No. 22-436

In the Supreme Court of the United States

XIAOJIE HE,

Petitioner,

v.

MERRICK B. GARLAND, ATTORNEY GENERAL,

Respondent.

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

BRIEF OF AMERICAN GATEWAYS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Cases—Continued: Page(s)

Cases—Continued: Page(s)

Cases—Continued: Page(s)

Statutes

Rules

Other Authorities

Cases—Continued: Page(s)

INTEREST OF *AMICUS CURIAE*[1]

Amicus Curiae American Gateways is a non-profit legal services provider in Central Texas advocating for low-income refugees fleeing persecution, domestic violence, human trafficking, and other violent crimes. Created in 1987 to serve communities escaping war in Central America, American Gateways has since broadened its mission to ensure that refugees from all over the globe have a path to immigration relief.

American Gateways has an interest in the sound development of immigration and asylum law and presents this brief to advocate for a more fair and administrable immigration system. American Gateways hopes that this brief can highlight the importance of asylum relief and the need for this Court's review to ensure the proper balance between administrative immigration courts and federal courts of appeals.

INTRODUCTION AND SUMMARY OF ARGUMENT

1. This case raises two important questions for review: (1) whether courts of appeals review *de novo* (i.e., as a question of law) the BIA's determination that established facts do not rise to the level of persecution,

[1] No counsel for any party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No entity or person, aside from *amicus curiae* and their counsel, made any monetary contribution intended to fund the preparation or submission of this brief. All parties were given timely notice and consented to the filing of this brief.

and (2) whether being prohibited by government officials from freely and openly practicing one's religion constitutes persecution as a matter of law. These questions have divided the courts of appeals.

2. The first question—the standard of review for whether established facts rise to the level of persecution—has intractably divided the courts of appeals. Pet.13–19; *Fon* v. *Garland*, 34 F.4th 810, 816 (9th Cir. 2022) (Graber, J., concurring) ("[T]here is a circuit split concerning the proper standard to use when we review the BIA's determination that a particular set of facts does or does not rise to the level of persecution."). Moreover, the circuits are internally confused, sometimes reviewing persecution determinations *de novo* and sometimes for substantial evidence. Despite decades of opportunities to correct and clarify their precedents, the courts of appeals have failed to coalesce around a uniform standard of review in these circumstances. This intra-circuit confusion, alongside inter-circuit conflict, requires this Court's review to "resolve conflicts * * * concerning the meaning of provisions of federal law." *Braxton* v. *United States*, 500 U.S. 344, 347 (1991).

3. One central reason the courts have been unable to resolve the conflict is a flawed interpretation of this Court's opinion in *INS* v. *Elias-Zacarias*, 502 U.S. 478 (1992). Many circuits, including the Eighth Circuit below, have inferred from that decision that "the ultimate question of past persecution * * * [is] judicially reviewed under the substantial evidence standard." Pet.App.8a. But those decisions overread *Elias-Zacarias,* which was narrowly focused on the *factual* question of whether acts of conscription by guerrillas were

motivated by the asylum applicant's political opinion. 502 U.S. at 480. This Court's intervention is necessary to clarify the reach of *Elias-Zacarias* and restore the proper balance of administrative and judicial power.

4. Finally, this Court's review is needed for the second question presented—whether government prohibitions on freely and openly practicing one's religion constitute persecution as a matter of law. While some courts have attempted to distinguish their conflicting decisions based on the harms suffered in each case, the decisions are irreconcilable. Moreover, here the Eighth Circuit's suggestion that petitioner can avoid persecution in China by concealing his Christianity or attending government-approved churches runs contrary to the basic principles of religious freedom. Such blatant prohibitions on the practice of religion are not tolerated in the Seventh, Ninth, and Eleventh Circuits, and should not be tolerated anywhere under our asylum laws.

The Court should grant the petition.

ARGUMENT

I. The existence of intra-circuit splits alongside inter-circuit splits reinforces the urgent need for this Court's guidance.

As petitioner has explained, federal appellate courts are deeply and intractably split on the first question presented by the petition, i.e., what standard of review to apply when the Board of Immigration Appeals ("BIA") determines that undisputed facts do or do not amount to "persecution" under the Immigration and Nationality Act ("INA"). Pet.13–19;

Fon, 34 F.4th at 816 (Graber, J., concurring) ("[T]here is a circuit split concerning the proper standard to use when we review the BIA's determination that a particular set of facts does or does not rise to the level of persecution."). That this deep-seated and intractable inter-circuit split has in turn given rise to numerous intra-circuit splits on the same question enhances, and in no way diminishes, the case for immediate intervention by this Court.

A. Over nearly three decades, intra-circuit divisions have proven difficult to overcome.

Intra-circuit conflicts persist even though the circuits have had ample time to unify their jurisprudence. For example, irreconcilable precedents have been on the books in the Ninth Circuit for nearly thirty years. Compare *Singh* v. *Ilchert*, 69 F.3d 375, 378 (9th Cir. 1995) (holding that because "the issues presented in this appeal involve the application of established legal principles to undisputed facts, our review of the BIA's asylum * * * determinations is de novo" (citation omitted)) with *Prasad* v. *INS*, 47 F.3d 336, 339 (9th Cir. 1995) (reviewing for substantial evidence despite accepting the "truth of [the asylum applicants'] testimony and examin[ing] only whether it is sufficient to establish statutory grounds for asylum"). Despite decades of opportunity, the Ninth Circuit has yet to issue an en banc decision disavowing one line of precedent or the other, and no clear rule has been established by any other means.

As Judge Collins recognized in May 2022, the Ninth Circuit's "caselaw [remains] internally inconsistent," or, put more bluntly, "is [still] a bit of a

mess." *Fon*, 34 F.4th at 823 (Collins, J., concurring). Just last year, two Ninth Circuit panels separated by mere months diverged on the relevant question in much the same manner as their predecessors in the 1990s had. Compare *Kaur* v. *Wilkinson*, 986 F.3d 1216, 1221 (9th Cir. 2021), with *Sharma* v. *Garland*, 9 F.4th 1052, 1060 (9th Cir. 2021).

The Ninth Circuit is hardly an outlier. To greater and lesser degrees, the intra-circuit splits identified in the petition are both long-lived and long-unresolved. Pet.17–18. Many circuits join the Ninth in repeatedly applying inconsistent standards of review across multiple decades. Compare, *e.g.*, *Sepulveda* v. *U.S. Atty. Gen.*, 401 F.3d 1226, 1231 (11th Cir. 2005) (reviewing for substantial evidence the conclusion that "menacing telephone calls and threats * * * do not rise to the level of past persecution"), and *Mejia* v. *U.S. Atty. Gen.*, 498 F.3d 1253, 1257 (11th Cir. 2007) (reviewing *de novo* whether asylum applicant's treatment "constitutes past persecution"), with *Martinez* v. *U.S. Att'y Gen.*, 992 F.3d 1283, 1291 (11th Cir. 2021) (applying substantial evidence review to "BIA's factual finding that [certain] treatment did not rise to the level of persecution"), and *Medina* v. *U.S. Att'y Gen.*, 800 F. App'x 851, 855 (11th Cir. 2020) ("[W]hether a fact pattern constitutes past-persecution is a question of law, subject to de novo review.").

The lower courts' failure to converge on a single standard has put many appellate panels to the difficult task of navigating around their circuits' muddled jurisprudence. Some panels have managed to sidestep the inconsistency of their circuit precedents

by concluding, fairly or unfairly, that the outcome is the same under either standard of review. See, *e.g.*, *Flores Molina* v. *Garland*, 37 F.4th 626, 633 n.2 (9th Cir. 2022). Others, including the Eighth Circuit panel in this case, have also had to sidestep their own *stare decisis* rules en route to a preferred outcome. Pet.App.7a; *Drake* v. *Scott*, 812 F.2d 395, 400 (8th Cir. 1987) ("One panel of this Court is not at liberty to disregard a precedent handed down by another panel. Only the Court en banc can take such action."); *Mader* v. *United States*, 654 F.3d 794, 800 (8th Cir. 2011) (en banc) (holding that "when faced with conflicting panel opinions, the earliest opinion must be followed").[2]

In short, the circuits have had ample time to police their own precedents, whether by deciding on the appropriate standard in an en banc decision or by

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[2] The Eighth Circuit panel below attempted to justify its departure from circuit precedent by contending that, in light of this Court's decision in *INS* v. *Elias-Zacarias*, 502 U.S. 478 (1992), "circuit court decisions supporting" *de novo* review in this context "are contrary to controlling Supreme Court precedent." Pet.App.7a. The Eighth Circuit's reliance on *Elias-Zacarias* is both wrong (Section II, *infra*) and contrary to the Eighth Circuit's ordinary rule that only an *intervening* Supreme Court precedent can justify a departure from circuit precedent. *Free the Nipple—Springfield Residents Promoting Equality* v. *City of Springfield,* 923 F.3d 508, 511 (8th Cir. 2019); see also *Stokes* v. *Sw. Airlines*, 887 F.3d 199, 205 (5th Cir. 2018) ("[T]he determination whether a given precedent has been abrogated is itself a determination subject to the rule of orderliness."). As petitioner has shown, Eighth Circuit opinions post-dating *Elias-Zacarias* allow for *de novo* review of the BIA's conclusion that a set of undisputed facts does or does not amount to "persecution" under the INA. Pet.17–18. *Elias-Zacarias* thus provides no justification for the panel's decision to disregard contrary circuit precedent.

reverting to the rule applied in the earliest published decision on point. See Michael Duvall, *Resolving Intra-Circuit Splits in the Federal Courts of Appeal*, 3 Fed. Cts. L. Rev. 17, 20 (2009) ("In most federal courts of appeal, resolution of an intra-circuit split is straightforward: the earliest decision controls."). But, instead of building cohesion, recent decisions of the appellate courts have exacerbated or strained to work around existing intra-circuit divisions. Only this Court's guidance will bring uniformity within and between the circuits on this important question.

After all, a "principal purpose for [this Court's] certiorari jurisdiction * * * is to resolve conflicts * * * concerning the meaning of provisions of federal law." *Braxton* v. *United States*, 500 U.S. 344, 347 (1991). Certainly, inter-circuit conflicts are of paramount concern. R. Sup. Ct. 10(a). But intra-circuit conflicts are no less a source of confusion about the meaning and application of federal law. Thus, when intra-circuit conflicts exist *alongside* inter-circuit conflicts, as here, the resulting jumble is particularly vexatious to both courts and litigants, and the need for review by this Court is all the more compelling.

B. Despite the extensive confusion within some circuits, many circuits have settled on a standard of review and entrenched an inter-circuit split.

The petition identifies four circuits—the First, Fifth, Seventh, and Tenth—for which the substantial evidence standard has been consistently applied to the BIA's conclusions about whether established facts qualify as "persecution" under the INA. Pet.14–16. As the petition makes clear, that is the wrong standard to

apply. The question at issue has been described as "a basic matter of statutory interpretation" and thus a "quintessential question of law." See *Gjetani* v. *Barr*, 968 F.3d 393, 401 (5th Cir. 2020) (Dennis, J., dissenting) (citation omitted). That is a fair extension of this Court's own precedents, which have held that the term "'questions of law' includes the application of a legal standard to undisputed or established facts." *Guerrero-Lasprilla* v. *Barr*, 140 S. Ct. 1062, 1068 (2020).[3]

The circuits that review for substantial evidence when the BIA makes a determination about whether established facts constitute "persecution" thus betray a profound misunderstanding of the INA. The INA assigns the substantial evidence standard only to "administrative findings of fact." 8 U.S.C. § 1252(b)(4)(B). But, both under this Court's decision

[3] One court has argued that *Guerrero-Lasprilla* cannot be extended this way because it addressed a different provision of the INA, 8 U.S.C. § 1252(a)(2)(D), which allows for judicial review of "questions of law" in removal proceedings. See *Gjetani*, 968 F.3d at 397 n.2. In essence, the panel majority in *Gjetani* contended that *Guerrero-Lasprilla* can only be read to answer a narrow question of statutory construction and thus that the decision's reasoning cannot be extended beyond the narrow scope of the question presented in that case. *Ibid.* But the Fifth Circuit has long applied *de novo* review when the BIA decides "questions of law." *Zhu* v. *Gonzales*, 493 F.3d 588, 594 (5th Cir. 2007). And there is no principled reason that the application of a legal standard to established facts can be both a "question[] of law" and an "administrative finding[] of fact" in the same statute. 8 U.S.C. § 1252(a)(2)(D), (b)(4)(B); cf. *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 319 (2014) (this Court "ordinarily assumes" that "identical words used in different parts of the same [statute] are intended to have the same meaning" (citation omitted)).

in *Guerrero-Lasprilla* and as a matter of common sense, the application of a legal standard like "persecution" to established facts presents a question of law.

In some circuits, this has been recognized in the vast majority of cases. For example, over a period of more than twenty years, nearly every relevant Second Circuit precedent has applied *de novo* review when determining whether established facts rise to the level of "persecution." See *Diallo* v. *INS*, 232 F.3d 279, 287 (2d Cir. 2000); *Edimo-Doualla* v. *Gonzales*, 464 F.3d 276, 282 (2d Cir. 2006); *Mirzoyan* v. *Gonzales*, 457 F.3d 217, 220 (2d Cir. 2006); *Hui Lin Huang* v. *Holder*, 677 F.3d 130, 136 (2d Cir. 2012); *Alom* v. *Whitaker*, 910 F.3d 708, 712 (2d Cir. 2018); but see *Scarlett* v. *Barr*, 957 F.3d 316, 336 (2d Cir. 2020) ("The agency's decision * * * is supported by substantial evidence that the past conduct did not rise to the level of 'persecution.'"). Because the great weight of Second Circuit authority favors *de novo* review, some courts have described the Second Circuit as a standard-bearer for one side of the inter-circuit split identified by petitioner. See *Xue* v. *Lynch*, 846 F.3d 1099, 1105 n.11 (10th Cir. 2017) (placing Second Circuit on the side of circuit split favoring a *de novo* standard); see also *Fon*, 34 F.4th at 823.

Thus, even if this Court were reluctant to intervene before the most egregious intra-circuit conflicts have been resolved in the lower courts, a writ of certiorari would still be warranted here. A genuine and entrenched inter-circuit split exists between circuits that have settled on one standard of review or the other. Without a decision from this Court, it is

virtually guaranteed that litigants will continue to receive disparate treatment driven only by differences in geography.

Granting review in this case would also allow this Court to clarify that *Guerrero-Lasprilla* abrogated the First, Fifth, Seventh, and Tenth Circuit precedents calling for substantial evidence review when the BIA "appli[es] a legal standard to undisputed or established facts." 140 S. Ct. at 1068. Such a ruling has already been foreshadowed by some members of those courts. *Gjetani*, 968 F.3d at 401 n.1 (Dennis, J., dissenting) ("[A]ny duty we had to follow these precedents was abrogated by the Supreme Court's recent affirmance of the basic principle that 'the application of a legal standard to undisputed or established facts' is a 'question of law' within the meaning of the Immigration and Nationality Act." (quoting *Guerrero-Lasprilla*, 140 S. Ct. at 1068)).

II. An opinion clarifying *INS* v. *Elias-Zacarias* would eliminate an important source of confusion in the lower courts.

One reason that the circuits have been unable to resolve their intra-circuit conflicts is that many panels have endorsed an erroneous interpretation of this Court's opinion in *INS* v. *Elias-Zacarias*, 502 U.S. 478 (1992). The Eighth Circuit panel opinion in this case is a perfect example. The Eighth Circuit acknowledged the existence of circuit precedents calling for *de novo* review, but applied the substantial evidence standard anyway, in large part because, in the panel's view, to do otherwise would be "contrary to controlling Supreme Court precedent." Pet.App.7a–8a.

The Eighth Circuit keyed in on a single sentence from the *Elias-Zacarias* opinion and inferred from that sentence alone that "the ultimate question of past persecution * * * as well as the findings underlying that determination, are judicially reviewed under the substantial evidence standard that applies to agency findings of fact." Pet.App.8a. But that inference overreads this Court's narrow focus in *Elias-Zacarias* only on the factual "motive" aspect of an asylum claim. 502 U.S. at 482–84.

The Eighth Circuit's reading of *Elias-Zacarias* reflects a common form of confusion in the appellate courts. See *Xue*, 846 F.3d at 1105 n.11 (circuits rely "uncritically" on *Elias-Zacarias*). That confusion has caused courts to apply substantial-evidence review to questions of law underlying asylum determinations. Granting certiorari in this case would allow the Court to provide crucial guidance about the meaning of *Elias-Zacarias*—and avoid the further entrenchment of some circuits' mistaken belief that *Elias-Zacarias* requires substantial evidence review whenever a determination has any bearing on an applicant's "eligibility" for asylum.

A. The substantial evidence standard of review in *Elias-Zacarias* is limited to factual findings.

In *Elias-Zacarias*, this Court addressed whether "acts of conscription by a nongovernmental group constitute persecution on account of political opinion." 502 U.S. at 480. The Ninth Circuit had concluded that conscription by a guerilla organization "necessarily constitutes 'persecution on account of * * * political opinion.'" *Id.* at 481. This Court disagreed. Notably, this

Court rested its decision upon the fact that the petitioner had only shown that he was harassed by the guerilla group because "of his refusal to fight with them" rather than any political opinion of his. *Id.* at 483. This Court explained that the motive for resisting recruitment could be as simple as "fear of combat, [or] a desire to remain with one's family and friends," rather than any political opinion held by the petitioner. *Id.* at 482. Indeed, this Court noted there was some evidence in that case that the noncitizen was not expressing any political opinions, but was instead "afraid that the government would retaliate against him and his family." *Ibid.* Applying the substantial evidence standard, this Court concluded that the evidence did not "compel[] the conclusion" that the petitioner would be persecuted "*because of* [his] political opinion." *Id.* at 483 (emphasis in original).

While the *ratio decidendi* of *Elias-Zacarias* involved only the resolution of disputed fact issues, the Court's description of the standard of review has caused disarray in the courts of appeals:

> The BIA's determination that Elias-Zacarias was not eligible for asylum must be upheld if "supported by reasonable, substantial, and probative evidence on the record considered as a whole."

Id. at 481 (quoting 8 U.S.C. § 1105a(a)(4)). From that sentence, courts of appeals have inferred that eligibility for asylum is always a "factual conclusion." *E.g.*, *Zhao* v. *Gonzales*, 404 F.3d 295, 306 (5th Cir. 2005) (reviewing "the IJ's factual conclusion that an alien is not eligible for asylum").

However, the substantial evidence standard of review espoused in *Elias-Zacarias* is cabined to factual findings, like the "nexus" element of asylum eligibility at issue in that case. See *Gjetani*, 968 F.3d at 400 (Dennis, J., dissenting) (noting that the nexus element is a "classic example of a question of fact"). Nor does the INA require deference to the entire decision on eligibility, but instead requires—as it has always required—courts to accept the "administrative findings of fact" unless compelled otherwise. 8 U.S.C. § 1252(b)(4)(B); 8 U.S.C. § 1105a(a)(4) (1992) ("the Attorney General's findings of fact"); Act of Sept. 26, 1961, Pub. L. 87-301, 75 Stat. 650, 651–52 (1961) (same). That standard does not apply to the *entire* asylum eligibility determination, which includes both questions of fact and questions of law. *Singh*, 63 F.3d at 1507 (noting that *Elias-Zacarias*' holding that the substantial evidence standard of review applies to a certain factual finding "does not mean that every review of an asylum eligibility determination involves only questions of fact, nor does it alter [the] application of de novo review to questions of law").

Indeed, many courts have noted that *Elias-Zacarias* stands for an even narrower "central tenet": that refusing to join a military movement is not by itself persecution based on political opinion. *Ustyan* v. *Ashcroft*, 94 F. App'x 774, 777 (10th Cir. 2004); see also *Charalambos* v. *Holder*, 326 F. App'x 478, 481 (10th Cir. 2009); *Rivas-Martinez* v. *I.N.S.*, 997 F.2d 1143, 1147 (5th Cir. 1993) (recognizing that the finding regarding military conscription is one of two holdings in *Elias-Zacarias*). Nothing in *Elias-Zacarias* implies

that the substantial evidence standard extends to every aspect of the asylum eligibility determination.

B. Courts of appeals continue to misconstrue *Elias-Zacarias* and apply the substantial evidence review to questions of law.

Many courts, including the Eighth Circuit in this case, have nonetheless mistakenly construed *Elias-Zacarias* to require deference to the *entire* asylum eligibility determination, including questions of law. Pet.App.7a–8a (finding that the factual findings and the ultimate question of past persecution are both reviewed for substantial evidence); *Gjetani*, 968 F.3d at 396 ("[O]ur circuit precedents * * * make clear that we use the 'substantial evidence' standard, even when the agency determines the alien is credible and accepts his version of facts."); *Vahora* v. *Holder*, 626 F.3d 907, 913 (7th Cir. 2010) ("[U]nder our precedent, the Board's conclusion that the harms [petitioner] personally suffered do not rise to the level of persecution is supported by substantial evidence.").

1. These erroneous interpretations have focused on the single sentence from *Elias-Zacarias* stating that "[t]he BIA's determination that Elias-Zacarias was not eligible for asylum must be upheld if supported by reasonable, substantial, and probative evidence on the record considered as a whole." *Elias-Zacarias*, 502 U.S. at 481 (citations omitted). And courts of appeals have expanded that standard of review, inferring that "the ultimate question of past persecution * * * as well as the findings underlying that determination, are judicially reviewed under the substantial evidence standard that applies to agency findings of fact."

Pet.App.8a. But this interpretation of *Elias-Zacarias* "conflates the standard [of review] for individual factual findings with the overall determination of asylum eligibility." Stephen M. Knight, *Shielded from Review: The Questionable Birth and Development of the Asylum Standard of Review under Elias-Zacarias*, 20 Geo. Immigr. L. J. 133, 143 (Fall 2005). In fact, nowhere in *Elias-Zacarias* did this Court suggest that the standard of review for legal questions has changed, much less that substantial evidence rather than *de novo* review applies.

This confusion among courts is widespread and well-documented. *E.g.*, *Gjetani*, 968 F.3d at 400 (Dennis, J., dissenting). For example, the Tenth Circuit has criticized courts for "rely[ing] uncritically on" *Elias-Zacarias* in applying substantial evidence review "to the question of whether an undisputed set of facts constitute persecution." *Xue*, 846 F.3d at 1105 n.11; see also *Fon*, 34 F. 4th at 820–22 (9th Cir.) (Collins, J., concurring) (questioning whether *Elias-Zacarias* mandates substantial evidence review for mixed questions). Likewise, legal scholarship in the wake of *Elias-Zacarias* has been critical of the fact that, after *Elias-Zacarias*, the substantial evidence standard of review has been "deployed to apply to the asylum applicant's broader eligibility * * *, rather than specifically to factual findings." Knight, *Shielded from Review*, at 146.

Thus, this Court should grant certiorari in this case, if only to resolve the muddled divide between and within the courts of appeals. See *Fon*, 34 F.4th at 823 (Collins, J., concurring) (calling for either the Ninth

Circuit en banc to resolve the internal circuit confusion or this Court to resolve the circuit split). Further, this Court should hold that whether undisputed facts rise to the level of persecution is a legal determination subject to *de novo* review.

2. This Court should also grant review due to the substantive importance of the question. Often, the determination of whether to grant an asylum applicant's petition for review (or instead uphold the order of removal from the United States) hinges on the applicable standard of review. To give just one example among many, in *Zhi Wei Pang* v. *Holder*, the BIA found the noncitizen to be credible, but found that the harm suffered for resisting China's population control policies did not rise to the level of persecution. 665 F.3d 1226, 1230, 1234 (10th Cir. 2012). Concurring in the result, Judge Matheson noted that, "[i]n [his] view, the evidence supports that [petitioner] suffered past persecution" but he felt "[c]onstrained by the highly deferential standard of review." 665 F.3d at 1234 (Matheson, J., concurring); see also *Gjetani*, 968 F.3d at 401 (Dennis, J., dissenting) ("Upon de novo review, I believe Gjetani has made a sufficient showing to establish past persecution under our precedents."), *Diallo* v. *Ashcroft,* 381 F.3d 687, 697–98 (7th Cir. 2004) (affirming the BIA's past-persecution decision but suggesting the outcome would be different "[w]ere we reviewing Diallo's claim *de novo"*).

And the consequences of an erroneous denial of asylum can be grievous. The Department of Justice does not track what happens to asylum seekers, but the harms to deported asylum-seekers are well-docu-

mented. For example, Human Rights Watch has identified 138 cases of Salvadorans killed since 2013 after deportation from the United States. Human Rights Watch, *Deported to Danger: United States Deportation Policies Expose Salvadorans to Death and Abuse*, (Feb. 2020), https://tinyurl.com/mr3asz2p. Similarly, an asylum-seeker from Honduras who was erroneously deported was imprisoned without charges and then died in a fire many believe was intentionally set by the government. Sarah Stillman, *When Deportation is a Death Sentence*, The New Yorker (Jan. 8, 2018), https://tinyurl.com/mryf76u7. And in Cameroon, Human Rights Watch documented at least 39 asylum-seekers from 2019-2021 who were imprisoned upon return, and "13 cases of torture, physical or sexual abuse, or assault of deported people by state agents in detention." Human Rights Watch, *How Can You Throw Us Back? Asylum Seekers Abused in the US and Deported to Harm in Cameroon* (Feb. 10, 2022), https://tinyurl.com/yckv43xs. This Court should grant review and clarify that *de novo* review applies to these critical questions of law.

III. This Court's review is warranted to decide whether government prohibitions on freely and openly practicing one's religion constitute persecution as a matter of law.

Petitioner has also identified a second issue on which the federal appellate courts are deeply divided: whether prohibitions on freely and openly practicing one's religion necessarily constitute persecution. Pet.25–32. As petitioner has aptly demonstrated, the Eighth Circuit's decision below, along with that of the

Tenth Circuit, conflicts with decisions from the Seventh, Ninth, and Eleventh Circuits. Pet.25–26. That conflict is ripe for review by this Court.

1. This multi-circuit conflict is particularly stark when considering the facts and rationale of each case. The Eighth Circuit below suggested that it was not creating a conflict because it was making a "fact-specific" determination. Pet.App.10a. The panel concluded that petitioner was not subject to persecution based on his mistreatment: an initial arrest, beating, and warning "not to participate in illegal gatherings anymore." Pet.App.2a. Because "house churches are illegal," the Chinese officials prohibited petitioner from worshipping as he believed. *Xue*, 846 F.3d at 1101 n.2. Lest there be any doubt about the Chinese officials' motives, petitioner was subsequently arrested for attending his house church and detained for another 30 days. Pet.App.10a–11a. Contrary to the Eighth Circuit's suggestion, the interference with petitioner's religious exercise is in line with—or more severe than—the mistreatment that other courts have concluded amounts to religious persecution.

For example, the Ninth Circuit expressly focused on the harms caused by government action that "prevented [petitioner] from practicing his faith * * * through coercive means." *Guo* v. *Sessions*, 897 F.3d 1208, 1211 (9th Cir. 2018). Like petitioner here, the Chinese petitioner in *Guo* was beaten with a baton, forced to promise never to attend his Christian home church, and required to report to the police in Fujian Province weekly. *Id.* at 1210–11. While the beating in *Guo* was more forceful, the noncitizen was only detained for two days (as opposed to the combined

45 days for petitioner). *Id.* at 1211. Nonetheless, the Ninth Circuit was clear that the key inquiry was not the severity of the beating or length of detention, but the post-release restrictions that prevented the noncitizen from attending his home church and"[t]he form of persecution" was that the petitioner was "forbidden by the government from otherwise living a Christian life." *Id.* at 1215; see also *Zhang* v. *Ashcroft*, 388 F.3d 713, 719 (9th Cir. 2004) ("[R]equir[ing] [petitioner] to practice his beliefs in secret is contrary to our basic principles of religious freedom and the protection of religious refugees.").

Similarly, the Eleventh Circuit has held in a published decision that "having to practice religion underground to avoid punishment is itself a form of persecution." *Kazemzadeh* v. *U.S. Atty. Gen.*, 577 F.3d 1341, 1354 (11th Cir. 2009). In *Kazemzadeh*, a Muslim-born Iranian converted to Christianity while in the United States and sought asylum in part because Iran formally punished apostasy with death. *Id.* at 1345. The BIA found the noncitizen lacked a reasonable fear because an estimated 0.147% of the population of Iran were Islam-to-Christianity converts, and there had been no apostasy death sentences in the prior year. *Id.* at 1354–55. The Eleventh Circuit rejected that logic because such a small minority might have escaped death only "by concealing their religion." *Id. a*t 1355.

Here, the Eighth Circuit took the opposite approach, concluding that because 0.06%[4] of the population in China are Christian (far less than the 0.147% of Iranians held under threat of death in *Kazemzadeh*), petitioner does not have a reasonable fear of future persecution based on his undisputed Christian faith. Pet.App.12a. But the Eighth Circuit did not consider that the small minority might have escaped persecution only "by concealing their religion." *Kazemzadeh*, 577 F.3d at 1355.

The Seventh Circuit, which has consistently held that prohibiting the open practice of religion is persecution, has concluded that treatment similar to China's treatment of Christian house churches is persecution. See *Muhur* v. *Ashcroft*, 355 F.3d 958, 960–61 (7th Cir. 2004); *Shan Zhu Qiu* v. *Holder*, 611 F.3d 403, 409 (7th Cir. 2010) (granting petition for review when petitioner was forced to "cease the practice of [his religion] or hope to evade discovery"). In *Muhur*, the Seventh Circuit flatly held that "Eritrea persecutes Jehovah's Witnesses." 355 F.3d at 959. For that holding, the Seventh Circuit relied in part on the State Department's 2002 Report on International Religious Freedom, which described the Eritrean government's efforts to "harass, detain, and discriminate against" Jehovah's Witnesses. https://tinyurl.com/4jeh9due. The

[4] The estimate relied upon by the Eighth Circuit is that 70 million Christians live in China, out of the 1.14 billion people living in China. See https://www.census.gov/popclock/world (China). While 70 million is certainly a large number, the Eleventh Circuit made clear that even large numbers must be considered in context of the population as a whole.

report states that Jehovah's Witnesses were not allowed to "manifest such practice," and the government had closed non-government-sanctioned churches, but there was no evidence that the Eritrean state detained Jehovah's Witnesses solely for their religious practices. *Ibid.*

Here, the evidence is nearly identical (or worse). The 2016 International Religious Freedom Report in the record showed that the Chinese government does not permit non-state-registered churches, and used "administrative detention" to "punish members of unregistered religious or spiritual groups." Pet.App.4a. The sanitized term "administrative detention" includes "high security mental hospitals where patients were forced to take medicines and subjected to shock treatment," *Saizhu Wang* v. *U.S. Atty. Gen.*, 591 F. App'x 794, 797 (11th Cir. 2014), and "reeducation-through-labor camps.," *Shan Zhu Qiu*, 611 F.3d at 407–8. For petitioner, the evidence shows he was beaten and detained for weeks each time he attended an unregistered church. Pet.App.2a–3a. In the Seventh Circuit, that would no doubt be treated (correctly) as persecution.

2. The Eighth Circuit's rule is also contrary to general asylum law. In defense of its rule, the Eighth Circuit noted that petitioner was punished for a gathering that was "facially contrary to the Chinese government's constitution and laws." Pet.App.11a. Rather than supporting its decision, the Eighth Circuit's statement shows that it has in essence approved the Chinese government's prohibition on religious practice. That logic was soundly rejected by our forebears,

whose "personal experiences in religious persecution * * * planted our belief in liberty of religious opinion," of which the "freedom to worship was indispensable." *Sch. Dist. of Abington Township* v. *Schempp,* 374 U.S. 203, 214 (1963).

Nor does the Eighth Circuit's suggestion that petitioner can practice his religion in state-sponsored churches render this an acceptable outcome under our laws. Limiting citizens to particular state-sanctioned religions is "antithetical to the freedom of religion." *Guo*, 897 F.3d at 1216 n.5. As a matter of law, it cannot be that a formal prohibition on the practice of religion makes the practice tolerable.

Conforming the Eighth and Tenth Circuit's law to that of the Seventh, Ninth, and Eleventh would not broadly expand asylum for those subject to religious persecution. Proving past persecution or a fear of future persecution is just one step in the asylum analysis. For noncitizens like petitioner who were subject to past persecution, the Department of Homeland Security would then be able to prove that circumstances have fundamentally changed or that the noncitizen could avoid future persecution by relocating within the country, and such relocation would be reasonable under the circumstances. 8 C.F.R. § 1208.13(b)(1)(i)(b). For noncitizens who have not previously been subject to persecution in their home country, they would be required to prove that relocation would not be feasible. *Id.* § 1208.13(b)(2)(ii). But here, the undisputed facts show that petitioner was prohibited from practicing his religion, and DHS has not shown that relocation would be reasonable under the circumstances.

Moreover, the rule announced by the Eighth Circuit is contrary to the general asylum-law principle that the ability to hide cannot negate a reasonable fear of future persecution. As the Fifth Circuit has explained, "[t]he case law is clear that an alien cannot be forced to live in hiding in order to avoid persecution." *Singh* v. *Sessions*, 898 F.3d 518, 522 (5th Cir. 2018); see also *N.L.A.* v. *Holder*, 744 F.3d 425, 435 (7th Cir. 2014) ("[I]t is an error of law to assume that an applicant cannot be entitled to asylum if she has demonstrated the ability to escape the persecution only by chance or by trying to remain undetected.") (citations omitted); *Essohou* v. *Gonzales*, 471 F.3d 518, 522 (4th Cir. 2006) (concluding "efforts to hide" did not undermine noncitizen's reasonable fear of future persecution). The Eighth Circuit's decision conflicts with this basic principle, and this Court's review is warranted.

CONCLUSION

For the foregoing reasons, and those set forth in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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