NON-DETAINED

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UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS
FALLS CHURCH, VIRGINIA

In the Matter of:	)	
A[redacted] B[redacted],	)	File No.: [redacted]
In Removal Proceedings	)	

REQUEST TO APPEAR AS AMICI CURIAE

Proposed amici curiae, immigration law professors, by and through undersigned pro bono counsel, respectfully request that the Board of Immigration Appeals permit them to submit the attached brief in support of respondent. In support of this motion, amici state:

1. Amici are 103 immigration and refugee law scholars and clinical professors. We teach immigration law, refugee law, or in law school clinics that provide representation to asylum seekers. As such, we have written numerous scholarly articles on immigration and refugee law and understand the practical aspects of asylum law through client representation.

2. In his prior decision in this case, the Attorney General stated that asylum applicants fleeing harms committed by private actors must show that the government "condoned" the actions or was "completely helpless" to stop them. Amici submit the attached brief to set forth the law on state action in asylum cases in all of the circuit courts, as well as the Board of Immigration Appeals and U.S Supreme Court.

3. Specifically, *amici* submit this brief to demonstrate that it is well established in every circuit court and the Board of Immigration Appeals that the standard for showing state action in

such cases is whether the government was "unwilling or unable" to protect the applicant from the harm. The Attorney General cherry picked the few circuit court cases that quote a heightened "condoned" or "complete helplessness" standard.

4. Amici submit the instant brief to demonstrate that the "condoned" or "complete helplessness" standard is incorrect and in tension with the asylum statute. Moreover, the "unable or unwilling" standard is the prevailing standard in every circuit court and in the agency itself. The Attorney General failed to provide an explanation, let alone a rational one, for departing from the prevailing standard.

5. This Board's resolution of the issues raised by this case has potential repercussions that go well beyond the facts of this case. The Board's resolution of the important issues in this case requires careful consideration. The attached brief draws upon the interest and special expertise of proposed amici curiae, which have a profound interest in the Board's ruling.

6. For these reasons, proposed amici curiae respectfully request leave of the Board to submit the attached proposed brief as amici curiae.

Dated: January 6, 2020

Respectfully Submitted,

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BRIEF OF AMICI CURIAE IMMIGRATION LAW PROFESSORS IN SUPPORT OF RESPONDENT

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INTEREST OF AMICI CURIAE

Amici are 103 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, they 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 (BIA), 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.

In *Matter of A-B-*, while the Attorney General acknowledged the "unwilling or unable" standard, he also stated that an applicant must show that the government "condoned" the actions or was "completely helpless" to protect the applicant.[2] While the IJ below did not explicitly cite the "condoned" or "completely helpless" language in his decision on remand, the IJ's analysis narrowly focuses on token assistance from the Salvadoran authorities without analyzing the effectiveness of such measures, and is therefore infected by the AG's commentary on the state protection element.

However, as shown below, of the literally hundreds of cases from the BIA and every circuit court that decides asylum cases setting forth and applying the "unwilling or unable" standard, the AG cherry picked the handful of cases that quote the "condoned" or "complete

[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.

helplessness" language. Moreover, even the circuit court opinions that state the "condoned" or "complete helplessness" language provide no explanation for this different formulation, and those cases clearly do not even apply a 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 "condoned" or "complete helplessness" 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 rephrased 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 simply have other priorities or believe that the persecution is a family matter to be handled in the home. Similarly, "unable" clearly does not mean "completely helpless." According to the United Nations High Commissioner for Refugees ("UNHCR"), Handbook on Procedures and Criteria for Determining

[3] *Matter of A-B-*, 27 I&N Dec. 316 (A.G. 2018)

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 "unwilling" or "unable" prongs do not require applicants to prove that the government will decline or 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" language 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 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 that decides asylum cases has consistently applied the "unwilling or unable" standard. The few courts that have stated the "condoned" or "complete helplessness" language have not explained the reason for any departure, and, in fact, have continued to apply the "unwilling or unable" test.

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 private actors can constitute persecution.[6] In a foundational case, *Matter of Acosta*, the BIA recognized that even before the

[4] UNHCR Handbook ¶ 65 (1979, rev. 1992) (emphasis added).
[5] *INS v. Cardoza-Fonseca*, 480 U.S. 421, 440 (1987).
[6] *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).

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."[7] 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." [8] 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. [9]

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] In that case, the agency argued that the applicant was required to show that the private action was

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[7] *Acosta*, 19 I. & N. Dec. at 222.
[8] *Id.* at 222.
[9] *Id.* at 223.
[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.*, *Matter of H-*, 21 I. & N. Dec. 337, 341 (BIA 1996) (detention as a result of interclan violence).
[14] *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).
[15] *See, e.g.*, *Matter of S-A-*, 22 I. & N. Dec. 1328 (BIA 2000). Moreover, 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.

"government-directed or condoned" and that he had not done so.[17] 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 respondent's attackers and protect him or his son from the anti-Semitic acts of violence.[18]

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.[19]

B. Federal Courts of Appeals

Every single federal court of appeals that decides asylum cases 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 mention, without any basis, the "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 standard, and that such claims, like all asylum claims, require an individualized, fact specific inquiry.

[17] *Matter of O-Z- & I-Z-*, 22 I. & N. Dec. at 25.
[18] *Matter of O-Z- & I-Z-*, 22 I. & N. Dec. at 26.
[19] *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.[20] In *Khattak v. Holder*, for example, the court considered the application of a Pakistani family.[21] 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."[22] 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."[23] The military's actions are a far cry from "condoning" the attacks or even a "complete helplessness" to prevent the attacks. Thus, the court was clearly applying the familiar "unwilling or unable" test.

Significantly, even after *Matter of A-B-*, the court has declined to use the more stringent "condoned" or "compete helplessness" language. In *Rosales Justo v. Sessions*, the applicant was a police officer from Mexico who also owned a store to supplement his income.[24] Members of organized crime demanded 2,000 pesos every two weeks as "rent," and when the applicant did not pay, the members threatened his family.[25] They eventually killed his son, and the police

[20] *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).
[21] *Khattak v. Holder*, 704 F.3d 197 (1st Cir. 2013).
[22] *Id*. at 203.
[23] *Id*. at 206.
[24] *Rosales Justo v. Sessions*, *895* F.3d 154, 157 (1st Cir. 2018).
[25] *Id.*

started an investigation into the murder.[26] The applicant did not report the events before and after his son's murder because he was afraid the men would kill him.[27] The court found that the BIA misapplied the unwilling or unable standard.[28] 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.[29] 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."[30] The court 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.[31] The court has recognized persecution committed at the hands of various non-state actors, including, *inter alia*, domestic abusers,[32] rebel guerilla groups,[33] religious groups,[34] tribe members,[35] members of other ethnic groups,[36] anti-Semites,[37]

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[26] *Id.* at 157–158.
[27] *Id.*
[28] *Id*. at 162.
[29] *Id.* at 163.
[30] *Id*. at 164.
[31] *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).
[32] *See, e.g.*, *Bori v. INS*, 190 F. App'x 17, 19 (2d Cir. 2006).
[33] *See, e.g.*, *Del Pilar Delgado v. Mukasey*, 508 F.3d 702, 707 (2d Cir. 2007).
[34] *See, e.g.*, *Rizal v. Gonzales*, 442 F.3d at 92.
[35] *See, e.g.*, *Abankwah v. INS*, 185 F.3d 18, 26 (2d Cir. 1999).
[36] *See, e.g.*, *Aliyev v. Mukasey*, 549 F.3d 111, 118 (2d Cir. 2008).
[37] *See, e.g.*, *Poradisova v. Gonzales*, 420 F.3d 70, 81 (2d Cir. 2005).

and traffickers.[38] 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,[39] lack of resources,[40] corruption or impunity,[41] or societal pervasiveness of the persecution.[42]

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.[43] 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."[44]

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.[45] 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 introduced enough evidence to forge the link between private conduct and public responsibility."[46] Plainly, in the court's view, an asylum

[38] *See, e.g.*, *Paloka v. Holder*, 762 F.3d 191, 198–99 (2d Cir. 2014).
[39] *See, e.g.*, *Pavlova v. I.N.S.*, 441 F.3d 82, 91 (2d Cir. 2006).
[40] *See, e.g.*, *Sotelo-Aquije v. Slattery*, 17 F.3d 33, 36 (2d Cir.1994).
[41] *See, e.g.*, *Poradisova*, 420 F.3d at 81.
[42] *See, e.g.*, *Abankwah*, 185 F.3d at 25–26.
[43] *Ivanishvili v. U.S. Dep't. of Just.*, 433 F.3d 332, 342–43 (2d. Cir. 2006).
[44] *Id.* at 342.
[45] *Aliyev v. Mukasey*, 549 F.3d 111 (2d Cir. 2008).
[46] *Id*. at 118.

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.[47] 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.[48] 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.

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."[49] In *Fiadjoe v. Attorney General*, for example, the Third Circuit remanded a BIA decision denying a Ghanaian woman's

[47] *Id*. at 545.
[48] *Bori v. INS*, 190 F. App'x 17, 19 (2d Cir. 2006)
[49] *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).

applications for asylum and CAT relief.[50] 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.[51] 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.[52] Finally, despite the legislation, the Ghanian government had not prosecuted any practitioners of Trokosi.[53] 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 did not "condone" the practice and was not "completely helpless" to stop it.

iv. Fourth Circuit

The Fourth Circuit Court of Appeals, in which this case arises, has long recognized the "unwilling or unable" standard.[54] 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.[55] He

[50] *Fiadjoe*, 411 F.3d at 160.
[51] *Id*. at 161.
[52] *Id*. at 162.
[53] *Id*. at 163.
[54] *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).
[55] *Crespin-Valladares v. Holder*, 632 F.3d 117 (4th Cir. 2011).

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.

The BIA concluded that a State Department report "demonstrates that the Salvadoran government has focused law enforcement efforts on suppressing gang violence."[56] 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."[57] 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.[58] 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.

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

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 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]."[59] 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."[60]

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*."[61] 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."[62] Additionally, in *Rivas-Martinez v. INS*, the court held in favor of an applicant who feared persecution at the hands of guerillas.[63]

Even when denying relief, the court has explicitly recognized that harms inflicted by private actors can constitute persecution.[64] For example, in *Adebisi v. INS*, the court recognized

[59] *Id.* at 952.
[60] *Id.* at 953.
[61] *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).
[62] *Eduard*, 379 F.3d at 190.
[63] *Rivas-Martinez*, 997 F.2d 1143, 1145 (5th Cir. 1993).
[64] *See, e.g.*, *Tesfamichael*, 469 F.3d at 113; *Adebisi*, 952 F.2d at 914.

that "the BIA extends the qualifying range of persecution fear to include acts by groups '*the government is unable or unwilling to control*.'"[65]

vi. Sixth Circuit

The Sixth Circuit Court of Appeals has consistently recognized the "unwilling or unable" standard.[66] 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.[67] 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 that the authorities in Jordan has placed eighty-two women in "protective custody" that year to prevent them from becoming victims of honor killings.[68] The BIA also held that subsequent country reports demonstrated that the Jordanian government was actively protecting victims and prosecuting the perpetrators of honor crimes.[69] The court reversed, finding that "governors in Jordan routinely abuse the law and use imprisonment to protect potential victims of honor crimes . . . ."[70] 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

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[65] *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.

[66] *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).

[67] *Kamar*, 875 F.3d at 818-20.

[68] *Id*. at 816.

[69] *Id*.

[70] *Id*. at 819 (quoting *Sarhan v. Holder*, 658 F.3d 649, 659 (7th Cir. 2011)).

perpetrator's family) did not press charges.[71] Clearly, the court was employing the "unable or unwilling" standard, and not a 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.[72] For example, in *Sarhan v. Holder*, a Jordanian asylum seeker feared that her brother would subject her to an honor killing in response to a false rumor that she had committed adultery.[73] 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.[74] The court found these arguments unconvincing and reversed the BIA, reasoning that "[p]rosecution at times is an empty gesture."[75] 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."[76] 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

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[71] *Id*.
[72] *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).
[73] *Sarhan v. Holder*, 658 F.3d 649 (7th Cir. 2011).
[74] *Id*. at 657.
[75] *Id*.
[76] *Id*.

"condoning" the killings or "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" language. In *Galina v. I.N.S.*, the case from which the "condoned" or "complete helplessness" language originated, the 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."[77] 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."[78] 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,[79] 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 a heightened "condoned or complete helplessness" standard. Moreover, the vast majority of Seventh Circuit cases decided after *Galina* and *Hor*, such as *Sarhan*, set forth and apply only the "unwilling/unable" standard.

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[77] *Galina v. I.N.S.*, 213 F.3d 955, 958 (7th Cir. 2000).
[78] *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.
[79] *Hor*, 421 F.3d at 499; *Galina*, 213 F.3d at 958.

viii. Eighth Circuit

The "unwilling or unable" standard is also well established in the Eighth Circuit.[80] 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.[81] 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.[82] 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."[83] 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 government is unable to control the Mungiki."[84] 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."[85] The "unwilling or unable" standard is recognized and reaffirmed in several opinions from this circuit.[86]

Some Eighth Circuit cases recite the "condoned" or "complete helplessness" language, yet they continue to apply the familiar "unable or unwilling" standard. In *Menjivar v. Gonzales*,

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[80] *See e.g.*, *Gathungu v. Holder*, 725 F.3d 900 (8th Cir. 2013); *Nabulwala v. Gonzalez*, 481 F.3d 1115 (8th Cir. 2007)
[81] *Gathungu v. Holder*, 725 F.3d 900 (8th Cir. 2013).
[82] *Id*. at 906.
[83] *Id*. at 908-09.
[84] *Id*. at 909.
[85] *Id*.
[86] *See* Appendix B.

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.'"[87] However, the court gave no reasons for departing from the well-established "unwilling or unable" test, and, as shown above, the Seventh Circuit decision to which it cites did not do so either. Moreover, in *Menjivar*, the court agreed with the IJ that the state action requirement had not been met because the police responded to the persecution in a timely manner and conducted a thorough investigation of the private actor's crimes.[88] It is clear that the court would have found the same applying the familiar "unable or unwilling" test.

ix. Ninth Circuit

The Ninth Circuit Court of Appeals also has consistently recognized the "unwilling or unable" standard.[89] 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.[90] The BIA concluded that the Mexican government was willing and able to control Los Zetas.[91] 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.[92] 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."[93] The court concluded

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[87] *Menjivar v. Gonzales*, 416 F.3d 918, 921 (8th Cir. 2005) (quoting *Galina*, 213 F.3d at 958).
[88] *Id*. at 922.
[89] *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.
[90] *Madrigal v. Holder*, 716 F.3d 499 (9th Cir. 2013).
[91] *Id*. at 506.
[92] *Id*. at 506-07.
[93] *Id*. at 506.

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.[94] As the court apparently recognized, a government 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.[95] 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.[96]

The Ninth Circuit reversed and remanded, stating, "It does not matter that financial considerations may account for such an inability to stop elements of ethnic persecution."[97] 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 of life-threatening persecution from elements that the government cannot control."[98] It is clear that, according to the court, a government may be "unable or

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[94] *Id*. at 506-07.
[95] *Avetova-Elisseva v. INS*, 213 F.3d 1192 (9th Cir. 2000).
[96] *Id*. at 1197-98.
[97] *Id*. at 1198.
[98] *Id*. at 1200.

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."[99] 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.[100] 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 control.[101] 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."[102] In remanding, the court plainly asked the agency to assess whether the family met the "unwilling or unable" test, and not a heightened "condoned or complete helplessness" test.

xi. Eleventh Circuit

Finally, the "unwilling or unable" standard is similarly well established in the Eleventh

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[99] *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).
[100] *de la Llana-Castellon v. INS*, 16 F.3d 1093 (10th Cir. 1994).
[101] *Id*. at 1097.
[102] *Id*.

Circuit.[103] 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."[104] The court remanded the decision because the BIA and IJ failed to address this point.[105]

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.[106] 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.[107] The Court found against the applicant on nexus grounds.[108] However, the court never called into question the notion that harms perpetrated by a private actor, namely the guerilla group, could constitute persecution.[109]

Similarly, in *Negusie v. Holder*, Justice Stevens in his dissent on an unrelated issue acknowledged that asylum and withholding of removal could be based on "harm inflicted by

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[103] *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).
[104] *Lopez v. U.S. Att'y Gen.*, 504 F.3d 1341, 1345 (11th Cir. 2007).
[105] *Id.* at 1345.
[106] *See Negusie v. Holder*, 555 U.S. 511, 536 n.6 (2009) (Stevens, J., dissenting).
[107] *Elias-Zacarias*, 502 U.S. at 480.
[108] *Id.* at 483–84.
[109] *Id.* at 483.

private actors."[110]

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."[111] 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."[112]

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, through dicta, that such claims should be subject to heightened standards or increased skepticism is contrary to settled law and without merit.

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[110] *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)).
[111] *INS v. Cardoza-Fonseca*, 480 U.S. 421, 439 n.22 (1987).
[112] 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.

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APPENDIX B: LIST OF CASES RECOGNIZING THE "UNWILLING OR UNABLE" STANDARD

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

First Circuit

Published Cases

Ortiz-Araniba v. Keisler, 505 F.3d 39 (1st Cir. 2001)
Menjivar v. Gonzales, 416 F.3d 918 (1st Cir. 2005)
Silva v. Ashcroft, 394 F.3d 1 (1st Cir. 2005)
Orelien v. Gonzales, 467 F.3d 67 (1st Cir. 2006)
Butt v. Keisler, 506 F.3d 86 (1st Cir. 2007)
Raza v. Gonzales, 484 F.3d 125 (1st Cir. 2007)
Kho v. Keisler, 505 F.3d 50 (1st Cir. 2007)
Ortiz-Araniba v. Keisler, 505 F.3d 39 (1st Cir. 2007)
Jorgji v. Mukasey, 514 F.3d 53 (1st Cir. 2008)
Budiono v. Mukasey, 548 F. 3d 44 (1st Cir. 2008)
Kadri v. Mukasey, 543 F.3d 16 (1st Cir. 2008)
Datau v. Mukasey, 540 F.3d 37 (1st Cir. 2008)
Sok v. Mukasey, 526 F.3d 48 (1st Cir. 2008)
Decky v. Holder, 587 F.3d 104 (1st Cir. 2009)
Cendrawasih v. Holder, 571 F.3d 128 (1st Cir. 2009)
Burbiene v. Holder, 568 F.3d 251 (1st Cir. 2009)
Lopez Perez v. Holder, 587 F.3d 456 (1st Cir. 2009)
Dias Gomes v. Holder, 566 F.3d 232 (1st Cir. 2009)
Castillo-Diaz v. Holder, 562 F.3d 23 (1st Cir. 2009)
Diaz-Garcia v. Holder, 609 F.3d 21 (1st Cir. 2010)
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)
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