

No. 16-1274

In the Supreme Court of the United States

TING XUE, PETITIONER

v.

JEFFERSON B. SESSIONS, RESPONDENT

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

**BRIEF FOR CHRISTIAN LEGAL SOCIETY,
JUBILEE CAMPAIGN USA, AND HIAS AS
AMICI CURIAE IN SUPPORT OF CERTIORARI**

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QUESTIONS PRESENTED

1. Whether an asylum applicant suffers “persecution” if he or she is forced to practice his or her religion in secret in order to avoid state-imposed punishment.

2. Whether a court of appeals reviews the Board of Immigration Appeals’ determination regarding the existence of persecution de novo (as a question of law) or for substantial evidence (as a question of fact), where all the underlying facts giving rise to the claim of persecution are undisputed.

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**INTRODUCTION AND
INTEREST OF *AMICI CURIAE****

The Tenth Circuit’s decision in this case urgently warrants review. According to the Tenth Circuit, this nation’s asylum statute does not offer any protection to a person who—in light of state threats of punishment—is forced to hide his religious affiliation and worship in secret. That ruling raises vital issues of national importance—not only to uniformity in immigration law but also to the core of the nation’s understanding of religious liberty and Congress’s decision to protect victims of religious persecution, which is rising across the globe. The decision below also stands in direct conflict with published decisions of the Seventh, Ninth, and Eleventh Circuits, which have correctly recognized that religious practice cannot be meaningfully distinguished from religious belief.

Persecution of religious practice—including being forced to practice one’s faith in secret to avoid state-imposed punishment—unquestionably constitutes persecution on the basis of religion, and thus warrants asylum under 8 U.S.C. § 1101(a)(42)(A). In concluding otherwise, the Tenth Circuit misunderstood the close relationship between religious belief and practice and gravely discounted the experience of individuals persecuted in foreign countries on account of their religion. Unless reversed, its decision will likely adversely

* Pursuant to Rule 37.2(a), *amici* provided timely notice of their intention to file this brief. All parties consented. In accordance with Rule 37.6, no counsel for any party authored this brief in whole or in part, and no person or entity other than the *amici* or their counsel made a monetary contribution intended to fund the brief’s preparation or submission.

affect thousands of worthy asylum and refugee petitioners who have a well-founded fear of religious persecution.

The *Christian Legal Society* (“CLS”) is the nation’s largest non-denominational Christian membership organization of attorneys, judges, law professors, and law students. Founded in 1961, CLS defends religious liberty in the legislatures and the courts, and provides legal assistance to those most in need in our society. CLS has an interest in this case because it opposes religious persecution around the world and works to defend and advance a robust concept of religious liberty that encompasses both belief and expression.

Jubilee Campaign USA is a non-profit organization that promotes human rights and religious liberties for ethnic and religious minorities throughout the world through advocacy and engagement. Jubilee advocates for prisoners of conscience and refugees; combats trafficking for protection of children; supports victims; and litigates for life. Jubilee has been granted Consultative Status by the United Nations (UN) and participates annually in the United Nations Human Rights Council, raising concerns of persecuted religious minorities and others from various parts of the world, including China.

HIAS is a non-profit organization that has assisted asylum seekers and refugees for over 130 years. Guided by Jewish values and heritage, HIAS works in war-torn areas to protect the dignity of all persons who have been forced to flee their homelands, including ethnic, religious, and sexual minorities. HIAS also partners with local Refugee Assistance Organizations in the U.S. to help newly arriving refugees. HIAS has an interest in this case because it works to defend the

human rights of refugees and freedom from religious persecution for vulnerable populations on a national and global level, and because it has an interest in consistent U.S. immigration laws to provide predictability for the refugees it supports.

Amici strongly believe that the Tenth Circuit’s distinction between religious practice and religious belief is artificial and without support in law. Being forced to practice one’s religion in secret to avoid actual or threatened state punishment constitutes “persecution on account of * * * religion.” 8 U.S.C. § 1101(a)(42)(A). *Amici* respectfully request that the Court address this issue and correct an understanding of religious persecution that conflicts with deeply ingrained American and international protections for open religious profession and practice.

STATEMENT

Ting Xue, a native and citizen of China, arrived in the United States after fleeing from government persecution for practicing his Christian faith. Not having a valid entry document, Xue applied for asylum.

The Chinese government requires religions and churches to register with the government, in significant part to control strictly the content of religious doctrine and teaching. Pet. App. 2a–3a. For example, Xue testified that “the government-approved Christian church teaches that loyalty to country and the Communist party come before loyalty to God.” *Ibid.* He further testified that the government-approved church does not allow “people * * * the freedom to express their views.” Pet. App. 35a. Worship outside of government-approved churches is illegal, and unregistered “house churches” are routinely sought out by

government officials, who arrest and imprison their members and leaders. Pet. App. 2a–3a.

A long-practicing, faithful Christian, Xue attended an unregistered house church. Each week, as a precaution, the believers gathered at a different member's house. But on October 26, 2007, the Chinese authorities discovered and raided a house church service that Xue was attending. *Ibid.* The authorities arrested all members present and brought them to the police station. *Id.* at 3a. Officers there took Xue to an interrogation room and pressured him to disclose information about the church. *Ibid.* When Xue's answers failed to satisfy them, the officers slapped him across the head and beat him with a baton. *Ibid.*

The officers then placed Xue in a small jail cell with four other men from the church. Pet. App. 3a. For three days and four nights, Xue remained in custody. *Id.* at 4a. The men were forced to share a single wooden bucket as a toilet, which was never emptied, and a single straw bed. *Id.* at 38a. Twice a day they were fed a bowl of porridge. *Ibid.* Before serving the meal, officers routinely forced them to sing the national anthem, mocking the prisoners' habit of praying before meals. *Ibid.* Officers also taunted Xue and his cellmates by referring to themselves as the prisoners' "god," claiming the power to refuse them food, and asking them to call on Jesus to rescue them. *Id.* at 3a.

Xue was released from imprisonment only after his mother paid a major fine—almost half of Xue's entire yearly salary. Pet. App. 4a. Upon his release, officers forced him to sign a pledge that he would not attend illegal church meetings and warned that if he resumed he would face even more severe punishment. *Ibid.* He was also required to report to the police station for

weekly “reeducation” sessions, during which officers inquired about his activities and instructed him on the importance of patriotism and work. *Ibid.*

Two weeks later, Xue returned to his house church, and in December 2007 police again raided the church and arrested all those present. Pet. App. 4a. Xue was not there, but he later learned that all repeat offenders were prohibited from posting bond and sentenced to one year in prison. *Ibid.*

Concerned that the police would discover his continued church attendance, and fearful for his safety, Xue’s family sent him to stay at his aunt’s home in another province. Pet. App. 4a–5a. When Xue did not report to the police station for his weekly check-in, officers came to his parents’ home looking for him. *Ibid.* The officers warned that if he did not report immediately he would be “severely punished.” *Ibid.*

Rather than return home, Xue and his family decided that he should leave the country. *Ibid.* With the help of a smuggler, he left China. *Id.* at 5a. He traveled for several months before entering the United States illegally in July 2008. *Ibid.*

The Department of Homeland Security (“DHS”) issued a notice to appear to Xue in March 2009. Pet. App. 32a. He applied for asylum, withholding of removal, and protection under the Convention Against Torture (“CAT”), arguing that the harsh mistreatment he suffered at the hands of Chinese authorities—and a well-founded fear that he would suffer more such persecution—would force him to continue practicing his faith in secret. *Id.* at 56a. The IJ credited his testimony but denied his petition, concluding that his fears of future persecution “do[] not amount to more

than a restriction on [his] liberty and thus do[] not rise to the level of persecution.” *Id.* at 55a. The Board of Immigration Appeals (“BIA”) affirmed.

The Tenth Circuit denied Xue’s petition for review. Although the issue on appeal was whether Xue’s undisputed factual circumstances qualified as persecution, the court applied its precedent in *Vicente-Elias v. Mukasey*, 532 F.3d 1086 (10th Cir. 2008), and treated the issue as a “question of fact.” Pet. App. 8a. The court acknowledged that this approach was “odd,” but deemed itself “bound” by *Vicente-Elias*. *Id.* at 11a–12a.

Applying that standard of review, the court held that substantial evidence supported the finding that the “level of harassment” Xue experienced fell short of persecution. Pet. App. 16a, 18a. The court declined to hold that an asylum seeker establishes persecution when “ordered, under threat of penalty, to stop practicing his religion.” *Id.* at 17a.

REASONS FOR GRANTING THE PETITION

- I. Certiorari is warranted because the increase in religious persecution globally and in China underscores the urgent need to apply the proper standard in asylum cases.**
 - A. Religious persecution is on the rise across the globe.**

Petitioner has persuasively shown that certiorari is warranted to address a conflict among the circuits over the proper standard of review for resolving cases such as this. Certiorari is also warranted, however, on account of the growth in religious persecution globally.

The rise in religious persecution is breathtaking and well-documented, and it affects people of nearly all

faiths. As the United States Commission on Religious Freedom has explained: “The state of affairs for international religious freedom is worsening in both the depth and breadth of violations.” U.S. Comm’n on Int’l Religious Freedom, *2017 Annual Report 1* (hereinafter U.S. Religious Freedom). Indeed, the “blatant assaults” on religious freedom “have become so frightening—attempted genocide, the slaughter of innocents, and wholesale destruction of places of worship—that less egregious abuses go unnoticed or at least unappreciated.” *Ibid.* In fact, “[n]early all Muslims, Jews, [and] Hindus live in countries where their group was harassed” by their governments or other powerful social groups. Pew Research Center, *Global Restrictions on Religion Rise Modestly in 2015, Reversing Downward Trend*, (Apr. 11, 2017).¹

Of course, the number of those who actually apply and are eligible for asylum in the United States is much smaller than the countless people who suffer religious persecution. The number is confined to those who have entered the United States and applied either affirmatively to the Department of Homeland Security’s asylum division under the United States Citizenship and Immigration Services, or to those who have received a Notice to Appear and apply defensively before an immigration court within the Executive Office of Immigration Review in the Department of Justice. But the increase in religious persecution confirms the importance of the questions presented.

¹ <http://www.pewforum.org/2017/04/11/global-restrictions-on-religion-rise-modestly-in-2015-reversing-downward-trend>.

Of the world's most populous nations, Egypt, China, Iran, Russia, and Indonesia have the highest levels of government restrictions on an individual's ability to practice his or her faith. *Ibid.* The Russian government's recent efforts to "ban" Jehovah's Witnesses is but one of countless examples of the persecution that persons of faith experience in this current anti-religious global climate. See Andrew Higgins, *Pacifist, Christian and Threatened by Russian Ban as Extremist*, N.Y. Times, Apr. 5, 2017, at A1; see also U.S. Religious Freedom, *supra* at 1, 3.

In an effort "to curtail religious groups that compete with the Russian Orthodox Church" or "challenge President Vladimir V. Putin's efforts to rally the country behind traditional and often militaristic patriotic values," the Russian government has ordered that all Jehovah's Witnesses be treated as extremists. *Ibid.* Extremism "is a catchall charge that can be deployed against just about anybody." *Ibid.* Even in the policy's nascence, Jehovah's Witnesses are losing their jobs simply because of their church membership.

South of Moscow, ISIS seeks to exterminate every member of the Yazidi faith—a religious minority living in Syria and Iraq—"who refuse[s] to convert to Islam." Nick Cumming-Bruce, *ISIS Committed Genocide Against Yazidis in Syria and Iraq, U.N. Panel Says*, N.Y. Times, June 16, 2016.² As the United Nations has reported, Yazidis who have refused to violate their conscience have been "shot in the head or their throats

² <https://www.nytimes.com/2016/06/17/world/middleeast/isis-genocide-yazidi-un.html> (accessed May 17, 2017).

were slit, often in front of their families, littering roadsides with corpses.” *Ibid.* Indeed, investigators noted that “ISIS permanently sought to erase the Yazidis through killing, sexual slavery, enslavement, torture, inhuman and degrading treatment, and forcible transfer causing serious bodily and mental harm.” *Ibid.* (internal quotation omitted).

East of Syria and Iraq, the rise of extremist ideologies leaves “religious minorities, such as Shia Muslims, Ahmadis, Christians, Sikhs, and Hindus, facing numerous injustices and the persistent threat of violence” in Pakistan. Lisa Cutis, *Religious Freedom in Pakistan: Glimmers of Light on a Darkening Horizon*, Rev. Faith & Int’l Affairs, Summer 2016, at 23, 23. Violence against the Shia community “has reached alarming proportions.” *Id.* at 26. In 2015, for example, 45 Shia died when gunmen attacked their bus, and 61 Shia were slain in a mosque bombing. *Ibid.*

The Shia community in Pakistan is routinely targeted by Sunni militant organizations. *Ibid.* Although the Shia’s persecution has been escalating since 1980, the Pakistani government waited until 2015 before it began to “crack[] down on [the Sunni militant group] and target[] its leadership.” *Ibid.* And even with these efforts, the Pakistani government prosecutes these human rights violators only selectively and treats them with “kid gloves,” such that there is no incentive to cease the persecution of religious minorities. *Id.* at 28.

And indeed, Pakistan’s blasphemy laws enable Sunni militants to carry out their deliberate discrimination against the Shia faith community. With no requirement of “proof of intent or evidence,” and “no penalties for false allegations,” the Pakistani government has incarcerated innocent religious minorities because

their accusers also “have broad leeway to define what they deem an offense.” *Id.* at 25.

The persecution of religious minorities in Mexico illustrates the human rights abuses that people of faith are suffering at the hands of their governments in this hemisphere. U.S. Religious Freedom, *supra* at 204. Religious minorities who have refused to convert from their faiths have been “forcibly displaced, arbitrarily detained, had their properties destroyed, and/or had their utilities cut off.” *Ibid.*

Although the Mexican Constitution purports to protect religious liberty, the Mexican Government uses its authority “to infringe on the rights of religious minorities in different municipalities.” *Ibid.* As a result, majority religious communities can use the power of the government to cause religious minorities “who do not wish to participate in or contribute financially to religious festivals, or who wish to practice a different faith or no faith” to “experience[] violence, forced displacement, arbitrary detention, and destruction of personal property and houses of worship.” *Id.* at 205.

B. Chinese officials are increasingly targeting religious believers, especially house church participants such as Xue, and violating their religious freedom and other fundamental human rights.

1. Chinese religious persecution generally

China stands out even among the world’s worst violators of religious freedom. Although its 1.38 billion residents seek to practice a wide variety of faiths, the Chinese Government extends legal status and official

recognition to only five: Buddhism, Taoism, Islam, Catholicism, and Protestantism. U.S. Religious Freedom, *supra* at 33. Not all Protestant or Catholic congregations are officially recognized, and groups such as Xue’s house church—which is unrecognized because it seeks to maintain freedom to choose leaders and doctrine instead of facing strict government control—are more likely to be persecuted. Particularly for these unrecognized groups, human rights are a grave concern.

Persecution in China is on the rise in both frequency and severity. Many religious groups—especially Uighur Muslims, Tibetan Buddhists, and Falun Gong practitioners—are routinely harassed, tortured, and exiled. *Id.* at 32. The Congressional-Executive Commission on China records that 1,433 political prisoners currently suffer for their beliefs, whether as religious minorities, human rights lawyers, house church leaders, or registered pastors who have criticized the government for its human rights abuses. Congressional-Executive Comm’n on China Political Prisoner Database, *China: List of Political Prisoners Detained or Imprisoned as of October 11, 2016* (2016) (hereinafter *Political Prisoners*).³ Although the Chinese government’s reasons for detaining prisoners often include “organizing illegal demonstrations,” “leaking state secrets,” or “obstructing official business,” a closer look reveals that most cases merely involved people meeting peaceably in homes for worship. *Ibid.*

Against this backdrop of religious persecution, the Chinese government is in the process of expanding

³ https://www.cecc.gov/sites/chinacommission.house.gov/files/documents/CECC%20Pris%20List_20161011_1433.pdf.

regulation of religious entities. By “[c]ombining both violent and nonviolent methods, the party’s policies are designed to curb the rapid growth of religious communities and eliminate certain beliefs and practices, while also harnessing aspects of religion that could serve the regime’s political and economic interests.” Sarah Cook, *The Battle for China’s Spirit: Religious Revival, Repression, and Resistance under Xi Jinping* 1 (2017).⁴ These events represent continued and increased persecution by the administration of President Xi Jinping. See *id.* at 6–8.

Indeed, persecution is the broader policy goal of President Jinping’s administration. Since 2013, that Administration has consistently restricted religious freedom and issued policies intending to restrict it further, in the name of vague interests such as “patriotism,” “social harmony,” or “public security.” President Xi Jinping, Speech on Religion, April 22, 2016, Beijing. At the National Religious Work Conference, he stressed that Chinese authorities should “incorporate the religions into socialist society” and that “[r]eligious groups * * * must adhere to the leadership of the Communist Party of China.” *Ibid.* He also directed Communist Party leaders to remain “unyielding Marxist atheists” and exercise greater oversight of religion via more detailed guidelines and stricter Internet regulations, aiming to “sinicize” China or eliminate foreign influence. *Ibid.*

⁴ https://freedomhouse.org/sites/default/files/FH_ChinasSprit2017_Abridged_FINAL_compressed.pdf.

On September 8, 2016, the Chinese government released for public comment a new set of Regulations on Religious Affairs. Religious Affairs Regulations Draft Revisions (Deliberation Draft) (Sept. 8, 2016) (hereinafter Religious Affairs Regulations).⁵ As an update to the existing 2005 Regulations, the 2016 Regulations demonstrate the Administration's goal of even more extensive control of religion: they contain seventy-four articles covering a wide range of public and private life. *Ibid.*

Specifically, the regulations would increase government oversight of non-profits, worship services, religious property, and schools, to the end of limiting religious influence in education, the Internet, public affairs, and Chinese society in general. *Ibid.* The regulations tighten the existing requirements for formal registration and approval of religious meetings. *Ibid.* They also add approval requirements for publishing religious documents, traveling for religious study, or using homes for religious activities. *Ibid.* These efforts confirm that China is attempting to regulate religion more closely, and the State Administration for Religious Affairs has stated that officially enacting them is high on its agenda for 2017. Yi Yang, *Revision of Religious Affairs Regulations to be Implemented in 2017*, China Christian Daily (Jan. 14, 2017).⁶

⁵ <http://www.chinalawtranslate.com/religious-regulations/?lang=en>.

⁶ http://chinachristiandaily.com/2017-01-14/society/revision-of-religious-affairs-regulations-to-be-implemented-in-2017_3829.html. (accessed May 23, 2017).

2. Chinese persecution of house churches

Chinese house churches bear the brunt of Chinese religious persecution. Such churches, which are increasingly common, are neither registered with the government nor affiliated with the Three-Self Patriotic Movement—a network of Protestant state-approved churches that go through a rigorous application process and experience significant oversight by Chinese government officials. House churches may or may not meet in actual homes and can range in size from a few dozen to 50,000, depending on the location and leadership. *Yang Rongli—Adopted by Congressman Robert Pittenger, China 18*⁷; see also Emily Rauhala, *Risen Again: China’s Underground Churches*, *Time*, Oct. 21, 2014.⁸ But all such churches lack legal protection because they are not recognized by the Chinese Government. *Ibid.*

The significance of this lack of protection is magnified given that up to two-thirds of China’s estimated 70 million Christians worship in house churches. Qiao Long, *China Tries Christian Church Members on Spying, Illegal Business Charges*, *Radio Free Asia*, Oct. 19, 2016 (Luisetta Mudie, trans.).⁹ Some apply for registration to avoid legal trouble, but their applications are often denied, leaving them still more vulnerable

⁷ http://www.china18.org/2013/11/blog-post_9767.html (accessed May 23, 2017).

⁸ <http://time.com/3508291/china-underground-churches-catholicism-catholics-christianity-christians-kevin-frayer/> (accessed May 19, 2017).

⁹ <http://www.rfa.org/english/news/charges-10192016111556.html> (accessed May 19, 2017).

because their location, size, and members' names have become known to local authorities. Kay Danielson, *House Church Attitudes Toward Government Authorities*, China Source, Dec. 9, 2013.¹⁰

Churches that succeed in registering with the Three-Self Movement, moreover, experience intense government oversight: their pastors can preach only where assigned; they must operate within a “fixed zone” at a “fixed location”; and they cannot print or distribute Bibles, share their faith with others, or hand out written tracts. *Three Self Churches*, Billionbibles.org (2017).¹¹ And, of course, under the Chinese version of “religious freedom,” these churches’ activities and preaching may not critique the Chinese government or “interfere with administration, culture, education, jurisprudence, marriage, and birth control.” *Resolution by the Committee of the Three-Self Movement of the Protestant Churches of Yunnan Province and the Christian Council of Yunnan Province Concerning the Upholding of Normal Religious Activities*, Chinese L. & Gov’t, Nov.–Dec. 2000, at 14, 14–16.

Government officials monitor sermons’ theological content to ensure compliance with these requirements. Accordingly, many house churches that value the freedom to choose their leaders, follow historic Christian doctrine, and maintain independence from government oversight remain unrecognized. Brent Fulton,

¹⁰ <http://www.chinasource.org/resource-library/articles/house-church-attitudes-towards-government-authorities> (accessed May 19, 2017).

¹¹ <http://www.billionbibles.org/china/three-self-church.html> (accessed May 19, 2017).

China Reveals What It Wants to Do with Christianity, Christianity Today, Apr. 28, 2016.¹²

House church participants are especially vulnerable to human rights abuses; Xue's persecution in the form of arrest, beating, and detention is a common experience for them. In 2016, China Aid recorded 48,100 Christians detained and 3,526 arrested. China Aid, *2016 Annual Report: Chinese Government Persecution of Churches and Christians in Mainland China* 35 (2017).¹³ While arrests and detention of religious groups in general have increased ten-fold since 2007, arrests and detention of Christians, particularly house church participants, have increased by over 20 percent since 2015. *Ibid.*

Local authorities target and punish house churches in many ways: “forcibly shutting down and banning [them] and their meeting sites; requiring them to disband, [and] then apply for official registration”; “taking pastors and other church leaders into custody for public security or criminal offenses”; issuing “subpoenas,” imposing “fines,” engaging in “intimidation, and cutting off water and electricity.” China Aid, *2015 Annual Report: Chinese Government Persecution of Christians and Churches in China* 9 (2016).

Initial warnings often appear in a “Notice of Order to Reform,” followed by threats, intimidation, beatings, and imprisonment of leaders—especially if the

¹² <http://www.christianitytoday.com/ct/2016/april-web-only/china-reveals-what-it-wants-to-do-christianity-xi-jinping.html> (accessed May 19, 2017).

¹³ <http://www.chinaaid.org>.

group continues to meet. China Aid, *supra*, 2016 Annual Report at 23. Fines vary in amount with the size of the gathering and local officials' discretion. For example, when punishing the Huoshi Church, the police "confiscated accounting ledgers and froze the church's bank accounts, which included a mortgage payment of 640,000 Yuan (U.S. \$98,960)." China Aid, *supra*, 2015 Annual Report at 11.

Imprisoned house church leaders often lack legal recourse. *Political Prisoners, supra*. Even for those who receive a trial, proper procedure is uncertain. See *ibid*. With legal help, citizens sometimes can press administrative appeals to challenge punitive actions by Public Security Bureau ("PSB") officials, but many human rights lawyers are themselves imprisoned or dismissed without cause by local PSB officials. See *ibid*. Religious prisoners often face fabricated charges without evidence—charges such as embezzlement, "gathering a crowd to disturb the public order," and "illegal business operations." See *ibid*. Detained under these charges, imprisoned believers often do not receive legitimate trials or access to counsel. See *ibid*. This extensive evidence of a national movement to suppress house churches forecloses the notion that such persecution is "regionalized and irregular," as the Tenth Circuit suggested below. Pet. App. 21a.

When denying Xue's petition for review, the Tenth Circuit announced that he could avoid persecution upon returning to China if he continued worshipping in secret as his family does. Pet. App. 20a. We explain below why that reasoning is legally problematic. As a factual matter, however, the 2016 Regulations will significantly increase the Government's authority to discover and persecute secret house churches. And quite

apart from whether the 2016 Regulations are enacted, Xue's fear of persecution is well-founded, as the 2005 Regulations have already established a detailed administrative system of government oversight and implementation, giving police extensive power to punish believers such as Xue and his family. Eric Carlson, *China's New Regulations on Religion: A Small Step, Not a Great Leap, Forward*, 2005 BYU L. Rev. 747, 773 (2005). The 2016 Regulations will only make the oversight system more extensive, empower local officials to target house churches more directly, and extend fines to not only participants but also landlords and others who assist such churches indirectly. Make no mistake, being forced to worship in secret for fear of punishment is persecution, and it is becoming even more prevalent for Chinese Christians.

3. Xue's fear of future persecution is well-founded because key problems caused by China's 2005 Regulations will likely grow worse as the 2016 Regulations specifically target house churches.

While myriad house churches have already been sanctioned under the 2005 Regulations, several clauses in the 2016 Regulations would provide a stamp of approval for such arrests to continue by further criminalizing house churches—thus underscoring the need for asylum. Religious Affairs Regulations, *supra*. Article 41 of the 2016 Regulations states that unregistered groups, schools, and sites shall not “organize or hold religious activities,” or “accept any religious donations,” or “organize religious training, activities, or meetings abroad.” *Ibid*.

In the 2005 Regulations, vague language has exacerbated the persecution of house churches by expanding local officials' discretion to target them. "Without an independent judiciary to fill in the gaps or check abuses, administrative agencies are left with nearly unfettered discretion to use law to oppress or crack-down on religious groups and individuals." Carlson, *supra* at 773. In many respects, the 2016 Regulations are even more vague than the 2005 Regulations. Article 4 adds "harm [to] national security" and "disrupt[ion to the] social order * * * or other harm [to] national interests" to the list of prohibitions of religious practices. Religious Affairs Regulations, *supra*. If construed broadly, these undefined terms could be applied to restrict almost any unpopular religious gathering. *Ibid.*

The 2016 Regulations' penalty clauses give official government approval for the crippling fines that local police are already imposing under the 2005 Regulations. *Ibid.* By threatening property confiscation or fines of up to 200,000 yuan for "those who provide the conditions for illegal religious activities," Article 68 of the 2016 Regulations discriminates against small gatherings that rely on tolerant landlords to keep their locations quiet. *Ibid.* These penalties amount to economic persecution, as they will deter landlords from allowing such gatherings—and prevent low-income believers in urban areas from meeting because their groups are too small to afford registration or their own building. *Ibid.* Registration, required by law since 2005, involves turning over lists of participants and giving up the rights to choose leaders, set doctrine, and define needed practices. *Ibid.* Yet failing to register results in debilitating fines and confiscated assets, and frequently detention and imprisonment.

In sum, registration requirements place believers like Xue in an impossible position by forcing them to choose between persecution and extensive government control. Both the 2005 and 2016 Regulations give credence to Xue’s well-founded fear of future persecution, as they demonstrate the Chinese Government’s past and ongoing intent to target house churches and to restrict their religious freedom by expanding the government’s centralized control.

II. Certiorari is also warranted because the decision below rests on a “belief” versus “practice” distinction that is untenable and effectively repeals 8 U.S.C. § 1101(a)(42)(A) as it applies to refugees fleeing religious persecution.

As petitioners have shown (Pet. 16), the Tenth Circuit’s decision conflicts with the holdings of numerous other circuits that “having to practice religion underground to avoid punishment is itself a form of persecution.” *Saizhu Wang v. U.S. Att’y Gen.*, 591 F. App’x 794, 799 (11th Cir. 2014) (quoting *Kazemzadeh v. U.S. Att’y Gen.*, 577 F.3d 1341, 1354 (11th Cir. 2009)). More fundamentally, however, the decision rests on an analytical framework that severs religious belief from practice and makes it virtually impossible for many victims of religious persecution to successfully seek asylum. In effect, the Tenth Circuit has held that mistreatment for practicing one’s faith is not religious persecution—so long as the practitioner can *believe* what he or she wants or perhaps practice that belief alone or in secret.

This troubling distinction between belief and practice is inconsistent with international consensus, American law and jurisprudence, and common sense. By applying a definition of religious persecution that

does not include suppression of the simple practice of religion, the Tenth Circuit has effectively repealed the statute within its jurisdiction.

A. International consensus and this Court’s jurisprudence reject the distinction between belief and practice.

1. The United Nations has long held to the principle that a distinction between religious belief and practice is at odds with international norms for protecting religious freedom. Article 18 of the Universal Declaration of Human Rights declares that all people have a right to the freedom of religion and the freedom to practice their religion “in public or private.”¹⁴ See also, *e.g.*, *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 438–439 (1987) (citing *United Nations High Commissioner for Refugees, Handbook on Procedures and Criteria for Determining Refugee Status* (Geneva 1979)).

Article 1 of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, passed by the United Nations General Assembly in 1981, echoed that sentiment when it declared that “[e]veryone shall have the right to freedom of thought, conscience and religion.”¹⁵ Notably, “religion” is listed separately from “thought” and “conscience,” confirming that the scope of religious freedom is distinct from, and greater than, mere belief. Indeed, the Declaration goes on to explain that “[t]his right shall include” the right, “either individually or in

¹⁴ <http://www.un.org/en/universal-declaration-human-rights/> (accessed May 17, 2017).

¹⁵ <http://www.un.org/documents/ga/res/36/a36r055.htm> (accessed May 17, 2017).

community with others and in public or private, to *manifest* his religion or belief in *worship, observance, practice* and *teaching*.” *Ibid.* (emphasis added).

2. This Court’s jurisprudence likewise rejects the Tenth Circuit’s belief-practice dichotomy. From our nation’s earliest days, the term “freedom of religion” did not confine “the protection to beliefs and opinions.” Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1459 (1990). Nor was it confined to the simple expression of those beliefs; rather, the *practice* of religion was protected as well. *Ibid.*; see also William P. Marshall, *Solving the Free Exercise Dilemma: Free Exercise as Expression*, 67 Minn. L. Rev. 545, 545–46 (1983). And more recently, the Court has reaffirmed that “the ‘exercise of religion’ often involves not only belief and profession *but the performance of (or abstention from) physical acts*: assembling with others for a worship service, participating in sacramental use of bread and wine, proselytizing, [or] abstaining from certain foods or certain modes of transportation.” *Emp’t Div., Dep’t of Human Res. of Oregon v. Smith*, 494 U.S. 872, 877 (1990) (emphasis added); see also *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2770 (2014).

Even the Tenth Circuit does not apply the “belief versus practice” distinction in analogous asylum cases that do not touch on religious persecution. For example, journalists who are under threat of politically motivated punishment for their journalistic activities are able to receive asylum under the same statute. 8 U.S.C. § 1101(a)(42)(A). In *Hayrapetyan v. Mukasey*, 534 F.3d 1330 (10th Cir. 2008), an Armenian journalist suffered a level of punishment similar to what Xue

experienced, when she was: “accosted on two occasions while doing her journalistic work”; detained for “brief periods of time by the authorities”; and “slapped.” *Id.* at 1334.

The immigration judge there found that those experiences were not “serious enough to rise to the level of persecution,” and that she had “failed to show it was more likely than not that she would be persecuted” in the future if she returned to Armenia. *Id.* at 1334–1335. But the Tenth Circuit reversed, citing “the fact that it was the Armenian government, or groups within its control, that engaged in the hostile actions,” and that the actions were taken “in retaliation for” the journalistic activities. *Id.* at 1336. The court concluded that the record “would support a determination to the contrary under the correct standard.” *Id.* at 1338. Other courts have reached similar results in cases involving sexual orientation. See *Karouni v. Gonzales*, 399 F.3d 1163, 1172 (9th Cir. 2005) (holding that asylum was warranted for a petitioner fleeing persecution based on sexual orientation and rejecting the government’s argument that likely future persecution would be due to “homosexual acts,” not “status,” and thus did not warrant asylum); *Velasquez-Banegas v. Lynch*, 846 F.3d 258, 262 (7th Cir. 2017) (“[I]t was error for the immigration judge to suggest that the petitioner would be safe if he kept secret his HIV status. The law does not require people to hide characteristics like religion or sexual orientation, and medical conditions, such as being HIV positive.”).

In the decision below, however, the court applied a wholly different standard to an applicant seeking asylum based on religious persecution—under the exact

same statute. See 8 U.S.C. § 1101(a)(42)(A). Review is warranted.

B. Distinguishing belief from practice effectively repeals the statute.

It is not an overstatement to say that the Tenth Circuit’s belief-practice dichotomy effectively repeals the statute, particularly where the practice at issue is gathering peaceably in a home for worship.

Congress reinforced the principles set forth in the international human rights instruments and this Court’s freedom of religion jurisprudence (*supra* at 21–22) when it passed the International Religious Freedom Act (“IRFA”). Pub. L. No. 105-292, 112 Stat. 2787 (Oct. 27, 1998), codified in part at 22 U.S.C. § 6401 *et seq.* The persecution of Chinese house churches was an important factor in the genesis of the Act. Steven Wales, *Remembering the Persecuted: An Analysis of the International Religious Freedom Act*, 24 Hous. J. Int’l L. 579, 586–588 (2002).

Notably, the Act “does not distinguish between physical harm and harm to conscience or belief.” Craig Mousin, *Standing With The Persecuted: Adjudicating Religious Asylum Claims After the Enactment of the International Religious Freedom Act of 1998*, 2003 BYU L. Rev. 541, 576. Congress’s findings included not only an acknowledgment of an “increasing assault” on the right to freedom of religion, but “[e]ven more abhorrent,” the fact that “religious believers in many countries face such *severe and violent forms of religious persecution* as detention, * * * beatings, * * * [and] imprisonment, * * * merely for the peaceful belief in, change of or practice of their faith.” 22 U.S.C.

§ 6401(a)(4)–(5) (emphasis added). Congress specifically defined “violations of religious freedom” as acts committed “on account of an individual’s religious belief *or practice*: detention, interrogation, * * * imprisonment,” or “beating.” *Id.* § 6402(16)(B) (emphasis added). Congress’s own description of “severe and violent religious persecution” and “violations of religious freedom” encompasses Xue’s treatment at the hands of Chinese authorities.

The Tenth Circuit’s decision ultimately stands for the proposition that suppressing peaceful worship in house churches—many of which have already effectively been driven underground—is not religious persecution. Allowed to stand, that decision will upend Congress’s expressed view that those seeking asylum from religious persecution may find refuge in 8 U.S.C. § 1101(a)(42)(A). This Court should intervene.

CONCLUSION

For the foregoing reasons, certiorari should be granted.

Respectfully submitted.

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