**No. 20-71316**

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**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

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KELSY SYLVESTRE,
*Petitioner*,

v.

WILLIAM P. BARR, ATTORNEY GENERAL
*Respondent*.

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Petition for Review from a Decision of the
Board of Immigration Appeals
Agency No. A 209-391-477

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# *AMICUS CURIAE* BRIEF OF THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION IN SUPPORT OF PETITION FOR REVIEW FROM A DECISION OF THE BOARD OF IMMIGRATION APPEALS BY PETITIONER KELSY SYLVESTRE

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Charles Shane Ellison
Katherine L. Evans
Amanda G. Dixon[1]
DUKE UNIVERSITY SCHOOL OF LAW
210 Science Dr., Box 90360
Durham, NC 27708-0360
919-660-6956
Ellison@law.duke.edu
Evans@law.duke.edu
Amanda.G.Dixon@lawnet.duke.edu

Tyler A. Young
David Yoshimura
Stephanie Koltookian
Abdullah Azkalany
Adam Foresman
FAEGRE DRINKER BIDDLE & REATH LLP
801 Grand Ave., 33rd Floor
Des Moines, IA 50309
515-248-9000
Tyler.Young@faegredrinker.com


[1] Ms. Dixon is law student who contributed to the preparation of this brief under the supervision of Professor Ellison.

David.Yoshimura@faegredrinker.com
Stephanie.Koltookian@faegredrinker.com
Abdullah.Azkalany@faegredrinker.com
Adam.Foresman@faegredrinker.com

*Counsel for The American Immigration Lawyers Association*

## Rule 26.1 Disclosure Statement

Pursuant to Federal Rule of Appellate Procedure 26.1, *Amicus Curiae* submits the following corporate disclosure statement: *Amicus curiae* is a nonprofit corporation and has no other corporate parents. *Amicus curiae* is not publicly traded.

Date: November 19, 2020

/s/ C. Shane Ellison
Charles Shane Ellison
Counsel for *Amicus Curiae* AILA

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## STATEMENT OF INTEREST OF AMICUS CURIAE[1]

Amicus curiae, the American Immigration Lawyers Association (AILA), is a national association with more than 15,000 members throughout the United States, including lawyers and law school professors who practice and teach in the field of immigration and nationality law. AILA National seeks to advance the administration of law pertaining to immigration, nationality, and naturalization; to cultivate the jurisprudence of the immigration laws; and to facilitate the administration of justice and elevate the standard of integrity, honor, and courtesy of those appearing in a representative capacity in immigration and naturalization matters.

AILA's members practice regularly before the Department of Homeland Security, immigration courts, and the Board of Immigration Appeals ("BIA" or "Board"), as well as before the United States District Courts, Courts of Appeals, and Supreme Court. AILA members, their clients, and the Government all benefit from having clear and predictable standards of law and standards of review in the Board's and the Courts' proceedings in these matters.

[1] This brief, proffered pursuant to Federal Rule of Appellate Procedure 29(a), was solely authored by counsel indicated on the cover page. No party, party's counsel, or any person other than amicus curiae, its members or its counsel, contributed money that was intended to fund preparing or submitting the brief. Petitioner has consented to the filing of this brief, the government has indicated that it takes no position.

As it relates to refugees and asylum seekers, AILA and its members have a profound interest in ensuring that bona fide applicants for protection in the U.S. are not errantly returned to the countries from which they have fled. For both asylum and withholding claims, an applicant can satisfy the statutory elements by establishing: "(1) his past treatment rises to the level of persecution; (2) the persecution was on account of one or more protected grounds; and (3) the persecution was committed by the government, or by forces that the government was *unable or unwilling to control*." *Bringas-Rodriguez*, 850 F.3d at 1062 (emphases added) (quoting *Baghdasaryan v. Holder*, 592 F.3d 1018, 1023 (9th Cir. 2010)). That final element—the unable-or-unwilling nonstate actor requirement (the "nonstate actor test")—plays a major role in determining eligibility for relief for many.

From transnational criminal organizations to terrorist groups to rebel factions, a significant number of asylum-seekers flee their countries due to nonstate persecution. Most flee because they are *unable or unwilling* to *avail* themselves of the protection of their country due to such protection being *unavailable*. 8 U.S.C. § 1101(a)(42)(A). Given the importance of this issue, AILA seeks to offer its expertise in this case to ensure that the nonstate actor test is properly construed and that agency decisions on this issue are properly reviewed.

## INTRODUCTION

The Court should remand this matter back to the Board because it committed significant legal errors in its determination that Petitioner Kelsey Sylvestre did not satisfy the nonstate actor test.[2] This Court should likewise clarify the appropriate standard of review applicable to appeals regarding nonstate actor determinations in requests for asylum and withholding for removal.

The nonstate actor test requires immigration judges ("IJs") to make factual findings and to determine whether those findings satisfy the nonstate-actor element of the statutory definition of a "refugee." Because there are legal questions embedded in this inquiry, the BIA was required to review the IJ's determination as a mixed question of law and fact; *i.e.*, the factual findings are reviewed for clear error and the legal determinations are reviewed de novo. In this case, however, the BIA failed to apply such a standard of review—in violation of its own regulations—because it treated the question as one of pure fact and applied only clear-error review.

The BIA also failed to apply the correct underlying legal standards regarding the nonstate actor test. Specifically, the agency (1) failed to recognize the disjunctive nature of the "unable or unwilling" nonstate actor test; (2) failed to analyze the inefficacy of government protection in this case; and (3) failed to recognize that

[2] AILA joins in and adopts the arguments set forth by Petitioner in the Opening Brief and those of other *amici curae* regarding the inapplicability of the firm resettlement bar in this case.

there is no per se reporting requirement under the law. These legal errors are subject to de novo review by this Court and require reversal and remand.

## ARGUMENT

### I. THE COURT SHOULD RULE THAT THE NONSTATE ACTOR TEST IS A MIXED QUESTION OF FACT AND LAW, REQUIRING APPLICATION OF A MIXED-QUESTION STANDARD OF REVIEW.

Standards of review are critically important because they often control the outcome of appeals. *Amicus curiae* contends that the proper standard of review for nonstate actor determinations must recognize the nuance of mixed questions and facilitate a fulsome review of both the factual and legal components of such determinations. This Court reviews questions regarding the proper standard of review de novo. *See Rodriguez v. Holder*, 683 F.3d at 1169.

#### A. Nonstate Actor Determinations Involve the Interpretation and Application of Statutory Terms and Necessarily Entail Questions of Law.

Because the nonstate actor test requires the application of law to the facts, it involves legal determinations that must be reviewed de novo. *See Madrigal v. Holder*, 716 F.3d 499, 503, 506-507 (9th Cir. 2013); *Xochihua-Jaimes*, 962 F.3d at 1183; *Ramadan v. Gonzales*, 479 F.3d 646, 654 (9th Cir. 2007); *Guerrero-Lasprilla v. Barr*, 140 S. Ct. at 1068.

The non-state actor test is derived from the Refugee Act's definition of refugee: a person "who is . . . *unable or unwilling to avail himself . . . of the*

*protection of* [*his country of nationality*] 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 USC § 1101(a)(42)(A) (emphasis added). This Court has recognized that "[t]he concept of *persecution* by non-state actors is 'inherent' in the definitions of *persecution* in the 1951 Convention and the Refugee Act of 1980." *Bringas-Rodriguez v. Sessions*, 850 F.3d 1051, 1060–62 (9th Cir. 2017) (emphasis added).

Additionally, the statutory text of the Refugee Act itself provides a mechanism for measuring the level of protection from persecution a government must provide: "a state is obligated . . . to provide sufficient protection to reduce the risk of persecution . . . below that of a well-founded fear." Deborah E. Anker, *Law of Asylum in the United States* § 4:8; Ellison & Gupta, *Unwilling or Unable: The Failure to Conform the Nonstate Actor Standard in Asylum Claims to the Refugee Act*, COLUMBIA HUMAN RIGHTS L. REV. (forthcoming) (arguing that the statutory language "*unable or unwilling to avail . . . of [state] protection*" in § 1101(a)(42)(A) is explicitly linked to the "well-founded fear" analysis and the latter must therefore serve as the lodestar for nonstate actor determinations).

Likewise, this Court has repeatedly construed the Refugee Act's nonstate actor test to have discrete *legal* parameters and rules for application. Examples include:

- When the IJ's findings of fact demonstrate existing government protections, **the IJ must consider whether those existing protections are sufficiently meaningful or effective to satisfy the government's obligation to control and prevent nonstate persecution**. *See J.R. v. Barr*, 975 F.3d 778, 782 (9th Cir. 2020); *Madrigal v. Holder*, 716 F.3d 499, 506 (9th Cir. 2013); *Rahimzadeh v. Holder*, 613 F.3d 916, 923 (9th Cir. 2010); *Navas v. I.N.S.*, 217 F.3d 646, 656 n.10 (9th Cir. 2000) ("[A]rrests by police, without more, may not be sufficient to rebut claims that the government is unable or unwilling to stop persecutors, . . . especially where the punishment may amount to no more than a 'slap on the wrist.'") (citations omitted); *see also* Deborah E. Anker, *Law of Asylum in the United States* § 4:8.

- When the IJ's findings of fact demonstrate persecution on a protected ground, **the IJ must analyze whether the persecuting agent is a government or nonstate actor**. *See Ramos v. Lynch*, 636 Fed. Appx. 710 (9th Cir. 2016) (holding that it was legal error for BIA to require petitioner to satisfy nonstate actor test when persecutors were police officers) (citing *Boer–Sedano v. Gonzales*, 418 F.3d 1082, 1088 (9th Cir. 2005); *Baballah v. Ashcroft*, 367 F.3d 1067, 1078 (9th Cir. 2004).

- When the IJ's findings of fact demonstrate persecution by nonstate actors, **the IJ must determine whether the persecution could or would have been controlled at *a local/regional level*—not only on a national level**. *Bringas-Rodriguez*, 850 F.3d at 1063 (citing *Mashiri v. Ashcroft*, 383 F.3d 1112, 1122 (9th Cir. 2004)) (rejecting the government's reliance on a U.S. Department of State country report to counter the petitioner's evidence of local police unwillingness to protect her and her family). "[A]n asylum applicant may meet her burden with evidence that the government was unable or unwilling to control the persecution in the applicant's *home city or area*." *Id.* (emphasis added); *see also Ornelas-Chavez v. Gonzales*, 458 F.3d 1052, 1055–58 (9th Cir. 2006) (finding petitioner's credible testimony that the government was unwilling or unable to control *his* persecutors sufficient to overcome country condition reports suggesting "improvements" for persons in petitioner's situation across country).

Conversely, the agency may not impose its own requirements on the nonstate actor test that are contrary to the text or established constructions of the statute.

Where an IJ applies such a requirement, it constitutes legal error, which is not entitled to the deferential standard of review reserved for findings of fact. For example:

- **An IJ may not require that an applicant demonstrate both that the government was unable <u>and</u> unwilling to control the persecution.** To the contrary, "unable" and "unwilling" are distinct requirements, and an applicant need only prove one or the other. *J.R. v. Barr*, 975 F.3d 778, 782 (9th Cir. 2020) (holding that evidence showing "that the police were willing to protect [him] . . . says little if anything about whether they are able to do so"); *Rahimzadeh v. Holder*, 613 F.3d 916, 921–23 (9th Cir. 2010) (stating the legal question is whether the government both "*could and would* provide protection" (emphasis added)).

- **An IJ may not apply a *per se* requirement that the applicant have reported the persecution to government authorities.** A Petitioner does <u>*not*</u> need in all circumstances to report persecution or torture to the local police in order to be eligible for asylum or withholding of removal. *Ornelas-Chavez v. Gonzales*, 458 F.3d 1052, 1058 (9th Cir. 2006). In *Bringas-Rodriguez*, 850 F.3d 1051, the en banc court elaborated a five-part analysis for nonstate actor determinations where the applicant did not seek state protection. The Court explained that reporting is not necessary where: (1) "a country's laws or customs effectively deprive the petitioner of any meaningful recourse to governmental protection;" (2) "[p]rior interactions with authorities" reveal governmental inability or unwillingness to protect; (3) "others have made reports of similar instances to no avail;" (4) "private persecution of a particular sort is widespread and well-known, but not controlled by the government;" or (5) reporting "would have been futile or would have subjected the applicant to further abuse." *Bringas-Rodriguez*, 850 F.3d at 1066–67 (citing cases).

- **An IJ may not require that the persecuting nonstate actor be part of an organized group.** A nonstate actor does not have to be organized to engage in persecution. *Singh v. INS*, 94 F.3d 1353, 1356 (9th Cir. 1996) (holding persecution does not need to be "committed by an 'organized or quasi-governmental group'").

As these requirements demonstrate, the nonstate actor test requires the IJ to make a number of legal determinations. When the nonstate actor test is at issue, therefore, the BIA and the Court should apply de novo review of those legal determinations.

### B. Nonstate Actor Determinations Are Not Reviewed Exclusively Under the Deferential Standard of Review for Fact-Finding.

As discussed above, the nonstate actor test sets forth *legal standards* to be applied to the idiosyncratic facts of each case. Therefore, when the BIA treats the nonstate actor analysis as one *exclusively* of fact and fails to appreciate the legal questions embedded in every nonstate actor determination, it commits legal error. This Court should rule explicitly that because the nonstate actor test implicates both questions of law and fact, the issue is subject to a mixed-question standard of review, not simply the deferential standard of review for findings of fact.

#### 1. The Case Law of This Court, Other Circuit Courts, and the BIA Demonstrate That the Nonstate Actor Test is Subject to a Mixed-Question Standard of Review.

A mixed question of law and fact "refer[s] to the application of law to undisputed facts." *Agonafer v. Sessions*, 859 F.3d 1198, 1202 (9th Cir. 2017). When the question is whether the established facts satisfy the applicable legal elements, the Court regards the inquiry as implicating the legal aspect of a mixed question and will engage in de novo review. *Guerrero-Lasprilla v. Barr*, 140 S. Ct. 1062, 1068–69 (2020) (ruling the application of law to undisputed facts is properly resolved as a

question of law); *U.S. Bank N.A. v. Village at Lakeside*, 138 S. Ct. 960, 966 (2018) (ruling "the application of law to settled facts" necessitates de novo review). On the other hand, facts determined by the IJ—including findings related to the credibility of testimony, historical facts, and predictive findings—are reviewed for clear error before the BIA, and for substantial evidence before this Court. *See Ridore v. Holder*, 696 F.3d 907, 911 (9th Cir. 2012); *Vitug v. Holder*, 723 F.3d 1056, 1063 (9th Cir. 2013).

The "mixed-question standard of review" begins by carefully distinguishing the reviewable legal conclusions from the reviewable factual findings. "Where there are mixed questions of fact and law, the BIA 'must break down the inquiry into its parts and apply the correct standard of review to the respective components;' it cannot 'glue[] the two questions together.'" *Vitug*, 723 F.3d at 1063 (quoting *Kaplun v. Attorney Gen. of U.S.*, 602 F.3d 260, 271 (3d Cir. 2010)).

In the context of the nonstate actor test, findings related to whether an applicant reported his persecution to the police, what happened in response, how similarly situated people are treated, and what the government is likely to do in the future, are all factual and thus subject to the deferential standard of review for fact-finding. *Vitug*, 723 F.3d at 1063. However, whether those facts found establish that a government was (or would be) unable or unwilling to control persecution by a nonstate actor constitutes a question of law. *See Madrigal v. Holder*, 716 F.3d 499,

506 (9th Cir. 2013) (holding the BIA committed "legal error" in its application of the "unable or unwilling" standard to established facts); *Ornelas-Chavez*, 458 F.3d at 1058 (holding the "BIA applied the wrong legal standard" by determining the nonstate actor test was not satisfied due the applicant's "failure to report").

This approach is consonant with the law in other Circuit Courts of Appeals. *See, e.g.*, *Rosales Justo v. Sessions*, 895 F.3d 154, 162–63 (1st Cir. 2018) ("The BIA's application of the 'unable or unwilling' standard is a legal question that we review de novo."); *Cruz-Quintanilla v. Whitaker*, 914 F.3d 884, 889–90 (4th Cir. 2019) (treating the analogous determination of whether the government will "acquiesce" in torture as a mixed question); *Hui Lin Huang v. Holder*, 677 F.3d 130, 135 (2d Cir. 2012) (holding that "de novo review applies to the ultimate question" of whether an applicant's subjective fear "is objectively reasonable"); *En Hui Huang v. Attorney General*, 620 F.3d 372, 382–83 (3d Cir. 2010) (holding that "whether what may or will happen to the asylum applicant is serious enough to meet the legal test of persecution" is a mixed question calling for de novo review).

Furthermore, the AG has recently called for a mixed-question standard of review of the nonstate actor test. *Matter of A–C–A–A–*, 28 I&N Dec. 84 (A.G. 2020) (ruling that "the Board . . . must examine de novo whether the facts found by the immigration judge satisfy all of the statutory elements of asylum as a matter of law"); *id.* at 88 (describing the "elements" of an asylum claim to include, *inter alia*, whether

the "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 (BIA 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[.]"). This is consistent with the agency's controlling regulations, which state that the BIA will review findings of fact for clear error and all other issues—including "questions of law, discretion, and judgment"—de novo. *See* 8 C.F.R. § 1003.1(d)(3)(i), (ii).

### 2. This Court Applies a Mixed-Question Standard of Review to Similar Questions and Should Apply It to the Nonstate Actor Test Here.

This Court should explicitly hold, consistent with its case law, that the nonstate actor test raises a mixed question of law and fact, which necessitates de novo review as to the legal aspects of the inquiry. While the question of *what* the government has or has not done (or is likely to do) is properly reviewed under the deferential standards for fact-finding, a determination as to *whether* such historical or predictive facts satisfy the legal standard must be reviewed de novo. *See Madrigal v. Holder*, 716 F.3d 506 (9th Cir. 2013); *Ornelas-Chavez*, 458 F.3d at 1058.

Such a holding from this Court would ensure consistency with its prior rulings requiring the bifurcation of mixed questions in other contexts. *See Vitug*, 723 F.3d at 1063 (describing the factual aspects of a mixed-question to include "past events," "states of mind such as intentions and opinions," and "expressions of likelihood," and the legal aspects to include "the application of a particular standard of law to a set of facts"); *Singh v. Ilchert*, 63 F.3d 1501, 1506 (9th Cir. 1995) (reviewing de novo the BIA's determination that Petitioner's harm was not on account of political opinion because the question required "the application of established legal principles to undisputed facts"); (*Ornelas-Chavez*, 458 F.3d at 1058-59 (holding that whether torture has occurred with the "consent or acquiesces" of the government is a legal determination); *Ramadan*, 479 F.3d at 654 (holding that whether the undisputed facts satisfied the "changed circumstances" exception to the one-year deadline for asylum was a question of law).

Furthermore, such a holding would naturally reconcile with prior decisions by this Court in which the affirmance of findings of fact under a substantial-evidence standard was dispositive of the claim. *See, e.g.*, *Diaz-Torres v. Barr*, 963 F.3d 976, 980 (9th Cir. 2020); *Bringas-Rodriguez*, 850 F.3d at 1059; *Bassene v. Holder*, 737 F.3d 530, 536 (9th Cir. 2013) (reviewing for substantial evidence an adverse credibility finding). These cases rightfully applied substantial evidence review to agency fact-finding, which was ultimately determinative of their respective

petitions. In the present Petition, on the other hand, questions of the applicable *legal standard* are central to the outcome of the case; therefore, de novo review is required. Holding explicitly that mixed-question review is the required standard of review for the nonstate actor test would harmonize this Court's case law regarding the applicable standard of review.

## II. The BIA Committed Reversible Error in This Case by Applying the Wrong Standard of Review and Misconstruing the Nonstate Actor Requirement.

The BIA committed reversible error in this case in two respects. First, the BIA failed to bifurcate its analysis as required by the mixed-question standard of review, and it therefore failed to apply de novo review to the legal conclusions the IJ made. A.R. at 7. Second, by improperly applying only clear-error review, the BIA furthered and compounded the IJ's legal errors in misapplying the nonstate actor test. A.R. at 7-8.

### A. The BIA Applied the Incorrect Standard of Review.

This Court reviews the BIA's applicable standard of review—including whether the BIA actually applied the proper standard—de novo. *See Rodriguez v. Holder*, 683 F.3d 1164, 1169 (9th Cir. 2012); *see also Zumel v. Lynch*, 803 F.3d 463, 471 (9th Cir. 2015); *Sio v. Lynch*, 604 F. App'x 578, 578 (9th Cir. 2015). The Court does not defer to the BIA's determination of the correct standard of review nor to the BIA's statement of which standard it applied; rather, the Court reviews the BIA's

rulings and determines what standard the BIA actually applied and whether the standard the BIA applied was the correct one. *Rodriguez*, 683 F.3d at 1170 & n.3.

In this case, the BIA was required to bifurcate the IJ's ruling on the nonstate actor test—*i.e.*, to apply clear error review to the IJ's factual findings and de novo review to the IJ's application of law to the facts. *See Matter of A–C–A–A–*, 28 I&N Dec. at 88.

However, the BIA never stated it was applying de novo review to any aspect of the IJ's nonstate actor determination. *Cf.* A.R. 7-8. Nor did it in fact do so. *Id.* Rather, the BIA repeatedly invoked the language of the clear-error standard, stating that it declined to say the IJ's determination was "clearly erroneous." *Id.* The record is clear: the BIA applied *only* deferential clear error review and did not engage in any de novo review of the IJ's legal conclusions related to the nonstate actor test. *Id.* The BIA's failure to bifurcate the review of a mixed question and apply de novo review of legal conclusions was reversible error. *See Vitug*, 723 F.3d at 1063.

### B. The IJ and the BIA Misconstrued the Statutory Nonstate Actor Requirement.

*Amicus curiae* agrees with the thorough arguments raised in Petitioner's opening brief in regards to the agency's flawed nonstate actor determination. The BIA's failure to bifurcate its standard of review contributed to its erroneous affirmance of the IJ's legal determinations.

By adopting the IJ's legal conclusions in full, the BIA failed to heed this Court's interpretation of the applicable immigration statute. This is apparent in at least three distinct legal errors the BIA committed in the course of making the nonstate actor determination: (1) it failed to apply "unable or unwilling" test disjunctively; (2) it failed to analyze the inefficacy of purported government protections; and (3) it imposed an erroneous per se reporting requirement. A.R. at 7-8. This Court should review the BIA's legal conclusions and determinations on these questions of law de novo. *See Rodriguez v. Holder*, 683 F.3d 1164, 1169 (9th Cir. 2012); *Madrigal*, 716 F.3d at 503, 506; *Ornelas-Chavez*, 458 F.3d at 1055, 1058.

**1. The "Unable or Unwilling" Analysis is a Disjunctive Test.**

First, in affirming the IJ's conclusion, the BIA noted that Haitian authorities investigated the murder of his cousin and stated "[t]he fact that limited information or resources mired an investigation does not establish" that Mr. Sylvestre is without protection from the Haitian Government. A.R. at 8. The BIA's conclusion here—which pointed exclusively to the state's willingness to investigate—amounts to reversible error. This Court has held the issue of governmental unwillingness or inability to protect a private citizen is properly examined by evaluating *will* and *ability independently*. *See, e.g.*, *Canahui v. Lynch*, 642 Fed. App'x 745, 746–47 (9th Cir. 2016) (ruling that "even if [police efforts] could be considered 'responding' to Petitioner's reports" of persecution, they "at best suggest that the 'police were

*willing* to protect [the petitioner,]' not that they were '*able* to do so'"); *Rahimzadeh v. Holder*, 613 F.3d 916, 921 (9th Cir. 2010) (affirming that a petitioner must establish "the government's inability or unwillingness" to control persecution, but not both).

The record reflects that the Haitian police took a report and engaged in a "mired" investigation. A.R. at 8. Whatever relevance those facts may have in showing the state's *willingness* to protect Mr. Sylvestre, they cannot show that Haiti is *able* to do so. Therefore, the BIA erred in its analysis. The BIA was required, employing de novo review, to determine whether the established facts amounted to *either* governmental inability *or* unwillingness.

**2. The Efficacy of Governmental Control Mechanisms Must Be Considered Under the Applicable Legal Standard.**

Second, the BIA erred in failing to consider the effectiveness of state protection. *See* A.R. at 7 (affirming under clear-error review the IJ's determination because "the record does not demonstrate that Haitian laws or customs effectively deprive[d] [him] … of the Government's protection".)

Even if the findings of fact underlying the IJ's analysis were properly affirmed following a clear error review, the BIA erred when it failed to engage in de novo review of the IJ's legal determinations related to the efficacy of *actual* governmental protection. *Bringas-Rodriguez*, 850 F.3d at 1072 ("[A] country's laws are not always reflective of actual country conditions."); *Madrigal*, 716 F.3d at 506–07. This

Court's jurisprudence demonstrates clearly that the efficacy of a government's efforts is a necessary factor in the legal analysis. *J.R. v. Barr*, 975 F.3d 778, 782 (9th Cir. 2020) ("Some official responsiveness to complaints of violence, although relevant, does not automatically equate to governmental ability and willingness [to protect]."); *Afriyie v. Holder*, 613 F.3d 924, 931 (9th Cir. 2010).

The effectiveness of state protection should be measured by the degree to which it reduces a refugee's risk of harm below the well-founded fear threshold. *See* 8 U.S.C. § 1101(a)(42)(A) (defining a refugee as one who cannot "avail himself . . . of [state] protection . . . *because of . . . a well-founded fear*.") (emphasis added); *INS v. Cardoza-Fonseca*, 489 U.S. 421, 440 (1987) (explaining "an applicant" can have a well-founded fear even where he "has only a 10% chance of being…persecuted"); *see also* Deborah E. Anker, *Law of Asylum in the United States* § 4:8.

Here, the BIA legally erred by wholly failing to address whether the Haitian government *would be* willing and able to provide effective protection in the future as part of the required well-founded fear analysis. *Rahimzadeh v. Holder*, 613 F.3d 916, 921–23 (9th Cir. 2010) (stating the legal question is whether the government both "*could and would* provide protection" (emphasis added)); *Madrigal*, 716 F.3d at 506 (ruling that the BIA must examine the "efficacy of [the government's] efforts" to protect); *cf. Navas v. I.N.S.*, 217 F.3d 646, 656 n.10 (9th Cir. 2000) ("[A]rrests by police, without more, may not be sufficient to rebut claims that the government is

unable or unwilling to stop persecutors, . . . especially where the punishment may amount to no more than a 'slap on the wrist.'"); *Afriyie*, 613 F.3d at 931 (noting that the "taking of a crime report" does not show that a government is able to protect as it may "lack … financial and physical resources" to actually prevent the persecution). The BIA is not relieved of its obligation to fully analyze the efficacy of state protection by merely pointing to the existence of laws and minimal efforts to take a report.

### 3. A Refugee Must Not be Penalized for Being Unwilling to Avail himself of State Protection.

Lastly, the BIA affirmed the IJ did not "clearly err[]" in determining that the "police" were able and willing "to control these private actors" in part because of Petitioner's failure to report sexual assault to the police. A.R. at 7. Using his unwillingness to "avail . . . of [state] protection" against him is contrary to the statute as recognized by this Court on numerous occasions. *See* 8 U.S.C. § 1101(a)(42)(A) (a refugee includes one who is "unable or unwilling to avail himself . . . of [state] protection"); *Bringas-Rodriguez*, 850 F.3d at 1066; *Ornelas-Chavez*, 458 F.3d at 1058; *Reyes-Reyes v. Ashcroft*, 384 F.3d 782, 789 n.3 (9th Cir. 2004) (noting that "a bright line rule [requiring reporting of sexual assault] would indeed be troubling"). Because the Agency did penalize Petitioner for his failure to report this incident while ignoring the significant evidence that doing so would been futile or dangerous, it erred as a matter of law.

## CONCLUSION

In light of the foregoing, the Court should grant Mr. Sylvestre's petition for review and remand his case to the BIA for further proceedings.

Dated: November 19, 2020

Respectfully submitted,

/s/ C. Shane Ellison
C. Shane Ellison
Katherine L. Evans
Amanda G. Dixon
DUKE UNIVERSITY SCHOOL OF LAW
210 Science Drive, Box 90360
Durham, North Carolina 27708
919-660-6956
ellison@law.duke.edu
Evans@law.duke.edu
Amanda.G.Dixon@lawnet.duke.edu

Tyler A. Young
Faegre Drinker Biddle & Reath, LLP
220 Wells Fargo Center
90 S. Seventh St.
Minneapolis, MN 55402
612-766-7000
tyler.young@faegredrinker.com

David Yoshimura
Stephanie Koltookian
Abdullah Azkalany
Adam Foresman
Faegre Drinker Biddle & Reath LLP
801 Grand Avenue, 33rd Floor
Des Moines, Iowa 50309

515-248-9000
david.yoshimura@faegredrinker.com
stephanie.koltookian@faegredrinker.com
abdullah.azkalany@faegredrinker.com
adam.foresman@faegredrinker.com

## CERTIFICATE OF SERVICE

I certify that on this 19th day of November 2020, I served the foregoing *Amicus Curiae* Brief of the American Immigration Lawyers Association in Support of Petition for Review From a Decision of the Board of Immigration Appeals by Petitioner Kelsy Sylvestre upon all counsel via the Court's ECF system.

Date: November 19, 2020

/s/ C. Shane Ellison
Charles Shane Ellison
Counsel for *Amicus Curiae* AILA

## CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify that:

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 4,752 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word Times New Roman 14-point font.

Date: November 19, 2020

/s/ C. Shane Ellison
Charles Shane Ellison
Counsel for *Amicus Curiae* AILA