**Case No.** [redacted]

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# IN THE UNITED STATES COURT OF APPEALS FOR THE [redacted] CIRCUIT

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[redacted],
**Petitioner**

**v.**

**JEFFERSON B. SESSIONS, III,**
**U.S. ATTORNEY GENERAL,**
**Respondent**

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**On Petition for Review of an Order of the Board of Immigration Appeals**

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## PETITIONER'S BRIEF

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[redacted]

*Counsel for Petitioner* [redacted]

Dated: [redacted] 2018

**Comment [1]:** Each individual court of appeals has local rules regarding the contents of briefs. Please consult the local rules before the filing of any brief in federal court.

# CERTIFICATE OF INTERESTED PERSONS

Case No.: [redacted]

[redacted] v. Jefferson B. Sessions, III

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of 5th Cir. R. 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

1. [redacted], Petitioner
2. Jefferson B. Sessions, III, U.S. Attorney General, Respondent
3. [redacted], Counsel for [redacted]
4. [redacted]
5. [redacted], Immigration Judge, [redacted], Texas
6. [redacted], Department of Homeland Security – Immigration and Customs Enforcement, [redacted] Texas

7. [redacted] Trial Attorney, Department of Justice, Civil Division – Office of Immigration Litigation, [redacted]

Respectfully submitted this [redacted] 2018.

_____/s/[redacted]_____
[redacted]
*Attorney of record for Petitioner* [redacted]

## STATEMENT REGARDING ORAL ARGUMENT

Petitioner, [redacted], respectfully requests oral argument. [redacted] Cir. R. 28.2.3; *see also* Fed. R. App. P. 34(a)(1). This case squarely presents the issue of whether the Haitian government was "unable or unwilling to control" [redacted] persecutors for the purposes of his asylum claim. No reported decision of this Court provides an authoritative interpretation regarding how the Board of Immigration Appeals' decisions in *Matter of O-Z- & I-Z-*, 22 I. & N. Dec. 23 (BIA 1998) and *Matter of S-A-*, 22 I. & N. Dec. 1328 (BIA 2000), relating to the "unable or unwilling to control" standard, are to be applied in this judicial circuit. Accordingly, this Court would be aided by oral argument in its consideration of this important issue of asylum law.

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## JURISDICTIONAL STATEMENT

The Board of Immigration Appeals (BIA or Board) dismissed [redacted] appeal from the Immigration Judge's order of removal on [redacted], 2018. This petition for review was timely filed on [redacted], 2018. This Court has jurisdiction under 8 U.S.C. § 1252.

## STATEMENT OF THE ISSUES

1. An applicant for asylum must demonstrate that his country of nationality is unable or unwilling to control the forces that have persecuted him. After fortuitously appearing during an attack on [redacted] and facilitating medical attention, Haitian authorities did nothing more than take police reports, even after mobs returned to murder his family, raze his business, severely injure his mother, and burn his mother's house. Has [redacted] shown that the Haitian government is unable or unwilling to control his attackers?
2. In determining whether an asylum applicant can reasonably relocate within his country, the burden of proof is on the Department of Homeland Security (DHS) in past persecution cases. The Board placed the burden of proof on internal relocation

on [redacted], despite the fact that he was persecuted in the past. Is remand required to allow the fact finder to apply the correct burden of proof?

## STATEMENT OF THE CASE

### [redacted] Persecution and the Police Response

[redacted] is a 37 year-old man from [redacted], Haiti.[1] ROA.138, 141. He is a practicing *bokor*, or voodoo priest. ROA.139.

Starting in [redacted] 2009, [redacted] began receiving threatening telephone calls blaming his voodoo religion for a yellow fever outbreak. ROA.518, 520. [redacted] would receive these threats sometimes ten times a day. ROA.520. [redacted] reported this

[1] The Immigration Judge did not make an adverse credibility determination. *See generally*, ROA.84-96. Further, while the Immigration Judge did question the extent to which [redacted] had corroborated his claim with nontestimonial evidence, ROA.93-94, the Board did not affirm on this basis. ROA.7-9. *Cf. Wang v. Holder*, 569 F.3d 531, 536 (5th Cir. 2009) ("When considering a petition for review, this court has the authority to review only the BIA's decision, not the IJ's decision, unless the IJ's decision has some impact on the BIA's decision."). Accordingly, this Court must "accept as true" all of the facts to which [redacted] testified. *Zhao v. Gonzales*, 404 F.3d 295, 306 (5th Cir. 2005); *accord* 8 U.S.C. § 1158(b)(1)(B)(iii) (stating that "if no adverse credibility determination is explicitly made, the applicant or witness shall have a rebuttable presumption of credibility on appeal").

campaign of threats to the police, including the telephone numbers from which these threats were received. ROA.140, 151.

On [redacted] 2009, a group of people wielding machetes attacked [redacted] at the shop he operated. ROA.138-39. [redacted]. [redacted] assailants cut his arm with a machete and poured gasoline on him in an attempt to murder him by immolation. ROA.139, 302. His would-be murderers identified him as "the *bokor*" and urged each other on, declaring that they "have to finish it." ROA.139. [redacted] injuries kept him in a hospital for six days. ROA.140, 302.

By happenstance, in the midst of [redacted] ordeal, a police car drove by, and the mob ran away. ROA.139, 147. An officer brought [redacted] to the hospital. ROA.139.

While [redacted] was hospitalized, his persecutors returned to the scene of the original assault and burned everything in [redacted] shop. ROA.141.

About a month later, on [redacted], 2009, another group of attackers descended on [redacted] home. ROA.142. This mob succeeded where the first attack failed; they murdered [redacted] partner, his daughter, and his sister. ROA.142. This time, [redacted]

[redacted] life was only spared because he was performing voodoo services in the neighboring town of [redacted]. ROA.142. Witnesses to the attack reported that [redacted] was the intended target; before killing his family, the mob asked for [redacted] by name, shouting, "[W]here is [redacted], where is [redacted]." ROA.148. The police and a judge took a report. ROA.143, 310. [redacted] credibly testified that beyond taking this report, nothing was done to investigate this triple homicide or the previous attempt on his life, as he had neither the political power nor the wealth to induce the authorities to meaningfully conduct an investigation. ROA.147, 148-49. According to the Department of State, [redacted] experience of non-investigation is not isolated: "Human Rights organizations reported that several judicial officials, including judges[2] and court clerks, arbitrarily charged fees to initiate criminal prosecutions, and that judges and prosecutors failed to respond to those who could not afford to pay." ROA.393.

Fearing for his life, [redacted] fled to [redacted], a town in southern Haiti, four or five hours away from [redacted], where his

[2] In Haiti, judges are involved in the investigatory stage of the criminal justice system. ROA.393. A judge was present for the taking of the report of [redacted] family's murders. ROA.143, 310.

mother lived. ROA.143-44, 154. Despite his efforts to move to a new town, far from his persecutors, on [redacted] 15, 2009, [redacted] tormenters tracked him to [redacted] ROA.144. They kicked open the door while [redacted] escaped out of a window. ROA.144. His mother was not so lucky. The mob attacked her, and her injuries required hospitalization for about seven days. ROA.144, 152-53. They burned down her house. ROA.144, 152-53. This attack was also reported to the authorities. ROA.152, 155. [redacted] hid with another voodoo priest during his mother's hospitalization. ROA.153. Once she was discharged, [redacted] and his mother fled Haiti. ROA.144.

**The Immigration Judge's Decision**

The Immigration Judge denied [redacted] applications for asylum, withholding of removal, and protection under the Convention Against Torture. ROA.84-96. The Immigration Judge did not make an adverse credibility determination. ROA.84-96. [redacted] application was denied, for among other reasons, because (1) certain general country conditions evidence "shows that Haiti is attempting to solve its crime problem," ROA.91, and (2) [redacted] "failed to show

why it would be unreasonable for him to relocate to another part of Haiti and/or the Dominican Republic and/or Brazil," ROA.94.

**The Decision of the Board of Immigration Appeals**

The Board of Immigration Appeals dismissed [redacted] appeal from the Immigration Judge's denial of his applications for asylum and withholding of removal. ROA.5-9. First, the Board held that [redacted] did not demonstrate that the government of Haiti is unable or unwilling to protect him. ROA.8. In support of this proposition, the Board relied on the flight of [redacted] attackers during the first attack when a police car drove by, the officer's willingness to take him to the hospital, the fact that the police took a report regarding his family's murder, and witnesses' inability to identify the murderers. ROA.8. The Board also held that [redacted] "has not shown that it would be unreasonable to expect him to relocate to another part of Haiti." ROA.8.

This timely petition for review follows.

SUMMARY OF THE ARGUMENT

The Board of Immigration Appeals misapplied its own legal standards to both of the issues presented by this petition: (1) whether

the Haitian government was unable or unwilling to control [redacted] persecutors and (2) whether it would have been reasonable for [redacted] to relocate elsewhere within Haiti.

In order to state a claim for asylum, an applicant must demonstrate that the government of his country of his nationality is either unable or unwilling to control his persecutors. The Board's own cases give content to this standard. In *Matter of O-Z- & I-Z-*, 22 I. & N. Dec. 23 (BIA 1998), the Board granted asylum to a Ukranian Jewish family who, like [redacted] here, reported past persecution to the authorities but did not receive effective protection. Likewise, in *Matter of S-A-*, 22 I. & N. Dec. 1328 (BIA 2000), the Board held that an applicant merited asylum where she could not "rely" on the authorities to protect her when she fled, and placed the burden on the government to show that she now has a "reasonable expectation of governmental protection." These administrative precedents displace this circuit's "specially oppressive" conditions rule, which was last adhered to in the 1992 case of *Adebisi v. INS*, 952 F.2d 910 (5th Cir. 1992). Other circuits have frequently reversed the BIA's denial of asylum in cases where the authorities took reports but were ineffective in controlling the

persecutors. Further, the Board's doctrine requiring reliable or effective protection before an asylum claim is defeated (and from which it departed in this case), is supported by the plain language of the statute and the international law norms from which the statute is derived. Accordingly, this Court should hold, at a minimum, that an asylum applicant has discharged his burden of proof that a foreign government is unable or unwilling to control his persecutors where (1) officials of that government are aware of ongoing persecution and (2) nevertheless, the persecution continues.

The BIA also held that [redacted] had not carried his burden to show that relocation within Haiti would have been reasonable. However, where an applicant's claim is based on past persecution, the burden of proof regarding internal relocation is on the government. In this case, the only basis on which the Board rejected [redacted] past persecution claim was its analysis regarding the Haitian government's ability and willingness to protect him. Therefore, if [redacted] succeeds on the issue of governmental protection, this Court must presume that he will succeed in proving qualifying past persecution. In turn, if this is a past persecution case, then the Board

misallocated the burden of proof on the issue of internal relocation. The Board has suggested that this sort of burden of proof error requires remand. In any event, the record contains powerful evidence that relocation would not be reasonable because [redacted] attempted to relocate and was tracked down by his persecutors. The Board's internal relocation analysis is not an independent, sufficient basis on which this Court may affirm its order.

## ARGUMENT

### I. STANDARD OF REVIEW

This Court generally reviews only the decision of the BIA, and reviews the decision of the Immigration Judge only to the extent it affects the BIA's decision. *Zhu v. Gonzales*, 493 F.3d 588, 593 (5th Cir. 2007). Non-precedential opinions of the BIA, such as the one currently under review, are not entitled to *Chevron*[3] deference. *Dhuka v. Holder*, 716 F.3d 149, 156 (5th Cir. 2013). Because the Immigration Judge did not make an adverse credibility determination, this Court "must accept as true all the facts to which [redacted] testified." *Zhao v. Gonzales*, 404 F.3d 295, 306 (5th Cir. 2005). While this Court may reverse a factual

[3] *Chevron, USA, Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984).

finding when the evidence compels it to do so, it nevertheless may reverse the Board's decision if it was decided on the basis of an erroneous application of the law. *Zhu*, 493 F.3d at 594.

Each of the issues in this case involves the erroneous application of the law to undisputed facts. As described below, the Board's holding regarding the Haitian government's ability and willingness to control [redacted] persecutors rests on too narrow an interpretation of the asylum statute and departs from the Board's own precedents. Accordingly, this issue is reviewed *de novo*. Likewise, the Board committed an error of law when it placed the burden of proof on [redacted] regarding the reasonableness of internal relocation. *Cf. Eduard v. Ashcroft*, 379 F.3d 182, 193-94 (5th Cir. 2004) (employing *de novo* review to a claim that an IJ employed an incorrect legal standard for the issue of internal relocation). Alternatively, whether relocation was reasonable under the undisputed facts of this case is a question of law that is reviewed *de novo*. *Id.*

## II. THE BOARD MISAPPLIED THE "UNABLE OR UNWILLING TO CONTROL" STANDARD APPLICABLE TO ASYLUM CLAIMS.

In order to be granted asylum, the applicant must meet the statutory definition of a "refugee." 8 C.F.R. § 1208.13(a). The statute defines a refugee 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."

8 U.S.C. § 1101(a)(42)(A). If the applicant demonstrates that he has suffered past persecution on account of a statutorily enumerated ground, he is entitled to a regulatory presumption that he will be persecuted in the future. 8 C.F.R. § 1208.13(b)(1). Past persecution "entails harm inflicted on the alien on account of a protected ground by the government or forces that a government is unable or unwilling to control." *Tesfamichael v. Gonzales*, 469 F.3d 109, 113 (5th Cir. 2006). In this case, [redacted] claims to have suffered qualifying past persecution on account of his voodoo religion. Despite the Haitian

authorities' impotence in the face of the terrible crimes committed against [redacted] and his family, the Board rejected the past persecution claim solely on the basis that [redacted] failed to meet his burden to show that the Haitian government is unable or unwilling to control his persecutors. ROA.8.

This holding misapplies the law in several respects. First, the Board's own precedents hold that if police take reports and take no further action, the asylum applicant has carried his burden of proof. Several courts of appeals agree. Further, the inquiry mandated by the plain language of the refugee definition asks only whether the applicant is willing to avail himself of his country's protection. In other words, the statute asks only whether an asylum applicant's fear of non-protection is well-founded. Finally, the history of the Refugee Protocol, on which the asylum statute is based, indicates that the drafters of the refugee definition believed that this element was satisfied so long as an asylum applicant did not receive "effective protection" from his government.

[redacted] and his family reported three murders, two attempted murders, two arsons, and a mob assault to the police, and yet the police did nothing more than facilitate first aid and take reports.

Denying asylum under these circumstances vindicates none of the purposes of the asylum statute and necessarily applies too narrow a conception of what it means for a foreign government to have the ability and willingness to control a persecutor.

**a. The Board's Conclusion in This Case Departs from Its Own Precedent.**

In determining the meaning of the "unable or unwilling to control" standard, the Board does not write on a clean slate. It has addressed the scope of this standard in two precedential decisions, *Matter of O-Z- & I-Z-*, 22 I. & N. Dec. 23 (BIA 1998), and *Matter of S-A-*, 22 I. & N. Dec. 1328 (BIA 2000). Several courts of appeals have reversed the BIA for failing to faithfully implement these two precedents. *See Aliyev v. Mukasey*, 549 F.3d 111, 119 (2d Cir. 2008) (reversing for failure to follow *O-Z-*); *Ngengwe v. Mukasey*, 543 F.3d 1029, 1036 (8th Cir. 2008) (reversing for failure to follow *S-A-*); *Lopez v. U.S. Att'y Gen.*, 504 F.3d 1341, 1345 (11th Cir. 2007) (same); *Ayala v. U.S. Att'y Gen.*, 605 F.3d 941, 950 (11th Cir. 2010) (same); *Bringas-Rodriguez v. Sessions*, 850 F.3d 1051, 1063, 1066 (9th Cir. 2017) (*en banc*) (approvingly discussing *O-Z-* and *S-A-*). Because the Board departed from *O-Z-*'s holding that merely taking reports does not reflect an ability and willingness to

control persecutors, and because the Board's holding is inconsistent with *S-A-*'s reasonable expectations doctrine, the decision in this case cannot be upheld.

### 1. The Board Impermissibly Departed from *Matter of O-Z- & I-Z-*, in which the Applicant Also Reported Violence to the Police to No Avail.

In *Matter of O-Z- & I-Z-*, the Board considered the case of a Jewish family from Ukraine that was the victim of threats and violence at the hands of non-state actors. 22 I. & N. Dec. 23, 24 (BIA 1998). The applicant suffered a beating requiring stitches after a political rally. *Id.* Subsequently, he would receive threatening leaflets. *Id.* On one occasion, his apartment was vandalized. *Id.* He suffered two subsequent beatings, which caused a rib injury and bruises. *Id.* His son also suffered abuse at school. *Id.* The applicant "testified that he reported the burglary as well as the January 1993 and July 1993 assaults to the police. He testified that the police promised to 'take care of [it]' on each occasion, but that no action was ever taken." *Id.* There is no indication that the applicant in *O-Z-* knew his attackers' identities or had any information about them other than certain identifiers of their ultra-nationalist ideology. *See id.* The Board held that the Ukrainian

government was unable or unwilling to control the applicant's attackers because "the respondent reported at least three of the incidents to the police, who took no action beyond writing a report."[4] *Id.* at 26.

The facts in [redacted] case are very similar to those in *O-Z-*, and it was error for the Board to reach a contrary result here. Like the applicant in *O-Z-*, [redacted], too, reported multiple crimes to the police. *See* ROA.139, 140, 143, 147, 151, 152, 155, 310. Like the applicant in *O-Z-*, the police were willing to take reports of these incidents, but no action was ever taken in response to the growing body of evidence that [redacted] and his family were being targeted. ROA.147, 148-49. In short, the operative facts of both cases are identical: the applicant reported three crimes to the police, who take no further action beyond writing a report. The Board's precedent states

[4] Notably, like in [redacted] case, the only evidence that the police did nothing in response to the reports was the credible testimony of the applicant. *Compare O-Z-*, 22 I. & N. Dec. at 24 ("He *testified* that the police promised to 'take care of [it]' on each occasion, but that no action was ever taken.") (emphasis added) *with* ROA.147 ("[W]hen my family was assassinated, the police came and the judge and [sic] to make a report, and after that they said they will conduct an investigation, but they never do [sic] anything about it.").

that this is sufficient to carry an applicant's burden under the "unable or unwilling to control" standard.

Indeed, the facts of this case are stronger than those of *O-Z-*. In *O-Z-*, the police were only aware of one burglary and two assaults. 22 I. & N. Dec. at 24. While the applicant in *O-Z-* was severely injured during the assaults, there was no evidence that his attackers were trying to kill him. *Id.* Here, the police were aware, at a minimum, of the campaign of telephone threats against [redacted], ROA.140, 151, the attempted murder of [redacted] involving machetes and gasoline, ROA.139, 147, the premeditated murder of three of [redacted] family members, ROA.143, 310, the assault on [redacted] mother that sent her to the hospital, ROA.152, 155, and the burning of his mother's house, ROA.152, 155. The crimes reported by [redacted] were more serious and numerous than those reported by the applicant in *O-Z-*. If taking a report is an insufficient government response to vandalism and assault under the Board's own precedent, then it is utterly deficient in the face of a triple murder.

Further, [redacted] provided more substantial assistance to the police than the asylum applicant in *O-Z-*. An asylum applicant does not

need to be able to identify his persecutors; rather, the evidence only needs to show that, for whatever reason, the government is unable or unwilling to control them. *Cf. O-Z-*, 22 I. & N. Dec. at 24 (identifying the applicant's attackers only as otherwise anonymous members of an ultra-nationalist movement). However, because the Board partially relied on the fact that no witnesses were able to identify [redacted] attackers, ROA.8, it is worth noting that [redacted] also appears to have provided more information about his attackers to the police than the applicant in *O-Z-*. The applicant in *O-Z-* appears to have only identified his attackers by the anti-Semitic language they used, ultra-nationalist insignias they wore, and the leaflets with which they vandalized his apartment. 22 I. & N. Dec. at 24. Similarly, [redacted] was able to identify the basic motives of his attackers: they were an anti-voodoo mob who believed he caused a recent outbreak of disease. ROA.518, 520. Instead of insignia worn by an entire movement and anonymous written threats, *cf. O-Z-*, 22 I. & N. Dec. at 24, [redacted] presented the authorities with the telephone numbers of those who had threatened him, ROA.140, 151.

[redacted] acknowledges that the police assisted him during the first attack. However, this assistance does not meaningfully distinguish this case from *O-Z-*. The assistance provided was merely fortuitous and fleeting. As described by [redacted] credible testimony, a police car happened to be "passing by," causing his assailants to "run away." ROA.139. This brief run-in with the authorities did nothing to substantially deter [redacted] persecutors. They would brazenly return to the very scene of their attempted murder just days later to burn down his shop. ROA.141. More importantly, they would make two more attempts on his life, and they would successfully kill or maim several of his family members. ROA.142, 144. Finally, and critically, [redacted] persecution continued (indeed, it escalated) after this first encounter. During this period of *continued* attacks *after* the initial, transitory aid provided during the first attack, the police did nothing more than take reports. ROA.147, 148-49. There is no basis in the statute or the Board's case law to hold that a single, accidental instance of a police officer "passing by" renders the government able and willing to control a non-state actor where (1) the persecution continues unabated and (2) the foreign

government does nothing in the face of this continued persecution other than take reports.

### 2. Under the Board's Precedent in *Matter of S-A-*, an Application for Asylum Succeeds if Government Protection Cannot Be Relied On.

The Board's decision in *Matter of S-A-*, 22 I. & N. Dec. 1328 (BIA 2000), is also instructive. In *S-A-*, the Board granted asylum to a Moroccan woman who suffered abuse at the hands of her father. *Id.* at 1329-30. The applicant never went to the police, but the testimony of fact witnesses and country conditions information indicated that such an effort might have been futile. *Id.* at 1330, 1333. The Board concluded that in view of these facts, the applicant had established "that she suffered past persecution in Morocco at the hands of her father and could not *rely* on the authorities to protect her." *Id.* at 1335 (emphasis added). The Board further concluded that the government "made no showing that conditions in Morocco have materially changed such that, upon her return, the respondent could *reasonably expect* governmental protection from her persecutor." *Id.* (emphasis added).

Factually, [redacted] case is stronger than that of the asylum applicant in *Matter of S-A-*. *S-A-* had never reported her abuse to the

police, 22 I. & N. Dec. at 1330, and so needed to persuade the Board that, even if she made a report, it would have been futile. In contrast, [redacted] has more definitively shown the futility of reporting these crimes to the police because, even after the police were well aware of the dangers he faced, his persecution continued.

*Matter of S-A-* is also doctrinally important. It stands for the proposition, consistent with the plain language of the statute and the international obligations of the United States, that a person states a claim for asylum if he cannot be reasonably assured of the effective protection of his government. The Board held that the "unable or unwilling to control" standard was satisfied because the applicant could not "rely" on the authorities to protect her. *S-A-*, 22 I. & N. Dec. at 1335. Indeed, where the applicant had shown that, at the time of her persecution, reporting her abuse to the police would not have *reliably* resulted in actual protection, the Board placed the burden *on the government* to show that she "could reasonably expect governmental protection from her persecutor." *Id.* The Board's conclusion in [redacted] case cannot be squared with the rule of *S-A-* that a claim for asylum has been stated if the applicant harbors a reasonable

expectation that their government is unable or unwilling to provide reliable protection.

### b. This Court's "Specially Oppressive Conditions" Doctrine Has Been Abrogated by *Matter of O-Z- & I-Z-* and *Matter of S-A-*.

The only reported decision in this circuit to substantively examine the "unable or unwilling to control" standard is *Adebisi v. INS*, 952 F.2d 910 (5th Cir. 1992). The *Adebisi* court expressed deference to the BIA's "unable or unwilling to control standard," adding a gloss that this standard will generally only be met where "specially oppressive" political or government conditions are present. *See id.* at 914. However, *Adebisi* was decided before the Board's decisions in *Matter of O-Z- & I-Z-*, 22 I. & N. Dec. 23 (BIA 1998), and *Matter of S-A-*, 22 I. & N. Dec. 1328 (BIA 2000). As the discussion of these two cases above shows, the Board's current doctrine is incompatible with the notion that a government is only unable or unwilling to control a persecutor if "specially oppressive" conditions exist. Rather, the Board's precedent focuses on the availability of actual, effective protection from persecution. *See S-A-*, 22 I. & N. Dec. at 1335 (granting asylum because the applicant could not rely on the authorities to protect her); *O-Z-*, 22 I.

& N. Dec. at 27 (granting asylum to a Jewish family where police did not investigate complaints, despite the fact that "the national government 'speaks out against anti-Semitism'"). Because *Adebisi*'s "specially oppressive" conditions statement did not rely on the plain language of the statute, the agency's subsequent precedential decisions control. *See Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 985 (2005) ("Before a judicial construction of a statute, whether contained in a precedent or not, may trump an agency's, the court must hold that the statute unambiguously requires the court's construction."). Notably, no reported decision of the Court has repeated the "specially oppressive" conditions formulation found in *Adebisi*. *Cf. Tesfamichael v. Gonzales*, 469 F.3d 109, 113 (5th Cir. 2006) (articulating the "unable or unwilling to control" standard without elaboration). Accordingly, this Court must evaluate [redacted] claim under the BIA's own contemporary standards.[5]

[5] Alternatively, remand to the agency to correctly apply the *O-Z-/S-A-* standard may be warranted. The Immigration Judge cited *Adebisi* in his decision, ROA.90, and the Board "uph[e]ld" this determination, citing only to regulations from which the "unable or willing to control" standard is derived, ROA.8. To the extent that the agency relied on a judicial precedent that was no longer binding, remand is required. *See Negusie v. Holder*, 555 U.S. 511, 522-23 (2009) (applying the ordinary

### c. Courts of Appeals Look to the Effectiveness of Police Protection Rather than Whether They Are Merely Willing to Take A Report.

When an asylum applicant has reported his persecution to the authorities, courts of appeals have generally proceeded to inquire whether the foreign government's response was effective in controlling the persecutors. Specifically, several reported cases cast doubt on the proposition that taking a report or providing medical assistance, without more, are probative of a foreign government's willingness and ability to control a persecutor.

At least three courts of appeals have reversed the BIA's determination that the police are willing and able to control a persecutor merely because the police took a report. In *Valdiviezo-Galdamez v. U.S. Att'y Gen.*, the asylum applicant had reported five instances of gang violence to the police. 502 F.3d 285, 289 (3d Cir. 2007). The Third Circuit reversed the asylum denial, holding that the Immigration Judge "erred by requiring Galdamez to prove that the police 'refused' to protect him, rather than simply [being] 'unable or

remand rule where the agency mistook the controlling effect of a prior Supreme Court precedent).

unwilling' to protect him." *Id.* Likewise, in *Ivanov v. Holder*, a Pentacostal man was attacked on four occasions by skinheads. 736 F.3d 5, 13 (1st Cir. 2013). Two of these attacks were reported to the police. *Id.* at 13-14. The First Circuit held that "[a]lthough the IJ did not credit Ivanov's assertion that skinheads were 'used by the police as surrogates' or 'aided and abetted by the authorities,' Ivanov was not required to make such a showing to qualify for asylum." *Id.* at 14. Rather, the government's "failure to respond [to Ivanov's reports] signals their unwillingness or inability to control Ivanov's persecutors." *Id.* Finally, the Ninth Circuit, in *Afriyie v. Holder*, held that merely taking a report, without further action, will generally not defeat an asylum claim: "Even if Afriyie's ability to file a police report suggests that he police were *willing* to protect Afriyie, that says little if anything about whether they were *able* to do so. Authorities capable of taking a crime report may still be 'powerless to stop' the persecution of which an individual complains." 613 F.3d 924, 931 (9th Cir. 2010); *accord Tchoukhrova v. Gonzales*, 404 F.3d 1181, 1195 (9th Cir. 2005), *vacated on other grounds sub nom. Gonzales v. Tchoukrova*, 549 U.S. 801 (2006) (holding that acts reported

to the police, which went uninvestigated, must be considered in the persecution analysis).

The Eleventh Circuit's decision in *De Santamaria v. U.S. Att'y Gen.*, 525 F.3d 999 (11th Cir. 2008), is also persuasive. Like [redacted], [redacted], Santamaria was threatened and injured in an initial encounter with her persecutors, the FARC rebels in Colombia. *Id.* at 1003-04. Like [redacted], her persecutors killed people close to her. *Id.* at 1004 (describing the killing of Santamaria's groundskeeper). In yet another parallel to [redacted] case, Santamaria attempted to evade her persecutors, but they eventually caught up to her. *Id.* Critically, as with [redacted], the Colombian government fortuitously intervened to stop one incident of persecution. During the course of her kidnapping, the FARC rebels transporting her into the mountains encountered resistance from Colombian military forces, and she was rescued by a Colombian soldier during the ensuing firefight. *Id.* at 1004-05. As with the fortuitous intervention of the police officer in [redacted] case, the government arranged for her transportation to the hospital. *Id.* at 1005. It was not until *after* the encounters constituting persecution in her case that Santamaria reported *any* of

them to the police. *Id.* She fled Colombia 28 days later. *Id.* While the government in that case does not appear to have joined the issue of the extent to which the government of Colombia was willing or able to protect Santamaria,[6] the Eleventh Circuit's holding is nonetheless instructive: it concluded "with little difficulty" that Santamaria had suffered qualifying past persecution such that she was entitled to a presumption of future persecution. *Id.* at 1009.

Indeed, [redacted] case is stronger than Santamaria's. The police in Haiti were contemporaneously aware of [redacted] persecution for more than three months, from the first attack on [redacted] 2009, ROA.138-39, to the attack on his mother's house on [redacted] 2009, ROA.144, and yet the violence continued unabated. Santamaria was rescued at the end of her persecution, and this did not defeat her asylum claim. *De Santamaria*, 525 F.3d at 1004-05. The

[6] It is little wonder that the government did not contest this element of Santamaria's claim. The Eleventh Circuit, in decisions before and after *De Santamaria*, has required strict compliance with the standard articulated in *Matter of S-A-*, 22 I. & N. Dec. 1328 (BIA 2000). *See Lopez v. U.S. Att'y Gen.*, 504 F.3d 1341, 1345 (11th Cir. 2007); *Ayala v. U.S. Att'y Gen.*, 605 F.3d 941, 950 (11th Cir. 2010).

police in [redacted] case knew about his persecution all along, and yet were powerless – or simply unwilling – to stop it from continuing.

A consistent theme emerges after surveying the courts of appeals' adjudication of claims similar to [redacted]. The phrase "unable or unwilling to control," as it has emerged in the law of asylum, must be taken at face value. If a foreign government has not been able to *effectively control* the persecutory conduct of non-state actors, the victim of that persecution may flee and state a valid claim for asylum. Where the authorities of that country were aware of the persecution, and the persecution *continues to occur*, this standard is met – regardless of whether the authorities refuse protection or simply have proven to be powerless to stop the persecution.

**d. The Statute Focuses on the Asylum Applicant's Reasonable Expectations of Protection.**

The standards urged here, and enshrined in *Matter of S-A-* and *Matter of O-Z- & I-Z-*, ultimately have their basis in the statutory language enacted by Congress. The statutory definition of a refugee includes a clause stating that a refugee is a person "who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, [his country of nationality] because of

persecution or a well-founded fear of persecution ….” INA § 1101(a)(42)(A); *see also* 8 C.F.R. § 1208.13(b)(1) (incorporating this clause into the eligibility criteria for asylum). The plain language of the statute focuses on the *applicant's* unwillingness to *avail himself* of the protection of his government.

This focus on the applicant's “willingness” to seek the protection of his government mirrors the statute's use of another applicant-centric standard: a “well-founded” fear of persecution. *See* INA § 101(a)(42)(A). It is well-settled that by employing the concept of “fear,” Congress had an “obvious focus on the individual's subjective beliefs.” *INS v. Cardoza-Fonseca*, 480 U.S. 421, 431 (1987). In determining whether a fear of persecution is well-founded, adjudicators employ a generous “reasonable possibility” standard, well below a preponderance of the evidence. *Matter of Mogharrabi*, 19 I. & N. Dec. 439, 442 (BIA 1987); *see also Cardoza Fonseca*, 480 U.S. at 431 (“One can certainly have a well-founded fear of an event happening when there is less than a 50% chance of the occurrence taking place.”); *Eduard v. Ashcroft*, 379 F.3d 182, 189 (5th Cir. 2004) (quoting *Mikhael v. INS*, 115 F.3d 299, 305 (5th Cir. 1997)) (“The well-founded fear standard, however, does not require

an applicant to demonstrate that he *will* be persecuted; rather the applicant must establish to a reasonable degree, that return to his country of origin would be intolerable.") (emphasis added) (quotation omitted).

The same reasonableness standard that applies to whether a fear of persecution is "well-founded" must also apply to the issue of whether a person is "unwilling" to avail himself of foreign government protection because of persecution or a well-founded fear of persecution. Courts should "interpret a term in a statute by reference to the words associated with them in the statute." *United States v. Golding*, 332 F.3d 838, 844 (5th Cir. 2003) (*per curiam*). The "unable or unwilling to avail" clause of the refugee definition is directly connected to the "persecution or well-founded fear of persecution" clause by the word "because." 8 U.S.C. § 1101(a)(42)(A). The statutory language indicates that the question of whether a foreign government is capable and willing to protect an individual from non-state actors simply a *component* of whether an applicant's *overall* fear is well-founded. If an applicant's *overall* fear of persecution is subjected only to scrutiny for objective

reasonableness, it undermines the statutory design to apply a higher standard to a component part of the well-foundedness inquiry.

Critically, the agency itself employs this framework. By framing the proper inquiry in terms of whether an applicant can "rely" on the police for protection (or alternatively, whether an applicant can "reasonably expect governmental protection"), the Board acknowledges that the evidentiary standard for the "unable or willing to control" element of an asylum claim must be understood in terms of the *applicant's* reasonable expectations of protection. *S-A-*, 22 I. & N. Dec. at 1335.

**e. The International Law Sources of Asylum Law Include Persons without Effective Government Protection within the Refugee Definition.**

One of Congress's primary purposes in passing the Refugee Act was to implement the principles agreed to in the 1967 United Nations Protocol Relating to the Status of Refugees, opened for signature Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 (entered in force Oct. 4, 1967; for the United States Nov. 1, 1968). *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 436-37 (1987). Accordingly, the Supreme Court has looked to the United Nations High Commissioner for Refugees (UNHCR) as a

source of guidance regarding the interpretation of asylum law. *Cardoza-Fonseca*, 480 U.S. at 438-39; *see also INS v. Aguirre-Aguirre*, 526 U.S. 415, 427 (1999) (describing the UNHCR Handbook as a useful, if nonbinding, interpretive aid). On the issue presented in this case, UNHCR's views complement those expressed by the Board in *S-A-* and *O-Z-*, as well as those expressed by several sister circuits. According to UNHCR, persecution is cognizable under refugee law if "the authorities refuse, or prove unable, to offer *effective* protection." United Nations High Commissioner for Refugees, Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees ¶ 65 (reissued 2011) (emphasis added). The phrase "unable or unwilling to control" a persecutor, as adopted in the asylum jurisprudence of the United States, is properly understood as being coextensive with the concept of "effective protection" from non-state actors present in international law sources.

### f. Where Persecution Continues for Months After a Foreign Government Becomes Aware of a Campaign of Violence Against An Individual, That Individual Does Not Enjoy the Protection of His Government for Asylum Purposes.

The foregoing survey of the jurisprudence regarding a foreign government's ability and willingness to control a persecutor yields several principles regarding the standard that must be applied to this case:

- An applicant for asylum is entitled to "rely" on the government for protection. *S-A-*, 22 I. & N. Dec. at 1335.
- An application for asylum should be granted unless the applicant "could reasonably expect governmental protection from her persecutor." *Id.*
- The statutory language focuses on the applicant's ability and willingness to avail himself of the protection of his government of nationality. 8 U.S.C. § 1101(a)(42)(A).
- The treaty obligations that form the basis of asylum law require the United States to offer refuge to those without the "effective protection" of their own governments. United Nations High Commissioner for Refugees, Handbook and Guidelines on

Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees ¶ 65 (reissued 2011).

- Taking a police report, without more, is insufficient governmental action to defeat an asylum claim. *O-Z-*, 22 I. & N. Dec. at 26; *Afriyie*, 613 F.3d at 931; *Valdiviezo-Galdamez* 502 F.3d at 289; *Ivanov*, 736 F.3d at 14.

The Board did not apply these principles to the undisputed facts of this case. [redacted] suffered a campaign of threats, followed by an attack that nearly killed him. ROA.138-39, 140, 151, 518, 520. By happenstance, a police car drove by, and the officer took [redacted] to the hospital. ROA.139, 147. However, the fluke of this officer's patrol route would not be followed by anything more than taking reports. ROA.143, 147, 148-49, 152, 155, 310. Critically, after serendipity brought an end to the first attack, [redacted] persecutors were not only undeterred, but unopposed, in their successful efforts to murder, maim, and raze their way to their target. ROA.142, 144, 152-53. The authorities, as is common in Haiti, did not conduct an investigation, ROA.147, 148-49, likely because [redacted] is not powerful enough to

influence a judge or rich enough to bribe him, ROA.148-49, 353. After such an ordeal, no reasonable person would continue to rely on the government for effective protection. Because the Board's decision to the contrary is rooted in an erroneous application of the law to these undisputed facts, its decision must be reversed. *Zhu v. Gonzales*, 493 F.3d 588, 594 (5th Cir. 2007).

## III. THE BOARD'S HOLDING REGARDING INTERNAL RELOCATION IS NOT A SUFFICIENT GROUND FOR DENYING THE PETITION.

Where an asylum application is premised on past persecution, a well-founded fear of persecution is presumed, and the government bears the burden to show that internal relocation is a safe and reasonable alternative to fleeing one's country of nationality. 8 C.F.R. § 1208.13(b)(1)(i)(B); *Matter of M-Z-M-R-*, 26 I. & N. Dec. 28, 30-31 (BIA 2012). The Board has previously held that "[b]ecause the regulations set forth varying burdens of proof depending on whether an applicant suffered past persecution, it is of paramount importance that Immigration Judges make a specific finding than an applicant either has or has not suffered past persecution." *Matter of D-I-M-*, 24 I. & N. Dec. 448, 451 (BIA 2008). Where an Immigration Judge "[does] not

explicitly apply the presumption and fail[s] to shift the burden of proof to the DHS to prove by a preponderance of the evidence that the [applicant] can avoid future persecution by relocating to another part of [his country of nationality], and that it would be reasonable for him to do so," the Board is constrained by its limited fact-finding abilities on appeal to remand for further fact finding. *Id.*

In this case, the Board's "unable and unwilling to control" analysis was the only basis on which the Board denied [redacted] past persecution claim. ROA.8. On the issue of internal relocation, the Board placed the burden of proof on [redacted] and only in its discussion of the well-founded fear analysis. ROA.8-9. Therefore, if [redacted] succeeds in persuading this Court that the Board applied an incorrect legal standard to the issue of whether Haitian authorities were able and willing to control his persecutors, the Board's internal relocation finding is not an adequate, independent basis on which this Court may deny his petition for review. Rather, if the governmental protection analysis is reversed, this Court must presume that [redacted] will be able to carry his burden on the remaining elements of a past persecution claim. *Cf. Zhu v. Gonzales*, 493 F.3d 588, 593 (5th Cir. 2007) (holding that this

Court only reviews the decision of the Board). The burden would shift to the government to demonstrate that internal relocation is both safe and reasonable, and remand to the agency would be necessary to conduct factfinding under the correct burden of proof. *See D-I-M-*, 24 I. & N. Dec. at 451.

Remand to the agency is particularly important in this case for two reasons. First, like the Immigration Judge in *D-I-M-*, the Board in this case made its internal relocation finding without reference to record evidence indicating that relocation is not safe and reasonable. *Compare D-I-M-*, 24 I. & N. Dec. at 451 ("Instead, the Immigration Judge concluded, without specific reference to the voluminous background materials in the record, that the respondent could safely relocate to a metropolitan area of Kenya.") *with* ROA.8-9 (purporting to deny the claim based on internal relocation, but making no reference to any specific facts) *and* ROA.94 (only stating facts relating to relocation in *Brazil*, and not Haiti). Second, even if [redacted] did have the burden regarding internal relocation, the Board and the Immigration Judge failed to engage with the most obviously relevant evidence relating to this issue: [redacted] failed attempt to relocate to [redacted]

[redacted]. While the Board is not required to "write an exegesis on every contention," it must still "consider the issues raised, and announce its decision in terms sufficient to enable a reviewing court to perceive that it has heard and thought and not merely reacted." *Efe v. Ashcroft*, 293 F.3d 899, 908 (5th Cir. 2002) (quoting *Becerra-Jiminez v. INS*, 829 F.2d 996, 1000 (10th Cir. 1987)). Neither the Board, ROA.8-9, nor the Immigration Judge, ROA.94, even mention the fact that [redacted] attempted to relocate to a town that is a four to five hour drive from [redacted], ROA.154, only to be tracked down and attacked once again, ROA.152. Nor did either adjudicator identify any factor, consistent with the government having the burden of proof, affirmatively demonstrating that conditions in an identified part of Haiti are "substantially better" than the disparate cities in which [redacted] has previously experienced attacks. *Cf. M-Z-M-R-*, 26 I. & N. Dec. at 33-34 (holding that DHS must identify "a specific area of the country" where conditions are "substantially better" than those giving rise to a well-founded fear of persecution on the basis of the original claim). Remand is required.

## CONCLUSION

For the foregoing reasons, the petition for review must be granted and this matter remanded to the Board of Immigration Appeals.

Respectfully submitted,

Dated: [redacted] 2018

_____/[redacted]_____
[redacted]
*Counsel for Petitioner* [redacted]

# CERTIFICATE OF SERVICE

I hereby certify that on [redacted] 2018, I electronically filed the foregoing with the Clerk for the United States Court of Appeals for the [redacted] Circuit by using the CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Dated: [redacted] 2018

/s/[redacted]

[redacted]

*Counsel for Petitioner* [redacted]

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Dated: [redacted] 2018

/s/[redacted]

[redacted]

*Counsel for Petitioner* [redacted]