No. 16-940

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

LESTON AUGUSTUS SCARLETT,
Petitioner,

v.

Attorney General William BARR,
Respondent.

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

BRIEF OF AMICI CURIAE IMMIGRATION LAW PROFESSORS IN SUPPORT OF PETITIONER

Anjum Gupta
Immigrant Rights Clinic
Rutgers Law School
123 Washington Street
Newark, NJ 07102
Tel. (973) 353-2518
Email: anjum.gupta@rutgers.edu

Janet E. Sabel, Attorney-in-Chief
Adriene Holder, Attorney-in-Charge, Civil Practice
Hasan Shafiqullah, Attorney-in-Charge, Imm. Law Unit
Julie Dona, Of Counsel
Amy Pont, Of Counsel
Natalie Maust, Of Counsel (admission pending)
THE LEGAL AID SOCIETY
199 Water Street
New York, New York 10038
Tel. (212) 577-3538
Email: APont@legal-aid.org

Counsel for Amici Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii
INTEREST OF AMICI CURIAE 1
ARGUMENT 1

I. THE "CONDONED" OR "COMPLETE HELPLESSNESS" STANDARD IS INCONSISTENT WITH WELL-SETTLED CASE LAW 2

II. THE "UNWILLING OR UNABLE" STANDARD IS WELL SETTLED IN THE BOARD OF IMMIGRATION APPEALS, EVERY FEDERAL COURT OF APPEALS, AND THE UNITED STATES SUPREME COURT 4

A. Board of Immigration Appeals 4
B. Federal Courts of Appeals 7
i. First Circuit 8
ii. Second Circuit 10
iii. Third Circuit 13
iv. Fourth Circuit 14
v. Fifth Circuit 16
vi. Sixth Circuit 17
vii. Seventh Circuit 18
viii. Eighth Circuit 21
ix. Ninth Circuit 23
x. Tenth Circuit 25
xi. Eleventh Circuit 26
C. Supreme Court of the United States 27

CONCLUSION 28
APPENDIX A: LIST OF SIGNATORIES 30
APPENDIX B: LIST OF CASES RECOGNIZING THE "UNWILLING OR UNABLE" STANDARD 41
CERTIFICATE OF COMPLIANCE 51
CERTIFICATE OF SERVICE 52

TABLE OF AUTHORITIES

Cases **Page(s)**

Abankwah v. INS,
185 F.3d 18 (2d Cir. 1999) 10, 11
Adebisi v. INS,
952 F.2d 910 (5th Cir. 1992) 16, 17
Aldana-Ramos v. Holder,
757 F.3d 9 (1st Cir. 2014) 8
Aliyev v. Mukasey,
549 F.3d 111 (2d Cir. 2008) 10, 11, 12
Avetova-Elisseva v. INS,
213 F.3d 1192 (9th Cir. 2000) 24, 25
Bartesaghi-Lay v. INS,
9 F.3d 819 (10th Cir. 1993) 25
Bori v. INS,
190 F. App'x 17 (2d Cir. 2006) 10, 12
Cece v. Holder,
733 F.3d 662 (7th Cir. 2013) 18
Chakir v. Gonzalez,
466 F.3d 563 (7th Cir. 2006) 18
Crespin-Valladares v. Holder,
632 F.3d 117 (4th Cir. 2011) 14, 15
de la Llana-Castellon v. INS,
16 F.3d 1093 (10th Cir. 1994) 25, 26
Del Pilar Delgado v. Mukasey,
508 F.3d 702 (2d Cir. 2007) 10
Doe v. Holder,
736 F.3d 871 (9th Cir. 2013) 23
Eduard v. Ashcroft,
379 F.3d 182 (5th Cir. 2004) 16
Espinosa-Cortez v. Att'y Gen. of the U.S.,
607 F.3d 101 (3d Cir. 2010) 13
Fiadjoe v. Att'y Gen.,
411 F.3d 135 (3d Cir. 2005) 13, 14
Galina v. I.N.S.,
213 F.3d 955 (7th Cir. 2000) 19, 20
Garcia v. Att'y Gen. of the U.S.,
665 F.3d 496 (3d Cir. 2011) 13

Gathungu v. Holder,
725 F.3d 900 (8th Cir. 2013) 20, 21
Grace v. Whitaker,
344 F. Supp. 3d 96 (D.D.C. 2018) 4, 20
Hayrapetyan v. Mukasey,
534 F.3d 1330 (10th Cir. 2008) 25
Hernandez-Avalos v. Lynch,
784 F.3d 944 (4th Cir. 2015) 15, 16
Hor v. Gonzalez,
421 F.3d 497 (7th Cir. 2005) 20
INS v. Cardoza-Fonseca,
480 U.S. 421 (1987) 4, 28
INS v. Elias-Zacarias,
502 U.S. 478 (1992) 27
Ivanishvili v. U.S. Dep't. of Just.,
433 F.3d 332 (2d Cir. 2006) 11
Ivanov v. Holder,
736 F.3d 5 (1st Cir. 2013) 8
Kamar v. Sessions,
875 F.3d 811 (6th Cir. 2017) 17, 18
Khattak v. Holder,
704 F.3d 197 (1st Cir. 2013) 8
Krastev v. INS,
292 F.3d 1268 (10th Cir. 2002) 25
Lopez v. U.S. Att'y Gen.,
504 F.3d 1341 (11th Cir. 2007) 26
Madrigal v. Holder,
716 F.3d 499 (9th Cir. 2013) 23
Malu v. United States AG,
764 F.3d 1282, 1291 (11th Cir. 2014) 26
Marouf v. Lynch,
811 F.3d 174 (6th Cir. 2016) 17
Menjivar v. Gonzales,
416 F.3d 918 (8th Cir. 2005) 22
Mulyani v. Holder,
771 F.3d 190 (4th Cir. 2014) 14
Nabulwala v. Gonzalez,
481 F.3d 1115 (8th Cir. 2007) 20
Negusie v. Holder,
555 U.S. 511 (2009) 27

Paloka v. Holder,
762 F.3d 191 (2d Cir. 2014) 10
Pan v. Holder,
777 F.3d 540 (2d Cir. 2015) 10, 12
Pavlova v. INS,
441 F.3d 82 (2d Cir. 2006) 11
Poradisova v. Gonzales,
420 F.3d 70 (2d Cir. 2005) 10, 11
R.R.D. v. Holder,
746 F.3d 807 (7th Cir. 2014) 18
Rivas-Martinez v. INS,
997 F.2d 1143 (5th Cir. 1993) 16
Rizal v. Gonzales,
442 F.3d 84 (2d Cir. 2006) 10
Rosales Justo v. Sessions,
895 F.3d 154 (1st Cir. 2018) 9, 10
Sarhan v. Holder,
658 F.3d 649 (7th Cir. 2011) 18, 19
Shehu v. Gonzales,
443 F.3d 435 (5th Cir. 2006) 17
Sok v. Mukasey,
526 F.3d 48 (1st Cir. 2008) 8
Sotelo-Aquije v. Slattery,
17 F.3d 33 (2d Cir.1994) 11
Tariq v. Keisler,
505 F.3d 650 (7th Cir. 2007) 18
Tesfamichael v. Gonzalez,
469 F.3d 109 (5th Cir. 2006) 16, 17
Vente v. Gonzales,
415 F.3d 296 (3d Cir. 2005) 13
Zavaleta-Policiano v. Sessions,
873 F.3d 241 (4th Cir. 2017) 14

Administrative Decisions

Matter of A-B-,
27 I. & N. Dec. 316 (AG 2018) 1, 2, 3, 8, 9, 19, 20
Matter of Acosta,
19 I. & N. Dec. 211 (BIA 1985) 5

Matter of H-,
21 I. & N. Dec. 337 (BIA 1996) 6, 27
Matter of Kasinga,
21 I. & N. Dec. 357 (BIA 1996) 6, 27
Matter of McMullen,
19 I. & N. Dec. 90 (BIA 1984) 5, 7
Matter of O-Z- & I-Z-,
22 I. & N. Dec. 23 (BIA 1998) 6, 7
Matter of Pierre,
15 I. & N. Dec. 461 (BIA 1975) 5
Matter of S-A-,
22 I. & N. Dec. 1328 (BIA 2000) 6
Matter of S-A-K- & H-A-H-,
24 I. & N. Dec. 464 (BIA 2008) 6
Matter of Villalta,
20 I. & N. Dec. 142 (BIA 1990) 6

Other Authorities

U.N. High Comm'r for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, U.N. Doc. HCR/IP/4/Eng/REV.1 (1992 ed.) 3, 28

This brief was authored entirely by counsel for Amici. 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. Petitioner has consented to the filing of this brief. Respondent has no position on the filing of this brief.

INTEREST OF AMICI CURIAE

Amici are 105 immigration and refugee law scholars and clinical professors.[1] They teach immigration law, refugee law, or in law school clinics that provide representation to asylum seekers. As such, amici have written numerous scholarly articles on immigration and refugee law and understand the practical aspects of asylum law through client representation.

ARGUMENT

It is well settled in the Board of Immigration Appeals, every Federal Circuit Court of Appeals, and the United States Supreme Court that harms inflicted by private actors can constitute persecution under U.S. asylum laws when the government of the home country is "unwilling or unable" to protect the applicant, and this standard has been applied to cases based on persecution on account of all five protected grounds.

In *Matter of A-B-*, the Attorney General impermissibly purported to heighten the standard, stating that an applicant must show that the government "condoned" the actions or was "completely helpless" to protect the applicant.[2]

---

[1] *See* Appendix A – List of Amici Immigration Law Professors and Scholar Signatories.

[2] *Matter of A-B-*, 27 I. & N. Dec. 316, 337 (A.G. 2018). Amici disagree with any characterization of intimate partner violence as "private actions," given that these types of harms, as shown below, often would not occur without the societal, even governmental, sanction they enjoy.

As shown below, of the literally hundreds of cases from every circuit court and the BIA setting forth and applying the "unwilling or unable" standard, the AG cherry picked the handful of cases that quote the "condoned" or "complete helplessness" standard. Moreover, even the circuit court opinions that state the "condoned" or "complete helplessness" language provide no explanation for this different standard, and those cases clearly do not even apply the heightened standard. They merely apply the "unwilling or unable" standard, looking not at whether the government condones the persecution or is completely helpless to stop it, but at whether the government is able to provide effective protection. Finally, even if the heightened "condoned" or "complete helplessness" standard were the controlling standard in a few circuit courts, it has not been the agency standard, and the AG has provided no explanation, let alone a reasoned one, for the change. This heightened standard is contrary to decades of precedent and would impose an unduly restrictive requirement on applicants for asylum.

I. THE "CONDONED" OR "COMPLETE HELPLESSNESS" STANDARD IS INCONSISTENT WITH WELL-SETTLED CASE LAW

In *Matter of A-B-*, the Attorney General purported to heighten the state action standard, requiring applicants to show that the government was not only "unwilling" to stop the persecutors, but that it "condoned" their actions, or that the

government was not only "unable" to protect them from the persecution, but that it was "completely helpless" to do so.[3]

However, it is axiomatic that "unwilling" does not mean "condoned." There may be many reasons why a government would be unwilling to protect an applicant from persecution short of condoning the persecution, including that the government may just have other priorities or believe that the persecution is a family matter to be handled in the home.

Similarly, "unwilling" clearly does not mean "completely helpless." According to the United Nations High Commissioner for Refugees ("UNHCR"), Handbook on Procedures and Criteria for Determining Refugee Status, which has been relied upon by the U.S. Supreme Court, harms committed by private actors can constitute persecution "if the authorities refuse, or prove unable, to offer *effective* protection."[4] Therefore, the "unable" prong does not require applicants to prove that the government will fail to help them with absolute certainty, but rather that the government's attempt at policing the persecution is or would be *ineffective*.

Moreover, the "condoned" or "complete helplessness" standard is in tension with the statutory requirement in asylum law to show a "well-founded fear" of persecution, which the Supreme Court has stated only requires showing that there

[3] *Matter of A-B-*, 27 I&N Dec. 316 (A.G. 2018)
[4] UNHCR Handbook ¶ 65 (1979, rev. 1992) (emphasis added).

is a 10% chance of persecution.[5] Clearly, requiring an applicant to show that the government was "completely helpless" to protect her (or 100% ineffectiveness) contravenes this statutory standard.

As shown in further detail below, every Court of Appeals has used the "unwilling/unable" standard. The few courts that have used the words "condoned" or "complete helplessness" have not departed from the standard or explained a reason for any departure. For this reason, in *Grace v. Whitaker*, the U.S District Court for the District of Columbia recently found that the "condoned" or "complete helplessness" standard was inconsistent with current standards under immigration law.[6] Citing the Supreme Court, the *Grace* court also found the "[u]nexplained inconsistency is…a reason for holding an interpretation to be an arbitrary and capricious change."[7]

II. THE "UNWILLING OR UNABLE" STANDARD IS WELL SETTLED IN THE BOARD OF IMMIGRATION APPEALS, EVERY FEDERAL COURT OF APPEALS, AND THE UNITED STATES SUPREME COURT

A. Board of Immigration Appeals

The Board of Immigration Appeals ("BIA") has issued precedential decisions dating back more than forty years affirming that harms perpetrated by

[5] *INS v. Cardoza-Fonseca*, 480 U.S. 421, 440 (1987).
[6] *Grace v. Whitaker*, 344 F. Supp. 3d 96 (D.D.C. 2018).
[7] *Grace*, 344 F. Supp. 3d at *65 n.17.

private actors can constitute persecution.[8] In a foundational case, *Matter of Acosta*, the BIA recognized that even before the passage of the Refugee Act of 1980, harms could constitute persecution if they were inflicted "either by the government of a country or by persons or an organization that the government was unable or unwilling to control."[9] The BIA noted that Congress carried forward the term "persecution" from pre-1980 statutes, where it had a well-settled judicial and administrative construction of meaning "harm or suffering . . . inflicted either by the government of a country or by persons or an organization that the government was unwilling or unable to control." [10] The BIA then applied the basic rule of statutory construction that when Congress carries forward a term that has an established meaning, it intends the same meaning to apply. [11]

[8] *See, e.g.*, *Matter of Pierre*, 15 I. & N. Dec. 461, 462 (BIA 1975); *Matter of McMullen*, 19 I. & N. Dec. 90, 96 (BIA 1984).
[9] *Acosta*, 19 I. & N. Dec. at 222.
[10] *Id.* at 222.
[11] *Id.* at 223.

The BIA has recognized various types of harms inflicted by private actors as persecution including, but not limited to, murder,[12] beatings,[13] threats,[14] detention,[15] female genital cutting,[16] and domestic abuse.[17]

For example, in *Matter of O-Z- & I-Z-*, the applicants were persecuted by an anti-Semitic, pro-Ukrainian independence movement, unconnected with the Ukrainian government.[18] In that case, the Service[19] argued that the applicant was required to show that the private action was "government-directed or condoned" and that he had not done so.[20] The Board disagreed with the formulation and conclusion, stating:

> [W]e note that the respondent reported at least three of the incidents to the police, who took no action beyond writing a report. It appears that the Ukrainian Government was unable or unwilling to control the

---

[12] *See, e.g.*, *Matter of Villalta*, 20 I. & N. Dec. 142, 147 (BIA 1990) (finding that Salvadoran government appeared to be unable to control paramilitary death squads).
[13] *See, e.g.*, *Matter of O-Z- & I-Z-*, 22 I. & N. Dec. 23, 25 (BIA 1998).
[14] *See, e.g.*, *id.* at 25–26.
[15] *See, e.g.*, *Matter of H-*, 21 I. & N. Dec. 337, 341 (BIA 1996) (detention as a result of interclan violence).
[16] *See, e.g.*, *Matter of Kasinga*, 21 I. & N. Dec. 357, 365 (BIA 1996). *See also Matter of S-A-K- & H-A-H-*, 24 I. & N. Dec. 464, 465 (BIA 2008).
[17] *See, e.g.*, *Matter of S-A-*, 22 I. & N. Dec. 1328 (BIA 2000). Amici further note that these acts are nearly universally criminalized in countries throughout the world. The fact that an act is a crime does not, in any way, preclude it from being persecution; many acts of persecution are, in fact, criminal.
[18] *Matter of O-Z- & I-Z-*, 22 I. & N. Dec. at 24.
[19] At the time this case was decided, the relevant government agency was the Immigration and Naturalization Service, not the DHS.
[20] *Matter of O-Z- & I-Z-*, 22 I. & N. Dec. at 25.

> respondent's attackers and protect him or his son from the anti-Semitic acts of violence.[21]

As the BIA apparently recognized, the police's lack of action does not amount to "condoning" or "directing" the behavior, but it was enough to satisfy the "unwilling or unable" standard.

Even when the BIA has decided against the applicant, it has acknowledged the "unwilling or unable" standard.[22]

B. Federal Courts of Appeals

Every single federal court of appeals has held that harms inflicted by private actors can qualify as persecution, so long as the government is unwilling or unable to control the persecution. Despite the hundreds of cases from the courts of appeals acknowledging the "unwilling/unable" standard, the AG has cherry picked the handful of cases that contain "condoned or complete helplessness" language. The relevant case law from each circuit is set forth below. These decisions demonstrate that "condoned" or "completely helpless" is not the required legal standard, and that claims involving harms inflicted by private actors, like all asylum claims, require an individualized, fact specific inquiry.

---

[21] *Matter of O-Z- & I-Z-*, 22 I. & N. Dec. at 26.
[22] *See, e.g.*, *Matter of McMullen*, 19 I. & N. Dec. 90, 96 (BIA 1984).

i. First Circuit

The U.S. Court of Appeals for the First Circuit has long recognized the "unwilling or unable" standard.[23] In *Khattak v. Holder*, for example, the court considered the asylum application of a Pakistani family.[24] The father voiced opposition to the Taliban through his various political and activist roles. The Taliban began threatening the family. The IJ held, and the BIA affirmed, that the family failed to establish that the Pakistani government was unwilling or unable to control the Taliban because the government "was in fact taking on the Taliban" through military action and was "making inroads."[25] On appeal, the First Circuit held that "although such military action indicates that the Pakistani government is *willing* to take on the Taliban, such action does not show that the Pakistani government is *able* to protect its citizens from Taliban attacks."[26] The military's actions are a far cry from "condoning" the attacks or even a "complete helplessness" to prevent the attacks.

Significantly, even after *Matter of A-B-*, the court has declined to apply the more stringent "condoned" or "compete helplessness" standard. In *Rosales Justo v.*

---

[23] *Aldana-Ramos v. Holder*, 757 F.3d 9, 17 (1st Cir. 2014) (citing *Ivanov v. Holder*, 736 F.3d 5, 12 (1st Cir. 2013)). *See also Sok v. Mukasey*, 526 F.3d 48, 53 (1st Cir. 2008).
[24] *Khattak v. Holder*, 704 F.3d 197 (1st Cir. 2013).
[25] *Id*. at 203.
[26] *Id*. at 206.

Sessions, the applicant was a police officer from Mexico who also owned a store to supplement his income.[27] One day members of organized crime came into his store and demanded 2,000 pesos every two weeks as "rent."[28] When the applicant did not pay, the members threatened his family.[29] They eventually killed his son, and the police started an investigation into the murder.[30] The applicant and his family moved within Mexico, but unknown men "from organized crime" came looking for them.[31] The applicant did not report the events before and after his son's murder because he was afraid the men would kill him.[32] The court found that the BIA misapplied the unwilling or unable standard.[33] The court explained that, with respect to claims involving private actors, it has "consistently stated that an applicant must prove either unwillingness or inability" of the government to control the persecution.[34] Specifically, the court reasoned: "the evidence in the record showed only that the police made efforts to investigate [the son's] murder. The evidence showed nothing about the quality of this investigation or its likelihood of catching the perpetrators."[35] Although the court cited *Matter of A-B-*

---

[27] *Rosales Justo v. Sessions*, 895 F.3d 154, 157 (1st Cir. 2018).
[28] *Id.*
[29] *Id.*
[30] *Id.* at 157–158.
[31] *Id.* at 158.
[32] *Id.*
[33] *Id*. at 162.
[34] *Id.* at 163.
[35] *Id*. at 164.

in its decision,[36] it clearly applied the "unwilling or unable" standard, given that the police did conduct an investigation, demonstrating that they neither condoned the persecution nor were completely helpless to stop it.

ii. Second Circuit

The Second Circuit Court of Appeals also has consistently and unambiguously held that harms inflicted by private actors may constitute persecution so long as the government is unwilling or unable to control the conduct.[37] The court has recognized persecution committed at the hands of various non-state actors, including, *inter alia*, domestic abusers,[38] rebel guerilla groups,[39] religious groups,[40] tribe members,[41] members of other ethnic groups,[42] anti-Semites,[43] and traffickers.[44] Further, it has stated that a government's inability or unwillingness to control private persecutors can be corroborated by a showing of

---

[36] *Id*.
[37] *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).
[38] *See, e.g.*, *Bori v. INS*, 190 F. App'x 17, 19 (2d Cir. 2006).
[39] *See, e.g.*, *Del Pilar Delgado v. Mukasey*, 508 F.3d 702, 707 (2d Cir. 2007).
[40] *See, e.g.*, *Rizal v. Gonzales*, 442 F.3d at 92.
[41] *See, e.g.*, *Abankwah v. INS*, 185 F.3d 18, 26 (2d Cir. 1999).
[42] *See, e.g.*, *Aliyev v. Mukasey*, 549 F.3d 111, 118 (2d Cir. 2008).
[43] *See, e.g.*, *Poradisova v. Gonzales*, 420 F.3d 70, 81 (2d Cir. 2005).
[44] *See, e.g.*, *Paloka v. Holder*, 762 F.3d 191, 198–99 (2d Cir. 2014).

authorities' failure to respond,[45] lack of resources,[46] corruption or impunity,[47] or societal pervasiveness of the persecution.[48]

In *Ivanishvili v. DOJ*, the court remanded the case because it found that the IJ failed to consider the applicant's testimony that authorities and unknown private parties violently attacked her and other church members.[49] The court emphasized that "even 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."[50]

Similarly, in *Aliyev v. Mukasey*, the Second Circuit Court of Appeals remanded a BIA decision that affirmed an IJ's denial of asylum to a family of ethnic Uyghurs from Kazakhstan.[51] After a Kazakh nationalist group threatened and beat the father, he filed a report with the police. The police sent him to the hospital for an examination and injury report, yet never conducted a proper investigation. After the family reported that their home was destroyed by an explosion, a local sheriff came to the home, but did nothing further. The court held that the BIA improperly failed to consider that the applicant had "clearly

---

[45] *See, e.g.*, *Pavlova v. I.N.S.*, 441 F.3d 82, 91 (2d Cir. 2006).
[46] *See, e.g.*, *Sotelo-Aquije v. Slattery*, 17 F.3d 33, 36 (2d Cir. 1994).
[47] *See, e.g.*, *Poradisova*, 420 F.3d at 81.
[48] *See, e.g.*, *Abankwah*, 185 F.3d at 25–26.
[49] *Ivanishvili v. U.S. Dep't. of Just.*, 433 F.3d 332, 342–43 (2d Cir. 2006).
[50] *Id.* at 342.
[51] *Aliyev v. Mukasey*, 549 F.3d 111 (2d Cir. 2008).

introduced enough evidence to forge the link between private conduct and public responsibility."[52] Plainly, in the court's view, an asylum seeker can meet the "unable or unwilling" standard even if the police provide some level of support.

Further still, decisions from the Second Circuit demonstrate that asylum seekers can meet the "unable or unwilling" standard even if they never reported private violence to the police. In *Pan v. Holder*, the 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.[53] Similarly, in *Bori v. INS*, the court held that an IJ improperly failed to take into account an Albanian asylum seeker's reasons for not reporting domestic abuse to the government.[54] In particular, the IJ failed to consider a country report that stated that the majority of spousal abuse goes unreported as a result of lax police responses.

Together, *Pan v. Holder* and *Bori v. INS* demonstrate that, far from needing to introduce direct evidence of the government's "condoning" the persecution or its "complete helplessness" to stop it, the applicant need only introduce circumstantial evidence indicating that the government is unlikely to have protected the applicant had he or she reported.

---

[52] *Id*. at 118.
[53] *Id*. at 545.
[54] *Bori v. INS*, 190 F. App'x 17, 19 (2d Cir. 2006)

iii. Third Circuit

The Third Circuit Court of Appeals has consistently recognized that persecution can be committed "by forces the government is unable or unwilling to control."[55] In *Fiadjoe v. Attorney General*, for example, the Third Circuit remanded a BIA decision denying a Ghanaian woman's applications for asylum and CAT relief.[56] The applicant's father physically and sexually abused her and forced her to serve as his slave in accordance with the tenets of the Trokosi sect. In 1998, Ghana passed legislation banning the practice of "customary servitude." After this legislation was passed, a Ghanaian government commission, working with an NGO, helped release 2,800 Trokosi slaves. The Third Circuit found that the BIA "totally ignored the evidence in the record that establishes the deep hold that the Trokosi religion has upon substantial elements of the Ghanaian people" even after Trokosi slavery was outlawed.[57] Further, the court pointed to a State Department Report as evidence that it would have been futile to report her father's violence given that law enforcement tended not to intervene in domestic disputes.[58] Finally, despite the legislation, the Ghanian government had not prosecuted any

---

[55] *Fiadjoe v. Att'y Gen.*, 411 F.3d 135, 160 (3d Cir. 2005). *See also Garcia v. Att'y Gen. of the U.S.*, 665 F.3d 496, 503 (3d Cir. 2011); *Espinosa-Cortez v. Att'y Gen. of the U.S.*, 607 F.3d 101, 113 (3d Cir. 2010); *Vente v. Gonzales*, 415 F.3d 296, 300 (3d Cir. 2005).
[56] *Fiadjoe*, 411 F.3d at 160.
[57] *Id.* at 161.
[58] *Id.* at 162.

practitioners of Trokosi.[59] This case demonstrates that an applicant can satisfy the "unable or unwilling" standard even if the government has passed legislation outlawing the form of violence that she faced and has dramatically reduced the incidence of the practice, clearly revealing that the government neither "condone[d]" the practice nor was "completely helpless" to stop it.

iv. Fourth Circuit

The Fourth Circuit Court of Appeals has long recognized the "unwilling or unable" standard.[60] In *Crespin-Valladares v. Holder*, for example, a Salvadoran applicant had seen four members of MS-13 flee the scene after his cousin was fatally shot.[61] He described the four men to the police. Two weeks later, the police arrested two of the men. As the murder trial approached, gang members told the applicant's uncle that they would kill him if he continued to cooperate. The prosecutor provided the uncle with police protection. Because the applicant did not directly witness the murder, he did not receive police protection. A court convicted both defendants. The gang members continued to threaten him until he fled to the United States.

---

[59] *Id*. at 163.
[60] *See, e.g.*, *Zavaleta-Policiano v. Sessions*, 873 F.3d 241, 246 (4th Cir. 2017); *Hernandez-Avalos v. Lynch*, 784 F.3d 944, 949 (4th Cir. 2015); *Crespin-Valladares v. Holder*, 632 F.3d 117, 128 (4th Cir. 2011); *Mulyani v. Holder*, 771 F.3d 190, 198 (4th Cir. 2014).
[61] *Crespin-Valladares*, 632 F.3d at 120.

The BIA concluded that a State Department report "demonstrates that the Salvadoran government has focused law enforcement efforts on suppressing gang violence."[62] On that basis, the BIA found that the applicant had not shown "that the government would be unable or unwilling to protect them from MS-13."[63] The Fourth Circuit remanded because the BIA erred in failing to consider that "attempts by the Salvadoran government to control gang violence have proved futile." The Salvadoran government's efforts to control gang violence demonstrate that the government neither condoned the violence nor was completely helpless to control it; nevertheless, the court granted the petition for review out of a recognition that the government's efforts were ineffective.

Similarly, in *Hernandez-Avalos v. Lynch*, the Salvadoran gang, Mara 18, attempted to recruit the applicant's 12-year-old son.[64] When the applicant refused to give up her son to the gang, Mara 18 members continuously threatened her at gunpoint for opposing the gang's recruiting efforts. The gang told her that she had one day to turn over her son or she would be killed. Before dawn the following day, she and her son entered the United States.

The IJ concluded, and BIA affirmed, that the applicant did not show the government was "unwilling or unable" to protect her because she never attempted

---

[62] *Id*. at 128.
[63] *Id*.
[64] *Hernandez-Avalos v. Lynch*, 784 F.3d 944, 949 (4th Cir. 2015)

to obtain protection from the authorities. The Fourth Circuit disagreed and granted petition for review, holding that the BIA was motivated by its "faulty conclusion that the Salvadoran government would have been willing to prosecute the gang members who threatened [the applicant]."[65] Additionally, the court held that the State Department Human Rights Report "notes the existence of widespread gang influence and corruption within the Salvadoran prisons and judicial system."[66]

v. Fifth Circuit

It is similarly well established in the Fifth Circuit that "persecution entails harm inflicted . . . by the government *or by forces that a government is unable or unwilling to control*."[67] In *Eduard v. Ashcroft*, the court granted the petition of an applicant who was "afraid to go back to Indonesia because Christians are being persecuted there by the Moslems and the Indonesian government cannot control them."[68] Additionally, in *Rivas-Martinez v. INS*, the court held in favor of an applicant who feared persecution at the hands of guerillas.[69]

---

[65] *Id.* at 952.
[66] *Id.* at 953.
[67] *Tesfamichael v. Gonzalez*, 469 F.3d 109, 113 (5th Cir. 2006) (emphasis added). *See also Eduard v. Ashcroft*, 379 F.3d 182, 187 (5th Cir. 2004); *Adebisi v. INS*, 952 F.2d 910, 914 (5th Cir. 1992).
[68] *Eduard*, 379 F.3d at 190.
[69] *Rivas-Martinez*, 997 F.2d 1143, 1145 (5th Cir. 1993).

Even when denying relief, the court has explicitly recognized that harms inflicted by private actors can constitute persecution.[70] For example, in *Adebisi v. INS*, the court recognized that "the BIA extends the qualifying range of persecution fear to include acts by groups '*the government is unable or unwilling to control*.'"[71]

vi. Sixth Circuit

The Sixth Circuit Court of Appeals has consistently recognized the "unwilling or unable" standard.[72] For example, in *Kamar v. Sessions*, a Jordanian asylum seeker feared that her cousins would subject her to an honor killing because she "shamed" her family by divorcing her husband and conceiving a child while unmarried.[73] The BIA affirmed the IJ's finding that the Jordanian government was not unable or unwilling to protect her, crediting a 2011 country report that stated

---

[70] *See, e.g.*, *Tesfamichael*, 469 F.3d at 113; *Adebisi*, 952 F.2d at 914.
[71] *Id.* at 914. While it is true that the court in *Shehu v. Gonzales*, 443 F.3d 435, 437 (5th Cir. 2006), quoted (without discussion) the "condone" or "complete helplessness" phrase from a Seventh Circuit decision (discussed in further detail below), the case at hand dealt with violence not at the hands of private actors, but at the hands of a government that had since changed from being dominated by Serbs to being dominated by the United Nations Interim Administrative Mission in Kosovo and Provisional Institutions of Self Government. *Shehu*, 443 F.3d at 437–38. Accordingly, the real issue before the court was whether country conditions had changed such that the applicant no longer had a well-founded fear of persecution, not whether the state action requirement had been met.
[72] *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).
[73] *Kamar*, 875 F.3d at 818-20.

that the authorities in Jordan has placed eighty-two women in "protective custody" that year to prevent them from becoming victims of honor killings.[74] The BIA also held that subsequent country reports demonstrated that the Jordanian government was actively protecting victims and prosecuting the perpetrators of honor crimes.[75] The court reversed, finding that "governors in Jordan routinely abuse the law and use imprisonment to protect potential victims of honor crimes . . . ."'"[76] Meanwhile, the Jordanian government frequently reduced the sentences of perpetrators of honor killing or dismissed the case if the victim's family (who is also often the perpetrator's family) did not press charges.[77] Clearly, the court was employing the "unable or unwilling" standard, and not the heightened standard, as the Jordanian government was not "completely helpless" to protect women from honor killings. Its protections were merely ineffective.

vii. Seventh Circuit

The Seventh Circuit Court of Appeals also has long recognized the "unwilling or unable" standard.[78] For example, in *Sarhan v. Holder*, a Jordanian asylum seeker feared that her brother would subject her to an honor killing in

---

[74] *Id*. at 816.
[75] *Id*.
[76] *Id*. at 819 (quoting *Sarhan v. Holder*, 658 F.3d 649, 659 (7th Cir. 2011)).
[77] *Id*.
[78] *See, e.g.*, *R.R.D. v. Holder*, 746 F.3d 807, 809 (7th Cir. 2014); *Cece v. Holder*, 733 F.3d 662, 675 (7th Cir. 2013) (en banc); *Tariq v. Keisler*, 505 F.3d 650, 656 (7th Cir. 2007); *Chakir v. Gonzalez*, 466 F.3d 563, 569–70 (7th Cir. 2006).

response to a false rumor that she had committed adultery.[79] The IJ denied her claim, finding the Jordanian government would protect the applicant if her brother posed a threat, and the BIA affirmed. On appeal, the government argued that in 2007 there were only 17 reported instances of honor killings, and all 17 honor crimes were prosecuted.[80] The court found these arguments unconvincing and reversed the BIA, reasoning that "[p]rosecution at times is an empty gesture."[81] It stated that the six-month prison sentences amounted to "little more than a slap on the wrist" and sent a "strong social message of toleration for the practice."[82] After reviewing this and other evidence, the court concluded it was "at a loss to understand" how the BIA held that the record does not establish that the Jordanian government would be unable or unwilling to protect the applicant. The Jordanian government might have been ineffective at protecting the applicant, but it could hardly be characterized as "completely helpless" given that it prosecuted all 17 reported instances of honor killings in 2007.

In *Matter of A-B-*, the AG cited two Seventh Circuit decisions in support of the "condoned" or "complete helplessness" standard. In *Galina v. I.N.S.*, the case from which the "condoned" or "complete helplessness" language originated, the

---

[79] *Sarhan v. Holder*, 658 F.3d 649 (7th Cir. 2011).
[80] *Id.* at 657.
[81] *Id.*
[82] *Id.*

court stated that "a finding of persecution ordinarily requires a determination that government authorities . . . condoned it or at least demonstrated a complete helplessness to protect the victims."[83] However, none of the cases the court cited in support of this proposition contain the "condoned" or "complete helplessness" language, and the court did nothing further to explain where the language came from. Similarly, in *Hor v. Gonzalez*, relying on *Galina*, the court recognized that an applicant cannot claim asylum on the basis of "persecution by a private group unless the government either condones it or is helpless to prevent it, but if either of those conditions is satisfied, the claim is a good one."[84] Notably, however, in both *Galina* and *Hor*, 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,[85] demonstrating that, despite the language it used to describe the standard, the standard the court actually applied was the "unable or unwilling" standard and not the heightened "condoned or complete helplessness" standard that the AG applied in *Matter of A-B-*.[86] Moreover, the vast majority of Seventh Circuit

---

[83] *Galina v. I.N.S.*, 213 F.3d 955, 958 (7th Cir. 2000).
[84] *Hor v. Gonzalez*, 421 F.3d 497, 501 (7th Cir. 2005). The AG decision in *A-B-* cited *Hor v. Gonzales*, 400 F.3d 482, 485 (7th Cir. 2005), in which a panel of the court denied the applicant's motion for a stay of removal, reasoning that "the probability of success on the merits [was] low." *Id.* at 485. In the second *Hor* decision, the merits panel disagreed and granted the applicant's petition for review.
[85] *Hor*, 421 F.3d at 499; *Galina*, 213 F.3d at 958.
[86] *See also Grace*, 344 F. Supp. 3d at 129 (reviewing the cases cited by the government in support of its heightened "condone and complete helplessness"

cases decided after *Galina* and *Hor*, such as *Sarhan*, set forth and apply only the "unwilling/unable" standard.

viii. Eighth Circuit

The "unwilling or unable" standard is also well established in the Eighth Circuit.[87] In *Gathungu v. Holder*, a Kenyan asylum seeker feared persecution by members of the Mungiki, a violent political group that tortured him after he defected.[88] Both the IJ and BIA found that the applicant had failed to establish that the Kenyan government was unwilling or unable to control the Mungiki, citing country reports that indicated the Kenyan police had "very strong policies" against the Mungiki.[89] On appeal, the Eighth Circuit held that the BIA improperly ignored evidence that the Kenyan government accepted bribes and had a practice of "making a show of arresting the Mungiki members but then releasing them."[90] The court concluded, "[T]he very fact that the Mungiki have continued to create significant violence over the last decade despite repeated assertions by the Kenyan government that it is cracking down on the Mungiki . . . show the Kenyan

---

standard, including *Galina*, and concluding that "although the word 'condone' was used, the courts were in actuality applying the 'unwilling or unable standard'").
[87] *See e.g.*, *Gathungu v. Holder*, 725 F.3d 900 (8th Cir. 2013); *Nabulwala v. Gonzalez*, 481 F.3d 1115 (8th Cir. 2007)
[88] *Gathungu v. Holder*, 725 F.3d 900 (8th Cir. 2013).
[89] *Id*. at 906.
[90] *Id*. at 908-09.

government is unable to control the Mungiki."[91] This case demonstrates that an asylum seeker can meet the "unwilling or unable" standard even if a government "takes action" to crack down on violence perpetrated by a rebel group if "the record shows that many of the crackdown promises are hollow."[92] The "unwilling or unable" standard is recognized and reaffirmed in several opinions from this circuit.[93]

Nevertheless, there exists an unexplained (indeed, unacknowledged) tension in the Eighth Circuit between that line of cases and another line of cases that cites the "condoned" or "complete helplessness" language. In *Menjivar v. Gonzales*, the court quoted the Seventh Circuit *Galina* decision in stating that "the applicant must show that the government 'condoned it or at least demonstrated a complete helplessness to protect the victims.'"[94] However, the court gave no reasons for using the "condoned" or "complete helplessness" language, and, as shown above, the Seventh Circuit decision to which it cites did not do so either. Moreover, in *Menjivar*, the court summarized its conclusion using the "unable or unwilling" test.[95]

---

[91] *Id*. at 909.
[92] *Id*.
[93] *See* Appendix B.
[94] *Menjivar v. Gonzales*, 416 F.3d 918, 921–22 (8th Cir. 2005) (quoting *Galina*, 213 F.3d at 958).
[95] *Id*. at 922.

ix. Ninth Circuit

The Ninth Circuit Court of Appeals has consistently recognized the "unwilling or unable" standard.[96] In *Madrigal v. Holder*, a former Mexican soldier who had conducted anti-drug activities alleged past persecution and a well-founded fear of future persecution at the hands of Los Zetas, a violent drug cartel.[97] The BIA concluded that the Mexican government was willing and able to control Los Zetas.[98] In its decision, the BIA cited various statistics on the efforts of the Mexican national government to combat drug violence, including the arrest of 79,000 people on drug trafficking related charges during a seven-year period.[99] The court reversed and remanded, stating that "the BIA appears to have focused only on the Mexican government's willingness to control Los Zetas, not its *ability* to do so."[100] The court concluded that record evidence demonstrated that "violent crime traceable to drug cartels remains high despite the Mexican government's efforts to quell it," suggesting that the Mexican government may lack the ability to effectively control Los Zetas.[101] As the court apparently recognized, a government

---

[96] *See, e.g.*, *Doe v. Holder*, 736 F.3d 871, 873, 77–78 (9th Cir. 2013) ("Doe was not required to demonstrate that the Russian government sponsored or condoned the persecution of homosexuals…."); *see also* Appendix B.
[97] *Madrigal v. Holder*, 716 F.3d 499 (9th Cir. 2013).
[98] *Id*. at 506.
[99] *Id*. at 506-07.
[100] *Id*. at 506.
[101] *Id*. at 506-07.

that has arrested tens of thousands of drug traffickers is not "completely helpless" at suppressing drug cartels, yet might still be "unable" to protect an asylum seeker.

In *Avetova-Elisseva v. INS*, a Russian asylum seeker feared future persecution on account of her Armenian ethnicity.[102] She was born in Baku, Azerbaijan, but fled to escape Azeri ethnic cleansing. With the help of Soviet troops, she crossed the Caspian Sea and settled in Moscow. While in Russia, she continued to face harassment. In rejecting her claim, the IJ seemed to apply a "condoned" standard, reasoning:

> [T]he inability of the police to sometimes deal with [the harassment of people of Armenian dissent], is not due to the fact that the police is [sic] participating in the persecution or harassment but, rather, because of lack of resources and a very high crime rate . . . . The evidence is not one that shows that the government is systematically engaging in these acts or tolerating the people that do engage in acts of discrimination and harassment, deliberately to persecute Armenians because of the fact that they are Armenian.[103]

The Ninth Circuit reversed and remanded, stating, "[i]t does not matter that financial considerations may account for such an inability to stop elements of ethnic persecution."[104] Further, the court held, "just because the Russian army rescued Avetova and other Armenians from a likely death in Azerbaijan does not negate the prospect of future persecution that is less than life-threatening—or even

---

[102] *Avetova-Elisseva v. INS*, 213 F.3d 1192 (9th Cir. 2000).
[103] *Id*. at 1197-98.
[104] *Id*. at 1198.

of life-threatening persecution from elements that the government cannot control."[105] It is clear that, according to the court, a government may be "unable or unwilling" to protect an applicant from continued persecution even if it does not "condone" the persecution and is not "completely helpless" at aiding the applicant.

x. Tenth Circuit

Similarly, the Tenth Circuit Court of Appeals has long held that persecution "may come from a non-government agency which the government is unwilling or unable to control."[106] In *de la Llana-Castellon v. INS*, the BIA denied a Nicaraguan family's asylum application after *sua sponte* taking administrative notice of the fact that elections had brought about a change in government in Nicaragua.[107] The Sandinistas, a party that controlled the Nicaraguan government before the elections, had previously persecuted the family. The BIA held that the family could no longer establish a well-founded fear of future persecution given the change in government.

The court reversed, finding the BIA erred in failing to analyze whether the Sandinistas constitute an entity that the government was unable or unwilling to

---

[105] *Id*. at 1200.
[106] *de la Llana-Castellon v. INS*, 16 F.3d 1093, 1097 (10th Cir. 1994). *See also Hayrapetyan v. Mukasey*, 534 F.3d 1330, 1336–37 (10th Cir. 2008); *Krastev v. INS*, 292 F.3d 1268, 1275–76 (10th Cir. 2002); *Bartesaghi-Lay v. INS*, 9 F.3d 819, 822 (10th Cir. 1993).
[107] *de la Llana-Castellon v. INS*, 16 F.3d 1093 (10th Cir. 1994).

control.[108] The court reasoned, "[t]here may very well be evidence that the coalition government does not enjoy full or even marginal control in Nicaragua and that the Sandinistas are still a force to be reckoned with."[109] In remanding, the court plainly asked the agency to assess whether the family met the "unwilling or unable" test, and not the heightened "condoned or complete helplessness" test.

xi. Eleventh Circuit

Finally, the "unwilling or unable" standard is similarly well established in the Eleventh Circuit.[110] For instance, in *Lopez v. U.S. Attorney General*, the court stated that the failure to report private persecution to government authorities is "excused where the petitioner convincingly demonstrates that those authorities would have been unable or unwilling to protect her, and for that reason she could not rely on them."[111] The court remanded the decision because the BIA and IJ failed to address this point.[112]

---

[108] *Id*. at 1097.
[109] *Id*.
[110] *See*, *e.g.*, *Lopez v. U.S. Att'y Gen.*, 504 F.3d 1341 (11th Cir. 2007); *Malu v. United States AG*, 764 F.3d 1282, 1291 (11th Cir. 2014).
[111] *Lopez v. U.S. Att'y Gen.*, 504 F.3d 1341, 1345 (11th Cir. 2007).
[112] *Id.* at 1345.

C. Supreme Court of the United States

Likely because of the agreement among the lower courts that harms inflicted by private actors can constitute persecution so long as the government is unwilling or unable to control the private actors, the United States Supreme Court has not had occasion to explicitly opine on the issue. However, the Court has implicitly acknowledged that harms inflicted by private actors can constitute persecution.[113] For example, in *INS v. Elias-Zacarias*, the Court evaluated the claim of a Guatemalan asylum applicant who claimed that he feared persecution at the hands of a non-state guerilla group.[114] The Court found against the applicant on nexus grounds.[115] However, the court never called into question the notion that harms perpetrated by a private actor, namely the guerilla group, could constitute persecution.[116]

Similarly, in *Negusie v. Holder*, Justice Stevens in his dissent on an unrelated issue briefly discussed the difference between asylum and withholding of removal—which he stated could be based on "harm inflicted by private actors"—and the Convention Against Torture, which requires "state involvement."[117]

---

[113] *See Negusie v. Holder*, 555 U.S. 511, 536 n.6 (2009) (Stevens, J., dissenting).
[114] *Elias-Zacarias*, 502 U.S. at 480.
[115] *Id.* at 483–84.
[116] *Id.* at 483.
[117] *Negusie*, 555 U.S. at 536 n.6 (Stevens, J., dissenting) (citing *Matter of Kasinga*, 21 I. & N. Dec. at 365; *Matter of H-*, 21 I. & N. Dec. 337, 343–44 (BIA 1996)).

Moreover, the Supreme Court has stated that the UNHCR Handbook "provides significant guidance in construing the Protocol [Relating to the Status of Refugees], to which Congress sought to conform. It has been widely considered useful in giving content to the obligations that the Protocol establishes."[118] The UNHCR Handbook clearly recognizes that harms inflicted by private actors can constitute persecution "if the authorities refuse, or prove unable, to offer effective protection."[119]

CONCLUSION

It is well settled in the Board of Immigration Appeals, all Federal Courts of Appeals, and the United States Supreme Court that harms inflicted by private actors can constitute persecution for purposes of asylum or withholding of removal, so long as the applicant demonstrates that the government was unable or unwilling to control the private actors. Any pronouncement by the AG that such claims should be subject to heightened standards or increased skepticism is contrary to settled law and without merit.

---

[118] *INS v. Cardoza-Fonseca*, 480 U.S. 421, 439 n.22 (1987).

[119] U.N. High Comm'r for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, ¶ 65, U.N. Doc. HCR/IP/4/Eng/REV.1 (1992 ed.), http://www.unhcr.org/4d93528a9.pdf.

Dated: April 12, 2019

Respectfully Submitted,

/s/ Amy Pont

Anjum Gupta
Immigrant Rights Clinic
Rutgers Law School
123 Washington Street
Newark, NJ 07102
Tel. (973) 353-2518
Email: anjum.gupta@rutgers.edu

Janet E. Sabel, Attorney-in-Chief
Adriene Holder, Attorney-in-Charge, Civil Practice
Hasan Shafiqullah, Attorney-in-Charge, Imm. Law Unit
Julie Dona, Of Counsel
Amy Pont, Of Counsel
Natalie Maust, Of Counsel (admission pending)
THE LEGAL AID SOCIETY
199 Water Street
New York, New York 10038
Tel: (212) 577-3538
Email: APont@legal-aid.org

Counsel for Amici Curiae

APPENDIX A: LIST OF SIGNATORIES*

Ana Pottratz Acosta
Assistant Teaching Professor
Mitchell Hamline School of Law

Raquel Aldna
Professor of Law
UC Davis

Sabi Ardalan
Assistant Clinical Professor
Harvard Law School

Heather Axford
Adjunct Professor of Law
New York Law School

Sabrina Balgamwalla
Director of Wayne State Law School Asylum & Immigration Law Clinic
Wayne State Law School

Melynda H. Barnhart
Visiting Professor of Law
New York Law School

Caitlin Barry
Director, Farmworker Legal Aid Clinic
Villanova University Charles Widger School of Law

David Baluarte
Associate Clinical Professor of Law and Director of the Immigrant Rights Clinic
Washington and Lee University School of Law

Jon Bauer
Clinical Professor of Law and Richard D. Tulisano '69 Scholar in Human Rights
University of Connecticut School of Law

---

* Listed in individual capacity. University affiliation is listed for identification purposes only.

Kaci Bishop
Clinical Associate Professor of Law, Immigration Clinic
The University of North Carolina School of Law

Linda Bosniak
Professor of Law
Rutgers University

Jason A. Cade
Associate Professor of Law
University of Georgia School of Law

Benjamin Casper Sanchez
Faculty Director, James H. Binger Center for New Americans
University of Minnesota Law School

Violeta R. Chapin
Clinical Professor of Law
University of Colorado Law School

Gabriel J. Chin
Edward L. Barrett Jr. Chair and Martin Luther King Jr. Professor of Law
University of California, Davis School of Law

Michael J. Churgin
Raybourne Thompson Centennial Professor in Law
The University of Texas at Austin

Marisa S. Cianciarulo
Professor of Law, Associate Dean for Academic Affairs
Chapman University Fowler School of Law

Dree K. Collopy
Lecturer, Past Director of the Immigration Litigation Clinic
The Catholic University of America Columbus School of Law

Fernando Colon-Navarro
Fernando Colon-navarro
Thurgood Marshall School of Law (Texas Southern University)

Charles Shane Ellison
Director of Immigrant and Refugee Clinic
Creighton University School of Law

Kate Evans
Associate Professor of Law
University of Idaho College of Law

Richard H. Frankel
Associate Professor of Law
Drexel University Thomas R. Kline School of Law

Niels W. Frenzen
Sidney M. and Audrey M. Irmas Endowed Clinical Professor of Law
Univ. of Southern California Gould School of Law

Paula Galowitz
Clinical Professor of Law Emerita
New York University School of Law

Denise Gilman
Director, immigration Clinic
University of Texas School of Law

Deborah Gonzalez
Director of the Immigration Clinic
Roger Williams University School of Law

Joanne Gottesman
Clinical Professor of Law & Director of the Immigrant Justice Clinic
Rutgers Law School

Lindsay M. Harris
Assistant Professor & Co-Director of Immigration and Human Rights Clinic
University of the District of Columbia — David A. Clarke School of Law

Kayleen R. Hartman
Clinical Teaching Fellow

Dina Francesca Haynes
Professor of Law
New England Law

Susan Hazeldean
Assistant Professor of Law
Brooklyn Law School

Geoffrey Heeren
Professor of Law and Director of the Immigration Clinic
Valparaiso University Law School

Barbara Hines
Retired Clinical Professor of Law
University of Texas School of Law

Geoffrey A. Hoffman
Director of Immigration Clinic
University of Houston Law Center

Mary Holper
Associate Clinical Professor, Director, Immigration Clinic
Boston College Law School

Alan Hyde
Distinguished Professor of Law
Rutgers Law School

Michael Kagan
Joyce Mack Professor of Law
University of Nevada, Las Vegas

Elizabeth Keyes
Associate Professor
University of Baltimore School of Law

Krista Kshatriya
Lecturer
UC San Diego

Charles H. Kuck
Adjunct Professor of Law
Emory Law School

Hiroko Kusuda
Clinic Professor
Loyola New Orleans University College of Law

Stephen H. Legomsky
John S. Lehmann University Professor Emeritus
Washington University School of Law

Romy Lerner
Associate Director Immigration Clinic
University of Miami

Beth Lyon
Clinical Professor of Law
Cornell Law School

Randi Mandelbaum
Distinguished Clinical Professor of Law
Rutgers Law School

Lynn Marcus
Director, Immigration Law Clinic
University of Arizona Rogers College of Law

Fatma E. Marouf
Professor of Law
Texas A&M Univ. School of Law

Sheila Velez Martinez
Jack and Lovell Olender Professor of Asylum Refugee and Immigration Law
University of Pittsburgh School of Law

Miriam Marton
Assistance Clinical Professor of Law
University of Tulsa College of Law

Elizabeth McCormick
Associate Clinical Professor of Law
University of Tulsa College of Law

Karla M. McKanders
Clinical Professor of Law
Vanderbilt University Law School

Katie Herbert Meyer
Assistant Prof. of Practice & Director, Immigration Law Clinic
Washington University in St. Louis

Richard T. Middleton, IV
Associate Professor of Political Science and Adjunct Professor of Law
Univesity of Missouri-St. Louis; St. Louis University School of Law

Nickole Miller
Clinical Teaching Fellow, Immigrant Rights Clinic
University of Baltimore School of Law

Jennifer Moore
Professor of Law
University of New Mexico School of Law

Elora Mukherjee
Jerome L. Greene Clinical Professor of Law; Director, Immigrants' Rights Clinic
Columbia Law School

Natalie Nanasi
Assistant Professor and Director, Hunter Legal Center for Victims of Crimes Against Women
SMU Dedman School of Law

Lori A. Nessel
Professor of Law, Director, Center for Social Justice
Seton Hall University School of Law

Mariela Olivares
Associate Professor of Law
Howard University School of Law

John Palmer
Tenure-Track Professor
Pompeu Fabra University

Sarah H. Paoletti
Practice Prof. of Law and Dir., Transnational Legal Clinic
University of Pennsylvania School of Law

Helen Parsonage
Adjunct Professor of Law
Wake Forest School of Law

Huyen Pham
Professor of Law
Texas A&M University School of Law

Nina Rabin
Director, Immigrant Family Law Clinic
UCLA School of Law

Jaya Ramji-Nogales
I. Herman Stern Research Professor
Temple Law School

Renee C. Redman
Adjunct Professor of Law
University of Connecticut School of Law

Maritza Reyes
Associate Professor of Law
Florida A&M University College of Law

Emily Robinson
Co-Director, Loyola Immigrant Justice Clinic
Loyola Law School, Los Angeles

Katherine Aschenbrenner Rodriguez
Associate Professor, Immigration Clinic
Barry University School of Law

Sarah Rogerson
Clinical Professor of Law
Albany Law School

Carrie Rosenbaum
Adjunct Professor
Golden Gate University School of Law

Samantha Rumsey
Immigrant Rights Clinic Fellow
Rutgers Law School

Kevin Ruser
Richard and Margaret Larson Professor of Law, M.S. Hevelone Professor of Law,
Director of Clinical Programs
University of Nebraska College of Law

Irene Scharf
Prof. of Law, Dir. Immigration Litigation Clinic
Univ of Mass School of Law

Anne Schaufele
Practitioner-in-Residence, International Human Rights Law Clinic
American University, Washington College of Law

Erica Schommer
Clinical Associate Professor of Law
St. Mary's University School of Law

Philip G. Schrag
Delaney Family Professor of Public Interest Law
Georgetown University

Ragini Shah
Clinical Professor of Law
Suffolk University Law School

Rebecca Sharpless
Clinical Professor
University of Miami School of Law

Deena N. Sharuk
Lecturer, Clinic Supervisor: Immigration Law Clinic
University of Virginia School of Law

Rachel Settlage
Associate Professor
Wayne State Law School

Gemma Solimene
Clinical Associate Professor of Law
Fordham University School of Law

Jayashri Srikantiah
Professor of Law & Director, Immigrants' Rights Clinic
Stanford Law School

Elissa Steglich
Clinical Professor
University of Texas School of Law

Rick Su
Professor of Law
University at Buffalo School of Law

Maureen A. Sweeney
Law School Associate Professor
University of Maryland Carey School of Law

Margaret H. Taylor
Professor of Law
Wake Forest University School of Law

Claire R. Thomas
Director, Asylum Clinic; Adjunct Professor of Law
New York Law School

David B. Thronson
Professor of Law and Associate Dean for Academic Affairs
Michigan State University College of Law

Philip L. Torrey
Managing Attorney, Harvard Immigration and Refugee Clinical Program
Harvard Law School

Emily C. Torstveit Ngara
Director, Deportation Defense Clinic
Maurice A. Deane School of Law at Hofstra University

Diane Uchimiya
Professor of Law and Director of the Justice and Immigration Clinic
University of La Verne College of Law

Julia Vázquez
Associate Clinical Professor of Law
Southwestern Law School

Yolanda Vazquez
Associate Professor of Law
University of Cincinnati College of Law

Penny M. Venetis
Clinical Professor of Law & Director of International Human Rights Clinic &
Judge Dickinson R. Debevoise Scholar
Rutgers Law School

Rose Cuison Villazor
Professor of Law and Chancellor's Social Justice Scholar
Rutgers Law School

Susannah D. Volpe
Visiting Assistant Clinical Professor
Seton Hall Law School

Leti Volpp
Robert D. and Leslie Kay Raven Professor of Law
UC Berkeley School of Law

Shoba Sivaprasad Wadhia
Clinical Professor of Law and Director of the Center for Immigrants' Rights Clinic
Penn State Law-University Park

Anna Welch
Clinical Professor
University of Maine School of Law

Deborah M. Weissman
Reef C. Ivey II Distinguishd Professor of Law
University of North Carolina School of Law

Virgil Wiebe
Professor of Law, Robins Kaplan Director of Clinical Education, Co-Director of Interprofessional Center
University of St. Thomas (MN)

Stephen Wizner
William O. Douglas Clinical Professor of Law Emeritus
Yale Law School

Lauris Wren
Clinical Professor of Law
Maurice A. Deane School of Law at Hofstra University

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)
Anacasus 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. US Dept. of Justice & Atty Gen. Gonzales, 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. Attorney General of U.S., 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, 607 F.3d 101 (3d Cir. 2010)
Garcia v. Att'y Gen., 665 F.3d 496 (3d Cir. 2011)

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)

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. I.N.S, 952 F.3d 910 (5th Cir. 1992)
Rivas-Martinez v. I.N.S, 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)

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)

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. Immigration & Naturalization Service, 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.33d 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)

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)

Tenth Circuit

Published Cases
Bartesaghi-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. United States AG, 241 F.3d 1320 (11th Cir. 2001)
Sanchez v. United States AG, 392 F.3d 434 (11th Cir. 2004)
Ruiz v. United States AG, 440 F.3d 1247 (11th Cir. 2006)
Zheng v. United States AG, 451 F.3d 1287 (11th Cir. 2006)
Lopez v. United States AG, 504 F.3d 1341 (11th Cir. 2007)
Sanchez Jimenez v. United States AG, 492 F.3d 1223 (11th Cir. 2007)
Ayala v United States AG, 605 F.3d 941 (11th Cir. 2010)
Malu v. United States AG, 764 F.3d 1282 (11th Cir. 2014)
Sama v. United States AG, 887 F.3d 1225 (11th Cir. 2018)

Unpublished Cases

Calderon Salinas v. United States AG, 140 Fed. Appx. 868 (11th Cir. 2005)
Sulaman v. United States AG, 147 Fed. Appx. 872 (11th Cir. 2005)
Rios-Cano v. United States AG, 151 Fed. Appx. 916 (11th Cir. 2005)
Popov v. United States AG, 199 Fed. Appx. 900 (11th Cir. 2006)
Restrepo v. United States AG, 176 Fed. Appx. 17 (11th Cir. 2006)
Longchar v. United States AG, 179 Fed. Appx. 665 (11th Cir. 2006)
Barrios v. United States AG, 196 Fed. Appx. 865 (11th Cir. 2006)
Kurt v. United States AG, 252 Fed. Appx. 295 (11th Cir. 2007)
Barrera Castrillon v. United States AG, 221 Fed. Appx. 863 (11th Cir. 2007)
Soler v. United States AG, 258 Fed. Appx. 295 (11th Cir. 2007)
Njenga v. United States AG, 216 Fed. Appx. 963 (11th Cir. 2007)
Paredes v. United States AG, 219 Fed. Appx. 879 (11th Cir. 2007)
Morehodov v. United States AG, 270 Fed. Appx. 775 (11th Cir. 2008)
Cantave v. United States AG, 295 Fed. Appx. 327 (11th Cir. 2008)
Gomez v. United States AG, 321 Fed. Appx. 834 (11th Cir. 2009)
Zambrano v. United States AG, 329 Fed. Appx. 235 (11th Cir. 2009)
Solaque-Prieto v. United States AG, 310 Fed. Appx. 325 (11th Cir. 2009)
Fernandes de Paula v. United States AG, 380 Fed. Appx. 946 (11th Cir. 2010)
Darmawan v. United States AG, 362 Fed. Appx. 44 (11th Cir. 2010)
Ladnov v. United States AG, 384 Fed. Appx. 867 (11th Cir. 2010)
Wangboje v. United States AG, 438 Fed. Appx. 813 (11th Cir. 2011)
Juan-Esteban v. United States AG, 407 Fed. Appx. 413 (11th Cir. 2011)
Minaylova v. United States AG, 423 Fed. Appx. 855 (11th Cir. 2011)
Euceda v. United States AG, 491 Fed. Appx. 163 (11th Cir. 2012)
Valbuena v. United States AG, 460 Fed. Appx. 906 (11th Cir. 2012)
Lewis v. United States AG, 512 Fed. Appx. 963 (11th Cir. 2013)

Zampaligidi-Jebreel v. United States AG, 539 Fed. Appx. 969 (11th Cir. 2013)
Bhai v. United States AG, 555 Fed. Appx. 854 (11th Cir. 2014)
Hossain v. United States AG, 630 Fed. Appx. 914 (11th Cir. 2015)
Alonzo-Rivera v. United States AG, 649 Fed. Appx. 983 (11th Cir. 2016)
Ossa v. United States AG, 656 Fed. Appx. 455 (11th Cir. 2016)
Jeronimo v. United States AG, 678 Fed. Appx. 796 (11th Cir. 2017)
Kapa v. United States AG, 675 Fed. Appx. 903 (11th Cir. 2017)
Leka v. United States AG, 704 Fed. Appx. 878 (11th Cir. 2017)
Rotaru v. United States AG, 704 Fed. Appx. 875 (11th Cir. 2017)
Acosta v. United States AG, 704 Fed. Appx. 869 (11th Cir. 2017)
Luchina v. United States AG, 687 Fed. Appx. 907 (11th Cir. 2017)
Sumschi v. United States AG, 677 Fed. Appx. 579 (11th Cir. 2017)
Acosta v. United States AG, 727 Fed. Appx. 595 (11th Cir. 2018)
Sontay v. United States AG, 723 Fed. Appx. 707 (11th Cir. 2018)
Lama v. United States AG, 745 Fed. Appx. 330 (11th Cir. 2018)
Cruz v. United States AG, 746 Fed. Appx. 869 (11th Cir. 2018)
Briones v. United States AG, 2018 U.S. App. LEXIS 30196 (11th Cir. 2018)

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) because it contains 6500 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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 it has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in Century Schoolbook 14-point typeface.

Pursuant to Circuit Rule 28(A)(h)(2), I further certify that the brief has been scanned for viruses, and the brief is virus free.

Dated: April 12, 2019

/s/ Amy Pont

Anjum Gupta
Immigrant Rights Clinic
Rutgers Law School
123 Washington Street
Newark, NJ 07102
Tel. (973) 353-2518
Email: anjum.gupta@rutgers.edu

Janet E. Sabel, Attorney-in-Chief
Adriene Holder, Attorney-in-Charge, Civil Practice
Hasan Shafiqullah, Attorney-in-Charge, Imm. Law Unit
Julie Dona, Of Counsel
Amy Pont, Of Counsel
Natalie Maust, Of Counsel (admission pending)
THE LEGAL AID SOCIETY
199 Water Street
New York, New York 10038
Tel: (212) 577-3538
APont@legal-aid.org

Counsel for Amici Curiae

CERTIFICATE OF SERVICE

I hereby certify that on April 12, 2019, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the First 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.

Dated: April 12, 2019

/s/ Amy Pont

Janet E. Sabel, Attorney-in-Chief
Adriene Holder, Attorney-in-Charge, Civil Practice
Hasan Shafiqullah, Attorney-in-Charge, Imm. Law Unit
Julie Dona, Of Counsel
Amy Pont, Of Counsel
Natalie Maust, Of Counsel (admission pending)
THE LEGAL AID SOCIETY
199 Water Street
New York, New York 10038
Tel: (212) 577-3538
APont@legal-aid.org

Counsel for Amici Curiae