UNWILLING OR UNABLE? THE FAILURE TO CONFORM THE NONSTATE ACTOR STANDARD IN ASYLUM CLAIMS TO THE REFUGEE ACT

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ABSTRACT

Pursuant to its obligations to the international community, the United States provides asylum to individuals fleeing persecution "on account of race, religion, nationality, membership in a particular social group, or political opinion." For decades, both the Board of Immigration Appeals and federal courts recognized that individuals could obtain asylum based on a fear of persecution at the hands of nonstate actors, so long as the applicant demonstrated that their government was "unable or unwilling" to control the persecution.

As part of a wide-ranging attack on asylum, the Trump administration has sought to eliminate asylum based on nonstate actor persecution. In June 2018, the Attorney General ("AG") issued a sweeping decision, *Matter of A-B-*, vacating a 2014 decision in which the Board of Immigration Appeals had held that those fearing domestic violence could obtain asylum relief. Among other things, the decision heightened the nonstate actor standard, requiring that applicants not only show that their governments were "unwilling or

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** Professor of Law, Judge Chester J. Straub Scholar, and Director of the Immigrant Rights Clinic, Rutgers Law School. I would like to thank Rachael Newcomb for excellent research assistance. I would also like to thank the team of law students that assisted me over the years with writing amicus briefs on this issue in the federal courts of appeals, including Priscila Abraham, Tamara Anaie, Amanda Clark, Lena Kim, Noah Kim, Christina LaBruno, and Kathryn Robinson. I would also like to thank the editors of the *Columbia Human Rights Law Review* for their excellent edits and suggestions.

unable" to control the persecution, but also that the governments "condoned" or were "completely helpless" to stop the persecution.

After *Matter of A-B-* was decided, federal courts have disagreed as to which standard to apply, or, indeed, whether the two tests differ at all. Courts in some circuits found the two standards to be different and held that the change to heighten the nonstate actor test was arbitrary and capricious. Other courts held that the condone-or-completely-helpless formulation was merely a permissible interpretation of the familiar unwilling-or-unable standard.

In response, on January 14, 2021, the Acting AG issued *Matter of A-B- II*, redoubling the defense of the condone-or-complete-helplessness articulation and evoking the agency's *Chevron* and *Brand X* authority to combat decisions from the courts of appeals that had rejected *Matter of A-B- I*. The Acting AG claimed that the condone-or-complete-helplessness articulation was not a departure from the older unable-or-unwilling test, but he argued that even if it was a change in policy, it constituted a reasonable construction of the ambiguous statutory term "persecution." In his elaboration of the condone-or-complete-helplessness standard, however, the Acting AG revealed that the new test is vastly more difficult to satisfy. He concluded that any state effort to protect victims—including even the most minimal effort—is sufficient to deny asylum protections.

This Article provides the first systematic analysis of the impact of the heightened nonstate actor test in cases before both the Board of Immigration Appeals and federal courts. We argue that the two tests are, in fact, different by analyzing the plain language they employ as well as the divergent case outcomes they have produced. Then, rather than ground the nonstate actor standard in the term "persecution," we anchor the standard in the statutory language defining refugees as those who are "unable or unwilling to avail [themselves] . . . of [state] protection," a strangely ignored part of the U.S. asylum statute and international treaty. This novel theory has yet to be considered by the courts, but it demonstrates that the unwilling-or-unable test is the correct one. The heightened condone-or-complete-helplessness standard, by contrast, is antithetical to the protections afforded by the statute and treaty and poses an insurmountable hurdle for many of the world's most vulnerable refugees.

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INTRODUCTION

While asylum claims by individuals fleeing persecution by nonstate actors historically have been successful both in the United States [1] and beyond, [2] the Trump administration sought to significantly curb such claims. [3] As part of the administration's reticulated assault on the U.S. asylum system,[4] Attorneys General

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1. *See infra* Part II.

2. *See* 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 [https://perma.cc/FT7L-ENUS] (clearly recognizing that harms inflicted by nonstate actors can constitute persecution "if the authorities refuse, or prove unable, to offer effective protection").

3. *See* Matter of A-B-, 27 I&N Dec. 316 (A.G. 2018) [hereinafter *Matter of A-B- I*] (requiring applicants fleeing nonstate persecution to establish their government "condones" that persecution or is "completely helpless" to stop it, but providing no explanation for such an elevated standard); Matter of A-B-, 28 I&N Dec. 199 (A.G. 2021) [hereinafter *Matter of A-B- II*] (affirming *Matter of A-B- I*'s condone-or-complete-helplessness standard and adding a lengthy explanation aimed at justifying such a standard).

4. *See, e.g.*, Eunice Lee, *Regulating the Border*, 79 MD. L. REV. 374, 375 (2020) ("Since 2017 . . . the Trump Administration has issued a spate of policies targeting" asylum-seekers at the border as a "threat," "invasion," and "emergency."); Fatma Marouf, *Executive Overreaching in Immigration Adjudication*, 93 TULANE L. REV. 707, 763–68 (2019) (discussing the Trump administration's "policy" of turning away asylum-seekers at the southern border); *see also* Jennifer Lee Koh, *Barricading the Immigration Courts,* 69 DUKE L. REV. ONLINE, 48, 50 (Feb. 2020) (describing "[t]he Administration's efforts to prevent adjudication in the immigration courts" as "a barricade: an improvised barrier"); E. Bay Sanctuary Covenant v. Trump, 349 F. Supp. 3d 838, 844 (N.D. Cal. 2018), *aff'd*, 950 F.3d 1242 (9th Cir. 2020) (finding the Trump administration's efforts to bar asylum to "immigrants who enter the country outside a port of entry" irreconcilably inconsistent with the expressed intent of Congress); O.A. v. Trump, 404 F. Supp. 3d 109, 151 (D.D.C. 2019) (same); CAIR Coal. v. Trump, No. 19-cv-2117 (TJK) (D.D.C. June 30, 2020) (finding the third country transit bar for asylum-seekers to be unlawful); Procedures for Asylum and Withholding of Removal, 85 Fed. Reg. 36,264 (proposed June 15, 2020) (proposing extensive changes that would virtually eliminate asylum protection in the United States); Order Suspending the Right to Introduce Certain Persons from Countries Where a Quarantinable Communicable Disease Exists, 85 Fed. Reg. 65,808 (Oct. 16, 2020) (to be codified at 42 U.S.C. 265, 268) (indefinitely suspending entry to certain noncitizens—including asylum-seekers—traveling through Mexico); Innovation Law Lab v. Wolf, 951 F.3d 1073, 1095 (9th Cir. 2020), *cert. granted*, --- S. C.t. ---, 2020 WL 6121563 (2020) (No. 19-1212) (finding the Trump administration's Migrant Protection Protocols ("MPP")—more commonly known as the "Remain in Mexico" policy—to be unlawful); *Delivered to Danger*, HUM. RTS. WATCH, https://www.humanrightsfirst.org/campaign/remain-mexico

("AG") Jeff Sessions and William Barr, along with Acting AG Jeffrey Rosen, issued sweeping decisions with the apparent objective of dramatically reducing the probability of success for refugees fleeing nonstate persecutors. [5] The Trump administration framed its antipathy toward existing asylum structures as an effort to combat abuse in the system.[6] However, the administration's efforts to reduce access to protection for individuals fleeing nonstate persecution cannot be justified under the auspices of fraud prevention. Indeed, such nonstate actor claims have been long-recognized by the Board of Immigration Appeals ("BIA" or "Board")—the chief appellate body that issues administrative immigration decisions—and every federal court of appeals in the country. [7] Rather, the more probable motivation for targeting refugees fleeing nonstate persecutors stemmed from the administration's policy decision to affect profound reductions in immigration in all areas.[8]

[https://perma.cc/H7GH-RHB7] (noting the dangers faced by asylum-seekers turned away from the United States under MPP); *Contrasting Experiences: MPP v. Non-MPP Court Cases*, TRAC IMMIGR. (Dec. 19, 2019), https://trac.syr.edu/immigration/reports/587/ [https://perma.cc/XYZ4-E29A] (examining the negative impact of MPP on immigration court outcomes); *A Year of Horrors: The Trump Administration's Illegal Returns of Asylum Seekers to Danger in Mexico*, HUM. RTS. WATCH (Jan. 2020), https://www.humanrightsfirst.org/sites/default/files/MPP-aYearofHorrors-UPDATED.pdf [https://perma.cc/YX2L-MGBE] ("Despite the overwhelming evidence that this illegal policy [MPP] is leading to kidnappings, torture, sexual assaults, legal representation barriers, and the denial and abandonment of genuine refugee protection requests, Trump Administration . . . officials continue to implement, expand, and tout this horrific policy as a 'success.'").

5. Among these decisions are *Matter of A-B- I*, 27 I&N at 227; *Matter of A-B- II*, 28 I&N Dec. at 199; Matter of L-E-A-, 27 I&N Dec. 581, 581 (A.G. 2019); and Matter of E-R-A-L-, 27 I&N Dec. 767, 767 (B.I.A. 2020); *see also* Matter of A-C-A-A-, 28 I&N Dec. 84, 85 (A.G. 2020) ("In recent decisions, former Attorney General Sessions and I . . . have explained that victims of private violence . . . will not usually satisfy the requirements for asylum . . . .").

6. *President Donald J. Trump Is Working to Stop the Abuse of Our Asylum System and Address the Root Causes of the Border Crisis*, WHITE HOUSE (Apr. 29, 2019), https://www.whitehouse.gov/briefings-statements/president-donald-j-trump-working-stop-abuse-asylum-system-address-root-causes-border-crisis/ [https://perma.cc/GQL2-U6DT].

7. *See infra* Sections II.A–C.

8. *See* Michael Shear & Maggie Haberman, *Trump's Temporary Halt to Immigration Is Part of Broader Plan, Stephen Miller Says*, N.Y. TIMES (Aug. 26, 2020), https://www.nytimes.com/2020/04/24/us/politics/coronavirus-trump-immigration-stephen-miller.html (on file with the *Columbia Human Rights Law Review*). Indeed, White House Senior Policy Adviser Stephen Miller has said that stopping asylum seekers is "all [he] care[s] about" and that he would be "happy if not a single refugee" came to the United States. Molly Olmstead, *Stephen Miller:*

Traditionally, nonstate actor persecutor claims have turned upon determinations related to whether a putative refugee's country of nationality is insufficiently able and willing to afford protection, such that the refugee[9] is justified in seeking surrogate protection in another country.[10] Long before the passage of the 1980 Refugee Act, which incorporated international refugee law principles into domestic law, U.S. adjudicators recognized that a refugee can be one fleeing state-perpetrated persecution or nonstate persecution from which the state is either "unable or unwilling" to provide effective protection.[11] The unable-or-unwilling standard, interpreted and applied according to the ordinary meaning of those words, is consonant with both international legal interpretations as well as the constructions

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Stopping Asylum Seekers Is "All I Care About," SLATE (Feb. 21, 2020), https://slate.com/news-and-politics/2020/02/stephen-miller-immigration-this-is-my-life.html [https://perma.cc/QY2J-M8Y8]; Ellen Cranley, *Stephen Miller Said He "Would Be Happy If Not a Single Refugee" Came to the U.S.*, BUS. INSIDER (Jan. 28, 2019), https://www.businessinsider.com/stephen-miller-said-he-would-be-happy-if-not-a-single-refugee-came-to-us-2019-1 [https://perma.cc/6YE2-H3X3].

9. The burden of proving that an applicant is a "refugee" pursuant to the Immigration and Nationality Act rests on the applicant. 8 U.S.C. § 1158(b)(1)(B)(i). To qualify for asylum, an individual must show that they suffered past persecution or have a well-founded fear of future persecution on account of a protected ground. *Id.* Although courts have interpreted the term "persecution" to require a showing of something more than mere discrimination or harassment, it is not clearly defined in the Act or its implementing regulations. *See* Stanojkova v. Holder, 645 F.3d 943, 947–48 (7th Cir. 2011); Borca v. INS, 77 F.3d 210, 214 (7th Cir. 1996) ("The Immigration Act does not, however, provide a statutory definition for the term 'persecution.'"). The applicant must also show that they have a status that is protected by the Act, and they must show that the persecution occurred or will occur "on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1101(a)(42)(B). If an applicant demonstrates past persecution, they are entitled to a presumption that they have a well-founded fear of future persecution. *See* 8 C.F.R. § 208.13(b)(1) (2014). An asylum applicant can also establish asylum eligibility based upon an independent showing of a well-founded fear of future persecution. *See* Matter of Mogharrabi, 19 I&N Dec. 439, 446 (B.I.A. 1987). Withholding of removal is similar to asylum in that an applicant must also show that they meet the definition of a refugee, but a successful applicant must instead show that they face a clear probability of harm, rather than merely a well-founded fear of future persecution, to be granted protection. *See infra* notes 67, 74.

10. DEBORAH E. ANKER, LAW OF ASYLUM IN THE UNITED STATES § 4:8 (2019 ed.).

11. Rosa v. INS, 440 F.2d 100, 102 (1st Cir. 1971); Matter of Tan, 12 I&N Dec. 564, 568 (B.I.A. 1967); Matter of Pierre, 15 I&N Dec. 461, 462 (B.I.A. 1975).

adopted by other signatories to the multilateral 1951 Refugee Convention.[12]

However, the Trump administration heightened the nonstate actor standard to an extent that, if unchecked, it essentially eliminates nonstate actor asylum claims. AG Sessions wrote in *Matter of A-B- I* that to satisfy the nonstate actor requirement, an applicant must show that their government has "more than difficulty controlling private behavior;" rather, they must demonstrate that their government either "condones" the persecution or is "completely helpless" to protect them from such persecution.[13] More than two years later, in elaborating on this condone-or-completely-helpless standard, Acting AG Rosen explained in *Matter of A-B- II* that it is meant to delimit "when persecution committed by non-governmental actors may be attributed to the government."[14] He stated that a government is not "completely helpless" simply for "failing to provide a particular standard of protection, or for lapses in protection."[15] Rather, he provided that the "level of inaction or ineffectiveness required" is quite high,[16] as the words *completely helpless* indicate. Such an articulation provides a virtually insuperable requirement for legitimate refugees fleeing nonstate-perpetrated violence. Based upon the plain language alone, failing to demonstrate utter powerlessness on the part of the state to provide protection—rather than a mere inability or unwillingness to do so—will prove fatal in essentially all nonstate actor claims subjected to this heightened nonstate actor test.[17]

Only failed states can be fairly characterized as "completely helpless" to provide protection,[18] and claims involving failed states comprise an exceptionally small number of all asylum claims.[19] AG

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12. *See* ANKER, *supra* note 10, § 4:8 ("A state fails in its duty to protect if it is unwilling or unable to . . . reduce the risk of serious harm to 'the point where the fear of persecution could be said to be no longer well-founded.'"); Ward v. Att'y Gen. of Canada, [1993] 2 S.C.R 689, 724; Refugee Appeal No. 71427/99 [2000] NZAR 545 at para. 64 (noting that "it would seem to defeat the purpose of international protection if a claimant would be required to risk his or her life seeking ineffective protection of a state, merely to demonstrate that ineffectiveness").

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

14. *Matter of A-B- II*, 28 I&N Dec. 199, 200 (A.G. 2021).

15. *Id*. at 202.

16. *Id.* at 204.

17. *See infra* Section V.A.

18. *See infra* Section V.A.

19. *See* Sarah Bressan, *What's Left of the Failed States Debate?*, GLOB. PUB. POL'Y INST. (May 13, 2020), https://www.gppi.net/2020/05/13/whats-left-of-the-

Sessions clearly recognized the dramatic winnowing effect that his vision of this test would entail, writing that "[g]enerally," claims based upon harms "perpetrated by non-governmental actors *will not qualify for asylum*."[20] He reasoned, "[w]hile I do not decide that violence inflicted by non-governmental actors may *never* serve as the basis for . . . asylum . . . , in practice *such claims are unlikely to satisfy* the statutory grounds for proving group persecution that the government is *unable or unwilling* to address."[21] Although AG Sessions continued to use the "unable or unwilling" language throughout the decision, it is clear that he did not intend for that language to function as it has historically.[22] Betraying his true intentions, he wrote that where the persecutor is not a government actor, the adjudicator[23] must consider "the government's role in *sponsoring or enabling* such actions."[24] Doubling down on this claim, Acting AG Rosen added that only where government efforts "have fallen so far short of adequate protection" as to demonstrate the government played "some role in or responsibility for the persecution" is the standard satisfied.[25] Rather than adhere to the traditional "unable or unwilling" requirement, *Matter of A-B- I* and *II* suggest that an applicant must now demonstrate state *sponsorship* or *empowerment* of persecution. Such a requirement constitutes a radical departure from the traditional standard, tantamount to the

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failed-states-debate [https://perma.cc/FM6J-RRZR] ("Very few states have completely failed.").

20. *Matter of A-B- I*, 27 I&N Dec. at 320 (emphasis added).

21. *Id.* (emphasis added).

22. *Id.*; *see also* Grace v. Barr, 965 F.3d 883, 898–99 (D.C. Cir. 2020) ("[A]s a matter of plain language, the two formulations are hardly interchangeable. A government that 'condones' or is 'completely helpless' in the face of persecution is obviously more culpable, or more incompetent, than one that is simply 'unwilling or unable' to protect its citizens.").

23. We use the term "adjudicator" because asylum decisions are issued by the federal courts of appeals, the BIA, immigration judges, and asylum officers. Asylum cases are adjudicated by both the Asylum Office, part of the Department of Homeland Security, and the Executive Office for Immigration Review ("EOIR"), part of the Department of Justice. EOIR is composed of immigration judges and the BIA. 8 C.F.R. § 208.2 (2014); Exec. Off. for Immigr. Rev., *About the Office*, U.S. DEP'T OF JUST. (Feb. 2014), http://www.justice.gov/eoir/orginfo.htm [https://perma.cc/T4SY-ZWK8]. Because only EOIR typically issues published decisions, all references to the "agency" are to EOIR.

24. *Matter of A-B- I*, 27 I&N Dec. at 318.

25. *Matter of A-B- II*, 28 I&N Dec. at 204–05.

heightened state acquiescence standard found in claims for protection under the Convention Against Torture ("CAT").[26]

While only a few courts of appeals have reacted to the heightened nonstate actor requirement of *Matter of A-B- I*, those that have weighed in have deeply disagreed on how to address the test—a result that will continue to sow confusion for vulnerable asylum seekers.[27] Additionally, courts that have employed the heightened test demonstrate just how devastating it can be. A close analysis of case law from the Eighth Circuit, which has used and applied the condone-or-complete-helplessness standard in more cases than any other circuit, proves how exceedingly difficult it is to surpass that threshold.[28]

In the course of considering *Matter of A-B- I*'s construction of the nonstate actor requirement, the litigation positions of the government (in defending the condone-or-completely-helpless standard) and some advocates (in resisting *Matter of A-B- I*'s standard) have overlapped in surprising ways. Some refugee advocates have argued that while the AG might have intended to heighten the nonstate actor standard, he did not clearly accomplish that.[29] This strategy emanates both from the need to litigate these

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26. *Id.*; *see also* 8 C.F.R. § 208.18(a)(1) (requiring that an applicant for CAT relief show that the torture would be "inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity").

27. Juan Antonio v. Barr, No. 18-3500, 2020 U.S. App. LEXIS 15984, at *9 (6th Cir. May 19, 2020) (finding domestic violence victim was eligible for asylum under unwilling or unable standard); Scarlett v. Barr, 957 F.3d 316, 331, 333 (2d Cir. 2020) (interpreting unwilling or unable standard as, "(1) condoned the private actions, or (2) at least demonstrated a "complete helplessness to protect the victims"); *Grace*, 965 F.3d at 898–99 (holding the two standards are different, "A government that 'condones' or is "completely helpless" in the face of persecution is obviously more culpable, or more incompetent, than one that is simply 'unwilling or unable' to protect its citizens."); Jimenez Galloso v. Barr, 954 F.3d 1189, 1192 (8th Cir. 2020), *as amended* (Apr. 15, 2020) ("To the extent that the condone-or-completely-helpless standard conflicts with the unable-or-unwilling standard, the latter standard controls."); Gonzales-Veliz v. Barr, 938 F.3d 219, 233 (5th Cir. 2019) (holding that the AG, "did not raise the standard for the government's unwillingness or inability to protect to the 'complete helplessness' standard.").

28. *See infra* Part II.

29. *See*, *e.g.*, *Gonzales-Veliz*, 938 F.3d at 233 ("As Gonzales-Veliz *acknowledges*, in this circuit as well as others, the 'inability or unwillingness' standard is interchangeable with the 'complete helplessness' standard." (emphasis added)); *see also* Kaci Bishop, *Unconventional Actors*, 44 N.C. J. INT'L L. 519, 529 (2019) ("[D]espite including rhetoric suggesting a heightened standard, *Matter of A-B-* actually only applied the 'unable or unwilling' to control standard.").

cases before Asylum Officers ("AOs") and Immigration Judges ("IJs")—who are bound by *Matter of A-B- I*[30]—and a desire to defuse the government's call for *Chevron* deference.[31] In an odd parallel, the government's primary defense of *Matter of A-B- I* is that, because the condone-or-completely-helpless standard did not meaningfully alter the unable-or-unwilling standard, it is simply an acceptable gloss on the traditional rule.[32] If the standard is unchanged, the government argues, it cannot possibly be causing harm or altering outcomes.[33]

Efforts before the courts of appeals to argue that the standard is unchanged have been mixed.[34] The risk in arguing that *Matter of A-B- I* and *II* did not elevate the standard is that asylum seekers will be stuck with all of the negative consequences attendant to the condone-or-completely-helpless standard (i.e., that the plain language of this standard is objectively more difficult to satisfy) without any ability to argue that the heightened standard is an erroneous and unreasoned departure from the existing standard.[35] In this Article, we contend that *Matter of A-B- I* and *II* did intend to heighten the standard and that there is a danger in not clearly calling out and challenging the condone-or-completely-helpless language as a more onerous test. While we understand the impulse to take the position

30. 8 C.F.R. §§ 103.10(b), 1003.1(g) (2020).

31. *See, e.g.*, *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016) (describing the case law surrounding *Chevron* deference and the procedural requirements for agency decision-making).

32. *Grace*, 965 F.3d at 898 ("The government insists that no change occurred, that is, that the two standards are identical.")

33. *Id.*

34. *Compare Gonzales-Veliz*, 938 F.3d at 233 (rejecting the appellant's argument that the BIA misinterpreted *A-B- I* as heightening the standard for the government's showing because the "complete helplessness" standard is interchangeable with the "inability or unwillingness standard") *and* Scarlett v. Barr, 957 F.3d 316, 333 (2d Cir. 2020) (stating that the "complete helplessness to protect" standard is not a novel formulation of the "unwilling or unable" standard, but instead one well-grounded in circuit precedent which does not "impermissibly heighten an applicant's burden") *with Grace*, 965 F.3d at 898–99 ("[T]he two formulations are hardly interchangeable. A government that 'condones' or is 'completely helpless' in the face of persecution is obviously more culpable, or more incompetent, than one that is simply 'unwilling or unable' to protect its citizens."); *see also* Ellison & Gupta, *Un(avail)able Protection: The Shifting Legal Landscape in the Eighth Circuit and Beyond for Asylum-Seekers Fleeing Nonstate Persecution,* 25 BENDER'S IMMIGR. BULL. 1061, 1070–72 (2020) (comparing decisions that have found the unable-or-unwilling articulation to be synonymous with the condone-or-completely-helpless articulation with decisions that have found the two standards to be different).

35. *Cf. Grace*, 965 F.3d at 898–99 (noting that "as a matter of plain language, the two formulations are hardly interchangeable").

that *Matter of A-B- I* and *II* did not actually heighten the standard when litigating before IJs and the BIA, advocates must be careful to preserve arguments that the agency did in fact alter and elevate the nonstate actor standard in a way that is contrary to the statute and congressional intent.[36]

Until now, there has been no comprehensive study of nonstate actor claims that juxtaposes pre-*A-B- I* cases with post-*A-B- I* cases. While there has been some scholarship related to *Matter of A-B- I* and its use of the condone-or-completely-helpless standard,[37] more work is needed to show the effects of this articulation of the nonstate actor persecutor requirement. It is particularly important to address this void given *Matter of A-B- II*'s claim that the condone-or-completely-helpless standard is not discernably different from the traditional unable-or-unwilling standard.[38] Not only does such a position require adjudicators to ignore the differences in the plain language of the two standards, it also ignores the strong correlation between nearly all cases citing the heightened standard and the outcome of those cases: denial of asylum.[39]

In addition to showing the negative effects of the condone-or-completely-helpless standard, there is a need to rethink the best legal strategy to combat that heightened standard. While much attention has been given to grounding the traditional unable-or-unwilling standard in the term "persecution,"[40] advocates should begin to advance arguments that situate the unable-or-unwilling standard in the terms of the Refugee Act[41] and Refugee Convention[42] that speak of

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36. *See, e.g.*, Kanagu v. Holder, 781 F.3d 912, 917 (8th Cir. 2015) (noting that circuit courts "lack jurisdiction to consider arguments not clearly made before the agency").

37. *See, e.g.*, Bishop, *supra* note 29, at 531–40 (arguing that a state condones or is helpless to prevent harms when it has been usurped by a nongovernmental actor or has delegated its authority to a nongovernmental actor); Theresa A. Vogel, *Critiquing Matter of A-B-: An Uncertain Future in Asylum Proceedings for Women Fleeing Intimate Partner Violence*, 52 U. MICH. J.L. REFORM 343, 398 (2019) (arguing that the condoned-or-completely-helpless standard in *Matter of A-B- I* is inconsistent with *Matter of Acosta*, *Matter of M-E-V-G-*, and *Matter of W-G-R-*); Mikhail Izrailev, *A New Normative Approach for the Grant of Asylum in Cases of Non-State Actor Persecution*, 19 CARDOZO J. INT'L & COMP. L. 171, 177–79 (2011) (summarizing the nonstate actor requirement prior to *Matter of A-B- I*).

38. *See Matter of A-B- II*, 28 I&N Dec. at 200-02.

39. *See infra* Part II.

40. *See infra* Part II.

41. 1980 Refugee Act, Pub. L. No. 96-212, 94 Stat. 102.

refugees as those who are "unable or unwilling to avail [themselves] of protection" of the state "because of . . . a well-founded fear of persecution." Despite the obvious linguistic analogue between "unable or unwilling to avail . . . of protection" and "unable or unwilling to protect," courts have ignored this statutory basis for the nonstate actor requirement, preferring instead to root the test in the term "persecution." [43] However, efforts to push back on the agency's heightened test that couple the traditional standard with the statutory term "persecution"—which many courts have found to be ambiguous[44]—are less likely to be successful given the deference that is accorded to the BIA under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.* ("*Chevron*") and *National Cable & Telecommunications Association v. Brand X Internet Services* ("Brand X").[45]

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42. Convention Relating to the Status of Refugees, art. 1, July 28, 1951, 19 U.S.T. 6259 (entered into force Apr. 22, 1954) [hereinafter Refugee Convention].

43. Miranda v. INS, 139 F.3d 624, 626–27 (8th Cir. 1998) (stating that the Board in *Acosta* "adopt[ed] the pre-1980 definition of 'persecution' for purposes of interpreting . . . § 1101(a)(42)(A)," one "required component[] of" which is "the harm or suffering . . . be inflicted either by the government of a country or by [those] . . . the government [is] unable or unwilling to control"); *see also* Matter of McMullen, 17 I&N Dec. 542, 545 (B.I.A. 1980) ("We will therefore require under the new Act, as we did under the old law, that an alien must show . . . persecution at the hands of an organization or person from which the government cannot or will not protect the alien."); Matter of Acosta, 19 I&N Dec. 211, 222–23 (B.I.A. 1985) (concluding that because the "unable or unwilling" standard was a "significant aspect[] of . . . [the] accepted construction of the term 'persecution'" prior to the passage of the Refugee Act, it thus "should be applied to the term as it appears in [8 U.S.C. § 1101(a)(42)]").

44. *See, e.g.*, Scarlett v. Barr, 957 F.3d 316, 333 (2d Cir. 2020) (finding the term "persecution" to be ambiguous); Grace v. Barr, 965 F.3d 883, 897 (D.C. Cir. 2020) ("The INA nowhere defines the term 'persecution.'").

45. Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984). *Chevron* deference is frequently analyzed as part of a two-step process. At Step One, if "a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect." *Id.* at 843. However, if the statute is ambiguous, then a court must proceed to Step Two, where it is required to defer to a reasonable or permissible agency interpretation provided the agency is authorized to interpret the statute and has spoken "with [the] force of law." United States v. Mead Corp., 533 U.S. 218, 237 (2001). When an agency provides such a reasonable construction of an ambiguous statutory term, that interpretation takes precedence even over a contrary construction by a court. *See* Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 984 (2005). While we do not concede that the condone-or-completely-helpless formulation is a reasonable interpretation of the statutory provision at issue, we

Moreover, given the recent issuance of *Matter of A-B- II*, which explicitly appeals to the agency's authority under *Chevron* and *Brand X*,[46] it is more important than ever to advance statutory arguments that firmly ground the unable-or-unwilling test in the unambiguous language of the text. Indeed, even if the incoming Biden administration were to withdraw *Matter of A-B- I* and *II*, the need to properly construe the nonstate actor element of the refugee definition would persist because the traditional justification for the nonstate actor element that roots the test in the term "persecution" leaves the nonstate actor element vulnerable to harmful modifications by future administrations.[47] As such, the framework for which we advocate here—one that durably anchors the nonstate actor element in the plain text of the statute relating to state protection—is of vital importance even in a post-*Matter of A-B-* world.[48]

This Article will first focus on the origin and earliest understanding of the state protection analysis in international law. Part I will delve into the historical development of state protection considerations, beginning with the formation of international documents leading up to the 1951 Refugee Convention and 1967 Protocol. It will trace the evolution of these concepts as they are incorporated into U.S. law, first through the passage of the withholding statute and then later through the passage of the 1980 Refugee Act. Given clear congressional intent to bring U.S. law into conformity with international standards, Part I aims to frame up how these interpretive developments should shape our understanding of nonstate actor claims. Part II will then survey how these concepts

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acknowledge, as we must, that most *Chevron* Step Two/*Brand X* challenges fail. *See* Lee, *supra* note 4, at 378–83.

46. *Matter of A-B- II*, 28 I&N Dec. at 213.

47. *See infra* Section V.B.

48. Additionally, there are at least two other reasons why a simple reversal of *Matter of A-B- I* and *II* is not a panacea. First, several circuit courts have already adopted *Matter of A-B- I*'s test and thus withdrawal of *Matter of A-B- I* and *II* would not automatically undo all of the damage the agency has wrought. Instead, further litigation on this issue will be required, at a minimum, in the Second and Fifth Circuits. *See* Gonzales-Veliz v. Barr, 938 F.3d 219, 233 (5th Cir. 2019); Scarlett v. Barr, 957 F.3d 316, 333 (2d Cir. 2020). Second, two other circuits had used the heightened language even before *Matter of A-B- I* sought to adopt it nationwide. Thus, even if *Matter of A-B- I* and *II* both disappear, a risk will remain that courts of appeals could advance narrow constructions of the standard independent of the agency. For examples of narrow constructions, see Hor v. Gonzalez, 421 F.3d 497, 501 (7th Cir. 2005); Menjivar v. Gonzales, 416 F.3d 918, 921 (8th Cir. 2005).

have percolated within U.S. refugee jurisprudence (in the agency, the federal courts of appeals, and the U.S. Supreme Court) prior to the AG's decision in *Matter of A-B- I*. This survey serves as a baseline for comparing how decisions have been resolved since *Matter of A-B- I*. Part III will then address the fundamentally flawed approach adopted by the AG in *Matter of A-B- I* by applying the analysis begun in Parts I and II. Part IV looks at the challenges that have been brought against *Matter of A-B- I* with a focus on where challenges have succeeded and where others have come up short. Part IV also highlights the disagreement among the courts as to the proper standard for nonstate actor claims that has resulted from *Matter of A-B- I*. Finally, Part V will cast a vision for an alternative framework for understanding the unable-or-unwilling nonstate actor analysis that is grounded in the related statutory terms "avail of . . . protection" and "well-founded fear." There, we argue that the condone-or-completely-helpless standard is fundamentally irreconcilable with the clearly expressed congressional intent demonstrated by the terms of the statute, binding case law, and international law. Specifically, we argue that the statutory terms "avail of . . . [state] protection" and "well-founded fear" require a probability of harm analysis to serve as a lodestar for any proper understanding of the nonstate actor persecution analysis.

I. HISTORICAL DEVELOPMENT OF THE STATE PROTECTION ANALYSIS

This Part begins by discussing the relevant international refugee law foundations and traces how those concepts were translated into U.S. asylum law, with particular focus on the state protection component of the refugee framework and its tight link to the well-founded fear analysis. It also describes the interaction between international legal developments of the nonstate actor requirement and U.S. asylum law to set the stage for our discussion of *Matter of A-B- I* and *II* and their radical departure from the longstanding nonstate actor analysis.

A. Core International Law Instrument: The 1951 Refugee Convention

Born from the ashes of World War II, the U.N. Convention Relating to the Status of Refugees serves as the historical foundation of the contemporary refugee framework.[49] The Refugee Convention

49. ANKER, *supra* note 10, § 4:8.

defines a refugee, in relevant part, as one who "*owing to [a] well-founded fear* of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and *is unable or, owing to such fear, is unwilling to avail himself of the protection of that country*."[50] Guy Goodwin-Gill and Jane McAdam note that the foregoing definition gives primacy to "a well-founded fear of persecution," and references only secondarily the state of being "unable or unwilling, by reason of such fear, to use of take advantage of the protection of their government."[51]

This conclusion is supported both by the text of the Refugee Convention and its precursor documents. Prior to the creation of the Refugee Convention, a number of international legal instruments went so far as to provide categorical relief to those without state protection, irrespective of nexus to a protected characteristic.[52] And even after the nexus requirement was added, the primacy of protection was still evident. For example, the Constitution of the International Refugee Organization ("IRO") [53] provided a multipronged protection analysis for "displaced persons" who were "expelled from their own countries" for reasons of "race, religion, nationality, or political opinion," *as well as* "those *unable or unwilling to avail themselves of the protection* of the government of their country."[54] In other words, in addition to harm on account of a protected characteristic, lack of state protection provided an *alternative* basis upon which to qualify for relief. The IRO regime "expressly recognized that individuals might have *'valid objections' to returning to their country of origin*, including 'persecution or fear based on reasonable grounds of persecution because of race, religion, nationality or political opinion.'"[55] Likewise, the UNHCR's Statute contained similar language, applying to any person who "*is unable or,*

50. Refugee Convention, *supra* note 42, art. 1 (emphasis added).

51. GUY S. GOODWIN-GILL & JANE MCADAM, THE REFUGEE IN INTERNATIONAL LAW 10 (Oxford Univ. Press 3rd ed. 2007) (1983).

52. *Id.* at 16 (noting that being (a) outside one's country of origin and (b) without protection of the government of that state were sufficient and necessary conditions to qualify as a refugee under a 1926 agreement). A similar standard was used to grant relief to persons fleeing Nazi Germany. *Id*. at 17 (noting that refugee arrangements covered those "possessing . . . German nationality . . . who are provided not to enjoy, in law or fact the protection of the German Government").

53. The IRO was the precursor office to the United Nations High Commissioner for Refugees (UNHCR).

54. GOODWIN-GILL & MCADAM, *supra* note 51, at 19 (emphasis added).

55. *Id.*

because of such fear, is unwilling to avail himself *of the protection of the government* of the country of his nationality."[56]

An influential 1949 U.N. report gives meaning to the types of state protection contemplated in the foregoing international documents. The report describes refugees as "persons who, having left the country of which they were nationals, *no longer enjoy the protection and assistance of their national authorities*, either because these authorities refuse to grant them assistance and protection, or because they themselves renounce the assistance and protection of the countries of which they are nationals."[57] It further explains that such protection includes "efforts to improve the status of citizens abroad," "oversight of . . . conventions and actions to ensure the rights granted to citizens are actually respected," "consular services," "the provision of passports," and similar services.[58] Yet, the protection contemplated clearly went further than the mere "external" state protection just described. The report also noted that "[i]n attempt[ing] to make good the deficiency of national protection, the international protection agency should therefore aim to protect the refugee's basic human rights, including the right to life, liberty, and security of the person."[59] Taken together, the foregoing elaboration of the term "state protection" shows a more expansive understanding of states' obligations vis-a-vis their citizens than is often evident in contemporary analyses.[60]

Professor Goodwin-Gill writes that state protection is "an integral part of the . . . determination that a well-founded fear of persecution exists," but it should not be elevated above, or to the exclusion of, the probability of harm analysis.[61] As one scholar has explained, "[t]he whole ethos of humanitarian protection" supports

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56. *Id*. at 21. Goodwin-Gill and McAdam point out that whether under the statute one "must also *prove* a lack of protection is debatable." *Id.* (emphasis in original).

57. *Id.* at 21 (emphasis added) (citing U.N. Secretary-General, *A Study of Statelessness*, U.N. Doc. E/1112;E/1112/Add.1 (Aug. 1949)).

58. *Id.* at 22; *see also* Antonio Fortin, *The Meaning of 'Protection' in the Refugee Definition*, 12 INT'L J. REFUGEE L. 548, 551–58 (2001) (arguing that the meaning of protection in international refugee law refers to a "diplomatic protection").

59. GOODWIN-GILL & MCADAM, *supra* note 51, at 23.

60. Contemporary understandings of the term "state protection" have tended to focus on the "internal protection" a state offers almost to the exclusion of those historical "external protections" contemplated early on. *Id.* at 22 n.30 (citing Januzi v. Secretary of State for the Home Department [2006] UKHL 5, [2006] 2 AC (HL) 426 (appeal taken from Eng.)).

61. *Id.*

the assertion that the "only criterion under human rights treaty law is whether the person will be subject to substantial risk of harm from the non-state actor. If there is such a risk, the human rights treaty obligation . . . should prevent . . . a state from sending individuals into harm's way."[62] Thus, employing the semi-effectiveness of a state's protection apparatus as a means of denying refugee status to one who otherwise has a well-founded fear of persecution is simply antithetical to the intent of the Refugee Convention.[63]

B. Incorporating the International Refugee Definition into U.S. Law Through the 1980 Refugee Act

While U.S. law "did not utilize the Refugee Convention's exact language" in describing the state protection element, "the U.S. Supreme Court has long recognized congressional intent to construe the asylum and refugee provisions consistently with the Convention."[64] The Refugee Act of 1980[65] adopts a definition of the

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62. ANDREW CLAPHAM, HUMAN RIGHTS OBLIGATIONS OF NON-STATE ACTORS 335–41 (Grainne de Burca et al. eds 2006); *see also* ANKER, *supra* note 10, § 4.8 ("A state often cannot completely eliminate the risk of actions by private parties, but . . . is expected to take effective actions toward protecting persons who are being harmed by private actors, reducing the level of risk to below that of a well-founded fear."); Crespin-Valladares v. Holder, 632 F.3d 117, 128 (4th Cir. 2011) (noting that even if the Salvadoran government had "focused law enforcement efforts on suppressing gang violence," a factual inquiry into the specific record of the case was necessary to determine if the government was able to prevent the persecution); Malu v. U.S. Att'y. Gen., 764 F.3d 1282, 1292 (11th Cir. 2014) (highlighting the actions taken by authorities to prevent a mob lynching of a lesbian woman while pointing out that the IJ did not consider this incident in isolation but looked at the state's overall record, which "shows the government . . . is not, in fact, unable or unwilling to control private actors").

63. *See* GOODWIN-GILL & MCADAM, supra note 51, at 12. The preamble to the 1951 Refugee Convention states that its object and purpose is to assure to "'refugees the widest possible exercise of . . . fundamental rights and freedoms.'" *Id.* at 7–8. The Vienna Convention on the Law of Treaties "confirms that a treaty 'shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.'" *Id.* (citing Vienna Convention on the Law of Treaties, opened for signature May 23, 1969, art. 1, 1155 U.N.T.S. 331, art. 31(1) (entered into force Jan. 27, 1980)).

64. Charles Shane Ellison, *Defending Refugees: A Case for Protective Procedural Safeguards in the Persecutor Bar Analysis*, 33 GEO. IMMIGR. L.J. 213, 221 (2019) (pointing out that in INS v. Cardoza-Fonseca, 480 U.S. 421, 437 (1987), the Court, in noting the link between INA §208(a) and Article 34 of the Refugee Convention, observed that there were "many statements indicating Congress' intent that the new statutory definition of 'refugee' be interpreted in conformance with the Protocol's definition"); INS v. Aguirre-Aguirre, 526 U.S. 421, 427 (1999)

term "refugee" that is clearly anchored in the 1951 Refugee Convention[66] and 1967 Protocol.[67] Under U.S. law, a refugee is defined in relevant part as:

> [A]ny person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who *is unable or unwilling to return to*, *and is unable or unwilling to avail himself or herself of the protection of, that country* because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion."[68]

With respect to the state protection element, the parallels between U.S. and international law are clear: where U.S law speaks of refugees as those who are "*unable or unwilling* to return to, and [] *unable or unwilling to avail* [themselves] . . . of [state] *protection* . . . because of persecution or a well-founded fear of persecution," the Refugee Convention states that refugees are those who "*owing to [a] well-founded fear* of being persecuted [are] outside the country of [their] nationality and [are] *unable or, owing to such fear, [are] unwilling to avail [themselves]. . . of [their country's] protection*."[69] Both provisions conspicuously use the "unable or unwilling to avail of . . . [state] protection" framing. Additionally, both provisions overtly link the reason for why a refugee would be "unable or unwilling" to seek state protection to a well-founded fear of persecution.

(recognizing that the "withholding provision . . . parallels [the Refugee Convention's] Article 33")).

65. Pub. L. No. 96-212, 94 Stat. 102 (1980).

66. Refugee Convention, *supra* note 42.

67. Protocol Relating to the Status of Refugees, *opened for signature* Jan. 31, 1967, 19 U.S.T. 6224, 606 U.N.T.S. 267 [hereinafter Protocol]. The United States acceded to Articles 2 through 34 of the Refugee Convention when it signed on to the Protocol in 1968. *See* INS v. Stevic, 467 U.S. 407, 416 (1984); INS v. Cardoza-Fonseca, 480 U.S. 421, 429 (1987). The withholding of removal provision of INA §241(b)(3) (formerly INA section 243(h)), which prohibits the removal of a noncitizen to a country where their "life or freedom would be threatened" because of a protected ground, also corresponds to the Refugee Convention. *See* Refugee Convention, *supra* note 42, art. 33(1) (discussing the signatory-states' obligation to not expel or return ('*refouler*') a refugee where their life or freedom would be threatened).

68. 8 U.S.C. § 1101(a)(42) (emphasis added).

69. Refugee Convention, *supra* note 42, art. 1 (emphasis added).

Given the well-established interpretive rule of understanding the meaning of terms used in the U.S. refugee definition by looking to the Refugee Convention,[70] one would expect U.S. asylum adjudicators to have grounded their understanding of the nonstate actor doctrine in the "unable or unwilling to avail of state protection" language, informed by the meaning of the term "well-founded fear." However, they have uniformly failed to do so. Rather, as discussed in the next Section, U.S. adjudicators have rooted the nonstate actor doctrine in the statutory term "persecution" and have analyzed it in an insular fashion, untethered to determinations of whether fears of such persecution are well-founded.

C. Earliest U.S. Case Law Grounds the Nonstate Actor Doctrine in the Term "Persecution"

Early on, the BIA and federal courts of appeals began to explain that the term "persecution" in the Refugee Act meant harm perpetrated by the applicant's home government or a nonstate actor *that the government is unable or unwilling to control*.[71] The Board, in a seminal decision, *Matter of Acosta*, noted that the "unable or unwilling" standard was a "significant aspect[] of . . . [the] accepted construction of the term '*persecution*,'" long before the passage of the Refugee Act. [72] The precursor statute [73] to the contemporary withholding of removal provision—intended to implement the United States' nonrefoulment obligations under Article 33 of the Refugee Convention[74]—required the Board and the courts to engage in a very

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70. Matter of Negusie, 27 I&N Dec. 347, 353–60 (B.I.A. 2018). Here, the Board explained that "[i]t is well established that Congress enacted the Refugee Act to bring the U.S. law into conformity with the Convention and Protocol." *Id.* at 353.

71. Matter of Acosta, 19 I&N Dec. 211, 222 (B.I.A. 1985) (emphasis added) (describing the term "persecution" as encompassing both harms inflicted "by the government of a country" as well as those "by *persons . . . that the government was unable or unwilling to control*" (emphasis added)).

72. *Id.* at 222–23 (emphasis added) (citing McMullen v. INS, 658 F.2d 1312, 1315 n.2 (9th Cir. 1981)). In *McMullen*, the Court noted the government's concession that "*persecution* within the meaning of [former] § 243(h) [the prior withholding statute] includes [harms] by non-governmental groups . . . where it is shown that the government . . . is *unwilling or unable to control* that group." 658 F.2d at 1315 n.2 (emphasis added).

73. Immigration and Nationality Act of 1952, H.R. 5678, 82nd Cong. § 243(h) (1952) [hereinafter Former INA § 243(h)].

74. INS v. Cardoza-Fonseca, 480 U.S. 421, 429 (1987). In *Cardoza-Fonesca*, the Supreme Court explained:

similar analysis as that called for in the Refugee Convention.[75] During the course of the case law's development regarding that provision's definition of persecutory harm, adjudicators had reached the consensus that such harm could be inflicted either by a government or a nongovernmental actor that the government was unable or unwilling to control.[76] As far back as at least 1967, the Board had recognized that relief could be available even as it relates to a fear of harm inflicted by a nonstate actor.[77] And by 1975, the Board had worked out a fully-fledged articulation that "even though the persecution was . . . not connected with any government," where "the government concerned was either *unwilling or unable to control* the persecuting individual or group," protection could be granted.[78]

Thus, when the question arose as to the meaning of the term "persecution" as used in the Refugee Act, the Board in *Acosta* concluded that the established nonstate actor doctrine "should be applied to the term [persecution] as it appears in [the Refugee Act]" to the same extent as it had been applied in cases dealing with

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> In 1968 . . . the United States agreed to comply with the substantive provisions of Articles 2 through 34 of the 1951 United Nations Convention Relating to the Status of Refugees. Article 33.1 of the Convention . . . which is the counterpart of § 243(h) . . . imposed a mandatory duty on contracting States not to return [noncitizens] to a country where his "life or freedom would be threatened."

Id. (citing 19 U.S.T. 6223, 6259–6276, T.I.A.S. No. 6577 (1968); INS v. Stevic, 467 U.S. 407, 416–17 (1984)).

75. *Stevic*, 467 U.S. at 423 ("Section 243(h) of the Act, 8 U.S.C. § 1253(h), requires the Attorney General to withhold deportation of an alien who demonstrates that his 'life or freedom would be threatened' on account of one of the listed factors if he is deported."). In *Stevic*, the Supreme Court held that to qualify for withholding of removal, one must demonstrate that "it is more likely than not that the alien would be subject to *persecution*" in the country to which he would be returned. *Id.* at 429–30 (emphasis added). As compared to asylum, withholding covers "a narrower class of [noncitizens] who are given a statutory right not to be deported to the country where they are in danger." *Cardoza-Fonseca*, 480 U.S. at 424.

76. *Matter of Acosta*, 19 I&N Dec. at 222–23.

77. Matter of Tan, 12 I&N Dec. 564, 568 (B.I.A. 1967) (recognizing the availability of relief where "a government cannot control" nonstate actor persecution); Rosa v. INS, 440 F.2d 100, 102 (1st Cir. 1971) (noting that while the legislative history is silent on nonstate actor harm, the Board "took a clear position on the issue in [*Matter of*] *Tan* . . . 'that the [withholding] statute does not require proof of persecution by an organized government" (citing *Matter of Tan*, 12 I&N Dec. at 568)).

78. Matter of Pierre, 15 I&N Dec. 461, 462 (B.I.A. 1975) (emphasis added).

withholding of removal.[79] To reach this conclusion, the Board employed the basic rules of statutory construction and relied on the well-established maxim that "words used in an original act . . . , that are repeated in subsequent legislation with a similar purpose, are presumed to be used in the same sense."[80] Accordingly, the Board had no trouble concluding that Congress intended for the unable-or-unwilling standard to be carried forward into the Refugee Act because of its use of the term "persecution."[81] Soon thereafter, federal circuit courts began to recognize that the Board in *Acosta* adopted the pre-1980 definition of "persecution" for the purpose of interpreting the Refugee Act, one of the required components of which is that the harm or suffering be inflicted either by the government of a country or by those the government is "unable or unwilling" to control.[82] Since that time, every circuit in the country has followed suit.[83]

What is not clear is why the more obvious statutory hook—the "unable or unwilling to avail of . . . [state] protection because of . . . a well-founded fear" language—has not played a more significant role in understanding the nonstate actor doctrine in U.S. jurisprudence. As discussed further below, the interpretive choice to ground the nonstate actor doctrine in the term "persecution" carries grave risks for refugees, given that the statutory term "persecution" has almost invariably been recognized as an ambiguous one, such that the BIA's reasonable interpretations of the term are owed great deference.[84] Even if concerns related to administrative law and

79. *Matter of Acosta*, 19 I&N Dec. at 222–23 (emphasis added); *see also* Matter of McMullen, 17 I&N Dec. 542, 544–45 (B.I.A. 1980) ("We will, therefore, require under the new Act, as we did under the old law, that an alien must show either persecution by the government . . . , or . . . at the hands of an organization or person from which the government *cannot or will not protect* the alien." (emphasis added)).

80. *Matter of Acosta*, 19 I&N Dec. at 222–23 (citing Lorillard v. Pons, 434 U.S. 575, 581 (1978)).

81. *Id.*

82. Miranda v. INS, 139 F.3d 624, 626–27 (8th Cir. 1998).

83. *See infra* Part II.

84. *See* Scarlett v. Barr, 957 F.3d 316, 333 (2d Cir. 2010) (stating that it is when an applicant's well-founded fear pertains to private violence that his ability to claim persecution depends on showing that the government is unwilling or unable to protect him against that violence); Grace v. Barr, 965 F.3d 883, 890 (D.C. Cir. 2020) (noting that the AG has reiterated that asylum seekers alleging non-state-actor persecution must show that their governments are "unable or unwilling to prevent" the persecution); Gonzales-Veliz v. Barr, 938 F.3d 219, 233 (5th Cir. 2019) (noting that the "inability or unwillingness standard" requires that a noncitizen's home government has "more than difficulty . . . controlling private

deference are put aside, the tendency to view the nonstate actor doctrine in isolation from the Refugee Convention's and Refugee Act's language—which link up the state protection and well-founded fear analyses—has amounted to higher hurdles for refugees to obtain protection in the United States. To understand why, it is necessary to discuss the well-founded fear analysis.

D. Viewing State Protection Through the Lens of the Well-Founded Fear Test

When the term "well-founded fear of persecution" was first introduced in U.S. law, its meaning was not at all clear. Four years after the passage of the Refugee Act, the Supreme Court in *INS v. Stevic* clarified that to qualify for withholding of deportation, a noncitizen had to show that "it is more likely than not" that their "life or freedom would be threatened" if they were to be deported.[85] However, a circuit split quickly developed over whether the "more likely than not" standard likewise applied to the well-founded fear requirement of requests for asylum.[86] The BIA had held that the two standards were equivalent.[87] And the government, in defending the agency decision in *Cardoza-Fonseca*, argued that "even though the 'well-founded fear' standard is applicable [to requests for asylum], there is no difference between it and the 'would be threatened' test" of the withholding provision.[88] The government asserted that the agency's interpretation of this ambiguous statutory term was entitled to *Chevron* deference.[89]

The Court rejected the government's arguments, "[e]mploying traditional tools of statutory construction," to discern "that Congress did not intend the two standards to be identical."[90] The Court noted that "the reference to 'fear' in the . . . [asylum] standard obviously makes the eligibility determination turn to some extent on the subjective mental state of the" noncitizen, and that the "linguistic difference between the words" requires a conclusion that the standards are not the same.[91] The Court explained that "[o]ne can

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behavior"); *see also infra* Part IV (mapping out the various challenges to *A-B-* and describing where those challenges have fallen short).

85. INS v. Stevic, 467 U.S. 407, 424, 425 (1984).
86. INS v. Cardoza-Fonseca, 480 U.S. 421, 423 (1987).
87. *Id.* at 445.
88. *Id.* at 434.
89. *Id.* at 445–46.
90. *Id.* at 446.
91. *Id.* at 430–31.

certainly have a well-founded fear of an event happening when there is less than a 50% chance of the occurrence taking place," and recognized that even a one-in-ten chance of persecution could produce a well-founded fear in a reasonable person.[92] The Court also noted that "the [Refugee Act's] legislative history . . . demonstrate[d] that Congress added the 'well-founded' language only because that was the language incorporated by the United Nations Protocol to which Congress sought to conform."[93] The Court underscored that "[i]f one thing is clear from the legislative history of the new definition of 'refugee,' and indeed the entire 1980 Act, it is that one of Congress' primary purposes was to bring United States refugee law into conformance with the 1967 United Nations Protocol Relating to the Status of Refugees . . . to which the United States acceded in 1968."[94] In noting that the "definition of 'refugee' that Congress adopted . . . is virtually identical to the one prescribed by . . . the Convention," the Court recognized "congress[ional] intent that the new statutory definition of 'refugee' be interpreted in conformance with the" Refugee Convention's and Protocol's definition.[95]

In turning to international law authorities, the Court explained that the "origin of the Protocol's definition of 'refugee' is found in the 1946 Constitution of the IRO, which "defined a 'refugee' as a person who had a 'valid objection' to returning to his country of nationality, and specified that 'fear, based on reasonable grounds of persecution . . .' constituted a valid objection."[96] The Committee that drafted the provision explained that "[t]he expression 'well-founded fear of being the victim of persecution . . . 'means that a person has either been . . . a victim of persecution or can show good reason why he fears persecution."[97] The term was incorporated into the Refugee Convention and Protocol.[98] The Court noted that "[t]he standard, as it has been consistently understood by those who drafted it, as well as those drafting the documents that adopted it, certainly does not require . . . [a] show[ing] that it is more likely than not that [one] will be persecuted in order to be classified as a 'refugee.'"[99] Rather, in

92. *Id.* at 431.
93. *Id.* at 434–35.
94. *Id.* at 436–37.
95. *Id.* at 437.
96. *Id.* (citing IRO CONST., annex 1, pt. 1, § C1(a)(i)).
97. *Id.* at 438 (citing U.N. Economic & Social Council, Rep. of the Ad Hoc Comm. on Statelessness and Related Problems, U.N. Doc. E/1618, E/AC.32/5, at 39 (1950)).
98. *Id.* at 438 (citing Refugee Convention, *supra* note 42, art. 1).
99. *Id*.

consulting the *Office of the United Nations High Commissioner for Refugees, Handbook on Procedures and Criteria for Determining Refugee Status*, the Court explained that "[i]n general, the applicant's fear should be considered well-founded if he can establish, to a reasonable degree, that his continued stay in his country of origin has become intolerable to him for the reasons stated in the definition, or would for the same reasons be intolerable if he returned there."[100] The Court thus ultimately found that "[t]here is simply no room in the . . . definition for concluding that because an applicant only has a 10% chance of being shot, tortured, or otherwise persecuted, that he or she has no 'well-founded fear' of the event happening."[101]

Significantly, the Court noted that while "[t]here is obviously some ambiguity in a term like 'well-founded fear,' which can only be given concrete meaning through a process of case-by-case adjudication," that conclusion did not eliminate a role for statutory construction.[102] The Court explained that:

> [T]he plain language of the Act, its symmetry with the United Nations Protocol, and its legislative history, lead inexorably to the conclusion that to show a "well-founded fear of persecution," [a noncitizen] need not prove that it is more likely than not that he or she will be persecuted in his or her home country.[103]

The Court could thus answer the question presented through the "ordinary canons of statutory construction."[104]

With the clarity that *Cardoza-Fonseca* provided, the Board reassessed the question as to the correct meaning of the term well-founded fear and crafted the eponymous *Mogharrabi* test.[105] That four-part test directs adjudicators to determine whether (1) the applicant *possesses* a protected characteristic the persecutor seeks to overcome, (2) the persecutor is *aware* that the applicant has that protected characteristic, (3) the persecutor is *able* to harm the applicant, and (4) the persecutor is *inclined* to harm the applicant.[106]

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100. *Id.* at 439 (citing UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees, Ch. II B(2)(a) §§ 37–42, U.N. Doc. HCR/IP/4/Eng/REV.1 (1979)).

101. *Id.* at 440. Rather, the Court explained that "it is enough that persecution is a reasonable possibility." *Id.*

102. *Id.* at 448.

103. *Id.* at 449.

104. *Id.*

105. Matter of Mogharrabi, 19 I&N Dec. 439, 446 (B.I.A. 1987).

106. *Id.*

If this four-part test is satisfied, then the adjudicator may conclude that the applicant faces a *reasonable possibility* of future harm and thus has a well-founded fear.[107]

Given that the nonstate actor doctrine similarly looks to a government's *ability* and *willingness* to provide protection vis-a-vis a nongovernmental persecutor, there is a clear analogue between the nonstate actor doctrine and the well-founded fear analysis in the context of a nonstate persecutor. However, when the nonstate actor test is fashioned and applied in isolation from the well-founded fear analysis, as occurs in efforts to ground the doctrine in the term "persecution," it "tends . . . to downplay and even . . . trump the individual's fear of persecution, while giving preference to the state and its efforts to provide a reasonably effective and competent police and judicial system which operates compatibly with minimum international standards."[108] Put another way, if a person who has established a well-founded fear of future harm can lose their asylum claim when the government is making good faith but ineffective efforts to protect them, then such a nonstate actor requirement consumes *Cardoza-Fonseca*'s analysis.

* * *

When an elevated nonstate actor standard is imposed to require an applicant to show *more* than a reasonable possibility of future harm, these two elements of the refugee definition work at irreconcilable cross-purposes in contravention of both the Refugee Convention and Refugee Act. For this reason, we argue that the nonstate actor requirement must be interpreted consistently with the historical understanding of the state protection component as well as the rest of the refugee definition, and in particular the well-founded fear requirement. When the nonstate actor requirement is allowed to develop in isolation, it threatens to usurp the probability of harm analysis embedded in the well-founded fear requirement, rendering that "reasonable possibility" test a nullity. Indeed, the condone-or-complete-helplessness standard represents the worst culmination of the nonstate actor analysis divorced from its original context, which clearly tethered considerations of state protection to the probability of harm.

The next Part explores how the nonstate actor test developed prior to *Matter of A-B- I* and *II*. In particular, it notes how the agency and courts have both grounded the test in the term "persecution" and

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107. *Id*. at 444.

108. *See* GOODWIN-GILL & MCADAM, *supra* note 51, at 11.

have approached it as an insular inquiry, rather than a contextualized one most appropriately understood through the lens of the well-founded fear analysis.

II. THE NONSTATE ACTOR STANDARD LEADING UP TO *MATTER OF A-B- I AND II*

Prior to the AG's decision in *Matter of A-B- I*, the unwilling-or-unable standard was well-established with the BIA and all eleven federal courts of appeals. This Part sets forth the law of each court prior to the issuance of the *Matter of A-B- I* decision. This information serves as important context for the confusion created by the use of the condone-or-completely-helpless standard in *Matter of A-B- I* and the subsequent decisions. These cases also reveal the differences in the plain meaning of the words used in the two standards.

In addition to canvassing the Board's and courts' treatment of the unable-or-unwilling test, this Part also reveals the agency's and courts' clear preference for anchoring that test in the term "persecution." While we contend that the BIA's and courts' choice to adopt the unable-or-unwilling standard is correct, grounding that test in the term "persecution" created a latent vulnerability to future negative revisions—a vulnerability *Matter of A-B- I* and *II* exploited.

A. The Board of Immigration Appeals

Prior to the issuance of *Matter of A-B- I*, the BIA issued precedential decisions dating back more than forty years affirming that harms perpetrated by nonstate actors can constitute persecution.[109] As noted above, in *Matter of Acosta*, the Board recognized that in the Refugee Act, 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."[110] 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.[111]

109. *See, e.g.*, Matter of Pierre, 15 I&N Dec. 461, 462 (B.I.A. 1975); Matter of McMullen, 19 I&N Dec. 90, 96 (B.I.A. 1984).

110. Matter of Acosta, 19 I&N Dec. 211, 222 (B.I.A. 1985).

111. *Id.* at 223.

The BIA has recognized various types of harms inflicted by nonstate actors as persecution, including, but not limited to, murder, [112] beatings, [113] threats, [114] detention, [115] female genital cutting,[116] and domestic abuse.[117] 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.[118] The Board rejected the Service's[119] argument that the persecution needed to be "government directed or condoned," [120] instead concluding that government *inaction* was sufficient to show 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."[121] As the BIA apparently recognized, the police's lack of action does not amount to "condoning" or "directing" the behavior, but it was nonetheless enough to satisfy the unwilling-or-unable standard.

The BIA similarly recognized the applicability of the unwilling-or-unable standard to claims based on domestic violence—the very type of claim later addressed by the Attorney General in

112. *See, e.g.*, Matter of Villalta, 20 I&N Dec. 142, 147 (B.I.A. 1990) (finding that the Salvadoran government appeared to be unable to control paramilitary death squads).

113. *See, e.g.*, Matter of O-Z- & I-Z-, 22 I&N Dec. 23, 25 (B.I.A. 1998) (finding that the applicant, who suffered repeated beatings and received multiple handwritten anti-Semitic threats, whose apartment was vandalized by anti-Semitic nationalists, and whose son was subjected to degradation and intimidation, established that he had suffered harm which, in the aggregate, rose to the level of persecution).

114. *See, e.g.*, *id.* at 25–26 (finding repeated threats, among other harms, sufficient).

115. *See, e.g.*, Matter of H-, 21 I&N Dec. 337, 341 (B.I.A. 1996) (finding that the applicant, who had been detained as a result of interclan violence, had suffered persecution).

116. *See, e.g.*, Matter of Kasinga, 21 I&N Dec. 357, 365 (B.I.A. 1996) (holding that female genital mutilation constitutes persecution); *see also* Matter of S-A-K- & H-A-H-, 24 I&N Dec. 464, 465 (B.I.A. 2008) (finding that applicant, who was "forcibly circumcised by women brought home by her father when she was 9 years old," had experienced persecution).

117. *See, e.g.*, Matter of S-A-, 22 I&N Dec. 1328, 1335 (B.I.A. 2000) (holding that applicant's abuse at the hands of her orthodox Muslim father amounted to persecution).

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

119. At the time this case was decided, the relevant government agency was not the Department of Homeland Security, but rather the now-defunct Immigration and Naturalization Service.

120. *Matter of O-Z- & I-Z-*, 22 I&N Dec. at 25.

121. *Id.* at 26.

Matter of A-B- I. In *Matter of A-R-C-G-*, the applicant was abused by her husband, who beat her weekly, broke her nose, burned her breast, and raped her.[122] The IJ denied relief, and the BIA reversed, holding that she had demonstrated persecution on account of her membership in a particular social group.[123] The BIA reaffirmed a longstanding principle that harms committed by nonstate actors constitute persecution when the applicant demonstrates that the government was "unwilling or unable to control the 'private' actor."[124] Similarly, 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 constituted persecution where Moroccan authorities would have been unable or unwilling to protect her.[125]

Finally, the BIA has found persecution where a victim's family forces them to undergo female genital 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.[126] 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.[127] In so doing, it explicitly recognized the unwilling-or-unable standard.[128]

Even when the BIA has decided against the applicant, it has acknowledged that harms inflicted by nonstate 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."[129] It recognized that the Provisional Irish Republican Army ("PIRA") was a terrorist organization that the government was unable to control.[130] It denied McMullen asylum only because he was himself a member of PIRA and had persecuted others.[131]

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122. Matter of A-R-C-G-, 26 I&N Dec. 388, 389 (B.I.A. 2014).
123. *Id.* at 389–90.
124. *Id.* at 395.
125. Matter of S-A-, 22 I&N Dec. 1328, 1335 (B.I.A. 2000).
126. Matter of Kasinga, 21 I&N Dec. 357, 358–59 (B.I.A. 1996).
127. *Id.* at 359, 368.
128. *Id.* at 365.
129. Matter of McMullen, 19 I&N Dec. 91, 95 (B.I.A. 1984).
130. *Id.* at 94.
131. *Id.* at 99.

B. The Federal Courts of Appeals

Before the issuance of *Matter of A-B- I*, every single federal court of appeals had held that harms inflicted by nonstate actors can qualify as persecution, so long as the government is "unwilling or unable" to control the harm.[132] Here, too, we observe both a strong consensus in favor of the unable-or-unwilling test, as well as a widespread tendency to follow the Board's lead in using the term "persecution" as the statutory hook for that standard. The relevant case law from each circuit is summarized below.

1. First Circuit

The U.S. Court of Appeals for the First Circuit has long recognized the unwilling-or-unable standard.[133] 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.[134] The First Circuit remanded the BIA's denial of asylum and reiterated the IJ's initial reliance on the established principle that harms committed by nonstate actors can constitute persecution when there is a "showing that the persecution is due to the government's unwillingness or inability to control the conduct of private actors."[135] In *Khattak v. Holder*, the court considered the application of a Pakistani family who had been threatened by the Taliban.[136] 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

132. As there are no immigration courts located in the District of Columbia Circuit, the Court of Appeals for the District of Columbia Circuit had no occasion to review the nonstate actor standard prior to the issuance of *Matter of A-B-*. *See EOIR Immigration Court Listing*, U.S. DEP'T OF JUST. https://www.justice.gov/eoir/eoir-immigration-court-listing [https://perma.cc/RLP2-UEAA].

133. *See, e.g.*, Aldana-Ramos v. Holder, 757 F.3d 9, 17 (1st Cir. 2014) (citing *Ivanov v. Holder*, 736 F.3d 5, 12 (1st Cir. 2013) for government's unwillingness or inability to control private conduct); Sok v. Mukasey, 526 F.3d 48, 53 (1st Cir. 2008) (citing *Nikijuluw v. Gonzáles*, 427 F.3d 115, 121 (1st Cir. 2005) for the unwilling-or-unable standard).

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

135. *Kadri*, 543 F.3d at 20 (citing Jorgji v. Mukasey, 514 F.3d 53, 57 (1st Cir. 2008)); *see also* Orelien v. Gonzales, 467 F.3d 67, 72 (1st Cir. 2006) (providing that asylum seekers must show mistreatment that is the direct result of "government action, government-supported action, or government's unwillingness or inability to control private conduct").

136. Khattak v. Holder, 704 F.3d 197, 200 (1st Cir. 2013).

"making inroads."[137] 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."[138]

Even when the court has ruled against the applicant, it has nonetheless acknowledged that harms inflicted by nonstate actors can constitute persecution. In *Guaman-Loja v. Holder*, for example, the court set forth the unwilling-or-unable rule, but found that the petitioner failed to show government inability or unwillingness to control assaults by members of an indigenous tribe.[139] In *Vega-Ayala v. Lynch*, a more recent domestic violence case, the court set forth the unwilling-or-unable standard, but found that, unlike the applicant in *Matter of A-R-C-G-*, Vega-Ayala had not shown that her persecution was on account of a protected category.[140]

Thus, prior to *A-B- I*, the court clearly recognized the unwilling-or-unable standard as the proper standard for assessing nonstate actor claims. Numerous unpublished decisions from the First Circuit pre-*Matter of A-B- I* establish the same.[141]

2. Second Circuit

The Second Circuit Court of Appeals also has consistently held that harms inflicted by nonstate actors may constitute

137. *Id*. at 203. In several of the circuit court cases described in this Section, the BIA initially found that the applicant had not shown that the government was unwilling or unable to protect that applicant. However, this fact does not cut against the argument that the BIA has historically recognized and applied the unwilling-or-unable standard and not the more onerous condone-or-completely-helpless test. In each of these cases, the BIA set forth and applied the unwilling-or-unable test. In some, the courts of appeals agreed with the BIA's analysis, and in others they disagreed and remanded. Although the authors argue that the unwilling-or-unable test is less burdensome than the condone-or-completely-helpless test, the authors do not mean to suggest that the unwilling-or-unable test will always be satisfied. Indeed, there may be cases in which the courts or agency might legitimately find that the applicant did not meet their burden to show that their government was unwilling or unable to protect them from the persecution.

138. *Id*. at 206.

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

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

141. For First Circuit cases that apply the unwilling-or-unable standard 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); Barzoia Becerra v. Holder, 323 F. App'x 1, 2 (1st Cir. 2009); Kamuh v. Mukasey, 280 F. App'x 7, 10 (1st Cir. 2008).

persecution so long as the government is unwilling or unable to control the conduct.[142] The Second Circuit has recognized persecution committed at the hands of various nonstate actors, including, *inter alia*, domestic abusers,[143] rebel guerilla groups,[144] religious groups,[145] tribe members,[146] members of other ethnic groups,[147] anti-Semites,[148] and traffickers.[149] Further, it has stated that a government's inability or unwillingness to control nonstate persecutors can be corroborated by a showing of authorities' failure to respond,[150] lack of resources,[151] corruption or impunity, [152] or societal pervasiveness of the persecution.[153]

In *Ivanishvili v. Department of Justice*, the Second Circuit remanded the case because it found that the IJ failed to consider the applicant's testimony that authorities and unknown nonstate actors violently attacked her and other church members. [154] 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."[155]

Similarly, in *Aliyev v. Mukasey*, the Second Circuit remanded a BIA decision that affirmed an IJ's denial of asylum to a family of ethnic Uyghurs from Kazakhstan.[156] After a Kazakh nationalist group threatened and beat the father, he filed a report with the police.[157] The police sent him to the hospital for an examination and injury report, yet never conducted a proper investigation.[158] After the family

142. *See, e.g.*, Pan v. Holder, 777 F.3d 540, 543 (2d Cir. 2015) (holding acts by private actors can constitute persecution if the government is unable or unwilling to control them); Rizal v. Gonzales, 442 F.3d 84, 92 (2d Cir. 2006) (recognizing that private acts may be persecution if the government is unwilling to control the actions).

143. Bori v. INS, 190 F. App'x 17, 19 (2d Cir. 2006).

144. Del Pilar Delgado v. Mukasey, 508 F.3d 702, 707 (2d Cir. 2007).

145. *Rizal*, 442 F.3d at 92.

146. Abankwah v. INS, 185 F.3d 18, 26 (2d Cir. 1999).

147. Aliyev v. Mukasey, 549 F.3d 111, 118 (2d Cir. 2008).

148. Poradisova v. Gonzales, 420 F.3d 70, 81 (2d Cir. 2005).

149. Paloka v. Holder, 762 F.3d 191, 198–99 (2d Cir. 2014).

150. Pavlova v. INS, 441 F.3d 82, 91 (2d Cir. 2006).

151. Sotelo-Aquije v. Slattery, 17 F.3d 33, 36 (2d Cir.1994).

152. *Poradisova*, 420 F.3d at 81.

153. Abankwah v. INS, 185 F.3d 18, 25–26 (2d Cir. 1999).

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

155. *Id.* at 342.

156. Aliyev v. Mukasey, 549 F.3d 111, 119 (2d Cir. 2008).

157. *Id*. at 114.

158. *Id*.

reported that their home was destroyed by an explosion, a local sheriff came to the home, but did nothing further.[159] 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."[160] Plainly, in the court's view, an asylum seeker could meet the nonstate standard even if the police provided 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 nonstate actor 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.[161] Likewise, in *Bori v. INS*, the court held that an IJ failed to take into account an Albanian asylum seeker's reasons for not reporting domestic abuse to the government.[162] In particular, the IJ did not consider a country report that stated that the majority of spousal abuse goes unreported as a result of lax police responses.[163] In these two cases, the Second Circuit made clear 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 they reported. Several unpublished decisions also demonstrate the court's longstanding recognition of the unwilling-or-unable standard prior to *Matter of A-B- I*.[164]

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159. *Id*.

160. *Id*. at 118.

161. Pan v. Holder, 777 F.3d 540, 545 (2d Cir. 2015).

162. Bori v. INS, 190 F. App'x 17, 19 (2d Cir. 2006).

163. *Id.*

164. Prior to the *Matter of A-B- I* decision, the Second Circuit consistently recognized the unwilling-or-unable standard. *See, e.g.*, Martinez-Segova v. Sessions, 696 F. App'x 12, 14 (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, 831 (2d Cir. 2010); Gjicali v. Mukasey, 260 F. App'x 360, 362 (2d Cir. 2008); Ketaren v. Mukasey, 269 F. App'x 90, 94 (2d Cir. 2008); Jasaraj-Hot v. Gonzales, 217 F. App'x 33, 35 (2d Cir. 2007); Camara v. Dep't of Homeland Sec., 218 F. App'x 61, 64 (2d Cir. 2007); Hussain v. Gonzales, 228 F. App'x 101, 102 (2d Cir. 2007); Mikhailenko v. U.S. Citizenship and Immigr. Servs., 228 F. App'x 41, 43 (2d Cir. 2007).

3. 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."[165] A prime example is *Fiadjoe v. Attorney General*, in which the court remanded a BIA decision denying a Ghanaian woman's applications for asylum and CAT relief based on her abuse and enslavement in accordance with the tenets of the Trokosi sect.[166] Ghana had passed legislation banning the practice of "customary servitude," and working with an NGO, helped release 2,800 Trokosi slaves.[167] Despite these policy changes, the court 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.[168] This case demonstrates that an applicant could satisfy the "unable or unwilling" standard even when a government passes legislation outlawing the form of persecution faced by an asylum seeker, clearly revealing that the government did not "condone" the practice and was not "completely helpless" to stop it. Similarly, in *Garcia v. Attorney General*, the court found persecution where the Guatemalan government was unable to protect the applicant, a criminal witness who testified against violent gang members.[169]

Even where the Third Circuit has ruled against the asylum applicant, it has nonetheless recognized that harms inflicted by nonstate actors can constitute persecution.[170] In none of these cases did the court rule against the applicant on the basis that harms inflicted by nonstate actors do not constitute persecution.[171] Moreover, numerous unpublished decisions from the circuit also demonstrate

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165. Fiadjoe v. U.S. Att'y Gen., 411 F.3d 135, 160 (3d Cir. 2005); *see also* Garcia v. U.S. Att'y Gen., 665 F.3d 496, 503 (3d Cir. 2011) (applying the unwilling-or-unable framework); Espinosa-Cortez v. U.S. Att'y Gen., 607 F.3d 101, 113 (3d Cir. 2010) (recognizing the unwilling-or-unable standard); Vente v. Gonzales, 415 F.3d 296, 300 (3d Cir. 2005) (same).

166. *Fiadjoe*, 411 F.3d at 160, 163.

167. *Id.* at 139.

168. *Id.* at 161.

169. *Garcia*, 665 F.3d at 500, 503.

170. *See, e.g.*, Ndayshimiye v. U.S. Att'y Gen., 557 F.3d 124, 132 (3d Cir. 2009) (finding that the 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) (denying relief on credibility grounds).

171. *Ndayshimiye*, 557 F.3d at 133; *Chen*, 434 F.3d at 221–22 (denying relief on other grounds).

that it is well-established that harms inflicted by nonstate actors can constitute persecution.[172]

4. Fourth Circuit

The Fourth Circuit Court of Appeals has long recognized the unwilling-or-unable standard.[173] In *Crespin-Valladares v. Holder*, for example, a Salvadoran applicant witnessed four members of MS-13 flee the scene after fatally shooting his cousin.[174] He described the four men to the police.[175] Two weeks later, the police arrested two of the men.[176] As the murder trial approached, gang members told the applicant's uncle that they would kill him if he continued to

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172. The following cases are just some of those in which the Third Circuit has held that persecution need not directly arise from state-created harm: Emran v. U.S. Att'y Gen., 801 F. App'x 841, 845 (3d Cir. 2020); Bera v. U.S. Att'y Gen., 555 F. App'x 129, 132 (3d Cir. 2014); Kesuma v. U.S. Att'y Gen., 555 F. App'x 123, 124 (3d Cir. 2014); Pitel v. U.S. Att'y Gen., 528 F. App'x 172, 174 (3d Cir. 2013); Kuruca v. U.S. Att'y Gen., 547 F. App'x 126, 129 (3d Cir. 2013); Ferreira v. U.S. Att'y Gen., 513 F. App'x 184, 188 (3d Cir. 2013); Ball v. U.S. Att'y Gen., 479 F. App'x 443, 443 (3d Cir. 2012); Haxhari v. U.S. Att'y Gen., 459 F. App'x 140, 143 (3d Cir. 2012); Cardozo v. U.S. Att'y Gen., 505 F. App'x 135, 137 (3d Cir. 2012); Xing Qiang Zhuo v. U.S. Att'y Gen., 502 F. App'x 176, 178 (3d Cir. 2012); Dolley v. U.S. Att'y Gen., 440 F. App'x 121, 124 (3d Cir. 2011); Mahadeo v. U.S. Att'y Gen., 455 F. App'x 274, 276 (3d Cir. 2011); Lopez-Perez v. U.S. Att'y Gen., 447 F. App'x 370, 375 (3d Cir. 2011); Abazaj v. U.S. Att'y Gen., 443 F. App'x 725, 729 (3d Cir. 2011); Paprskarz v. U.S. Att'y Gen., 360 F. App'x 283, 286 (3d Cir. 2010); Ngo v. U.S. Att'y Gen., 350 F. App'x 714, 717 (3d Cir. 2009); Sze Fung Cheng v. U.S. Att'y Gen., 312 F. App'x 460, 463 (3d Cir. 2008); Massaquoi v. U.S. Att'y Gen., 313 F. App'x 483, 485 (3d Cir. 2008); Soesilo v. U.S. Att'y Gen., 239 F. App'x 703, 704 (3d Cir. 2007); Suherwanto v. U.S. Att'y Gen., 230 F. App'x 211, 215 (3d Cir. 2007); Setiawan v. U.S. Att'y Gen., 237 F. App'x 728, 731 (3d Cir. 2007); Susanto v. U.S. Att'y Gen., 244 F. App'x 492, 495 (3d Cir. 2007); Wijaya v. U.S. Att'y Gen., 172 F. App'x 411, 412 (3d Cir. 2006); Rehman v. U.S. Att'y Gen., 178 F. App'x 126, 128 (3d Cir. 2006); Lie v. Sec'y of Dept. of Homeland Sec., 121 F. App'x 453, 457 (3d Cir. 2005); Lin v. U.S. Att'y Gen., 151 F. App'x 113, 116 (3d Cir. 2005).

173. *See, e.g.*, Zavaleta-Policiano v. Sessions, 873 F.3d 241, 246 (4th Cir. 2017) (holding that an asylum applicant must show persecution by an entity that the government is unable or unwilling to control); Hernandez-Avalos v. Lynch, 784 F.3d 944, 949 (4th Cir. 2015) (finding that El Salvador was unwilling and unable to protect the petitioner); Crespin-Valladares v. Holder, 632 F.3d 117, 128 (4th Cir. 2011) (remanding the BIA's denial of asylum in part because the petitioner showed the El Salvadoran government was unable or unwilling to control MS-13's activities); Mulyani v. Holder, 771 F.3d 190, 198 (4th Cir. 2014) (denying asylum because the BIA had strong evidence the Indonesian government was not unwilling or unable to protect the applicant from religious persecution).

174. 632 F.3d 117, 120 (4th Cir. 2011).

175. *Id.*

176. *Id.*

cooperate.[177] The prosecutor provided the uncle with police protection, but because the applicant did not directly witness the murder, he did not receive police protection.[178] A court convicted both defendants, and the gang members continued to threaten him until he fled to the United States.[179]

The BIA concluded that a State Department report "demonstrates that the Salvadoran government has focused law enforcement efforts on suppressing gang violence."[180] 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."[181] 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."[182] 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.[183]

In like manner, in *Hernandez-Avalos v. Lynch*, the Fourth Circuit concluded that the Mara 18 gang persecuted a mother based on family ties.[184] 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.[185]

Fourth Circuit cases in which the court decided against the applicant do not lead to a different conclusion.[186] In *Velasquez v. Sessions*, despite denying the petition, the court explicitly recognized that harms perpetrated by "an organization that the Honduran

177. *Id.*
178. *Id.*
179. *Id.*
180. *Id.* at 128.
181. *Id.*
182. *Id.*
183. *See also* Hernandez-Avalos v. Lynch, 784 F.3d 944, 952–53 (4th Cir. 2015) (granting petition for review where 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]").
184. *Id.* at 949–50.
185. *Id.* at 952–53.
186. *See, e.g.*, Mulyani v. Holder, 771 F.3d 190, 200 (4th Cir. 2014) (acknowledging the unwilling-or-unable standard, but finding that the standard was not met because the applicant did not attempt to go to the police regarding the incidents in which she was attacked and noting that the government had successfully prosecuted similar cases).

government 'is unable or unwilling to control'" could constitute persecution.[187] It denied relief not because of a rejection of the unwilling-or-unable 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.[188] Instead, the court found that the reason for the feared harm was a dispute over the custody of a child.[189] 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 nonstate actor standard.

Unpublished cases in the Fourth Circuit also show that, prior to *Matter of A-B- I*, it was well established in the circuit that harms inflicted by nonstate actors could constitute persecution under the unwilling-or-unable standard.[190] Indeed, the court's decision not to publish these cases demonstrates just how well-established this proposition was.

5. Fifth Circuit

Prior to *Matter of A-B- I*, it was 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*."[191] In *Eduard v. Ashcroft*, the court granted the petition of an applicant who was "afraid to go back to Indonesia because Christians

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

188. *Id.* at 196.

189. *Id.* at 195–96.

190. *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 to her father and brother); Mazzi v. Lynch, 662 F. App'x 227, 234, 236 (4th Cir. 2016) (granting petition for review because IJ erred 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) (finding that the petitioner failed to show the government was unwilling or unable to control the abuser); Diaz v. INS, No. 92-2167, 1993 U.S. App. LEXIS 29530, at *6–7 (4th Cir. Nov. 15, 1993) (finding that the petitioner failed to show that the government was unwilling or unable to control the group from which the petitioner feared persecution).

191. 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) (using the "unable or unwilling" language); Adebisi v. INS, 952 F.2d 910, 914 (5th Cir. 1992) (affirming denial of asylum because the applicant could not show that the government was unable or unwilling to control the persecutors).

are being persecuted there by the Moslems and the Indonesian government cannot control them."[192]

Even when denying relief, the court explicitly recognized that harms inflicted by nonstate actors can constitute persecution.[193] 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."[194] In denying the petition, the court nonetheless recognized that "the BIA extends the qualifying range of persecution fear to include acts by groups '*the government is unable or unwilling to control*.'"[195]

As in other jurisdictions, unpublished cases in the Fifth Circuit further demonstrate that, prior to *Matter of A-B- I*, it was well settled that harms inflicted by nonstate actors could constitute persecution, so long as the applicant could show that the government was "unable or unwilling" to control them.[196]

6. Sixth Circuit

The Sixth Circuit Court of Appeals has consistently recognized the unwilling-or-unable standard. [197] For example, in

192. *Eduard*, 379 F.3d at 190.

193. *See, e.g.*, *Tesfamichael*, 469 F.3d at 113 (noting that persecution also entails harm inflicted by forces the government is unable or unwilling to control); *Adebisi*, 952 F.2d at 914 (same).

194. *Adebisi*, 952 F.2d at 914.

195. *Id.* While it is true that the court in *Shehu v. Gonzales*, 443 F.3d 435, 437 (5th Cir. 2006), briefly quoted the condone-or-complete-helplessness language from a Seventh Circuit decision (discussed in further detail below), the *Shehu* case dealt with violence not at the hands of nonstate actors, but at the hands of a government that had since changed from being dominated by Serbs to being dominated by the U.N. 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.

196. *See, e.g.*, Venturini v. Mukasey, 272 F. App'x 397, 402 (5th Cir. 2008) (stating that past persecution can entail harm inflicted by forces the government is unable or unwilling to control); Gomez v. Gonzales, 163 F. App'x 268, 272 (5th Cir. 2006) (finding that persecution can occur at the hands of private persons when the government is unable or unwilling to intervene); Manjee v. Holder, 544 F. App'x 571, 575 (5th Cir. 2006) (stating that the harm in question could be suffered at the hands of forces the government is unable or unwilling to control).

197. *See, e.g.*, Kamar v. Sessions, 875 F.3d 811, 818 (6th Cir. 2017) (acknowledging that persecution can be by those the government is unable or unwilling to control); Marouf v. Lynch, 811 F.3d 174, 189 (6th Cir. 2016) (stating

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.[198] 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 had placed eighty-two women in "protective custody" that year to prevent them from becoming victims of honor killings.[199] The BIA also held that subsequent country reports demonstrated that the Jordanian government was actively protecting victims and prosecuting the perpetrators of honor crimes.[200] The court reversed, finding that "governors in Jordan routinely abuse the law and use imprisonment to protect potential victims of honor crimes.'"[201] Meanwhile, the Jordanian government frequently reduced sentences for perpetrators of honor killings or dismissed cases if the victim's family (who is also often the perpetrator's family) did not press charges.[202] Clearly, the court was employing the "unable or unwilling" standard, and not the heightened standard, as the Jordanian government was not "completely helpless" to protect women from honor killings. Its protections were merely ineffective.

Similarly, in *Marouf v. Lynch*, where the applicants, who were Christian, were repeatedly attacked by Muslim individuals,[203] the court held that a violent attack on the basis of religion amounts to past persecution, even if perpetrated by civilians.[204] In its decision, the court noted that a State Department report showed that the Palestinian Authority was unable or unwilling to control the Muslim persecutors.[205]

Even when denying relief, the Sixth Circuit has explicitly recognized the unwilling-or-unable 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

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that discrimination, harassment, and violence by groups the government is unwilling or unable to control can constitute persecution).

198. *Kamar*, 875 F.3d at 818–20.

199. *Id*. at 816.

200. *Id*.

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

202. *Id*.

203. *Marouf*, 811 F.3d at 178.

204. *Id.* at 189.

205. *Id.*

government is unwilling or unable to control."[206] The court has also recognized the unwilling-or-unable standard in several unpublished decisions.[207]

7. Seventh Circuit

The Seventh Circuit Court of Appeals has likewise long recognized the unwilling-or-unable standard.[208] For example, in *Sarhan v. Holder*, a Jordanian asylum seeker feared that her brother would subject her to an honor killing based on a false rumor that she had committed adultery.[209] The IJ denied her claim, finding that the Jordanian government would protect the applicant if her brother posed a threat, and the BIA affirmed.[210] On appeal, the government argued that in 2007 there were only seventeen reported instances of honor killings, and all seventeen honor crimes were prosecuted.[211] The court found these arguments unconvincing and reversed the BIA, reasoning that "[p]rosecution at times is an empty gesture."[212] 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."[213] 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

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

207. *See, e.g.*, Abdramane v. Holder, 569 F. App'x 430, 436 (6th Cir. 2014) (applying the unwilling-or-unable standard when determining asylum eligibility); Anyakudo v. Holder, 375 F. App'x 559, 564 (6th Cir. 2010) (finding the applicant did not demonstrate he was persecuted by government officials or actors the government was unwilling or unable to control); El Ghorbi v. Mukasey, 281 F. App'x 514, 516 (6th Cir. 2008) (determining the applicant did not prove persecution under the unwilling-or-unable standard); Berishaj v. Gonzales, 238 F. App'x 57, 61 (6th Cir. 2007) (using the unwilling-or-unable standard in an asylum determination); Keita v. Gonzales, 175 F. App'x 711, 713 (6th Cir. 2006) (finding that unwillingness or inability on the part of the government was not proven by the asylum applicant).

208. For cases applying the unwilling-or-unable standard to a variety of fact patterns, including persecution on the basis of sex, religion, and social group membership, 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).

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

210. *Id.* at 652.

211. *Id*. at 658.

212. *Id*.

213. *Id*.

would be unable or unwilling to protect the applicant.[214] The Jordanian government might have been ineffective at protecting the applicant, but it could hardly be characterized as "completely helpless" given that it prosecuted all seventeen reported instances of honor killings in 2007.[215]

Even when denying petitions for review, the Seventh Circuit has recognized that persecution could be inflicted by nonstate 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.[216] Several unpublished cases in the circuit also demonstrate the court's longstanding recognition of the unwilling-or-unable standard.[217]

Despite the Seventh Circuit's adherence to the unwilling-or-unable standard, the AG's decision in *Matter of A-B- I* cited two Seventh Circuit decisions in support of the condone-or-completely-helpless standard. The condone-or-completely-helpless language originated in *Galina v. INS*, in which the court stated that "a finding of persecution ordinarily requires a determination that government authorities, if they did not actually perpetrate or incite the persecution, *condoned it or at least demonstrated a complete helplessness* to protect the victims."[218] However, none of the cases that the court cited in support of this proposition contain the condone-or-completely-helpless language, and the court did nothing further to explain where the language came from.[219] 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,

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214. *Id*. at 660.

215. *Sarhan*, 658 F.3d at 660.

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

217. For cases recognizing that asylum applicants must show that their home countries were unwilling or unable to offer them protection, see, e.g., Abdelghani v. Holder, 309 F. App'x 19, 21 (7th Cir. 2009); Rupey v. Mukasey, 304 F. App'x 453, 455 (7th Cir. 2008); Yaylacicegi v. Gonzalez, 175 F. App'x 33, 36 (7th Cir. 2006); Lleshanaku v. Ashcroft, 100 F. App'x 546, 548 (7th Cir. 2004); Esquivel v. Ashcroft, 105 F. App'x 99, 100 (7th Cir. 2004).

218. Galina v. INS, 213 F.3d 955, 958 (7th Cir. 2000) (emphasis added).

219. *See* Bucur v. INS, 109 F.3d 399, 403 (7th Cir. 1997); Hengan v. INS, 79 F.3d 60, 62 (7th Cir. 1996); Borja v. INS, 175 F.3d 732, 735 n.1 (9th Cir. 1999) (en banc); Aguilar-Solis v. INS, 168 F.3d 565, 573 (1st Cir. 1999).

but if either of those conditions is satisfied, the claim is a good one."[220] Notably, however, in both *Galina* and *Hor*, the court held that the petitioners had established the state action requirement despite the fact that the police took some actions to protect them (albeit ineffectively), [221] because they demonstrated that, despite the language the court used to describe the standard, the standard the court actually applied was the unable-or-unwilling standard and not the heightened condone-or-completely-helpless standard that the AG applied in *Matter of A-B- I*. Moreover, the vast majority of Seventh Circuit cases decided after *Galina* and *Hor*, such as *Sarhan*, set forth and apply only the unwilling-or-unable standard.[222]

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220. Hor v. Gonzalez, 400 F.3d 482, 485 (7th Cir. 2005), *rev'd on reh'g*, 421 F.3d 497, 501 (7th Cir. 2005). The AG's decision in *A-B- I* cited the original hearing of this case, 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." *Hor*, 400 F.3d at 485. In the second *Hor* decision, however, the merits panel disagreed and granted the applicant's petition for review. *Hor*, 421 F.3d at 502.

221. *Hor*, 421 F.3d at 499; *Galina*, 213 F.3d at 958.

222. *See*, *e.g.*, N.L.A. v. Holder, 744 F.3d 425, 440 (7th Cir. 2014) (granting the petition of a Colombian asylum seeker because the Colombian government was unwilling or unable to protect her from FARC); R.R.D. v. Holder, 746 F.3d 807, 809 (7th Cir. 2014) (granting the petition for review where the BIA failed to consider whether the Mexican government was unable or unwilling to protect an "honest police" officer from organized crime); Vahora v. Holder, 707 F.3d 904, 908 (7th Cir. 2013) (denying the petition for review because the petitioner, by failing to seek out police protection, did not meet the unwilling-or-unable standard); Cece v. Holder, 733 F.3d 662, 675 (7th Cir. 2013) (granting the applicant's petition because the Albanian government was unwilling or unable to protect her from criminal gangs and prostitution rings); Bitsin v. Holder, 719 F.3d 619, 628 (7th Cir. 2013) (denying a Bulgarian asylum-seeker's petition, in part because the petitioner was unable to show that the Bulgarian government was unwilling or unable to protect him from a crime syndicate); Salim v. Holder, 728 F.3d 718, 721 (7th Cir. 2013) (denying a Chinese Christian asylum-seeker's petition because he was unable to prove that the Indonesian government met the unwilling-or-unable standard); Sarhan v. Holder, 658 F.3d 649, 657 (7th Cir. 2011) (granting a Jordanian couple's petitions for review where a familial rumor about the wife's adultery subjected her to a potential honor killing upon return and the Jordanian government was unwilling or unable to protect her); Gatimi v. Holder, 578 F.3d 611, 616 (7th Cir. 2009) (vacating the BIA's removal order because the petitioner, a Kenyan who had fled the Mungiki tribe, demonstrated the Kenyan government's complicity in tribal violence); Ramos v. Holder, 589 F.3d 426, 428 (7th Cir. 2009) (granting the petition for review where a born-again El Salvadorian Christian could not repatriate because the El Salvadorian government was unwilling or unable to protect him from gang violence); Ingmantoro v. Mukasey, 550 F. 3d 646, 650 (7th Cir. 2008) (denying the petition for review because the applicant, a Chinese Christian living in Indonesia, failed to

8. Eighth Circuit

The unwilling-or-unable standard is also well-established in the Eighth Circuit.[223] 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.[224] 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.[225] 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."[226] The court concluded, "the 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."[227] This case demonstrates that an asylum seeker can meet the unwilling-or-unable standard even if a government "takes action"

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show that the Indonesian government was unwilling or unable to prevent acts of religious or racial violence); Garcia v. Gonzalez, 500 F.3d 615, 618 (7th Cir. 2007) (denying the petition for review on the grounds that threats from Colombian insurgent group FARC did not satisfy the unwilling-or-unable test); Kaharudin v. Gonzalez, 500 F.3d 619, 623 (7th Cir. 2007) (denying judicial review of an Indonesian Christian's asylum claim because "acts of private citizens do not constitute persecution unless the government is complicit in those acts or is unable or unwilling to take steps to prevent them."); Tariq v. Keisler, 505 F.3d 650, 656 (7th Cir. 2007) (holding that the applicant's family's flight from Pakistan to evade a loan shark did not satisfy the unwilling-or-unable test); Margos v. Gonzalez, 443 F.3d 593, 599 (7th Cir. 2006) (denying review of an Iraqi Christian's asylum claim as the Iraqi government was not unwilling and unable to afford protection); Chakir v. Gonzalez, 466 F.3d 563, 570 (7th Cir. 2006) (upholding the denial of a Moroccan Christian's asylum claim on the grounds that the private acts of persecution did not satisfy the unwilling-or-unable test).

223. *See*, *e.g.*, Gathungu v. Holder, 725 F.3d 900, 906 (8th Cir. 2013) (granting Kenyan asylum seekers' petitions for review on the grounds that they had fled the Mungiki tribe, that they had been targeted by the tribe as a result of being "Mungiki defector[s]," and that the Kenyan government was either complicit or unwilling or unable to control the Mungiki); Nabulwala v. Gonzalez, 481 F.3d 1115, 1118 (8th Cir. 2007) (granting a petition by a Ugandan lesbian who faced private violence because of her sexual orientation and who the Ugandan government was unwilling or unable to protect).

224. Gathungu v. Holder, 725 F.3d 900, 902 (8th Cir. 2013).

225. *Id.* at 906.

226. *Id.* at 908–09.

227. *Id.* at 909.

to crack down on violence perpetrated by a rebel group if "the record shows that many of the crackdown promises are hollow."[228]

Moreover, the Eighth Circuit has acknowledged that harms inflicted by nonstate actors could constitute persecution even when holding against the applicant. For instance, in *Fuentes-Erazo v. Sessions*, the court recognized the unwilling-or-unable standard.[229] 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]."[230] The court accordingly distinguished *Matter of A-R-C-G-* based on the protected ground requirement of the statute.[231] Similarly, in *Rodriguez-Mercado v. Lynch*, the court recognized the unwilling-or-unable standard and held against the applicant in a domestic violence case due to lack of credibility, and not because the persecutor was a private individual.[232] 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 both willing and able to control the private individuals who had harmed the applicant.[233] Unpublished decisions from the circuit prior to *A-B- I* also demonstrate the court's recognition of the unwilling-or-unable standard.[234]

Nevertheless, there had been an unexplained and unacknowledged tension within the Eighth Circuit's jurisprudence between cases using the unwilling-and-unable standard and cases using the condone-or-completely-helpless standard. In *Menjivar v. Gonzales*, the court quoted the Seventh Circuit's *Galina* decision in stating that "the applicant must show that the government 'condoned

228. *Id.*

229. Fuentes-Erazo v. Sessions, 848 F.3d 847, 852 (8th Cir. 2017).

230. *Id.* at 853.

231. *Id.* (citing Matter of A-R-C-G-, 26 I&N Dec. 388 (B.I.A. 2014)).

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

233. 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 an Israeli court convicted persecutors of murder and sentenced them to imprisonment).

234. *See, e.g.*, De La Cruz v. Sessions, 697 F. App'x 887, 888 (8th Cir. 2017) (upholding the BIA's determination that the Guatemalan government was neither unwilling nor unable to protect the applicant from masked assailants who attacked the petitioner and his father-in-law in 2000); Santacruz v. Lynch, 666 F. App'x 576, 580 (8th Cir. 2016) (upholding the BIA's determination that the Salvadoran government was neither unwilling nor unable to protect the petitioner from domestic violence).

it or at least demonstrated a complete helplessness to protect the victims.'"[235] 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.

As set forth in Part V, the Eighth Circuit Court of Appeals has since clarified that the unwilling-or-unable standard prevails. Still, a comparison of the cases in which the court quoted the unwilling-or-unable language versus the cases in which the court quoted the condone-or-completely-helpless language reveals the perils of the latter. Petitioners have succeeded at more than twice the rate when the lower unable-or-unwilling standard was cited than when the heightened condone-or-completely-helpless standard was quoted.[236]

9. Ninth Circuit

The Ninth Circuit Court of Appeals has also consistently recognized the unwilling-or-unable standard. [237] 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.[238] The BIA concluded that the Mexican government was willing and able to control Los Zetas.[239] In its decision, the BIA cited various statistics on the efforts of the Mexican national government to combat drug violence, including the arrest of seventy-nine thousand people on drug trafficking-related charges during a seven-year period.[240] The Ninth Circuit 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."[241] The court concluded that record evidence demonstrated that "violent crime traceable to drug cartels remains high despite the Mexican government's efforts to

235. Menjivar v. Gonzales, 416 F.3d 918, 921 (8th Cir. 2005) (quoting Galina v. INS, 213 F.3d 955, 958 (7th Cir. 2000)).

236. *Compare infra* note 395 (noting an 18% grant rate for petitions for review using the unable-or-unwilling standard), *with infra* note 394 (noting only an 8% grant rate for petitions for review using the condone-or-completely-helpless standard).

237. *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 . . . .").

238. Madrigal v. Holder, 716 F.3d 499, 502 (9th Cir. 2013).

239. *Id.* at 506.

240. *Id.* at 507.

241. *Id.* at 506.

quell it," suggesting that the Mexican government may lack the ability to effectively control Los Zetas.[242] 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.[243] She was born in Baku, Azerbaijan, but fled to escape Azeri ethnic cleansing.[244] With the help of Soviet troops, she crossed the Caspian Sea and settled in Moscow.[245] While in Russia, though, 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 descent], 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.[246]

The Ninth Circuit Court of Appeals reversed and remanded, stating: "It does not matter that financial considerations may account for such an inability to stop elements of ethnic persecution."[247] 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."[248] It is clear that, according to the court, a government may be "unable or unwilling" to protect an applicant from continued persecution even if it does not "condone" the persecution and is not "completely helpless" in aiding the applicant.

Even when the Ninth Circuit has held against the applicant, it has nevertheless acknowledged that harms inflicted by nonstate actors can constitute persecution. For instance, in *Rahimzadeh v.*

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242. *Id.* at 506–07.
243. Avetova-Elisseva v. INS, 213 F.3d 1192, 1195 (9th Cir. 2000).
244. *Id.* at 1196.
245. *Id*.
246. *Id.* at 1197–98.
247. *Id.* at 1198.
248. *Id.* at 1200.

Holder, despite finding that the applicant had failed to show that the Dutch authorities would be unwilling or unable to protect him from extremists, the court stated that persecution may be "committed by the government or forces the government is either unable or unwilling to control."[249] In *Sangha v. INS*, the court determined that a terrorist group's actions constituted persecution because the government was unable to control the group.[250] However, the court ultimately held against the applicant because he failed to prove that his persecution was motivated by a protected ground.[251]

Thus, prior to *Matter of A-B- I*, the unwilling-or-unable standard was well-established in the Ninth Circuit. Unpublished cases from that time period establish the same.[252]

10. Tenth Circuit

The Tenth Circuit Court of Appeals has also long held that persecution "may come from a non-government agency which the government is unwilling or unable to control."[253] 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. [254] The Sandinistas, a party that controlled the

249. Rahimzadeh v. Holder, 613 F.3d 916, 920 (9th Cir. 2010) (quoting Knezevic v. Ashcroft, 367 F.3d 1206, 1211 (9th Cir. 2004); Navas v. INS, 217 F.3d 646, 655–56 (9th Cir. 2000)).

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

251. *Id.* at 1491.

252. For a sampling of pre-*Matter of A-B- I* Ninth Circuit cases establishing the unable-or-unwilling standard within the circuit, see, e.g., Garces v. Mukasey, 312 F. App'x 12, 14 (9th Cir. 2009); Ebeid v. Mukasey, 274 F. App'x 508, 511 (9th Cir. 2008); Sablina v. Gonzales, 217 F. App'x 671, 672 (9th Cir. 2007); Papazyan v. Gonzales, 179 F. App'x 428, 431 (9th Cir. 2006); Mashiri v. Ashcroft, No. 02-71841, 2004 U.S. App. LEXIS 22714, at *13 (9th Cir. Sept. 22, 2004); Ganut v. Ashcroft, 85 F. App'x 38, 43 (9th Cir. 2003); Velasquez v. Ashcroft, 81 F. App'x 673, 674 (9th Cir. 2003); .

253. de la Llana-Castellon v. INS, 16 F.3d 1093, 1097 (10th Cir. 1994) (quoting Bartesaghi-Lay v. INS, 9 F.3d 819, 822 (10th Cir. 1993)); *see also* Krastev v. INS, 292 F.3d 1268, 1275–76 (10th Cir. 2002) (stating that persecution may come from a non-government entity the government is unable or unwilling to control (citing *Bartesaghi-Lay*, 9 F.3d at 822)); *Bartesaghi-Lay*, 9 F.3d at 822 ("[T]he possible persecution to be established by an alien in order for him to be eligible for asylum may come from a non-government agency which the government is unwilling or unable to control." (citing McMullen v. INS, 658 F.2d 1312, 1315, n.2 (9th Cir. 1981) and Rosa v. INS, 440 F.2d 100, 102 (1st Cir. 1971))).

254. *de la Llana-Castellon*, 16 F.3d at 1095.

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.[255] 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.[256] 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."[257] In remanding, the court plainly asked the agency to assess whether the family met the unwilling-or-unable test, and not the heightened condoned-or-complete-helplessness test.

Furthermore, the Tenth Circuit upheld the principle that harms inflicted by nonstate 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 if the government made no attempts to control those individuals.[258] 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 nonstate persecutors. [259] The court also has issued several unpublished decisions recognizing the unwilling-or-unable standard.[260]

11. Eleventh Circuit

Finally, the unwilling-or-unable standard is similarly well-established in the Eleventh Circuit. [261] For instance, in *Lopez v. Attorney General*, the court stated that the failure to report nonstate persecution to government authorities is "excused where the

255. *Id.*
256. *Id.* at 1097.
257. *Id.*
258. Batalova v. Ashcroft, 355 F.3d 1246, 1253 (10th Cir. 2004).
259. *Id.* at 1253, 1255.
260. For cases applying the unwilling-or-unable standard, 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).
261. For cases applying the unwilling-or-unable standard, see, e.g., Sama v. U.S. Att'y Gen., 887 F.3d 1225, 1234 (11th Cir. 2018); Malu v. U.S. Att'y Gen., 764 F.3d 1282, 1291 (11th Cir. 2014); Ayala v. U.S. Att'y Gen., 605 F.3d 941, 950 (11th Cir. 2010); Lopez v. U.S. Att'y Gen., 504 F.3d 1341, 1345 (11th Cir. 2007); Sanchez Jimenez v. U.S. Att'y Gen., 492 F.3d 1223, 1231 (11th Cir. 2007); Mazariegos v. U.S. Att'y Gen., 241 F.3d 1320, 1324 (11th Cir. 2001).

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."[262] The court remanded the decision because the BIA and IJ failed to address this point.[263] Indeed, the court has never in a published decision so much as quoted the condone-or-completely-helpless language.[264]

In *Sanchez Jimenez v. Attorney General*, the court highlighted the unwilling-or-unable standard when it remanded the case in part because the IJ did not consider vital evidence on the record when applying the standard.[265] The court reasoned that the IJ only took into account the arrests of Revolutionary Armed Forces of Colombia (FARC) members when determining the government was able or willing to control them, but that the IJ should have also considered "the evidence that the arrest spurred the FARC to expressly mark the family for death" and when it spurred the FARC to attempt to kidnap and murder members of the family.[266]

Even when the Eleventh Circuit has ruled against the applicant, it has acknowledged the unwilling-or-unable standard. In *Sama v. Attorney General,* the court applied the unwilling-or-unable standard in a case involving a Cameroonian asylum seeker who suffered significant injuries when an anti-gay group attacked him, although the claim was ultimately unsuccessful.[267] In *Ruiz v. Attorney General*, the applicant claimed he feared persecution at the hands of the FARC in Colombia.[268] 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 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."[269] A large number of unpublished

262. *Lopez*, 504 F.3d at 1345.
263. *Id.*
264. For unpublished decisions where the court has applied the unwilling-or-unable standard, see, e.g., Cerrato-Chirinos v. U.S. Att'y Gen., 795 F. App'x 1036, 1040 (11th Cir. 2020); Bautista-Lopez v. U.S. Att'y Gen, 813 F. App'x 430, 434 (11th Cir. 2020).
265. *Sanchez Jimenez*, 492 F.3d at 1238 n.13.
266. *Id.*
267. Sama v. U.S. Att'y Gen., 887 F.3d 1225, 1229, 1234 (11th Cir. 2018).
268. Ruiz v. U.S. Att'y Gen., 440 F.3d 1247, 1251 (11th Cir. 2006).
269. *Id.* at 1257, 1259.

decisions from the circuit prior to *A-B- I* also acknowledge the unwilling-or-unable standard.[270]

C. The United States Supreme Court

Likely because of the widespread agreement among the lower courts that harms inflicted by nonstate actors can constitute persecution so long as the government is unwilling or unable to control the nonstate 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 nonstate actors can constitute persecution.[271] For example, in *INS v. Elias-Zacarias*, the Court evaluated the claim of a Guatemalan asylum applicant who

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270. For a sampling of these cases, see, e.g., Sontay v. U.S. Att'y Gen., 723 F. App'x 707 (11th Cir. 2018); Acosta v. U.S. Att'y Gen., 727 F. App'x 595 (11th Cir. 2018); Sumschi v. U.S. Att'y Gen., 677 F. App'x 579 (11th Cir. 2017); Luchina v. U.S. Att'y Gen., 687 F. App'x 907 (11th Cir. 2017); Acosta v. U.S. Att'y Gen., 704 F. App'x 869 (11th Cir. 2017); Rotaru v. U.S. Att'y Gen., 704 F. App'x 875 (11th Cir. 2017); Leka v. U.S. Att'y Gen., 704 F. App'x 878 (11th Cir. 2017); Kapa v. U.S. Att'y Gen., 675 F. App'x 903 (11th Cir. 2017); Jeronimo v. U.S. Att'y Gen., 678 F. App'x 796 (11th Cir. 2017); Ossa v. U.S. Att'y Gen., 656 F. App'x 455 (11th Cir. 2016); Alonzo-Rivera v. U.S. Att'y Gen., 649 F. App'x 983 (11th Cir. 2016); Hossain v. U.S. Att'y Gen., 630 Fed. Appx. 914 (11th Cir. 2015); Zampaligidi-Jebreel v. U.S. Att'y Gen., 539 F. App'x 969 (11th Cir. 2013); Lewis v. U.S. Att'y Gen., 512 F. App'x 963 (11th Cir. 2013); Valbuena v. U.S. Att'y Gen., 460 F. App'x 906 (11th Cir. 2012); Euceda v. U.S. Att'y Gen., 491 F. App'x 163 (11th Cir. 2012); Minaylova v. U.S. Att'y Gen., 423 F. App'x 855 (11th Cir. 2011); Juan-Esteban v. U.S. Att'y Gen., 407 F. App'x 413 (11th Cir. 2011); Wangboje v. U.S. Att'y Gen., 438 F. App'x 813 (11th Cir. 2011); Ladnov v. U.S. Att'y Gen., 384 F. App'x 867 (11th Cir. 2010); Darmawan v. U.S. Att'y Gen., 362 F. App'x 44 (11th Cir. 2010); Fernandes de Paula v. U.S. Att'y Gen., 380 F. App'x 946 (11th Cir. 2010); Solaque-Prieto v. U.S. Att'y Gen., 310 F. App'x 325 (11th Cir. 2009); Zambrano v. U.S. Att'y Gen., 329 F. App'x 235 (11th Cir. 2009); Gomez v. U.S. Att'y Gen., 321 F. App'x 834 (11th Cir. 2009); Cantave v. U.S. Att'y Gen., 295 F. App'x 327 (11th Cir. 2008); Morehodov v. U.S. Att'y Gen., 270 F. App'x 775 (11th Cir. 2008); Paredes v. U.S. Att'y Gen., 219 F. App'x 879 (11th Cir. 2007); Njenga v. U.S. Att'y Gen., 216 F. App'x 963 (11th Cir. 2007); Soler v. U.S. Att'y Gen., 258 F. App'x 295 (11th Cir. 2007); Barrera Castrillon v. U.S. Att'y Gen., 221 F. App'x 863 (11th Cir. 2007); Kurt v. U.S. Att'y Gen., 252 F. App'x 295 (11th Cir. 2007); Longchar v. U.S. Att'y Gen., 179 F. App'x 665 (11th Cir. 2006); Restrepo v. U.S. Att'y Gen., 176 F. App'x 17 (11th Cir. 2006); Popov v. U.S. Att'y Gen., 199 F. App'x 900 (11th Cir. 2006); Rios-Cano v. U.S. Att'y Gen., 151 F. App'x 916 (11th Cir. 2005); Sulaman v. U.S. Att'y Gen., 147 F. App'x 872 (11th Cir. 2005); Calderon Salinas v. U.S. Att'y Gen., 140 F. App'x 868 (11th Cir. 2005).

271. *See* Negusie v. Holder, 555 U.S. 511, 536 n.6 (2009) (Stevens, J., dissenting) (noting that asylum and withholding of removal, unlike relief under CAT, are available to victims of persecution at the hands of private actors "without regard to state involvement").

claimed that he feared persecution at the hands of a nonstate guerilla group.[272] The Court found against the applicant on nexus grounds.[273] However, the court never called into question the notion that harms perpetrated by a nonstate actor, namely the guerilla group, could constitute persecution.[274]

Similarly, in his dissent on an unrelated issue in *Negusie v. Holder*, Justice Stevens briefly discussed the difference between asylum and withholding of removal—which he stated could be based on "harm inflicted by private actors"—and the Convention Against Torture, which requires "state involvement."[275]

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."[276] As noted above, the Handbook clearly recognizes that harms inflicted by nonstate actors can constitute persecution "if the authorities refuse, or prove unable, to offer effective protection."[277]

* * *

The foregoing pre-*Matter of A-B- I* analysis reveals a high degree of agreement among the Board and federal courts of appeals that the unable-or-unwilling standard is the proper one for assessing nonstate actor claims. The cases also demonstrate the divide between the plain meaning of the terms used in each standard. However, they also reveal a similar (though perhaps less helpful) consensus to treat this standard as emanating from the statutory term "persecution." As discussed in the next two Parts, treating the nonstate actor standard as a subcomponent of the persecution analysis—while on the surface harmless—may have unwittingly created a space for the agency to elevate the standard in *Matter of A-B- I* and *II*.

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272. INS v. Elias-Zacarias, 502 U.S. 478, 480 (1992).
273. *Id.* at 483–84.
274. *Id.* at 483.
275. *Negusie*, 555 U.S. at 536 n.6 (Stevens, J., dissenting) (citing Matter of Kasinga, 21 I&N Dec. 357, 365 (B.I.A. 1996) and Matter of H-, 21 I&N Dec. 337, 343–44 (B.I.A. 1996)).
276. INS v. Cardoza-Fonseca, 480 U.S. 421, 439 n.22 (1987).
277. U.N. High Comm'r for Refugees, *supra* note 2, ¶ 65.

III. *MATTER OF A-B- I* AND THE CONDONE-OR-COMPLETELY-HELPLESS STANDARD

As set forth above, in 2014, the Board issued a precedential decision, *Matter of A-R-C-G-*, in which it recognized that a victim of domestic violence could be eligible for asylum, stating that "married women in Guatemala who are unable to leave their relationship" constitute a cognizable social group.[278] The Board remanded the decision to the IJ for a determination of whether "the Guatemalan Government was unwilling or unable to control the 'private' actor."[279]

Nevertheless, in 2018, then-AG Jeff Sessions invoked a regulation[280] rarely used by previous administrations to certify to himself a separate decision, *Matter of A-B- I*, in which the Board had granted asylum to a victim of domestic violence.[281] He asked the parties and amici to submit briefs on 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."[282]

Numerous groups submitted amicus briefs on several different aspects of the question posed.[283] Regarding the state action requirement in particular, 116 immigration law professors nationwide submitted a brief demonstrating that it was well-

278. Matter of A-R-C-G-, 26 I&N Dec. 388, 392–95 (B.I.A. 2014).

279. *Id.* at 395 (citing Gutierrez-Vidal v. Holder, 709 F.3d 728, 732–33 (8th Cir. 2013)); Menjivar v. Gonzales, 416 F.3d 918, 920–22 (8th Cir. 2005) (denying review of petition by an asylum seeker from El Salvador who fled after rejecting the romantic advances of a gang member, who shot two of the petitioner's relatives, because the IJ properly concluded that the Salvadoran government's response did not rise to the level of "unable or unwilling").

280. 8 C.F.R. § 1003.1(h)(1)(i) (2020).

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

282. *Id.* It is important to note that the question posed by the Attorney General itself was problematic as, generally, individuals had not been arguing that "being a victim of a private criminal activity" was what made them members of particular social groups. Indeed, the Department of Homeland Security sought clarification on this question, which the Attorney General refused to grant. *Matter of A-B- I*, 27 I&N Dec. at 247. Moreover, some amici explicitly disagreed with any characterization of intimate partner violence (or the other types of harm described in the cases) as "private," given "that these types of harms often would not occur without the societal, even governmental, sanction they enjoy." Br. for Immigr. L. Professors as Amici Curiae Supporting Respondent at 2 n.6, *Matter of A-B- I*, 27 I&N Dec. 316 (A.G. 2018) (No. 3929).

283. *Backgrounder and Briefing on Matter of A-B-*, CTR. FOR GENDER & REFUGEE STUD., https://cgrs.uchastings.edu/matter-b/backgrounder-and-briefing-matter-b [https://perma.cc/4ZBD-8KW8].

established in the BIA, every federal circuit court, and the U.S. Supreme Court that those who feared persecution at the hands of nonstate actors could qualify for asylum, so long as they showed that the home government was unwilling or unable to control the persecution.[284]

In a sweeping thirty-one-page decision, the Attorney General in *Matter of A-B- I* not only overruled *Matter of A-R-C-G-* but attempted to create a near-blanket prohibition on asylum claims made by those fleeing nonstate persecutors, stating that "[g]enerally" claims based upon harms "perpetrated by non-governmental actors *will not qualify for asylum*."[285] Significantly, AG Sessions went well beyond the scope of the case before him, including not just victims of domestic violence, but victims of any type of harm committed at the hands of nonstate actors. He stated: "[w]hile . . . violence inflicted by non-governmental actors may [sometimes] serve as the basis for [] asylum . . . , in practice *such claims are unlikely to satisfy* the statutory grounds for proving group persecution that the government is *unable or unwilling* to address."[286] With respect to the standard for nonstate actor claims, he sought to heighten the unwilling-or-unable standard, proclaiming that to satisfy the nonstate actor requirement, an "applicant must show that the government *condoned* the private actions 'or at least demonstrated a complete helplessness to protect the victims.'"[287]

Sessions clearly recognized the dramatic narrowing that would result from his altered test.[288] Although he continued to use the "unable or unwilling" language in the decision, his reasoning makes clear that he does not intend for that language to operate as it has historically.[289] Rather, he sees his redefined nonstate requirement as being rarely satisfied; he characterizes those cases in which asylum applicants fleeing nonstate persecution could meet the statutory requirements as "exceptional."[290] His assessment is unsurprising given his statement that "[w]here the persecutor is not part of the

284. *See generally* Br. for Immigr. L. Professors as Amici Curiae, *supra* note 282.

285. *Matter of A-B- I*, 27 I&N Dec. at 320 (emphasis added).

286. *Id.* (emphasis added).

287. *Id.* at 337 (emphasis added) (quoting Galina v. INS, 213 F.3d 955, 958 (7th Cir. 2000)).

288. *See id.* (recognizing that it is exceedingly difficult for victims of private violence to prove that they have been persecuted).

289. *Id.*

290. *Id.* at 317.

government, the [adjudicator] must consider . . . the government's role in *sponsoring or enabling* such actions."[291]

In selecting the condone-or-completely-helpless framing of the nonstate actor requirement, AG Sessions cherry-picked and seized upon the handful of circuit court cases that mentioned this language.[292] Specifically, he cited the Seventh Circuit's decision in *Galina* and the Eighth Circuit's decision in *Menjivar*.[293] Beyond citing these cases, he offered no rationale or explanation for the change to the Board's longstanding policy that one need only show that the government was unwilling or unable to control the persecution.

Sessions did not provide any explicit justification for using this heightened nonstate actor standard. However, as discussed in the next Part, both the Justice Department's defense of *Matter of A-B- I* and the post hoc rationalization provided by Acting AG Rosen in *Matter of A-B- II* assert that the standard is not actually heightened, and alternatively, even if it is, the AG is entitled to deference in interpreting ambiguous statutory terms.

IV. LITIGATION RELATED TO THE HEIGHTENED NONSTATE ACTOR STANDARD

Not surprisingly, the *A-B- I* decision led to a slew of litigation in courts around the country. In *Grace v. Whitaker*, twelve asylum applicants who feared either domestic violence or gang violence in their home countries filed suit, alleging violations of, *inter alia*, the Administrative Procedure Act and the Immigration and Nationality Act ("INA").[294] Specifically, they argued that *Matter of A-B- I* and subsequent United States Citizenship and Immigration Services ("USCIS") guidelines impermissibly heightened the standards for credible fear determinations in nonstate actor cases.[295] In a lengthy decision, the U.S. District Court for the District of Columbia found that *Matter of A-B- I* and the USCIS guidance incorrectly created "a general rule against positive credible fear determinations in cases in which aliens claim a fear of persecution based on domestic or gang-related violence."[296] The court then held that this general rule was arbitrary and capricious and runs contrary to the individualized

291. *Id.* at 318 (emphasis added).
292. *Id.* at 331, 337.
293. *Id.* at 337.
294. Grace v. Whitaker, 344 F. Supp. 3d 96, 105 (D.D.C. 2018).
295. *Id.*
296. *Id.* at 125.

determination required by the INA.[297] With respect to the nonstate actor requirement, in particular, the court held that the condone-or-completely-helpless formulation was inconsistent with the meaning of the term "persecution," which the court found was unambiguous.[298]

The Court of Appeals for the District of Columbia, however, reversed both aspects of the district court's decision. In particular, the court took a different view of the statutory term "persecution."[299] The court explained that the "INA nowhere defines the term 'persecution,'" that the term does not address "the standards for government conduct," and that "nothing in the statute otherwise speaks directly 'to the precise question at issue,'" to wit, "the level of government culpability required to qualify for asylum."[300] The court explicitly rejected the argument that the unwilling-or-unable standard "has been a settled construction of the term 'persecution' since before Congress established the modern asylum system in 1980."[301] It reasoned that the domestic law the petitioners cited—"a single circuit court decision and two Board decisions—is far too sparse . . . to conclude that when Congress enacted the Refugee Act, it 'would have surveyed the jurisprudential landscape and necessarily concluded that the courts had already settled the question.'" [302] Alternatively, the *Grace* court stated that, "[i]n any event, the decisions the asylum seekers cite are themselves ambiguous regarding the non-government persecutor standard."[303]

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297. *Id.*

298. *Id.* at 128.

299. Grace v. Barr, 965 F.3d 883, 897 (D.C. Cir. 2020).

300. *Id.* (citing Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842 (1984)).

301. *Id.*

302. *Id.* at 898 (citing Lightfoot v. Cendant Mortgage Corp., 137 S. Ct. 553, 564 (2017)). *Cf.* Banister v. Davis, 140 S. Ct. 1698, 1706–07 (2020) (finding that one Supreme Court decision and multiple court of appeals decisions established a "legal backdrop"); Bragdon v. Abbott, 524 U.S. 624, 645 (1998) (finding the Refugee Act's meaning "settled" where an Office of Legal Counsel opinion, twelve judicial decisions, and multiple federal agencies interpreted the term consistently and where "[a]ll indications [we]re that Congress was well aware of th[at] position" when it incorporated that term into the statute).

303. *Grace*, 965 F.3d at 898 (citing Rosa v. INS, 440 F.2d 100, 102 (1st Cir. 1971) (lacking discussion of the precise standard for determining when non-governmental persecutors "[have] sufficient . . . power to carry out [their] purposes without effective hindrance"); Matter of Eusaph, 10 I&N Dec. 453, 454–55 (B.I.A. 1964) (using the terms "unable," "sponsored," "tolerated," and "condone" without distinguishing among them); Matter of Stojkovic, 10 I&N Dec. 281, 287 (B.I.A. 1963) ("not consider[ing]" "whether intentional physical harm . . . by a

Nevertheless, the court affirmed the district court on the disparate nature of the two nonstate actor requirements.[304] The court rejected the government's argument that the unwilling-or-unable standard and the condone-or-completely-helpless standard were "identical." It reasoned: "A government that 'condones' or is 'completely helpless' in the face of persecution is obviously more culpable, or more incompetent, than one that is simply 'unwilling or unable' to protect its citizens."[305] Moreover, "putting all of its eggs in the 'no change' basket, the government [did] not, in the alternative, defend the condone-or-completely-helpless standard on the merits."[306] Because the government had not provided a reasoned explanation for the change, the court found the imposition of the new heightened standard arbitrary and capricious.[307]

Several circuit courts have followed the district court's decision in *Grace*. In *Juan Antonio v. Barr*, the Sixth Circuit approvingly cited *Grace*'s holding that the condone-or-complete-helplessness language is "arbitrary, capricious, contrary to law, and 'not a permissible construction of the persecution requirement.'"[308] The Sixth Circuit, while acknowledging that it was not bound by the *Grace* decision, stated that it found the reasoning in *Grace* to be "persuasive," and noted that *Matter of A-B- I* "ha[d] been abrogated."[309]

Similarly, the First Circuit implicitly declined to apply the more stringent condone-or-completely-helpless standard of *Matter of A-B- I*. In *Rosales Justo v. Sessions*, the applicant was a police officer from Mexico who also owned a store to supplement his income.[310] After he refused to be extorted by members of organized crime, they murdered his son.[311] Despite reporting the murder to law enforcement and attempting to internally relocate, the applicant continued to receive threats.[312] In reversing the Board's decision, the First Circuit explained that, with respect to claims involving nonstate actors, it has "consistently stated that an applicant must prove *either*

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riotous mob, acting without the sanction of the Dominican Government, would amount to physical persecution")).

304. *Id.*
305. *Id.* at 898–99.
306. *Id.* at 900.
307. *Id.*
308. Juan Antonio v. Barr, 959 F.3d 778, 795 (6th Cir. 2020).
309. *Id.* at 790 n.3.
310. Rosales Justo v. Sessions, 895 F.3d 154, 157 (1st Cir. 2018).
311. *Id.* at 157–58.
312. *Id.* at 158.

unwillingness *or* inability" of the government to control the persecution.[313] 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." [314] Although the court cited *Matter of A-B- I* in its decision,[315] its analysis reveals that it applied the unwilling-or-unable standard and not the more stringent condone-or-completely-helpless standard.

Recently, the Eighth Circuit explicitly clarified that, to the extent that the condoned-or-completely-helpless test and the unwilling-or-unable test conflict, the unwilling-or-unable test controls.[316] In *Jimenez Galloso v. Barr*,[317] the IJ had found that the applicant—who had suffered significant abuse in the United States at the hands of her spouse—was a member of the cognizable particular social group of "married Mexican women who are viewed as property by virtue of their position within a domestic relationship."[318] While the IJ determined that Ms. Jimenez Galloso had failed to timely file for asylum, he found that she could "easily me[e]t her [withholding] burden," and thus implicitly found that there was a greater than 50% probability of her being harmed in Mexico upon her return. [319] However, the IJ ultimately denied her withholding claim because he found that she could not establish that the Mexican government

313. *Id.* at 163 (emphasis in original).
314. *Id.* at 164.
315. *Id.*
316. Jimenez Galloso v. Barr, 954 F.3d 1189, 1192 (8th Cir. 2020).
317. *Id.*
318. Matter of Prudencia Jimenez Galloso, IJ Decision (Matthew Morrissey), Omaha, NE (Jan. 29, 2018) (on file with the *Columbia Human Rights Law Review*). Ms. Jimenez Galloso had also suffered harm in Mexico, but that harm largely stemmed from a grandfather who had passed away and her ex-husband, whom she had divorced. The most significant harms she experienced all occurred within the United States. Because the BIA did not provide any analysis of past persecution, that issue was not properly before the Court of Appeals. *See* Gathungu v. Holder, 725 F.3d 900, 907 (8th Cir. 2013) (explaining that, where "the BIA did not rule on the IJ's" alternative grounds for denial, those issues are "not before [the] court" (citing Ibrahimi v. Holder, 566 F.3d 758, 762 n.3 (8th Cir. 2009)); Ngengwe v. Mukasey, 543 F.3d 1029, 1037 (8th Cir. 2008) (explaining that the Court of Appeals could not consider the nexus issue because the BIA had not addressed it).
319. INS v. Cardoza-Fonseca, 480 U.S. 421, 423 (1987) ("[T]o qualify for . . . withholding of deportation, [a noncitizen] must demonstrate that 'it is more likely than not that [she] would be subject to persecution' in the country to which [she] would be returned.")

would be "completely helpless" to prevent her persecution.[320] The IJ also found that because Ms. Jimenez Galloso stated that she would not seek protection in Mexico, because she believed it would be futile to do so, she could not satisfy the nonstate actor requirement. While the case was pending on appeal before the BIA, AG Sessions decided *Matter of A-B- I*.[321] The BIA dismissed Ms. Jimenez Galloso's appeal, explaining that *Matter of A-B- I*'s nonstate actor requirement was the same as the Eighth Circuit's standard, which the IJ found she had failed to satisfy.[322]

In deciding *Jimenez Galloso*, the Eighth Circuit Court of Appeals resolved a fifteen-year intra-circuit split in favor of the unable-or-unwilling standard.[323] The court noted that since at least 1998, it had held that the statutory term "persecution" requires harm to be "inflicted either by the government of or by persons or an organization that the government was unable or unwilling to control."[324] The court acknowledged that it used the condone-or-completely-helpless language for the very first time in 2005 in *Menjivar*.[325] The court then employed the earlier-in-time rule from a previous decision[326] to resolve the intra-circuit conflict *Menjivar* created.[327] Because the two lines of cases stood in tension with one another, and because the unwilling-or-unable standard came first,[328] the *Jimenez Galloso* court held that the unable-or-unwilling standard must control.[329] Ironically, the Eighth Circuit's earlier decisions were among those cited by the Attorney General in *Matter of A-B- I* in purporting to heighten the nonstate actor standard. Unfortunately,

320. Jimenez Galloso v. Barr, 954 F.3d 1189, 1192 (8th Cir. 2020), *as amended* (Apr. 15, 2020).

321. 27 I&N Dec. 316 (B.I.A. 2018).

322. *Jimenez Galloso*, 954 F.3d at 1192; Matter of Prudencia Jimenez Galloso (B.I.A. Aug. 13, 2018) (on file with the *Columbia Human Rights Law Review*).

323. *Jimenez Galloso*, 954 F.3d at 1192.

324. *Id.* (citing Miranda v. INS, 139 F.3d 624, 627 (8th Cir. 1998)) (internal quotations omitted).

325. *Id.* (citing Menjivar v. Gonzales, 416 F.3d 918, 921 (8th Cir. 2005)).

326. *See* Mader v. United States, 654 F.3d 794, 800 (8th Cir. 2011) (en banc) (explaining that "when faced with conflicting panel opinions, the earliest opinion must be followed as it should have controlled the subsequent panels that created the conflict").

327. *Jimenez Galloso*, 954 F.3d. at 1192 (citing *Mader*, 654 F.3d at 800).

328. *Compare Miranda*, 139 F.3d at 627 (applying the unable-or-unwilling standard) *with Menjivar*, 416 F.3d at 921 (stating for the first time that a petitioner must show the government condones or is completely helpless to prevent a nonstate actor's behavior).

329. *Jimenez Galloso*, 954 F.3d at 1192.

the Eighth Circuit's view in *Jimenez Galloso*, that the unwilling-or-unable standard controls, has not been universally shared.[330]

Two federal courts of appeals have followed *Matter of A-B- I* and, more specifically, the condone-or-completely-helpless standard. In *Gonzales-Veliz v. Barr*, a decision that only briefly addressed the condone-or-complete-helplessness language, the Fifth Circuit Court of Appeals stated that *Matter of A-B- I* "did not raise the standard for the government's unwillingness or inability to protect to the 'complete helplessness' standard,"[331] reasoning that the two standards were "interchangeable."[332] Agreeing with *Gonzales-Veliz*, the Second Circuit in *Scarlett v. Barr* explicitly approved of the condone-or-completely-helpless language, likewise concluding that it is "interchangeable" with the unwilling-or-unable standard.[333] In reaching this conclusion, the Second Circuit—like the D.C. Circuit in *Grace*—rejected the argument that the term "persecution" unambiguously includes the unable-or-unwilling standard.[334] The court reasoned that "the word 'persecution' is subject to various definitions and, thus, sufficiently ambiguous to benefit from Attorney General clarification."[335] The court noted that the statutory term "persecution" is ambiguous as to "the severity of [harm]" analysis, "but [is] still more ambiguous" in relation to "when private-party violence can be attributed to the government . . . because of an unwillingness or inability to control it."[336] As such, the court felt duty-bound to afford *Chevron* deference to *Matter of A-B- I*'s construction of the term.[337]

Nevertheless, the court in *Scarlett* made clear that "nothing in *Matter of A-B-*'s 'complete helplessness' formulation will foreclose"

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330. Though they do not explicitly address the nonstate actor standard, two other cases from the federal courts of appeals limit *Matter of A-B- I*. In *De Pena-Paniagua v. Barr*, the First Circuit held that *Matter of A-B- I* did not categorically reject any social group defined in part by its members' "inability to leave" the relationships in which they are being persecuted. 957 F.3d 88, 92 (1st Cir. 2020). Similarly, in *Diaz-Reynoso v. Barr*, the Ninth Circuit explicitly held that, "[i]n *Matter of A-B- I*, the Attorney General did not announce a new categorical exception for victims of domestic violence or other private criminal activity." 968 F.3d 1070, 1080 (9th Cir. 2010).

331. Gonzales-Veliz v. Barr, 938 F.3d 219, 233 (5th Cir. 2019).

332. *Id.*

333. Scarlett v. Barr, 957 F.3d 316, 333 (2d Cir. 2020).

334. *Id.* at 332.

335. *Id.* (citing Ivanishvili v. U.S. Dep't of Just., 433 F.3d 332, 340–41 (2d Cir. 2006) (collecting cases defining "persecution" in different ways)).

336. *Id.*

337. *Id.*

asylum where a government offered "only ineffective assistance."[338] The court thus approved of the condone-or-completely-helpless formulation, but only on the understanding that it does not heighten the longstanding unwilling-or-unable standard. Moreover, although the court cited to Eighth Circuit case law multiple times for the proposition that the condone-or-completely-helpless language is not new, it failed to mention the Eighth Circuit's recent decision in *Jimenez Galloso*, in which the court explicitly clarified that the unwilling-or-unable standard controls.[339]

In response to the foregoing litigation, Acting AG Jeffrey Rosen issued *Matter of A-B- II* on January 14, 2021. In it, he provided the Trump administration's final defense of the heightened condone-or-complete-helplessness articulation of the nonstate actor element.[340] Seeking to make use of the agency's victories in the Second and Fifth Circuits in *Scarlett* and *Gonzales-Veliz* respectively, the Acting AG in *Matter of A-B- II* claimed that the condone-or-complete-helplessness articulation was not a departure from the older unable-or-unwilling test. Rosen explained that *Matter of A-B- I* "relied on several [f]ederal court decisions" to hold that the unable-or-unwilling standard required "an applicant to show that the government condoned the [persecution] 'or at least demonstrated a complete helplessness to protect the victims."[341] While acknowledging the charge that this condone-or-completely-helpless standard was "inconsistent with" the unable-or-unwilling standard, he asserted "the two are interchangeable" because the courts of appeals began using them as such years before *Matter of A-B- I*.[342] He then countered the conclusion of the D.C. Circuit in *Grace*—that the two standards are different—by arguing that *Grace* failed to "discuss the several circuit court decisions" that had used *Matter of A-B- I*'s nonstate actor test before Sessions adopted it.[343] In short, the Acting AG in *Matter of*

338. *Id.* at 334.

339. *Id.* at 331–33 (citing Menjivar v. Gonzales, 416 F.3d 918, 921 (8th Cir. 2005); Saldana v. Lynch, 820 F.3d 970, 977 (8th Cir. 2016)).

340. *Matter of A-B- II*, 28 I&N Dec. 199.

341. *Id*. at 200–01 (citing Galina v. INS, 213 F.3d 955, 958 (7th Cir. 2000).

342. *Id.* at 201 (citing Guillen-Hernandez v. Holder, 592 F.3d 883, 886–87 (8th Cir. 2010) (quoting, with approval, "condoned it or at least demonstrated a complete helplessness to protect the victims" language from *Galina*, 213 F.3d at 958); Kere v. Gonzales, 252 F. App'x 708, 712 (6th Cir. 2007) (same); Shehu v. Gonzales, 443 F.3d 435, 437 (5th Cir. 2006) (same); Hor v. Gonzales, 421 F.3d 497, 501–02 (7th Cir. 2005) (same)).

343. *Id*. at 201 (citing Grace v. Barr, 965 F.3d 883, 889–900 (D.C. Cir. 2020)).

A-B- II claimed, anachronistically, that its framing of the unwilling-or-unable standard is what courts meant all along.[344]

However, in apparently discerning that not everyone would be convinced by his dubious claim of synonymy between the two tests, he spent most of his time in *Matter of A-B- II* arguing that even if *Matter of A-B- I*'s articulation were an altered standard, it constituted a reasonable construction of the ambiguous statutory term "persecution."[345] But in his elaboration of this new nonstate actor standard, Rosen confirmed that the condone-or-complete-helplessness test—as those words suggest—is vastly more difficult to satisfy.[346] He began by stating that in order for violence to constitute persecution, it must be tethered to a governmental system, [347] writing that persecution "always implies some connection to government action or inaction."[348] Thus, it is only where "the government in the home country has fallen so far short of adequate protection" as to "have some role in or responsibility for the 'persecution'" that the test can be met.[349] He concluded this step of his analysis by stating "[a]sylum law protects persons from severe harm *inflicted by their government*,"[350] approaching the suggestion that nonstate persecutor claims are no longer viable. Indeed, Sessions and Rosen may have intended this effect by adopting the condone-or-complete-helplessness test, as it appears virtually impossible to satisfy.

Even the most minimal and ineffective state efforts to protect, according to Rosen, are sufficient to defeat an asylum claim subjected to the condone-or-complete-helplessness test. He stated that the condone-or-complete-helplessness test requires "more than the failure to prevent or solve a crime." [351] The test is not met "where a government has taken efforts to punish wrongdoers" or "to detect and . . . prevent" the harm. [352] It is not met where a government simply gives "light sentences" for perpetrators of the harm.[353] It is not

344. *Id.* at 202.
345. *Id.*
346. *Id.* at 204 (the "level of [state] inaction or ineffectiveness required . . . [is] high").
347. *Id*. at 203 (citing Rodas-Mendoza v. INS, 246 F.3d 1237, 1240 (9th Cir. 2001)).
348. *Id.* at 204 (citing Harutyunyan v. Gonzales, 421 F.3d 64, 68 (1st Cir. 2005)).
349. *Id.* at 204–05.
350. *Id.* at 205 (emphasis added).
351. *Id*. at 205.
352. *Id.*
353. *Id.* at 206.

met where a government is "not always successful" at "enforce[ing] its laws" intended to protect.[354] It is not met where "police . . . prove ineffective, and the guilty . . . go unpunished."[355] It is not even met where there is "localized police apathy or incompetence" unless an applicant can also show the entire government—countrywide—condones the violence or is completely helpless to stop it.[356] In fact, Rosen stated that one should not even focus "on whether government efforts to protect the applicant were effective," as apparently any state effort to protect demonstrates that a government is not "completely helpless."[357] Then, linking the effectiveness analysis back to his initial point about state culpability, he suggested that, in order to meet the test, the state must be inept to such a degree that the "'persecution' by third parties may be attributed to the government."[358]

Lastly, Rosen sought to secure this new test—with its *post hoc* rationalization—through explicit appeal to the agency's *Chevron* and *Brand X* authority.[359] To combat "existing case law in [] circuits" that conflict with *Matter of A-B- I*, he characterized *Matter of A-B- II* as a "clear and controlling interpretation[] of the statutory 'unable or unwilling,' [and] '*persecution*' . . . requirements."[360] He explains that the "Attorney General 'has primary responsibility for construing *ambiguous* provisions'" such as the term "persecution", and thus "his 'reasonable construction' . . . is entitled to deference."[361] Therefore, he concluded, his version of the nonstate actor requirement must trump contrary constructions adopted in the circuits that rejected *Matter of A-B- I*.[362]

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Despite broad agreement prior to *Matter of A-B- I* that the correct standard to apply in nonstate actor cases was the unable-or-

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354. *Id.*
355. *Id.*
356. *Id.* at 207.
357. *Id.* at 205.
358. *Id.* at 213.
359. *Id.*
360. *Id.* (emphasis added).
361. *Id.* (citing Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 844 (1984)).
362. *Id.* (citing Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 982 (2005) ("A court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion.")).

unwilling standard, there is now substantial disagreement among the courts as to which standard to apply, as well as the nature of that standard. Further, now that *Matter of A-B- II* has brought into focus the amount of damage that can be inflicted on current asylum structures through a heightened nonstate actor requirement, it is vital that this element be correctly construed. This Article contends that the conditions that have permitted the test to be heightened stem from the failure of the agency and courts to properly conform the nonstate actor requirement to the Refugee Act. The unwilling-or-unable standard is the correct one because it is most consonant with a fulsome understanding of the statutory refugee definition, which includes those who are "unable or unwilling to avail" themselves of state protection because of "a well-founded fear of persecution." The next Part argues that the only acceptable construction of the unable-or-unwilling standard is one that uses the probability of harm analysis as the guiding principle for measuring the effectiveness of state protection. This framing of the standard is the most faithful to the Refugee Convention and Refugee Act. Rather than grounding the unable-or-unwilling test in the term "persecution," we seek to advance a new framework for approaching the nonstate actor requirement.

V. A NEW FRAMEWORK FOR IDENTIFYING THE CORRECT NONSTATE ACTOR STANDARD

The litigation position of the U.S. government in defending *Matter of A-B- I*'s condone-or-completely-helpless standard had been to argue that it did not meaningfully alter the familiar unable-or-unwilling standard, but simply provided an acceptable interpretation of the traditional rule that is owed *Chevron* deference.[363] The government argued that because the standard is unchanged, it cannot possibly be causing harm or impacting outcomes.[364] The government apparently believed that it could have all the benefits of a heightened standard if the condone-or-completely-helpless language remained in the case law, even if it was not officially acknowledged as heightened.

In seeking to cabin the damage AG Sessions intended, some refugee advocates had likewise argued that, while the AG might have

363. *See* Grace v. Barr, 965 F.3d 883, 898 (D.C. Cir. 2020) ("The government insists that no change occurred, that is, that the two standards are identical.").

364. *Id.*

desired to raise the nonstate actor standard, he did not clearly do so.[365] This argument derived from the need to continue to litigate nonstate persecution cases before AOs and IJs—who are bound by the AG's decision[366]—and a desire to defuse the government's call for *Chevron* deference.[367] For if the AG did not clearly announce a new standard, much less provide a rationale for the departure, it should not be accorded *Chevron* deference.[368]

In this respect, there was a surprising degree of overlap between the positions of the Justice Department and some refugee advocates in their treatment of the nature of *Matter of A-B- I*'s pronouncements on the nonstate actor. Additionally, there was some convergence between the parties' respective positions insofar as the parties set the terms of the debate, in part, as a dispute over the proper understanding of the statutory term "persecution." Where opponents of *Matter of A-B- I* argued that the term "persecution" unambiguously includes the unable-or-unwilling test, the government argued that the term "persecution" is ambiguous and benefits from *Matter of A-B- I*'s clarification, which is owed deference under *Chevron*.[369]

Informed by the decisions issued after *Matter of A-B- I,* as well as the recent issuance of *Matter of A-B- II*, we believe that a paradigm shift is needed. First, it is imperative to clearly call out and challenge the condone-or-completely-helpless formulation as a more

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365. *See, e.g.*, Gonzales-Veliz v. Barr, 938 F.3d 219, 233 (5th Cir. 2019) ("As Gonzales-Veliz acknowledges, in this circuit as well as others, the 'inability or unwillingness' standard is interchangeable with the 'complete helplessness' standard."); *see also* Bishop, *supra* note 29, at 529 ("In fact, despite including rhetoric suggesting a heightened standard, *Matter of A-B-* actually only applied the 'unable or unwilling' to control standard, thereby muddying how harms by nongovernment actors should be evaluated.").

366. 8 CFR §§ 103.10(b), 1003.1(g) (2020).

367. *See, e.g.*, Encino Motorcars, LLC v. Navarro, 136 S. Ct. 2117, 2127 (2016) (rejecting the government's claim of *Chevron* deference due to a lack of reasoned basis for a new regulation).

368. *See* FCC v. Fox Television Stations, Inc., 556 U.S. 502, 515 (2009) (asserting that the agency may not depart from prior policy *sub silentio* and must demonstrate good reasons for the new policy); Sw. Airlines v. FERC, 926 F.3d 851, 856 (2019) (finding FERC acted arbitrarily and capriciously because it did not announce or provide justification for fundamental departure from agency policy); Greater Bos. Television Corp. v. FCC, 444 F.2d 841, 852–53 (D.C. Cir. 1970) (finding the FCC's decision was sound and not arbitrary because it had provided a rationale for its departures from the decision of the Hearing Examiner).

369. The government made such arguments both in Scarlett v. Barr, 957 F.3d 316, 332 (2d Cir. 2020) and Jimenez Galloso v. Barr, 954 F.3d 1189, 1192 (8th Cir. 2020).

onerous standard. While it was understandable to take the position that *Matter of A-B- I* did not actually heighten the standard when litigating before IJs and the BIA,[370] advocates must forcefully assert and preserve arguments that *Matter of A-B- I* and *II* have in fact elevated the nonstate actor standard in a way that is contrary to the statute and congressional intent.[371] The risk in conceding that *Matter of A-B- I* and *II* did not elevate the standard is that asylum seekers may be stuck with all of the negative consequences of the condone-or-completely-helpless standard (i.e., that the plain language of this standard is objectively more difficult to satisfy) without any ability to argue that the heightened standard is an erroneous and unreasoned departure from the existing standard.[372] A position that equates the two standards not only requires adjudicators to ignore the plain language they employ, it fails to appreciate the fact that a significant number of cases demonstrate that the condone-or-completely-helpless standard is highly correlated to an increase in case denials.[373]

Second, it is time to rethink the best legal strategy for combatting any heightened nonstate actor standard. While efforts to ground the traditional unwilling-or-unable standard in the term "persecution" have produced mixed results,[374] the argument is vulnerable due to well-established administrative law principles of deference to agency interpretations of ambiguous statutory terms[375]

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370. *See* 8 CFR §§ 103.10(b), 1003.1(g) (2020).

371. *See, e.g.*, Kanagu v. Holder, 781 F.3d 912, 917 (8th Cir. 2015) ("[W]e lack jurisdiction to consider arguments not clearly made before the agency.")

372. *See, e.g.*, Grace v. Barr, 965 F.3d 883, 898 (D.C. Cir. 2020) (holding that USCIS's departure from established practices was unreasoned and arbitrary).

373. *See supra* Part II.

374. *Compare Grace*, 965 F.3d at 897–98 (rejecting asylum seeker's attempt to argue that term "persecution" unambiguously includes the unwilling-or-unable test) *and* Gonzales-Veliz v. Barr, 938 F.3d 219, 233 (5th Cir. 2019) (explaining that "[a]gencies are free to change their existing policies as long as they provide a reasoned explanation for the change"), *and* Scarlett v. Barr, 957 F.3d 316, 333 (2d Cir. 2020) (holding that the term "'persecution' is . . . sufficiently ambiguous to benefit from Attorney General clarification."), *with* Jimenez Galloso v. Barr, 954 F.3d 1189, 1192 (8th Cir. 2020) (rejecting wholesale adoption of the condone-or-completely-helpless standard due to the earlier definition of term "persecution"), *and* Juan Antonio v. Barr, 959 F.3d 778, 975 (6th Cir. 2020) (rejecting the condone-or-completely-helpless standard as an impermissible construction of the persecution requirement).

375. Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984) ("If the intent of Congress is clear, that is the end of the matter; for [we],

and the widespread recognition that the term "persecution" is ambiguous.[376] This vulnerability was laid bare by *Matter of A-B- II*.[377] As such, advocates must advance arguments that clearly link the traditional standard to the more explicit language employed by the Refugee Act and Refugee Convention that speak of refugees as those who are "unable or unwilling to avail [themselves] . . . of [state] protection . . . because of . . . a well-founded fear of persecution."[378] Despite the obvious parallels between the "unable or unwilling to avail" of state protection language and the "unable or unwilling to protect" standard, courts have completely ignored this statutory basis for the nonstate actor requirement.[379] This Article argues that there can be no room for a condone-or-completely-helpless test when, as the statute requires, the state protection analysis is viewed through the lens of the probability of harm.

Next, Section C considers whether there is any further utility at all to the statutory arguments that ground the unable-or-unwilling standard in the term "persecution." While there is significant support in the case law for this framing, we explore the weaknesses of this

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as well as the [AG], must give effect to the unambiguously expressed intent of Congress.").

376. *See*, *e.g.*, Mballa Bouba v. Sessions, 744 F. App'x 116, 126 (4th Cir. 2018) ("There is no set definition of persecution; the term is undefined by both Congress and the BIA."); Rios-Zamora v. Sessions, 751 F. App'x 784, 786 (6th Cir. 2018) ("Persecution is an "ambiguous" term that is not defined in the INA or the accompanying regulations."); Kazemzadeh v. U.S. Att'y Gen., 577 F.3d 1341, 1357 (11th Cir. 2009) ("There is no universally accepted definition of persecution. The INA is silent on the term's definition."); Amouri v. Holder, 572 F.3d 29, 33 (1st Cir. 2009) ("Persecution is a protean term, undefined by statute."); Shi Liang Lin v. U.S. Dep't of Just., 494 F.3d 296, 329 (2d Cir. 2007) ("As with any ambiguous statutory term, it is for the BIA to determine within its expertise what exactly constitutes 'persecution' so long as its interpretation is reasonable."); Chen v. Gonzales, 457 F.3d 670, 674 (7th Cir. 2006) ("There is no statutory definition of persecution, and the BIA has not yet developed any definition of its own . . . ."); Cai Luan Chen v. Ashcroft, 381 F.3d 221, 232 (3d Cir. 2004) ("[W]ith the exception of forced abortions and sterilizations, the concept of "persecution" is left completely undefined. We infer from Congress's use of this ambiguous term an intent to delegate interpretive authority to the agency, including the ability to decide, within a reasonable range, the precise contours of its meaning."); Corado v. Ashcroft, 384 F.3d 945, 947 (8th Cir. 2004) ("The BIA is entitled to deference in interpreting ambiguous statutory terms such as 'persecution,' so long as its interpretation is reasonable and consistent with the statute."); Fisher v. INS, 79 F.3d 955, 961 (9th Cir. 1996) ("The [INA] does not define "persecution"; therefore, we must defer to the Board's interpretation . . . .").

377. *Matter of A-B- II*, 28 I&N Dec. at 213.

378. 8 U.S.C. § 1101(a)(42); Refugee Convention, *supra* note 42, art 1.

379. *See supra* Part I.

approach and propose a few possible solutions and areas for further research.

Finally, this Part concludes by offering additional areas for exploration by discussing strategies that show promise in the effort to challenge the condone-or-complete-helplessness standard in courts of appeals that have not yet deferred to the heightened nonstate actor articulation.

A. Showing That *Matter of A-B- I* and *II* Heightened the Standard

While some circuit decisions have deferred to *Matter of A-B- I*'s condone-or-completely-helpless test, claiming it is not meaningfully different from the unwilling or unable test,[380] this assertion is belied both by the plain language used in the two tests as well as a careful analysis of the disparate outcomes in cases employing the two different standards.

There is a clear distinction in the ordinary meanings of the words "condone" and "unwilling" on the one hand, and "completely helpless" and "unable" on the other. It is axiomatic that "unwilling" does not mean "condone." 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 have other enforcement priorities or simply believe that the persecution is a family matter best handled in the home. Similarly, "unable" does not mean "completely helpless." The words "complete" or "completely" are modifiers that signify "in every way . . ., *as much as possible*" or "*to a full extent* or degree" with synonyms such as "*thoroughly* . . ., *totally*, *utterly* . . ., [and] wholly."[381] And the words "helpless" or "helplessness" mean: "*defenseless*, or *marked by an inability to act or react*;" "the . . . state of being *unable to do anything to help yourself or anyone else*;" "*weak*, *dependent*; . . . *powerless*; *incapacitated*."[382] The only countries in the world that can be so described are failed states.

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380. Gonzales-*Veliz*, 938 F.3d at 233; *Scarlett*, 957 F.3d at 333.

381. *See Completely,* CAMBRIDGE DICTIONARY, https://dictionary.cambridge.org/us/dictionary/english/completely [https://perma.cc/B7JQ-NFJP]; *Helpless,* MERIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/helpless [https://perma.cc/LRU4-HGAV] (emphasis added).

382. *Helplessness,* CAMBRIDGE DICTIONARY, https://dictionary.cambridge.org/us/dictionary/english/helplessness [https://perma.cc/T72B-DY75] (emphasis added); *see also* Salman v. Holder, 687 F.3d 991, 995 (8th Cir. 2012) (equating "helpless" with "powerless").

As noted above, the Court of Appeals for the District of Columbia specifically rejected the government's argument that the unwilling-or-unable standard and the condoned-or-complete-helplessness standard were "identical," reasoning that "[a] government that 'condones' or is 'completely helpless' in the face of persecution is obviously more culpable, or more incompetent, than one that is simply 'unwilling or unable' to protect its citizens."[383]

There can be no serious argument that the ordinary meanings of those words are synonymous. A contrary position requires adjudicators to pretend that the condone-or-completely-helpless framing simply does not mean what those words ordinarily mean, a position that will invariably lead to confusion and erroneous outcomes. The "linguistic difference between the words" requires a conclusion that the standards are not the same.[384] Even if courts declare by fiat—as did the Acting AG in *Matter of A-B- II*—that the two standards are the same, adjudicators below who are under strict processing quotas[385]will very likely treat the apparently heightened condone-or-completely-helpless language as a more onerous standard.[386] If the two standards are in fact the same, then only confusion will result in using a standard that at least in name is more exacting.

Moreover, nothing in the decisions of those courts that have held the two standards to be synonymous provides any real explanation for why we should pretend that the words "condone" and

383. Grace v. Barr, 965 F.3d 883, 898–99 (D.C. Cir. 2020).

384. *See, e.g.*, INS v. Cardoza-Fonseca, 480 U.S. 421, 433–34 (1987) (holding that the words "well-founded fear" and "clear probability" justify applying two different standards (internal quotation marks omitted)).

385. *See* George Tzamaras & Belle Woods, *The Need for an Independent Immigration Court Grows More Urgent As DOJ Imposes Quotas on Immigration Judges*, AM. IMMIGR. L. ASS'N (Oct. 1, 2018), https://www.aila.org/advo-media/press-releases/2018/need-independent-court-doj-judges [https://perma.cc/JBQ7-668Q] (stating that IJs are required "to finish 700 cases per year or face disciplinary action").

386. In *Nabulwala v. Gonzalez*, for example, the IJ had read *Menjivar*'s use of the condone-or-complete-helplessness formulation to effectively eliminate asylum for refugees fleeing nonstate actor persecutors, denying relief because the asylum seeker's "past persecution was 'not in any way *government-sponsored or authorized*.'" 481 F.3d 1115, 1117–18 (8th Cir. 2007). AG Sessions expressed a similar sentiment in *Matter of A-B- I*, writing that "[w]here the persecutor is not part of the government, the [adjudicator] must consider . . . the government's role in *sponsoring or enabling* such actions." 27 I&N Dec. 316, 318 (A.G. 2018).

"completely helpless" do not carry their ordinary meaning.[387] Apart from claiming the two formulations "serve the same purpose," the cases make no attempt to reconcile the obviously divergent meanings of the terms used.[388]

Similarly, while the Acting AG in *Matter of A-B- II* halfheartedly suggested the "ordinary sense of" those words were the same and that the condone-or-completely-helpless standard was "not a more stringent test," that assertion is clearly undermined by the AG's elaboration of the test.[389] The Acting AG in *Matter of A-B- II* provided that the threshold for that test's satisfaction was high and rarely met,[390] a clear departure from the traditional unable-or-unwilling standard.[391] Additionally, his analysis of the plain language consisted merely of pointing out that a government that *condones* persecution can be described as "unwilling" to prevent it, and a government that is *completely helpless* is "unable" to protect.[392] However, his argument misses the point. Clearly a lower threshold will always be included within a higher one, but this does not render them equivalent.[393] Every government that is *completely helpless* is unable to protect, but the reverse is not true.

Yet it is not just a linguistic analysis that leads to the conclusion that the standards differ; analysis of case resolutions points to the same conclusion. The Eighth Circuit Court of Appeals—a court that has used and applied this standard in more cases than any other—reveals just how elevated the condone-or-complete-helplessness threshold is. On petitions for review where the Eighth Circuit cited the condone-or-complete-helplessness standard[394] rather

387. *Cf.* Scarlett v. Barr, 957 F.3d 316, 333 (2d Cir. 2020) (declaring the two standards to be "interchangeable" without any actual analysis of the words used); Gonzales-Veliz v. Barr, 938 F.3d 219, 233 (5th Cir. 2019) (same).

388. *Scarlett*, 957 F.3d at 333; *see also Gonzales-Veliz*, 938 F.3d at 233 (stating that the "two formulations accomplish the same purpose.").

389. *Matter of A-B- II*, 28 I&N Dec. at 201–02.

390. *Id.* at 203–07.

391. *See supra* Part II.

392. *Id*. at 202.

393. For example, any asylum applicant that fails to satisfy the lower well-founded fear probability of harm threshold necessarily fails to satisfy the higher clear probability threshold for claims for withholding of removal. However, that does not make the two standards the same. *See* INS v. Cardoza-Fonseca, 480 U.S. 421, 423 (1987).

394. For cases denying applicants' petitions for review, citing the condone-or-complete-helplessness standard, see Fuentes-Erazo v. Sessions, 848 F.3d 847, 854 (8th Cir. 2017) (denying petition for review ("PFR")); Saldana v. Lynch, 820 F.3d 970, 977 (8th Cir. 2016) (denying PFR); Ming Li Hui v. Holder, 769 F.3d 984,

than the unwilling-or-unable standard,[395] virtually all were denied. In nearly fifteen years of cases decided on this issue, just one case before the Eighth Circuit, *Ngengwe v. Mukasey*, [396] cited the elevated standard and found the nonstate actor requirement satisfied.[397] And a searching analysis of *Ngengwe* reveals that the court did not actually apply a true condone-or-complete-helplessness standard; it just cited it in the course of applying the familiar unable-or-unwilling standard. [398] However, even if *Ngengwe* is numbered among the condone-or-complete-helplessness line of cases in the Eighth Circuit, petitioners still succeeded at more than twice the rate when the lower unable-or-unwilling standard was cited.[399]

986–87 (8th Cir. 2014) (denying PFR); Constanza-Martinez v. Holder, 739 F.3d 1100, 1103 (8th Cir. 2014) (denying PFR); De Castro-Gutierrez v. Holder, 713 F.3d 375, 381 (8th Cir. 2013) (denying PFR); Gutierrez-Vidal v. Holder, 709 F.3d 728, 732 (8th Cir. 2013) (denying PFR); Salman v. Holder, 687 F.3d 991, 995 (8th Cir. 2012) (denying PFR); Guillen-Hernandez v. Holder, 592 F.3d 883, 887 (8th Cir. 2010) (denying PFR); Khilan v. Holder, 557 F.3d 583, 585 (8th Cir. 2009) (denying PFR); Setiadi v. Gonzales, 437 F.3d 710, 714 (8th Cir. 2006) (denying PFR); Menjivar v. Gonzales, 416 F.3d 918, 921 (8th Cir. 2005) (denying PFR). *But see* Ngengwe, v. Mukasey, 543 F.3d 1029, 1035 (8th Cir. 2008) (finding nonstate actor requirement satisfied).

395. For cases applying some version of the unwilling-or-unable standard, see Juarez-Coronado v. Barr, 919 F.3d 1085, 1089 (8th Cir. 2019) (denying PFR); Edionseri v. Sessions, 860 F.3d 1101, 1105 (8th Cir. 2017) (denying PFR), *cert. denied*, 138 S. Ct. 1332 (2018), *reh'g denied*, 138 S. Ct. 2019 (2018); Cinto-Velasquez v. Lynch, 817 F.3d 602, 606 (8th Cir. 2016); Gathungu v. Holder, 725 F.3d 900, 906 (8th Cir. 2013) (granting PFR); La v. Holder, 701 F.3d 566, 571 (8th Cir. 2012) (denying PFR); Shaghil v. Holder, 638 F.3d 828, 834 (8th Cir. 2011) (denying PFR); Osuji v. Holder, 657 F.3d 719, 721–22 (8th Cir. 2011) (denying PFR); Bracic v. Holder, 603 F.3d 1027, 1034 (8th Cir. 2010) (granting PFR); Khrystotodorov v. Mukasey, 551 F.3d 775, 783 (8th Cir. 2008) (denying PFR); Beck v. Mukasey, 527 F.3d 737, 740 (8th Cir. 2008) (denying PFR); Nabulwala v. Gonzales, 481 F.3d 1115, 1118 (8th Cir. 2007) (granting PFR); Makatengkeng v. Gonzales, 495 F.3d 876, 885 (8th Cir. 2007) (denying PFR); Lengkong v. Gonzales, 478 F.3d 859, 862 (8th Cir. 2007) (denying PFR); Suprun v. Gonzales, 442 F.3d 1078, 1080–81 (8th Cir. 2006) (denying PFR); Kimumwe v. Gonzales, 431 F.3d 319, 322–23 (8th Cir. 2005) (denying PFR); Alyas v. Gonzales, 419 F.3d 756, 761 (8th Cir. 2005) (denying PFR).

396. Ngengwe, v. Mukasey, 543 F.3d 1029, 1035 (8th Cir. 2008).

397. *Id.* at 1035–36.

398. *Id.* at 1036 (stating that "[g]iven the evidence in the record that the Cameroonian government would not protect Ngengwe from her in-laws, this court finds no substantial evidence to uphold the IJ's and BIA's decision" and citing to cases that quote the unwilling-or-unable standard).

399. *Compare supra* note 395 (reflecting an 18% grant rate for petitions for review using the unable-or-unwilling standard), *with supra* note 394 (reflecting a

Whether viewed through the lens of the ordinary meaning of the words used in the condone-or-complete-helplessness standard or the results of cases employing that test, the conclusion is the same: the nonstate actor standard of *Matter of A-B- I* and *II* is a heightened one. Failing to demonstrate utter and complete powerlessness on the part of the state to provide protection will prove fatal in virtually all claims subjected to that articulation of the nonstate actor test.

B. Unwilling or Unable to Avail of State Protection: The Plain Language of the Refugee Act

Having shown that *Matter of A-B- I* and *II* heightened the nonstate actor test, we contend that the strategy most likely to succeed against that test is one that anchors the unable-or-unwilling standard in the plain language used in the Refugee Act. The statutory refugee definition—which includes those "who [are] unable or unwilling to . . . *avail* [themselves] of the protection" of their country "because of . . . a well-founded fear of persecution"—must serve as the foundation for any permissible nonstate actor doctrine.[400]

As noted above, the Supreme Court has explained that "the [Refugee Act's] legislative history . . . demonstrates that Congress added the 'well-founded' language only because that was the language incorporated by the United Nations Protocol to which Congress sought to conform."[401] The Court stated that "the legislative history of the new definition of 'refugee,' and indeed the entire 1980 Act," clearly reveals that "Congress' primary purpose was to bring United States refugee law into conformance with the 1967 United Nations Protocol Relating to the Status of Refugees . . . to which the United States acceded in 1968."[402] The Court explicitly found that the "definition of 'refugee' that Congress adopted . . . is virtually identical to the one prescribed by . . . the Convention," demonstrating "congress[ional] intent" to interpret "the new statutory definition of 'refugee' . . . in conformance with the" Refugee Convention's and Protocol's definition."[403]

The Refugee Convention, in turn, defines refugees, in relevant part, as those who "owing to [a] well-founded fear of being persecuted . . . [are] unable or, owing to such fear . . . , unwilling to

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grant rate of just 8% for petitions for review using the condone-or-completely-helpless standard).

400. 8 U.S.C. § 1101(a)(42).

401. INS v. Cardoza-Fonseca, 480 U.S. 421, 434–35 (1987).

402. *Id.* at 436–37.

403. *Id.* at 437.

avail [themselves] of the protection of [their] country." [404] To understand the Refugee Convention drafters' intent in employing the language "unable or . . . unwilling to avail . . . of [state] protection," it is necessary to look to the documents from which that language is derived. [405] The Refugee Convention did not create the phrase; instead, it appears in earlier documents related to the creation of refugee protection. For example, the IRO Constitution, discussed above, [406] provided protection for "displaced persons" who were "expelled from their own countries" for reasons of "race, religion, nationality, or political opinion," as well as "those unable or unwilling to avail themselves of the protection of the government of their country." [407] The UNHCR's Statute contained similar language, "extend[ing] [protection] to [a]ny other person who is outside the country of his nationality . . . [who] is unable or, because of such fear, is unwilling to avail himself of the protection of the government of the country of his nationality."[408]

At the time these international law documents were drafted, state protection was understood to include both (1) *external* protection, such as "consular services," "the provision of passports," and similar services;[409] as well as (2) *internal* protection, such as obligations to safeguard "the refugee's basic human rights, including the right to life, liberty, and security of the person."[410] Thus, it was not just a country's failure to protect a refugee from harms within the country that was relevant for the analysis; ineffectiveness of consular and diplomatic protection outside the country was also weighed. This expansive understanding of "state protection" for the drafters of the Refugee Convention must inform how we approach the Refugee

404. Refugee Convention, *supra* note 42, art. 1.

405. *See, e.g.*, Matter of Negusie, 27 I&N Dec. 347, 353–60 (B.I.A. 2018) (examining the legislative history of the Refugee Act and noting the strong similarities between the Act and the Refugee Convention); *accord* GOODWIN-GILL & MCADAM, *supra* note 51, at 7–8 ("[A] treaty 'shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.'" (quoting Vienna Convention on the Law of Treaties art. 32, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331)). The intent of the Refugee Convention should serve as the lens through which questions of the meaning of "state protection" are viewed.

406. *See supra* note 53 and accompanying text; *Cardoza-Fonseca*, 480 U.S. at 437–38 (citing IRO CONST., annex 1, pt. 1, § C1(a)(i)).

407. GOODWIN-GILL & MCADAM, *supra* note 51, at 19 (emphasis added).

408. *Id.* at 21.

409. *Id.* at 22 (citing *A Study of Statelessness*, *supra* note 57).

410. *Id*. at 23.

Convention's and Refugee Act's use of the language "unable or . . . unwilling to avail . . . of [state] protection."

Similarly, it was not just the availability of protection that mattered, but the putative refugee's willingness to lay claim to that protection. A 1949 U.N. report on statelessness describes refugees as "persons who, having left the country of which they were nationals, *no longer enjoy the protection and assistance of their national authorities*, either because these authorities refuse to grant them assistance and protection, *or because they themselves renounce the assistance and protection of the countries* of which they are nationals."[411]

Additionally, both the Refugee Convention and the Refugee Act explicitly link the reason for why refugees cannot avail themselves of state protection to a well-founded fear of persecution. Where U.S law speaks of refugees as those who are "*unable or unwilling* to return to, and [are] *unable or unwilling to avail* [*themselves*] . . . of [state] *protection* . . . because of . . . a well-founded fear of persecution," the Refugee Convention states that refugees are those who "*owing to [a] well-founded fear* of being persecuted . . . [*are*] *unable or, owing to such fear . . . , unwilling to avail* [*themselves*] . . . *of* [*state*] *protection*."[412]

The Board's interpretations of the well-founded fear test create further parallels between these analyses. The Board has held that to establish a well-founded fear, an applicant must show, *inter alia*, that their feared persecutor is both *able* to harm them and *inclined* to harm them.[413] In the context of nonstate persecutors, the question of whether a feared persecutor is *able* to harm necessarily turns upon the degree to which the state has both the will and capacity to protect.

Given the tight link between the state protection and probability of harm analyses, the Refugee Act's "unable or . . . unwilling to *avail* . . . of [state] protection" language must be understood consistently with the Supreme Court's articulation of the well-founded fear test.[414] Just as the Supreme Court did in *Cardoza-*

411. *See* GOODWIN-GILL & MCADAM, *supra* note 51, at 21 (citing *A Study of Statelessness, supra* note 57) (emphasis added).

412. *Compare* 8 U.S.C. § 1101(a)(42) (emphasis added), *with* Refugee Convention, *supra* note 42, art. 1 (emphasis added).

413. Matter of Mogharrabi, 19 I&N Dec. 439, 446 (B.I.A. 1987).

414. INS v. Cardoza-Fonseca, 480 U.S. 421, 437–38 (1987) (emphasis added) (citing IRO CONST., annex 1, pt. 1, § C1(a)(i)) (explaining that the "origin of the Protocol's definition of 'refugee,'" found in the 1946 [IRO] Constitution,

Fonseca, courts must examine "the plain language of the Act, its symmetry with the United Nations Protocol, and its legislative history."[415] We believe when this analysis is properly conducted, effective state protection can only be measured by the degree to which it reduces a refugee's probability of suffering future harm below the 10% well-founded fear threshold.[416] Any other construction of the nonstate actor standard threatens to overtake the Supreme Court's established interpretation of the reasonable possibility element of the refugee definition.

The probability of future harm in any given case where there is a nonstate persecutor will depend on the level of state protection available. In this way, the two analyses are interconnected. Whereas the well-founded fear analysis looks at the *ability* and *inclination* of a persecutor to harm,[417] the unable-or-unwilling standard looks at the *ability* and *willingness* of the state to protect.[418] The greater the degree to which the state is able and willing to protect, the lesser the probability of harm will be. Under this approach, the state protection analysis becomes a subcomponent of the well-founded fear analysis where the persecutor is a nonstate actor. To construe both statutory terms consistently, effectiveness of state protection must be measured within the context of the probability of harm.[419]

In contrast, an elevated nonstate actor doctrine that requires an applicant to show more than a reasonable possibility of future harm is irreconcilable with the Refugee Convention and Refugee Act

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"defined a 'refugee'" as one with a "'valid objection' to returning to his country," and specified that "'fear . . . of persecution . . . constituted a valid objection"); *id.* at 439 (quoting the UNHCR Handbook's proposition that "[in] general, the applicant's fear should be considered well founded if he can establish, to a reasonable degree, that his continued stay in his country of origin has become intolerable to him for the reasons stated in the definition.").

415. *Id.* at 449.

416. *Cardozo-Fonseca,* 480 U.S. at 440 ("There is simply no room in the . . . definition for concluding that because an applicant only has a 10% chance of being shot, tortured, or otherwise persecuted, that he or she has no 'well-founded fear' of the event happening.").

417. *Matter of Mogharrabi*, 19 I&N Dec. at 446.

418. Jimenez Galloso v. Barr, 954 F.3d 1189, 1192 (8th Cir. 2020).

419. *Jimenez Galloso* supports this argument by linking up the state protection analysis with the well-founded fear analysis. *Id*. (discussing whether petitioner had "established a well-founded fear of future persecution under the unable-and-unwilling standard"); *accord* Gathungu v. Holder, 725 F.3d 900, 909 (8th Cir. 2013) (reasoning that where the Mungiki "will probably murder" applicant, the unwilling-or-unable standard is satisfied (citing Wanjiru v. Holder, 705 F.3d 258, 260 (7th Cir. 2013))).

because it renders the "reasonable possibility" analysis superfluous. If the condone-or-completely-helpless standard can defeat the claim of someone who has established a well-founded fear of persecution where their country made some effort to protect[420]—and is therefore not completely helpless—then that standard is incongruous with the statute and thus cannot be afforded *Chevron* deference.[421]

What should be beyond dispute is that the nonstate actor test cannot be viewed in isolation from the well-founded fear element of the refugee definition. Such an approach is foreclosed by the text of the statute.[422] Longstanding cannons of statutory construction require that these elements be construed and understood consistently with one another.[423] However, when the nonstate actor standard is linked to the term "persecution," the connection to the probability of harm analysis is obscured to a degree that creates an opening for an elevated standard to take hold.

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420. This is precisely what the IJ in *Jimenez Galloso* did: even though he felt that the petitioner had met the standard for withholding of removal—a more likely than not probability of harm—he denied her relief because she could not show that Mexico was completely helpless in its struggle with domestic violence. *See supra* notes 318–22 and accompanying text. This approach was also apparently adopted in *Matter of A-B- II*, 28 I&N Dec. 199, 205 (A.G. 2021) (indicating adjudicators should not even focus "on whether government efforts to protect the applicant were effective," as any state effort to protect demonstrates the government is not "completely helpless").

421. The Second Circuit was critical of this argument in *Scarlett*, reasoning that it conflates the nonstate actor and well-founded fear requirements. Scarlett v. Barr, 957 F.3d 316, 332–33 (2d Cir. 2020). However, such a critique is misplaced. It should be beyond dispute that these two elements of the refugee definition must be understood consistently with one another. Yet if *complete* state *helplessness* carries the ordinary meaning those words suggest, then theoretically even a refugee facing a 90% probability of harm (in a country where the state protects just 10% of victims) could be denied asylum under that heightened standard because the state is not *completely helpless*. Such a *complete helplessness* rule nullifies the 10% probability of harm analysis where the feared persecutor is a nonstate actor. As such, that construction must be rejected for violating a cardinal rule of statutory interpretation. *See* Yates v. United States, 574 U.S. 528, 543 (2015) ("We resist a reading of [the relevant statutory provision] that would render superfluous an entire provision passed in proximity as part of the same Act.").

422. *See supra* note 414 and accompanying text.

423. FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133 (2000) (holding that courts must "interpret the statute 'as a symmetrical and coherent regulatory scheme'" (citing Gustafson v. Alloyd Co., 513 U.S. 561, 569 (1995), and "'fit, if possible, all parts into an harmonious whole'" (citing FTC v. Mandel Brothers, Inc., 359 U.S. 385, 389 (1959)).

C. Future Utility for the Term "Persecution"?

As discussed at length above, the prevailing statutory hook used by both the agency and the courts for the unable-or-unwilling test has been the pre-defined nature of the term "persecution."[424] Most courts have followed the lead of the BIA in using this rationale as the basis for the nonstate actor requirement, holding that "persecution" includes harm inflicted by a government or by nonstate actors the government is unable or unwilling to control.[425] As this was the well-established understanding of the term before the passage of the Refugee Act, most courts have deferred to the agency's determination that the standard was embedded within the term "persecution."

However, the risk in this approach—which *Matter of A-B- I* and its progeny have exposed—is that the term "persecution" also encompasses another component of the refugee definition: the severity of harm analysis.[426] And courts have universally treated this term as ambiguous.[427] Thus, while the nonstate actor test is a

424. *See supra* Section I.C.

425. *See supra* Section I.C.

426. *See*, *e.g.*, Nelson v. INS, 232 F.3d 258, 263 (1st Cir. 2000) ("To qualify as persecution, a person's experience must rise above unpleasantness, harassment, and even basic suffering."); Beskovic v. Gonzales, 467 F.3d 223, 226 (2d. Cir. 2006) (finding that a "minor beating . . . may rise to the level of persecution if it occurred in the context of an arrest or detention"); Gomez-Zulaga v. U.S. Att'y Gen., 527 F.3d 330, 342 (3d Cir. 2008) (stating that brief detentions by armed guerillas where little physical harm occurs generally do not rise to the level of "persecution," while an eight-day detention does); Li v. Gonzales, 405 F.3d 171, 178 (4th Cir. 2005) ("[E]conomic penalties rise to the level of persecution only if they are so harsh as to constitute a threat to life or liberty."); Munoz-Granados v. Barr, 958 F.3d 402, 407 (5th Cir. 2020) (finding that indirect threats lacking in immediacy do not rise to the level of "persecution"); Mikhailevitch v. INS, 146 F.3d 384, 389–90 (6th Cir. 1998) (stating that harassment or discrimination alone does not rise to the level of "persecution"); Stanojkova v. Holder, 645 F.3d 943, 947–48 (7th Cir. 2011) (stating that, to constitute "persecution," the harm must be more severe than discrimination or harassment); Ahmed v. Ashcroft, 396 F.3d 1011, 1014 (8th Cir. 2007) ("Economic discrimination has been held to rise to the level of persecution if such sanctions are sufficiently harsh to constitute a threat to life or freedom."); Ahmed v. Keisler, 504 F.3d 1183, 1194 (9th Cir. 2007) (stating that, though single incidents of harm may not rise to the level of "persecution," the cumulative effect of the harms may support an asylum claim); Witjaksano v. Holder, 573 F.3d 968, 977 (10th Cir. 2009) (finding that assaults that do not "requir[e] medical attention" do not rise to the level of persecution); Barrios-Bermudez v. U.S. Att'y Gen., 322 F. App'x 787, 792 (11th Cir. 2009) ("[V]erbal harassment alone does not rise to the level of persecution.").

427. *See supra* note 376.

separate and discrete element, courts are much more likely to defer to the agency's construction of that test when it is framed as a subcomponent of the term "persecution." Administrative law principles put those challenging the heightened standard at a distinct disadvantage if the terms of the debate center on the meaning of the word "persecution."[428] Additionally, as explicitly noted by *Matter of A-B- II*,[429] an agency can depart from its past interpretations of an ambiguous statutory provision, even taking a 180 degree turn in positions, so long as that departure is explained.[430] And courts will defer to even a reversed agency position, provided a rational reason can be conjured in its defense.[431] Consequently, we believe that continued use of the term "persecution" in this debate is imprudent, and likely to produce only diminishing returns at best.

Nevertheless, there remain at least two possible additional arguments with regard to the term "persecution" that merit consideration. First, while the term "persecution" has been held to be ambiguous as it relates to the severity of harm,[432] the term is not necessarily ambiguous in every respect.[433] Specifically, as it relates to

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428. *See, e.g.*, Gonzales-Veliz v. Barr, 938 F.3d 219, 233 (5th Cir. 2019) (rejecting a challenge to the condone-or-completely-helpless standard in part because the term "persecution" is ambiguous); Scarlett v. Barr, 957 F.3d 316, 333 (2d Cir. 2020) (same). Moreover, the nature of the debate regarding the meaning of the term "persecution" is only growing more challenging for refugees and their allies. On June 15, 2020, EOIR proposed a rule that would elevate the severity of harm threshold. Under the proposal:

> [P]ersecution would not include . . . : (1) Every instance of harm that arises generally out of civil, criminal, or military strife in a country . . . ; (2) any and all treatment that the United States regards as unfair, offensive, unjust, or even unlawful or unconstitutional . . . ; (3) intermittent harassment, including brief detentions; (4) repeated threats with no actions taken to carry out the threats; (5) non-severe economic harm or property damage; or (6) government laws or policies that are infrequently enforced, unless there is credible evidence that those laws or policies have been or would be applied to an applicant personally.

See Procedures for Asylum and Withholding of Removal, *supra* note 4, at *36,280–81.

429. *Matter of A-B- II*, 28 I&N Dec. 199, 213 (A.G. 2021).

430. *See* Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 981 (2005).

431. *Id.*

432. Corado v. Ashcroft, 384 F.3d 945, 947 (8th Cir. 2004).

433. Ass'n of Battery Recyclers, Inc. v. U.S. Env'tal Prot. Agency, 208 F.3d 1047, 1056 (D.C. Cir. 2000) ("A term may be ambiguous as applied to some situations, but not as applied to others."); INS v. Cardoza-Fonseca, 480 U.S. 421,

the unable-or-unwilling standard, at least two courts have been receptive to the argument that the canons of statutory construction demonstrate that the condone-or-completely-helpless language impermissibly conflicts with the statute's language.[434] Under their approach, there is no occasion for *Chevron* deference.[435] Second, following *Grace*, future scholarship and research could provide a stronger showing of an established and fully articulated nonstate actor requirement that existed prior to the passage of the Refugee Act to bolster the assertion that Congress was indeed aware of the doctrine and intended it to be carried forward by using that term in the Refugee Act.

In any event, so long as the unable-or-unwilling standard is the product of the agency's interpretation of the term "persecution," it is vulnerable to reinterpretation and revision given *Chevron* and *Brand X*. Without conceding the point, we believe that a paradigm shift is needed to ground the nonstate actor standard in the more explicit statutory language that speaks of refugees as being "unable or unwilling to avail" themselves of state protection "because of a well-founded fear of persecution." Not only does this language provide a firmer foundation for the unable-or-unwilling standard, it frames

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448 (1987) (noting that while "[t]here is obviously some ambiguity in a term like 'well-founded fear,' which can only be given concrete meaning through a process of case-by-case adjudication," the ordinary tools of statutory construction have a role to play in ruling out erroneous agency constructions of the term well-founded fear).

434. Grace v. Whitaker, 344 F. Supp. 3d 96, 130 (D.D.C. 2018) (finding that "the Attorney General's 'condoned' or 'complete helplessness' standard is not a permissible construction of the persecution requirement"); Juan Antonio v. Barr, 959 F.3d 778, 795 (6th Cir. 2020) (reversing the Board's conclusion because the "complete helplessness" standard is "'not a permissible construction of the persecution requirement.'" (quoting *Grace*, 344 F. Supp. 3d at 130)); Jimenez Galloso v. Barr, 954 F.3d 1189, 1192 (8th Cir. 2020) (citing *Miranda*, 139 F.3d at 627 (8th Cir. 1998)). In the Eighth Circuit, for example, *Jimenez Galloso* adopted this argument as it relates to the unable-or-unwilling standard existing within the predefined term "persecution." However, it is noteworthy that the Eighth Circuit did not reach or discuss *A-B- I* even though both Ms. Jimenez Galloso and the government raised the issue. *See* Ellison & Gupta, supra note 34, at 1066–69. Given *Jimenez Galloso's* silence on that issue, a future panel may well decide to defer to *A-B-'s* new construction of the nonstate actor standard.

435. *See* Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984). For additional resources and arguments, see *Practice Advisories Available for Domestic Violence and Children's Asylum Claims*, CTR. FOR GENDER & REFUGEE STUDS., https://cgrs.uchastings.edu/article/practice-advisories-available-domestic-violence-and-childrens-asylum-claims (on file with the *Columbia Human Rights Law Review*).

the standard in terms that help adjudicators measure the required level of effectiveness of state protection. As stated above, effective state protection can only be measured by the degree to which it reduces a refugee's probability of suffering future harm below the 10% well-founded fear threshold.

D. Areas for Further Exploration

This Section offers a few additional lines of inquiry to consider in pushing back against the heightened condone-or-complete-helplessness standard for nonstate actor asylum claims. It does not purport to analyze these arguments exhaustively, but flags them for further scholarly exploration. In addition to considering the need for a symmetrical and coherent humanitarian framework—one that considers asylum, withholding, and protection under CAT alongside one another—this Section points to controlling law in the court of appeals related to intra-circuit conflicts as two additional strategies that merit some discussion.

First, it is important that the standard for eligibility in the context of asylum and withholding be interpreted and construed consistently with the established standards for relief under CAT. Any requirement to show that one's government "condones" their persecution by contrast elides the clearly established delineation between claims for relief under asylum and CAT. Courts have recognized that the CAT "consent or acquiescence" requirement is a more onerous one than the asylum nonstate actor standard.[436] However, if applicants for asylum must prove their government *condones* or "enables" their persecution,[437] the asylum standard is

436. *See* 8 C.F.R. § 208.18(a)(1) (2020) ("Torture is defined as any act by which severe pain or suffering . . . is inflicted by or at the instigation of or with the consent or acquiescence of a public official . . . ."); Fuentes-Erazo v. Sessions, 848 F.3d 847, 852 (8th Cir. 2017) (describing the "more onerous" CAT standard for government protection); Garcia v. Holder, 746 F.3d 869, 874 (8th Cir. 2014) ("Without more, the *inability* of Guatemalan police to curtail MS-13 violence *does not entitle Somoza to CAT relief*." (emphasis added)); Mouawad v. Gonzales, 485 F.3d 405, 413 (8th Cir. 2007) (noting that CAT imposes a higher standard than asylum for government protection).

437. *Matter of A-B- I*, 27 I&N Dec. 227, 316 (A.G. 2018); *Matter of A-B- II*, 28 I&N Dec. 199, 204–05 (A.G. 2021) (stating that only where "the government in the home country has fallen so far short of adequate protection" as to "have some role in or responsibility for the 'persecution'" can the condone-or-completely helpless test be met); *id.* at 206 (stating that "the inability [to protect]" should be tantamount to "a government . . . affirmatively persecuting its own citizens").

effectively elevated above that of CAT.[438] To the extent that *Matter of A-B- I* and *II* create a standard for asylum that exceeds even the standard for CAT, they violate the maxim that adjudicators must "interpret the statute 'as a symmetrical and coherent regulatory scheme' . . . and 'fit . . . all parts into an harmonious whole.'"[439]

Second, in circuit courts where both the condone-or-completely-helpless and unable-or-unwilling standards have been used, there may be arguments related to resolving intra-circuit splits that provide additional fodder for resisting the condone-or-completely-helpless test. Prior to *Matter of A-B- I*, the Fifth, Seventh, and Eighth Circuits had cited the two standards in the same decision without any apparent sense that the two standards differed.[440] Where advocates can show that the two standards are actually inconsistent with one another, there is an opening that implicitly favors the older unable-or-unwilling standard. Most circuit courts have recognized that in the event of an intra-circuit conflict, the earliest-in-time rule should be used to choose between competing lines of cases.[441] This strategy was successfully employed in *Jimenez Galloso*, where the court held that the older unable-or-unwilling standard controlled over the condone-or-completely-helpless standard. While this argument has yet to be raised in the Seventh Circuit, given the order in which the two standards were recognized there, this intra-circuit conflict approach would favor the unable-or-unwilling standard.

Because the foregoing arguments largely fall outside the central statutory arguments advanced in this Article, this Section has only glancingly discussed them. Yet they deserve attention for further

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438. *See*, *e.g.*, Madrigal v. Holder, 716 F.3d 499, 509 (9th Cir. 2013) ("Acquiescence . . . does not require that the public official *approve of* the torture, even implicitly. It is sufficient that the public official be aware that torture . . . occurs and remain *willfully blind* to it." (emphasis added)); Khrystotodorov v. Mukasey, 551 F.3d 775 (8th Cir. 2008) (noting that the standard for relief under CAT is more onerous than the standard for asylum).

439. *See* FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133 (2000) (stating that the court must "interpret[] a statute to create a symmetrical and coherent regulatory scheme"); Matter of Khan, 26 I&N Dec. 797, 804 (B.I.A. 2016) (disagreeing with the circuit court's interpretation because it did not "result in a harmonious statutory scheme").

440. Shehu v. Gonzales, 443 F.3d 435, 437 (5th Cir. 2006); Galina v. INS, 213 F.3d 955, 958 (7th Cir. 2000); Menjivar v. Gonzales, 416 F.3d 918, 921 (8th Cir. 2005).

441. Mader v. United States, 654 F.3d 794, 800 (8th Cir. 2011) ("[I]n accordance with the almost universal practice in other federal circuits, . . . when faced with conflicting panel opinions, the earliest opinion must be followed 'as it should have controlled the subsequent panels that created the conflict.'").

scholarship and advocacy as part of the larger effort to resist application of any elevated nonstate actor standard.[442]

CONCLUSION

Contrary to arguments made by both the government and counsel for many asylum applicants and to pronouncements in some circuit court decisions, the condone-or-complete-helplessness standard is clearly a heightened one for nonstate actor asylum claims. The unable-or-unwilling standard, which had been recognized for decades prior to the issuance of *Matter of A-B- I*, is the correct test. That standard is anchored in the plain language of the Refugee

442. There is likewise a need to decide upon the standard of review of nonstate actor disputes before the BIA and the federal courts of appeals. Whether the undisputed facts of a case satisfy nonstate actor standard is a question of law that should receive *de novo* review. *See* Guerrero-Lasprilla v. Barr, 140 S. Ct. 1062, 1068 (2020) (holding that "the statutory phrase 'questions of law' includes the application of a legal standard to undisputed or established facts"); 8 C.F.R. § 1003.1(d)(3) (providing that questions of law get *de novo* review). Both the Board and the Attorney General recently have lent support for this position. *See, e.g.*, Matter of A-C-A-A-, 28 I&N Dec. 84, 84 (A.G. 2020) ("[T]he Board . . . must examine *de novo* whether the facts found by the IJ satisfy all of the statutory *elements* of asylum as a matter of law." (emphasis added)); *id.* at 88 (describing the "elements" of an asylum claim to include, *inter alia*, whether "the alleged harm is inflicted by the government . . . or by persons the government is unwilling or unable to control"); Matter of R-A-F-, 27 I&N Dec. 778, 779 (A.G. 2020) ("Although the Board reviews an immigration judge's factual findings for clear error, it reviews *de novo* 'questions of law,' . . . including the application of law to fact."); Matter of Z-Z-O-, 26 I&N Dec. 586, 591 (B.I.A. 2015) ("[W]e will accept the underlying factual findings of the Immigration Judge unless they are clearly erroneous, and we will review *de novo* whether the underlying facts found by the Immigration Judge meet the legal requirements for relief from removal . . . ."). However, a number of courts have tended to review this issue under the deferential substantial evidence standard applied to factual disputes. *See* Portillo-Flores v. Barr, 973 F.3d 230, 230 (4th Cir. 2020) (holding that "[w]hether a government is 'unable or unwilling to control' a private actor 'is a factual question'" reviewed for substantial evidence), *reh'g granted*, 830 F. App'x 125 (2020); Bringas-Rodriguez v. Sessions, 850 F.3d 1051, 1061 (9th Cir. 2017) (determining that the evidence was sufficient to conclude that the government was unwilling or unable to control a private actor). While clear error and substantial evidence would be the correct standards of review for disputes over the IJ's factual findings, we contend that where the only question is whether the undisputed facts satisfy the nonstate actor test, that is a legal dispute and should be subject to the *de novo* standard of review. *See e.g.*, Rosales Justo v. Sessions, 895 F.3d 154, 162–163 (1st Cir. 2018) ("The BIA's application of the 'unwilling or unable' standard is a legal question that we review de novo."). The courts' and agency's lack of precision on this matter merit further scholarship.

Act and Refugee Convention. When correctly framed in its original context, the unable-or-unwilling test measures the effectiveness of state protection by the degree to which it reduces a refugee's probability of future harm below the well-founded fear threshold.

In addition to being rooted in the historical and textual analysis of the state protection component of the refugee framework, this Article's arguments reflect the normative judgment that individuals facing a reasonable possibility of torture, death, or other serious harm deserve protection. Ineffective efforts on the part of a state to provide protection must not be used to send a bona fide refugee back into harm's way. Such an outcome cannot be reconciled with the purpose or intent of the Refugee Act. Yet that is precisely what *Matter of A-B- I* and *II* do: their heightened nonstate actor standard functions to effectively eliminate asylum for many of the world's most vulnerable refugees. When the state protection analysis is retooled and weaponized to defeat the claims of legitimate refugees facing a real risk of harm, it ceases to serve any purpose consonant with the Refugee Act or Refugee Convention. The time is thus ripe not only to relegate *Matter of A-B- I* and *II* to the jurisprudential dustbin, but also to properly ground the nonstate actor element in the text of the Refugee Act and thus provide a durable bulwark against future efforts to heighten the standard.