No. 22-1288

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

XIOMARA LETICIA HERNANDEZ PARADA

Petitioner

v.

MERRICK B. GARLAND, Attorney General

Respondent

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION OF NEW HAMPSHIRE IN SUPPORT OF PETITIONER

ON THE PETITION FOR REVIEW OF
THE ORDER FROM THE BOARD OF IMMIGRATION APPEALS

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CORPORATE DISCLOSURE STATEMENT

Amicus curiae the **American Civil Liberties Union of New Hampshire** is a non-profit entity that does not have parent corporations. No publicly held corporation owns 10 percent or more of any stake or stock in *amicus curiae*.

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RULE 29 STATEMENTS

Pursuant to Rule 29(a)(2), counsel for *amicus curiae* certify that all parties have consented to the filing of this brief. Pursuant to Rule 29(a)(4)(E), counsel for *amicus curiae* state that no counsel for a party authored this brief in whole or in part, and no person other than *amicus curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

/s/ SangYeob Kim
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INTERESTS OF *AMICUS CURIAE*

The American Civil Liberties Union of New Hampshire (ACLU-NH) is the New Hampshire affiliate of the American Civil Liberties Union (ACLU)—a nationwide, nonpartisan, public-interest organization with over 1.8 million members and supporters (including over 9,000 New Hampshire members and supporters). The ACLU-NH, through its New Hampshire Immigrants' Rights Project, engages in litigation by direct representation and as *amicus curiae* to encourage the protection of immigrants' rights guaranteed under the Immigration and Nationality Act (INA) and the United States Constitution.

In this role, the ACLU-NH has participated in cases concerning the statutory and constitutional rights of noncitizens. *See, e.g., Rivera-Medrano v. Garland*, Docket No. 20-1667, 2022 U.S. App. LEXIS 24104 (1st Cur. Aug. 26, 2022); *Barros v. Garland*, 31 F.4th 51 (1st Cir. 2022); *Adeyanju v. Garland*, 27 F.4th 25 (1st Cir. 2022); *Hernandez Lara v. Barr*, 962 F.3d 45 (1st Cir. 2020); *Hernandez-Lara v. Lyons*, 10 F.4th 19 (1st Cir. 2021); *Perez-Trujillo v. Garland*, 3 F.4th 10 (1st Cir. 2021); *Compere v. Nielsen*, 358 F. Supp. 3d 170 (D.N.H. 2019).

Under the INA, an asylum applicant can establish the presumption of a well-founded fear of future persecution by proving that they suffered past persecution on account of one of five statutorily-protected grounds. *See Hernandez-Barrera v. Ashcroft*, 373 F.3d 9, 21 (1st Cir. 2004); *see also* 8 U.S.C. § 1158(b)(1)(B)(i); 8

C.F.R. § 208.13(b)(1).

The ACLU-NH has a particular interest in this case because it involves the agency's past persecution assessment of an asylum applicant who suffered non-physical injury when she was a child. In *amicus*' view, the agencies' past persecution assessment in this case was flawed by ignoring two considerations that are crucial in assessing whether a child victim suffered sufficient harm to constitute legal persecution—namely, (1) the variations of the psychological make-up of each victim, and (2) the cumulative effect of past suffering, including the suffering endured both as a child and adult. As the agencies failed to meaningfully consider either factor in this case, the agencies' decisions should be vacated.

SUMMARY OF ARGUMENT

Amicus argues that the Board of Immigration Appeals (BIA) and Immigration Judge (IJ) committed at least two errors in assessing whether Petitioner's past harm establishes past persecution.

First, the BIA and IJ erred when they concluded that Petitioner's past persecution in the form of racial discrimination in school was not sufficiently severe under the INA because Petitioner still completed her education. This cursory conclusion ignores the reality that, just because a victim has endeavored to overcome persecution in some way (in this case, by still completing her education), this ability to cope does not negate the fact that persecution occurred or was severe.

It is obvious that victims, including children, wrestle with their trauma in dramatically different ways. Some struggle with maintaining personal and professional relationships by engaging in isolation and withdrawal, while others find coping mechanisms to function in society through strength of will. Others fall somewhere in between, with these coping mechanisms often evolving throughout the stages of life. These varying responses reflect the complexity of human beings more broadly and how they respond to, and process, trauma. *See* Edith Montgomery, Yvonne Krogh, Anne Jacobsen, Berit Lukman, *Children of Torture Victims: Reactions and Coping*, 16 Child Abuse & Neglect 6 (1992) (observations that children develop "four main coping strategies: (a) isolation and withdrawal, (b) mental fight, (c) eagerness to acclimatize, and (d) strength of will and fighting"). Applying these principles, in assessing a child victim's past persecution—particularly threats and psychological harm—the agency must be mindful of each victim's variations in psychological make-up. This is because each victim will react differently when confronted with persecution. Because of this complexity, the agency must not jump to the conclusion that a child victim's past harm was not severe enough simply because the victim persevered in some aspect of life. Rather, the agency must meaningfully and holistically consider the effects of the past suffering and how the victim coped with the trauma.

In this case, the agencies ignored these complexities and, instead, adopted a

simplistic (and erroneous) view that, just because Petitioner had completed her education despite her persecution, this means that the persecution she suffered was not severe. In so doing, the agencies not only failed to appreciate the meaningful difference between the existence of persecution and how victims respond to the persecution, but also ignored other evidence indicating the severity of the Petitioner's persecution despite the completion of her education. This evidence included Petitioner's attempted suicide and how she still struggled to cope with this psychological trauma. This error warrants vacatur relief. *See Ordonez-Quino v. Holder*, 760 F.3d 80, 91-92 (1st Cir. 2014).

Second, neither the BIA nor the IJ analyzed all three incidents of Petitioner's past sufferings *in a cumulative manner*—namely, (1) the gangs' threat to rape Petitioner when she was a minor, (2) the racial discrimination she experienced in school when she was young, and (3) a death threat from another gang when she was an adult at university. Each of these claims is based on the same statutorily-protected ground—her indigenous ethnicity. As a result, the BIA and IJ should have analyzed these three incidents in the aggregate. However, they failed to do so by excluding the third incident (the death threat) from the cumulative analysis. This failure is inconsistent with the BIA's own precedent, as well as the precedent of this Court. *See Matter of O-Z- & I-Z-*, 22 I. & N. Dec. 23, 26 (BIA 1998) ("We find that these incidents constitute more than mere discrimination and harassment.

In the *aggregate*, they rise to the level of persecution as contemplated by the [Immigration and Nationality] Act.") (emphasis added); *Ordonez-Quino*, 760 F.3d at 92 (requiring the agency to consider all incidents of past persecution "in the aggregate").

ARGUMENT

Amicus argues that the BIA and IJ made two errors in concluding that Petitioner's past suffering did not rise to the level of cognizable persecution. The first error is the BIA and IJ's reliance on Petitioner's completion of her education as the determinative factor in finding that her suffering was not severe enough. This analysis failed to meaningfully analyze the psychological harm she already suffered and how she coped with this trauma. The second error is the BIA and IJ's failure to analyze all incidents involving her indigenous ethnicity in the aggregate.

I. AS A THRESHOLD MATTER, THE STANDARD OF REVIEW ON WHETHER UNDISPUTED FACTS ESTABLISH PAST PERSECUTION

This case raises two threshold issues that this Court should revisit and clarify. The first issue is the following: Is the question of whether Petitioner's past suffering establishes past persecution factual in nature, or is it *legal* in nature as a mixed question of law and undisputed facts consistent with precedent in other circuits? The second issue is the following: If this is a legal question, should this Court review the agency's conclusion under the *de novo* standard of review or the

substantial evidence standard of review?

This Court appears to have treated the first question as factual in nature and, thus, applied the substantial evidence review standard. But this Court has done so without significant analysis. Nor does it appear that any petitioner has challenged this assessment through developed arguments. *See, e.g., Martínez-Pérez v. Sessions*, 897 F.3d 33, 40-41 (1st Cir. 2018) (reviewing the question of whether past suffering rises to the level of legal persecution under the substantial evidence standard); *Gao v. Barr*, 950 F.3d 147, 152 (1st Cir. 2020) (same); *Thapaliya v. Holder*, 750 F.3d 56, 60 (1st Cir. 2014) (same); *Mejila-Romero v. Holder*, 600 F.3d 63, 71 (1st Cir. 2010) (same); *Barsoum v. Holder*, 617 F.3d 73, 80 (1st Cir. 2010) (same); *Decky v. Holder*, 587 F.3d 104, 112 (1st Cir. 2009) (same); *Khan v. Mukasey*, 549 F.3d 573, 576 (1st Cir. 2008) (same); *Vaka v. Gonzales*, 192 F. App'x. 9, 14 (1st Cir. 2006) (unpublished) (same).

With the benefit of more developed briefing in this case, this Court should revisit and clarify its prior unchallenged assessment. Typically, a panel of this Court is bound by an on-point holding of a previously published decision of another panel. *See United States v. Holloway*, 630 F.3d 252, 258 (1st Cir. 2011). However, this doctrine "is neither a straightjacket nor an immutable rule." *Carpenters Local Union No. 26 v. U.S. Fid. & Guar. Co.*, 215 F.3d 136, 142 (1st Cir. 2000). There are exceptions. "[T]his limitation [of not revisiting the previous

ruling] does not apply where an intervening decision of the Supreme Court overturns or undermines our earlier decision." *Wallace v. Reno*, 194 F.3d 279, 283 (1st Cir. 1999). In addition, "non-binding but compelling caselaw" of other circuits can "convince[] [the panel] to abandon [prior precedents]." *AER Advisors, Inc. v. Fid. Brokerage Servs., LLC*, 921 F.3d 282, 293-94 (1st Cir. 2019). Furthermore, even without these exceptions, a new panel has the authority to clarify a prior panel's holding if it is warranted. *See, e.g., Rojas-Perez v. Holder*, 699 F.3d 74, 81 (1st Cir. 2012) (electing to address the social visibility prong for asylum notwithstanding a prior panel's decision upholding the BIA's view on social visibility because "it is not [the Court's] task to operate blindly and unscientifically in the face of legitimate challenges to either [its] prior rulings or the adjudications of an administrative agency tasked with interpreting its organic statute").

These exceptions are applicable here. As to the first threshold question, there is an intervening decision of the Supreme Court in *Guerrero-Lasprilla v. Barr*, 140 S. Ct. 1062 (2020). That case involved the question of whether a motion to reopen deadline can be tolled is legal in nature as a mixed question of law and facts. Prior to *Guerrero-Lasprilla*, the First Circuit's position on the question of equitable tolling was that the "challenge to the BIA's decision not to grant such [equitable] tolling [of an untimely motion to reopen with the BIA]" was *not* a

question of law. *Boakai v. Gonzales*, 447 F.3d 1, 4 (1st Cir. 2006). However, *Guerrero-Lasprilla* disagreed with *Boakai* and held that the question of equitable tolling is a legal question since 8 U.S.C. § 1252(a)(2)(D)'s text implicates a mixed question of law and undisputed facts. *Guerrero-Lasprilla*, 140 S. Ct. at 1068. The holding of *Guerrero-Lasprilla* is equally applicable in the context of past persecution.

Indeed, in light of *Guerrero-Lasprilla*, this Court recently held that a mixed question of law and undisputed facts is a legal question in a different context. *See Dor v. Garland*, Docket No. 20-1694, 2022 U.S. App. LEXIS 23196, at *7 (1st Cir. Aug. 19, 2022) ("not only can we exercise jurisdiction when a petition raises an argument about such application-of-a-legal-standard questions of law, but we can do so when a petition challenges the sufficiency of that application"). Other circuit courts and judges also have either suggested or newly held that mixed questions of law and undisputed facts are legal questions in various contexts, including in the context of past persecution. *See, e.g., Alexis v. Barr*, 960 F.3d 722, 730 (5th Cir. 2020) ("we may review the application of legal standards for asylum, withholding of removal, or protection under CAT to the settled, undisputed facts in Alexis's case"); *Cha Liang v. AG of the United States*, 15 F.4th 623, 627-29 (3d Cir. 2021) (Jordan, J., joined by Ambro, J., concurring) ("[p]ast persecution is a mixed question of law and fact") (citing *Guerrero-Lasprilla*, 140

S. Ct. at 1069); *Fon v. Garland*, 34 F.4th 810, 817 (9th Cir. 2022) (Graber, J., concurring) (same); *id*. at 820-23 (Collins, J., concurring); *Martinez-Baez v. Wilkinson*, 986 F.3d 966, 971 (7th Cir. 2021) (holding that *Guerrero-Lasprilla* is not limited to the equitable tolling issue but to all "the application of a legal standard to undisputed or established facts"); *Galvan v. Garland*, 6 F.4th 552, 555 (4th Cir. 2021) (a circuit court can review the agency's conclusion that an applicant failed to satisfy the hardship requirement of cancellation of removal if the question involves the application of a legal standard to undisputed or established facts); *Trejo v. Garland*, 3 F.4th 760, 773 (5th Cir. 2021) (same); *Singh v. Rosen*, 984 F.3d 1142, 1149 (6th Cir. 2021) (same); *Tepepan v. Garland*, Docket No. 21-6109-ag, 2022 U.S. App. LEXIS 12160 (2d Cir. May 5, 2022) (unpublished) (same).[1]

As to the second threshold question, review of this Court's prior decisions is important because this Court's substantial evidence review standard is in tension with the BIA's review of past persecution. The agency has adopted the position that the question of whether an asylum applicant's past suffering meets the legal definition of past persecution is a legal question. *See Matter of A-S-B-*, 24 I. & N. Dec. 493, 496 (BIA 2008) (The governing regulation "explained that the Board

[1] However, *Guerrero-Lasprilla* did not answer the *second* question—namely, then which standard is the proper review standard for mixed questions of law and facts. *See Guerrero-Lasprilla*, 140 S. Ct. at 1069.

should defer to the factual findings of an Immigration Judge, unless they are clearly erroneous, but that it retains independent judgment and discretion, subject to applicable governing standards, regarding pure questions of law and *the application of a particular standard of law to those facts*.") (emphasis added) (citing Board of Immigration Appeals: Procedural Reforms To Improve Case Management, 67 Fed. Reg. 54878-01, 54,888-89 (Aug. 26, 2002) (hereinafter "the BIA Reform"), *overruled on other grounds by Matter of Z-Z-O-*, 26 I. & N. Dec. 586 (BIA 2015).[2] Thus, the agency has declined to apply the clear error standard, and instead applied the *de novo* review standard for this question. *See id.* ("The clearly erroneous standard therefore does not apply to the application of legal standards, such as whether the facts established by an alien 'amount to past persecution or a well-founded fear of persecution.'") (internal bracket omitted) (quoting The BIA Reform, 67 Fed. Reg. at 54,890). Based on this precedent, the BIA *in this case* also applied the *de novo* review standard in reviewing whether the facts found by the IJ establishes past persecution as a matter of law. AR 2 (assessing "[w]hether the facts in the record amount to past persecution . . . ." *de*

[2] In *Z-Z-O-*, the BIA overturned *A-S-B-*'s holding that an IJ's predictive finding of future events is not a factual finding. *Z-Z-O-*, 26 I. & N. Dec. at 590. However, the BIA emphasized that "whether an asylum applicant has established an objectively reasonable fear of persecution based on the events that the Immigration Judge found may occur upon the applicant's return to the country of removal is a legal determination that remains subject to de novo." *Id*. at 590-91.

novo). As the Tenth Circuit has indicated, "[i]t is certainly odd, to stay the least, for th[e] court to review for substantial evidence a determination the BIA itself has concluded is legal in nature." *Ting Xue v. Lynch*, 846 F.3d 1099, 1105 (10th Cir. 2017).

Based on these two reasons, this Court can revisit these two threshold questions. Currently, as to the first threshold question—and as noted above—circuit courts generally agree that the question of whether a non-citizen's undisputed past suffering meets the legal standard of past persecution is legal in nature as a mixed question of law and undisputed facts. This Court should reach this same holding.

However, as to the second threshold question, courts and judges have different views on the proper standard of review (the second threshold question). *See Fon*, 34 F.4th at 813 n.1 (despite treating the past persecution question as a legal mixed question of law and fact, the court ultimately applied the substantial evidence standard); *id*. at 816 (Graber, J., concurring) ("there 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"); *id*. at 820-21 (Collins, J., concurring) (noting that the Ninth Circuit's intra-circuit holding on this question is "a bit of a mess"); *Ting Xue*, 846 F.3d at 1105 n.11 ("The circuits are split as to the standard of review applicable to the question

whether an undisputed set of facts constitute persecution."; collecting cases); *Cha Liang*, 15 F.4th at 629 (3d Cir. 2021) (Jordan, J., joined by Ambro, J., concurring) ("The question of past persecution is indeed largely fact-driven, in the sense that there is always a factual component to the question, although not always a factual dispute. But being 'largely' something is not the same as being 'entirely' something."); *Gjetani v. Barr*, 968 F.3d 393, 400 (5th Cir. 2020) (Dennis, J., dissenting) (noting that mixed questions of past persecution can be reviewed *de novo*).

In this case, this Court should find that the *de novo* review standard is appropriate. *Amicus* agrees that "[t]he question of past persecution is indeed largely fact-driven." *Cha Liang*, 15 F.4th at 629 (Jordan, J., joined by Ambro, J. concurring). However, as shown below, the dispositive questions, in this case, are "law-dominated." *Johnson v. Bos. Pub. Schs.*, 906 F.3d 182, 191 (1st Cir. 2018) ("Where the case raises mixed questions of law and fact, we employ a degree-of-deference continuum, providing non-deferential plenary review for law-dominated questions and deferential review for fact-dominated questions.") (internal quotations omitted); *Sierra Fria Corp. v. Donald J. Evans, P.C.*, 127 F.3d 175, 181 (1st Cir. 1997) ("the applicable standard of review varies depending upon the nature of the mixed question"). *See also Valentin v. Hosp. Bella Vista*, 254 F.3d 358, 365 (1st Cir. 2001) ("Of course, once the court has found the facts, its

ultimate legal conclusion is subject to de novo review.").

II. THE BIA AND IJ'S ERRONEOUS RELIANCE ON PETITIONER'S COMPLETION OF HER HIGH SCHOOL EDUCATION TO FIND THAT THE RACIAL DISCRIMINATION SHE SUFFERED IN SCHOOL WAS NOT SEVERE ENOUGH

A. The Requirement of Considering and Analyzing Individualized Psychological Characteristics of Applicants in Psychological Persecution

In assessing whether an asylum applicant's past harm—especially psychological harm to a child victim—rises to the level of legal persecution, the agency must be mindful of the variations in the psychological make-up of the applicant.

Under the INA, an asylum applicant can establish the presumption of a well-founded fear of future persecution by proving that she suffered past persecution on account of one of the five statutorily-protected grounds. *See Hernandez-Barrera v. Ashcroft*, 373 F.3d 9, 21 (1st Cir. 2004); 8 U.S.C. § 1158(b)(1); 8 C.F.R. § 208.13(b)(1). "A victim of past persecution need not show any objective or subjective fear—only that [s]he was in fact persecuted." *Torres v. Mukasey*, 551 F.3d 616, 629 (7th Cir. 2008); *cf. Diab v. Ashcroft*, 397 F.3d 35, 40-41 (1st Cir. 2005) (the well-founded fear of future persecution "requirement has both an objective and subjective component").

"Persecution is a fluid term, not defined by statute." *Ordonez-Quino*, 760 F.3d at 87. The BIA generally defines persecution as "a threat to the life or

freedom of, or the infliction of suffering or harm upon, those who differ in a way regarded as offensive." *Matter of Acosta*, 19 I. & N. Dec. 211, 222 (BIA 1985). "For the most part, the BIA has eschewed the articulation of rigid rules for determining when mistreatment sinks to the level of persecution, preferring instead to treat the issue on an ad hoc, case-by-case." *Bocova v. Gonzales*, 412 F.3d 257, 263 (1st Cir. 2005).

However, the legal definition of persecution does have some parameters. Although the persecution "does not embody a direct and unremitting threat to life or freedom," it must be "more than ordinary harassment, mistreatment, or suffering." *Id.*; *Lopez de Hincapie v. Gonzales*, 494 F.3d 213, 217 (1st Cir. 2007). Further, the "mistreatment ordinarily must entail more than sporadic abuse" and must "be systematic rather than reflective of a series of isolated incidents." *Bocova*, 412 F.3d at 263.

Even though the absence or presence of physical injury is a relevant factor, it is not always determinative in recognition that abuse can encompass non-physical forms of harm. *See O-Z- & I-Z-*, 22 I. & N. Dec. at 25-26 (persecution "encompasses a variety of forms of adverse treatment, including non-life threatening violence and physical abuse or non-physical forms of harm"); *Ruiz v. Mukasey*, 526 F.3d 31, 37 (1st Cir. 2008) ("[T]he presence or absence of physical harm (and, indeed, the degree of harm inflicted) remains a relevant factor in

determining whether mistreatment rises to the level of persecution."). For example, credible and specific threats of murder and rape may constitute persecution. *See Lopez de Hincapie*, 494 F.3d at 217 ("threats of murder would fit neatly under this carapace"); *Aldana-Ramos v. Holder*, 757 F.3d 9, 17 (1st Cir. 2014) (same); *Sok v. Mukasey*, 526 F.3d 48, 54 (1st Cir. 2008) ("[W]e have often acknowledged that credible threats can, depending on the circumstances, amount to persecution, especially when the assailant threatens the petitioner with death, in person, and with a weapon."); *Kaur v. Wilkinson*, 986 F.3d 1216, 1224 (9th Cir. 2021) ("Similar to attempted murder and attempted kidnapping, attempted rape almost always constitutes persecution. Attempted rape, like rape itself, carries the hallmarks of persecutory conduct."); *Nakibuka v. Gonzales*, 421 F.3d 473, 477 (7th Cir. 2005) ("we are unwilling to dismiss so casually a threat of imminent rape" in analyzing past persecution).

Similarly, this Court has recognized that, "under the right set of circumstances, a finding of past persecution might rest on a showing of psychological harm." *Makhoul v. Ashcroft*, 387 F.3d 75, 80 (1st Cir. 2004); *see also Knezevic v. Ashcroft*, 367 F.3d 1206, 1211 (9th Cir. 2004) (collecting cases where the court "recognized that persecution comes in many forms" including severe harassment and discrimination, and psychological harm) (citing *Kovac v. INS*, 407 F.2d 102, 105-07 (9th Cir. 1969)); *Ghaly v. INS*, 58 F.3d 1425, 2431 (9th

Cir. 1995).

"Where the events that form the basis of a past persecution claim were perceived when the petitioner was a child," this Court requires the agency to "look at the events from the child's perspective, and measure the degree of his injuries by their impact on a child of his age." *See Ordonez-Quino*, 760 F.3d at 90-91 (internal quotations and brackets omitted); *Santos-Guaman v. Sessions*, 891 F.3d 12, 18 (1st Cir. 2018) (same). Under this childhood standard, important evidence the agency must affirmatively consider is the applicant's psychological reaction to the series of harms the applicant endured. *See Ordonez-Quino*, 760 F.3d at 91 ("the trauma [the applicant] and his family suffered as a result [of past harm]"; the applicant's memory of "being extremely frightened" and "witness[ing] many terrible things"); *see also Santos-Guaman*, 891 F.3d at 14-15, 18 (vacating the BIA's decision because "the BIA failed to provide any explanation as to why the facts Santos Guaman described in his (credible) testimony did not amount to persecution under the childhood standard[,]" which included "a great deal of abuse, discrimination, and harassment" in school that resulted in the applicant's abandonment of school).

In assessing the degree of past suffering from a child's perspective, the adjudicating agency should be mindful that children victims' reactions to identical persecution can differ. The Department of Justice has acknowledged this fact. *See*

Memorandum from Jeff Weiss, Acting Director, INS Office of International Affairs, "Guidelines for Children's Asylum Claims," ("Weiss Memorandum") 120/11.26, at 19 (Dec. 10, 1993) ("The harm a child fears or has suffered … may be relatively less than that of an adult and still qualify as persecution. Given the 'variations in the psychological make-up of individuals and in the circumstances of each case, interpretations of what amounts to persecution are bound to vary.' The types of harm that may befall children are varied."), *reproduced in* 76 Interpreter Releases 1 (Jan. 4, 1999).[3] In adopting this position, the Department of Justice has endorsed the findings of the United Nations High Commissioner for Refugees (UNHCR). *Id*. (citing and quoting the United Nations High Comm'r for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, ("UNHCR Handbook") at ¶ 52 (Geneva, 1979), *reissued* in 1992 and 2019, U.N. Doc. HCR/1P/4/ENG/REV.4 (2019)[4]). [5]

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[3] *Available at* https://www.uscis.gov/sites/default/files/document/memos/ChildrensGuidelines121098.pdf.

[4] *Available at* https://www.unhcr.org/en-us/publications/legal/5ddfcdc47/handbook-procedures-criteria-determining-refugee-status-under-1951-convention.html.

[5] Although UNHCR's position is not binding before the BIA or this Court, it serves as persuasive authority in the interpretation of persecution. *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 439 n.22 (1987) (despite no binding force, "the [UNHCR] Handbook provides significant guidance in construing the Protocol, to which

More specifically, the Department of Justice emphasized that the consideration of each child victim's psychological make-up is vital because "a minor's mental maturity must normally be determined in the light of his [or her] personal, family[,] and cultural background." *Id*. (quoting UNHCR Handbook at ¶ 216).[6] "[P]sychological reactions of different individuals may not be the same in identical conditions." UNHCR Handbook, at 19 ¶ 40. Indeed, children victims of persecution and torture employ different modes to cope with psychological trauma. *See* Edith Montgomery, Yvonne Krogh, Anne Jacobsen, Berit Lukman, *Children of Torture Victims: Reactions and Coping*, 16 Child Abuse & Neglect 6 (1992) (observations that children develop "four main coping strategies: (a) isolation and withdrawal, (b) mental fight, (c) eagerness to acclimatize, and (d) strength of will

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Congress sought to conform."); *De Pena-Paniagua v. Barr*, 957 F.3d 88, 97 n.3 (1st Cir. 2020) (same). Moreover, courts, including this court, have relied on the Weiss Memorandum as persuasive authority. *See Ordonez-Quino*, 760 F.3d at 91 (quoting the Weiss Memorandum); *Liu v. Ashcroft*, 380 F.3d 307, 314 (7th Cir. 2004) (same); *Mansour v. Ashcroft*, 390 F.3d 667, 680 (9th Cir. 2004) (same); *Jorge-Tzoc v. Gonzales*, 435 F.3d 146, 150 (2d Cir. 2006) (same).

[6] In addition to the Department of Justice, the United States Citizenship and Immigration Services (USCIS) has also adopted the UNHCR's position that the adjudicator must "consider the feelings, opinions, age, and physical and psychological characteristics of the applicant in determining whether the harm suffered or feared rises to the level of persecution." USCIS Refugee, Asylum, & Int'l Operations Directorate, *Definition of Persecution and Eligibility Based on Past Persecution*, at *15-16 (Dec. 20, 2019) (citing UNHCR Handbook at ¶ 52), *available at* https://www.uscis.gov/sites/default/files/document/foia/Persecution_LP_RAIO.pdf .

and fighting"); Department of Justice – Canada, *Victims' Response to Trauma and Implications for Interventions: A Selected Review and Synthesis of the Literature* (Nov. 2003) at 18 ("victims [of crimes] have many possible coping strategies at their disposal and their choice of strategy is likely a combination of cognitive skills in problem-solving, history and individual personality variables")[7].

Thus, the agency should not jump to the conclusion that a victim's past suffering was not severe enough solely because they did not seek immediate medical attention or found some way to cope with or endure the trauma. *See Nsimba v. AG of the United States*, 21 F.4th 244, 251 (3d Cir. 2021) ("We have also explained that past persecution requires more than considering whether individual incidents are sufficiently extreme; it requires meaningful consideration of whether their aggregate effect poses a severe affront to the petitioner's life or freedom.") (internal quotations and brackets omitted).

B. The BIA and IJ's Failure to Apply this Standard

As this Court has explained, the agency "must look at the events from the child's perspective, and measure the degree of his injuries by their impact on a child of his age." *Ordonez-Quino*, 760 F.3d at 90-91. Again, important evidence the agency must affirmatively consider is the applicant's psychological reaction to

[7] *Available at* https://www.justice.gc.ca/eng/rp-pr/cj-jp/victim/rr03_vic2/rr03_vic2.pdf.

the series of harms the applicant endured. *Id.* at 91. Here, the BIA failed to apply this standard when it relied on Petitioner's completion of her high school education as the sole dispositive factor[8] in concluding that she did not suffer past persecution. The BIA's analysis failed to meaningfully appreciate the psychological harm she already suffered. This harm was evidenced by Petitioner drinking rat poison to commit suicide and cutting her own cheek in an act of self-harm to avoid racial discrimination in school, as well as her own strategy of coping with her trauma (including her strength of will and fighting by "dream[ing] of being a [civil engineering] professional"). AR 3 (the applicant "was never physically harmed as a child, did not witness any acts of physical violence against her family, and was not prevented from obtaining an education"), 139; *see also Ordonez-Quino*, 760 F.3d at 92 ("Because the BIA failed to address the harms Ordonez-Quino and his family experienced cumulatively and from the perspective of a child, its determination is not supported by substantial evidence in the record.").

In this case, the IJ viewed Petitioner as a credible witness and made factual

[8] Unlike the BIA, the IJ also relied on the fact that Petitioner could "find employment in El Salvador" to conclude that her past suffering was legally insufficient. AR 48 ("She was able to find employment in El Salvador."). Because the BIA explicitly declined to include this fact as part of its past persecution assessment, the reviewable analysis before this Court is the BIA's reasoning. AR 3 (Petitioner "was never physically harmed as a child, did not witness any acts of physical violence against her family, and was not prevented from obtaining an education").

findings that she suffered harm from racial discrimination in school. AR 46-47. More specifically, the IJ found that Petitioner's schoolmates and teachers mistreated her by "always" calling her "a 'dumb Indian'" and mocking her. AR 46-47. Because of this racial discrimination, Petitioner "once fainted because she was so afraid of reading aloud" and "once tried to swallow rat poison." AR 47. Although the IJ's analysis is silent on Petitioner's decision to "cut [her own] cheeks" by "knife" to avoid racial discrimination in school, the BIA noted this incident in its analysis. AR 139 (Transcript), 10 (BIA Decision), 47 (IJ Decision).

Notwithstanding these findings, the BIA and IJ held that her suffering did not rise to the level of persecution even from "a child's perspective." AR 3, 48. Relevant to this incident, the BIA explained that Petitioner "was not prevented from obtaining an education." AR 3. Similarly, the IJ also opined that Petitioner "was able to graduate high school and attend university in El Salvador" and "was able to find employment in El Salvador." AR 48.

The BIA and IJ's reliance on Petitioner's completion of her education as the determinative factor undermining the severity of her past suffering in school is erroneous. This is notably true when the IJ already made—and the BIA did not disturb—the factual finding that Petitioner attempted to take her own life because of the racial discrimination she experienced in school. It is true that the BIA and IJ may consider the absence of physical harm as a relevant factor to determine

whether the mistreatment was sufficiently severe. *See Ruiz*, 526 F.3d at 37. But additional evidence establishes the severity of the persecution in this case.

Here, the BIA and IJ already found that Petitioner attempted to commit suicide because of racial discrimination in school. Without meaningfully analyzing this crucial evidence of psychological harm, the BIA and IJ jumped to the conclusion that she did not suffer enough because she completed her education. This analysis ignores the fact that victims of psychological trauma cope with trauma in different ways. *See supra* Section I.A. Some struggle with maintaining personal and professional relationships by engaging in isolation and withdrawal, while others find coping mechanisms to function in society through strength of will. In other words, just because a victim has endeavored to overcome her persecution in some way—in this case, by still completing her high school education—this does not negate the fact that persecution occurred or was severe. Here, although Petitioner initially attempted to take her own life because of this discrimination, she could nonetheless finish school and even went to the university because of her will to become a civil engineer. AR 139 (Tr. at 33) ("But I wanted to be someone if life. I dreamed of being a professional."). However, nowhere in the BIA or IJ decisions is there a meaningful discussion of Petitioner's psychological ability to cope while completing her education, notwithstanding the persecution she faced.

In sum, Petitioner's capacity to overcome the severe racial discrimination should have little bearing on the severity of psychological harm that she suffered. The BIA and IJ's sole reliance on Petitioner's resilience—but without meaningfully addressing her psychological capacity and her initial decision to take her life as a child—warrants vacatur of their conclusion. *See Ordonez-Quino*, 760 F.3d at 91-92 ("[T]here is no indication that the BIA considered the harms Ordonez-Quino suffered throughout this period from his perspective as a child, or that it took the harms his family suffered into account."); *Herrera-Reyes*, 952 F.3d at 110 ("In evaluating whether a threat is 'concrete and menacing' in the absence of physical harm to a petitioner, we have considered more broadly whether surrounding acts of mistreatment had corroborated that threat with the ultimate effect of placing the petitioner's life or liberty in peril.").

III. THE BIA AND IJ'S FAILURE TO ANALYZE ALL PAST HARMS ON ACCOUNT OF INDIGENOUS ETHNICITY IN THE AGGREGATE

A. The Requirement of Analyzing All Incidents on Account of The Same Protected Ground in Aggregate

In assessing the sufficiency of past suffering, the agency must aggregate all incidents of past persecution that are connected to the same statutorily-protected ground asserted (in this case, indigenous ancestry). *See O-Z- & I-Z-*, 22 I. & N. Dec. at 26 ("We find that these incidents constitute more than mere discrimination and harassment. In the *aggregate*, they rise to the level of persecution as

contemplated by the [Immigration and Nationality] Act.") (emphasis added); *Ordonez-Quino*, 760 F.3d at 92 (requiring the agency to consider all incidents of past persecution "in the aggregate"); *Lopez de Hincapie*, 494 F.3d at 217 (holding that the agency must consider "the sum of an [applicant's] experiences" to determine whether they "rise to the level of persecution").

This aggregate analysis requirement is applicable even if each incident is not directly related to another or involves different persecutors. The facts of *O-Z- & I-Z-*, which required the aggregate analysis, demonstrate this rule. *O-Z- & I-Z-*, 22 I. & N. Dec. at 23-26. In *O-Z- & I-Z-*, all incidents involved different persecutors in different circumstances. *Id*. at 23-24 ((1) an attack on the applicant after attending a political rally; (2) burglary on the applicant's home; (3) an attack on the applicant on his way from work; (4) an attack on the applicant and his son at a bus stop; and (5) discrimination at school)). Nonetheless, the agency required the past suffering analysis to be under the aggregate standard. *Id*. at 25-26.

This Court's analysis in *Ordonez-Quino* is identical to the BIA's analysis in *O-Z- & I-Z-*. There, the applicant suffered harm caused by different persecutors, including by the Guatemalan military, other Guatemalans, and racist gangs from 1962 to 2005. *Ordonez-Quino*, 760 F.3d at 83-84. This Court vacated the BIA's decision because the IJ, in concluding that the applicant did not suffer persecution, did not analyze all incidents in aggregate and from children's perspectives. *Id*. at

91-92.

In sum, the agency is required to assess all incidents in aggregate if they are all based on the same statutorily-protected ground asserted.

B. The BIA and IJ's Failure to Apply this Standard

Applying these principles, the BIA and IJ erred when they failed to analyze all of Petitioner's past suffering in aggregate, particularly the death threat by the leader of the 18th street gang when she was an adult at university. Again, in this Circuit, the agency is required to analyze all past incidents *cumulatively* in assessing whether the total sum of past harm rises to legal persecution. *See Ordonez-Quino*, 760 F.3d at 91-92. "A cursory invocation of the word 'cumulative' is insufficient" to withstand judicial scrutiny. *Herrera-Reyes*, 952 F.3d at 109; *Cha Liang*, 15 F.4th at 626 (same).

Here, the BIA and IJ failed to apply this principle. The IJ considered three incidents as part of Petitioner's past persecution. The first incident is a threat of rape by the MS-13 gang members when she was young. AR 46-47. Because of these threats, "Petitioner and her family moved to San Miguel when she was fourteen years old." AR 46. The second incident, as addressed above, is the discrimination Petitioner suffered in school. AR 46-47. The third incident is the death threat by "a leader of the 18th street gang" when she "told him that she did not want to be his girlfriend because she wanted to be an engineer." AR 47. This

threat occurred when she was an adult at university. AR 47. After this incident, she left El Salvador. AR 47. The BIA did not disturb these factual findings. AR 2-3.

Notwithstanding these factual findings, the BIA and the IJ failed to add the death threat by the leader of the 18th street gang claim to the sum of past persecution as part of the aggregate analysis. The IJ's analysis shows that the IJ did not analyze this threat in the aggregate. The only time the IJ invoked the "cumulative" analysis was in the context of Petitioner's past suffering from her childhood. AR 48. In contrast, the IJ does not even mention applying the aggregate standard in its one sentence of analysis addressing the death threat claim. AR 48 ("Nor does [Petitioner's] interactions with the gang leader who wanted her to be his girlfriend rise to the level of persecution.").

The BIA's analysis was indifferent as to the death threat claim. AR 10. The only harm the BIA analyzed in a cumulative manner was "the threats [of rape] in Sonsonate and the discrimination and mistreatment experienced by [Petitioner] through a child's perspective cumulatively." AR 10. On the other hand, the BIA treated the death threat claim as an independent and isolated past suffering without applying the aggregate analysis standard. AR 10 ("Additionally, the sexual harassment, assault, and threats by the gang member that occurred while [Petitioner] was an adult, while certainly deplorable, were not sufficiently severe to

amount to persecution.").

The BIA's failure to add the death threat claim as part of the cumulative analysis is not a harmless error. With respect to Petitioner's past persecution claim, in addition to the sufficiency of past suffering, the IJ did address the questions of whether there was a nexus between this ethnicity and the death threat. AR 48. However, the BIA did not address the nexus question. AR 11. Because the question of whether the BIA applied the aggregate standard in assessing past persecution is dispositive in this appeal, this Court can and should vacate the BIA's conclusion on past persecution in its entirety and remand for the appropriate aggregate analysis. *See Ordonez-Quino*, 760 F.3d at 92.

CONCLUSION

For the foregoing reasons, *amicus* respectfully submits that the Court should hold that the agencies erred in rejecting Petitioner's past persecution.

Dated: August 31, 2022

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing Brief complies with the type-volume limit of Fed. R. App. P. 29(a)(5) and 32(a)(7)(B)(i) and the typeface requirement of Fed. R. App. P. 32(a)(5)(A) [proportionally spaced face 14-point or larger]. The Brief, containing 6,465 words, exclusive of those items that, under Fed. R. App. P. 32(f), are excluded from the word count, was prepared in proportionally spaced Times New Roman 14-point type.

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Dated: August 31, 2022

CERTIFICATE OF SERVICE

I certify that this Brief is served to all counsel of record registered in ECF on August 31, 2022.

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