
**UNITED STATES DEPARTMENT OF JUSTICE
OFFICE OF THE ATTORNEY GENERAL**

MATTER OF A-B-
Respondent

Referred from:
United States Department of Justice
Executive Office for Immigration Review
Board of Immigration Appeals

BRIEF OF AMICI CURIAE IMMIGRATION LAW PROFESSORS

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INTEREST OF AMICI CURIAE

Amici are 116 immigration and refugee law scholars and clinical professors.¹ We teach immigration law, refugee law, and/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.

SUMMARY OF THE 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 when the state is unwilling or unable to protect the applicant. It is also well established that such harms can constitute persecution with respect to every protected ground under INA §101(a)(42). Any decision by the Attorney General to the contrary would unilaterally overturn decades of precedent on a firmly established principle of law.

ARGUMENT

In referring *Matter of A-B-* to himself, the Attorney General (“AG”) asked amici to submit briefs addressing the following question: “Whether, and under what circumstances, being a victim of private criminal activity constitutes a cognizable ‘particular social group’ for purposes of an application for asylum or withholding of removal.”² However, the question presented conflates two distinct elements of asylum eligibility—the persecution element and the protected ground element.³ Amici also note the ambiguity in the phrases “private criminal activity,”⁴ and “private violence.”⁵ For purposes of this brief, amici interpret the phrases to refer

¹ Appendix – List of Amici Immigration Law Professors and Scholar Signatories.

² *Matter of A-B-*, 27 I. & N. Dec. 227, 227 (AG 2018).

³ We refer the AG to the Brief of Amicus Curiae National Immigrant Justice Center for further explication of this argument.

⁴ *Matter of A-B-*, 27 I. & N. Dec. at 227.

to harms perpetrated by private actors, or, in other words, individuals or groups not officially affiliated with the government.⁶ Accordingly, in this brief, amici will address two interrelated questions: (1) whether harms inflicted by private actors can constitute persecution; and (2) whether harms inflicted by private actors on account of an applicant’s membership in a particular social group can form the basis of an asylum claim. Courts have, without exception, answered both questions in the affirmative.

I. IT IS WELL SETTLED IN THE BOARD OF IMMIGRATION APPEALS, EVERY FEDERAL COURT OF APPEALS, AND THE UNITED STATES SUPREME COURT THAT HARMS INFLICTED BY PRIVATE ACTORS CAN CONSTITUTE PERSECUTION

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 private actors can constitute persecution.⁷ 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.”⁸ Relying on rules of statutory construction and congressional intent, the BIA then “conclude[d] that the pre-Refugee Act construction of ‘persecution’ should be applied to the term as it appears in section 101(a)(42)(A) of the Act.”⁹

⁵ *Matter of A-B-*, 27 I. & N. Dec. 247, 249 (AG 2018). See Respondent’s Opening Brief at 22 for further explication of this argument.

⁶ See DHS Brief on Referral to the AG at 4 n.2. Moreover, amici disagree with any characterization of intimate partner violence (or the other types of harm described in the cases below) as “private violence,” given, as recognized in the cases described below, that these types of harms often would not occur without the societal, even governmental, sanction they enjoy.

⁷ 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).

⁸ *Matter of Acosta*, 19 I. & N. Dec. 211, 222 (BIA 1985).

⁹ *Id.* at 222.

The BIA has recognized various types of harms inflicted by private actors as persecution including, but not limited to, murder,¹⁰ beatings,¹¹ threats,¹² detention,¹³ female genital cutting,¹⁴ and domestic abuse.¹⁵

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.¹⁶ The BIA affirmed the principle that non-state actors that the government is unwilling or unable to control can be persecutors, reasoning that the Ukrainian ultranationalists fostered ethnic hatred through anti-Semitic acts against which the government failed to take action.¹⁷

In *Matter of A-R-C-G-*, the applicant, beginning at age 17, was abused by her husband, who beat her weekly, broke her nose, burned her breast, and raped her.¹⁸ The Immigration Judge (“IJ”) denied relief, and the BIA reversed, holding that she had demonstrated persecution on account of particular social group.¹⁹ The BIA reaffirmed a longstanding principle that harms committed by private actors constitute persecution when the applicant demonstrates that the government was “unwilling or unable to control the ‘private’ actor.”²⁰

In *Matter of S-A-*, the BIA held in favor of the applicant, holding that the physical assaults, imposed isolation, and deprivation of education perpetrated by her own father

¹⁰ 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).

¹¹ See, e.g., *Matter of O-Z- & I-Z-*, 22 I. & N. Dec. 23, 25 (BIA 1998).

¹² See, e.g., *id.* at 25–26.

¹³ See, e.g., *In re H-*, 21 I. & N. Dec. 337, 341 (BIA 1996) (detention as a result of interclan violence).

¹⁴ See, e.g., *In re 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).

¹⁵ See, e.g., *Matter of A-R-C-G-*, 26 I. & N. Dec. 388, 395 (BIA 2014). We 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.

¹⁶ *Matter of O-Z- & I-Z-*, 22 I. & N. Dec. at 24.

¹⁷ *Id.* at 26–27.

¹⁸ *Matter of A-R-C-G-*, 26 I. & N. Dec. at 389.

¹⁹ *Id.* at 389–90.

²⁰ *Id.* at 395.

constituted persecution where Moroccan authorities would have been unable or unwilling to protect her.²¹

In cases of female genital cutting, the BIA has found persecution where a victim's family forces her to undergo the cutting and the government is ineffective at preventing it. In *Matter of Kasinga*, the applicant's aunt and husband would have forced her to undergo genital cutting had she not fled Togo.²² The applicant testified that the government of Togo would have taken no steps to protect her, and the BIA accordingly held that these actions constituted persecution.²³

Even when the BIA has decided against the applicant, it has acknowledged that harms inflicted by private actors can constitute persecution. For example, in *Matter of McMullen*, the BIA stated that "the persecution contemplated under the Act is not limited to the conduct of organized governments, but may, under certain circumstances, be committed by individuals or nongovernmental organizations."²⁴ It recognized that the Provisional Irish Republican Army ("PIRA") was a terrorist organization that the government was unable to control.²⁵ However, it found McMullen barred from asylum because he was himself a member of PIRA and had persecuted others.²⁶

²¹ *Matter of S-A-*, 22 I. & N. Dec. 1328, 1335 (BIA 2000).

²² *See, e.g., In re Kasinga*, 21 I. & N. Dec. 357, 358–59 (BIA 1996).

²³ *Id.* at 359, 368.

²⁴ *Matter of McMullen*, 19 I. & N. Dec. at 96.

²⁵ *Id.* at 94.

²⁶ *Id.* at 99.

B. Federal Courts of Appeals

Every single federal court of appeals has held that harms inflicted by private actors can qualify as persecution.²⁷ Contrary to the AG’s suggestion, the courts of appeals have not “questioned whether victims of private violence may qualify for asylum.”²⁸ Quite the opposite; even when denying relief, courts acknowledge that harms inflicted by private actors can constitute persecution. These decisions demonstrate that evaluation of such claims requires an element by element, fact specific inquiry. The relevant case law from each circuit is set forth below.

i. First Circuit

The First Circuit Court of Appeals has stated that persecution “‘always implies some connection to government action or inaction,’ whether in the form of direct government action, ‘government-supported action, or government’s unwillingness or inability to control *private conduct*.’”²⁹ In *Kadri v. Mukasey*, for example, the IJ determined that the treatment the applicant had experienced in his workplace on account of his sexual orientation constituted persecution.³⁰ The court remanded the BIA’s denial of asylum and reiterated the IJ’s initial reliance on the established principle that harms committed by private actors can constitute persecution when there is a “showing that the persecution is due to the government’s unwillingness or inability to

²⁷ It is worth noting that the courts of appeals have found torture committed by private actors to be sufficient for Convention Against Torture (“CAT”) purposes, so long as the government acquiesces to the torture. Given that the standard for state action under CAT is even higher than for asylum and withholding, this finding is significant. *See, e.g., De La Rosa v. Sessions*, 690 F. App’x 20, 23 (2d Cir. 2017); *Wanjiru v. Holder*, 705 F.3d 258, 266–67 (7th Cir. 2013); *Zelaya v. Holder*, 668 F.3d 159, 168 (4th Cir. 2012); *Pieschacon-Villegas v. Att’y Gen. of the U.S.*, 671 F.3d 303, 311 (3d Cir. 2011); *Del Pilar Delgado v. Mukasey*, 508 F.3d 702, 708–09 (2d Cir. 2007).

²⁸ *Matter of A-B-*, 27 I. & N. Dec. 247, 249 (AG 2018).

²⁹ *Aldana-Ramos v. Holder*, 757 F.3d 9, 17 (1st Cir. 2014) (emphasis added) (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); *Nikijuluw v. Gonzales*, 427 F.3d 115, 120–21 (1st Cir. 2005).

³⁰ *Kadri v. Mukasey*, 543 F.3d 16, 19 (1st Cir. 2008).

control the conduct of private actors.”³¹ Numerous unpublished decisions from this circuit establish the same.³²

When the court has ruled against the applicant, it has nonetheless acknowledged that harms inflicted by private actors can constitute persecution. In *Guaman-Loja v. Holder*, for example, the court set forth the private actors rule, but found that the petitioner failed to show government inability or unwillingness to control assaults by members of an indigenous tribe.³³

Similarly, in recent domestic violence cases in which the court has ruled against the applicant, the court has nevertheless acknowledged the private actors standard. For example, in *Vega-Ayala v. Lynch*, the court found that, unlike *A-R-C-G-*, Vega-Ayala had not shown that her particular social group was immutable.³⁴ It reasoned, “Vega-Ayala’s facts are a far cry from the circumstances in *A-R-C-G-*. Vega-Ayala could have left [the abuser]. She never lived with him. She saw him only twice a week and continued to attend a university. . . . Their relationship spanned only eighteen months, and he was incarcerated for twelve of those months.”³⁵ Similarly, in *Cardona v. Sessions*, the court distinguished *A-R-C-G-* and agreed with the BIA that the applicant had not shown she was a member of her proffered social group because she was never in a “domestic relationship” with her abuser.³⁶ As the Department of Homeland Security (“DHS”) concedes, the court in these cases did not “question[] the underlying validity of *A-R-C-G-*.”³⁷

³¹ *Kadri*, 543 F.3d at 20 (citing *Jorgji v. Mukasey*, 514 F.3d 53, 57 (1st Cir. 2008)); see *Orelien v. Gonzales*, 467 F.3d 67, 72 (1st Cir. 2006).

³² See, e.g., *Rodriguez v. Lynch*, 654 F. App’x 498, 500 (1st Cir. 2016); *Mawa v. Holder*, 569 F. App’x 2, 4 (1st Cir. 2014); *Barzola Becerra v. Holder*, 323 F. App’x 1, 2 (1st Cir. 2009); *Kamuh v. Mukasey*, 280 F. App’x 7, 10 (1st Cir. 2008).

³³ *Guaman-Loja v. Holder*, 707 F.3d 119, 123–24 (1st Cir. 2013).

³⁴ *Vega-Ayala v. Lynch*, 833 F.3d 34, 39 (1st Cir. 2016).

³⁵ *Id.* at 39.

³⁶ *Cardona v. Sessions*, 848 F.3d 519, 523 (1st Cir. 2017).

³⁷ DHS Brief on Referral to the AG at 18.

ii. Second Circuit

The Second Circuit Court of Appeals also has consistently and unambiguously held that harms inflicted by private actors may constitute persecution.³⁸ For example, in *Pavlova v. INS*, the court found the IJ erroneously denied asylum based on the reasoning that the applicant did not suffer persecution by state actors, but rather by private Baptist groups.³⁹ 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.⁴⁰ 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."⁴¹

The court has recognized persecution committed at the hands of various non-state actors, including, *inter alia*, domestic abusers,⁴² rebel guerilla groups,⁴³ religious groups,⁴⁴ tribe members,⁴⁵ members of other ethnic groups,⁴⁶ anti-Semites,⁴⁷ and traffickers.⁴⁸ Further, it has stated that a government's inability or unwillingness to control private persecutors can be corroborated by a showing of authorities' failure to respond,⁴⁹ lack of resources,⁵⁰ corruption or impunity,⁵¹ or societal pervasiveness of the persecution.⁵² Several unpublished decisions also demonstrate the court's longstanding recognition of the private actors standard.⁵³

³⁸ 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).

³⁹ *Pavlova v. INS*, 441 F.3d 82, 91–92 (2d Cir. 2006).

⁴⁰ *Ivanishvili v. U.S. Dep't. of Just.*, 433 F.3d 332, 342–43 (2d Cir. 2006).

⁴¹ *Id.* at 342.

⁴² See, e.g., *Bori v. INS*, 190 F. App'x 17, 19 (2d Cir. 2006).

⁴³ See, e.g., *Del Pilar Delgado v. Mukasey*, 508 F.3d 702, 707 (2d Cir. 2007).

⁴⁴ See, e.g., *Rizal v. Gonzales*, 442 F.3d at 92.

⁴⁵ See, e.g., *Abankwah v. INS*, 185 F.3d 18, 26 (2d Cir. 1999).

⁴⁶ See, e.g., *Aliyev v. Mukasey*, 549 F.3d 111, 118 (2d Cir. 2008).

⁴⁷ See, e.g., *Poradisova v. Gonzales*, 420 F.3d 70, 81 (2d Cir. 2005).

⁴⁸ See, e.g., *Paloka v. Holder*, 762 F.3d 191, 198–99 (2d Cir. 2014).

⁴⁹ See, e.g., *Indradjaja v. Holder*, 737 F.3d 212, 216 (2d Cir. 2013).

⁵⁰ See, e.g., *Sotelo-Aquiye v. Slattery*, 17 F.3d 33, 36 (2d Cir. 1994).

⁵¹ See, e.g., *Poradisova*, 420 F.3d at 81.

iii. Third Circuit

The Third Circuit Court of Appeals has consistently recognized persecution as action “that is committed by the government or *by forces the government is unable or unwilling to control.*”⁵⁴ For example, in *Fiadjoe v. AG*, the court found that the sexual abuse the applicant suffered at the hands of her father constituted persecution because the Ghanaian government was unable and unwilling to control it.⁵⁵ In *Garcia v. AG*, the court found persecution where the Guatemalan government was unable to protect the applicant, a criminal witness who testified against violent gang members.⁵⁶ Moreover, numerous unpublished decisions from the circuit also demonstrate that it is well established that harms inflicted by private actors can constitute persecution.⁵⁷

Even where the court has ruled against the asylum applicant, it nonetheless recognized that harms inflicted by private actors can constitute persecution.⁵⁸ In neither of these cases did

⁵² See, e.g., *Abankwah*, 185 F.3d at 25–26.

⁵³ See, e.g., *Singh v. Sessions*, 706 F. App’x 732, 734 (2d Cir. 2017); *Sutiono v. Lynch*, 611 F. App’x 738, 740 (2d Cir. 2015); *Farook v. Holder*, 407 F. App’x 545, 547 (2d Cir. 2011); *Cortez v. Holder*, 363 F. App’x 829, 830–31 (2d Cir. 2010); *Gjicali v. Mukasey*, 260 F. App’x 360, 362 (2d Cir. 2008); *Camara v. Dep’t. of Homeland Sec.*, 218 F. App’x 61, 63 (2d Cir. 2007); *Hussain v. Gonzales*, 228 F. App’x 101, 102–03 (2d Cir. 2007); *Jasaraj-Hot v. Gonzales*, 217 F. App’x 33, 35 (2d Cir. 2007); *Mikhailenko v. U.S. Citizenship & Immigration Servs.*, 228 F. App’x 41, 43 (2d Cir. 2007).

⁵⁴ *Fiadjoe v. Att’y Gen.*, 411 F.3d 135, 160 (3d Cir. 2005) (emphasis added). 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).

⁵⁵ *Fiadjoe*, 411 F.3d at 161–63.

⁵⁶ *Garcia*, 665 F.3d at 503.

⁵⁷ See, e.g., *Rehman v. Att’y Gen. of the U.S.*, 178 F. App’x 126, 129 (3d Cir. 2006); *Bera v. Att’y Gen. of the U.S.*, 555 F. App’x 129, 132 (3d Cir. 2014); *Ferreira v. Att’y Gen. of the U.S.*, 513 F. App’x 184, 188 (3d Cir. 2013); *Pitel v. Att’y Gen. of the U.S.*, 528 F. App’x 172, 174 (3d Cir. 2013); *Cardozo v. Att’y Gen. of the U.S.*, 505 F. App’x 135, 138 (3d Cir. 2012); *Zhuo v. Att’y Gen. of the U.S.*, 502 F. App’x 176, 179–80 (3d Cir. 2012); *Abazaj v. Att’y Gen. of the U.S.*, 443 F. App’x 725, 729 (3d Cir. 2011); *Lopez-Perez v. Att’y Gen. of the U.S.*, 447 F. App’x 370, 375 (3d Cir. 2011); *Paprskarz v. Att’y Gen. of the U.S.*, 360 F. App’x 283, 286 (3d Cir. 2010); *Ngo v. Att’y Gen. of the U.S.*, 350 F. App’x 714, 717–18 (3d Cir. 2009); *Cheng v. Att’y Gen. of the U.S.*, 312 F. App’x 460, 463 (3d Cir. 2008); *Setiawan v. Att’y Gen. of the U.S.*, 237 F. App’x 728, 731 (3d Cir. 2007); *Soesilo v. Att’y Gen. of the U.S.*, 239 F. App’x 703, 704 (3d Cir. 2007); *Suherwanto v. Att’y Gen. of the U.S.*, 230 F. App’x 211, 215 (3d Cir. 2007).

⁵⁸ See, e.g., *Ndayshimiye v. Att’y Gen.*, 557 F.3d 124, 132 (3d Cir. 2009) (finding that abuse applicant suffered from his aunt was the product of a land dispute and not on account of a protected ground); *Chen v. Gonzales*, 434 F.3d 212, 221–22 (3d Cir. 2005).

the court rule against the applicant on the basis that harms inflicted by private actors do not constitute persecution.⁵⁹

iv. Fourth Circuit

The Fourth Circuit Court of Appeals has long held that harms inflicted by private actors can constitute persecution.⁶⁰ In *Crespin-Valladares v. Holder*, for example, the court remanded the case because the BIA erred in not considering the correct social group of family members of witnesses to a crime and not considering the IJ’s finding that “attempts by the Salvadoran government to control gang violence have proved futile.”⁶¹ In *Hernandez-Avalos v. Lynch*, the court concluded that the Mara 18 gang persecuted a mother based on family ties.⁶² The court found that a human rights report corroborating corruption within the Salvadoran judicial system showed that the Salvadoran government was unwilling or unable to protect the mother from the Mara 18.⁶³ In *Cruz v. Sessions*, drug traffickers targeted the applicant when she inquired about her husband’s whereabouts.⁶⁴ The court held that her relationship with her husband was a central reason for the persecution at the hands of non-state actors.⁶⁵

Unpublished cases in the Fourth Circuit also show that it is well established in the circuit that harms inflicted by private actors can constitute persecution.⁶⁶ In fact, the court’s decision not to publish these cases demonstrates that this proposition is well established.

⁵⁹ *Ndayshimiye*, 557 F.3d at 133; *Chen*, 434 F.3d at 221–22.

⁶⁰ *See, e.g., Salgado-Sosa v. Sessions*, 882 F.3d 451, 460 (4th Cir. 2018); *Cruz v. Sessions*, 853 F.3d 122, 124–25 (4th Cir. 2017); *Zavaleta-Policiano v. Sessions*, 873 F.3d 241, 246 (4th Cir. 2017); *Hernandez-Avalos v. Lynch*, 784 F.3d 944, 949 (4th Cir. 2015); *Cordova v. Holder*, 759 F.3d 332, 339–40 (4th Cir. 2014); *Crespin-Valladares v. Holder*, 632 F.3d 117, 128 (4th Cir. 2011).

⁶¹ *Crespin-Valladares*, 632 F.3d at 128.

⁶² *Hernandez-Avalos*, 784 F.3d at 949–50.

⁶³ *Id.* at 952–53.

⁶⁴ *Cruz*, 853 F.3d at 125.

⁶⁵ *Id.* at 129.

⁶⁶ *See, e.g., Villatoro v. Sessions*, 680 F. App’x 212, 220–22 (4th Cir. 2017) (granting petition for review where applicant had a well-founded fear of persecution from gang members because of her relationship with her father and brother); *Mazzi v. Lynch*, 662 F. App’x 227, 234, 236 (4th Cir. 2016) (granting petition for review because IJ erred

Fourth Circuit cases in which the court decided against the applicant do not lead to a different conclusion.⁶⁷ In *Velasquez v. Sessions*, despite denying the petition, the court explicitly recognized that harms perpetrated by “an organization that the Honduran government ‘is unable or unwilling to control’” could constitute persecution.⁶⁸ It denied relief not because of a rejection of the private actors standard, but because the applicant had not shown that the harm she feared would occur on account of her membership in a particular social group, namely her nuclear family.⁶⁹ Instead, the court found that the reason for the feared harm was a dispute over the custody of a child.⁷⁰ Accordingly, the court denied relief based on a finding that the applicant had failed to prove nexus to a protected ground, and not because of any rule change on the private actors issue. Indeed, the DHS concedes that “in *Velasquez*, the Fourth Circuit did not overrule or even criticize *A-R-C-G*.”⁷¹

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*.”⁷² 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

in only considering the fact that government prohibited female genital cutting without looking at defiance of those laws); *Banegas-Rivera v. Lynch*, 664 F. App'x 296, 297 (4th Cir. 2016); *Diaz v. U.S. INS*, No. 92-2167, 1993 U.S. App. LEXIS 29530, at *6–7 (4th Cir. Nov. 15, 1993).

⁶⁷ See, e.g., *Mulyani v. Holder*, 771 F.3d 190, 200 (4th Cir. 2014) (acknowledging the private actors standard, but finding that the standard was not met because the applicant did not attempt to go to the police during the four incidents in which she was attacked and noting that the government had successfully prosecuted perpetrators of religiously motivated violence).

⁶⁸ *Velasquez v. Sessions*, 866 F.3d 188, 194 (4th Cir. 2017).

⁶⁹ *Velasquez*, 866 F.3d at 196.

⁷⁰ *Id.* at 195–96.

⁷¹ DHS Brief on Referral to the AG at 20.

⁷² *Tesfamichael v. Gonzalez*, 469 F.3d 109, 113 (5th Cir. 2006) (emphasis added). See also *Hernandez-De La Cruz v. Lynch*, 819 F.3d 784, 785 (5th Cir. 2016); *Ramirez-Mejia v. Lynch*, 794 F.3d 485, 488, 494 (5th Cir. 2015); *Orellana-Monson v. Holder*, 685 F.3d 511, 518 (5th Cir. 2012); *Tamara-Gomez v. Gonzales*, 447 F.3d 343, 347 (5th Cir. 2006); *Eduard v. Ashcroft*, 379 F.3d 182, 187 (5th Cir. 2004); *Rivas-Martinez v. INS*, 997 F.2d 1143, 1148 (5th Cir. 1993); *Adebisi v. INS*, 952 F.2d 910, 914 (5th Cir. 1992).

government cannot control them.”⁷³ Additionally, in *Rivas-Martinez v. INS*, the court held in favor of an applicant who feared persecution at the hands of guerillas.⁷⁴

Unpublished cases in the Fifth Circuit further demonstrate that it is well settled that harms inflicted by private actors can constitute persecution.⁷⁵

Even when denying relief, the court has explicitly recognized that harms inflicted by private actors can constitute persecution.⁷⁶ For example, in *Adebisi v. INS*, the applicant feared persecution at the hands of his tribe members but never sought police protection “because of his fear of the Esubete elders and their voodoo powers”⁷⁷ In denying the petition, 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.’”⁷⁸

vi. Sixth Circuit

The Sixth Circuit Court of Appeals has consistently held that harms inflicted by private actors can constitute persecution.⁷⁹ For example, in *Kamar v. Sessions*, the court found that the record supported the applicant’s assertion that she would be persecuted, in the form of an honor killing, by her cousins because she “shamed” her family by divorcing her husband and conceiving a child while unmarried.⁸⁰ In *Marouf v. Lynch*, the applicants, who were Christian, were repeatedly attacked by Muslim individuals.⁸¹ The court held that a violent attack on the

⁷³ *Eduard*, 379 F.3d at 190.

⁷⁴ *Rivas-Martinez*, 997 F.2d at 1145.

⁷⁵ See, e.g., *Rawal v. Holder*, 476 F. App’x 768, 770 (5th Cir. 2012); *Aligwekwe v. Holder*, 345 F. App’x 915, 921 (5th Cir. 2009); *Garcia-Garcia v. Mukasey*, 294 F. App’x 827, 829 (5th Cir. 2008); *Venturini v. Mukasey*, 272 F. App’x 397, 402 (5th Cir. 2008); *Gomez v. Gonzales*, 163 F. App’x 268, 272 (5th Cir. 2006); *Manjee v. Holder*, 544 F. App’x 571, 575 (5th Cir. 2006).

⁷⁶ See, e.g., *Tesfamichael*, 469 F.3d at 113; *Adebisi*, 952 F.2d at 914.

⁷⁷ *Adebisi*, 952 F.2d at 914.

⁷⁸ *Id.* at 914.

⁷⁹ See, e.g., *Trujillo Diaz v. Sessions*, 880 F.3d 244, 253 (6th Cir. 2018); *Kamar v. Sessions*, 875 F.3d 811, 818 (6th Cir. 2017); *Marouf v. Lynch*, 811 F.3d 174, 189 (6th Cir. 2016).

⁸⁰ *Kamar*, 875 F.3d at 819.

⁸¹ *Marouf*, 811 F.3d at 178.

basis of religion amounts to past persecution, even if perpetrated by civilians.⁸² The court noted that a State Department report showed that the Palestinian Authority is unable or unwilling to control the Muslim persecutors.⁸³

The court also has recognized the private actors standard in several unpublished decisions.⁸⁴

Even when denying relief, the court has explicitly recognized the private actors standard. In both *Bonilla-Morales v. Holder* and *Khalili v. Holder*, the court defined persecution as “the infliction of harm or suffering by the government, or persons the government is unwilling or unable to control”⁸⁵ Based on this standard, the court found that the applicant in *Bonilla-Morales* did not present sufficient evidence to show the Honduran government was unwilling or unable to control the MS-13 gang.⁸⁶ The court in *Khalili* found that reports showed Jordanian authorities prosecuted honor killing crimes and offered potential victims protective custody.⁸⁷

When the court has denied relief in the domestic violence context, the court also has recognized the private actors standard. For example, in *Marikasi v. Lynch*, the court acknowledged *A-R-C-G-*; however, it denied the petition because it found that substantial evidence supported the IJ’s adverse credibility determination, the applicant had not provided sufficient corroborating evidence, and the applicant (unlike *A-R-C-G-*) had failed to show that

⁸² *Id.* at 189.

⁸³ *Id.* at 189.

⁸⁴ See, e.g., *Alakhfash v. Holder*, 606 F. App’x 291, 299 (6th Cir. 2015) (granting petition for review because applicant was persecuted by terrorist groups); *Abdramane v. Holder*, 569 F. App’x 430, 436 (6th Cir. 2014); *Anyakudo v. Holder*, 375 F. App’x 559, 564 (6th Cir. 2010); *El Ghorbi v. Mukasey*, 281 F. App’x 514, 517 (6th Cir. 2008); *Berishaj v. Gonzales*, 238 F. App’x 57, 61 (6th Cir. 2007); *Keita v. Gonzales*, 175 F. App’x 711, 713 (6th Cir. 2006).

⁸⁵ *Bonilla-Morales v. Holder*, 607 F.3d 1132, 1136 (6th Cir. 2010); *Khalili v. Holder*, 557 F.3d 429, 436 (6th Cir. 2009).

⁸⁶ *Bonilla-Morales*, 607 F.3d at 1136.

⁸⁷ *Khalili*, 557 F.3d at 436.

her marriage to the abuser was immutable.⁸⁸ It cited the “substantial period of time” that had passed since she had any contact with her abuser, “her ability to freely move through the country and avoid her husband,” and her failure “to substantiate any religious, cultural, or legal constraints that prevented her from separating from the relationship.”⁸⁹ Thus, as the DHS concedes, the court distinguished *A-R-C-G-* and did not call into question its validity.⁹⁰

vii. Seventh Circuit

The Seventh Circuit Court of Appeals also has repeatedly stated that harms inflicted by private actors can constitute persecution.⁹¹ For example, in *Hor v. Gonzalez*, 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.”⁹² In *Sarhan v. Holder*, a false rumor circulated that the applicant committed adultery, and a family member vowed to kill her in order to “restore the family’s honor.”⁹³ The court held that the record compelled the conclusion that the government was unable or unwilling to protect the applicant.⁹⁴

Several unpublished cases in the circuit also demonstrate the court’s longstanding recognition of the private actors standard.⁹⁵

⁸⁸ *Marikasi v. Lynch*, 840 F.3d 281, 288–91 (6th Cir. 2016).

⁸⁹ *Id.* at 91.

⁹⁰ DHS Brief on Referral to the AG at 18.

⁹¹ *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); *Vahora v. Holder*, 707 F.3d 904, 908 (7th Cir. 2013); *Gatimi v. Holder*, 578 F.3d 611, 616–17 (7th Cir. 2009); *Kholyavskiy v. Mukasey*, 540 F.3d 555, 575 (7th Cir. 2008); *Jiang v. Gonzalez*, 485 F.3d 992, 997 (7th Cir. 2007); *Tariq v. Keisler*, 505 F.3d 650, 656 (7th Cir. 2007); *Chakir v. Gonzalez*, 466 F.3d 563, 569–70 (7th Cir. 2006); *Hor v. Gonzalez*, 421 F.3d 497, 502 (7th Cir. 2005); *Mitreva v. Gonzalez*, 417 F.3d 761, 764 (7th Cir. 2005); *Guchshenkov v. Ashcroft*, 366 F.3d 554, 559 (7th Cir. 2004).

⁹² *Hor*, 421 F.3d at 501.

⁹³ *Sarhan v. Holder*, 658 F.3d 649, 651 (7th Cir. 2011).

⁹⁴ *Id.* at 657.

⁹⁵ *See, e.g., Abdelghani v. Holder*, 309 F. App’x 19, 22 (7th Cir. 2009); *Turangan v. Mukasey*, 307 F. App’x 11, 14–15 (7th Cir. 2009); *Rupey v. Mukasey*, 304 F. App’x 453, 455–56 (7th Cir. 2008); *Lopez-Monterroso v. Gonzales*, 236 F. App’x 207, 211 (7th Cir. 2007); *Varghese v. Gonzalez*, 219 F. App’x 546, 550 (7th Cir. 2007); *Yaylalicegi v.*

Even when denying the petition for review, the court recognized that persecution can be inflicted by private actors. For example, in *Kaharudin v. Gonzales*, the court recognized that the applicant must prove that the government is unable or unwilling to control the persecutor, but denied the applicant's petition because the record did not demonstrate that the Indonesian government was unable or unwilling to protect ethnic Chinese Christians against acts of violence perpetrated by native Indonesians.⁹⁶

viii. Eighth Circuit

It is also well established in the Eighth Circuit that harms inflicted by private actors can constitute persecution. For instance, in *Ngengwe v. Mukasey*, the court remanded the case because the IJ's finding that the government could protect the applicant from violence at the hands of her family members was not supported by substantial evidence.⁹⁷ Similarly, in *Nabulwala v. Gonzalez*, the court remanded the case to determine whether the government was unable or unwilling to control applicant's family, who physically abused her and forced her to have sex with a stranger, in order to change her sexual orientation.⁹⁸

Unpublished decisions from the circuit also demonstrate the court's recognition of the private actors standard.⁹⁹

Moreover, the court acknowledges that harms inflicted by private actors can constitute persecution even when holding against applicant. For instance, in *Fuentes-Erazo v. Sessions*, the court recognized that harm committed by a former partner could be grounds for asylum on

Gonzalez, 175 F. App'x 33, 37 (7th Cir. 2006); *Esquivel v. Ashcroft*, 105 F. App'x 99, 101 (7th Cir. 2004); *Lleshanaku v. Ashcroft*, 100 F. App'x 546, 549 (7th Cir. 2004).

⁹⁶ *Kaharudin v. Gonzales*, 500 F.3d 619, 623–25 (7th Cir. 2007).

⁹⁷ *Ngengwe v. Mukasey*, 543 F.3d 1029, 1036 (8th Cir. 2008). *See also Gathungu v. Holder*, 725 F.3d 900, 908–09 (8th Cir. 2013) (finding many reports that suggest Kenyan government was complicit in various attacks by Mungiki members and that Kenyan police force is widely corrupt).

⁹⁸ *Nabulwala v. Gonzalez*, 481 F.3d 1115, 1116–17, 1119 (8th Cir. 2007).

⁹⁹ *See, e.g., De La Cruz v. Sessions*, 697 F. App'x 887, 887–88 (8th Cir. 2017); *Santacruz v. Lynch*, 666 F. App'x 576, 578 (8th Cir. 2016); *Vasquez-Solorzano v. Holder*, 570 F. App'x 628, 628–29 (8th Cir. 2014).

account of membership in a particular social group.¹⁰⁰ However, the court found that the applicant was not a member of the social group “Honduran women in domestic relationships who are unable to leave their relationships,” because “she was, in fact, able to leave her relationship with [the abuser].”¹⁰¹ The court noted that she “resided in Honduras safely for approximately five years, during which time she traveled and worked in several different parts of Honduras, entered into a relationship with another man, and gave birth to a second child—all without having any contact whatsoever with [the abuser].”¹⁰² The court accordingly distinguished *A-R-C-G-* and, as the DHS concedes, did not “question[] the underlying validity of *A-R-C-G-*.”¹⁰³ In *Rodriguez-Mercado v. Lynch*, the court held against the applicant in a domestic violence case due to lack of credibility and not because the persecutor was a private individual.¹⁰⁴ Finally, in *Guillen-Hernandez v. Holder*, the court held against the applicant because the extensive police investigation, trial, and conviction of the persecutors amply supported the finding that the Salvadoran government was willing to control the private individuals who harmed the applicant.¹⁰⁵

ix. Ninth Circuit

The Ninth Circuit Court of Appeals also has consistently held that “[a]sylum is not restricted to petitioners who have suffered persecution at the hands of state actors.”¹⁰⁶ In

¹⁰⁰ *Fuentes-Erao v. Sessions*, 848 F.3d 847, 852 (8th Cir. 2017).

¹⁰¹ *Id.* at 853.

¹⁰² *Id.* at 853.

¹⁰³ DHS Brief on Referral to the AG at 18.

¹⁰⁴ *Rodriguez-Mercado v. Lynch*, 809 F.3d 415, 417, 420 (8th Cir. 2015).

¹⁰⁵ *Guillen-Hernandez v. Holder*, 592 F.3d 883, 887 (8th Cir. 2010). *See also Salman v. Holder*, 687 F.3d 991, 995 (8th Cir. 2012) (finding against applicant because Israeli court convicted persecutors of murder and sentenced them to imprisonment).

¹⁰⁶ *Smolniakova v. Gonzales*, 422 F.3d 1037, 1048 (9th Cir. 2005) (citing *Singh v. INS*, 134 F.3d 962, 967 n.9 (9th Cir. 1998)). *See also Bringas-Rodriguez v. Sessions*, 850 F.3d 1051, 1062–63 (9th Cir. 2017); *Doe v. Holder*, 736 F.3d 871, 877–78 (9th Cir. 2013); *Henriquez-Rivas v. Holder*, 707 F.3d 1081, 1083 (9th Cir. 2013); *Madrigal v. Holder*, 716 F.3d 499, 503 (9th Cir. 2013); *Karapetyan v. Mukasey*, 543 F.3d 1118, 1128 (9th Cir. 2008); *Nehad v. Mukasey*, 535 F.3d 962, 972 (9th Cir. 2008); *Ahmed v. Keisler*, 504 F.3d 1183, 1191 (9th Cir. 2007); *Ornelas-*

Bringas-Rodriguez v. Sessions, the court determined that the applicant, whose family members and neighbors sexually abused him because of his sexual orientation, sufficiently established that the Mexican government was unable or unwilling to control his persecutors and that it would have been futile for him to report the abuse.¹⁰⁷ The court came to the same conclusion in *Mohammed v. Gonzales*, in which the applicant feared being forcibly subjected to genital cutting if returned to Somalia.¹⁰⁸ The court noted that she “would almost certainly be able to demonstrate that the government of Somalia was unable or unwilling to control her persecution.”¹⁰⁹ Unpublished cases from the Ninth Circuit establish the same.¹¹⁰

Even when the court held against the applicant, it nevertheless acknowledged that harms inflicted by private actors can constitute persecution. For instance, in *Rahimzadeh v. Holder*, the court stated that persecution may be “committed by the government or forces the government is either unable or unwilling to control.”¹¹¹ However, relying on the fact that the applicant never reported the abuse and on information contained in the State Department report, the court held that the applicant had failed to show that the Dutch authorities would be unwilling or unable to

Chavez v. Gonzales, 458 F.3d 1052, 1056 (9th Cir. 2006); *Castro-Perez v. Gonzales*, 409 F.3d 1069, 1072 (9th Cir. 2005); *Krotova v. Gonzales*, 416 F.3d 1080, 1087 (9th Cir. 2005); *Faruk v. Ashcroft*, 378 F.3d 940, 944 (9th Cir. 2004); *Hoque v. Ashcroft*, 367 F.3d 1190, 1198 (9th Cir. 2004); *Malty v. Ashcroft*, 381 F.3d 942, 947 (9th Cir. 2004); *Mashiri v. Ashcroft*, 383 F.3d 1112, 1121 (9th Cir. 2004); *Melkonian v. Ashcroft*, 320 F.3d 1061, 1065 (9th Cir. 2003); *De La Rodas-Mendoza v. INS*, 246 F.3d 1237, 1239–40 (9th Cir. 2001); *Avetova-Elisseva v. INS*, 213 F.3d 1192, 1196 (9th Cir. 2000); *Mgoian v. INS*, 184 F.3d 1029, 1036 (9th Cir. 1999).

¹⁰⁷ *Bringas-Rodriguez*, 850 F.3d at 1056, 1073–75. See also *Faruk*, 378 F.3d at 944.

¹⁰⁸ *Mohammed v. Gonzales*, 400 F.3d 785, 789 (9th Cir. 2005).

¹⁰⁹ *Id.* at 798.

¹¹⁰ See, e.g., *Garces v. Mukasey*, 312 F. App'x 12, 17 (9th Cir. 2009) (finding persecution when government could not control the guerrilla group persecuting the applicants); *Ebeid v. Mukasey*, 274 F. App'x 508, 510–11 (9th Cir. 2008) (finding that government was unable or unwilling to control persecution when authorities dissuaded applicants from filing reports of their mistreatment); *Sablina v. Gonzales*, 217 F. App'x 671, 672 (9th Cir. 2007) (finding persecution when applicant was beaten and threatened by private individuals police were unwilling or unable to control); *Papazyan v. Gonzales*, 179 F. App'x 428, 431–32 (9th Cir. 2006) (finding persecution when government was unable or unwilling to help applicant after suffering from physical attacks from Armenian ultranationalists); *Ganut v. Ashcroft*, 85 F. App'x 38, 43–44 (9th Cir. 2003) (finding persecution when applicant was attacked by forces government was unable to control); *Velasquez v. Ashcroft*, 81 F. App'x 673, 676 (9th Cir. 2003) (holding that BIA erred in failing to consider whether applicant's beatings were from private actors government was unable or unwilling to control).

¹¹¹ *Rahimzadeh v. Holder*, 613 F.3d 916, 920 (9th Cir. 2010).

protect him from extremists.¹¹² In *Sangha v. INS*, the court determined that a terrorist group's actions constituted persecution because the government was unable to control the group.¹¹³ However, the court ultimately held against the applicant because he failed to prove that his persecution was motivated by a protected ground.¹¹⁴

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.”¹¹⁵ In *de la Llana-Castellon v. INS*, the court found that the BIA erred in failing to consider whether the applicant's persecutors, members of an opposition political party, were forces that the government was unable or unwilling to control.¹¹⁶ Similarly, in *Niang v. Gonzales*, the court determined that the applicant, who was forced to undergo genital cutting by her own family, would be eligible for asylum if, on remand, the BIA determined that the government was unwilling or unable to control her persecutors.¹¹⁷

The court also has issued several unpublished decisions recognizing the private actors standard.¹¹⁸

Furthermore, the court has upheld the principle that harms inflicted by private actors can constitute persecution even when it held against the applicant. For instance, in *Batalova v. Ashcroft*, the court acknowledged that harm from private individuals could constitute persecution

¹¹² *Id.* at 920.

¹¹³ *Sangha v. INS*, 103 F.3d 1482, 1487 (9th Cir. 1997).

¹¹⁴ *Id.* at 1491.

¹¹⁵ *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).

¹¹⁶ *de la Llana-Castellon*, 16 F.3d at 1097.

¹¹⁷ *Niang v. Gonzales*, 422 F.3d 1187, 1191–92, 1201–02 (10th Cir. 2005).

¹¹⁸ *See, e.g., Sagala v. Mukasey*, 295 F. App'x 932, 936 (10th Cir. 2008); *Gichema v. Gonzales*, 139 F. App'x 90, 94 (10th Cir. 2005); *Sauveur v. Ashcroft*, 108 F. App'x 557, 559 (10th Cir. 2004); *Nasir v. INS*, 30 F. App'x 812, 814 (10th Cir. 2002).

if the government made no attempts to control those individuals.¹¹⁹ However, because the court upheld the IJ’s adverse credibility finding, it declined to address whether the government was unable or unwilling to control the private persecutors.¹²⁰

xi. Eleventh Circuit

Finally, it is well established in the Eleventh Circuit that harms inflicted by private actors can constitute persecution. For instance, in *Lopez v. AG*, 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.”¹²¹ The court remanded the decision because the BIA and IJ failed to address this point.¹²²

Several unpublished decisions from the circuit have also acknowledged the private actors standard.¹²³

Moreover, the court acknowledges that harms inflicted by private actors can constitute persecution, even when holding against the applicant. For instance, in *Ruiz v. AG*, the applicant claimed he feared persecution at the hands of the Revolutionary Armed Forces of Colombia (FARC) in Colombia.¹²⁴ Despite denying the petition for review based on an adverse credibility finding, the court explicitly stated, “[t]he statutes governing asylum and withholding of removal

¹¹⁹ *Batalova v. Ashcroft*, 355 F.3d 1246, 1253 (10th Cir. 2004).

¹²⁰ *Id.* at 1253, 1255.

¹²¹ *Lopez v. U.S. Att’y Gen.*, 504 F.3d 1341, 1345 (11th Cir. 2007).

¹²² *Id.* at 1345.

¹²³ See, e.g., *Alonzo-Rivera v. U.S. Att’y Gen.*, 649 F. App’x 983, 991–92 (11th Cir. 2016) (granting petition for review because evidence showed that Honduran government was ineffective at addressing domestic violence); *Morehodov v. U.S. Att’y Gen.*, 270 F. App’x 775, 779–81 (11th Cir. 2008) (stating that persecution can come from actors that government is unable or unwilling to control and remanding); *Jeronimo v. U.S. Att’y Gen.*, 678 F. App’x 796, 800–02 (11th Cir. 2017); *Kapa v. U.S. Att’y Gen.*, 675 F. App’x 903, 906–07 (11th Cir. 2017); *Hossain v. U.S. Att’y Gen.*, 630 F. App’x 914, 916–17 (11th Cir. 2015); *Lewis v. U.S. Att’y Gen.*, 512 F. App’x 963, 968 (11th Cir. 2013).

¹²⁴ *Ruiz v. U.S. Att’y Gen.*, 440 F.3d 1247, 1251 (11th Cir. 2006).

protect not only against persecution by government forces, but also against persecution by non-governmental groups that the government cannot control, such as the FARC.”¹²⁵

C. Supreme Court of the United States

Likely because of the unanimous agreement among the lower courts that harms inflicted by private actors can constitute persecution, the United States Supreme Court has not had occasion to explicitly decide the issue. However, the Court has implicitly acknowledged that harms inflicted by private actors can constitute persecution.¹²⁶ For example, in *INS v. Elias-Zacarias*, the Court evaluated the claim of a Guatemalan asylum applicant who claimed he feared persecution at the hands of a non-state guerilla group.¹²⁷ The Court found that he had failed to show that his refusal to join the guerillas was based on a political opinion or that the group was seeking to persecute him because of that opinion.¹²⁸ Accordingly, the Court found against the applicant on nexus grounds.¹²⁹ However, the court never called into question the notion that harms perpetrated by a private actor, namely the guerilla group, could constitute persecution.¹³⁰

Similarly, in *Negusie v. Holder*, Justice Stevens in his dissent briefly discussed the difference between asylum and withholding of removal—which he stated could be based on “harm inflicted by private actors” (citing the *In re Kasinga* and *In re H-* BIA decisions as examples)—and the Convention Against Torture, which requires “state involvement.”¹³¹

¹²⁵ *Ruiz*, 440 F.3d at 1257, 1259.

¹²⁶ See *Negusie v. Holder*, 555 U.S. 511, 536 n.6 (2009) (Stevens, J., dissenting) (citing *In re Kasinga*, 21 I. & N. Dec. 357, 365 (BIA 1996); *In re H-*, 21 I. & N. Dec. 337, 343–44 (BIA 1996)); cf. *INS v. Elias-Zacarias*, 502 U.S. 478, 483 (1992).

¹²⁷ *Elias-Zacarias*, 502 U.S. at 480.

¹²⁸ *Id.* at 483.

¹²⁹ *Id.* at 483–84.

¹³⁰ *Id.* at 483.

¹³¹ *Negusie*, 555 U.S. at 536 n.6 (Stevens, J., dissenting) (citing *In re Kasinga*, 21 I. & N. Dec. at 365; *In re H-*, 21 I. & N. Dec. 337, 343–44 (BIA 1996)).

It is also worth noting that the Supreme Court has stated that the United Nations High Commissioner for Refugees (“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.”¹³² The UNHCR Handbook clearly recognizes that harms inflicted by private actors can constitute persecution.¹³³

II. COURTS ROUTINELY HAVE FOUND HARMS INFLICTED BY PRIVATE ACTORS TO CONSTITUTE PERSECUTION ON ACCOUNT OF ALL FIVE PROTECTED GROUNDS

It is clear from the above that harms inflicted by private actors can constitute persecution. Although the AG limited his question to the particular social group ground, the persecution and protected ground elements of an asylum claim are separate and distinct. Accordingly, this section demonstrates that it is well settled that harms inflicted by private actors on account of any of the five protected grounds, including particular social group, can constitute persecution.

A. Particular Social Group

The BIA and circuit courts routinely have held that harms inflicted by private actors on account of membership in a particular social group can constitute persecution. For example, courts have granted claims involving persecution by private actors on account of sexual orientation,¹³⁴ family membership,¹³⁵ mental illness,¹³⁶ and clan or tribe membership,¹³⁷ among

¹³² *INS v. Cardoza-Fonseca*, 480 U.S. 421, 439 n.22 (1987).

¹³³ 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> (Harms inflicted by private actors “can be considered as persecution if they are knowingly tolerated by the authorities, or if the authorities refuse, or prove unable, to offer effective protection.”).

¹³⁴ See, e.g., *Bringas-Rodriguez v. Sessions*, 850 F.3d 1051, 1056, 1076 (9th Cir. 2017) (persecution by family members and neighbor on account of applicant’s homosexuality); *Doe v. Holder*, 736 F.3d 871, 874, 879 (9th Cir. 2013) (persecution by classmates and other private individuals); *Kadri v. Mukasey*, 543 F.3d 16, 18–19, 21–22 (1st Cir. 2008) (persecution by private patients and private members of the medical community); *Nabulwala v. Gonzalez*, 481 F.3d 1115, 1117–18 (8th Cir. 2007) (persecution by applicant’s family members in order to change her sexual

others.¹³⁸ Courts also have granted cases involving domestic violence,¹³⁹ gang violence,¹⁴⁰ sex trafficking,¹⁴¹ forced marriage,¹⁴² involuntary servitude,¹⁴³ and female genital cutting,¹⁴⁴ perpetrated on account of the applicant's particular social group.

B. Religion

Freedom of religion is often curtailed by family members, communities, and militia groups, not affiliated with the government, who are seeking to punish individuals who do not comply with religious, and often cultural, norms. The BIA and courts of appeals routinely have

orientation); *Ornelas-Chavez v. Gonzales*, 458 F.3d 1052, 1054, 1056–58 (9th Cir. 2006) (persecution by family members and other private parties).

¹³⁵ See, e.g., *Salgado-Sosa v. Sessions*, 882 F.3d 451, 457–59 (4th Cir. 2018); *Cruz v. Sessions*, 853 F.3d 122, 129–30 (4th Cir. 2017); *Zavaleta-Policiano v. Sessions*, 873 F.3d 241, 249–50 (4th Cir. 2017); *Hernandez-Avalos v. Lynch*, 784 F.3d 944, 949–50, 953 (4th Cir. 2015); *Aldana-Ramos v. Holder*, 757 F.3d 9, 15, 17–19 (1st Cir. 2014); *Cordova v. Holder*, 759 F.3d 332, 338–40 (4th Cir. 2014); *Crespin-Valladares v. Holder*, 632 F.3d 117, 126–27 (4th Cir. 2011).

¹³⁶ See, e.g., *Kholyavskiy v. Mukasey*, 540 F.3d 555, 572–74 (7th Cir. 2008).

¹³⁷ See, e.g., *Ahmed v. Keisler*, 504 F.3d 1183, 1198–99 (9th Cir. 2007) (persecution by the Awami League on account of applicant's membership in the social group of Bihari); *Fiadjoe v. Att'y Gen.*, 411 F.3d 135, 157–58, 162–63 (3d Cir. 2005) (persecution by applicant's father on account of her social group of Trokosi slaves); *In re H-*, 21 I. & N. Dec. 337, 344–46 (BIA 1996) (persecution by members of the Hawiye clan on account of applicant's membership in the Marehan clan).

¹³⁸ See, e.g., *Kamar v. Sessions*, 875 F.3d 811, 818–19 (6th Cir. 2017) (persecution by family on account of membership in the social group of “women who, in accordance with social and religious norms in Jordan, are accused of being immoral criminals and, as a consequence, face the prospect of being killed or persecuted without any protection from the Jordanian government”); *R.R.D. v. Holder*, 746 F.3d 807, 808, 810 (7th Cir. 2014) (persecution by drug traffickers on account of membership in the social group of “honest police”); *Gathungu v. Holder*, 725 F.3d 900, 907 (8th Cir. 2013) (persecution by members of the Mungiki group on account of membership in the social group of “Mungiki defectors”); *Orejuela v. Gonzales*, 423 F.3d 666, 672–74 (7th Cir. 2005) (persecution by FARC on account of membership in the social group of “educated, landowning class of cattle farmers targeted by FARC”).

¹³⁹ See, e.g., *Ngengwe v. Mukasey*, 543 F.3d 1029, 1031–32, 1034, 1038 (8th Cir. 2008) (persecution by applicant's in-laws on account of her membership in the social group of female Cameroonian widows); *Matter of A-R-C-G-*, 26 I. & N. Dec. 388, 392–94 (BIA 2014).

¹⁴⁰ See, e.g., *Oliva v. Lynch*, 807 F.3d 53, 56–57, 59–60 (4th Cir. 2015); *Henriquez-Rivas v. Holder*, 707 F.3d 1081, 1085–87, 1091 (9th Cir. 2013); *Madrigal v. Holder*, 716 F.3d 499, 503–06 (9th Cir. 2013); *Garcia v. Att'y Gen. of the U.S.*, 665 F.3d 496, 503–04 (3d Cir. 2011).

¹⁴¹ See, e.g., *Paloka v. Holder*, 762 F.3d 191, 193–95, 198–99 (2d Cir. 2014) (persecution by private sex traffickers on account of social group of unmarried young women in Albania between the ages of 15 and 25); *Cece v. Holder*, 733 F.3d 662, 673, 675–76 (7th Cir. 2013) (en banc) (sex trafficking on account of social group of “young, Albanian women who live alone”).

¹⁴² See, e.g., *Qu v. Holder*, 618 F.3d 602, 604, 608 (6th Cir. 2010).

¹⁴³ See, e.g., *id.* at 604, 608; *Gomez-Zuluaga v. Att'y Gen. of the U.S.*, 527 F.3d 330, 346–48 (3d Cir. 2008).

¹⁴⁴ See, e.g., *Gatimi v. Holder*, 578 F.3d 611, 614–15, 618 (7th Cir. 2009); *Haoua v. Gonzales*, 472 F.3d 227, 230–32 (4th Cir. 2007); *Mohammed v. Gonzales*, 400 F.3d 785, 795–98 (9th Cir. 2005); *Abay v. Ashcroft*, 368 F.3d 634, 639–40 (6th Cir. 2004); *Abankwah v. INS*, 185 F.3d 18, 21, 23–26 (2d Cir. 1999); *In re Kasinga*, 21 I. & N. Dec. 357, 368 (BIA 1996).

granted cases involving persecution by private actors on account of religion.¹⁴⁵ We refer the AG to the amicus brief submitted on behalf of faith based organizations for additional examples.

C. Race & Nationality

The categories of race and nationality often meld together in asylum law.¹⁴⁶ As set forth in greater detail above, in *Matter of O-Z- & I-Z-*, the BIA affirmed a grant of relief to asylum seekers of Jewish nationality who were persecuted by an anti-Semitic, pro-Ukrainian independence movement, unconnected with the Ukrainian government.¹⁴⁷ The BIA noted that the applicants reported at least three incidents to the police, who failed to take action beyond writing a report.¹⁴⁸ Numerous other courts have granted cases in which the applicant claimed harm by private actors on account of race or nationality.¹⁴⁹

D. Political Opinion

Asylum seekers facing persecution on account of their political opinion often are subjected to the acts of non-state actors, including militias, freedom fighters, rebels, terrorists, paramilitaries, revolutionaries, guerrillas, and quasi-state bodies. Expressing opposition to these non-state actors can subject an asylum seeker to acts of persecution, torture and even death. The

¹⁴⁵ See, e.g., *Marouf v. Lynch*, 811 F.3d 174, 189 (6th Cir. 2016); *Ivanov v. Holder*, 736 F.3d 5, 12–13 (1st Cir. 2013); *Afriyie v. Holder*, 613 F.3d 924, 932 (9th Cir. 2010); *Paul v. Gonzales*, 444 F.3d 148, 151, 157 (2d Cir. 2006); *Pavlova v. INS*, 441 F.3d 82, 91–92 (2d Cir. 2006); *Rizal v. Gonzales*, 442 F.3d 84, 92 (2d Cir. 2006); *Krotova v. Gonzales*, 416 F.3d 1080, 1087 (9th Cir. 2005); *Poradisova v. Gonzales*, 420 F.3d 70, 81–82 (2d Cir. 2005); *Eduard v. Ashcroft*, 379 F.3d 182, 187–88 (5th Cir. 2004); *Matter of O-Z- & I-Z-*, 22 I. & N. Dec. 23, 26 (BIA 1998).

¹⁴⁶ See, e.g., *Baballah v. Ashcroft*, 367 F.3d 1067, 1077 n.10 (9th Cir. 2004) (“[E]thnicity describes a category which falls somewhere between and within the protected grounds of race and nationality.”)

¹⁴⁷ *Matter of O-Z- & I-Z-*, 22 I. & N. Dec. at 24.

¹⁴⁸ *Id.* at 26.

¹⁴⁹ See, e.g., *Pan v. Holder*, 777 F.3d 540, 545 (2d Cir. 2015); *Poradisova v. Gonzales*, 420 F.3d 70, 81–82 (2d Cir. 2005); *Eduard v. Ashcroft*, 379 F.3d 182, 190–91 (5th Cir. 2004); *Guchshenkov v. Ashcroft*, 366 F.3d 554, 559 (7th Cir. 2004); *Mashiri v. Ashcroft*, 383 F.3d 1112, 1122 (9th Cir. 2004); *Melkonian v. Ashcroft*, 320 F.3d 1061, 1069 (9th Cir. 2003); *Hengan v. INS*, 79 F.3d 60, 62–63 (7th Cir. 1996); *Singh v. INS*, 94 F.3d 1353, 1360 (9th Cir. 1996); *Surita v. INS*, 95 F.3d 814, 819–20 (9th Cir. 1996).

BIA and courts of appeals have routinely granted cases involving persecution by private actors on account of political opinion.¹⁵⁰

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 on account of any of the five protected grounds.

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¹⁵⁰ See, e.g., *Khattak v. Holder*, 704 F.3d 197, 203, 207 (1st Cir. 2013); *Sharma v. Holder*, 729 F.3d 407, 412–13 (5th Cir. 2013); *Escobar v. Holder*, 657 F.3d 537, 539–40 (7th Cir. 2011); *Espinosa-Cortez v. Att’y Gen. of the U.S.*, 607 F.3d 101, 114 (3d Cir. 2010); *Zheng v. Mukasey*, 552 F.3d 277, 287–88 (2d Cir. 2009); *Gomez-Zuluaga v. Att’y Gen. of the U.S.*, 527 F.3d 330, 344–45 (3d Cir. 2008); *Sok v. Mukasey*, 526 F.3d 48, 57–58 (1st Cir. 2008); *Lopez v. U.S. Att’y Gen.*, 504 F.3d 1341, 1344 (11th Cir. 2007); *Orejuela v. Gonzales*, 423 F.3d 666, 673–74 (7th Cir. 2005); *Vente v. Gonzales*, 415 F.3d 296, 301–03 (3d Cir. 2005); *Hoque v. Ashcroft*, 367 F.3d 1190, 1198 (9th Cir. 2004); *Bace v. Ashcroft*, 352 F.3d 1133, 1138–39 (7th Cir. 2003); *de la Llana-Castellon v. INS*, 16 F.3d 1093, 1097 (10th Cir. 1994); *Sotelo-Aquiye v. Slattery*, 17 F.3d 33, 38 (2d Cir. 1994); *Rivas-Martinez v. INS*, 997 F.2d 1143, 1148 (5th Cir. 1993); *Bolanos-Hernandez v. INS*, 767 F.2d 1277, 1287–88 (9th Cir. 1984); *Matter of Villalta*, 20 I. & N. Dec. 142, 147 (BIA 1990).

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This brief complies with the instructions in the Attorney General's referral order dated March 7, 2018, because the brief contains 8995 words, excluding the cover page, Table of Contents, Table of Authorities, signature block, Appendix, Certificate of Compliance, and Certificate of Service.

Dated: April 27, 2018



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