 respect to the availability of corroborating
22 evidence. I mean, Congress was really trying
23 to nail it down in terms of what courts are
24 supposed to do.

25 So I guess I'm -- I'm worried about

1 looking at (c) and treating it so narrowly that
2 we're suggesting that Congress somehow carved
3 out asylum determinations and did not mean for
4 everything the agency is saying regarding the
5 determination of eligibility for admission to
6 be included.

7 MR. ROSELLINI: So I'll -- I'll start
8 with what I agree with in what Your Honor just
9 said, that we do think Section 1252 establishes
10 a reticulated scheme for judicial review that
11 was meant to be comprehensive or -- or close to
12 it.

13 Where I disagree respectfully with
14 Your Honor is that admission somehow
15 encompasses asylum. It does not.

16 JUSTICE JACKSON: But don't you have
17 then the burden if you agree with me with the
18 first part of establishing that Congress
19 intended to carve out asylum and not have it be
20 covered by this?

21 MR. ROSELLINI: Yes, I do, but I think
22 we've shown that because, again, in (D), in
23 1252(b)(4)(D), it carves out entitlement to
24 asylum, the second step of the asylum
25 determination, but it doesn't say anything

1 about -- about the first step.

2 And, again, (c) -- and -- and perhaps
3 we just -- we just disagree on this, but
4 admission is a distinct inquiry from -- from
5 asylum.

6 JUSTICE JACKSON: I understand. Isn't
7 that the first step? That's the first step,
8 and then they go to the second step in (D).

9 MR. ROSELLINI: No, Your Honor,
10 that's -- that's incorrect. You do not need to
11 be admissible to be eligible for asylum. Those
12 are -- those are distinct statuses. My clients
13 have conceded removability, they've conceded
14 they were not admissible, but they are claiming
15 nevertheless that they are eligible for and
16 ultimately entitled to asylum.

17 Those are distinct inquiries, and,
18 again, I understand Your Honor is not the
19 government, but I think that is why the
20 government to their credit did not make this
21 argument because that -- that's well
22 established in this Court's cases.

23 JUSTICE GORSUCH: To be fair -- to be
24 fair, neither side made that argument, right, I
25 mean, that -- that that's applicable. You

1 instead appealed to the background rule that
2 questions of law are for the court to decide de
3 novo, right?

4 MR. ROSELLINI: That -- that's
5 correct. But we think the inference --

6 JUSTICE GORSUCH: Okay. All right.
7 Okay. Good enough.

8 MR. ROSELLINI: Fair enough.

9 JUSTICE GORSUCH: I wonder why you
10 didn't make more of Elias-Zacarias. The Court
11 there said -- and I -- I -- I take your point
12 that the Court there said the finding of
13 causation could not be reviewed except for --
14 except as a finding of fact.

15 But the Court also said on page 481 it
16 can be reversed only if the evidence presented
17 by Elias-Zacarias was such that a reasonable
18 fact finder would have to conclude that the
19 requisite fear of persecution existed.

20 That's kind of the traditional
21 standard we apply when reviewing jury verdicts.
22 We take the light -- the facts in the light
23 most favorable to the victor and we assess
24 whether, as a matter of law, any reasonable
25 fact finder could make the conclusion that the

1 jury made.

2 Elias-Zacarias seems to suggest the
3 same standard -- at least in this sentence
4 seems to suggest the same standard applies
5 under the INA.

6 Is that your position?

7 MR. ROSELLINI: No. We -- we disagree
8 with that, Your Honor, because, again, that --
9 that sentence you just read from Elias-Zacarias
10 is correct as to what that case was -- was
11 about, this inquiry into causation and to the
12 subjective state of mind of the persecutor and
13 whether the non-citizen feared --

14 JUSTICE GORSUCH: Why wouldn't -- why
15 wouldn't we apply that same standard under the
16 INA? So we take the facts. Here, they're
17 undisputed. We take them as given. And we ask
18 whether any reasonable fact finder could
19 conclude that that was persecution as a matter
20 of law.

21 MR. ROSELLINI: Be --

22 JUSTICE GORSUCH: Why wouldn't that be
23 the -- why wouldn't -- if we're going to do de
24 novo legal review, as we -- why wouldn't that
25 be the standard we would apply?

1 MR. ROSELLINI: Because, for example,
2 I'll analogize this case to -- to fair use or
3 antitrust conspiracies, the -- which often go
4 to jury verdicts like it did in -- in Google
5 versus Oracle, in that instance, Your Honor is
6 correct the -- the reviewing court would
7 construe the record in favor of the verdict.

8 But it would not then ask whether any
9 reasonable fact finder could have reached the
10 result rendered by the jury. It would review
11 the determination de novo, and that's because
12 the inquiry involved in those instances,
13 despite being record-intensive, you have to
14 look at, you know, the particular facts of the
15 case, as this Court did at length in Google
16 versus Oracle, for example, it's still a
17 fundamentally legal inquiry or at least a
18 primarily legal inquiry under U.S. Bank.
19 And -- and we know that because, as, again,
20 decades of judicial experience --

21 JUSTICE GORSUCH: Well, but the -- the
22 legal inquiry again with juries, it is a legal
23 inquiry, but the inquiry is as I've described
24 it. It isn't do we think this amounts to on
25 our own. That's usurping the fact finding

1 function we say of the jury.

2 So we take all the evidence in the
3 light most favorable and we say could any
4 reasonable jury conclude those facts are
5 enough.

6 MR. ROSELLINI: Respectfully, Your
7 Honor, no, you do not do that in the fair use
8 context, in the antitrust context, in Icicle
9 Seafoods, where the question was whether the
10 particular activities of a group of workers
11 qualified them as seamen under the Fair Labor
12 Standards Act.

13 JUSTICE GORSUCH: I'm pretty familiar
14 with the antitrust context, and that's exactly
15 how you review jury verdicts in antitrust
16 cases.

17 MR. ROSELLINI: The -- the -- the --
18 the ultimate question of whether an antitrust
19 conspiracy existed, whether there was
20 anticompetitive conduct, that is ultimately
21 reviewed de novo.

22 JUSTICE GORSUCH: Viewed in the light
23 most favorable to the jury verdict, could
24 someone conclude this violates Section 2, could
25 this violate Section 1, that's exactly how we

1 proceed.

2 MR. ROSELLINI: I -- I don't believe
3 so, Your Honor. In Google -- Google versus
4 Oracle, I mean, that one, that's a decision
5 from this Court, held the exact opposite. It
6 said we do not ask whether any reasonable jury
7 could find that there was fair use. We
8 determine -- we're -- we're construing all of
9 the subsidiary facts in favor of the verdict,
10 but as to the ultimate question of whether
11 those facts demonstrate fair use under the law,
12 the Court did not ask whether any reasonable
13 jury could have found fair use. It asked do
14 we, exercising independent judgment, find fair
15 use.

16 JUSTICE GORSUCH: Why didn't you make
17 that as a backup argument?

18 MR. ROSELLINI: Because I think that's
19 what the First Circuit essentially did in this
20 case. It said we're taking the facts as given
21 and we're reviewing the BIA's interpretation of
22 the law for reasonableness. That's -- and
23 that's the inquiry that we are asserting in
24 this context is incorrect because the
25 underlying question is a primarily legal one

1 that should be reviewed de novo by a reviewing
2 court.

3 That's why the BIA -- the BIA itself
4 under -- I think under that reasoning should be
5 deferring to -- to the IJ on -- on this
6 question. The IJ is the one who sat through
7 the evidence, they've heard the testimony in
8 the record, they're closest to the facts.
9 That's an inquiry that, you know, under U.S.
10 Bank, would normally -- would say, if this is a
11 factual inquiry or -- or a primarily factual
12 inquiry, we should defer to the -- to the fact
13 finder.

14 The BIA does not do that. It
15 recognizes that the inquiry is primarily legal
16 and it warrants exercise of independent
17 judgment by the BIA as the appellate body and
18 the --

19 JUSTICE KAVANAUGH: It's primarily --
20 oh, go ahead.

21 JUSTICE KAGAN: Putting aside what the
22 BIA thinks, why is this primarily legal? If I
23 understand the question here, we have this word
24 "persecution," and the question is how do we
25 apply it to certain threats. And there's a

1 legal rule that says, well, it can -- a threat
2 can be persecution but only if it's menacing
3 enough to cause actual harm. And that's the
4 legal rule. A threat can be persecution but
5 only if it's menacing enough to cause actual
6 harm.

7 Now what's going to happen in this
8 case is we're going to have to look at all this
9 evidence, all these facts, and decide whether
10 these threats were indeed that level of
11 menacing, and that sounds like really weighing
12 evidence to me. That sounds really factual.

13 MR. ROSELLINI: So we -- we disagree
14 with that, Your Honor, and I -- I think for --
15 for two primary reasons. I think the
16 persecution inquiry in itself, persecution,
17 that's not a commonplace word like are two
18 people acting as strangers like in U.S. Bank or
19 are people going to have a hardship like
20 they -- like in Wilkinson. It's -- it's --
21 it's a term of art, it's the product of a
22 treaty that this country signed.

23 JUSTICE KAGAN: We're not -- we're
24 not, though, going straight from the word
25 "persecution." We, in fact, do have what U.S.

1 Bank might have thought of as a auxiliary legal
2 principle, and that auxiliary legal principle
3 is it counts as persecution if the threat is
4 sufficiently menacing to cause actual harm.

5 Now the question in this case doesn't
6 actually have to do with whether that legal
7 principle is right or wrong, should be changed
8 or not. The question in this case is just were
9 these threats that level of menacing, and
10 that's really factual.

11 MR. ROSELLINI: So I think just one --
12 one quibble with the -- with the question, Your
13 Honor. We actually do dispute the propriety
14 of -- of that legal rule. It's not current --
15 it's not presently before the Court.

16 But, when we were stuck --

17 JUSTICE KAGAN: Okay. But, as -- as
18 this case comes to us, that legal rule is that
19 legal rule.

20 MR. ROSELLINI: To an -- to an
21 extent --

22 JUSTICE KAGAN: And then I'm -- I'm
23 just sort of thinking then you're --

24 MR. ROSELLINI: Yeah.

25 JUSTICE KAGAN: -- saying we have all

1 these masses of evidence of what the threats
2 were and who made them and, you know, how
3 serious they were. I don't mean to belittle
4 that. That's an important question. But it's
5 a factual question.

6 MR. ROSELLINI: We disagree with that,
7 Your Honor, because --

8 JUSTICE KAGAN: I mean, it's a
9 primarily factual question. You're obviously
10 applying law to a set of facts, but what you're
11 going to be doing in the way that the U.S. Bank
12 opinion lays it out is really getting into the
13 nitty-gritty of what the testimony is about
14 what happened.

15 MR. ROSELLINI: That -- I don't --
16 that's true to an extent, but I think the same
17 thing is true in the fair use case. I mean,
18 this Court's opinion in Google versus Oracle
19 was looking at the nature of declaring code.
20 It got extremely in the weeds, credit to
21 Justice Breyer for doing that, but it -- it
22 still involved like any mixed question is going
23 to involve a close look at the factual record.

24 But I think what the inquiry in U.S.
25 Bank calls for is asking, number one, is this

1 standard something that people have a -- have
2 an ordinary common understanding of? I think
3 the answer to that is no.

4 And in addition to that, in applying
5 this standard, is the stock judicial job just
6 to say, oh, persecution, let's look at the
7 facts and determine whether it's persecution?
8 That's not what's happened in the lower courts.
9 And the government doesn't dispute this. Lower
10 courts have developed a slew of auxiliary legal
11 principles related to threats, as Your Honor
12 pointed out, but in a whole bunch of different
13 areas, religious persecution, sexual violence.
14 I -- I -- I -- I could go on.

15 And what U.S. Bank says is that when
16 that is the case, you don't necessarily look at
17 any given case that comes before -- before the
18 court and say, look, is this -- is this a
19 boring case that's kind of, you know, run of
20 the mill, or is this a case that raises some
21 really interesting new issue? No, when it --
22 when the U.S. -- when courts are developing
23 auxiliary legal principles, all decisions about
24 that mixed question are reviewed de novo. We
25 don't look at a fair use case and say, oh, is

1 this a -- is this a boring one or is this a
2 really interesting one presenting novel issues?
3 And I think that's the -- the problem with the
4 government's position.

5 I do want to say one thing, to the
6 government's credit, they've made, I think, a
7 significant concession here that departs from
8 the status quo in a lot of circuits, is that
9 they have at least acknowledged that courts owe
10 no deference to the BIA in interpreting, you
11 know, the law at least in some kind of purely
12 legal sense and in developing these auxiliary
13 legal principles.

14 And I think were the Court to announce
15 that and reaffirm it, you know, with -- with a
16 megaphone, I think that would do a lot of good
17 and it would change how a lot of circuits
18 address these cases. And we think, in our
19 case, it would warrant a remand to assess
20 whether this requirement of --

21 JUSTICE ALITO: Mr. Rosellini, do you
22 think that in every instance in which a legal
23 standard, no matter how -- no matter the -- the
24 degree of concreteness of the legal standard is
25 applied to a set of facts, that the ultimate

1 determination is a legal question?

2 MR. ROSELLINI: No, Justice Alito, we
3 don't think that. We think that under this
4 particular statute, when -- when that inquiry
5 looks a lot like an admission eligibility
6 decision or an asylum entitlement decision but
7 isn't one of those like we have here, that's a
8 situation where, yes, the -- the application of
9 law to fact would be de novo.

10 JUSTICE ALITO: My -- my question is
11 similar to Justice Kagan's. So the definition
12 of "persecution" that was applied by the IJ
13 here is -- based on First Circuit precedent, is
14 that it must add up to more than ordinary
15 harassment, mistreatment, or suffering.

16 You may have a set of historical facts
17 that are undisputed, but determining whether
18 they add up, whether the totality of those
19 facts satisfies that standard sure looks to me
20 like primarily a factual question. Why is it
21 not?

22 MR. ROSELLINI: Because, when courts
23 make that decision, they are building out a
24 decision -- a body of decisional law that
25 guides future cases. If you look at the First

1 Circuit's decision in this case, the IJ's
2 decision in this case, they are analogizing to
3 cases that came before.

4 JUSTICE ALITO: But that would be true
5 in a vast majority of situations. Do you think
6 the determination of whether -- of negligence
7 is -- is a -- is a legal standard?

8 MR. ROSELLINI: No, Your Honor. We --
9 we would agree that negligence would be
10 something that's reviewed deferentially. But
11 I -- I think there's actually a helpful --

12 JUSTICE ALITO: Yeah, but every case
13 where negligence is found or not found
14 builds -- could be said to build out a body of
15 precedent about whether negligence was -- was
16 shown. Why isn't this similar to that?

17 MR. ROSELLINI: Because I think
18 negligence, number one, the inquiry there is
19 basically what should a person have done given
20 the circumstances. The light was red. Should
21 they have braked or accelerated? People have
22 an ordinary sense of that. I think the
23 negligence example is a helpful one because you
24 can contrast it with the duty-of-care inquiry,
25 which -- and as -- you know, as this Court well

1 knows, duty is traditionally for the judge;
2 negligence is for the jury. And in the duty
3 context, you do have to get immersed into the
4 record to establish whether there was a duty of
5 care. But, if you ask someone on the street,
6 hey, was there a duty of care in this
7 circumstance or that, it's a -- they're not
8 going to be able to answer that as readily.

9 And courts build out, again, a host of
10 legal principles for different kinds of
11 situations in the duty-of-care context. And
12 that's what happens when courts apply the
13 persecution standard. They're taking a term of
14 art that's not commonly understood. They're
15 building out these legal principles that courts
16 can then apply and flesh out. Yes, at this
17 kind of, you know, medium-high level of
18 establishing auxiliary legal principles, as
19 Justice Kagan was explaining, but then also
20 refining what those auxiliary principles
21 actually mean on the ground. What does it mean
22 for a death threat to be sufficiently menacing
23 to qualify as persecution or not?

24 And, again, that is why the decisions
25 in this case, like in so many others, are

1 looking to these prior decisions to figure out
2 what is the mode of analysis that is applicable
3 to these facts. And if you -- if you go to --
4 many circuits, in fact, to help their staff
5 attorneys and law clerks, have these very
6 detailed outlines explaining prior -- decisions
7 that came before so that it's -- it helps them
8 assist their judges in making correct and
9 efficient decisions that are -- can be squared
10 with the cases that came before them.

11 But the irony in this context is that
12 a lot of those decisions, the ones that are at
13 least denying relief, they're not holding that
14 the BIA's decision was correct as a matter of
15 law. They're just saying that it was
16 reasonable.

17 So you have courts, you have the
18 agency, they're all looking for guidance on
19 this question. They're looking for prior --
20 they're looking for precedent to -- to -- to
21 use in making their determination. But they
22 don't have a clean set of precedent to do that.
23 They don't have precedent where courts have
24 come in and said this is, in fact, the correct
25 interpretation of -- of persecution as a matter

1 of law. And that is really the problem here.
2 And, again, courts are already doing
3 the -- the kind of inquiry that we're
4 suggesting here under the Convention Against
5 Torture. What -- in most courts of appeals, if
6 the facts are undisputed and the sole remaining
7 question is whether those facts demonstrate
8 mistreatment rising to the level of torture
9 within the meaning of CAT, they review that
10 determination de novo and they're doing just
11 fine. And that's correct because it builds out
12 a body of precedent that courts can use
13 effectively for future cases. And that is the
14 kind of judicial work that, under U.S. Bank, we
15 think would counsel in favor of de novo review.
16 And it's the kind of judicial work that makes
17 clear that this inquiry is not a finding of
18 fact within the meaning of Section 1252(b)(4).

19 JUSTICE KAVANAUGH: Can I ask you a
20 question about how the BIA reviews the IJ?
21 Because that's a good point for you, but the
22 government responds that the agency's decisions
23 about how to structure internal review do not
24 determine the standard of the review that
25 courts of appeals should apply, which is

1 determined by statute and constrained by the
2 role of appellate courts that -- they go on,
3 but I want to get your clear response to the
4 government on that point.

5 MR. ROSELLINI: Certainly, Justice
6 Kavanaugh. And, again, we're not here telling
7 you that the -- the BIA's interpretations of
8 these -- of these regulations dictate the
9 meaning of the statute. But what's telling is
10 that the regulation on which the BIA relies
11 uses the exact same words as Section
12 1252(b)(4). It says findings of fact. And the
13 BIA has said that this exact inquiry is not a
14 finding of fact.

15 And on top of that, the BIA, despite
16 recognizing that immigration judges are in the
17 room, they're hearing the witnesses' testimony,
18 they found the evidence, the BIA is still
19 viewing that as something that it is
20 institutionally better positioned to resolve,
21 just like a court is.

22 JUSTICE KAVANAUGH: Thank you.

23 CHIEF JUSTICE ROBERTS: Thank you,
24 counsel.

25 Justice Thomas?

1 Justice Alito?

2 Justice Sotomayor?

3 JUSTICE SOTOMAYOR: Counsel, you did
4 not challenge below the legal standard that the
5 First Circuit uses, right?

6 MR. ROSELLINI: Not explicitly, Your
7 Honor. We've obviously resisted the finding of
8 persecution here. We think that argument --

9 JUSTICE SOTOMAYOR: But you -- you
10 didn't say that they've used a wrong
11 definition. I actually don't understand why a
12 credible death threat would not always cause
13 suffering or harm. And the other side will
14 respond to that. But you didn't say that.

15 MR. ROSELLINI: Our -- our briefs --

16 JUSTICE SOTOMAYOR: You've been
17 arguing something quite different.

18 MR. ROSELLINI: We did not make that
19 argument explicitly before the First Circuit.
20 I think it's fairly subsumed in the question of
21 whether do these facts as they are demonstrate
22 persecution. And, again, on remand, we would
23 make that argument.

24 JUSTICE SOTOMAYOR: As far as I
25 understand the government's position, if you

1 had challenged the standard, they would say
2 that's a legal question that the court would
3 have looked at.

4 MR. ROSELLINI: I -- yes, I think --

5 JUSTICE SOTOMAYOR: But, because you
6 didn't, you were actually arguing the facts,
7 that these facts showed enough suffering or
8 harm. I think that's their position.

9 MR. ROSELLINI: I -- I do think that
10 is the government's position, but, again, below
11 we were up against a substantial --

12 JUSTICE SOTOMAYOR: Do you lose if I
13 accept what the government says?

14 MR. ROSELLINI: No, Your Honor,
15 because, in the First Circuit, they were --
16 they cabined their review entirely to -- to
17 deference to the BIA. And, like many other
18 courts of appeals, they have not taken the same
19 position as the government that a question like
20 that --

21 JUSTICE SOTOMAYOR: I see.

22 MR. ROSELLINI: -- would be reviewed
23 de novo.

24 JUSTICE SOTOMAYOR: So we -- you're
25 saying we have to look at that question.

1 MR. ROSELLINI: Correct.

2 JUSTICE SOTOMAYOR: We have to decide
3 that?

4 MR. ROSELLINI: Not in the first
5 instance, but remand so that we can -- we can
6 advance it. Maybe the government has a waiver
7 argument. Maybe they -- they argue that we
8 didn't waive it because there was First Circuit
9 precedent on point, but we need to go en banc.
10 You know, we'll have that fight on remand.

11 JUSTICE SOTOMAYOR: Okay.

12 MR. ROSELLINI: But it's not something
13 this Court should resolve in the first
14 instance.

15 JUSTICE SOTOMAYOR: Thank you.

16 CHIEF JUSTICE ROBERTS: Justice Kagan?

17 JUSTICE KAGAN: Could I make sure I
18 understand your argument about Elias-Zacarias?
19 Because I think that that's -- I -- I came in
20 thinking this is a strong argument on the
21 government's side, so I want to understand why
22 you don't think it is.

23 But, if I look at Elias, if I look at
24 that footnote, the Court is clearly saying that
25 we're going to provide deference here because,

1 you know, Elias -- you know the footnote I'm
2 talking about, right?

3 MR. ROSELLINI: Yes.

4 JUSTICE KAGAN: Which I can't find.
5 And -- and then the question that they're
6 providing all the substantial deference on is
7 this: It's whether a guerrilla organization's
8 attempt to coerce a person into performing
9 military service necessarily constitutes
10 persecution.

11 So I -- I don't get it. That seems
12 like at least -- that -- that seems like a very
13 similar question to this one, and they're
14 providing substantial deference.

15 MR. ROSELLINI: Well, two points
16 there. I think the question that Your Honor
17 finished with of whether there's, like, a
18 categorical rule that something would qualify
19 as being on account of persecution, I don't
20 actually think that the -- the court deferred
21 to the BIA in that regard. It analyzed that --
22 that issue -- that legal issue for itself.

23 But the underlying question of what
24 was in the persecutors' heads, why were they
25 doing this, that is a classic finding of fact.

1 And, again, the statute that Elias-Zacarias was
2 analyzing, like this one, did not say --

3 JUSTICE KAGAN: You're saying that the
4 only thing that Elias-Zacarias deferred to was
5 an underlying finding of fact as opposed to the
6 application of a legal standard to those facts?

7 MR. ROSELLINI: I think that's right,
8 Your Honor, because, again, the -- what
9 Elias-Zacarias was analyzing, and the opinion
10 says -- makes this clear, is that the statute
11 makes motive central. And the -- what the
12 non-citizen had failed to do in that case was
13 come forward with sufficient evidence to compel
14 the conclusion that the motive of his alleged
15 persecutors was on the basis of political
16 opinion.

17 That was the core -- that was the
18 molten core of the dispute. And the court
19 correctly viewed that as a factual issue going
20 to state of mind and it reviewed that
21 deferentially.

22 JUSTICE KAGAN: Okay.

23 CHIEF JUSTICE ROBERTS: Justice
24 Gorsuch?

25 Justice Kavanaugh?

1 JUSTICE KAVANAUGH: So I think you're
2 saying Elias-Zacarias was written more broadly
3 than it needed to be because, as written, it is
4 broader than that.

5 MR. ROSELLINI: I think there are a
6 few lines that are -- are a little bit more
7 broad, but, again, I think that's exactly why
8 this Court has cautioned multiple times we do
9 not read judicial opinions like statutes. We
10 take them in context. We look at what was the
11 actual question presented.

12 JUSTICE KAVANAUGH: But, if we read
13 those lines as written, that's -- that's a
14 problem for you.

15 MR. ROSELLINI: I think it would be a
16 problem for us.

17 JUSTICE KAVANAUGH: Right.

18 MR. ROSELLINI: But, again, we would
19 encourage the Court not to read its opinion
20 like a statute but read the statute here like a
21 statute. And that's where the government has
22 some problems.

23 JUSTICE KAVANAUGH: Second different
24 point. On pages 4 to -- 4 and 40 of the
25 government's brief, as you point out in your

1 reply, they make this, you call it, concession
2 about legal arguments. Do you have a -- I'm
3 going to ask them this, but do you have a sense
4 of how that's going to apply?

5 MR. ROSELLINI: I think it's going to
6 be tricky. I mean, again, I do want to commend
7 the government for making that concession
8 because that is not how courts -- many courts
9 of appeals are viewing this issue. They are
10 deferring to the BIA on those kinds of
11 questions. We've cited some cases in our reply
12 brief doing just that. So this Court again
13 takes --

14 JUSTICE KAVANAUGH: Your -- your point
15 is that the government's brief is asking for
16 something new as well?

17 MR. ROSELLINI: That's correct.
18 That's correct.

19 JUSTICE KAVANAUGH: Well, we'll ask
20 them about that.

21 MR. ROSELLINI: Okay.

22 JUSTICE KAVANAUGH: Okay. Thank you.

23 CHIEF JUSTICE ROBERTS: Justice
24 Barrett?

25 Justice Jackson?

1 JUSTICE JACKSON: So, as I understand
2 the history of this (b)(4), Congress added it
3 to the INA when it enacted IIRIRA in 1996, and
4 prior to that, I understood that courts were
5 applying deference, substantial evidence review
6 to this asylum eligibility question.

7 So, if you're right that Congress was
8 silent as to what is supposed to happen with
9 asylum eligibility, I guess I'm trying to
10 wonder whether we shouldn't believe that
11 Congress wanted the preexisting practice to
12 continue.

13 MR. ROSELLINI: No, Your Honor. That
14 preexisting practice was not, with respect, as
15 Your Honor described. It's true that some
16 aspects, like motive, as was at issue in
17 Elias-Zacarias, were reviewed deferentially as
18 they should be, as they still are today, but if
19 you look at the actual component of the asylum
20 eligibility inquiry that is at issue in this
21 case, what rises to the level of persecution,
22 that inquiry, the government -- the government
23 has an extended string cite on -- on page --
24 Footnote 2 of its -- of its brief, and those
25 cases are not, by and large, not addressing

1 that issue. They're addressing other issues.
2 They're just referring to --

3 JUSTICE JACKSON: All right. Do you
4 have a corresponding string cite of cases pre
5 this provision where --

6 MR. ROSELLINI: Yes. In our reply
7 brief -- forgive me, the -- the -- the page
8 number is escaping me -- but we've cited a
9 couple of cases that go the opposite direction.

10 And the point here is that the
11 government asked you to grant cert in this case
12 because they agreed with us that the courts
13 were so confused about the appropriate standard
14 of review as to this narrow subcomponent of the
15 asylum eligibility determination.

16 I think it's a -- with respect to my
17 friends, it's a little bit rich to say that
18 that confusion that is so entrenched and
19 significant that they supported cert in this
20 case can somehow be resolved on a snapshot
21 consensus at a given point in time. That's
22 just -- that consensus did not exist.

23 JUSTICE JACKSON: All right. One more
24 question. Going -- going to the kind of
25 overall thrust of your argument, it would be to

1 enable courts to consider this de novo and
2 particularly and -- and possibly override the
3 BIA's determinations, and I guess I'm wondering
4 how that's consistent with what we understand
5 the general thrust of Congress's amendments and
6 the thrust of IIRIRA to be, which was really to
7 limit the Court's ability to override the
8 agency in this context.

9 So it seems like this would be a
10 little discordant with what Congress was trying
11 to do here, right?

12 MR. ROSELLINI: No, Your Honor. Point
13 number one, asylum has actually been kind of
14 like singled out for special treatment by
15 Congress. If you look at Section 1252(a), even
16 the discretionary determination about whether
17 to grant asylum, that's -- judicial review over
18 that determination has been preserved even as
19 Congress stripped away judicial review of most
20 other discretionary determinations.

21 And I -- I think what that tells you
22 is that even as -- even as Congress is -- of
23 course, was limiting judicial review in many
24 respects, it viewed asylum as different and
25 something that needed to be preserved in

1 significant part.

2 And I would also just come back to the
3 fact that we're not vouching for a change here.
4 We're -- we're saying that Congress
5 crystallized in Section 1252(b)(4) what had
6 already been the case, is that a determination
7 about whether undisputed facts legally
8 qualifies as persecution is not a finding of
9 fact. The -- those words, they were in place
10 before IIRIRA. They're in place now. And the
11 plain meaning of those words does not encompass
12 this determination.

13 JUSTICE JACKSON: Thank you.

14 CHIEF JUSTICE ROBERTS: Thank you,
15 counsel.

16 Mr. Dos Santos.

17 ORAL ARGUMENT OF JOSHUA DOS SANTOS

18 ON BEHALF OF THE RESPONDENT

19 MR. DOS SANTOS: Thank you, Mr. Chief
20 Justice, and may it please the Court:

21 Let me just start by picking up on
22 questions about, like, what the inquiry is that
23 the BA -- BIA is making here and what our
24 position is on what the standard is here. So
25 the courts of appeals -- appeals have broadly

1 agreed that "persecution" means really extreme
2 suffering. So you kind of plug that in kind of
3 like the Court did in U.S. Bank.

4 So what the agency is asking here is
5 looking at the evidence that the Petitioner has
6 provided, is this extreme suffering? How much
7 suffering has there been? And that is, one, a
8 question that requires lots of weighing of
9 facts and drawing of inferences.

10 So, in this particular case, just look
11 at the facts here.

12 So, on the one hand, Petitioner's
13 half-brothers were shot because of a dispute
14 between their father and a sicario -- the
15 half-brother's father and a sicario. But then,
16 on the other hand, his mother and his
17 stepsister and his stepfather were never
18 threatened or harmed. The half-brothers appear
19 to have been fine when they moved away from the
20 hometown.

21 Petitioner appears to have been fine
22 when he moved away from the hometown and he
23 lived for years in peace in other parts of El
24 Salvador. Then -- then Petitioner talks about
25 the threats, but, on the other hand, the

1 threats demanded money. So whether you infer
2 from that was it just intimidation, were they
3 even connected with the sicario, I mean, these
4 are all questions of the kind that go to
5 juries. The juries draw inferences. They can
6 cut in different questions. You have to weigh
7 the facts and inferences.

8 What we're saying here is Congress
9 wanted substantial evidence review to apply so
10 that there is deferential review of the
11 weighing of facts and inferences by the agency.

12 And we think it's very clear for
13 several reasons. Let me just do three quick
14 points. One, we think the text and the history
15 point exactly in that direction. So, one,
16 Congress in Section 1158 talked about the
17 question as one that is factual for the trier
18 of fact.

19 Two, this Court in Elias-Zacarias
20 beforehand had said that that was a factual
21 question and applied substantial evidence
22 review. The courts of appeals had all done
23 that.

24 And then the substantial evidence
25 provision at issue here codified language from

1 Elias-Zacarias. So, clearly, Congress was
2 aware of it.

3 And there's no way, no realistic
4 chance that when Congress was overhauling
5 standards of review in IIRIRA and affirmatively
6 overturning what courts of appeals were doing
7 in certain respects and then codifying
8 Elias-Zacarias that it was either unaware of
9 that practice or silently departing from it.
10 It's just not realistically possible.

11 And the second point I'll do even more
12 quickly. This Court's standard approach, even
13 if you thought the statute were less clear, the
14 standard approach that the Court uses across a
15 variety of contexts points in exactly the same
16 way. The work being done here is primarily
17 factual. And just last year in Wilkinson, this
18 Court applied that approach to the INA and said
19 that application of extraordinary hardship is
20 going to be a primarily factual inquiry that is
21 subject to deferential review.

22 And the last thing I'll say is
23 Petitioners' contrary arguments, they really
24 kind of all boil down to the idea that every
25 mixed question in the INA is going to be

1 subject to de novo review. I think this Court
2 both in Guerrero-Lasprilla and -- and Wilkinson
3 said that wasn't going to be the consequence,
4 and -- and I think that would be a sea change
5 and irreconcilable with IIRIRA.

6 I welcome the Court's questions.

7 CHIEF JUSTICE ROBERTS: Yeah. Thank
8 you, counsel. Your -- I'm sorry.

9 JUSTICE THOMAS: No.

10 CHIEF JUSTICE ROBERTS: Your --
11 your -- your friend began the argument by
12 saying they were not, in fact, factual
13 determinations. What precise facts do you
14 think are -- would be necessary to resolve?

15 MR. DOS SANTOS: So I think, here, the
16 ultimate fact is -- is the one that's at issue,
17 is how much suffering was there? So, for
18 example, I'll point the Court to, like, the
19 decision in TSC Industries about materiality.
20 There are all kinds of situations in which
21 juries get a question like, was the statement
22 material or pain and suffering or negligence?
23 And you have historical facts that -- that
24 could be undisputed, like, here, there were
25 these threats and we know what was said.

1 But then what do you infer from that?
2 How much suffering was there? How do you
3 balance the fact that he was fine when he moved
4 away from his hometown versus the fact that he
5 was threatened several times and the -- the
6 threateners asked for money? And that -- that
7 kind of weighing is one for the BIA.

8 Now, if Petitioner succeeds in
9 saying -- in the argument that no reasonable
10 fact finder, no matter how you weigh the
11 evidence against him, no matter what inferences
12 you draw against him, no reasonable fact finder
13 could have found that there was no persecution,
14 then he would win under substantial evidence --

15 JUSTICE GORSUCH: Isn't that a legal
16 question?

17 MR. DOS SANTOS: That -- the
18 substantial -- that question, when you draw all
19 of the inferences --

20 JUSTICE GORSUCH: Yeah.

21 MR. DOS SANTOS: -- yeah.

22 JUSTICE GORSUCH: Yeah.

23 MR. DOS SANTOS: And that's what we
24 say should be done.

25 JUSTICE GORSUCH: So that's a legal

1 question that judges can review under that
2 preexisting standard that Elias-Zacarias speaks
3 of.

4 MR. DOS SANTOS: That's correct, and
5 that is our position.

6 JUSTICE GORSUCH: And also, you
7 concede on page 40, as Justice Kavanaugh
8 pointed out, that if there's some dispute about
9 what the term "persecution" means as a matter
10 of law, that a court can resolve that de novo?

11 MR. DOS SANTOS: Yes, that -- that's
12 right.

13 JUSTICE GORSUCH: Yeah. All right.

14 MR. DOS SANTOS: And -- and just to
15 pick up on Justice Kavanaugh's earlier question
16 about how that would work, I think this is very
17 similar to what courts of appeals do in all
18 kinds of contexts and, in fact, what they are
19 doing under the INA. So think of the -- the
20 example of a district court. There are all
21 kinds of decisions that district courts make
22 that are subject to abuse of discretion review
23 or clear error, and all the time litigants come
24 and they say, okay, so here are my arguments on
25 abuse of discretion and clear error, but

1 setting aside the way that the district court
2 cashed out my particular facts, the district
3 court used the wrong standard, and that is a
4 legal question and you have to correct the
5 legal standard de novo.

6 And the courts of appeals distinguish
7 these things all the time.

8 JUSTICE KAGAN: Would I be right,
9 Mr. Dos Santos, to say that I could say the
10 same of your position that you just said to
11 Mr. Rosellini? You said he would have every
12 mixed question turn -- turn into a -- a de novo
13 question. But would you have every mixed
14 question be given substantial review,
15 substantial evidence review?

16 MR. DOS SANTOS: No, Your Honor. I
17 think you -- you could look at the way that
18 this Court talked about it in U.S. Bank. Not
19 all mixed questions are alike.

20 JUSTICE KAGAN: So what kinds of mixed
21 questions would not get substantial evidence
22 review with respect to these matters?

23 MR. DOS SANTOS: With respect to what?
24 I'm sorry.

25 JUSTICE KAGAN: These matters.

1 MR. DOS SANTOS: So I don't -- I don't
2 have any examples to give you in that respect.
3 I think a lot of what is done is going to be
4 factual in the immigration space. If there
5 are -- you know, if there are legal questions
6 that turn on interpretation of a particular
7 definition like a reticulated definition and
8 the -- the primary work being done is
9 interpreting, looking at a statute, looking at
10 structure, looking at legislative history, and
11 so on, which is not what's at issue here, I
12 mean, then it looks more primarily factual.

13 The other thing I'll say is one of our
14 arguments is that Congress treated this as
15 factual. So, if there were evidence that
16 Congress treated something else as -- as more
17 legal, then that would cut the other way. But,
18 I mean, here, if you look at Section 1158,
19 Congress said --

20 JUSTICE KAGAN: Wait, I don't get that
21 argument, I have to say, Mr. Dos Santos,
22 because it seems -- you have some good
23 arguments in this case, but, honestly, none of
24 them come from the text. You have good history
25 arguments. You have arguments about the

1 Elias-Zacarias case. But 1158, just because we
2 call an IJ a trier of fact, you're going to
3 read that to determine what the standard of --
4 of -- of review is?

5 MR. DOS SANTOS: So several --

6 JUSTICE KAGAN: I mean, you just said
7 that we don't give substantial evidence review
8 to legal questions. If we took your textual
9 argument seriously, we'd have to give
10 substantial evidence review to legal questions
11 too because, after all, 1158 calls the IJ a
12 trier of fact.

13 MR. DOS SANTOS: So I -- I think what
14 we're saying about 1158 is the thrust of the
15 way Congress thought about the refugee
16 question, is someone a refugee, is that it's --
17 it's primarily factual. And so the way that it
18 described the way that an applicant sustains
19 the burden -- that's the title of the
20 provision -- to show that they're a refugee was
21 by saying that they have to satisfy the trier
22 of fact not only that their evidence is
23 credible, not only that it's persuasive, but
24 that it's sufficient to show that and then goes
25 on to say: And the way that the trier of fact

1 does that is by weighing the testimony,
2 weighing the other evidence.

3 And that, combined with Congress's
4 codification of Elias-Zacarias taking that same
5 language and plugging it into the substantial
6 evidence review provision, combined with the
7 history before that, I mean, I think it all
8 just makes clear that the way Congress was
9 thinking about it is these are primarily
10 factual inquiries that the IJ is going to make,
11 that we want to have the -- the attorney
12 general take care of.

13 And then --

14 JUSTICE KAVANAUGH: Did you --

15 JUSTICE KAGAN: Okay.

16 JUSTICE KAVANAUGH: -- did you say at
17 the beginning that extreme suffering is the
18 essential standard here?

19 MR. DOS SANTOS: Yes. I think most --
20 every court of appeals essentially has said
21 persecution --

22 JUSTICE KAVANAUGH: And is that a
23 legal question, what extreme suffering means?

24 MR. DOS SANTOS: No. I think
25 that's -- that's the kind of inquiry that's

1 going to just -- you look at the totality of
2 the circumstances. I think it's kind of a -- a
3 concept that most people can grasp, and you're
4 going to have to in each case just look at all
5 the facts and say, was this extreme enough?
6 How much suffering was there here?

7 JUSTICE JACKSON: But I think that
8 suggests that you really can never have cases
9 that serve as precedents for others or that the
10 court is not actually developing law in the
11 area, and that's my concern.

12 I mean, I -- I understand questions of
13 fact that arise out of disputes over what
14 happened. So, if we had a situation, not this
15 case, but if in this case there was some
16 question about whether he was actually
17 threatened, the government had some evidence
18 that showed that what this -- this person who
19 was seeking asylum said happened to him wasn't
20 true, all of those things would be questions of
21 fact that the trier of fact would be charged
22 with determining.

23 But then, once we have the established
24 body of facts, you move to another stage, which
25 is determining whether or not -- whether or not

1 this body of facts meets a certain legal
2 standard, whether it's persecution or some
3 other standard in this area of the law. There
4 are many legal standards in immigration law.

5 And I guess I'm just concerned about
6 the suggestion that in the second stage, where
7 we have settled on the facts and we're deciding
8 whether or not -- or the -- the agency has
9 decided whether or not the legal standard is
10 met, that we're somehow now in a world that is
11 not a question of law.

12 MR. DOS SANTOS: So that's because,
13 like this Court has said several times, when
14 there's a mixed question, it's not just the
15 historical facts. It's what inferences you
16 draw from them and how you weigh them. And
17 that's traditionally the province of the jury,
18 like this Court said in TSC Industries, where
19 the Court said it's not proper to do summary
20 judgment for the materiality question when,
21 even if you take the historical facts, there's
22 going to have to be infer -- inferences drawn
23 and weighing.

24 And the other thing I'll say is that
25 it's not the case that the legal principles go

1 totally undeveloped. I think that's totally
2 belied by experience over decades. There --
3 there are lots of times when courts of appeals
4 in the course of applying substantial evidence
5 review will either say, one, petitioner wins,
6 so, as a matter of law, no matter how you weigh
7 this, you know, then you have this rule of law,
8 but also, in the course of saying that, they'll
9 provide broad guideposts, like, for example, in
10 general, mere threats are usually not going to
11 be enough or --

12 JUSTICE GORSUCH: Well, couldn't we
13 develop the law too as we do with jury verdicts
14 and say some set of facts cannot be
15 reasonably -- by any fact finder reach the
16 conclusion of persecution?

17 MR. DOS SANTOS: That's -- that's
18 right. So that -- that is the -- it's exactly
19 in the same way that you would review a jury
20 verdict.

21 JUSTICE GORSUCH: Then we'll develop
22 the law that way.

23 MR. DOS SANTOS: That's right.

24 JUSTICE GORSUCH: But what about the
25 very limited circumstances that our friends on

1 the other side point out, like fair use
2 doctrine under the copyright statute, that we
3 will review de novo without that kind of gloss?

4 MR. DOS SANTOS: Yeah, I think the
5 Court has said that when the background -- I
6 should say just to back up to sort of make
7 clear what the inquiry is here, in the U.S.
8 Bank, sort of how do we decide which bucket of
9 standard of review to put something in, there
10 are a couple of different important
11 considerations.

12 The lodestar is what kind of work is
13 there, primarily factual or legal. But then
14 there's also you consider the background,
15 what's the tradition been here and whether it's
16 constitutional or not. With those kinds of
17 questions, the ones you're referring to, I
18 think the -- the Court has looked to the
19 history of this is that it developed de novo
20 in -- in, like, a common law sort of way.

21 JUSTICE GORSUCH: Fair -- fair use
22 was -- was usually done by judges.

23 MR. DOS SANTOS: Right. It developed
24 that way. And so, if -- if Congress has then
25 talked about it, we presume that, you know,

1 Congress was treating it that way. That's not
2 the case with these kinds of determinations.
3 The tradition cuts exactly the opposite way.

4 JUSTICE SOTOMAYOR: I'm a little
5 confused by your answer to Justice Gorsuch.
6 You said what -- a definition of "persecution"
7 could be a legal error if that's what they were
8 challenging, correct?

9 MR. DOS SANTOS: That's right.

10 JUSTICE SOTOMAYOR: All right. So,
11 here, if they had said why do you need to show
12 suffering at all, if it's a death threat, why
13 isn't that, standing on its own, suffering?
14 The threat itself doesn't cause you suffering
15 or harm. You see your mother or your father
16 killed in front of you, you suffer from their
17 death, but you're not suffering from the
18 threat.

19 MR. DOS SANTOS: So, as Petitioner, I
20 think, admitted, they didn't make that argument
21 about the legal standard. So the only question
22 was applying the First Circuit's own
23 precedent --

24 JUSTICE SOTOMAYOR: All right. So, in
25 answer to Justice Gorsuch, you then said that

1 it was a legal question of whether any
2 reasonable fact finder would have said this was
3 not prosecution, and you said that's a legal
4 question, correct?

5 MR. DOS SANTOS: Applying the standard
6 that the circuit had already announced, yes.

7 JUSTICE SOTOMAYOR: Yes. So I think
8 what the other side is saying is the First
9 Circuit -- I'm not sure what they're saying,
10 whether they're saying the First Circuit didn't
11 apply that standard at all.

12 MR. DOS SANTOS: No, the First Circuit
13 definitely applied the standard. Everybody
14 applied that standard from First Circuit cases,
15 the B -- the IJ, the BIA, and the First Circuit
16 itself.

17 JUSTICE SOTOMAYOR: No, no, the
18 standard being that no reasonable fact finder
19 could not find this -- every reasonable fact
20 finder would find this persecution. It's a
21 little easier to put it in the positive rather
22 than the negative.

23 MR. DOS SANTOS: I -- I think
24 Petitioner agrees that the First Circuit
25 applied that rule, which is substantial

1 evidence, which is Elias-Zacarias.

2 JUSTICE SOTOMAYOR: All right. Thank
3 you.

4 JUSTICE KAVANAUGH: Why does the BIA
5 review these kinds of questions de novo?

6 MR. DOS SANTOS: Yeah. So I -- I
7 think understanding what the regulation
8 actually says, which is different from what my
9 friend --

10 JUSTICE KAVANAUGH: I'm just curious
11 why.

12 MR. DOS SANTOS: So if I could give
13 you a --

14 JUSTICE KAVANAUGH: What the --

15 MR. DOS SANTOS: -- little background,
16 it'll make more sense.

17 JUSTICE KAVANAUGH: -- what the
18 underlying rationale is for that.

19 MR. DOS SANTOS: Yes. I think the
20 history is very helpful here. So, before 2002,
21 the BIA was reviewing everything de novo,
22 including facts.

23 JUSTICE KAVANAUGH: I -- I got the
24 history. I'm just, though, like, what is the
25 reason --

1 MR. DOS SANTOS: Oh, okay.

2 JUSTICE KAVANAUGH: -- that makes
3 sense --

4 MR. DOS SANTOS: So --

5 JUSTICE KAVANAUGH: -- of why, like
6 Judge Collins said, why something that's
7 treated as a question of law transforms into a
8 question of fact?

9 MR. DOS SANTOS: So here's where I was
10 going. It's not that it's a question of law.
11 The reg -- what the regulation says is we're
12 going to stop the de novo thing, we're going to
13 do clear error for facts, but we don't want
14 that to mean that judgments and questions of
15 discretion are not subject to de novo review,
16 and it said judgments include decisions about
17 whether the applicant has shown past
18 persecution.

19 JUSTICE KAVANAUGH: Well, that's
20 telling me what the regulation is. I'm still
21 trying to get at, like, what -- what --

22 MR. DOS SANTOS: Yeah. Well, my
23 answer is because it's a question of judgment
24 and both the BIA and the IJ share the
25 responsibility to exercise --

1 JUSTICE KAVANAUGH: What's the
2 difference between a question of judgment and a
3 question of law --

4 MR. DOS SANTOS: Because judgment --
5 the question about weighing --

6 JUSTICE KAVANAUGH: -- in this
7 context?

8 MR. DOS SANTOS: So the question about
9 weighing facts and determining whether it's
10 persecution is going to involve judgment. And
11 both the BIA and the IJ have expertise in
12 looking at recurring fact patterns and seeing
13 all kinds of -- of -- of different versions of
14 these cases, far more cases than any court of
15 appeals is ever going to see. And as this
16 Court recognized in *Ming Dai* and *Orlando*
17 *Ventura*, in many cases, the agency has
18 expertise here to apply to -- to deciding those
19 questions.

20 So the AG decided, you know, we'll do
21 clear error, but -- but I'm going to reserve
22 more review for these judgment questions. That
23 doesn't mean that Congress wanted courts of
24 appeals engaging in that kind of judgment in
25 the first instance, and -- and as was already

1 said and admitted, the way that the BIA engages
2 in review, the way that the AG designs internal
3 review has -- has no bearing on that.

4 For example, the BIA reviews questions
5 of discretion de novo. No one thinks the court
6 of appeals should do that. It reviewed facts
7 de novo before 2002. No one thinks the court
8 of appeals should be doing that either.

9 JUSTICE KAVANAUGH: If we repeat what
10 you write in your brief on page 40, do you
11 think the lower courts are already doing that?
12 Namely, the --

13 MR. DOS SANTOS: Yes, I do. I think
14 they were doing that before IIRIRA. I think
15 they're doing that now. I think it's standard
16 practice where, if a petitioner says, look,
17 regardless of the way my facts cash out, the
18 BIA stated the wrong standard and used -- it
19 used a standard that's incorrect. That is a
20 question that courts review de novo.

21 JUSTICE KAVANAUGH: And to show that
22 the standard is incorrect again on extreme
23 suffering, what would you have to say? We
24 think extreme suffering is too high a bar?

25 MR. DOS SANTOS: So -- so there --

1 there have been questions that have come up.
2 So, like, one that -- that happened earlier was
3 is evidence that there's lots of crime in my
4 country and I'm very likely to be a victim of
5 crime, is that relevant to persecution? And
6 the court said no, that's -- that's not
7 relevant to persecution.

8 JUSTICE KAVANAUGH: That's legal, what
9 you just said?

10 MR. DOS SANTOS: So, like, is it ever
11 relevant, right? Is it ever going to be
12 relevant to persecution? Legal questions, it's
13 not like look at the facts of my case, it's
14 like this is the standard.

15 And there are -- there are other
16 questions like that where questions about
17 whether the standard should be lower in certain
18 circumstances and -- and so on.

19 So the other thing I just want to
20 emphasize is that this Court in Wilkinson
21 really already talked about this some and cited
22 the U.S. Bank sort of formulation and said --
23 and applied it there and said application of
24 the term "extreme hardship," which is kind of
25 very analogous to the question of extreme

1 suffering, that that is going to be something
2 that is primarily factual and reviewed
3 deferentially.

4 I think the Petitioners' contrary
5 arguments are really saying the thing that this
6 Court was resisting in both Guerrero-Lasprilla
7 and in -- in Wilkinson, which is that every
8 mixed question no matter how factual it is in
9 the INA is going to be subject to de novo
10 review. I mean, that really would be a sea
11 change and is really irreconcilable with
12 IIRIRA.

13 The other thing that I'll note, as,
14 Justice Jackson, you pointed out, I mean, the
15 thrust of IIRIRA was Congress was coming in and
16 then overturning things that courts of appeals
17 were doing.

18 I don't think there's -- there's any
19 realistic chance that you could look at IIRIRA
20 and think that Congress was silently departing
21 from the substantial evidence review consensus
22 for persecution questions and asylum
23 eligibility generally in -- in adopting IIRIRA.

24 Unless there are any further
25 questions?

1 CHIEF JUSTICE ROBERTS: Justice

2 Thomas?

3 Justice Sotomayor?

4 Justice Kagan?

5 Justice Kavanaugh?

6 Thank you, counsel.

7 Mr. Rosellini, rebuttal.

8 ORAL ARGUMENT OF NICHOLAS ROSELLINI

9 ON BEHALF OF THE PETITIONERS

10 MR. ROSELLINI: Thank you, Mr. Chief

11 Justice. Just a few points.

12 The first one is that our position is
13 not that every mixed question in the
14 immigration context would be reviewed de novo.
15 Under the text of the statute, our argument is
16 only that mixed questions that are -- that
17 resemble the determinations at issue in (c) and
18 (d), admission eligibility and entitlement to
19 asylum, would get de novo review because, if
20 the -- the language Congress could have used is
21 right there, they didn't use it.

22 We think that inference is strong as
23 to this particular question, but other things,
24 such as equitable tolling in
25 Guerrero-Lasprilla, other kind of docket

1 management determine -- determinations, for
2 example, those would be reviewed for abuse of
3 discretion. Of course, if the government came
4 in and tried to say that those are findings of
5 fact, we would again disagree, but we wouldn't
6 dispute that they are entitled to deference,
7 just a different kind.

8 And then, if you are looking beyond
9 the text just to U.S. Bank, that -- that
10 analysis is really limited to just this
11 particular mixed question at issue here.

12 And as U.S. Bank, you know, makes
13 clear, the Court has to look at each particular
14 mixed question that comes before it and make
15 the call. So that -- that -- a decision on
16 those grounds would be even narrower.

17 I -- I think it's telling that the
18 government couldn't come up in response to I
19 believe it was Justice Kagan asked what
20 about -- would any mixed question in this
21 context get de novo review, and they couldn't
22 name one.

23 I think that's because, if this one
24 doesn't get it, it's hard to think of an
25 example. Persecution, again, it is a term of

1 art. It's not something that ordinary people
2 understand right off the bat. It's the product
3 of -- of -- of a major international treaty,
4 and we have decades of experience where courts
5 are coming up with the exact kind of auxiliary
6 legal principles that U.S. Bank talked about as
7 a -- as a -- as a marker of a mixed question
8 that deserves de novo review, even though it
9 can -- yes, some aspects of the decision can
10 be -- can be fact-intensive. They involve a
11 close look at the record, but courts are also
12 doing what courts do when they analyze this
13 mixed question and that's what separates this
14 particular mixed question from others.

15 Second, Justice Kavanaugh, to your --
16 your question about the BI -- the BIA
17 regulations, the government is trying to couch
18 this determination as a question of judgment
19 versus law. They don't cite anything for that.
20 We have BIA decisions calling it a question of
21 law. But it really doesn't matter because the
22 fundamental point is that the BIA agrees that
23 it's not a finding of fact, which is the exact
24 language we have in this statute.

25 And the BIA agrees that the IJ's

1 institutional advantages of being closer to the
2 evidence don't justify deference to the IJ on
3 this particular question. So this debate about
4 judgment versus question of law is just -- is
5 just immaterial.

6 Fourth, on Elias-Zacarias and the
7 history, Justice Jackson, your question, if you
8 look at page 12 of our reply in Note 2, we cite
9 examples of cases analyzing this exact mixed
10 question that predate IIRIRA that were reviewed
11 de novo.

12 The case law as it is now is a muddle,
13 so I'm not going to pretend that there is some
14 consensus going in our favor, but we don't need
15 to show that. The government is trying to tell
16 you that there was a consensus that was somehow
17 overruled by Congress. That's not the case.

18 And on -- on Elias-Zacarias more
19 broadly, we would just reiterate that the
20 actual dispute in that case was about motive,
21 it was about a subjective state of mind, and
22 the decision needs to be read in that context.

23 And if it's read as the government
24 says it is, number one, the government
25 concession doesn't make sense because

1 Elias-Zacarias, if you take a couple lines at
2 face value, says the entire asylum eligibility
3 determination must be reviewed deferentially,
4 but they're admitting that even legal questions
5 or even some amount of mixed questions about
6 these auxiliary -- auxiliary legal principles
7 are reviewed de novo. So that just can't be
8 right.

9 And we think trying to draw that line
10 about where do interesting cases that are
11 creating auxiliary legal principles, where do
12 those end and where do the fact-intensive ones
13 start, you just can't draw that principled line
14 and this Court has never tried to do that when
15 it's analyzed other mixed questions like in --
16 like in U.S. Bank, like in Google versus Oracle
17 and other cases.

18 But, finally, even if the -- if -- if
19 the Court does try -- try to draw that line and
20 accept the government's position, it's not the
21 case that courts of appeals are doing what the
22 government says is correct. Some are, but some
23 are not. If you look at page 3 of our reply
24 brief, we cite a Tenth Circuit decision and a
25 Fourth Circuit decision that said, look, we

1 knowledge that the BIA has created this legal
2 rule, but the Tenth Circuit said we can't
3 disagree with that legal rule unless, you know,
4 we could overcome the substantial evidence
5 review.

6 And the Fourth Circuit dis- --
7 ultimately disagreed with the BIA but only
8 because it found that this requirement of
9 showing significant actual harm was manifestly
10 contrary to law. So it too was deferring on
11 what even the government admits is a legal
12 question that should be reviewed de novo.

13 So, if the Court -- even if it sides
14 with the government here, we believe that is
15 a -- that is an important change. It's
16 clarified the standard of -- of review. That
17 will matter going forward, and it should matter
18 in this case, and we should be entitled to
19 vacatur of the judgment below at least on those
20 narrow grounds.

21 CHIEF JUSTICE ROBERTS: Thank you,
22 counsel.

23 The case is submitted.

24 (Whereupon, at 12:46 p.m., the case
25 was submitted.)

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