

# 16-940

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT**

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**Leston Augustus SCARLETT,  
Petitioner,**

**v.**

**Attorney General William BARR,  
Respondent.**

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**ON PETITION FOR REVIEW OF AN ORDER OF  
THE BOARD OF IMMIGRATION APPEALS**

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**BRIEF OF AMICI CURIAE IMMIGRATION LAW PROFESSORS  
IN SUPPORT OF PETITIONER'S PETITION FOR REHEARING AND  
REHEARING EN BANC**

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## INTEREST OF AMICI CURIAE<sup>1</sup>

Amici are 105 immigration and refugee law scholars and clinical professors.<sup>2</sup> We teach immigration law, refugee law, or in law school clinics that provide representation to asylum seekers. As such, we have written numerous scholarly articles on immigration and refugee law and understand the practical aspects of asylum law through client representation.

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<sup>1</sup> No party, or any counsel for a party, authored this brief, in whole or in part, nor did any party, party's counsel or any other person or entity contribute money to fund the preparation or submission of this brief. This brief is submitted *pro bono*, by counsel of record.

<sup>2</sup> See Appendix A – List of Amici Immigration Law Professors and Scholar Signatories.

## SUMMARY OF ARGUMENT

This Court should rehear the Panel’s decision because it upends decades of this Court’s uniform precedent that has exclusively applied an “unwilling-or-unable” standard to evaluate a government’s response to persecution by a private actor. The Panel adopted a new state action standard of “condoned-or-complete-helplessness,” which is not grounded in any of this Court’s precedent, and the Panel explained the relationship between the two standards in a contradictory manner. The Panel stated that the “condoned-or-complete-helplessness” standard *clarified* the “unwilling-or-unable” standard; however, the Panel’s decision also agreed with the Fifth Circuit in *Gonzales-Veliz v. Barr*,<sup>3</sup> that the standards were “interchangeable.” The Panel’s contradictory holdings threaten the uniform application of the state action standard in this Court.

Literally hundreds of cases from every circuit court and the Board of Immigration Appeals (BIA)<sup>4</sup> have applied the “unwilling-or-unable” standard, contradicting the Panel’s conclusion that the “condoned-or-complete-helplessness” standard is “well grounded in circuit precedents.”<sup>5</sup> In reaching its conclusion, the Panel erroneously relied on three decisions—the Eighth Circuit’s *Saldana v.*

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<sup>3</sup> 938 F.3d 219 (5th Cir. 2019).

<sup>4</sup> See Dkt. 159 (Brief of Amici Curiae Law Professors).

<sup>5</sup> *Scarlett v. Barr*, 957 F.3d 316, 333 (2d Cir. 2020).

*Lynch*,<sup>6</sup> the Seventh Circuit’s *Galina v. INS*,<sup>7</sup> and the Fifth Circuit’s *Shehu v. Gonzales*.<sup>8</sup> This brief explains why the Panel improperly relied on each of these decisions.

Close in time to the Panel’s decision on April 28, 2020, the Sixth and Eighth Circuits issued decisions explicitly rejecting the “condoned-or-complete-helplessness” standard in favor of the “unwilling-or-unable” standard.<sup>9</sup> The Panel did not consider either case, which constitute persuasive authority for a rejection of the “condoned-or-complete-helplessness” standard. Granting the petitioner’s request for rehearing or rehearing en banc would allow the Court to consider these significant decisions.

The Panel’s adoption of a “condoned-or-complete-helplessness” standard marks an unfounded departure from decades of precedent and imposes an unduly restrictive requirement on asylum and withholding of removal applicants. The Court should reject the Panel’s adoption of the “condoned-or-complete-

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<sup>6</sup> 820 F.3d 970 (8th Cir. 2016).

<sup>7</sup> 213 F.3d 955 (7th Cir. 2000).

<sup>8</sup> 443 F.3d 435 (5th Cir. 2006).

<sup>9</sup> See *Juan Antonio v. Barr*, 959 F.3d 778, 795 (6th Cir. 2020); *Gallosso v. Barr*, 954 F.3d 1189, 1192 (8th Cir. 2020), *as amended* (Apr. 15, 2020).

helplessness” standard and return to exclusively applying the “unable-or-unwilling” standard.

## ARGUMENT

### I. THE REASONING USED BY THE PANEL TO ADOPT THE “CONDONED-OR-COMPLETE-HELPLESSNESS” STANDARD IS CONTRADICTORY AND UPENDS DECADES OF SECOND CIRCUIT PRECEDENT THAT EXCLUSIVELY APPLIED THE “UNWILLING-OR-UNABLE” STANDARD

The Panel’s reasoning for adopting the new standard is contradictory. The Panel cites to *Gonzales-Veliz v. Barr*, 938 F.3d 219, 233 (5th Cir. 2019), in which the Fifth Circuit held that the “condoned-or-complete-helplessness” standard “did not raise” the “unwilling-or-unable” standard,<sup>10</sup> reasoning that the two standards were “interchangeable.”<sup>11</sup> However, the *Scarlett* Panel’s articulation of the “condoned-or-complete-helplessness” standard makes clear that these two standards are not “interchangeable.”<sup>12</sup> In fact, the Panel distinguished the standards in saying that the “condoned-or-complete-helplessness” standard “*clarifies* how to identify when a government is unwilling or unable to control private violence.”<sup>13</sup> The petition for rehearing should be granted to address the Panel’s disjunctive

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<sup>10</sup> *Gonzales-Veliz v. Barr*, 938 F.3d 219, 233 (5th Cir. 2019).

<sup>11</sup> *Id.*

<sup>12</sup> *Scarlett*, 957 F.3d at 333.

<sup>13</sup> *Id.* (emphasis added).

holdings, which threaten the uniform application of this Court’s precedent regarding the state action requirement.

Second, the Panel’s articulation of the two standards conflicts with decades of Second Circuit precedent. The Panel noted that the “‘complete helplessness’ formulation thus ensures that a government is not charged with persecution for failing to provide a particular standard of protection, or for lapses in protection.”<sup>14</sup> Contrary to the Panel’s assertion, government lapses in protection and a government’s failure to provide a particular standard of protection to sectors of the population have formed the bases for satisfying the “unwilling or unable” standard over decades of precedent by this Court. This Court has consistently held that harms inflicted by private actors may constitute persecution so long as the government is “unwilling or unable” to control the conduct.<sup>15</sup> As set forth in our

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<sup>14</sup> *Scarlett*, 957 F.3d at 333. This position is an unexplained reversal from this Court’s previous finding, in the unpublished decision *Moncada v. Sessions*, 751 F. App’x 116, 118 (2d Cir. 2018), that the Attorney General’s decision in *Matter of A-B-* “offers substantial new guidance on the viability of asylum claims by aliens pertaining to . . . gang violence” and “addresses the circumstances in which gang violence qualifies as persecution.” (internal quotations omitted). This Court noted that because *Matter of A-B-* “alter[ed] the applicable legal standards,” it would remand the case to the BIA to apply the “new standards in the first instance.” *Id.*

<sup>15</sup> *See, e.g., Pan v. Holder*, 777 F.3d 540, 543 (2d Cir. 2015); *Rizal v. Gonzales*, 442 F.3d 84, 92 (2d Cir. 2006); *Ivanishvili v. U.S. Dep’t. of Justice*, 433 F.3d 332, 342–43 (2d. Cir. 2006) (“[E]ven assuming the perpetrators of these assaults were not acting on orders from the Georgian government, it is well established that private acts may be persecution if the government has proved unwilling to control such actions.”).

prior brief in this case, this Court has never before applied a “condoned-or-complete-helplessness” standard. Under this Court’s well-established precedent, a government’s inability or unwillingness to control private persecutors can be corroborated by a showing of authorities’ failure to respond,<sup>16</sup> lack of resources,<sup>17</sup> corruption or impunity,<sup>18</sup> or societal pervasiveness of the persecution.<sup>19</sup> Effectively, these decisions either demonstrate governmental lapses in protection or governmental failure to meet certain standards of protection for certain sectors of the population without further inquiry into whether the government was

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<sup>16</sup> See, e.g., *Pavlova v. I.N.S.*, 441 F.3d 82, 91 (2d Cir. 2006).

<sup>17</sup> See, e.g., *Sotelo-Aquije v. Slattery*, 17 F.3d 33, 36–37 (2d Cir. 1994) (noting that “[8 U.S.C. § 1101(a)(42)] protects against persecution not only by government forces but also by nongovernmental groups that the government cannot control” and stating that the evidence presented by the petitioner that he requested help from the police who told him they were unable to help him compelled a finding that he had a well-founded fear of persecution). This Court did not require a heightened burden under a “condoned-or-complete-helplessness” standard. *Id.*

<sup>18</sup> See, e.g., *Poradisova v. Gonzales*, 420 F.3d 80, 81–82 (2d Cir. 2005) (finding that the petitioners met their burden of showing a “realistic chance” of establishing eligibility for asylum after the petitioners presented evidence of societal hostility toward Jews in Belarus and general lawlessness). This Court never mentioned a “condoned-or-complete-helplessness” standard. *Id.*

<sup>19</sup> See, e.g., *Abankwah v. INS*, 185 F.3d 18, 25–26 (2d Cir. 1999) (finding that the evidence presented by the petitioner, including the societal pervasiveness of female genital mutilation (FGM) by private actors in Ghana, her subjective fear of FGM, and the insignificant number of prosecutions by the Ghanaian government, was sufficient to meet the objective component of well-founded fear and remanded the case for further proceedings). The Court did not question whether the government “condoned” the harm or was “completely helpless” to protect against it. *Id.*

“completely helpless” to protect against the persecution. The outcomes of these decisions are now called into question under the newly articulated standard in *Scarlett*.<sup>20</sup>

Furthermore, this Court has never required evidence that the government “condones” the persecution. In *Pavlova v. I.N.S.*, this Court clearly stated, “we have never held that direct governmental action is required to make out a claim of persecution. On the contrary, ‘it is well established that private acts may be persecution if the government has proved unwilling to control such actions.’”<sup>21</sup> In the same vein, in *Pan v. Holder*, this Court held that the BIA improperly ignored “ample” evidence of the government’s unwillingness to help, including a country report and evidence regarding the police’s refusal to help a similarly situated refugee.<sup>22</sup> This Court has made clear that, far from needing to introduce direct evidence of the government’s “condoning” the persecution or its “complete helplessness” to stop the persecution, the applicant need only introduce

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<sup>20</sup> While the *Scarlett* Panel noted a “government that can offer its citizens only ineffective assistance is a government unable to protect them” would satisfy the “complete helplessness” standard, this standard is still an elevated version of government “unwillingness or inability” because it seemingly includes a government reporting requirement that does not exist in Second Circuit precedent. *Scarlett*, 957 F.3d at 334.

<sup>21</sup> *Pavlova v. I.N.S.*, 441 F.3d 82, 91 (2d Cir. 2006) (citing *Ivanishvili v. U.S. Dept. of Justice*, 433 F.3d 332, 342 (2d Cir. 2006)).

<sup>22</sup> *Pan v. Holder*, 777 F.3d 540, 544-45 (2d Cir. 2015).

circumstantial evidence indicating that the government is unlikely to have afforded protection had the applicant reported. As such, the Panel decision conflicts with this Court’s analysis of the state action requirement.

**II. THE THREE CIRCUIT COURT DECISIONS CITED BY THE PANEL DO NOT SUPPORT ITS CONCLUSION THAT A “CONDONED-OR-COMPLETE-HELPLESSNESS” STANDARD IS “WELL GROUNDED” IN CIRCUIT PRECEDENTS**

Contrary to the Panel’s pronouncement, the “condoned-or-complete-helplessness” standard is new to the agency, as the BIA had not used that language prior to *Matter of A-B-*. Moreover, the Panel erroneously relied on three decisions—the Eighth Circuit’s *Saldana v. Lynch*,<sup>23</sup> the Seventh Circuit’s *Galina v. INS*,<sup>24</sup> and the Fifth Circuit’s *Shehu v. Gonzales*<sup>25</sup>—in support of its conclusion that the “condoned-or-complete-helplessness” standard “is well grounded in circuit precedents.”<sup>26</sup>

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<sup>23</sup> 820 F.3d 970 (8th Cir. 2016).

<sup>24</sup> 213 F.3d 955 (7th Cir. 2000).

<sup>25</sup> 443 F.3d 435 (5th Cir. 2006).

<sup>26</sup> *Scarlett*, 957 F.3d at 333.

**A. The Panel Completely Overlooked the Eighth Circuit’s Recent Decision in *Galloso v. Barr*, Which Held that the “Unwilling-or-Unable” Standard Controls, and the Panel Improperly Relied on a Prior Decision, *Saldana v. Lynch***

The Panel incorrectly interpreted Eighth Circuit case law, citing to *Saldana v. Lynch*, 820 F.3d 970, 977 (8th Cir. 2016), for its conclusion that the “condoned-or-complete-helplessness” standard “is well grounded in circuit precedents.” To the contrary, the “unwilling-or-unable” standard has been the well-established standard in the Eighth Circuit going back to at least 1998.<sup>27</sup> Though the Eighth Circuit had a small line of cases that stated the “condoned-or-complete-helplessness” language, just weeks before the *Scarlett* decision was issued, the court issued *Galloso v. Barr*,<sup>28</sup> in which it explicitly clarified that the “unwilling-or-unable” standard controls. The court then applied *only* the “unwilling-or-unable” standard in analyzing the petitioner’s claim.<sup>29</sup> The *Scarlett* Panel overlooked the Eighth Circuit’s precedential decision in *Galloso* that interpreted its own case law regarding the appropriate standard, and as such, must correct its erroneous holding that Eighth Circuit law favors a “condoned-or-complete-

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<sup>27</sup> See e.g., *Miranda v. INS*, 139 F.3d 624, 627 (8th Cir. 1998); *Nabulwala v. Gonzalez*, 481 F.3d 1115, 1118 (8th Cir. 2007); *Gathungu v. Holder*, 725 F.3d 900, 906 (8th Cir. 2013).

<sup>28</sup> *Galloso v. Barr*, 954 F.3d 1189 (8th Cir. 2020), *as amended* (Apr. 15, 2020).

<sup>29</sup> *Id.* at 1192.

helplessness” standard. At minimum, the citation to *Saldana* should be removed from the Panel’s decision and consideration should be given to *Galloso*.

**B. This Court Should Not Rely on the Seventh Circuit’s *Galina v. INS* Decision Because that Court Actually Applied the “Unwilling-or-Unable” Standard, and the Court Thereafter Continued to Apply the “Unwilling-or-Unable” Standard**

The Panel misunderstood Seventh Circuit precedent in relying on *Galina v. INS*, 213 F.3d 955, 958 (7th Cir. 2000) to conclude that the “condoned-or-complete-helplessness” standard is “well grounded in circuit precedents.”<sup>30</sup> In *Galina*, the decision in which the court first introduced the “condoned-or-complete-helplessness” language (without explanation), the court held that the petitioners had met the state action requirement despite the fact that the police took some actions to protect them, albeit ineffectively.<sup>31</sup> The court’s decision and reasoning demonstrate that, despite the language it used to describe the standard, the court actually applied the familiar “unable or unwilling” standard.<sup>32</sup> A plain language understanding of “complete helplessness” would have precluded satisfying the state action requirement had any government assistance been given. Moreover, the vast majority of Seventh Circuit cases decided after *Galina*, such as

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<sup>30</sup> *Scarlett*, 957 F.3d at 333.

<sup>31</sup> *Galina*, 213 F.3d at 958.

<sup>32</sup> See also *Grace v. Whitaker*, 344 F. Supp. 3d 96, 129 (D.D.C. 2018).

*Sarhan v. Holder*, 658 F.3d 649, 659, 662 (7th Cir. 2011), set forth and apply only the “unwilling-or-unable” standard.

**C. This Court Should Not Rely on the Fifth Circuit’s *Shehu v. Gonzalez* Decision in Support of a “Condoned-or-Complete-Helplessness” Standard Because that Case Did Not Involve Persecution by a Private Actor**

Because the Panel improperly relied on the Seventh Circuit’s *Galina* decision, it cannot rely on the Fifth Circuit’s decision in *Shehu v. Gonzales*, 443 F.3d 435, 437 (5th Cir. 2006) as grounding for a “condoned-or-complete-helplessness” standard because the court in *Shehu* merely quoted, without explanation or analysis, the “condone-or-complete-helplessness” standard from the Seventh Circuit’s decision in *Galina*. However, the factual circumstances in *Shehu* did not involve persecution by a private actor, and as such, the state action requirement did not apply.<sup>33</sup> Furthermore, the Fifth Circuit has routinely applied the “unable or unwilling” standard without reference to the “condoned-or-complete-helplessness” language.<sup>34</sup>

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<sup>33</sup> *Shehu*, 443 F.3d at 437–38.

<sup>34</sup> See *Tesfamichael v. Gonzalez*, 469 F.3d 109, 113 (5th Cir. 2006); *Eduard v. Ashcroft*, 379 F.3d 182, 187 (5th Cir. 2004); *Adebisi v. INS*, 952 F.2d 910, 914 (5th Cir. 1992).

### **III. THIS COURT SHOULD BE PERSUADED BY THE SIXTH CIRCUIT’S RECENT DECISION, REJECTING THE “CONDONED-OR-COMPLETE-HELPLESSNESS” STANDARD**

Just weeks after the Panel’s decision, the Sixth Circuit rejected the “condoned-or-complete-helplessness” standard in *Juan Antonio v. Barr*, 959 F.3d 778 (6th Cir. 2020). The court approvingly cited the holding in *Grace v. Whitaker*,<sup>35</sup> that the “condoned-or-complete-helplessness” language is “arbitrary, capricious, contrary to law, and ‘not a permissible construction of the persecution requirement.’”<sup>36</sup> Indeed, the court, finding the reasoning in *Grace* to be “persuasive,” noted that *Matter of A-B-* “has been abrogated.”<sup>37</sup> The court’s decision is consistent with the Sixth Circuit’s prior application of the “unwilling or unable standard.”<sup>38</sup> Therefore, this Court should consider this persuasive authority and similarly reject a “condoned-or-complete-helplessness” standard, which does not comport with the long-standing precedent of this Court.

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<sup>35</sup> *Grace v. Whitaker*, 344 F. Supp. 3d 96 (D.D.C. 2018).

<sup>36</sup> *Juan Antonio*, 959 F.3d at 795.

<sup>37</sup> *Id.* at 790 n.3.

<sup>38</sup> *See, e.g., Kamar v. Sessions*, 875 F.3d 811, 818 (6th Cir. 2017); *Marouf v. Lynch*, 811 F.3d 174, 189 (6th Cir. 2016).

## CONCLUSION

The Court should grant Mr. Scarlett's petition for rehearing and rehearing en banc, given the decision's exceptional importance and its impact on an individual's ability to seek refuge from persecution.

Dated: June 24, 2020

Respectfully Submitted,

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## APPENDIX B: LIST OF CASES RECOGNIZING THE “UNWILLING OR UNABLE” STANDARD

The following is a non-exhaustive list of cases (published and unpublished) from each circuit that explicitly recognize the “unwilling or unable” standard for state action in asylum cases.

### First Circuit

#### **Published Cases**

*Ortiz-Araniba v. Keisler*, 505 F.3d 39 (1st Cir. 2001)  
*Menjivar v. Gonzales*, 416 F.3d 918 (1st Cir. 2005)  
*Silva v. Ashcroft*, 394 F.3d 1 (1st Cir. 2005)  
*Orelien v. Gonzales*, 467 F.3d 67 (1st Cir. 2006)  
*Butt v. Keisler*, 506 F.3d 86 (1st Cir. 2007)  
*Raza v. Gonzales*, 484 F.3d 125 (1st Cir. 2007)  
*Kho v. Keisler*, 505 F.3d 50 (1st Cir. 2007)  
*Ortiz-Araniba v. Keisler*, 505 F.3d 39 (1st Cir. 2007)  
*Jorgji v. Mukasey*, 514 F.3d 53 (1st Cir. 2008)  
*Budiono v. Mukasey*, 548 F. 3d 44 (1st Cir. 2008)  
*Kadri v. Mukasey*, 543 F.3d 16 (1st Cir. 2008)  
*Datau v. Mukasey*, 540 F.3d 37 (1st Cir. 2008)  
*Sok v. Mukasey*, 526 F.3d 48 (1st Cir. 2008)  
*Decky v. Holder*, 587 F.3d 104 (1st Cir. 2009)  
*Cendrawasih v. Holder*, 571 F.3d 128 (1st Cir. 2009)  
*Burbiene v. Holder*, 568 F.3d 251 (1st Cir. 2009)  
*Lopez Perez v. Holder*, 587 F.3d 456 (1st Cir. 2009)  
*Dias Gomes v. Holder*, 566 F.3d 232 (1st Cir. 2009)  
*Castillo-Diaz v. Holder*, 562 F.3d 23 (1st Cir. 2009)  
*Diaz-Garcia v. Holder*, 609 F.3d 21 (1st Cir. 2010)  
*Anacasmus v. Holder*, 602 F.3d 14 (1st Cir. 2010)  
*Barsoum v. Holder*, 617 F.3d 73 (1st Cir. 2010)  
*Morgan v. Holder*, 634 F.3d 53 (1st Cir. 2011)  
*Gilca v. Holder*, 680 F.3d 109 (1st Cir. 2012)  
*Rebenko v. Holder*, 693 F.3d 87 (1st Cir. 2012)  
*Khattak v. Holder*, 704 F.3d 197 (1st Cir. 2013)  
*Guaman-Loja v. Holder*, 707 F.3d 119 (1st Cir. 2013)  
*Vasili v. Holder*, 732 F.3d 83 (1st Cir. 2013)  
*Khan v. Holder*, 727 F.3d 1 (1st Cir. 2013)  
*Sunarto Ang. v. Holder*, 723 F.3d 6 (1st Cir. 2013)  
*Muyubisnay-Cungachi v. Holder*, 734 F.3d 66 (1st Cir. 2013)

*Ivanov v. Holder*, 736 F.3d 5 (1st Cir. 2013)  
*Aldana-Ramos v. Holder*, 757 F.3d 9 (1st Cir. 2014)  
*Morales-Morales v. Sessions*, 857 F.3d 130 (1st Cir. 2017)  
*Rosales Justo v. Sessions*, 895 F.3d 154, 157 (1st Cir. 2018)

### **Unpublished Cases**

*Kamuh v. Mukasey*, 280 Fed. Appx. 7 (1st Cir. 2008)  
*Barzoia Becerra v. Holder*, 323 Fed. Appx. 1 (1st Cir. 2009)  
*Mawa v. Holder*, 569 Fed. Appx. 2 (1st Cir. 2014)  
*Rodriguez v. Lynch*, 654 Fed. Appx. 498 (1st Cir. 2016)

## **Second Circuit**

### **Published Cases**

*Sotelo-Aquije v. Slattery*, 17 F.3d 33 (2d Cir. 1994)  
*Ivanishvili v. U.S. Dep't of Justice*, 433 F.3d 332 (2d Cir. 2006)  
*Pavlova v. INS*, 441 F.3d 82 (2d Cir. 2006)  
*Rizal v. Gonzales*, 442 F. 3d 84 (2d Cir. 2006)  
*Joaquin-Porras v. Gonzales*, 435 F.3d 172 (2d Cir. 2006)  
*Zheng v. Mukasey*, 552 F.3d 277 (2d Cir. 2009)  
*Paloka v. Holder*, 762 F.3d 191 (2d Cir. 2014)  
*Pan v. Holder*, 777 F.3d 540 (2d Cir. 2014)

### **Unpublished Cases**

*Jasaraj-Hot v. Gonzales*, 217 Fed. Appx. 33 (2d Cir. 2007)  
*Camara v. Dept. of Homeland Sec.*, 218 Fed. Appx. 61 (2d Cir. 2007)  
*Hussain v. Gonzales*, 228 Fed. Appx. 101 (2d Cir. 2007)  
*Mikhailenko v. U.S. Citizenship and Immigration Services*, 228 Fed. Appx. 41 (2d Cir. 2007)  
*Gjicali v. Mukasey*, 260 Fed. Appx. 360 (2d Cir. 2008)  
*Ketaren v. Mukasey*, 269 Fed. Appx. 90 (2d Cir. 2008)  
*Cortez v. Holder*, 363 Fed. Appx. 829 (2d Cir. 2010)  
*Farook v. Holder*, 407 Fed. Appx. 545 (2d Cir. 2011)  
*Sutiono v. Lynch*, 611 Fed. Appx. 738 (2d Cir. 2015)  
*Martinez-Segova v. Sessions*, 696 Fed. Appx. 12 (2d Cir. 2017)

## **Third Circuit**

### **Published Cases**

*Abdille v. Ashcroft*, 242 F.3d 477 (3d Cir. 2001)  
*Fiadjoe v. Att'y Gen.*, 411 F.3d 135 (3d Cir. 2005)  
*Fiadjoe v. Att'y Gen.*, 411 F.3d 135 (3d Cir. 2005)

*Vente v. Gonzales*, 415 F.3d 296 (3d Cir. 2005)  
*Sukwanputra v. Gonzales*, 434 F.3d 627 (3d Cir. 2006)  
*Espinosa-Cortez v. Att’y Gen.*, 607 F.3d 101 (3d Cir. 2010)  
*Garcia v. Att’y Gen.*, 665 F.3d 496 (3d Cir. 2011)  
*Doe v. Att’y Gen.*, 956 F.3d 135 (3d Cir. 2020)

### **Unpublished Cases**

*Rehman v. Att’y Gen.*, 178 Fed. Appx. 126 (3d Cir. 2006)  
*Lie v. Secretary of Dept. of Homeland Sec.*, 121 Fed. Appx. 453 (3d Cir. 2005)  
*Lin v. Att’y Gen.*, 151 Fed. Appx. 113 (3d Cir. 2005)  
*Wijaya v. Att’y Gen.*, 172 Fed. Appx. 411 (3d Cir. 2006)  
*Soesilo v. Att’y Gen.*, 239 Fed. Appx. 703 (3d Cir. 2007)  
*Suherwanto v. Att’y Gen.*, 230 Fed. Appx. 211 (3d Cir. 2007)  
*Setiawan v. Att’y Gen.*, 237 Fed. Appx. 728 (3d Cir. 2007)  
*Susanto v. Att’y Gen.*, 244 Fed. Appx. 492 (3d Cir. 2007)  
*Massaquoi v. Att’y Gen.*, 313 Fed. Appx. 483 (3d Cir. 2008)  
*Sze Fung Cheng v. Att’y Gen.*, 312 Fed. Appx. 460 (3d Cir. 2008)  
*Ngo v. Att’y Gen.*, 350 Fed. Appx. 714 (3d Cir. 2009)  
*Paprskarz v. Att’y Gen.*, 360 Fed. Appx. 283 (3d Cir. 2010)  
*Dolley v. Att’y Gen.*, 440 Fed. Appx. 121 (3d Cir. 2011)  
*Mahadeo v. Att’y Gen.*, 455 Fed. Appx. 274 (3d Cir. 2011)  
*Lopez-Perez v. Att’y Gen.*, 447 Fed. Appx. 370 (3d Cir. 2011)  
*Abazaj v. Att’y Gen.*, 443 Fed. Appx. 725 (3d Cir. 2011)  
*Ball v. Att’y Gen.*, 479 Fed. Appx. 443 (3d Cir. 2012)  
*Haxhari v. Att’y Gen.*, 459 Fed. Appx. 140 (3d Cir. 2012)  
*Cardoza v. Att’y Gen.*, 505 Fed. Appx. 135 (3d Cir. 2012)  
*Xing Qiang Zhuo v. Att’y Gen.*, 502 Fed. Appx. 176 (3d Cir. 2012)  
*Pitel v. Att’y Gen.*, 528 Fed. Appx. 172 (3d Cir. 2013)  
*Kuruca v. Att’y Gen.*, 547 Fed. Appx. 126 (3d Cir. 2013)  
*Ferreira v. Att’y Gen.*, 513 Fed. Appx. 184 (3d Cir. 2013)  
*Bera v. Att’y Gen.*, 555 Fed. Appx. 129, 132 (3d Cir. 2014)  
*Kesuma v. Att’y Gen.*, 555 Fed. Appx. 123 (3d Cir. 2014)  
*Emran v. Att’y Gen.*, 801 Fed. Appx. 841 (3d Cir. 2020)

### **Fourth Circuit**

#### **Published Cases**

*M.A. A26851062 v. U.S. I.N.S.*, 858 F.2d 210 (4th Cir. 1988)  
*Crespin-Valladares v. Holder*, 632 F.3d 117 (4th Cir. 2011)  
*Mulyani v. Holder*, 771 F.3d 190 (4th Cir. 2014)  
*Martinez v. Holder*, 740 F.3d 902 (4th Cir. 2014)

*Cordova v. Holder*, 759 F.3d 332 (4th Cir. 2014)  
*Hernandez-Avalos v. Lynch*, 784 F.3d 944 (4th Cir. 2015)  
*Cruz v. Sessions*, 853 F.3d 122 (4th Cir. 2017)  
*Zavaleta-Policiano v. Sessions*, 873 F.3d 241 (4th Cir. 2017)  
*Velasquez v. Sessions*, 866 F.3d 188 (4th Cir. 2017)  
*Salgado-Sosa v. Sessions*, 882 F.3d 451 (4th Cir. 2018)

### **Unpublished Cases**

*Banegas-Rivera v. Lynch*, 664 Fed.Appx. 296 (4th Cir. 2016)

## **Fifth Circuit**

### **Published Cases**

*Adebisi v. INS*, 952 F.3d 910 (5th Cir. 1992)  
*Rivas-Martinez v. INS*, 997 F.2d 1143 (5th Cir. 1993)  
*Eduard v. Ashcroft*, 379 F.3d 182 (5th Cir. 2004)  
*Tesfamichael v. Gonzalez*, 469 F.3d 109 (5th Cir. 2006)  
*Tamara-Gomez v. Gonzales*, 447 F.3d 343, 347 (5th Cir. 2006)  
*Orellana-Monson v. Holder*, 685 F.3d 511, 518 (5th Cir. 2012)  
*Hernandez-De La Cruz v. Lynch*, 819 F.3d 784 (5th Cir. 2016)  
*Ramirez-Mejia v. Lynch*, 794 F.3d 485, 488 (5th Cir. 2015)

### **Unpublished Cases**

*Gomez v. Gonzales*, 163 Fed. Appx. 268 (5th Cir. 2006)  
*Manjee v. Holder*, 544 Fed. Appx. 571 (5th Cir. 2006)  
*Venturini v. Mukasey*, 272 Fed. Appx. 397 (5th Cir. 2008)

## **Sixth Circuit**

### **Published Cases**

*Khalili v. Holder*, 557 F.3d 429 (6th Cir. 2009)  
*Al-Ghorbani v. Holder*, 585 F.3d 980 (6th Cir. 2009)  
*Bonilla-Morales v. Holder*, 607 F.3d 1132 (6th Cir. 2010)  
*Bi Xia Qu v. Holder*, 618 F.3d 602 (6th Cir. 2010)  
*Kante v. Holder*, 634 F.3d 321 (6th Cir. 2011)  
*Marouf v. Lynch*, 811 F.3d 174 (6th Cir. 2016)  
*Marikasi v. Lynch*, 840 F.3d 281 (6th Cir. 2016)  
*Kamar v. Sessions*, 875 F.3d 811 (6th Cir. 2017)  
*Diaz v. Sessions*, 880 F.3d 244 (6th Cir. 2018)

### **Unpublished Cases**

*Keita v. Gonzales*, 175 Fed.Appx. 711 (6th Cir. 2006)  
*Berishaj v. Gonzales*, 238 Fed.Appx. 57 (6th Cir. 2007)  
*El Ghorbi v. Mukasey*, 281 Fed.Appx. 514 (6th Cir. 2008)  
*Anyakudo v. Holder*, 375 Fed.Appx. 559 (6th Cir. 2010)  
*Abdramane v. Holder*, 569 Fed.Appx. 430 (6th Cir. 2014)  
*Juan Antonio v. Barr*, 959 F.3d 778 (6th Cir. 2020)

### **Seventh Circuit**

#### **Published Cases**

*Hengan v. INS*, 79 F.3d 60 (7th Cir. 1996)  
*Chitay-Pirir v. INS*, 169 F.3d 1079 (7th Cir. 1999)  
*Galina v. I.N.S.*, 213 F.3d 955 (7th Cir. 2000)  
*Bace v. Ashcroft*, 352 F.3d 1133 (7th Cir. 2003)  
*Guchshenkov v. Ashcroft*, 366 F.3d 554 (7th Cir. 2004)  
*Mitreva v. Gonzalez*, 417 F.3d 761 (7th Cir. 2005)  
*Hor v. Gonzalez*, 421 F.3d 497 (7th Cir. 2005)  
*Hernandez v. Baena v. Gonzalez*, 417 F.3d 720 (7th Cir. 2005)  
*Orejuela v. Gonzalez*, 423 F.3d 666 (7th Cir. 2005)  
*Margos v. Gonzalez*, 443 F.3d 593 (7th Cir. 2006)  
*Chakir v. Gonzalez*, 466 F.3d 563 (7th Cir. 2006)  
*Kaharudin v. Gonzalez*, 500 F. 3d 619 (7th Cir. 2007)  
*Tariq v. Keisler*, 505 F.3d 650 (7th Cir. 2007)  
*Garcia v. Gonzalez*, 500 F.3d 615 (7th Cir. 2007)  
*Jiang v. Gonzalez*, 485 F.3d 992 (7th Cir. 2007)  
*Tariq v. Keisler*, 505 F.3d 650 (7th Cir. 2007)  
*Kholyavskiy v. Mukasey*, 540 F.3d 555 (7th Cir. 2008)  
*Ingmantoro v. Mukasey*, 550 F. 3d 646 (7th Cir. 2008)  
*Ramos v. Holder*, 589 F.3d 426 (7th Cir. 2009)  
*Gatimi v. Holder*, 578 F.3d 611 (7th Cir. 2009)  
*Sarhan v. Holder*, 658 F.3d 649 (7th Cir. 2011)  
*Salim v. Holder*, 728 F.3d 718 (7th Cir. 2013)  
*Bitsin v. Holder*, 719 F.3d 619 (7th Cir. 2013)  
*Cece v. Holder*, 733 F.3d 662 (7th Cir. 2013)  
*Vahora v. Holder*, 707 F.3d 904 (7th Cir. 2013)  
*R.R.D. v. Holder*, 746 F.3d 807 (7th Cir. 2014)  
*N.L.A. v. Holder*, 744 F.3d 425 (7th Cir. 2014)

#### **Unpublished Cases**

*Llieshanaku v. Ashcroft*, 100 Fed. Appx. 546 (7th Cir. 2004)

*Esquivel v. Ashcroft*, 105 Fed. Appx. 99 (7th Cir. 2004)  
*Yaylacicegi v. Gonzalez*, 175 Fed. Appx. 33 (7th Cir. 2006)  
*Rupey v. Mukasey*, 304 Fed. Appx. 453 (7th Cir. 2008)  
*Abdelghani v. Holder*, 309 Fed. Appx. 19 (7th Cir. 2009)

### **Eighth Circuit**

#### **Published Cases**

*Yacoub v. INS*, 999 F.2d 1296 (8th Cir. 1993)  
*Valioukevitch v. INS*, 251 F.3d 747 (8th Cir. 2001)  
*Francois v. INS*, 283 F.3d 926 (8th Cir. 2002)  
*Kimumwe v. Gonzales*, 431 F.3d 319 (8th Cir. 2005)  
*Suprun v. Gozales*, 442 F.3d 1078 (8th Cir. 2006)  
*Flores-Calderon v. Gonzales*, 472 F.3d 1040 (8th Cir. 2007)  
*Makatengkeng v. Gonzales*, 495 F.3d 876 (8th Cir. 2007)  
*Nabulwala v. Gonzalez*, 481 F.3d 1115 (8th Cir. 2007)  
*Beck v. Mukasey*, 527 F.3d 737 (8th Cir. 2008)  
*Yatim v. Mukasey*, 531 F.3d 584 (8th Cir. 2008)  
*Cubillos v. Holder*, 565 F.3d 1054 (8th Cir. 2009)  
*Manani v. Filip*, 552 F.3d 894 (8th Cir. 2009)  
*Khilan v. Holder*, 557 F.3d 583 (8th Cir. 2009)  
*Guillen-Hernandez v. Holder*, 592 F.3d 883 (8th Cir. 2010)  
*Osuji v. Holder*, 657 F.3d 719 (8th Cir. 2011)  
*Matul-Hernandez v. Holder*, 685 F.3d 707 (8th Cir. 2012)  
*La v. Holder*, 701 F.3d 566 (8th Cir. 2012)  
*Salman v. Holder*, 687 F.3d 991 (8th Cir. 2012)  
*Edionseri v. Sessions*, 860 F.3d 1101 (8th Cir. 2012)  
*De Castro-Gutierrez v. Holder*, 713 F.3d 375 (8th Cir. 2013)  
*Gutierrez-Vidal v. Holder*, 709 F.3d 728 (8th Cir. 2013)  
*Gathungu v. Holder*, 725 F.3d 900 (8th Cir. 2013)  
*Barillas-Mendez v. Lynch*, 790 F.3d 787 (8th Cir. 2015)  
*Rodriguez-Mercado v. Lynch*, 809 F.3d 415 (8th Cir. 2015)  
*Saldana v. Lynch*, 820 F.3d 970 (8th Cir. 2016)  
*Cinto-Velasquez v. Lynch*, 817 F.3d 602 (8th Cir. 2016)  
*Fuentes-Erazo v. Session*, 848 F.3d 847 (8th Cir. 2017)  
*Lemus-Arita v. Sessions*, 854 F.3d 476 (8th Cir. 2017)  
*Galoso v. Barr*, 954 F.3d 1189 (8th Cir. 2020), *as amended* (Apr. 15, 2020)

*Cano v. Barr*, 956 F.3d 1034 (8th Cir. 2020)

### **Unpublished Cases**

*Santacruz v. Lynch*, 666 Fed. Appx. 576 (8th Cir. 2016)

*De La Cruz v. Sessions*, 697 Fed. Appx. 887 (8th Cir. 2017)

## **Ninth Circuit**

### **Published Cases**

*McMullen v. INS*, 658 F.2d 1312 (9th Cir. 1981)

*Bolanos-Hernandez v. INS*, 767 F.2d 1277 (9th Cir. 1984)

*Del Valle v. INS*, 776 F.2d 1407 (9th Cir. 1985)

*Arteaga v. INS*, 836 F.2d 1227 (9th Cir. 1988)

*Elnager v. U.S. INS*, 930 F.2d 784 (9th Cir. 1991)

*Singh v. INS*, 94 F.3d 1353 (9th Cir. 1996)

*Surita v. INS*, 95 F.3d 814 (9th Cir. 1996)

*Gomez-Saballos v. INS*, 79 F.3d 912 (9th Cir. 1996)

*Sangha v. INS*, 103 F.3d 1482 (9th Cir. 1997)

*Korablina v. INS*, 158 F.3d 1038 (9th Cir. 1998)

*Mgoian v. INS*, 184 F.3d 1029 (9th Cir. 1999)

*Chouchkov v. INS*, 220 F.3d 1077 (9th Cir. 2000)

*Avetova-Elisseva v. INS*, 213 F.3d 1192 (9th Cir. 2000)

*Quirino Canedo Ochave v. INS*, 254 F.3d 859 (9th Cir. 2001)

*Melkonian v. Ashcroft*, 320 F.3d 1061 (9th Cir. 2003)

*Malty v. Ashcroft*, 381 F.3d 942 (9th Cir. 2004)

*Hoque v. Ashcroft*, 367 F.3d 1190 (9th Cir. 2004)

*Mansour v. Ashcroft*, 390 F.3d 667 (9th Cir. 2004)

*Mashiri v. Ashcroft*, 383 F.3d 1112 (9th Cir. 2004)

*Baballah v. Ashcroft*, 367 F.3d 1067 (9th Cir. 2004)

*Faruk v. Ashcroft*, 378 F.3d 940 (9th Cir. 2004)

*Castro-Perez v. Gonzales*, 409 F.3d 1069 (9th Cir. 2005)

*Krotova v. Gonzales*, 416 F.3d 1080 (9th Cir. 2005)

*Nahrvani v. Gonzales*, 399 F.3d 1148 (9th Cir. 2005)

*Mohammed v. Gonzales*, 400 F.3d 785 (9th Cir. 2005)

*Smolniakova v. Gonzales*, 422 F.3d 1037 (9th Cir. 2005)

*Ornelas-Chavez v. Gonzales*, 458 F.3d 1052 (9th Cir. 2006)

*Ahmed v. Keisler*, 504 F.3d 1183 (9th Cir. 2007)  
*Lolong v. Gonzales*, 484 F.3d 1173 (9th Cir. 2007)  
*Nehad v. Mukasey*, 535 F.3d 962 (9th Cir. 2008)  
*Karapetyan v. Mukasey*, 543 F.3d 1118 (9th Cir. 2008)  
*Xun Li v. Holder*, 559 F.3d 1096 (9th Cir. 2009)  
*Wakkary v. Holder*, 558 F.3d 1049 (9th Cir. 2009)  
*Donchev v. Mukasey*, 553 F.3d 1206 (9th Cir. 2009)  
*Rahimzadeh v. Holder*, 613 F.3d 916 (9th Cir. 2010)  
*Afriyie v. Holder*, 613 F.3d 924 (9th Cir. 2010)  
*Trung Van Truong v. Holder*, 613 F.3d 938 (9th Cir. 2010)  
*Madrigal v. Holder*, 716 F.3d 499 (9th Cir. 2012)  
*Quiambao Vitug v. Holder*, 723 F.3d 1056 (9th Cir. 2013)  
*Doe v. Holder*, 736 F.3d 871 (9th Cir. 2013)  
*Henriquez-Rivas v. Holder*, 707 F.3d 1081 (9th Cir. 2013)  
*Bringas-Rodrigues v. Sessions*, 850 F.3d 1051 (9th Cir. 2017)  
*C.J.L.G v. Sessions*, 880 F.3d 1122 (9th Cir. 2017)  
*Guo v. Sessions*, 897 F.3d 1208 (9th Cir. 2018)

### **Unpublished Cases**

*Ganut v. Ashcroft*, 85 Fed. Appx. 38 (9th Cir. 2003)  
*Velasquez v. Ashcroft*, 81 Fed. Appx. 673 (9th Cir. 2003)  
*Mashiri v. Ashcroft*, 2004 U.S. App. LEXIS 22714 (9th Cir. 2004)  
*Papazyan v. Gonzales*, 179 Fed. Appx. 428 (9th Cir. 2006)  
*Sablina v. Gonzales*, 217 Fed. Appx. 671 (9th Cir. 2007)  
*Ebeid v. Mukasey*, 274 Fed. Appx. 508 (9th Cir. 2008)  
*Garces v. Mukasey*, 312 Fed. Appx. 12 (9th Cir. 2009)  
*Alfaro v. Barr*, 790 Fed. Appx. 91 (9th Cir. 2020)  
*Cervantes v. Barr*, 795 Fed. Appx. 995 (9th Cir. 2020)  
*Loya v. Barr*, 800 Fed. Appx. 516 (9th Cir. 2020)

### **Tenth Circuit**

#### **Published Cases**

*Bartesghi-Lay v. INS*, 9 F.3d 819 (10th Cir. 1993)  
*de la Llana-Castellon v. INS*, 16 F.3d 1093 (10th Cir. 1994)  
*Krastev v. INS*, 292 F.3d 1268 (10th Cir. 2002)  
*Batalova v. Ashcroft*, 355 F.3d 1246 (10th Cir. 2004)  
*Niang v. Gonzales*, 422 F.3d 1187 (10th Cir. 2005)

*Hayrapetyan v. Mukasey*, 534 F.3d 1330 (10th Cir. 2008)  
*Sidabutar v. Gonzales*, 503 F.3d 1116 (10th Cir. 2010)  
*Ritonga v. Holder*, 633 F.3d 971 (10th Cir. 2011)

### **Unpublished Cases**

*Nasir v. INS*, 30 Fed. Appx. 812 (10th Cir. 2002)  
*Sauveur v. Ashcroft*, 108 Fed. Appx. 557 (10th Cir. 2004)  
*Gichema v. Gonzales*, 139 Fed. Appx. 90 (10th Cir. 2005)  
*Sagala v. Mukasey*, 295 Fed. Appx. 932 (10th Cir. 2008)

## **Eleventh Circuit**

### **Published Cases**

*Mazariegos v. U.S. Att’y Gen.*, 241 F.3d 1320 (11th Cir. 2001)  
*Sanchez v. U.S. Att’y Gen.*, 392 F.3d 434 (11th Cir. 2004)  
*Ruiz v. U.S. Att’y Gen.*, 440 F.3d 1247 (11th Cir. 2006)  
*Zheng v. U.S. Att’y Gen.*, 451 F.3d 1287 (11th Cir. 2006)  
*Lopez v. U.S. Att’y Gen.*, 504 F.3d 1341 (11th Cir. 2007)  
*Sanchez Jimenez v. U.S. Att’y Gen.*, 492 F.3d 1223 (11th Cir. 2007)  
*Ayala v. U.S. Att’y Gen.*, 605 F.3d 941 (11th Cir. 2010)  
*Malu v. U.S. Att’y Gen.*, 764 F.3d 1282 (11th Cir. 2014)  
*Sama v. U.S. Att’y Gen.*, 887 F.3d 1225 (11th Cir. 2018)

### **Unpublished Cases**

*Calderon Salinas v. Att’y Gen.*, 140 Fed. Appx. 868 (11th Cir. 2005)  
*Sulaman v. U.S. Att’y Gen.*, 147 Fed. Appx. 872 (11th Cir. 2005)  
*Rios-Cano v. U.S. Att’y Gen.*, 151 Fed. Appx. 916 (11th Cir. 2005)  
*Popov v. U.S. Att’y Gen.*, 199 Fed. Appx. 900 (11th Cir. 2006)  
*Restrepo v. U.S. Att’y Gen.*, 176 Fed. Appx. 17 (11th Cir. 2006)  
*Longchar v. U.S. Att’y Gen.*, 179 Fed. Appx. 665 (11th Cir. 2006)  
*Barrios v. U.S. Att’y Gen.*, 196 Fed. Appx. 865 (11th Cir. 2006)  
*Kurt v. U.S. Att’y Gen.*, 252 Fed. Appx. 295 (11th Cir. 2007)  
*Barrera Castrillon v. U.S. Att’y Gen.*, 221 Fed. Appx. 863 (11th Cir. 2007)  
*Soler v. U.S. Att’y Gen.*, 258 Fed. Appx. 295 (11th Cir. 2007)  
*Njenga v. U.S. Att’y Gen.*, 216 Fed. Appx. 963 (11th Cir. 2007)  
*Paredes v. U.S. Att’y Gen.*, 219 Fed. Appx. 879 (11th Cir. 2007)  
*Morehodov v. U.S. Att’y Gen.*, 270 Fed. Appx. 775 (11th Cir. 2008)  
*Cantave v. U.S. Att’y Gen.*, 295 Fed. Appx. 327 (11th Cir. 2008)  
*Gomez v. U.S. Att’y Gen.*, 321 Fed. Appx. 834 (11th Cir. 2009)  
*Zambrano v. U.S. Att’y Gen.*, 329 Fed. Appx. 235 (11th Cir. 2009)

*Solaque-Prieto v. U.S. Att’y Gen.*, 310 Fed. Appx. 325 (11th Cir. 2009)  
*Fernandes de Paula v. U.S. Att’y Gen.*, 380 Fed. Appx. 946 (11th Cir. 2010)  
*Darmawan v. U.S. Att’y Gen.*, 362 Fed. Appx. 44 (11th Cir. 2010)  
*Ladnov v. U.S. Att’y Gen.*, 384 Fed. Appx. 867 (11th Cir. 2010)  
*Wangboje v. U.S. Att’y Gen.*, 438 Fed. Appx. 813 (11th Cir. 2011)  
*Juan-Esteban v. U.S. Att’y Gen.*, 407 Fed. Appx. 413 (11th Cir. 2011)  
*Minaylova v. U.S. Att’y Gen.*, 423 Fed. Appx. 855 (11th Cir. 2011)  
*Euceda v. U.S. Att’y Gen.*, 491 Fed. Appx. 163 (11th Cir. 2012)  
*Valbuena v. U.S. Att’y Gen.*, 460 Fed. Appx. 906 (11th Cir. 2012)  
*Lewis v. U.S. Att’y Gen.*, 512 Fed. Appx. 963 (11th Cir. 2013)  
*Zampaligidi-Jebreel v. U.S. Att’y Gen.*, 539 Fed. Appx. 969 (11th Cir. 2013)  
*Bhai v. U.S. Att’y Gen.*, 555 Fed. Appx. 854 (11th Cir. 2014)  
*Hossain v. U.S. Att’y Gen.*, 630 Fed. Appx. 914 (11th Cir. 2015)  
*Alonzo-Rivera v. U.S. Att’y Gen.*, 649 Fed. Appx. 983 (11th Cir. 2016)  
*Ossa v. U.S. Att’y Gen.*, 656 Fed. Appx. 455 (11th Cir. 2016)  
*Jeronimo v. U.S. Att’y Gen.*, 678 Fed. Appx. 796 (11th Cir. 2017)  
*Kapa v. U.S. Att’y Gen.*, 675 Fed. Appx. 903 (11th Cir. 2017)  
*Leka v. U.S. Att’y Gen.*, 704 Fed. Appx. 878 (11th Cir. 2017)  
*Rotaru v. U.S. Att’y Gen.*, 704 Fed. Appx. 875 (11th Cir. 2017)  
*Acosta v. U.S. Att’y Gen.*, 704 Fed. Appx. 869 (11th Cir. 2017)  
*Luchina v. U.S. Att’y Gen.*, 687 Fed. Appx. 907 (11th Cir. 2017)  
*Sumschi v. U.S. Att’y Gen.*, 677 Fed. Appx. 579 (11th Cir. 2017)  
*Acosta v. U.S. Att’y Gen.*, 727 Fed. Appx. 595 (11th Cir. 2018)  
*Sontay v. U.S. Att’y Gen.*, 723 Fed. Appx. 707 (11th Cir. 2018)  
*Lama v. U.S. Att’y Gen.*, 745 Fed. Appx. 330 (11th Cir. 2018)  
*Cruz v. U.S. Att’y Gen.*, 746 Fed. Appx. 869 (11th Cir. 2018)  
*Briones v. U.S. Att’y Gen.*, 752 Fed. Appx. 898 (11th Cir. 2018)  
*Munguia-Mejia v. U.S. Att’y Gen.*, 781 Fed. Appx. 857 (11th Cir. 2019)  
*Reule v. U.S. Att’y Gen.*, --- Fed. Appx. ---, 2020 U.S. App. LEXIS 13539 (11th Cir. 2020)  
*Bautista-Lopez v. U.S. Att’y Gen.*, --- Fed. Appx. ---, 2020 U.S. App. LEXIS 14862 (11th Cir. 2020)

## CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 29(b)(4) and Fed. R. App. P. 32(a)(7)(B)(iii). Exclusive of the exempted portions of the brief, as provided in Fed. R. App. P. 32(f), the brief contains 2,501 words.

I further certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman 14-point typeface.

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## CERTIFICATE OF SERVICE

I hereby certify that on June 24, 2020, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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