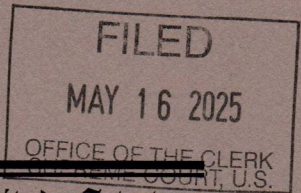


No. 24-805



In the Supreme Court of the United States

WALTER MALDONADO-MAGNO, ET AL., PETITIONERS

v.

PAMELA BONDI, ATTORNEY GENERAL

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly reviewed for substantial evidence the agency's finding that the criminals who threatened and extorted petitioners in Peru were not motivated by a statutorily protected characteristic, which rendered petitioners ineligible for asylum under 8 U.S.C. 1101(a)(42)(A) and 1158(b)(1)(B)(i).

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*ON PETITION FOR A WRIT OF CERTIORARI
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BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The order and judgment of the court of appeals (Pet. App. 1a-9a) is available at 2024 WL 4692214. The decisions of the Board of Immigration Appeals (Pet. App. 10a-18a) and the immigration judge (Pet. App. 19a-32a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 6, 2024. The petition for a writ of certiorari was filed on January 24, 2025. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Under the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, the Attorney General or the Secretary of Homeland Security may, in her discretion, grant asylum to an alien determined to be unable or un-

willing to return to his country of origin “because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.” 8 U.S.C. 1101(a)(42)(A); see 8 U.S.C. 1158(b)(1)(A). An individual may seek asylum either by filing an affirmative application that will be considered by an asylum officer in United States Citizenship and Immigration Services in the Department of Homeland Security, see 8 U.S.C. 1158(a), or by asserting eligibility for asylum before an immigration judge (IJ) in the Department of Justice after removal proceedings have been initiated, see 8 U.S.C. 1229a. A grant of asylum prevents the removal of the asylee to his country of nationality. 8 U.S.C. 1158(c)(1)(A). An accompanying spouse or child of an asylee is entitled to the same status. 8 U.S.C. 1158(b)(3)(A).

For purposes of asylum eligibility, “persecution” refers to harm or suffering that is inflicted upon an individual to punish him for possessing a protected belief or characteristic. *In re Acosta*, 19 I. & N. Dec. 211, 222 (B.I.A. 1985), overruled in part on other grounds by *In re Mogharrabi*, 19 I. & N. Dec. 439 (B.I.A. 1987). The determination of whether an applicant has experienced persecution involves assessing degrees of physical injury, pain, or distress. See, e.g., *Santos Garcia v. Garland*, 67 F.4th 455, 461 (1st Cir. 2023) (“Persecution goes beyond ‘unpleasantness, harassment, and even basic suffering.’”) (citation omitted); *KC v. Garland*, 108 F.4th 130, 135 (2d Cir. 2024) (persecution “is an extreme concept” and does not include “mere harassment”) (citations omitted); *Gilaj v. Gonzales*, 408 F.3d 275, 285 (6th Cir. 2005) (per curiam) (similar). Unfulfilled threats of harm are generally insufficient. See, e.g., *Brizuela v. Garland*, 71 F.4th 1087, 1093 (8th Cir.

2023) (“Threats alone ‘constitute persecution in only a small category of cases.’”) (citation omitted). The mistreatment must be at the hands of the foreign government or by groups or individuals that the foreign government is unable or unwilling to control. *In re Acosta*, 19 I. & N. Dec. at 222.

In addition, the persecution must be “on account of” a statutorily protected ground. 8 U.S.C. 1101(a)(42)(A). This is often referred to as the “nexus” requirement. See, e.g., Pet. App. 6a; *Gonzalez-Arevalo v. Garland*, 112 F.4th 1, 9 (1st Cir. 2024). To meet the nexus requirement, an applicant must show that his persecutor knew of the protected characteristic and was motivated to harm him on that basis. See *INS v. Elias-Zacarias*, 502 U.S. 478, 483 (1992) (“[S]ince the statute makes motive critical, [the applicant] must provide some evidence of it, direct or circumstantial.”) (emphasis omitted); 8 U.S.C. 1158(b)(1)(B). And under amendments to the INA made by the REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, 119 Stat. 302, the applicant must show that a protected ground is “at least one central reason” for the claimed persecution. 8 U.S.C. 1158(b)(1)(B)(i). A protected characteristic does not amount to a “central reason” for the harm if the characteristic is “incidental, tangential, superficial, or subordinate to another reason for harm.” *In re J-B-N- & S-M-*, 24 I. & N. Dec. 208, 214 (B.I.A. 2007); see Pet. App. 6a-7a.

An alien who has been found ineligible for asylum and is ordered removed by an IJ may appeal to the Board of Immigration Appeals (Board or BIA). See 8 C.F.R. 1003.1(b). If the appeal is unsuccessful, the individual may file a petition for review in the court of appeals for the judicial circuit in which the IJ completed the proceedings. 8 U.S.C. 1252(b)(2); see 8 U.S.C.

1252(a)(1). The INA provides that, when adjudicating such a petition for review, the court must treat “the administrative findings of fact [as] conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary.” 8 U.S.C. 1252(b)(4)(B).

2. a. Petitioners—an unmarried couple and their minor son—are natives and citizens of Peru who entered the United States without authorization in 2022. Pet. App. 2a. Proceeding pro se before the IJ, petitioners conceded removability and applied for asylum. *Id.* at 20a.¹

The adult petitioners testified that they had resided in the El Agustino neighborhood of the Lima metropolitan area, which they described as a dangerous neighborhood where many private businesses were subject to extortion by criminal gangs. Pet. App. 2a, 20a, 23a-24a. In 2016, petitioners began operating a seafood restaurant out of their home. *Id.* at 21a. In April 2021, criminals began extorting petitioners and threatening them with harm if the criminals’ payment demands were not met. *Id.* at 2a, 21a. Petitioners complied until they could no longer meet the extortion amounts. *Ibid.*

In January 2022, petitioners’ home was robbed while they slept. Pet. App. 2a. The next day, a caller took responsibility for the robbery and threatened further harm if petitioners continued to miss payments. *Id.* at

¹ The minor petitioner also sought asylum as a derivative beneficiary of his parents’ applications. Pet. App. 10a n.1. In addition, all three petitioners sought withholding of removal under 8 U.S.C. 1231(b)(3)(A) and protection under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), *adopted* Dec. 10, 1984, S. Treaty Doc. No. 20, 100th Cong., 2d Sess. (1988), 1465 U.N.T.S. 85. Pet. App. 2a n.1, 11a. They abandoned their CAT claims below, *id.* at 2a n.1, 11a n.2, and have not raised their withholding claims before this Court.

2a, 22a. Petitioners provided the police with video footage of the robber, but the individual was wearing a mask, and no arrest was made. *Id.* at 2a. Petitioners still could not meet the extortion demands, and the criminals started harassing and robbing the restaurant's customers. *Id.* at 2a, 22a. In April 2022, petitioners closed the restaurant and relocated to a relative's home that was a two-hour drive from El Agustino. *Id.* at 3a, 23a. They did not encounter the criminals there, but continued to feel unsafe, and later left for the United States. *Id.* at 23a.

Petitioner Andrea Uchuypoma-Palomino also testified that, for a time, she was politically active and supported the election of a man from El Agustino who ran for parliament. Pet. App. 5a, 24a. She did not testify to any harm or threats stemming from her political activities. *Id.* at 24a.

b. The IJ denied petitioners' asylum applications. Pet. App. 19a-32a. The IJ based the denials on multiple grounds. He first found that the extortion and extortionate threats that petitioners experienced did not rise to the level of past persecution. *Id.* at 26a-27a. The IJ next found that, even if there had been persecution, petitioners had not shown that it was on account of a protected ground (*i.e.*, they had failed to satisfy the nexus requirement). *Id.* at 27a; see *id.* at 28a (explaining that "the evidence demonstrate[s] that respondents were targeted for harm because they operated a small business that criminals perceived to be successful"). The IJ further found that petitioners had not shown that the Peruvian government would be unwilling or unable to control the extortionists. *Id.* at 27a. The IJ similarly found that petitioners had not shown a well-founded fear of future persecution, as petitioners failed to estab-

lish that they could not reasonably relocate in Peru or that any future persecution would be on account of a protected ground. *Id.* at 28a-29a.

c. The Board dismissed petitioners' appeal. Pet. App. 10a-18a. The Board agreed with all of the IJ's grounds for denial. *Id.* at 12a-17a. With respect to the IJ's nexus determination in particular, the Board found no clear error in the IJ's finding that the criminals were motivated by monetary gain, not by any protected characteristic of petitioners. *Id.* at 15a-16a. The Board acknowledged petitioner Uchuypoma-Palomino's testimony that she had supported a local political candidate, but observed that "she did not testify to any problems that occurred, or harm that was suffered, due to her support of this political figure." *Id.* at 14a.

3. Petitioners sought review in the court of appeals, which denied their petition for review in an unpublished order. Pet. App. 1a-9a.

At the outset, the court of appeals explained that it "ha[s] characterized the issue of whether an alien has established persecution as a question of fact." Pet. App. 6a (quoting *Matumona v. Barr*, 945 F.3d 1294, 1300 (10th Cir. 2019)). But the court considered only the agency's nexus finding, which the court reviewed for substantial evidence. *Id.* at 6a-8a. The court found no basis to disturb the agency's finding that the criminals targeted petitioners because petitioners ran a successful business, not on account of any protected characteristic. *Id.* at 6a-7a. Like the agency, the court noted that petitioner Uchuypoma-Palomino did not testify to any connection between her political activity and the extortionate threats. *Id.* at 7a-8a. And while petitioners had argued that the IJ should have elicited further testimony regarding their political activity, the court disa-

greed that a remand was warranted, as petitioners “ha[d] not identified any additional testimony or evidence showing they were targeted for extortion because of their political opinions.” *Id.* at 7a. Because petitioners’ failure to meet the nexus requirement was “dispositive,” the court did “not reach the other independent grounds also addressed by the Board.” *Id.* at 8a.

ARGUMENT

Petitioners contend (Pet. 19-20) that the court of appeals erred in reviewing for substantial evidence “whether established facts amount to persecution on account of a protected characteristic.” They similarly contend (Pet. 9-17) that the courts of appeals are conflicted on the standard of review applicable to that issue. It is true, as the government has acknowledged in its response to the pending petition for a writ of certiorari in *Urias-Orellana v. Bondi*, No. 24-777 (filed Jan. 17, 2025), that there is significant confusion in the courts of appeals regarding the standard of review applicable to an agency finding that an asylum applicant has not experienced persecution. See Gov’t Br. at 15-17, in *Urias-Orellana v. Bondi*, No. 24-777 (filed May 16, 2025) (*Urias-Orellana* Br. in Resp.).² But petitioners’ case is not a suitable vehicle for addressing that confusion because the decision below resolved petitioners’ asylum claims on the distinct ground that they had not established the required nexus between any persecution and a protected characteristic. Petitioners have identified no court of appeals that would review a nexus finding *de novo*. Moreover, before the court of appeals, petitioners expressly agreed that the substantial-evidence stand-

² We have served petitioners with a copy of the government’s response brief in *Urias-Orellana*.

ard applies to the court's review of the agency's nexus finding. And a reversal on that question would not affect the disposition of petitioners' asylum applications. As a result, further review is unwarranted. At most, the Court should hold the petition for a writ of certiorari pending the Court's disposition of *Urias-Orellana* and then dispose of this petition as appropriate.

1. Petitioners contend that the court of appeals erred in reviewing for substantial evidence "whether established facts amount to persecution on account of a protected characteristic." Pet. 19; see Pet. 19-20. They similarly contend that the courts of appeals disagree "on the standard of review applicable to the agency's determination that an individual has not established persecution on account of a protected characteristic." Pet. 9; see Pet. 9-17.

The INA provides that a court of appeals reviewing an order of removal must accept "administrative findings of fact" as "conclusive," unless "any reasonable adjudicator would be compelled to conclude to the contrary." 8 U.S.C. 1252(b)(4)(B); see *Nasrallah v. Barr*, 590 U.S. 573, 584 (2020) (explaining that Section 1252(b)(4)(B) reflects "the substantial-evidence standard"). As the government has explained in its response to the pending petition in *Urias-Orellana*, "administrative findings of fact" under Section 1252(b)(4)(B) include mixed questions of law and fact that are of a primarily factual nature. See *Urias-Orellana* Br. in Resp. 9-12. The mixed questions that are appropriately subject to substantial-evidence review include an agency's determination of whether the harm or mistreatment an applicant has experienced constituted "persecution." See *id.* at 12-13.

But as the government has also acknowledged in its response to the petition in *Urias-Orellana*, there is significant confusion in the courts of appeals regarding that question—*i.e.*, the standard of review applicable to past-persecution findings. *Urias-Orellana* Br. in Resp. at 15-17; cf. Pet. 10-16 (discussing cases implicating that confusion). The government agrees that this Court’s review of that question is warranted. *Urias-Orellana* Br. in Resp. 17.

In this case, however, the court of appeals did not review the agency’s finding of no persecution. See Pet. App. 8a. Instead, the court affirmed the denial of petitioners’ asylum claims solely on the ground that petitioners had not shown a nexus between any persecution they might have experienced and a protected characteristic. *Id.* at 6a-8a. To be sure, the court reviewed *that* agency finding—which turns on the alleged persecutors’ motivations—for substantial evidence. See *id.* at 8a. That approach was correct, largely for the same reasons why past-persecution findings are appropriately subject to substantial-evidence review. See *Urias-Orellana* Br. in Resp. 9-15.

But unlike persecution findings, there does not appear to be any division in the courts of appeals regarding the standard of review applicable to nexus findings. See, *e.g.*, *Mazariegos-Rodas v. Garland*, 122 F.4th 655, 664 (6th Cir. 2024) (applying substantial-evidence review to nexus finding); *Alvarado-Reyes v. Garland*, 118 F.4th 462, 474 (1st Cir. 2024) (same); *Jathursan v. U.S. Att’y Gen.*, 17 F.4th 1365, 1373 (11th Cir. 2021) (same); see also American Gateways Amicus Br. 15 n.6 (observing that “what the persecutor’s subjective motives are is a ‘classic factual question’”) (quoting *Crespin-Valdadares v. Holder*, 632 F.3d 117, 128 (4th Cir. 2011)). Pe-

tioners have not identified any decision of a court of appeals holding that a nexus determination, or the finding of motivation underlying it, should be reviewed de novo. Cf. Pet. 15 n.1. They cite *Perez Vasquez v. Garland*, 4 F.4th 213 (4th Cir. 2021), but that court noted only that it would review de novo “whether the [Board of Immigration Appeals] and the [immigration judge] applied the correct legal standard’ in their nexus analysis.” *Id.* at 221 (emphasis added; citation omitted; brackets in original). And the Ninth Circuit (see Pet. 16) has merely indicated that the standard of review for nexus findings is “unsettled” in that circuit. *Aleman-Belloso v. Bondi*, 128 F.4th 1031, 1040 & n.2 (9th Cir. 2025); see *Garcia v. Wilkinson*, 988 F.3d 1136, 1142 n.2 (9th Cir. 2021) (likewise declining to decide the issue).³

In the absence of a conflict regarding the specific standard-of-review question presented in this case, petitioners primarily rely (Pet. 10-16) on decisions impli-

³ Petitioners also observe (Pet. 16-17) that within the agency, the Board reviews de novo the IJ’s ultimate conclusion regarding nexus, while reviewing for clear error the IJ’s findings regarding the persecutors’ motivations. See *In re S-E-G-*, 24 I. & N. Dec. 579, 588 n.5 (2008); see *Ferreira v. Garland*, 97 F.4th 36, 46 n.4 (1st Cir. 2024) (referencing the administrative practice and suggesting that there may be “tension” between that practice and the court’s review for substantial evidence of the Board’s nexus determinations). But that administrative practice is a function of the respective authorities that the Attorney General has chosen to delegate to the Board and to IJs. See 8 C.F.R. 1003.1(d)(3)(i) and (ii); 67 Fed. Reg. 54,878, 54,890-54,891 (Aug. 26, 2002). The dividing line need not correspond with the meaning of the statutory phrase “administrative finding[] of fact” in 8 U.S.C. 1252(b)(4)(B), and there is nothing anomalous about giving the Board greater latitude when reviewing an intra-agency determination than appellate courts have when they review the agency’s ultimate finding. Cf. *He v. Garland*, 24 F.4th 1220, 1224 & n.3 (8th Cir. 2022), cert. dismissed, 143 S. Ct. 2694 (2023).

cating the confusion about persecution findings. Although the court of appeals appeared to briefly advert to that divide at the outset of the analysis in its unpublished order, see Pet. App. 6a n.2, that issue is not squarely implicated here because the court's refusal to overturn the Board's findings was directed to the nexus question, see *id.* at 7a-8a. As a result, even assuming that the legal analysis regarding the appropriate standard of review may be substantially similar for both inquiries—which are subcomponents of the overarching determination whether an applicant has established that he is a “refugee” under 8 U.S.C. 1101(a)(42)(A), cf. Pet. i, 4—this Court should grant review only in the case presenting the standard-of-review dispute that has already percolated in the lower courts. See *Urias-Orellana* Br. in Resp. 15-17.

2. Moreover, petitioners' case presents a poor vehicle to decide the appropriate standard of review for nexus findings because petitioners previously agreed that the substantial-evidence standard applies to that review. Pet. C.A. Br. 24 (“The determination as to whether a nexus exists between the harm Petitioners have suffered and fear and a protected ground is an issue of fact, and subject to the substantial evidence standard of review.”); Pet. C.A. Reply Br. 8 (same). This Court does not generally review arguments not pressed nor passed upon below. See *Babcock v. Kijakazi*, 595 U.S. 77, 82 n.3 (2022).⁴

⁴ Relatedly, if the Court were to hold this petition, decide the question presented in *Urias-Orellana* in favor of those petitioners, and then remand this case for further consideration in light of such a decision, the government reserves its ability to raise a forfeiture argument in the court of appeals.

3. This case would also be a poor vehicle for resolving the question presented because a reversal on that question would not affect the disposition of petitioners' asylum applications, for multiple reasons. Cf. *Supervisors v. Stanley*, 105 U.S. 305, 311 (1882) (explaining that this Court does not grant a writ of certiorari to "decide abstract questions of law * * * which, if decided either way, affect no right" of the parties).

First, the court of appeals would have upheld the agency's nexus determination under any standard of review. As the court observed, petitioner Uchuypoma-Palomino "'did not testify to any problems that occurred or harm that was suffered, due to her support of'" the local politician, Pet. App. 7a (citation omitted), and she "did not testify that she was targeted for her political opinions or that the extortionists had a political motivation," *id.* at 8a. Given the total absence of evidence connecting a protected ground to any past harm that petitioners experienced, the court could not have reversed the agency's nexus determination even under a de novo standard. And while petitioners argued below that the IJ had erred in not eliciting such evidence, the court of appeals correctly determined that any such error would be harmless because petitioners "identified no additional testimony or evidence related to [Uchuypoma-Palomino's] political opinions or involvement that support their asylum claim." *Id.* at 5a.

Second, the agency based the asylum denials on multiple independent grounds that the court of appeals had no need to reach. See Pet. App. 8a. Some of those alternative grounds have no connection to the nexus finding or to the question presented in *Urias-Orellana*, including petitioners' failure to establish that the Peruvian government would be unwilling or unable to control

the extortionists, see *id.* at 16a, 27a, as well as petitioners' failure to show that they could not reasonably relocate within Peru, see *id.* at 16a-17a, 28a.

For those reasons—as well as petitioners' forfeiture of the standard-of-review argument they press now and the absence of lower-court decisions adopting that view—the Court should deny further review. At most, it might consider holding petitioners' case pending the Court's disposition in *Urias-Orellana*.

CONCLUSION

The petition for a writ of certiorari should be denied. In the alternative, the Court may wish to hold this petition pending disposition of *Urias-Orellana v. Bondi*, No. 24-777 (filed Jan. 17, 2025), and then dispose of the petition as appropriate in light of the Court's disposition in that case.

Respectfully submitted.

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