No. 24-805

IN THE

Supreme Court of the United States

WALTER MALDONADO-MAGNO, ET AL.,

Petitioners,

v.

PAMELA BONDI,
ATTORNEY GENERAL,

Respondent.

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

REPLY BRIEF FOR PETITIONERS

CHRISTINE HERNANDEZ
HERNANDEZ &
ASSOCIATES, P.C.
1801 York Street
Denver, CO 80206

GREGORY J. DUBINSKY
Counsel of Record
BRIAN T. GOLDMAN
JAMES T. CAMPBELL
ARIELLA KAHAN
HOLWELL SHUSTER
& GOLDBERG LLP
425 LEXINGTON AVENUE
New York, NY 10017
(646) 837-5120
gdubinsky@hsgllp.com

May 30, 2025

Counsel for Petitioners

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes

Other Authorities

Rules

REPLY BRIEF FOR PETITIONERS

Section 1101(a)(42)(A) requires an applicant seeking to qualify as a "refugee" to show "persecution or a well-founded fear of persecution on account of" a protected characteristic. 8 U.S.C. § 1101(a)(42)(A). The Courts of Appeals are deeply divided as to whether they should review *de novo* or for substantial evidence the agency's determination that a given set of facts does not satisfy the statute's requirements.

The Government contends that the Court should review that question, but only as to one part of the statute: "persecution." The Government's position is that the Court should grant the petition in *Urias-Orellana* (No. 24-777)—which implicates the standard applicable to "persecution" determinations—while denying this Petition and thus declining to clarify the standard applicable to determinations whether persecution was "on account of" a protected characteristic (the so-called "nexus" requirement). Thus, per the Government, the Court should constrain its consideration of the standard to half of the statute.

The Government's reasoning makes little sense. If the Court is inclined to grant *Urias-Orellana* to decide the standard governing "persecution" determinations, it should likewise grant this Petition to review the standard applicable to "nexus" determinations. Although "persecution" and "nexus" are distinct requirements, they are component elements of a single overarching statutory inquiry. Even were the Court to consider the prospect that the

statutory elements should be reviewed under different standards, the Court's consideration will be enhanced by granting both this Petition and *Urias-Orellana*, so that the Court has before it the entire statutory landscape and briefing as to both elements.

Moreover, by reviewing both petitions, this Court will be ideally positioned to clarify the appropriate standard of review governing all agency "refugee" determinations. Hearing both this case and *Urias-Orellana* would provide the Court the most capacious legal and factual toolbox to resolve "this standard-of-review question [which] is both important and frequently recurring." Br. for Gov't, *Urias-Orellana* v. *Bondi*, at 17. In so doing, the Court can alleviate confusion plaguing thousands of cases.

The Government's arguments for denying this Petition while granting *Urias-Orellana* are unsound. Contrary to the Government's assertion otherwise, the Courts of Appeals are indeed divided as to the standard of review governing "nexus" determinations. And this Petition is a suitable vehicle to decide the question presented.

Regardless of whether this Court grants *Urias-Orellana*, the Court should grant this Petition—it squarely implicates the question presented and is an ideal vehicle for the Court's consideration.

I. The Circuits Are Divided on the Standard Applicable to "Nexus" Determinations

The Government asserts that the circuits are not divided with respect to the standard of review for

nexus determinations. It claims that "petitioners have not identified any decision of a court of appeals" holding that such determinations "should be reviewed *de novo*." Br. in Opp. ("BIO") 9–10. That contention is incorrect.

A. At least two circuits—the Fourth and Ninth Circuits—expressly review nexus determinations *de novo*. See Pet. I.B.

To begin, the Fourth Circuit reviews *de novo* the application of the nexus standard to undisputed facts. *Perez Vasquez* v. *Garland* (discussed Pet. 14–15) makes that plain. 4 F.4th 213 (4th Cir. 2021). There, the circuit reviewed *de novo* whether the agency correctly applied the statutory nexus standard to "unrebutted" facts, *id.* at 226, and held that the agency's "fail[ure] to consider the intertwined reasons for the persecution"—in particular, the petitioner's familial relationship to her husband—constituted a "misapplication of the statutory nexus standard." *Id.* at 224 (cleaned up).

Similarly, *Cordova* v. *Holder*, 759 F.3d 332 (4th Cir. 2014), also held that "the BIA's nexus analysis" failed to support its ultimate "legal conclusion," *id.* at 340. Indeed, even the dissent there (which would have denied the petition) agreed that the question whether an applicant "established the requisite nexus between his proposed social group and the death threats he alleges is a question of law that the Court reviews de novo." *Id.* at 341 (Agee, J., dissenting) (citing *Li Fang Lin* v. *Mukasey*, 517 F.3d 685, 696 (4th Cir. 2008)).

Although the Government seeks to distinguish *Perez Vasquez* by saying it shows the Fourth Circuit reviews *de novo* only whether the agency "applied the correct legal standard in their nexus analysis," BIO 10 (quoting *Perez Vasquez*, 4 F.4th at 221), that is a distinction without a difference. The Fourth Circuit contrasted its review of a persecutor's "motivation"—which it considered a "classic factual question, reviewed for substantial evidence"—with its review of whether the BIA "applied the correct legal standard in their nexus analysis," which it "review[s] *de novo*," and which sweeps in the application of law to facts. *Perez Vasquez*, 4 F.4th at 221. And the Circuit's *de novo* analysis encompassed a mixed question of law and fact—the court held that the BIA erred because it "focus[ed] narrowly on the 'immediate trigger'" for the persecution. *Id.* at 224.

In short, in the Fourth Circuit, "the requisite nexus . . . is a question of law that the Court reviews *de novo*," *Cordova*, 759 F.3d at 341 (Agee, J., dissenting). The Fourth Circuit's rule squarely splits with the decision below and the other circuits that deferentially review nexus determinations. Pet. 10–14.

But there is more. The Ninth Circuit, like the Fourth Circuit, has expressly stated that "[w]hen an applicant is deemed credible, we have considered nexus issues to be questions of law entitled to *de novo* review." *Garcia* v. *Wilkinson*, 988 F.3d 1136, 1142 n.2 (9th Cir. 2021). And it has applied that standard of review in granting asylum applications. In *Singh* v.

Ilchert, 63 F.3d 1501, 1506 (9th Cir. 1995), where "[t]he facts [we]re not at issue" because "[t]he IJ expressly credited the heart of the applicant's testimony," the "issues presented in this appeal involve the application of established legal principles to undisputed facts" and therefore "whether the harm the respondent fears is on account of 'political opinion [is] a question of law, and we review the decision of the BIA *de novo*." *Id.* at 1506 (cleaned up).

There, the Ninth Circuit, applying *de novo* review, reversed on the nexus question because the facts established a nexus under the statute. *Id.* at 1508–10. *Singh* built on an unbroken line of prior cases that also reviewed *de novo* whether an applicant "suffered persecution on account of" a protected ground, "as a matter of law." *Lazo-Majano* v. *I.N.S.*, 813 F.2d 1432, 1436 (9th Cir. 1987), *overruled on other grounds by Fisher* v. *I.N.S.*, 79 F.3d 955 (9th Cir. 1996); *Desir* v. *Ilchert*, 840 F.2d 723, 728 (9th Cir. 1988) (holding as a matter of law that "the treatment endured by [applicant] is more properly understood as motivated by 'political' rather than 'personal' interests").

Although the Government cites later Ninth Circuit cases saying the question is "unsettled," BIO 10 (quoting *Aleman-Belloso* v. *Bondi*, 128 F.4th 1031, 1040 & n.2 (9th Cir. 2025)), *Singh*, as the first-in-time case, provides the operative rule of decision.[1] Regardless, as the Government acknowledges in its brief in *Urias-Orellana* (at pp. 16–17), intra-circuit

---

[1] *Koerner* v. *Grigas*, 328 F.3d 1039, 1050 (9th Cir. 2003).

confusion also supports granting certiorari in these circumstances.

B. "[T]he widespread and entrenched confusion" (Br. for Gov't, *Urias-Orellana*, at 16) and diverging views on nexus determinations extend beyond the Fourth and Ninth Circuits. The Second Circuit has stated, in accord with the Fourth and Ninth Circuits, that it "review[s] *de novo* the BIA's application of legal principles, including whether the persecution allegedly faced by the applicant is connected to one of these protected grounds," *Singh* v. *Gonzales*, 169 F. App'x 28, 29 (2d Cir. 2006), while at other times it has applied the substantial evidence standard, see *Feitosa* v. *Lynch*, 651 F. App'x 19, 21 (2d Cir. 2016).

The First Circuit has also "noted the tension inherent . . . in how we review the agency's nexus conclusion, which, as with persecution, involves factual determinations by the IJ but a *de novo* review by the BIA as to whether those facts taken together are sufficient to meet the legal standard." *Ferreira* v. *Garland*, 97 F.4th 36, 46 n.4 (1st Cir. 2024).

As *Ferreira* explains, this tension arises from the Executive Branch's view that nexus conclusions should be reviewed *de novo* by the BIA when it reviews the immigration judge. "[T]he BIA must review *de novo* whether a persecutor's motives meet the nexus legal standards." *Umana-Escobar* v. *Garland*, 69 F.4th 544, 552 (9th Cir. 2023). Thus, as the agency explained in *Matter of S-E-G-*, it "perform[s] *de novo* review of . . . whether the respondents established that they were persecuted 'on

account of' a protected ground." 24 I. & N. Dec. 579, 590 n.5 (B.I.A. 2008).

The Government waves away the BIA's *de novo* review. It asserts that it is not "anomalous" for the BIA to conduct *de novo* review while the Courts of Appeals review deferentially, because it "is a function of the respective authorities that the Attorney General has chosen to delegate to the Board." BIO 10 n.3. But the principal authorities the Government cites—8 C.F.R. § 1003.1(d)(3)(i) and (ii)—provide merely that, in the BIA, "questions of law" may receive *de novo* review while "findings of fact" will not. *Compare* 8 C.F.R. § 1003.1(d)(3)(i) ("The Board will not engage in de novo review of findings of fact[.]"), *with* 8 C.F.R. § 1003.1(d)(3)(ii) ("The Board may review questions of law . . . *de novo*."). That the Board considers as a question of law "whether a persecutor's motives meet the nexus legal standards," *Umana-Escobar*, 69 F.4th at 552, while certain circuits consider that *same question* a "finding of fact" subject to deferential review is indeed a significant "tension," *Ferreira*, 97 F.4th 46 n.4.

II. The Issue Is Important, and the Decision Below Is Plainly Wrong

As the Government acknowledges, the "standard-of-review question is both important and frequently recurring," and therefore worthy of resolution by this Court. Br. for Gov't, *Urias-Orellana*, at 17. The Government is correct to acknowledge the importance of the standard of review, as it implicates thousands of asylum cases each year. Pet. 17–19.

The decision below—along with the other courts that review nexus conclusions deferentially—is also wrong. Whether undisputed facts amount to persecution "on account of" a protected ground is a question of law that must be reviewed *de novo*.

"[Q]uestions of law" in the INA "include[] the application of a legal standard to undisputed or established facts." *Guerrero-Lasprilla* v. *Barr*, 589 U.S. 221, 225 (2020). Courts that have concluded otherwise in the nexus context have confused two questions. While "[t]he immigration judge's determination of 'what happened' to the individual is a factual determination," the "judge's determination[] of whether these facts demonstrate . . . the harm inflicted was 'on account of' a protected ground" is a legal question. *Board of Immigration Appeals: Procedural Reforms To Improve Case Management*, 67 Fed. Reg. 54878-01 (2002).

Accordingly, while "what was a persecutor's motive" may be a factual question subject to deferential review, "whether a persecutor's motives meet the nexus legal standards" is a legal question that must be "review[ed] *de novo*," *Umana-Escobar*, 69 F.4th at 552, as it involves "[t]he application of a statutory legal standard . . . to an established set of facts." *Wilkinson* v. *Garland*, 601 U.S. 209, 212 (2024).

Thus, this Petition implicates similar confusion that prompted this Court's review last term in *Wilkinson* and, shortly before that, in *Guerrero-Lasprilla*. As in those cases, the Court has the

opportunity to resolve uncertainty in thousands of cases by reaffirming that whether a set of facts satisfies the "statutory legal standard" for "refugees" is a "quintessential mixed question of law and fact" regarded as a "question[] of law" under the INA. See *Wilkinson*, 601 U.S. at 212.

III. This Petition Is an Ideal Vehicle to Resolve the Nexus Question

This Petition is an ideal vehicle to resolve the nexus question. The Tenth Circuit in the decision below affirmed solely on the basis that any persecution was not "on account of" a protected ground, while acknowledging that the deferential "standard of review" it had to apply "compel[s] affirmance." Pet. App. 8a.

Further, the agency accepted Petitioners' testimony and found them credible, Pet. App. 25a, therefore squarely presenting the issue whether the application of undisputed facts to the statutory nexus standard implicates primarily a question of law or of fact. The Government's attempt to recast this Petition as a poor vehicle is meritless.

A. The Government contends that Petitioners forfeited their arguments by not advancing them below. BIO 11. That is not true, and in any event would pose no vehicle problem for at least two separate reasons.

First, this Court declines to review *issues* not pressed or passed upon by lower courts. See, *e.g.*, *Yee* v. *City of Escondido*, 503 U.S. 519, 534–35 (1992). But

as this Court has acknowledged, litigants are free to advance new legal arguments in support of issues properly presented, especially when those arguments would have been futile before lower courts. See *Citizens United* v. *Fed. Election Comm'n*, 558 U.S. 310, 330–31 (2010) ("[O]nce a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." (quoting *Yee*, 503 U.S. at 534)).

That is precisely what happened here. In the Court of Appeals, Petitioners sought judicial review of a BIA determination that they are not "refugees" within the meaning of 8 U.S.C. § 1158(b)(1). The claim was therefore preserved. Petitioners did not throw away their chance at Supreme Court review by declining to implore lower-court judges to disregard unambiguous circuit precedent. Indeed, the Government's position would flip this Court's issue-preservation rules on their head, requiring litigants to waste lower courts' time with futile (and potentially sanctionable) arguments.

Second, the Court grants certiorari to review not only issues "pressed" below but also those "passed upon." *United States* v. *Williams*, 504 U.S. 36, 41 (1992) (explaining that certiorari is available for issues "not pressed . . . so long as [they were] passed upon" below). And that plainly occurred here: The Tenth Circuit passed upon the question presented when it concluded that binding circuit precedent "compelled" deference to—rather than *de novo* review

of—the BIA's conclusion notwithstanding the circuit split on that very question.

B. The Government further urges the Court to deny the Petition on the basis that the Tenth Circuit would likely reach the same result on other grounds in the event of a remand. BIO 7, 12. This argument, too, is wrong.

This Court has consistently instructed that the hypothetical possibility of affirmance on other grounds in the event of a remand does not bear on the availability of judicial review when a threshold federal question is squarely presented. *E.g., Limelight Networks, Inc.* v. *Akamai Techs., Inc.*, 572 U.S. 915, 926 (2014). The Government itself regularly advances this argument in support of its own petitions for review. *See, e.g.*, Gov't Cert. Reply. Br., *Comm'r* v. *Estate of Jelke,* No. 07-1582, 2008 WL 4066478, at *9 (Sept. 3, 2008). But even if legally or logically subsequent questions for remand were relevant to certiorari, the Government's argument would be still meritless, because the *Urias-Orellana* petition is identically situated to the Petition here with respect to such questions. *Urias-Orellana* v. *Garland*, 121 F.4th 327, 332 (1st Cir. 2024) (noting that the agency "premised its denials on several grounds," including, for example, the petitioners' failure to "show that they could not reasonably relocate in El Salvador").

Below, the Tenth Circuit expressly declined to reach any alternative grounds once it concluded that binding circuit precedent "compelled" deference to the agency's conclusion that Petitioners are not

"refugees." Pet. App. 8a; see also *id.* 12a–13a (confirming that the Tenth Circuit did not and need not "reach any the other independent grounds also addressed by the Board"). The fact that issues remain for the Tenth Circuit to decide on remand is of no moment and does not detract from the suitability of this Petition as a vehicle to decide the question presented.

IV. The Court Should Grant this Petition Alongside *Urias-Orellana*

The Court should grant this Petition regardless, but if the Court is inclined to grant *Urias-Orellana*, the Court should grant this Petition as well.

Review of both petitions would afford the Court the broadest possible array of facts and briefing to adjudicate the standard of review governing refugee determinations, including any distinction in the standard applicable to the two elements.

The Court routinely grants multiple petitions to ensure review of the full scope of a statutory provision, including in the immigration context. See, *e.g.*, *Campos-Chaves* v. *Garland*, 602 U.S. 447, 450 (2024) (explaining two petitions were granted to "consider what it means to demonstrat[e] that the alien did not receive notice in accordance with paragraph (1) or (2)"); Br. in Opp. at 8, *Campos-Chaves* v. *Garland* (No. 22-674) (Mar. 24, 2023) ("Granting both petitions would allow this Court to consider the proper interpretation of the INA's *in absentia* removal

provisions in full view of the somewhat different scenarios presented[.]").

The Court should do the same here. At the absolute minimum, if the Court grants *Urias-Orellana*, it should hold this petition pending resolution of that case. *Cf.* BIO 8, 13 (suggesting that "the Court may wish to hold this Petition pending disposition of *Urias-Orellana*").

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

CHRISTINE HERNANDEZ
HERNANDEZ &
ASSOCIATES, P.C.
1801 York Street
Denver, CO 80206

GREGORY J. DUBINSKY
Counsel of Record
BRIAN T. GOLDMAN
JAMES T. CAMPBELL
ARIELLA KAHAN
HOLWELL SHUSTER
& GOLDBERG LLP
425 LEXINGTON AVENUE
New York, NY 10017
(646) 837-5120
gdubinsky@hsgllp.com

May 30, 2025

Counsel for Petitioners