No. 21-2014

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

MIGUEL IXCUNA

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

Gilles Bissonnette (No. 123868)
SangYeob Kim (No. 1183553)
AMERICAN CIVIL LIBERTIES UNION OF NEW HAMPSHIRE
New Hampshire IMMIGRANTS' RIGHTS PROJECT
18 Low Avenue
Concord, NH 03301
Tel.: (603) 333-2081
gilles@aclu-nh.org
sangyeob@aclu-nh.org

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 any of the amici curiae.

/s/ SangYeob Kim
SangYeob Kim (No. 1183553)

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
SangYeob Kim (No. 1183553)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Regulations

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 1.7 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 and the United States Constitution. In this role, the ACLU-NH has participated in numerous cases concerning the statutory and constitutional rights of noncitizens. *See, e.g., Barros v. Garland*, 31 F.4th 51 (1st Cir. 2022) (holding that an immigrant need not file a motion to reconsider before the BIA to exhaust a claim that the BIA failed to apply the clear error review standard in reversing the IJ's factual findings; as amicus); *Adeyanju v. Garland*, 27 F.4th 25 (1st Cir. 2022) (the BIA failed to apply the clear error review standard in reversing the IJ's factual findings); *Hernandez Lara v. Barr*, 962 F.3d 45 (1st Cir. 2020) (concluding that immigration judge violated noncitizen's statutory right to counsel by not providing noncitizen sufficient time to obtain counsel); *Hernandez-Lara v. Lyons*, 10 F.4th 19 (1st Cir. 2021) (ruling that due process requires that the burden of justifying detention has to be on the government by a preponderance of the

evidence); *Perez-Trujillo v. Garland*, 3 F.4th 10 (1st Cir. 2021) (in part, in granting 2017 petition for review, holding that "the BIA was required to consider in an individualized manner the hardship that [the applicant] might suffer if he were required to return to El Salvador but . . . failed to undertake such consideration in reversing the immigration judge's grant of his application for adjustment of status"); *Compere v. Nielsen*, 358 F. Supp. 3d 170 (D.N.H. 2019) (holding that, because habeas corpus is the only means available to the non-citizen to protect his right to continue litigating his motion to reopen, the Suspension Clause of the U.S. Constitution prevents the jurisdiction-stripping provisions in federal law from being used to deny the Court's jurisdiction).

The ACLU-NH has a particular interest in this case for two reasons. *First*, this Court has recently vacated the Board of Immigration Appeals' decisions because the BIA failed to apply the required clear error review standard in reversing Immigration Judges' factual findings. *See Barros v. Garland*, 31 F.4th 51 (1st Cir. 2022) (the BIA failed to adequately employ the clear-error review); *Adeyanju v. Garland*, 27 F.4th 25 (1st Cir. 2022) (same). This case is another instance where the BIA made this error—this time, in the context of the "nexus" analysis for asylum and withholding of removal claims whereby the noncitizen must show that persecution is "on account of" or "because of" one of five statutorily-protected grounds. *See* 8 U.S.C. § 1101(a)(42) (for asylum claims,

stating that the term "refugee," in part, means "any person … who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country 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") (emphasis added); 8 U.S.C. § 1231(b)(3)(A) (for withholding of removal claims, stating that "the Attorney General may not remove an alien to a country if the Attorney General decides that the alien's life or freedom would be threatened in that country *because of* the alien's race, religion, nationality, membership in a particular social group, or political opinion.") (emphasis added).

Second, with respect to the presumption of a well-founded fear of future persecution that a noncitizen must establish as part of asylum and withholding of removal claims, this Court has yet to endorse the portion of *Matter of A-T-*, 24 I. & N. Dec. 617 (A.G. 2008) ("*A-T-II*") that interpreted the applicable regulations to hold that the presumption of a well-founded fear of future persecution continues even if the persecutors and context of past persecution have changed so long as the fear of persecution is "on account of the same statutory ground." *Id*. at 622 ("[T]he Board was wrong to focus on whether the future harm to life or freedom that respondent feared would take the 'identical' form … as the harm she had suffered in the past …. [W]here an alien demonstrates that she suffered past persecution on

account of one of the statutory bases, it is 'presumed' that her life or freedom would be threatened in the future 'on the basis of the original claim'—in other words, on account of the same statutory ground"); *see also* 8 C.F.R. § 1208.16(b)(1)(i) (stating that, when an applicant has shown past persecution on account of one of the specified grounds, it "shall be presumed that the applicant's life or freedom would be threatened in the future in the country of removal on the basis of the original claim"). This presumption can be rebutted if the agency can show, by a preponderance of the evidence, that "a 'fundamental change in circumstances [exists] such that the applicant's life or freedom would not be threatened on account of any of the five [protected] grounds.'" *A-T-II*, 24 I. & N. Dec. 619 (quoting 8 C.F.R. § 1208.16(b)(1)(i)(A)-(B), (ii)). Here, the BIA held that Petitioner did not have a well-founded fear of future persecution on account of his indigenous Mayan race because the Guatemalan civil war ended in 1996. But *A-T-II* makes clear that the mere change in the status of the Guatemalan civil war is insufficient for the agency to meet its "fundamental change in circumstance" burden here. More is required. As mandated by *A-T-II*, the agency was obligated to show how the end of the civil war would create "a fundamental change in circumstance such that" Petitioner's "life or freedom would not be threatened on account of" his indigenous Mayan race. The agency made no such showing under this more rigorous burden. Accordingly, this Court should vacate on this ground,

as well as endorse this portion of *A-T-II*. Indeed, until this case, this Court has had no occasion to review this specific holding in *A-T-II*.

SUMMARY OF ARGUMENT

Amicus argues that the Board of Immigration Appeals (BIA) committed at least two errors with respect to Petitioner's asylum and withholding of removal claims.

First, the BIA overturned the Immigration Judge's (IJ) finding on the nexus between Petitioner's past persecution and his indigenous Mayan race without employing the requisite clear error review standard. *See* 8 U.S.C. § 1101(a)(42) (for asylum claims, stating the nexus requirement); 8 U.S.C. § 1231(b)(3)(A) (for withholding of removal claims, stating the nexus requirement). The governing regulation only permits the BIA to review the IJ's factual findings under the clear error standard. *See* 8 C.F.R. § 1003.1(d)(3)(i) ("The [BIA] will not engage in *de novo* review of findings of fact determined by an [IJ]. Facts determined by the immigration judge, including findings as to the credibility of testimony, shall be reviewed only to determine whether the findings of the [IJ] are clearly erroneous."). It is well-established that the IJ's nexus determination is a factual finding. *See Matter of N-M-*, 25 I. & N. Dec. 526, 532 (BIA 2011) ("A persecutor's actual motive is a matter of fact to be determined by the Immigration Judge and reviewed by [the BIA] for clear error."). Nonetheless, the BIA

impermissibly overturned the IJ's nexus finding *de novo*.

Second, the BIA's determination that the Department of Homeland Security (DHS) rebutted the presumption of Petitioner's well-founded fear of future persecution by a preponderance of evidence should be vacated. Here, the BIA upheld the IJ's conclusion that Petitioner did not have a well-founded fear of future persecution on account of his indigenous Mayan race because the Guatemalan civil war ended in 1996. However, the dispositive question is not the end of the civil war; rather, more is required. Instead, pursuant to former Attorney General Michael Mukasey's decision in *Matter of A-T-*, 24 I. & N. Dec. 617 (A.G. 2008) (*A-T-II*), the presumption of a well-founded fear of future persecution continues even if the persecutors and context of past persecution have changed so long as the fear of persecution is "on account of the same statutory ground." *Id.* at 619. Thus, under *A-T-II*, the dispositive question is whether—even if the civil war ended—there has been a fundamental change in circumstances such that the agency can establish that Petitioner no longer has an objective fear of being persecuted on account of <u>*his indigenous Mayan race*</u>. *A-T- II*, 24 I. & N. Dec. 619 (noting that "[w]hen an eligible alien has shown past persecution on account of one of the specified grounds, it 'shall be presumed that the [alien's] life or freedom would be threatened in the future in the country of removal on the basis of the original claim," but that presumption can be rebutted if the government can show by a

preponderance of the evidence that a "fundamental change in circumstances such that the applicant's life or freedom would not be threatened on account of any of the five [protected] grounds") (brackets in original) (quoting regulations). The agency made no such showing in this case. Instead, DHS' argument was only limited to the end of the civil war—which the IJ and BIA also adopted—without any analysis of how the end of the civil war would create a fundamental change in circumstance that would cause his persecution on account of his indigenous Mayan race to change. Indeed, the expert evidence and other country conditions evidence presented in this case included the continuation of systematic persecution of indigenous communities in Guatemala even after the civil war.

ARGUMENT

I. THE BIA'S REVERSAL OF THE IJ'S NEXUS CONCLUSION SHOULD BE VACATED

A. The Regulation Requires the BIA to Employ the Clear-Error Review Standard for IJs' Nexus Findings

The BIA is duty-bound to follow its own regulations. Pursuant to its regulations, the BIA cannot "engage in *de novo* review of findings of fact determined by an [IJ]." 8 C.F.R. § 1003.1(d)(3)(i). Indeed, "the BIA does not violate the clear-error regulation when it identifies other undisputed facts in the record, not cited by the IJ, and applies different discretionary weight to those facts" in the context of discretionary reliefs. *Adeyanju v. Garland*, 27 F.4th 25, 42 (1st

Cir. 2022). Similarly, in the asylum context, this Court held that the BIA has "power to weigh and evaluate evidence introduced before the IJ" freely as long as the BIA does not "supplement the record by considering new evidence" or "impeach[ing], impugn[ing], or denigrat[ing] the IJ's factual findings." *Rotinsulu v. Mukasey*, 515 F.3d 68, 73 (1st Cir. 2008).

However, the BIA must employ the clear-error review standard if it wishes to assess the evidence considered by the IJ and comes to a different conclusion than the IJ's factual finding. "To find clear error as to the IJ's findings of fact, the BIA must be 'left with the definite and firm conviction that a mistake has been committed.'" *Adeyanju*, 27 F.4th at 43 (quoting Board of Immigration Appeals: Procedural Reforms to Improve Case Management, 67 Fed. Reg. 54878-01, 54889 (Aug. 26, 2002)). Put another way, the BIA can only reverse the IJ's factual finding if "the contested finding stinks like a 5 week old, unrefrigerated, dead fish." *Id*. at 33 (internal quotations omitted).

For instance, this Court previously found that the BIA misapplied the requisite clear-error standard because the BIA "simply point[ed] to potentially contradictory evidence in the allegations in the police report" to disagree with the IJ's decision that these allegations should be discounted after assessing all relevant evidence. *Id*. at 33. Because the BIA's reasoning was "another permissible view of the evidence, choosing another plausible interpretation of the evidence is

factfinding and does not meet the BIA's obligations to utilize clear-error review." *Id*. at 32-33.

What constitutes a factual finding has been well developed through caselaw. Traditionally, as provided by the regulation, a witness's credibility determination is factfinding. *See* 8 C.F.R. § 1003.1(c)(3)(i) ("Facts determined by the immigration judge, including findings as to the *credibility of testimony*, shall be reviewed only to determine whether the findings of the immigration judge are clearly erroneous.") (emphasis added); *Matter of Casanova*, 26 I. & N. Dec. 494, 498, 500, 505-09 (BIA 2015) ("[i]nferences from direct and circumstantial evidence are also reviewed for clear error" for the reliability and credibility of a witness's testimony and acts of torture); *Caal-Tiul v. Holder*, 582 F.3d 92, 95 (1st Cir. 2009) (per curiam) ("petitioner's credibility and good faith belief, it is a fact finding subject only to clear error review"). An IJ's predictive findings are also factual findings that "are subject to a clearly erroneous standard of review." *Matter of Z-Z-O-*, 26 I. & N. Dec. 586, 586 (BIA 2015).

Pertinent to the instant case, it is also well-established that an IJ's nexus conclusion in asylum and withholding of removal claims—whereby the noncitizen must show that past or future persecution is "on account of" or "because of" one of five statutorily-protected grounds, *see* 8 U.S.C. § 1101(a)(42), 8 U.S.C. § 1231(b)(3)(A)—is a factual finding requiring the clear-error review standard. *See*

Matter of N-M-, 25 I. & N. Dec. 526, 532 (BIA 2011) ("A persecutor's actual motive is a matter of fact to be determined by the Immigration Judge and reviewed by us for clear error."); *Matter of J-B-N- & S-M-*, 24 I. & N. Dec. 208, 214 (BIA 2007) ("[t]he motivation of the persecutors involves questions of fact"); *Matter of M-A-M-Z-*, 28 I. & N. Dec. 173, 176 (BIA 2020) ("[a]n Immigration Judge's finding regarding the motive of the persecutor is a factual issue that is reviewed for clear error"); *Ruiz-Escobar v. Sessions*, 881 F.3d 252, 258-59 (1st Cir. 2018) (treating the agency's nexus determination as a factual finding); *see also Rosiles-Camarena v. Holder*¸ 735 F.3d 534, 538 (7th Cir. 2013) (8 C.F.R. § 1003.1(d)(3)(i) "does not allow plenary appellate review of" IJ's "characterizations based on historical facts").

B. The BIA Unlawfully Reversed the IJ's Fact Findings on the Nexus Between Petitioner's Past Persecution and Petitioner's Mayan Ethnicity Without Employing the Requisite Clear Error Standard

The BIA failed to comply with 8 C.F.R. § 1003.1(d)(3)(i)'s requirement that it must defer to the IJ's factual findings absent clear error when it overturned the IJ's determination that a nexus exists between Petitioner's past persecution and his indigenous Mayan race.[1]

The IJ concluded that Petitioner "had established past persecution on

[1] The Court recently held that noncitizen petitions do not need to file motions to reconsider to exhaust this claim. *See Barros*, 31 F.4th at 63-69.

account of his indigenous Mayan race." AR[2] 5 (BIA), 129 (IJ; "find[ing] that [Petitioner] established his protected ground—his race as an indigenous Mayan—and a sufficient nexus between his race and the harm suffered"). Upon Petitioner's appeal to the BIA, the BIA overturned the IJ's nexus conclusion *sua sponte*[3] because it "is not supported by the record." AR 6. For this conclusion, the BIA treated the IJ's nexus finding as a type of finding (i.e., a mixed question of facts and law) that the BIA can review *de novo*. AR 6 ("*The facts as determined* by the [IJ], that the deaths of [Petitioner's] grandparents, father, and uncle occurred due to the Guatemalan Civil War, *do not demonstrate* that their deaths are related to any shared characteristic that [Petitioner] possesses.") (emphasis added).

This is wrong. Again, as explained above, historical facts are not the only factual findings that are reviewed under the clear error standard; rather, the ultimate nexus conclusion is also reviewed under the clear error standard. *See N-M-*, 25 I. & N. Dec. at 532 ("A persecutor's actual motive is a matter of fact to be determined by the Immigration Judge and reviewed by us for clear error."); *J-B-N- & S-M-*, 24 I. & N. Dec. at 214 (same); *M-A-M-Z-*, 28 I. & N. Dec. at 176 (same).

The BIA's improper *sua sponte* decision to *de novo* reweigh the evidence to

---

[2] All reference to "AR" indicates the Certified Administrative Record ("AR"). This brief is arranged in order of and with reference to the page numbers of the AR for ease of reference.

[3] DHS did not file its BIA brief in opposition to Petitioner's appeal. AR 3.

reverse the IJ's nexus finding instead of properly applying the clear error standard of review is further confirmed by the BIA's evaluation of the evidence, notably the expert affidavit of Dr. Diego Alburez-Gutierrez. AR 6. In applying the clear error standard of review, the BIA must have addressed this evidence because the IJ relied, in part, on Dr. Alburez-Gutierrez's expert affidavit for its conclusion that Petitioner suffered past persecution on account of his indigenous Mayan race. AR 129 (the IJ relying on the expert witness's declaration that "[g]uerrilla groups actively sought [to] recruit indigenous farmers in rural communities from around 1970" and that there were "also reports of members of guerrilla organizations conducting punitive operations against Mayan people or Mayan communities").

However, in contrast to the IJ's analysis, the BIA's reasoning is silent on the expert evidence. AR 6. Instead, the BIA only focused on Petitioner's testimony. AR 6 (Petitioner's "testimony that he believes his grandparents were killed because of their Mayan race is a guess as to the guerrilla's motivation that is insufficient to meet his burden of proof"). As a matter of law, the BIA and IJs must consider all evidence including circumstantial evidence on country conditions in determining the motives of persecutors. *See INS v. Elias-Zacarias*, 502 U.S. 478, 483 (1992) (emphasizing that "direct proof of [the] persecutors' motives" are not required but "*some* evidence of it, direct or circumstantial" is sufficient) (emphasis in original). AR 129.

As the BIA failed to address the IJ's analysis on the expert evidence, it cannot be said that the BIA meaningfully reviewed the IJ's nexus determination under the clearly erroneous standard, but rather substituted its judgment for that of the IJ. But the clear error review standard is deferential to the factfinder. The BIA's "another permissible view of the evidence, choosing another plausible interpretation of the evidence . . . does not meet the BIA's obligation to utilize clear-error review." *Adeyanju*, 27 F.4th at 32-33; *Matter of R-S-H-*, 23 I. & N. Dec. 629, 637 (BIA 2003) ("A factfinding may not be overturned simply because the Board would have weighed the evidence differently."). Thus, under clear error review, the BIA must have shown why the IJ's reliance on the expert evidence was a mistake with "definite and firm conviction." *Id*. at 33. Indeed, the BIA had a duty to provide its explanations on why it disagreed with the expert's conclusion. *See M-A-M-Z-*, 28 I. & N. Dec. at 177-78 ("[W]hen the Immigration Judge makes a factual finding that is not consistent with an expert's opinion, it is important, as the Immigration Judge did here, to explain the reasons behind the factual findings."); *Matter of J-G-T-*, 28 I. & N. Dec. 97, 104 (BIA 2020) ("[T]o the extent that the record contains contradictory evidence, the [IJ] should explain why inferences made by the expert are reasonable and more persuasive than the other evidence presented.").

Yet, the BIA failed to do so here, including by ignoring the relevant expert

evidence. The expert evidence was particularly important in this case because Petitioner—as a 12-year-old boy—could hardly know the precise motive of the persecutors. *See Ordonez-Quino v. Holder*¸ 760 F.3d 80, 90 (1st Cir. 2014) ("[r]arely will an applicant know the 'exact motivation' of his persecutors—especially when he was victimized as a young child").

For these reasons, this Court should find that the BIA violated the regulation by reweighing the underlying evidence *de novo* on the IJ's nexus determination. 8 C.F.R. § 1003.1(d)(3)(i). Significantly, the instant case is not the only case in which the BIA has overturned an IJs' fact findings *de novo* without applying the appropriate clear error standard. Based on *amicus*'s knowledge, this is the fourth such case since 2021. *See Adeyanju v. Garland*, 27 F.4th 25 (1st Cir. 2022); *Domingo-Mendez v. Garland*, No. 21-1029 (1st Cir.) (referred to the court's Civil Appeals Management Program (CAMP)); *Barros v. Garland*, 31 F.4th 51 (1st Cir. 2022). Given the BIA's apparent track record of applying the incorrect standard, this Court's guidance on this issue in the context of the nexus analysis is essential. Other circuits have similarly provided such guidance. *See, e.g., Crespin-Valladares v. Holder*, 632 F.3d 117, 128 (4th Cir. 2011) (vacating the BIA's nexus conclusion because "the BIA failed to review the IJ's nexus finding for clear error and instead simply substituted its own judgment for that of the IJ") (internal quotations omitted).

II. THE BIA'S CONCLUSION THAT DHS REBUTTED THE PRESUMPTION OF PETITIONER'S WELL-FOUNDED FEAR OF FUTURE PERSECUTION BY A PREPONDERANCE OF EVIDENCE SHOULD BE VACATED

This Court should reverse the BIA's conclusion that DHS successfully rebutted the presumption of Petitioner's well-founded fear of future persecution by a preponderance of evidence.

A. The Legal Landscape of DHS' Burden of Rebutting the Presumed Well-Founded Fear of Future Persecution

Once an asylum seeker establishes past persecution, he "become[s] entitled to a presumption that he ha[s] the 'well-founded fear of [future] persecution' that is necessary to obtain asylum [and withholding of removal]." *Dahal v. Barr*, 931 F.3d 15, 17 (1st Cir. 2019); *see also* 8 C.F.R. § 1208.13(b)(1) ("An applicant who has been found to have established such past persecution shall also be presumed to have a well-founded fear of persecution on the basis of the original claim."). While this presumption can be rebutted, *see* 8 C.F.R. § 1208.13(b)(1)(i)(A)-(B), the burden in doing so is on DHS to show, by a preponderance of the evidence, that either [1] "[t]here has been a fundamental change in circumstances such that the applicant no longer has a well-founded fear of persecution" or [2] the applicant could internally relocate to "another part of the applicant's country of nationality." 8 C.F.R. § 1208.13(b)(1)(i)-(ii). The first prong is at issue here.

This Court has previously explained that to satisfy its burden under this

prong, DHS must show through evidence that "material changes in country conditions" negate an applicant's "*particular* fear" by "demonstrate[ing] material changes in country conditions that affect the *specific circumstances* of an asylum seeker's claim." *Dahal*, 931 F.3d at 19 (quoting *Palma-Mazariegos v. Gonzales*, 428 F.3d 30, 35 (1st Cir. 2005)) (emphasis in original); *Uruci v. Holder*, 558 F.3d 14, 19 (1st Cir. 2009) ("The presumption can be rebutted, however, if 'a report demonstrates fundamental changes in the specific circumstances that form the basis of a petitioner's presumptive fear of future persecution.'") (quoting *Chreng v. Gonzales*, 471 F.3d 14, 22 (1st Cir. 2006)).

However, this Court has not yet provided guidance as to the precise meaning of "specific circumstances" and "particular fear." *Id*. For example, if the *persecutor* of an asylum applicant's past persecution *changed* over the time (e.g., from private persecutors to government officials), would the asylum applicant's presumed well-founded fear of future persecution be successfully rebutted? Or, if the *form* of the persecution *changed* over the times (e.g., from forcible recruitment during a war to hate crimes after the war), would the asylum applicant must independently demonstrate a well-founded fear because the presumption has been rebutted? Former Attorney General Mukasey answered these questions in *Matter of A-T- II*, 24 I. & N. Dec. 617 (A.G. 2008).

There, in assessing whether there has been a fundamental change in

circumstances such that an asylum applicant no longer has an objective fear of being persecuted, the Attorney General made clear that the dispositive inquiry is whether there have been fundamental changes in circumstances that negate "the same statutory ground" in overturning the BIA's earlier decision of *Matter of A-T-*, 24 I. & N. Dec. 296 (BIA 2007) ("*A-T-I*"). *See A-T- II*, 24 I. & N. Dec. at 622; *see also* Asylum Procedures, 65 Fed. Reg. 76,121, 76,127 (Dec. 6, 2000) (the establishment of past persecution "on account of race, religion, nationality, membership in a particular social group, or political opinion shall be presumed to have a well-founded fear of future persecution *on account of those same grounds*") (emphasis added).

In *A-T-I*, the BIA held that the applicant's presumed well-founded fear of future persecution based on female genital mutilation (FGM) was rebutted because the form of future persecution she feared—namely, family pressured forcible marriage—was not identical to the form of previous persecution—FGM. 24 I. & N. Dec. at 304. Attorney General Mukasey rejected this interpretation of 8 C.F.R. § 1208.16(b)(1)(i). *See A-T- II*, 24 I. & N. Dec. at 622 ("This is not what the law requires."). Attorney General Mukasey explained that the BIA "was wrong to focus on whether the future harm to life or freedom that [applicant] feared would take the 'identical' form—namely, female genital mutilation—as the harm she had suffered in the part" because the angle of the burden imposed on DHS under the

regulation was "not to show that the particular act of persecution suffered by the victim in the past will not recur" but, rather, whether "changed conditions obviate[d] the risk to life or freedom related to the original" protected ground. *Id.* at 622-23. In other words, the presumption of a well-founded fear of future persecution continues even if the persecutors or the forms of persecution have changed over the time, unless DHS can show by preponderance of evidence that the original protected ground (e.g., race, political opinion, religion, or particular social group) is negated.[4]

Amicus is unaware of any circuit cases in which courts have explicitly disagreed with this component of *A-T-II*'s holding.[5] Nonetheless, courts, including this Court, have interpreted the law in a similar manner. *See Bringas-Rodriguez v. Sessions*, 850 F.3d 1051, 1075 n.18 (9th Cir. 2017) ("[I]t is not the nature of the

---

[4] In light of *A-T-II*, the United States Citizenship and Immigration Service (USCIS) of DHS also has taken a position that "[t]he applicant [for asylum and withholding] does not have to fear that he or she will suffer the identical type of harm in the future that he or she suffered in the past in order to retain the presumption of future persecution so long as the fear of any future harm is on account of the original basis for persecution." U.S. Citizenship and Immigration Services (USCIS), *the Refugee, Asylum and International Operations (RAIO) Directorate—Officer Training: Guidance for Adjudicating Well-Founded Fear*, at *41-42 (Dec. 20, 2019) (emphasis added), *available at* https://www.uscis.gov/sites/default/files/document/foia/Well_Founded_Fear_LP_RAIO.pdf.

[5] Although this Court previously addressed *A-T-II* in *Mariko v. Holder*, 632 F.3d 1, 8-9 (1st Cir. 2011) and *Warui v. Holder*, 577 F.3d 55, 59 (1st Cir. 2009), the Court did not focus on the part of *A-T-II* relevant to *amicus*'s argument.

persecutory acts that must be related or the presumption to arise. Rather, it is the enumerated statutory ground that motivates the persecution that must be related—in other words, the reason for the fear of future persecution must be related to the reason for the past persecution."); *Miranda-Bojorquez v. Barr*, 937 F.3d 1, 6 (1st Cir. 2019) (finding that DHS met the burden on the race-based presumed persecution because of the changes in the specific circumstances and because the petitioner "d[id] not allege a fear of race-based persecution by any other parties").[6]

B. The BIA Unlawfully Reversed the IJ's Fact Findings on the Nexus Between Petitioner's Past Persecution and Petitioner's Mayan Ethnicity Without Employing the Requisite Clear Error Standard

In this case, the BIA held that DHS met its burden in showing that there has been a fundamental change in circumstances such that Petitioner no longer has a well-founded fear of persecution on account of his indigenous Mayan race. That

[6] While the former Attorney General's interpretation focused on withholding of removal, *amicus* can conceive of no rationale for treating asylum differently from withholding of removal in this respect since the languages of both regulations are identical. *Compare* 8 C.F.R. § 1208.16(b)(1)(i) ("[I]t shall be presumed that the applicant's life or freedom would be threatened in the future in the country of removal *on the basis of the original claim*.") (emphasis added) *with* 8 C.F.R. § 1208.13(b)(1) ("An applicant who has been found to have established such past persecution shall also be presumed to have a well-founded fear of persecution *on the basis of the original claim*.") (Emphasis added). In fact, this Court has treated these regulations the same. *See, e.g., Uruci*, 558 F.3d at 19 (interpreting 8 C.F.R. § 1208.13(b)(1)(i) – asylum); *Dahal*, 931 F.3d at 22 (interpreting 8 C.F.R. § 1208.16(b)(1)(i) – withholding of removal). *See also Clark v. Suarez Martinez*, 543 U.S. 371, 382-83 (2005) (interpretation of the same statute cannot produce two different meanings).

fundamental change, according to the BIA, was "the end of the civil war." AR 6. For this conclusion, the BIA reasoned that, "[s]ince the threat to [Petitioner] was a direct result of fighting between guerrilla forces and the Guatemalan army during the civil war, the end of the war in 1996 demonstrates a fundamental change in circumstances." AR 6. The IJ's reasoning is similar to the BIA's. AR 130 ("The harm [Petitioner] fears – namely the murders of his family members and the threats against his life for failure to join the communist guerrilla organization – occurred as a direct result of the Guatemalan Civil War and the fighting between the communist guerrilla organizations and the Guatemalan Army. [Petitioner's] own expert, [Dr.] Alburez-Gutierrez, indicated that the Guatemalan Civil War has ended."). Put another way, both the BIA and IJ believed that, if the specific context of Petitioner's past persecution on account of his indigenous Mayan race is no longer active—here, the formal pendency of declared civil war—then the burden of rebutting the presumption of this well-founded fear is satisfied. This reasoning is inconsistent with *A-T- II*.

Under *A-T-II*, the dispositive question is not the end of the Guatemalan Civil War. Rather, the dispositive question is whether, with the end of the Civil War, there have been fundamental changes in circumstances that would negate "the same statutory ground"—here, that would negate Petitioner's presumed persecution on account of *the Mayan indigenous race*. Petitioner articulated the

basis of his past persecution as "the Mayan indigenous group." AR 239; 397 (Petitioner "is unable to return to Guatemala due to the past persecution he has suffered on account of his [race], namely belonging to Mayan indigenous groups").[7] The IJ found that Petitioner "established his protected ground—his race as an indigenous Mayan—and a sufficient nexus between his race and the harm suffered." AR 129. Thus, DHS must have shown that there have been fundamental changes in circumstances that negate Petitioner's presumed persecution on account of *the Mayan indigenous race*.

This did not occur. Instead, DHS only made a perfunctory argument that "[t]he civil war has ended since [Petitioner] has been here in the United States," which was agreed by the IJ and BIA. AR 399, 130, 6. However, none of them addressed the question of whether Petitioner's presumed persecution *on account of the Mayan indigenous race* has been rebutted due to the end of this war. Put another way, neither body analyzed whether there have been fundamental changes in circumstance to the extent that Petitioner no longer has a well-founded fear based on his Mayan indigenous race *even after the end of the civil war*.

As Petitioner contended in this case, the end of the civil war did not end the systematic persecution of the Mayan indigenous communities in Guatemala. AR

[7] As acknowledged by the IJ, Petitioner corrected the Mayan indigenous base as a race, not a particular social group." AR 129 ("In [Petitioner's] corrections to his asylum application, he indicated that he is seeking asylum based on his race.").

35-36. The expert evidence and other country conditions evidence presented in this case also included the continuation of systematic persecution on indigenous communities in Guatemala, including after the civil war. *E.g.,* AR 482 ¶22 ("Mr. Ixcuna has expressed a fear of returning to Guatemala where the same racist structures that facilitated the mass killing of the Maya people endure in the country. I consider his fear to be consistent with the most recent reporting and my personal knowledge of the country conditions which show that there is ongoing mistreatment of indigenous communities."; "Despite the Peace Accords ending the Guatemalan Civil War, the indigenous community continues to be the target of harm."; expert affidavit), 605 ("Significant human rights issue included: . . . crimes involving violence or threats thereof targeting . . . members of other minority groups"; 2019 State Department County Conditions Report), 624 (same). Thus, the BIA and IJ's basis for the rebuttal of the presumed well-founded fear cannot stand pursuant to *A-T-II*.

The Court's explicit guidance on this issue is critical. Notwithstanding the settled course of adjudication provided by former Attorney General Mukasey in *A-T-II,* neither the BIA nor the IJ has apparently received this important message that they must focus on the statutory basis of the past persecution.

CONCLUSION

For the foregoing reasons, *amicus* respectfully submits that the Court should hold that (i) the BIA unlawfully reversed the IJ's nexus determination and (ii) DHS failed to meet its burden of rebutting the presumed well-founded fear of Petitioner's future persecution.

Dated: June 23, 2022

Respectfully submitted,

AMERICAN CIVIL LIBERTIES UNION OF NEW HAMPSHIRE

/s/ SangYeob Kim
Gilles Bissonnette (No. 123868)
SangYeob Kim (No. 1183553)
AMERICAN CIVIL LIBERTIES UNION OF NEW HAMPSHIRE
New Hampshire IMMIGRANTS' RIGHTS PROJECT
18 Low Avenue
Concord, NH 03301
Tel.: (603) 333-2081
gilles@aclu-nh.org
sangyeob@aclu-nh.org

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 5,550 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.

/s/ SangYeob Kim
SangYeob Kim (No. 1183553)

Dated: June 23, 2022

CERTIFICATE OF SERVICE

I certify that this Brief is served to all counsel of record registered in ECF on June 23, 2022.

/s/ SangYeob Kim
SangYeob Kim (No. 1183553)

Dated: June 23, 2022