16-940

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

LESTON AUGUSTUS SCARLETT
Petitioner,

v.

WILLIAM P. BARR, UNITED STATES ATTORNEY GENERAL,
Respondent.

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

BRIEF FOR *AMICI CURIAE* ASYLUM SEEKER ADVOCACY PROJECT; THE BRONX DEFENDERS; BROOKLYN DEFENDER SERVICES; CATHOLIC LEGAL IMMIGRATION NETWORK, INC.; CENTER FOR GENDER AND REFUGEE STUDIES; CENTRAL AMERICAN LEGAL ASSISTANCE; IMMIGRATION EQUALITY; LUTHERAN SOCIAL SERVICES OF NEW YORK'S IMMIGRATION LEGAL PROGRAM; LEGAL SERVICES NYC; NATIONAL IMMIGRANT JUSTICE CENTER; AND UNLOCAL, INC., IN SUPPORT OF PETITION FOR REHEARING

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RULE 26.1. CORPORATE DISCLOSURE STATEMENT

Amici curiae—the Asylum Seeker Advocacy Project; the Bronx Defenders; Brooklyn Defender Services; the Catholic Legal Immigration Network, Inc.; Center for Gender and Refugee Studies; Central American Legal Assistance; Immigration Equality; Lutheran Social Services of New York's Immigration Legal Program; Legal Services NYC; National Immigrant Justice Center; and UnLocal, Inc.—certify that each is a not-for-profit organization that does not have a parent corporation, and that no publicly held corporation owns 10% or more of its stock.

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STATEMENT OF INTEREST

Amici curiae are eleven not-for-profit organizations that represent asylum seekers before United States Citizenship and Immigration Services and in removal proceedings in immigration court. In their work, *Amici* regularly represent clients fleeing persecution from non-governmental actors, and regularly provide training and support materials for other attorneys on asylum law.[1] *Amici* are comprised of:

- The Asylum Seeker Advocacy Project;
- The Bronx Defenders;
- Brooklyn Defender Services;
- The Catholic Legal Immigration Network, Inc.;
- Center for Gender and Refugee Studies;
- Central American Legal Assistance;
- Immigration Equality;
- Lutheran Social Services of New York's Immigration Legal Program;
- Legal Services NYC;
- National Immigrant Justice Center;
- UnLocal, Inc.

[1] *Amici* certify, according to Federal Rule of Appellate Procedure 29(a)(4), that no *amicus curiae* is a corporation, no party counsel authored any part of the brief, and no person or entity contributed money to prepare or file the brief other than *Amici.*

Detailed statements of interest are included in Appendix A.

SUMMARY OF ARGUMENT

Amici—nonprofit organizations representing numerous asylum applicants—respectfully submit this brief in support of Petitioner's request for rehearing. In deferring to *Matter of A-B-*'s *dicta* suggesting a heightened "unwilling or unable" standard for asylum, the decision conflicts with longstanding Circuit precedent and sets a burden that will be near-impossible for asylum seekers to meet.

The panel's decision conflicts with prior precedent for asylum claims and claims under the Convention Against Torture. The resulting burden on asylum seekers will be particularly insurmountable for *pro se* asylum applicants. Ultimately, the panel's decision will lead to increased denials before the agency and will create confusion in thousands of cases currently pending within this Court's jurisdiction.

Given the importance of the issue, the broad impact of the decision, and the panel's failure to address conflicting prior precedent, *Amici* respectfully urge the Court to grant rehearing.

ARGUMENT

In *Scarlett*, the panel deferred to *dicta*, announced in *Matter of A-B-,* 27 I & N Dec. 316 (A.G. 2018), requiring an asylum seeker[2] to demonstrate that the government "condoned the private actions or . . . 'at least demonstrated a complete helplessness to protect the victims'" of non-state actors. *Scarlett v. Barr*, 957 F.3d 316, 331 (2d Cir. 2020) (quoting *Matter of A-B-*).[3]

That deference is unwarranted. The panel's decision conflicts with longstanding precedent in this Circuit detailing the burden on applicants to show the government was "unable or unwilling" to protect them. *Ivanishvili v. U.S. Dep't of Justice*, 433 F.3d 332, 342 (2d Cir. 2006) ("We note, however, 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."); *see also Grace v. Whitaker*, 344 F. Supp. 3d. 96, 127-30 (D.D.C. 2018) (noting that the "unable or

[2] The state action requirement discussed in this brief is the same for asylum and withholding of removal which is at issue in this case.

[3] The agency decision here, and Mr. Scarlett's *pro se* briefing, predated the Attorney General's decision in *Matter of A-B-*. The panel chose not to follow prior Circuit practice of remanding for the Board to consider the impact of the decision in the first instance prior to determining whether deference will be afforded that interpretation. *See, e.g.*, *Moncada v. Sessions*, 751 F. App'x 116, 118 (2d Cir. 2018) (remanding for BIA to consider *Matter of A-B-* in the first instance and "[r]ecognizing the wisdom of this practice") (citing *Biao Yang v. Gonzales*, 496 F.3d 268 (2d Cir. 2007)).

unwilling" standard flows from the unambiguous statutory text and rejecting *A-B-*'s standard as a violation of the statute's plain text).

I. THE "CONDONED" OR "COMPLETE HELPLESSNESS" FORMULATION CONFLICTS WITH MULTIPLE PRIOR DECISIONS OF THIS COURT.

The *Matter of A-B- dicta,* and the panel's deference to it, conflicts with this Circuit's repeated statements regarding the evidentiary burden on asylum seekers and survivors of torture when those claims are based on the conduct of non-state actors.

As a threshold matter, the panel's decision here is unclear and likely to cause confusion among asylum seekers and the immigration courts. The panel asserts that it is not announcing a changed legal standard, claiming that *Matter of A-B* "clarifies" the "unable or unwilling" standard and that it does not "impermissibly heighten an applicant's burden." *Scarlett*, 957 F.3d at 333. But the decision also states that the asylum seeker must demonstrate that the government is "completely helpless" to stop persecution, and that applicants could meet this standard by showing that the government "condoned" the violence. *Id.* at 332-33.[4] On its face, "condoning" violence shows greater acceptance of the violence than being "unable

[4] The panel states that asylum seekers "can" show "more than difficulty" by providing evidence that the government "condoned" the private violence. *Id.* at 333. Despite this suggestion, many immigration judges will see this decision as simply upholding the higher standard described in the *A-B- dicta*.

or unwilling" to control it, and appears to raise the burden on asylum seekers. Likewise, "complete helplessness" suggests a *total* inability to protect individuals from persecution. The phrase's ordinary meaning set, against the Court's qualifying phrases, causes unnecessary confusion, and conflicts with other circuit precedents.[5]

A. THIS CIRCUIT HAS REPEATEDLY REJECTED AGENCY HOLDINGS IN ASYLUM CASES APPROACHING "CONDONING" OR BEING "COMPLETELY HELPLESS."

This Circuit has long recognized that an asylum seeker can demonstrate persecution if an he or she sought government protection and did not receive it, or had realized that seeking protection would be futile. *Pavlova v. INS,* 441 F.3d 82, 91-92 (2d Cir. 2006).

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[5] Notably, the panel misread the Eight's Circuit's caselaw in a similar way. The Eighth Circuit, in a decision issued prior to *Scarlett,* clarified that the "unable or unwilling standard" controls, *not Matter of A-B-*. *See Galloso v. Barr*, 954 F.3d 1189 (8th Cir. 2020). The panel appeared unaware that it was relying on outdated Eighth Circuit caselaw when it cited to *Saldana v. Lynch*, 820 F.3d 970, 977 (8th Cir. 2016), rather than *Galloso*.

Only the panel and the Fifth Circuit have concluded *Matter of A-B-* is reasonable. Every other court to reach the question—the First, Sixth, Eighth Circuits, and the District Court for the District of Columbia—have either rejected the *Matter of A-B-* "condoned or complete helplessness" language or concluded that it does not override prior "unable or unwilling" caselaw. *See Juan Antonio v. Barr*, 959 F.3d. 778, 794 (6th Cir. 2020) ("It cannot be that an applicant must wait until she is dead to show her government's inability to control her perpetrator."); *Galloso*, 954 F.3d at 1192; *Rosales Justo v. Sessions*, 895 F.3d 154, 157 (1st Cir. 2018); *Grace v. Whitaker*, 344 F. Supp. 3d 96, 129 (D.D.C. 2018). *See also Guo v. Sessions*, 897 F.3d 1208, 1213 (9th Cir. 2018) (applying, post *Matter of A-B-*, the "unable or unwilling" standard).

In *Pan v. Holder*, 777 F.3d 540, 545 (2d Cir. 2015), this Circuit reversed the denial of an asylum claim by a Kyrgyz citizen who was beaten on several occasions based on his Korean ethnicity and evangelical Christianity. Pan's own testimony, relied on by the Court, did not demonstrate the police were completely helpless or condoned the violence; he testified that the police would act *only if* Pan provided "something in exchange." *Id.* at 542. His aunt testified that she had made a police report following her own persecution, "but there was no reaction whatsoever." *Id.* (alterations and quotation marks omitted). The *Pan* Court reversed and remanded because his aunt's testimony, coupled with Pan's testimony about corruption, could prove the government was unable or unwilling to protect him. *Id.* at 545. Yet under the standard announced in *Scarlett*, Mr. Pan would likely have lost because he could not demonstrate the government's complete helplessness.

Indeed, governments often criminalize persecutory conduct, such as the Ghanaian government's criminalization of female genital mutilation, but fail to enforce the laws on the books. *See Abankwah v. I.N.S.*, 185 F.3d 18, 25 (2d Cir. 1999). Authorities may refuse to condone trafficking, but if "efforts to combat the problem have been hampered by corruption and by active resistance by village leaders" the government is still unwilling or unable to protect the victim. *Gao v. Gonzales*, 440 F.3d 62, 71 (2d Cir. 2006), *vacated on other grounds in Keisler v.*

Hong Yin Gao, 552 U.S. 801 (2007). And a government may respond to interreligious violence, but fail to be "effective" in that response. *Rizal v. Gonzales*, 442 F.3d 84, 92 (2d Cir. 2006) ("[P]ersecution can certainly be found when the government, although not itself conducting the persecution, is unable or unwilling to control it.").

In each of these cases, the Circuit rejected agency holdings interpreting "unable or unwilling" too stringently and as anything approaching "condoning" or being "completely helpless" to stop the persecutors. In *Scarlett*, the panel states that a government that can only provide "ineffective" protection is "unwilling and unable," part of the panel's claim that *Matter of A-B-* does not impermissibly heighten the burden. *Scarlett*, 957 F.3d at 334. But the plain meaning of the phrases "condone" or "complete helplessness" contradict that statement and immigration courts will deploy those phrases to deny meritorious asylum claims.

B. REQUIRING ASYLUM APPLICANTS TO DEMONSTRATE THE GOVERNMENT "CONDONED" OR WAS "COMPLETELY HELPLESS" TO PREVENT PERSECUTION RAISES THE BURDEN BEYOND WHAT THE CIRCUIT REQUIRES FOR DEMONSTRATING GOVERNMENT ACQUIESCENCE TO TORTURE.

A "condone" or "complete helplessness" standard appears to eclipse the burden for demonstrating acquiescence under the Convention Against Torture ("CAT") articulated in *Khouzam v. Ashcroft*, 361 F.3d 161 (2d Cir. 2004), and *De La Rosa v. Holder*, 598 F.3d 103 (2d Cir. 2010). In *Khouzam*, this Court

recognized that "torture requires only that government officials know of or remain *willfully blind* to an act and thereafter breach their legal responsibility to prevent it." *Khouzam*, 361 F.3d at 171 (emphasis added). *See also Martinez De Artiga v. Barr,* No. 17-2898-ag, 2020 WL 3067492 (2d Cir. June 10, 2020) (confirming willful blindness standard controls). In *De La Rosa*, the Court stated that "the fact that some officials take action to prevent the torture" was "neither inconsistent with a finding of government acquiescence nor necessarily responsive to the question" of whether torture was likely to occur with government acquiescence. *De La Rosa*, 598 F.3d at 110.

Applying the CAT acquiescence requirement in *Delgado v. Mukasey*, 508 F.3d 702, 709 (2d Cir. 2007), this Court noted that the agency appeared to apply "an inappropriately stringent standard" that "required Petitioner to show the government's affirmative consent to torture." Such a stringent standard would "constitute legal error" requiring reversal. *Id.* Yet *Matter of A-B-* does just that: it requires that a government "condone" persecution, raising an asylum seeker's burden *beyond* that of a CAT claimant. And the panel here granted deference to that determination, despite the fact that this Court in *Delgado* recognized that the CAT standard for government wrongdoing is more stringent than the asylum standard, and meeting it would necessarily satisfy the asylum standard. *See id.* at

706 n.3, 709 n.5 (noting that the court's discussion of third-party actors "applies equally to all Petitioner's claims for relief from removal").

II. THE PANEL'S DESCISION WILL HAVE A DEVASTATING IMPACT ON ASYLUM SEEKERS, PARTICUARLLY FOR *PRO SE* APPLICANTS.

The lack of clarity in the panel opinion and the ways in which it conflicts with this Court's precedents are exacerbated where the asylum seeker is appearing *pro se*. Immigration law is notoriously opaque, having been compared in complexity to the U.S. tax code. *Castro-O'Ryan v. U.S. Dep't of Immigration & Naturalization*, 847 F.2d 1307, 1312 (9th Cir. 1987) ("A lawyer is often the only person who could thread the labyrinth."). Increasingly, the most complicated area of immigration law is asylum law[6]—an area of the law that by definition affects the most vulnerable, those fleeing for safety, usually with few resources to pay for representation.

Asylum seekers often have to navigate this complex web of rules and evidentiary burdens without counsel. As the overall number of cases has grown, the number of asylum seekers unable to secure legal representation has also grown. By March 2020, 22.5 percent of asylum seekers lacked legal representation during

[6] *A Timeline of the Trump Administration's Efforts to End Asylum*, NATIONAL IMMIGRANT JUSTICE CENTER, (June 1, 2020), https://immigrantjustice.org/sites/default/files/uploaded-files/no-content-type/2020-06/06-01-2020-asylumtimeline-final.pdf.

their immigration court proceedings. *See Fact Sheet: June 2020*, HUMAN RIGHTS FIRST at 8 (June 11, 2020), https://www.humanrightsfirst.org/sites/default/files/AdministrationDismantlingUSAsylumSystem.pdf ("*HRF Fact Sheet*").[7] Without an increase in the immigration bar's capacity, the number of *pro se* applicants will continue to increase.

The asylum process is already sufficiently complex to render the process impenetrable for unrepresented applicants, many of whom speak little English and have no legal training. As a result of these challenges, respondents with counsel were "ten-and-a-half times more likely to succeed" in their case when compared to *pro se* litigants. Ingrid V. Eagly and Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. PA. L. REV. 1, 49 (2015).

The standard announced by the panel will only make the asylum process more onerous. As addressed above, the panel's decision implies that it is not changing the legal standard, yet puts forth requirements inconsistent with prior law. *See* Part I *supra.* At a minimum, the legal standard that the panel articulated is unclear. That lack of clarity will have a disproportionate impact on those who are unrepresented, and overwhelmingly, not fluent English speakers.

[7] Accessing counsel is even more difficult given new regulations at the border forcing asylum seekers to remain in Mexico awaiting hearings or go through expedited proceedings in border tent courts. As of March 2020, only 9.3 percent of respondents subject to the Migrant Protection Protocols were represented. *Id.* at 8-9.

The decision will ultimately lead to the denial of meritorious cases where the immigration judge reads the opinion as effectively announcing a heightened standard. Immigration courts have already used *Matter of A-B-* to deny asylum claims at a much higher rate, particularly when the asylum seeker is from El Salvador, Guatemala, or Honduras. *See HRF Fact Sheet* at 3-4.

Many asylum seekers flee for their lives without complete information about who is seeking to harm them or what the government's response has been or is likely to be. Indeed, this Circuit has long recognized that persecutors rarely announce themselves. *Accord Secaida-Rosales v. INS*, 331 F.3d 297, 311 (2d Cir. 2003) ("[P]ersecutors are hardly given adequate notice that our government expects them to sign their names and reveal their individual identities when they deliver threatening messages." (internal quotation marks omitted)). Asylum seekers may be forced to make a substantially greater showing now than under prior Second Circuit precedent—they must not only show that the government offers ineffective protection, but must also show either its subjective motivation ("condones") or its complete inability to protect ("*complete* helplessness"). Meeting this standard will require extensive reports and testimony by expert witnesses, putting asylum out of reach for almost all unrepresented asylum seekers, especially those who are detained.

CONCLUSION

Given the considerations stated above, *Amici* respectfully request that this Court grant rehearing after appropriate briefing.

Dated: June 19, 2020

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

1. Pursuant to Fed. R. App. P. 32(g)(1), the undersigned counsel certifies that this brief complies with the type-volume limitation of Federal Rules of Appellate Procedure 29(b)(4) and 32(a)(7)(B)(iii). It contains 2,509 words, excluding the cover page, tables, and certificates.

2. The brief has been prepared in proportionally-spaced typeface using Microsoft Word, in 14-point Times New Roman font in compliance with Federal Rule of Appellate Procedure 32(a)(5) and 32(a)(6). Counsel has relied on the word count feature of this word processing system in preparing this certificate in accordance with Federal Rule of Appellate Procedure 32(a)(7)(B).

Dated: June 19, 2020

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APPENDIX A

STATEMENTS OF INTEREST OF *AMICI CURIAE*

The **Asylum Seeker Advocacy Project ("ASAP")** sees a future where the United States welcomes individuals who come to our borders fleeing violence. ASAP has worked with asylum seekers in over 40 states to achieve this vision. ASAP provides asylum seekers with online community support and emergency legal aid, and provides technical assistance to attorneys representing asylum seekers across the United States.

The Bronx Defenders is a nonprofit provider of innovative, holistic, and client-centered criminal defense, removal defense, family defense, social work support, and other civil legal services and advocacy to indigent Bronx residents. It represents individuals in over 20,000 cases each year and reaches hundreds more through outreach programs and community legal education. The Immigration Practice of the Bronx Defenders provides removal defense services to detained New Yorkers as part of the New York Immigrant Family Unity Project at the Varick Street Immigration Court and also represents non-detained immigrants in removal proceedings. The Bronx Defenders' Immigration Practice frequently pursues asylum claims on behalf of clients before the Immigration Court, as well as in appeals and motions before the Board of Immigration Appeals and petitions for review at the Second Circuit.

Brooklyn Defender Services ("BDS") is a public defender organization that represents nearly 30,000 low-income residents of Brooklyn and elsewhere each year in criminal, family, civil, and immigration proceedings, providing interdisciplinary legal and social services since 1996. Since 2009, BDS has counseled or represented more than 15,000 clients in immigration matters including deportation defense, affirmative applications, and advisals, as well as immigration consequence consultations in Brooklyn's criminal court system. Since 2013, BDS has represented more than 1,400 detained immigrants through the New York Immigrant Family Unity Project.

Catholic Legal Immigration Network, Inc. ("CLINIC") is an immigration-focused nonprofit that assists low-income immigrants in their claims for immigration relief. CLINIC partners with a network of nonprofit immigration legal services programs to protect the rights of asylum seekers. CLINIC's network includes over 380 diocesan and other affiliated immigration programs around the country. CLINIC supports the work of our affiliates through training, technical assistance, and litigation on behalf of the immigrant communities they serve.

The **Center for Gender & Refugee Studies ("CGRS")** has played a central role in the development of refugee and asylum law nationwide through its litigation, scholarship, and development of policy recommendations. It also provides technical assistance and expert consultation for attorneys representing

asylum seekers across the country in a wide range of cases. In 2019, it assisted in over 8,313 unique asylum cases at all levels of the immigration and federal court system, including cases before the asylum office, immigration courts, and federal courts. Many if not most of those cases raise claims involving persecution from non-governmental actors. CGRS serves as counsel for Ms. A.B, the applicant in the Attorney General's decision *Matter of A-B-* at issue in this case. CGRS has submitted briefs, as an *amicus* party and/or as counsel of record, regarding asylum and related claims in nearly every Court of Appeals, including the Second Circuit. CGRS has an interest in the questions under consideration in this appeal as they implicate fundamental principles of jurisprudence and statutory construction related to the definition of a "refugee," a subject of CGRS's research and practice and in furtherance of its core mission to advance the human rights of refugees and broaden asylum protections under U.S. law.

Central American Legal Assistance ("CALA") is a Brooklyn based non-profit organization that has been representing immigrants in removal proceedings since 1986. CALA's client population is comprised primarily of trauma survivors from Central and South America who are applying for asylum and other humanitarian relief. CALA represents several hundred asylum seekers in removal proceedings each year, the majority of whom have been persecuted by non-state

actors, including powerful Central American gangs and narco-trafficking organizations.

Immigration Equality is a national nonprofit organization providing free legal services and advocacy for indigent lesbian, gay, bisexual, transgender, and queer ("LGBTQ") immigrants. Through its in-house attorneys and nationwide network of pro bono partners, Immigration Equality presently represents over six hundred LGBTQ and HIV-positive individuals in affirmative and defensive asylum, withholding of removal and Convention Against Torture claims. In addition to providing direct representation to LGBTQ and HIV-positive asylum seekers, Immigration Equality offers assistance, support and training to other attorneys, publishes a comprehensive manual on the preparation of asylum claims, and has provided training on the adjudication of LGBTQ asylum cases to Asylum Officers within the Department of Homeland Security. Through its work, Immigration Equality has developed substantial expertise in the proper application of the United States immigration laws to asylum seekers and their claims. For these reasons, Immigration Equality has an urgent and direct interest in the outcome of this case.

Lutheran Social Services of New York ("LSSNY-ILP") provides 7,000 New Yorkers each day with a wide range of social services. LSSNY-ILP provides community-based direct immigration legal services to under-served populations in the New York City metropolitan area. Since 1995, the program has represented thousands of clients seeking asylum, family-based immigration status, citizenship,

and other forms of immigration relief. LSSNY-ILP has developed particular expertise in working with young clients pursuing asylum, and attorneys from the program regularly appear on behalf of clients before USCIS and in removal proceedings.

Legal Services NYC ("LSNYC") is one of the largest civil legal service providers in the country, with over 500 staff that help over 100,000 low-income New Yorkers annually in a wide range of services, including immigration, housing, and education law. LSNYC represents many immigrants eligible for asylum, withholding of removal and protection under the Convention Against Torture. LSNYC also gives legal advice to asylum-seekers whom it does not have capacity to represent and who may have to proceed without a lawyer. Many of the asylum-seekers that LSNYC represents or advises have been tortured by people and organizations that are not government officials.

The National Immigrant Justice Center ("NIJC") is a not-for-profit organization that provides legal consultations and representation to low-income immigrants, refugees, and asylum seekers. Each year, NIJC represents hundreds of asylum seekers before the immigration courts, BIA, federal courts, and Supreme Court of the United States through its legal staff and a network of more than 1800 pro bono attorneys.

UnLocal, Inc. provides free representation to undocumented immigrants who may be eligible to obtain lawful status, most of whom are in removal proceedings. UnLocal clients include hundreds of asylum seekers, both children and adults, many of whom flee persecution committed by private actors. These UnLocal clients have been deeply impacted by changes to determine asylum eligibility.

CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of June, 2020, a true and correct copy of the foregoing document was filed with the Clerk of Court using the CM/ECF system, which will send notice of electronic filing to all CM/ECF participants, resulting in service upon all counsel of record.

Dated: June 19, 2020

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