

No. 16-1274

---

---

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

TING XUE, an individual,

*Petitioner,*

v.

JEFFERSON B. SESSIONS,  
United States Attorney General,

*Respondent.*

---

ON PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS  
FOR THE TENTH CIRCUIT

---

---

**BRIEF OF *AMICUS CURIAE*, PACIFIC  
JUSTICE INSTITUTE, IN SUPPORT OF  
PETITION FOR WRIT OF CERTIORARI**

---

---

KEVIN T. SNIDER  
*Counsel of Record*  
MATTHEW B. MCREYNOLDS  
RAY D. HACKE  
PACIFIC JUSTICE INSTITUTE  
*Attorneys for Amicus Curiae*  
P.O. Box 276600  
Sacramento, CA 95827  
(916) 857-6900  
ksnider@pji.org

---

---

**TABLE OF CONTENTS**

	<b>Page</b>
INTEREST OF <i>AMICUS CURIAE</i> .....	1
INTRODUCTION AND SUMMARY OF THE ARGUMENT.....	1
<u>ARGUMENT</u>	
A. The Court Should Grant Certiorari To Resolve A Circuit Split As To Whether The Existence Of Persecution Is Reviewed As A Question of Law Or Fact .....	3
B. The History Of Religious Persecution Informed Both the Views of the Founding Generation Which Produced the First Amendment's Religion Clauses and the Cold War Generation Which Established the Public Policy Reflected In The Refugee Act .....	5
CONCLUSION .....	11



## TABLE OF AUTHORITIES

	<b>Page(s)</b>
<b>CASES</b>	
<i>Alavez-Hernandez v. Holder</i> , 714 F.3d 1063 (8th Cir. 2013).....	3
<i>Boer-Sedano v. Gonzales</i> , 418 F.3d 1082 (9th Cir. 2005).....	4
<i>Borca v. INS</i> , 77 F.3d 210 (7th Cir. 1996) .....	3
<i>Chen v. Holder</i> , 773 F.3d 396 (2nd Cir. 2014).....	3
<i>Cubillos v. Holder</i> , 565 F.3d 1054 (8th Cir. 2009).....	3
<i>Eduard v. Ashcroft</i> , 379 F.3d 182 (5 <sup>th</sup> Cir. 2004).....	3
<i>En Hui Huang v. Atty. Gen. of the U.S.</i> , 620 F.3d 372 (3d Cir. 2010) .....	3-4
<i>Engel v. Vitale</i> , 370 U.S. 421 (1962).....	6
<i>Everson v. Bd. of Educ.</i> , 330 U.S. 1 (1947).....	8
<i>Feldman v. U.S.</i> , 322 U.S. 487 (1943).....	6
<i>Ghaly v. INS</i> , 58 F.3d 1425 (9th Cir. 1995) .....	4

<i>Hernandez-Montiel v. INS</i> , 225 F.3d 1084 (9th Cir. 2000).....	4
<i>Hui Lin Huang v. Holder</i> , 677 F.3d 130 (2nd Cir. 2011).....	3
<i>In re Smith</i> , 10 F.3d 723 (10th Cir. 1993) .....	4
<i>Kazemzadeh v. U.S. Atty. Gen.</i> , 577 F. 3d 1341 (11th Cir. 2009).....	5, 8-10
<i>Lin v. Holder</i> , 723 F.3d 300 (1st Cir. 2013).....	3
<i>Lundberg v. West Monona Community Sch. Dist.</i> , 731 F. Supp. 331 (N.D. Iowa 1989) .....	6
<i>McGowan v. Maryland</i> , 366 U.S. 420 (1961).....	7
<i>Mejia v. U.S. Atty. Gen.</i> , 498 F.3d 1063 (11th Cir. 2007).....	3
<i>Pitcherskaia v. INS</i> , 118 F.3d 641 (9th Cir. 1997) .....	4
<i>Qiu v. Holder</i> , 611 F.3d 403 (7th Cir. 2010) .....	5
<i>Sch. Dist. of Abington Twp. v. Schempp</i> , 374 U.S. 203 (1963).....	7
<i>Vicente-Elias v. Mukasey</i> , 532 F.3d 1086 (10th Cir. 2008).....	4
<i>Voci v. Gonzales</i> , 409 F.3d 607 (3d Cir. 2005).....	4

<i>Xue v. Lynch</i> , 2017 WL 370739 (10th Cir. Nov. 25, 2016)....	3-4, 8
<i>Zhang v. Ashcroft</i> , 388 F.3d 713 (9th Cir. 2004) .....	5
<b>OTHER AUTHORITIES</b>	
125 Cong. Rec. 823231 (1979) .....	10
Thomas Jefferson, <i>A Bill for Establishing Religious Freedom</i> (June 12, 1779), 5 <i>The Founders' Constitution</i> 77 (P. Kerland & R. Lerner eds. 1987).....	9
Thomas Jefferson, <i>Notes on the State of Virginia</i> , (W. Penden ed. 1955) (1 <sup>st</sup> ed. 1787).....	8
James Madison, <i>Memorial and Remonstrance Against Religious Assessments</i> , 2 <i>The Writings of James Madison</i> 183 (G. Hunt ed. 1901) .....	9
Founding the Republic: A Documentary History (John J. Patrick ed. 1995) .....	9
Michael W. McConnell, <i>The Origins and Historical Understanding of Free Exercise of Religion</i> , 103 <i>Harv. L. Rev.</i> 1409 (1990)....	6-9
George Whitefield, <i>Works</i> , 4:306-307 .....	7

## **INTEREST OF *AMICUS CURIAE***

The Pacific Justice Institute (PJI) is a nonprofit public interest legal organization. PJI focuses primarily on religious freedom. Since its founding in 1997, PJI has advised and represented thousands of individuals, employers, religious institutions, and governmental entities, particularly in the realm of religious liberties. PJI's clients currently include immigrants seeking asylum in the United States on grounds of religious persecution. PJI therefore has a strong interest in the development of the law in this and related areas.

## **INTRODUCTION AND SUMMARY OF THE ARGUMENT**

This Petition affords the United States Supreme Court an opportunity to clarify the law in two areas where the circuits have reached conflicting rules relating to immigrants seeking asylum in the United States on grounds of religious persecution. The initial circuit split is whether the existence of persecution is determined as a matter of law or of fact. Next, the appellate courts are not uniform on whether persecution is present when one must worship in hiding because of state-sponsored prohibitions on religious exercise.

First, the disagreement among the federal courts as to the threshold determination of the standard of review argues for granting of the petition in order to mend the division over whether persecution is examined as a matter of fact or of law. The Second, Eighth and Eleventh Circuits approach the matter as a question of law. Three other circuits – the First, Fifth and Seventh – view persecution as a factual question. Joining these is the Tenth Circuit, as

illustrated in this case. Two other circuits attempt to use both methods, which only adds to the lack of clarity in the law.

This brief will then turn to the question of whether clandestine worship due to state hostility constitutes persecution. This issue also presents a circuit split. *Amicus* argues that being forced into hiding and fleeing – which is hiding in another form – demonstrates persecution per se. What *Amicus* more specifically brings to this discussion is the historical perspective: The founding generation of this country had the tragic historical narrative of religious persecution from Europe and the colonies in mind when they gave the religion clauses the preeminent place in the Bill of Rights. Later, the Cold War generation of lawmakers specifically pointed to that same history – as well as their own current events – when they passed the Refugee Act. A position that the necessity of stealth worship fails to rise to the level of persecution is out of step with this nation’s history and traditions. The Founding Fathers and Cold War-era legislators envisioned the United States as a haven for those who have suffered religious persecution. The Tenth Circuit’s position is that the underground practice of faith due to state hostility fails to meet the threshold for persecution. *Amicus* argues that such is inconsistent with more than 200 years of public policy.

## ARGUMENT

### **A. The Court Should Grant Certiorari To Resolve A Circuit Split As To Whether The Existence Of Persecution Is Reviewed As A Question of Law Or Fact.**

In this case, as in all other immigration cases involving religious asylum, the ultimate question centers on whether the applicant's harm rises to the level of persecution. Here the facts are not in dispute. Rather, the Tenth Circuit noted a split among federal appellate courts as to whether the existence of persecution is a question of law or fact. *Xue*, 2017 WL 370739 at \*5 n. 11. The lack of a uniform national standard of review merits granting of this petition.

The Courts that undertake review of persecution as a question of law are the Second, Eighth, and Eleventh Circuits. *Id.* [citing *Chen v. Holder*, 773 F.3d 396, 403 (2nd Cir. 2014), and *Alavez-Hernandez v. Holder*, 714 F.3d 1063, 1066 (8th Cir. 2013)]; see also *Hui Lin Huang v. Holder*, 677 F.3d 130, 136 (2nd Cir. 2011), *Cubillos v. Holder*, 565 F.3d 1054, 1058 (8th Cir. 2009), and *Mejia v. U.S. Atty. Gen.*, 498 F.3d 1253, 1257 (11th Cir. 2007) ["The question before us, then, is whether, as a matter of law, what Mejia endured constitutes past persecution ..."]. By contrast, the First, Fifth, and Seventh Circuits have concluded that the existence of persecution remains a question of fact. *Xue*, 2017 WL 370739 at \*5 n. 11 [citing *Lin v. Holder*, 723 F.3d 300, 307 (1st Cir. 2013), *Eduard v. Ashcroft*, 379 F.3d 182, 187-88 (5th Cir. 2004), and *Borca v. INS*, 77 F.3d 210 (7th Cir. 1996)].

The Third and Ninth Circuits vacillate between the opposing camps of law and fact. See, e.g., *En Hui Huang v. Atty. Gen. of the U.S.*, 620 F.3d 372, 383 (3d

Cir. 2010) [stating that whether the events giving rise to an applicant’s request for asylum “meet the legal definition of persecution ... is reviewed *de novo* because it is plainly an issue of law”] and *Voci v. Gonzales*, 409 F.3d 607, 613 (3d Cir. 2005) [“Whether an asylum applicant has demonstrated past persecution or a well-founded fear of future persecution is a factual determination”]; *see also Boer-Sedano v. Gonzales*, 418 F.3d 1082, 1088 (9th Cir. 2005) [“Whether particular acts constitute persecution for asylum purposes is a legal question, which we review *de novo*”], *Hernandez-Montiel v. INS*, 225 F.3d 1084, 1097 (9th Cir. 2000) [citing *Pitcherskaia v. INS*, 118 F.3d 641, 646 (9th Cir. 1997), to assert that the Ninth Circuit “review(s) *de novo* the legal question of the meaning of persecution”], and *Ghaly v. INS*, 58 F.3d 1425 (9th Cir. 1995) [stating that whether an applicant has established a “well-founded fear of persecution” is a “factual determination”].

Regarding Mr. Xue’s application, the Tenth Circuit treated the existence of persecution as a factual question based on the precedent set forth in *Vicente-Elias v. Mukasey*, 532 F.3d 1086, 1091 (10th Cir. 2008). *Xue*, 2017 WL 370739 at \*4 [quoting *In re Smith*, 10 F.3d 723, 724 (10th Cir. 1993)]. In the same sentence, however, the Court acknowledged that “a superseding contrary decision by the Supreme Court” would obligate the Tenth Circuit to deviate from following precedent in this case. *Id.* [quoting *Smith*, 10 F.3d at 724].

Public policy favors the uniform application of immigration laws nationwide. *See, e.g., En Hui Huang*, 620 F.3d at 386. This case arrives at the steps of this Court in a posture uniquely situated for review

and resolution relative to the standard for the determination of persecution. Therefore, a grant of the petition is warranted.

**B. The History Of Religious Persecution Informed Both the Views of the Founding Generation Which Produced the First Amendment's Religion Clauses and the Cold War Generation Which Established the Public Policy Reflected In The Refugee Act.**

There remains yet another split in the circuits: Does the compulsion to worship underground constitute persecution? The Seventh, Ninth, and Eleventh Circuits say yes. *See, Qiu v. Holder*, 611 F.3d 403 (7th Cir. 2010), *Zhang v. Ashcroft*, 388 F.3d 713 (9th Cir. 2004), *Kazemzadeh v. U.S. Attorney General*, 577 F.3d 1341 (11th Cir. 2009). In this case, however, the Tenth Circuit has said no. Petitioner thoroughly explains those cases, and *Amicus* will not repeat that discussion here. It is sufficient to note that the differences between the circuits remain irreconcilable. Instead, *Amicus* seeks to briefly explain the historically based understanding of religious persecution that formed this country's early public policy and continues to the present.

The notion that the necessity of worshipping in secret fails to rise to the level of persecution finds no basis in this country's founding generation's rationale for inserting the religion clauses into the Bill of Rights. It is no accident that religious liberty was placed in the First Amendment and is the initial freedom delineated in those expressive rights. Though ironically from a combatant country and long dead before the birth of most of the participants, John

Locke's ideas constituted an enormous presence in the Constitutional Convention: "Locke's ideas...are an indispensable part of the intellectual backdrop for the framing of the free exercise clause." Michael W. McConnell, *The Origins And Historical Understanding Of Free Exercise Of Religion*, 103 Harv. L. Rev. 1409, 1432 (1990). Locke wrote: "It is not diversity of opinions, which cannot be avoided; but the refusal of toleration to those that are of different opinions, which might have been granted, that has produced all the bustles and wars, that have been in the Christian world, upon account of religion." *Id.* [quoting J. Locke, *Two Tracts On Government* (P. Abrams ed. 1967)].

The very founding of the United States rests largely upon the efforts of the original thirteen colonies' early settlers to escape religious persecution in Europe. *Lundberg v. West Monona Community Sch. Dist.*, 731 F. Supp. 331, 341 (N.D. Iowa 1989). "[H]istory teaches that attempted exercises of freedom of religion, speech, press, and assembly have been commonest occasions for oppression and persecution." *Feldman v. U.S.*, 322 U.S. 487, 501 (1944) (Black, J., dissenting).

The religion clauses of the First Amendment reflect this history, which served as a lesson to the founding generation – and subsequent generations – that those who faced hatred, disrespect, and even contempt on the basis of religion needed a place of refuge after fleeing their native countries. *Lundberg*, 731 F. Supp. at 341 [quoting *Engel v. Vitale*, 370 U.S. 421, 431 (1962)]; *see also Feldman*, 322 U.S. at 501 (Black, J., dissenting) [noting that "(t)he founders of our federal government were too close to oppressions and persecutions of the unorthodox, the unpopular, and the less influential to trust even elected

representatives with unlimited powers of control over the individual” and that the founders enacted the First Amendment in part “*to protect unpopular minorities from oppressive majorities*” (emphasis added)]. In England, “both Roman Catholicism and extreme Protestantism (of which Puritanism was the most prominent element) were suppressed.” McConnell, 103 Harv. L. Rev. at 1421. Much like the subject of this Petition – Mr. Xue – the banning of dissenting religious services required clandestine preaching in fields and barns. George Whitefield, Works, 4:306-307.

Further driving home the need to protect individuals from religious persecution was that practitioners of certain faiths in some colonies had to flee to other colonies to seek refuge from persecution. *See, Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 232-233 (1963) (Brennan, J., concurring) [quoting *McGowan v. Maryland*, 366 U.S. 420, 464-65 (1961) (“In assuring the free exercise of religion ... the Framers of the First Amendment were sensitive to the then recent history of those persecutions and impositions of civil disability with which sectarian majorities in virtually all of the colonies had visited deviation in the matter of conscience”)]. For example, Massachusetts was a radicalized Congregationalist colony that jailed and horsewhipped dissenters. McConnell, 103 Harv. L. Rev. at 1423. A 1644 statute banished Baptists. Four Quakers who returned after being expelled were hanged. Authorities in Virginia prevented Presbyterians from preaching. *Id.*

Mr. Xue’s case presents a modern parallel to the pilgrims who fled England or the Huguenots who fled France: His arrest in China occurred while he attended an unapproved house church youth group.

*Xue*, 2017 WL 370739 at \*1. As religious dissenters, the young people find themselves prohibited by operation of law from meeting openly. *Id.* at \*1, n. 2 [“Because they are not registered with the Chinese government, which strictly controls the content of approved religions, house churches are illegal”]. After his arrest, mistreatment at the hands of the police, a highly punitive fine, and threats, he fled to another province. *Id.* at \*\*2-3.

The Supreme Court and lower courts have relied heavily on the words of James Madison, a drafter of the First Amendment, and Thomas Jefferson, who drafted Virginia’s Bill for Religious Freedom – a forerunner of the First Amendment – when determining what the “free exercise” of religion truly means. See *Kazemzadeh*, 577 F.3d at 1359 (Marcus, Circuit J., concurring) [noting that the Supreme Court “rel(ied) in no small measure on the writings of James Madison and Thomas Jefferson (when) defin(ing) free exercise” in *Everson v. Bd. of Educ.*, 330 U.S. 1, 15 (1947)] and McConnell, 103 Harv. L. Rev. at 1431 [noting that “Madison served as the floor leader in the Virginia Assembly in support of Jefferson’s bill; only three years later, he would serve as draftsman and floor leader in the (U.S.) House of Representatives in support of the” First Amendment]. Jefferson believed that religion posed no threat to the authority of government or to others under its authority: “The legitimate powers of government extend to such acts only as are injurious to others. But it does me no injury for my neighbor to say that there are twenty gods, or no god. It neither picks my pocket nor breaks my leg.” McConnell, 103 Harv. L. Rev. at 1451 n. 216 [quoting *Thomas Jefferson, Notes on the State of Virginia* 159 (W. Penden ed. 1955) (1<sup>st</sup> ed. 1787)]. Jefferson also strongly believed that individuals

should be protected from government coercion with regard to religion, declaring that “to compel a man” to support “opinions which he disbelieves and abhors, **is sinful and tyrannical.**” *Id.* at 1451 n. 214 (emphasis added) [quoting Thomas Jefferson, *A Bill for Establishing Religious Freedom* (June 12, 1779), reprinted in 5 *The Founders’ Constitution* 77, 77 (P. Kerland and R. Lerner eds. 1987)].

Madison likewise believed that “[t]he Religion then of every man must be left to the conviction and conscience of every man, and **it is the right of every man to exercise it as these may dictate ...**” McConnell, 103 Harv. L. Rev. at 1453 n. 229 (emphasis added) [quoting James Madison, *Memorial and Remonstrance Against Religious Assessments* (1785) (hereinafter *Memorial and Remonstrance*), reprinted in 2 *The Writings of James Madison* 183, 183-84 (G. Hunt ed. 1901)]. Madison’s views further aligned with Jefferson’s on the issue of whether government hostility toward religious views – particularly with regard to punishing dissenters – did more harm than good:

Torrents of blood have been spilt in the old world, by vain attempts of the secular arm, to extinguish religious discord, by proscribing all difference in Religious opinions. Time has at length revealed the true remedy. Every relaxation of narrow and rigorous policy, wherever it has been tried, has been found to assuage the disease.

*Kazemzadeh*, 577 F.3d at 1359 (Marcus, Circuit J., concurring) [quoting James Madison, *Memorial and Remonstrance*, reprinted in *Founding the Republic: A Documentary History* 92 (John J. Patrick ed., 1995)].

The drafters of the Immigration and Naturalization Act's asylum provisions, which Congress incorporated into the INA via the Refugee Act, bore this same sensitivity toward more recent victims of religious persecution: "While drafting the Refugee Act, Congress repeatedly referenced the founding legacy of our nation as a powerful motivation for the creation of the statutory scheme protecting asylum seekers from religious persecution." *Kazemzadeh*, 577 F.3d at 1359-60 (Marcus, Circuit J., concurring). As Senator Strom Thurmond of South Carolina said prior to the Refugee Act's passage, the Act would "tell those who come after us that we were true to our heritage as a people and a Nation ..." *Id.* at 1360 [quoting 125 Cong. Rec. S23231, S23238 (1979)].

In sum, both the founding generation of the federal government and Cold War generation that passed the Refugee Act did not arrive at their tasks with a blank slate in their hands. They came informed by a sobering history of the character and consequences of religious persecution. To worship in hiding or to flee from state-sponsored tormentors is the hallmark of persecution. This Court should thus grant this petition for certiorari to confirm what was already recognized by generations past and set that forth as a matter of law.

## CONCLUSION

The case presents two salient circuit splits that necessitate the granting of the petition for writ of certiorari. The granting of an asylum applicant's petition should not depend so heavily on whether he enters the country through New York, Los Angeles, Miami or Detroit. Nor should it hinge on whether he thereafter relocates to Denver or Des Moines. The promise of America's shores to embrace the persecuted should not come asterisked with the prospect of deportation if the refugee inadvertently crosses the wrong circuit boundary. Establishing a uniform understanding of persecution that is consistent with our founding values and the original purposes of federal asylum protections is both achievable and urgently needed.

Respectfully submitted,

KEVIN T. SNIDER

*Counsel of Record*

MATTHEW B. MCREYNOLDS

RAY D. HACKE

PACIFIC JUSTICE INSTITUTE

*Attorneys for Amicus Curiae*

P.O. Box 276600

Sacramento, CA 95827

(916) 857-6900

ksnider@pji.org

**CERTIFICATE OF COMPLIANCE**

**No. 16-1274**

---

TING XUE, an individual,

*Petitioner,*

v.

JEFFERSON B. SESSIONS,  
United States Attorney General,

*Respondent.*

---

As required by Supreme Court Rule 33.1(h), I certify that the Brief of *Amicus Curiae* in Support of Petition for Writ of Certiorari contains 2,702 words, excluding the parts of the brief that are exempted by Supreme Court Rule 33.1(d),

I declare under penalty of perjury that the foregoing is true and correct.

---

Robin Zuckerman

Sworn to on this 23<sup>rd</sup> day of  
May, 23, 2017