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Forced Back Into the Lion's Mouth: Per Se Reporting Requirements in U.S. Asylum Law

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FORCED BACK INTO THE LION'S MOUTH: PER SE REPORTING REQUIREMENTS IN U.S. ASYLUM LAW

AMELIA S. MCGOWAN*

This Article makes a significant contribution to scholarship on asylum law by identifying and calling for the abolition of a deadly (but unexplored) development in asylum law: per se reporting requirements. In jurisdictions where they apply, per se reporting requirements automatically bar protection to asylum seekers solely because they did not report their non-state persecutors (such as cartels or domestic abusers) to the authorities before fleeing, even where reporting would have been futile or dangerous. These requirements similarly provide no exception where law enforcement openly support an applicant's persecutor.

This Article demonstrates that even though per se reporting requirements have no basis in asylum law, individual immigration judges throughout the United States have developed and imposed them surreptitiously on asylum applicants for over twenty years. These adjudicators have done so in the face of a rare precedential Board of Immigration Appeals (BIA) decision—binding on all immigration courts—rejecting the application of a reporting requirement in 2000. Even the BIA itself has applied reporting requirements in unpublished opinions since that decision, in direct opposition to its own precedent. While five courts of appeals have rejected these requirements, one has outright adopted them, and five have not taken a firm position on them.

This Article argues that reporting requirements are a surreptitious—but noteworthy—attack on the lives and safety of asylum seekers and the rule of law. The administrative bodies and federal courts that apply these requirements not only shirk their duty to meaningfully review claims for protection (and, at times, ignore their own precedent), but also violate U.S. treaty obligations and perpetuate the violence against the very people they are supposed to protect. The Article also offers solutions for legislative, administrative, and legal

* Assistant Professor and Immigration Clinic Director, University of Arkansas School of Law. This Article is dedicated to Marta and to all others seeking safety and freedom in the U.S. The Author would like to thank the members of the *Marquette Law Review*, workshop participants of the SEC Faculty Exchange at the University of Mississippi School of Law, Professors Margie Alsbrook, Blair Druhan Bullock, Sara Gosman, Jill Wieber Lens, Annie Smith, and Tim Tarvin, Deans Tiffany Murphy and Jill Wieber Lens, and Dr. Brian McGowan for their invaluable comments and support.

advocacy to abolish per se reporting requirements and to protect the safety and lives of asylum seekers. These reforms would establish a system that complies with the letter and spirit of U.S. asylum law nationwide, ensures adherence to U.S. treaty obligations, and encourages adjudicators to fulfill their duty to consider the record meaningfully.

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I. INTRODUCTION

Marta¹ knew something was wrong when she found dark vehicles circling around her family home and following her as she walked her son to school in her Mexican hometown. She feared the worst, as she heard from neighbors, friends, and the media that the constant presence of dark vehicles usually indicated cartel surveillance. She knew from other cases that threats, violence, and in some cases, death, could follow.

She was right. Days after the vehicles appeared, the chilling calls began. Each time, the unidentified caller told Marta that he knew where she lived and where her son attended school. The caller demanded a large sum of money and threatened to kidnap and kill Marta and her son if she did not pay. Terrified, Marta changed her phone number, but the calls continued.

Several days later, Marta received a note on her door—this time identifying the cartel making the threats and again threatening kidnapping and death if Marta did not comply with their demands. Marta told her family and friends, who encouraged her to flee. They knew the consequences: in just the past few months, that same cartel had stalked, kidnapped, tortured, and murdered two other young women in the area. Marta decided to flee to the U.S. with her son, fearing they would be next.

Marta did not turn to the local authorities for help before fleeing, believing that doing so would be useless or even dangerous. Family members discouraged her from reporting, warning her that the authorities would not investigate. Other community members who sought police protection from cartel violence shared

1. The asylum applicant's name and story have been anonymized to protect her identity.

that officers merely encouraged them to comply with cartel extortion demands, and, in one case, even coerced a victim's mother into withdrawing her report with threats of their own. Marta also likened filing a police report to "signing her own death sentence." She viewed the police and the cartels as "part of the same thing." Family and friends told Marta stories of the police covering up for cartels and harming victims or witnesses who reported crimes. Solidifying this belief, Marta witnessed cartel members kill three young men in her area, with police officers protecting the cartel members as they sped away.

Country conditions evidence in the record supported Marta's fears. The U.S. State Department's *Human Rights Report* on Mexico for that year noted that Mexico's "most significant human rights issues included involvement by police, military, and other state officials, sometimes in coordination with criminal organizations, in unlawful killings, disappearances, and torture."² The report further concluded that "[o]rganized criminal groups also were implicated in numerous killings, acting with impunity and at times in league with corrupt federal, state, local, and security officials" and that "[i]mpunity for human rights abuses remained a problem, with extremely low rates of prosecution for all forms of crimes."³

Another report from Mexico's National Citizen Femicide Observatory highlighted that misogyny often exacerbates impunity in cases of cartel violence targeting women and girls. The head of the Observatory, María de la Luz Estrada, explained that many Mexican officials:

[C]an't be bothered to probe [the cases], or claim it's the woman's fault, or can be bought off by criminal gangs. . . . "In a macho society like Mexico, authorities are always questioning what the women did. What was she wearing? Was she sexually active? This helps the impunity and lack of action."⁴

The National Citizen Femicide Observatory's report estimated that authorities investigated only 24% of femicides.⁵ Only 1.6% of those investigations led to a sentence.⁶

2. U.S. DEP'T OF STATE, BUREAU OF DEMOCRACY, H.R. & LAB., MEXICO 2017 HUMAN RIGHTS REPORT 1 (2017), <https://www.state.gov/wp-content/uploads/2019/01/Mexico.pdf> [<https://perma.cc/WD73-GZZE>].

3. *Id.*

4. Judith Matloff, *Six Women Murdered Each Day as Femicide in Mexico Nears a Pandemic*, ALJAZEERA AM. (Jan. 4, 2015, 5:00 AM), <http://america.aljazeera.com/multimedia/2015/1/mexico-s-pandemicfemicides.html> [<https://perma.cc/YJ6F-BCSK>].

5. *Id.*

6. *Id.*

Despite this testimony and undisputed country conditions evidence, the immigration judge (IJ) denied Marta protection, in part because she did not report the harm she suffered to the authorities who were complicit with her persecutors.⁷ The IJ found Marta to be credible, but concluded that because Marta and her son did “not attempt[] to resolve their issues via the police there [wa]s no evidence to indicate that the Mexican government [wa]s unable or unwilling to control” the cartel members.⁸ The IJ’s analysis made no mention of Marta’s testimony explaining her fears about reporting, or the volumes of uncontested evidence in the record demonstrating the futility and danger of reporting.⁹ Instead, she ordered Marta and her son’s removal to Mexico—back into the hands of the cartel members and the authorities who openly and unquestionably supported them.¹⁰

This Article is the first to identify and analyze these hardline, or “per se,” reporting requirements in U.S. asylum law and argue for their abolition. As this Article will demonstrate, Marta’s case is far from unique. For at least the past two decades, IJs around the country have created and imposed these per se reporting requirements on asylum applicants fleeing non-state persecutors—with no legal basis to do so.

These requirements are deadly. They automatically bar protection to asylum seekers solely because they did not report their non-state persecutors to the authorities before fleeing, even if reporting would have been futile or even subjected the applicant to greater harm. In these cases, a cartel victim like Marta must file a report, despite uncontested evidence that the police in her country work hand-in-hand with cartels and even carry out violence on cartels’ behalf. A domestic violence victim must report their abuser, despite the abuser’s credible death threats and ties to the government. An Indigenous victim of racist violence must report to authorities who may not speak their language and who may be hostile to them.

These requirements also undermine the rule of law. They impose potentially dangerous (and, at times, impossible) standards for asylum seekers to meet, violating both the letter and spirit of asylum law and U.S. treaty obligations. They also blithely ignore legal precedent. While the BIA (the first level of appellate review of immigration court decisions) rejected per se reporting requirements in a 2000 decision that was binding on the BIA itself and all immigration courts nationwide, some IJs around the country have

7. *In re* A-R-, No. AXXXXX2298 (Immig. Ct. New Orleans June 5, 2018) (redacted, on file with author).

8. *Id.*

9. *Id.*

10. *Id.*

refused to follow it consistently.¹¹ The appellate process has largely failed in correcting these errors: the BIA itself has not followed its own precedent consistently and numerous courts of appeals have approved of *per se* reporting requirements in published and unpublished opinions.¹² Finally, reporting requirements mandate that adjudicators (and reviewing courts) ignore portions of the record that explain the applicant's reasons for not reporting, including proof, as in Marta's case, that reporting would have been futile, dangerous, or otherwise unreasonable.

While these requirements are surreptitious and unexplored in asylum law scholarship, they represent a tremendous risk to lives and the rule of law.¹³ The agencies and federal courts that adopt these requirements not only shirk their duty to meaningfully review claims for protection (and, at times, ignore their own precedent), but also perpetuate the violence against the very people they are supposed to protect. Therefore, they merit a careful review and strong rebuke.

While the BIA has again rejected *per se* reporting requirements in a published opinion in 2023,¹⁴ this Article demonstrates that its decision does not guarantee the end of *per se* reporting requirements. First, it is uncertain whether the BIA will follow its own precedent. After the BIA first rejected reporting requirements in 2000, both the BIA itself and some courts of appeals continued to apply them, as demonstrated *infra*. Second, following the BIA's 2000 decision, each court of appeals has addressed *per se* reporting requirements, with one circuit that affirmatively approves of them and five that have taken

11. *In re S-A-*, 22 I. & N. Dec. 1328, 1335 (B.I.A. 2000). As discussed *infra*, the BIA again rejected *per se* reporting requirements in a published opinion in 2023. See *In re C-G-T-*, 28 I. & N. Dec. 740, 743–45 (B.I.A. 2023); see also *infra* Section II.B.iv.

12. See *infra* Section II.B.iii.

13. As an example, in 2023 alone, nearly 35% of all asylum seekers receiving decisions in U.S. immigration courts were citizens of four Latin American countries: Mexico, Guatemala, Honduras, and El Salvador. See *Immigration Court Asylum Backlog*, TRAC: IMMIGR. (Dec. 2023), <https://trac.syr.edu/phptools/immigration/asylumb/> [<https://perma.cc/5CFP-H622>]. Much—if not most—of the violence that asylum seekers from these countries have fled is at the hands of non-state persecutors, such as gangs, cartels, and abusive family members or partners. *El Salvador, Guatemala and Honduras Situation*, UNHCR: GLOB. FOCUS, <https://reporting.unhcr.org/ncasituation> [<https://perma.cc/U496-QP7D>]; *The Impact of Violence Against Women on Central American Migration*, WILSON CTR. (June 15, 2022), <https://www.wilsoncenter.org/event/impact-violence-against-women-central-american-migration> [<https://perma.cc/7UXW-9XSD>]. In these cases, the states asylum seekers flee frequently fail to protect asylum seekers from that harm—and, as in Marta's case, sometimes even encourage the persecution. Amelia Cheatham & Diana Roy, *Central America's Turbulent Northern Triangle*, COUNCIL ON FOREIGN RELS. (June 22, 2022, 2:55 PM), <https://www.cfr.org/background/central-americas-turbulent-northern-triangle> [<https://perma.cc/7XQY-A896>].

14. *In re C-G-T-*, 28 I. & N. Dec. at 743–45.

inconsistent or unclear positions. Finally, as discussed *infra*, the 2023 decision raises additional questions as to an applicant's burden of proof.¹⁵

This Article highlights the dangers of per se reporting requirements, tracks their development throughout the BIA and courts of appeals, and argues for their abolition. Part II will discuss how per se reporting requirements fit within the greater context of U.S. asylum law. It will also survey the evolution of these reporting requirements—including the development of exceptions for futility, danger, or both—before the BIA and courts of appeals. Part III addresses the legal and policy concerns of per se reporting requirements and will argue that they endanger lives and violate the letter and spirit of asylum law, U.S. treaty obligations, and the rule of law. Finally, Part IV will offer recommendations for legislative, administrative, and legal advocacy to abolish per se reporting requirements and ensure meaningful protections for asylum applicants fleeing non-state persecutors.

II. THE ORIGIN AND DEVELOPMENT OF PER SE REPORTING REQUIREMENTS

A. Per Se Reporting Requirements within the Broader Context of U.S. Asylum Law

Before discussing per se reporting requirements, it is important to place them within the larger context of U.S. asylum law. Asylum is the central legal protection for non-citizens in the U.S. who fear returning to their country of citizenship (or last habitual residence) due to persecution. Having acceded to the 1967 Protocol Relating to the Status of Refugees, the U.S. may offer asylum status to non-citizens who apply for protection within the U.S. and meet the definition of a “refugee,” subject to certain limitations.¹⁶ Under that definition (as adopted into U.S. domestic law through the 1980 Refugee Act), a refugee is:

[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 persecution on account of race, religion, nationality,

15. See *infra* Section II.B.iv.

16. Protocol Relating to the Status of Refugees, art. 1, Jan. 31, 1967, 606 U.N.T.S. 268 [hereinafter Refugee Protocol], https://treaties.un.org/doc/Treaties/1967/10/19671004%2007-06%20AM/Ch_V_5p.pdf [https://perma.cc/A54R-G59N]; see also 8 U.S.C. § 1158(a)(2).

membership in a particular social group, or political opinion.¹⁷

U.S. law offers two avenues for applying for asylum protection: affirmative and defensive, depending on the applicant's circumstances. Applicants who are not in removal (formerly known as deportation) proceedings may apply for affirmative asylum before an asylum office of the Department of Homeland Security's U.S. Citizenship and Immigration Services (USCIS), provided they file within one year of their entry or they can show exceptional or changed circumstances that prevented their timely filing.¹⁸ On the other hand, most non-citizens who are in removal proceedings must file their applications defensively before the immigration court, which is a component of the Department of Justice's Executive Office for Immigration Review (EOIR).¹⁹ Asylum applicants in defensive proceedings may also apply for the related protections of withholding of removal and protection under the United Nations (U.N.) Convention Against Torture if they are eligible.²⁰

While both avenues for protection are important, defensive proceedings are often a matter of life or death. Unlike applicants in affirmative proceedings, defensive applicants for asylum and related protections who do not prevail generally receive an order removing them to the country where they fear persecution and barring their return for a period of years—or permanently—

17. 8 U.S.C. § 1101(a)(42) (emphasis added); Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (codified as amended in scattered sections of 8 and 22 U.S.C.). The definition excludes anyone who “ordered, incited, assisted, or otherwise participated” in the persecution of anyone on account of these protected grounds. 8 U.S.C. § 1101(a)(42).

18. See 8 C.F.R. § 208.2(a)(1)(i); see also 8 U.S.C. § 1158(a)(2)(B)–(D) (discussing the one-year deadline and potential exceptions); *Obtaining Asylum in the U.S.*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum/obtaining-asylum-in-the-united-states> [<https://perma.cc/U5MR-PUEJ>] (discussing affirmative asylum procedure). Unaccompanied children may also file for affirmative asylum, even if they are in removal proceedings. *Minor Children Applying for Asylum by Themselves*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum/minor-children-applying-for-asylum-by-themselves> [<https://perma.cc/FQ8U-HYLQ>].

19. See 8 C.F.R. § 208.2(b). Pursuant to 8 C.F.R. § 208.14(c)(1), affirmative asylum applicants who appear to be inadmissible or deportable and do not prevail before USCIS may also have their cases referred to EOIR, where they may relitigate their claims before an immigration judge (but face the possibility of removal if they do not prevail). Compare, e.g., 8 U.S.C. §§ 1158, 1159 (noting burdens of proof in and benefits of asylum), with 8 C.F.R. §§ 208.16, 208.17 (noting burdens of proof in and benefits of withholding of removal and protection under the Convention Against Torture), and *INS v. Cardoza-Fonseca*, 480 U.S. 421, 425–31 (1987) (discussing the different burdens of proof in asylum and withholding of removal).

20. 8 C.F.R. §§ 208.16, 208.17. However, in addition to requiring a higher burden of proof (and a completely separate analysis in the case of the Convention Against Torture), these withholding and CAT protections do not offer the robust protections that asylum does, including a pathway to lawful permanent residence (i.e., a green card).

depending on the circumstances.²¹ Despite the grave consequences of a removal order, defensive asylum applicants face an uneven playing field in court. Unlike affirmative asylum, defensive asylum proceedings are adversarial, with an IJ presiding.²² While the government always has representation through the Department of Homeland Security, it does not provide counsel to asylum seekers in the vast majority of proceedings.²³

In both affirmative and defensive asylum proceedings, applicants bear the burden of demonstrating that they meet the definition of a refugee.²⁴ They may meet this burden with their testimony alone, however, as long as it is “credible, is persuasive, and refers to specific facts sufficient to demonstrate that the applicant is a refugee.”²⁵ Moreover, most courts agree that IJs bear a “legal duty to fully develop the record in the cases that come before them,” especially in cases involving unrepresented applicants.²⁶

Additionally, in both types of proceedings, the law that asylum adjudicators apply comes from three primary sources: statutes (largely rooted in the 1967 U.N. Protocol Relating to the Status of Refugees by way of the Refugee Act of

21. See 8 C.F.R. § 1240.12; 8 U.S.C. § 1182(a)(9).

22. Compare 8 C.F.R. § 208.9(b), with 8 C.F.R. § 1240.2(a).

23. See 8 U.S.C. § 1362. The U.S. government has funded counsel for non-citizens in very limited circumstances. For example, under the Counsel for Children Initiative (CCI), the government funds representation for “certain unaccompanied children in eight immigration courts” nationwide. Holly Straut-Eppsteiner, *U.S. Immigration Courts: Access to Counsel in Removal Proceedings and Legal Access Programs*, CONG. RSCH. SERV. (July 6, 2022), <https://sgp.fas.org/crs/homesec/IF12158.pdf> [<https://perma.cc/S7RS-HSJQ>]. Through the National Qualified Representative Program (NQRP), the federal government funds qualified representatives for “certain unrepresented and detained respondents who are found by an Immigration Judge or the BIA to be mentally incompetent to represent themselves in immigration proceedings.” *National Qualified Representative Program*, U.S. DEP’T OF JUST., <https://www.justice.gov/eoir/national-qualified-representative-program-nqrp> [<https://perma.cc/N2JF-RT7C>]. Additionally, some state and local governments have funded immigration representation programs. *Advancing Universal Representation Initiative*, VERA INST. OF JUST., <https://www.vera.org/ending-mass-incarceration/reducing-incarceration/detention-of-immigrants/advancing-universal-representation-initiative> [<https://perma.cc/JG9R-4LNS>]. Outside of these limited circumstances, asylum seekers must hire a private attorney, locate one of the few law school immigration legal clinics, nonprofit immigration legal services programs, or pro bono programs that has capacity to accept new clients, or defend themselves alone. Lindsay M. Harris, *The One-Year Bar to Asylum in the Age of the Immigration Court Backlog*, 2016 WIS. L. REV. 1185, 1208–10.

24. 8 U.S.C. § 1158(b)(1)(B)(i).

25. 8 U.S.C. § 1158(b)(1)(B)(ii). Nevertheless, even if an adjudicator finds an applicant’s testimony to be credible but believes an applicant should provide corroborating evidence, “such evidence must be provided unless the applicant does not have the evidence and cannot reasonably obtain the evidence.” *Id.*

26. Jayanth K. Krishnan, *Overstepping: U.S. Immigration Judges and the Power to Develop the Record*, 2022 WIS. L. REV. 57, 59 (quoting *Quintero v. Garland*, 998 F.3d 612, 626 (4th Cir. 2021)).

1980), administrative regulations, and caselaw.²⁷ The statutes and administrative regulations provide the outer structure of U.S. asylum law, while caselaw attempts to fill their “gaps,” grappling with the many nuances of the refugee definition. Some of these questions include whether certain acts rise to the level of persecution, what constitutes a “particular social group,” and whether a state is unable or unwilling to protect an asylum applicant from a non-state persecutor.²⁸

To understand the development of this caselaw, however, one must first understand the U.S. asylum appellate system that creates it. While immigration court decisions themselves are not binding or even publicly available, applicants (or far less frequently, the Department of Homeland Security as prosecutor) may appeal an adverse decision to a nationwide administrative appellate body known as the BIA, which also falls under the Department of Justice.²⁹ In most cases, applicants are appealing an order denying all relief and ordering removal.³⁰ The BIA issues around thirty published opinions per year.³¹ These decisions are publicly available and are binding precedent “in all proceedings involving the same issue or issues” before all immigration courts and the BIA itself (unless modified or overruled by the BIA in a subsequent precedential decision, the Attorney General, or a federal court).³² The vast majority of BIA decisions—around 30,000 per year—are unpublished and non-precedential.³³ As discussed *infra*, these opinions are largely unavailable to non-parties at this time.³⁴

From the BIA, an applicant then may appeal an adverse decision to the court of appeals “for the judicial circuit in which the IJ completed the proceedings.”³⁵ Through these appeals, the courts of appeals create the bulk of the caselaw—in

27. Refugee Protocol, *supra* note 16; 8 U.S.C. § 1158; Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (codified as amended in scattered sections of 8 and 22 U.S.C.); 8 C.F.R. §§ 208.1–208.31.

28. *See, e.g.*, Ruiz v. Mukasey, 526 F.3d 31, 36 (1st Cir. 2008) (“The [Immigration and Nationality Act] provides no specific definition of the term ‘persecution.’ In light of this lacuna, we have concluded that what constitutes persecution is a question best answered on a case-by-case basis.”); *In re M-E-V-G-*, 26 I. & N. Dec. 227, 237 (B.I.A. 2014) (interpreting the elements of a particular social group); *Bringas-Rodriguez v. Sessions*, 850 F.3d 1051, 1055–56 (9th Cir. 2017) (en banc).

29. 8 C.F.R. §§ 1003.1(a)–(b).

30. 8 C.F.R. § 1003.1(b).

31. *Agency Decisions*, U.S. DEP’T OF JUST.: EXEC. OFF. FOR IMMIGR. REV., <https://www.justice.gov/eoir/ag-bia-decisions> [<https://perma.cc/LUM9-WCCN>].

32. *Id.*; 8 C.F.R. § 1003.1(g).

33. Complaint at 4, *N.Y. Legal Assistance Grp. v. B.I.A.*, 401 F. Supp. 3d 445 (S.D.N.Y. 2019) (No. 18-cv-9495), *vacated and remanded*, 987 F.3d 207 (2d Cir. 2021).

34. *Id.* at 4–7. On the other hand, as discussed *infra* Section II.B.iii, prosecuting attorneys with the Department of Homeland Security as well as the immigration courts and BIA may access (and, at times, cite) these unpublished decisions.

35. 8 U.S.C. § 1252(b)(2).

both published and unpublished opinions—relevant to asylum and its related protections of withholding of removal and protection under the U.N. Convention Against Torture in the U.S. The published caselaw that each court of appeals develops applies to all immigration courts and asylum offices within that circuit, as well as to the BIA when hearing cases arising from immigration courts within that circuit.³⁶ Because each court of appeals may interpret critical aspects of asylum law differently, asylum applicants fleeing similar circumstances may face vastly different results depending on the circuit in which their application is pending.³⁷ Finally, applicants may file a petition for writ of certiorari in the U.S. Supreme Court; however, it is rare that the Court grants review in asylum cases.³⁸

One area of circuit divergence—that can have real life-or-death implications for asylum applicants—is the analysis to determine whether a state is “unable or unwilling” to protect an asylum applicant from a non-state persecutor. The BIA and courts of appeals have recognized that under the refugee definition, persecutors may either be the state itself, or a non-state actor—such as an abusive family member or partner, or a gang, cartel, or terrorist group—that the state is “unable or unwilling” to control.³⁹ In these cases, the applicant bears the burden of demonstrating that the state was, or would be, “unable or unwilling” to protect them.⁴⁰ Courts and the BIA have grappled with the meaning of “unable or unwilling” in practice, however.

One question surrounding the “unable or unwilling” interpretation is focused on the state. What standard should adjudicators apply to determine whether a state is unable or unwilling to protect an applicant from a non-state persecutor? Professors Charles Shane Ellison and Anjum Gupta have examined this issue in depth, comparing the traditional “unwilling-or-unable” standard to the “condone-or-completely helpless” formulation promoted by the Trump administration and adopted by some courts of appeals.⁴¹ Ellison and Gupta

36. *Id.*; 28 U.S.C. § 41; *In re U. Singh*, 25 I. & N. Dec. 670, 672 (B.I.A. 2012) (“We apply the law of the circuit in cases arising in that jurisdiction . . .”).

37. Jaya Ramji-Nogales, Andrew I. Schoenholtz & Philip G. Schrag, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295, 375–76 (2007).

38. See Iлона Bray, *How Many Times Can You Appeal an Asylum Denial?*, NOLO, <https://www.nolo.com/legal-encyclopedia/how-many-times-you-can-appeal-asylum-denial.html> [<https://perma.cc/MA7N-QGAV>]; see also *generally Granted & Noted Cases List*, SUP. CT. OF THE U.S., <https://www.supremecourt.gov/orders/grantednotedlists.aspx> [<https://perma.cc/4KDS-C49K>].

39. Charles Shane Ellison & Anjum Gupta, *Unwilling or Unable? The Failure to Conform the Nonstate Actor Standard in Asylum Claims to the Refugee Act*, 52 COLUM. HUM. RTS. REV. 441, 445–92 (2021) (tracking the development of the non-state actor standard before the BIA and the federal circuit courts).

40. *Id.* at 447; 8 U.S.C. § 1158(b)(1)(B)(i).

41. Ellison & Gupta, *supra* note 39, at 492–552.

reject the latter test, concluding that it places a heightened burden on asylum seekers and is “antithetical to the protections afforded by the statute and treaty and poses an insurmountable hurdle for many of the world’s most vulnerable refugees.”⁴²

A related and equally important question, unexplored in asylum law scholarship until this Article, focuses on the applicant in the “unable or unwilling” analysis. Must an applicant first try to seek the help of the authorities in their home country to show that the government was, or would be, unwilling or unable to protect them before seeking protection in the U.S.? This is the question this Article seeks to address.

Neither the statutes nor the regulations require applicants to have reported persecution to the authorities in their home countries before seeking protection in the U.S. In fact, the U.N.—the source of the 1967 Protocol that became the basis of U.S. asylum law⁴³—explicitly rejects these per se reporting requirements.⁴⁴ As analyzed below, the BIA (in rare published opinions in 2000 and 2023) and five of the courts of appeals have correctly adopted this approach.⁴⁵

Nevertheless, these per se reporting requirements have slowly and surreptitiously corrupted U.S. asylum law, barring protection for the most vulnerable. Since at least 2000, individual IJs throughout the country have read these requirements into their “unable or unwilling” analyses, without legal authority.⁴⁶ Despite its binding precedent to the contrary, the BIA has affirmed this deadly practice in many of its unpublished opinions since.⁴⁷ One court of appeals currently rubber-stamps this practice outright, while the remaining five have vacillated or otherwise have not taken a firm position on the issue.⁴⁸ In 2020, the Trump administration attempted to adopt a per se reporting requirement as part of its sweeping asylum regulations (often termed the “Death to Asylum” rule),⁴⁹ but a U.S. District Court enjoined the rule just days before

42. *Id.* at 442, 448–52.

43. Refugee Protocol, *supra* note 16; 8 U.S.C. § 1158.

44. UNHCR, *Guidelines on International Protection No. 9: Claims to Refugee Status Based on Sexual Orientation and/or Gender Identify Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees*, ¶ 36, U.N. Doc. HCR/GIP/12/09 (Oct. 23, 2012), <https://www.unhcr.org/sites/default/files/legacy-pdf/509136ca9.pdf> [<https://perma.cc/9AHU-STE9>]; *see also infra* Section III.E.

45. *See infra* Section II.B.

46. *See infra* Section II.B.

47. *See infra* Section II.B.ii.

48. *See infra* Section I.B.iii.

49. Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, 85 Fed. Reg. 80274, 80394 (Dec. 11, 2020) (codified at 8 C.F.R. pts. 208, 235, 1003, 1208,

it took effect.⁵⁰ But as this Article will demonstrate, these reporting requirements continue to persist in immigration courts throughout the country, as they have for at least two decades.⁵¹ While overlooked, these requirements—like the “condoned-or-completely-helpless” standard—fly in the face of asylum protections by improperly foreclosing claims of many asylum seekers for whom reporting would have been, or would be, futile, dangerous, and even deadly.

B. The Development of Per Se Reporting Requirements

i. In re S-A-: An Early, Nationwide Rebuke of Per Se Reporting Requirements

Per se reporting requirements became a nationwide issue in 2000, when the BIA considered (and ultimately rejected) them in a rare published opinion, *In re S-A-*.⁵² Before that case reached the BIA, an IJ denied asylum and related protections to Ms. S.A., a Moroccan woman whose father physically and emotionally abused her because of her liberal Muslim beliefs.⁵³ His abuse included burning her thighs with a heated razor when she wore a skirt that he considered inappropriate outside the home, shouted and beat her in the face with a metal ring when she spoke with a young man, and punched and kicked her after she visited some friends.⁵⁴ This physical abuse happened at “a minimum of once a week.”⁵⁵ He also prohibited her from attending school or seeing friends, telling her that “a girl should stay at home and should be covered or veiled all the time.”⁵⁶ Because of the abuse, Ms. S.A. attempted suicide twice in Morocco—once leaving her hospitalized and unconscious for three days.⁵⁷ Her family then assisted her in seeking safety in the U.S.⁵⁸ Ms. S.A. did not seek help from the police because her mother previously attempted without success.⁵⁹ Her aunt testified that “going to the police would have been futile, because under Muslim law, particularly in Morocco, a father’s power over his

and 1235), *enjoined by* Pangea Legal Servs. v. U.S. Dep’t of Homeland Sec., 512 F. Supp. 3d 966, 977 (N.D. Cal. 2021).

50. *Pangea Legal Servs.*, 512 F. Supp. 3d at 977.

51. *See infra* Section II.B.

52. *In re S-A-*, 22 I. & N. Dec. 1328, 1335 (B.I.A. 2000).

53. *Id.* at 1328–31.

54. *Id.* at 1329–30.

55. *Id.* at 1329.

56. *Id.* at 1329–30.

57. *Id.* at 1330.

58. *Id.*

59. *Id.*

daughter is unfettered.”⁶⁰ The IJ denied Ms. S.A.’s applications for asylum and similar relief.⁶¹

The BIA sustained Ms. S.A.’s appeal and granted asylum.⁶² Among other things, the three-member panel found that Ms. S.A. demonstrated that the Moroccan government would have been unable or unwilling to protect her from her father, even though she never reported the abuse.⁶³ Considering the testimony of Ms. S.A. and her aunt, as well as the country conditions evidence, the BIA concluded that “the evidence convinces us that even if [Ms. S.A.] had turned to the government for help, Moroccan authorities would have been unable or unwilling to control her father’s conduct. [Ms. S.A.] would have been compelled to return to her domestic situation and her circumstances may well have worsened.”⁶⁴

In re S-A- made clear that reporting is not necessary to demonstrate that a state is unable or unwilling to protect an applicant from a non-state persecutor—at least when an applicant demonstrated that reporting would be futile or dangerous.⁶⁵ And as a precedential opinion, the Code of Federal Regulations mandates that it “shall be binding on all officers and employees of the Department of Homeland Security or IJs in the administration of the immigration laws of the United States,” unless modified or overturned.⁶⁶ As a result, all immigration courts nationwide—as well as the BIA itself—must follow it.

ii. The Continued Development of Per Se Reporting Requirements in Immigration Courts and the BIA Despite *In re S-A-*

Despite the BIA’s decision in *In re S-A-*, individual immigration courts throughout the U.S. have continued to apply per se reporting requirements, given the number of decisions on the issue in courts of appeals throughout the country.⁶⁷ The BIA itself has also applied per se reporting requirements in unpublished cases, despite its own binding precedent.⁶⁸ Many of the opinions from the federal courts of appeals, analyzed *infra*, involve cases in which the BIA did not disturb an IJ’s application of a per se reporting requirement or

60. *Id.* at 1330.

61. *Id.* at 1328, 1331.

62. *Id.* at 1337.

63. *Id.* at 1335.

64. *Id.*

65. *Id.*

66. 8 C.F.R. § 103.10(b).

67. See *infra* Section I.B.iii.

68. *Id.*

applied a per se reporting requirement on its own.⁶⁹ This includes at least one instance, in a case before the First Circuit, of the BIA's *reversal* of an IJ's grant of relief based in part on the applicant's failure to report the gang violence he suffered.⁷⁰ On appeal, the First Circuit chided the BIA for "ignor[ing] the proposition in our case law" providing exceptions for danger and futility and for "compound[ing] that error" by ignoring the copious country conditions evidence and the applicant's credible testimony demonstrating that he warranted an exception.⁷¹ The repeated failure of these immigration courts and the BIA to follow this binding precedent consistently undermines the rule of law and has potentially deadly consequences, as discussed *infra*.⁷²

iii. Divided Reactions in the Courts of Appeals

Since *In re S-A-*, the First through Eleventh Circuits (all federal circuit courts of appeals hearing appeals from immigration court decisions) have all addressed these requirements—at least in an unpublished opinion—with divided results.⁷³ One circuit currently approves of per se reporting requirements while five reject them, as the BIA did in *In re S-A-*.⁷⁴ Five have taken conflicting or uncertain positions. Given that nearly all these opinions involve the application of a per se reporting requirement in the proceedings below, these cases from the courts of appeals also reflect the failure of the immigration courts and the BIA to follow *S-A-*, which, as noted *supra*, is binding on the BIA itself and all immigration courts.⁷⁵

This Article analyzes both published and unpublished opinions from each of these circuits to track the development of per se reporting requirements after *In re S-A-*.⁷⁶ Following a thorough review of relevant cases in each circuit, this analysis organizes the courts of appeals' current positions into three groups: courts that adopt or approve of per se reporting requirements, courts that reject them, and courts whose approach is inconsistent or otherwise unclear. This

69. *Id.*

70. *Rosales Justo v. Sessions*, 895 F.3d 154, 158, 160 (1st Cir. 2018).

71. *Id.* at 165–66.

72. *See infra* Section III.

73. Each of these courts has at least one immigration court within its circuit. The D.C. and Federal Circuits are not included in this analysis as they do not have immigration courts within their jurisdictions. *See Find an Immigration Court and Access Internet-Based Hearings*, U.S. DEP'T OF JUST., <https://www.justice.gov/eoir/find-immigration-court-and-access-internet-based-hearings> [<https://perma.cc/K4CA-LFJZ>] (listing all U.S. immigration courts alphabetized by state); 8 U.S.C. § 1252(b)(2) (establishing "the court of appeals for the judicial circuit in which the immigration judge completed the proceedings" as the proper venue for petitions for review of removal orders).

74. *See infra* Section II.B.

75. *See infra* Sections II.B.iii.

76. This Article includes decisions through November 2023.

overview does not include every case in each circuit addressing per se reporting requirements. Instead, it focuses on decisions that indicate each circuit's current position on the issue as well as cases leading up to those decisions that provide important context or demonstrate a shift in approach. While this analysis focuses primarily on published cases, it also includes unpublished cases to highlight inconsistencies or uncertainties. All case discussions in this analysis include information on each applicant's past persecution, reasons for not reporting, and relevant country conditions evidence, where available, to demonstrate how these factors influenced a court's decision, if at all.

While including immigration court and asylum office decisions would provide the most comprehensive view of how (and where) immigration courts are applying reporting requirements, those decisions are sealed and unavailable to those who are not parties, their attorneys, or U.S. government agencies (with limited exceptions).⁷⁷ Reviewing BIA opinions would also be helpful in determining the extent to which the BIA fails to follow *In re S-A-* in unpublished opinions; however, such a review is likewise impossible at this time. As discussed *supra*, the BIA publishes only a handful of its cases a year, and unlike the courts of appeals, the BIA's unpublished opinions are largely unavailable to the public, including to non-citizens and their attorneys appearing before them.⁷⁸ (Meanwhile, these unpublished decisions "are cited and relied upon by the BIA itself, by IJs, and by lawyers representing the government in immigration proceedings."⁷⁹) The New York Legal Assistance Group successfully litigated for the release of these BIA opinions to the public under the Freedom of Information Act (FOIA); however, under the terms of its settlement, the release will take place over several years.⁸⁰ As of February 2024, the BIA has only released approximately 37,680 redacted unpublished opinions.⁸¹

77. 8 C.F.R. § 208.6.

78. *See supra* Section II.A. Non-citizens and their attorneys can access a small number of unpublished opinions that the BIA has made available in hard copy in its reading room in Virginia. Complaint at 5, N.Y. Legal Assistance Grp. v. B.I.A., 401 F. Supp. 3d 445 (S.D.N.Y. 2019) (No. 18-cv-9495), *vacated and remanded*, 987 F.3d 207 (2d Cir. 2021). Several commercial databases, such as Lexis, Westlaw, and the Immigrant & Refugee Appellate Center, have copied these unpublished opinions and made them available to the public for a fee. *Id.*

79. N.Y. Legal Assistance Grp. v. B.I.A., 987 F.3d 207, 209 (2d Cir. 2021) (emphasis added).

80. Stipulation of Settlement at 2–7, N.Y. Legal Assistance Grp. v. B.I.A., 401 F. Supp. 3d 445 (S.D.N.Y. 2019) (No. 18-cv-9495); Stipulation and Order at 2, N. Y. Legal Assistance Grp. v. B.I.A., 401 F. Supp. 3d 445 (S.D.N.Y. 2019) (No. 18-civ-9495).

81. *Id.*; *Reading Room-Executive Office for Immigration Review FOIA Public Access Link*, U.S. DEP'T OF JUST., <https://foia.eoir.justice.gov/app/ReadingRoom.aspx> [<https://perma.cc/K6P6-W4HY>] (including a full list of released decisions, which can be accessed by selecting "search" at this link without entering search terms).

Until the full release of the BIA's unpublished opinions, the only meaningful way to measure the development (or rejection) of per se reporting requirements is through the courts of appeals.⁸² While opinions from the courts of appeals do not tell the full story (for example, they represent only a fraction of cases below that address reporting requirements, their facts represent only the court's perspective and the sections of the record the court chooses to highlight, and the record and issues that the court addresses is limited to what the parties have submitted and argued), they offer helpful insight into the development and treatment of per se reporting requirements in each circuit. They also provide clues into general trends concerning reporting requirements in the immigration courts and the BIA below. Published opinions are particularly insightful, as they provide the interpretation that all asylum offices, immigration courts, and BIA adjudicating cases within their circuit must apply.⁸³

a. Courts that Approve of Per Se Reporting Requirements

One court of appeals, the Seventh Circuit, clearly approves of per se reporting requirements.

1. Seventh Circuit

While the Seventh Circuit appeared to acknowledge in 2013 that a futility exception to reporting may exist,⁸⁴ it relied in part on a bright-line reporting requirement in its denial of a Haitian asylum seeker's petition for review in a 2017 published decision.⁸⁵ There, the petitioner, Mr. Silais, sought asylum and related protections in the U.S. after fleeing political violence in Haiti.⁸⁶ Mr. Silais was a member of one of the two largest opposition political parties in Haiti, the OPL, that suffered sometimes violent disturbances from supporters of then-president Jean-Bertrand Aristide.⁸⁷ Known as the Chimères, these Aristide supporters "often disturbed OPL meetings that Silais had organized, beating participants, firing guns, or throwing rocks."⁸⁸ Two Chimères members in particular appeared to target Mr. Silais, once "placing a revolver in his mouth, and threatening to kill him," throwing rocks at him, and beating, cutting,

82. While the issue could be appealed to the U.S. Supreme Court, given the few immigration cases that it hears each term, the Court has not addressed this issue.

83. See 28 U.S.C. § 41.

84. *Vahora v. Holder*, 707 F.3d 904, 909–10 (7th Cir. 2013) (citing *Ornelas-Chavez v. Gonzales*, 458 F.3d 1052, 1058 (9th Cir. 2006)).

85. *Silais v. Sessions*, 855 F.3d 738, 738, 746–47 (7th Cir. 2017).

86. *Id.* at 739.

87. *Id.*

88. *Id.*

and stalking him on multiple occasions.⁸⁹ Mr. Silais did not report these incidents to the police.⁹⁰ However, while the Chimères were not officially part of the government, they “allegedly received benefits from various officials and included police officers in their ranks.”⁹¹

After fleeing Haiti and seeking protection in the U.S., Mr. Silais applied for asylum and related protections.⁹² Apart from his own testimony, Mr. Silais submitted a witness declaration, testimony and an affidavit from medical and country conditions experts, and media articles and country conditions reports about Haiti.⁹³ The IJ denied relief, finding, among other things, that Mr. Silais could not show that Haitian authorities were unable or unwilling to protect him because he “never attempted to file a police report or otherwise prompt law enforcement officers to intervene.”⁹⁴ The BIA adopted the IJ’s opinion, adding that it shared the IJ’s concerns about Mr. Silais’s lack of corroborating evidence.⁹⁵

The Seventh Circuit denied Mr. Silais’s petition for review, declining to disturb the IJ’s and BIA’s finding that Mr. Silais failed to carry his burden of proof.⁹⁶ Regarding the lack of a police report, the court noted that while Mr. Silais “*did not explicitly contest the fact that he had never filed a police report,*” he sufficiently raised the issue on appeal by arguing that the IJ and BIA ignored or improperly dismissed his evidence.⁹⁷ To that question, the court found that:

As the Agency stressed, Silais did not report any of the alleged incidents of harm to the Haitian police to give them an opportunity to intervene. While he challenged the Agency’s conclusion tangentially by arguing that the Agency had ignored related evidence, we have rejected those arguments.

This leaves the Agency’s finding otherwise undisturbed.⁹⁸

At no point did the court in *Silais* acknowledge *In re S-A-* or its own prior caselaw recognizing the existence of a futility/danger exception.⁹⁹

89. *Id.* at 739–40.

90. *Id.* at 740.

91. *Id.* at 739.

92. *Id.* at 738.

93. *Id.* at 738–41. The IJ excluded additional evidence that Mr. Silais attempted to file two days before his continued individual hearing. *Id.* at 740.

94. *Id.* at 741.

95. *Id.* at 741–42.

96. *Id.* at 742–47.

97. *Id.* at 746 n.7 (emphasis added).

98. *Id.* at 746.

99. *See id.* at 738–47.

The court solidified its approval of per se reporting requirements in a 2023 published decision, *Osorio-Morales v. Garland*.¹⁰⁰ There, it noted that “[w]e have also found it reasonable—even in cases of extreme violence—to expect asylum seekers to have sought help from the authorities before concluding that their country is ‘unable or unwilling’ to protect them.”¹⁰¹ In upholding the IJ’s determination that that Mr. Osorio-Morales failed to show that the Honduran government was unable or unwilling to protect him, the court concluded that “as the IJ noted, there is no evidence that anyone in Melvin’s family reported any of the violence to the police, so there is no way to know how the police would have reacted or whether the government would have helped. This means [Mr. Osorio-Morales] has failed to carry his burden.”¹⁰²

b. Courts that Reject Per Se Reporting Requirements

On the other hand, five courts of appeals clearly reject per se reporting requirements. These decisions generally base their decisions on two reasons: first, because the agency below failed to follow the principle of *In re S-A-*, and second, because per se rules represent a dereliction of an adjudicator’s duty to consider all evidence meaningfully—including evidence as to an applicant’s reasons for non-reporting. The Sixth Circuit bases its rejection on the latter reason while the First, Third, Fourth, and Ninth Circuits have rejected reporting requirements on both grounds.¹⁰³ For these courts, a bright-line rule cannot undermine thoughtful analysis that engages the full record and the realities of state protection (or lack thereof).

1. First Circuit

The First Circuit has shifted from approving of per se reporting requirements to rejecting them over time.¹⁰⁴ Most recently, the court outright

100. 72 F.4th 738, 743 (7th Cir. 2023).

101. *Id.*

102. *Id.* at 744 (internal citation omitted).

103. See *Zometa-Orellana v. Garland*, 19 F.4th 970, 979–80 (6th Cir. 2021); *Rosales Justo v. Sessions*, 895 F.3d 154, 165–66 (1st Cir. 2018); *Doe v. Att’y Gen.*, 956 F.3d 135, 146–49 (3d Cir. 2020); *Portillo-Flores v. Garland*, 3 F.4th 615, 634–37 (4th Cir. 2021) (en banc); *Bringas-Rodriguez v. Sessions*, 850 F.3d 1051, 1063–72 (9th Cir. 2017) (en banc).

104. In the 2005 case *Galicia v. Ashcroft*, the First Circuit affirmed a BIA decision denying an application for asylum filed by Luis Galicia, a gay Guatemalan man who suffered beatings and verbal abuse by his neighbors. 396 F.3d 446, 447–48 (1st Cir. 2005). The court upheld the IJ’s finding that Mr. Galicia could not show that Guatemalan authorities were unable or unwilling to protect him because Mr. Galicia “made no effort to contact the authorities or any other group in the country that might be able to help him.” *Id.* at 448. In 2017, the court shifted away from a per se approach by recognizing a futility exception but found that the exception did not apply in that case. *Morales-Morales v. Sessions*, 857 F.3d 130, 135 (1st Cir. 2017) (citing *Pavlova v. INS*, 441 F.3d 82, 91 (2d Cir. 2006); *Ornelas-Chavez v. Gonzales*, 458 F.3d 1052, 1058 (9th Cir. 2006)).

rejected the BIA's application of a bright-line reporting requirement in the case of a Mexican police officer, Mr. Rosales Justo, who suffered escalating threats because he and his family had refused to comply with extortion demands from apparent gang members.¹⁰⁵ Apart from threatening the family, the armed men also kidnapped, tortured, and murdered the couple's son in their hometown of Acapulco.¹⁰⁶ When Mr. Rosales Justo and his wife identified their son's body, they provided statements to police, who opened a criminal investigation.¹⁰⁷ The family also hired a private attorney to conduct an independent investigation.¹⁰⁸ The family tried to seek safety in another part of the country, yet the perpetrators pursued them.¹⁰⁹ Fearing murder, Mr. Rosales Justo and his family then decided to seek protection in the U.S.¹¹⁰ He did not report the stalkers to the police because he "was afraid members of organized crime would find and kill him" if he did.¹¹¹ He also shared from his own experience as a police officer that after a report, the "police usually conduct an initial investigation but, 'after that, all that, it gets archived. They don't really follow up with the cases,'" and that police rarely make arrests for murder because "the organized crime is overwhelmingly more [prevalent] than the police."¹¹²

The IJ granted asylum to Mr. Rosales Justo, finding, among other things, that while the Mexican authorities' steps to investigate the crimes indicated that they may have been willing to protect Mr. Rosales Justo, they would ultimately be unable to do so.¹¹³ The IJ cited to reports in the record stating that "some 94 percent of all crimes go unreported" in Guerrero, where "[i]mpunity, even for homicide, is the norm," and that "there were reports that police, particularly at the state and local level, were involved in kidnapping, extortion, and providing protection for or directly acting on behalf of organized crime and drug traffickers."¹¹⁴ Following the government's appeal, the BIA reversed, concluding that the IJ's finding that the Mexican government was "unable or unwilling" to protect Mr. Rosales Justo constituted clear error.¹¹⁵ In addition to finding the IJ's conclusion "impermissibly speculative," the BIA also rejected

105. *Rosales Justo*, 895 F.3d at 157–58, 165–66.

106. *Id.*

107. *Id.* at 158.

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.* at 166 (internal quotation marks omitted).

113. *Id.* at 160, 165.

114. *Id.* at 159–60 (alternation in original) (internal quotation marks omitted).

115. *Id.* at 160.

it because Mr. Rosales Justo did not report the gangs' attempts to pursue him to the police.¹¹⁶

On appeal, the First Circuit ordered remand.¹¹⁷ The court found that when the BIA imposed a per se reporting requirement, it “ignored the proposition in our case law that ‘the failure by a petitioner to make [a police] report is not necessarily fatal to a petitioner’s case [of persecution] if the petitioner can demonstrate that reporting private abuse to government authorities would have been futile.’”¹¹⁸ The court noted that the BIA “compounded that error” by ignoring the copious country conditions evidence in the record, as well as Mr. Rosales Justo’s own credible testimony “demonstrating that such a report would be futile or even dangerous.”¹¹⁹

2. Third Circuit

The Third Circuit also rejected a per se reporting requirement in a 2020 published opinion.¹²⁰ In that case, the Ghanaian applicant, Mr. Doe, sought protection in the U.S. after his father and neighbors discovered him with his male partner and “beat the two young men with stones, wooden sticks, and iron rods” before discussing whether to report the couple to the police or punish

116. *Id.*

117. *Id.* at 167–68.

118. *Id.* at 165 (alterations in original) (citing *Morales-Morales v. Sessions*, 857 F.3d 138, 135–36 (1st Cir. 2017)).

119. *Id.* at 165–66. In *Vila-Castro v. Garland*, the First Circuit addressed the relevance of futility/danger in the context of follow-up reporting in cases of continued harm. 77 F.4th 10, 14 (1st Cir. 2023). It noted its 2010 decision, *Barsoum v. Holder*, where the court found the record did not compel a finding that the state was unable or unwilling to protect a petitioner who “sought assistance from the police only once,” then “never again sought their help.” *Id.* (quoting *Barsoum v. Holder*, 617 F.3d 73, 80 (1st Cir. 2010) (internal quotation marks omitted)). Even in this situation, however, it appears that an applicant may successfully argue that subsequent reporting would have been futile or dangerous—although the First Circuit found the record did not compel such a finding in Ms. Vila-Castro’s case. *Id.* While the court recognized that Ms. Vila-Castro appeared to argue that a second report would have been futile, it reiterated from its 2017 decision in *Morales-Morales* that the “‘failure to report mistreatment’ due to ‘petitioner’s subjective belief that authorities are corrupt . . . is not, without more, sufficient’ to show that seeking police assistance would have been futile.” *Id.* (quoting *Morales-Morales*, 857 F.3d at 135). While Ms. Vila-Castro submitted evidence of official corruption in Peru in addition to her subjective belief, the court concluded that her evidence showed that “although corruption is a pervasive problem in Peru, the Peruvian government does take some action to investigate and prosecute corruption, and the evidence that the petitioners put forward does not compel a contrary conclusion.” *Id.* Therefore, this case appears to hinge upon evidence rather than the explicit application of a per se reporting requirement. It does, however, raise related concerns about the nature of evidence necessary to demonstrate futility, danger, or both. *See infra* Section III.

120. *Doe v. Att’y Gen.*, 956 F.3d 135, 139 (3d Cir. 2020). In a 2012 unpublished case, the Third Circuit indicated that it would not require reporting if reporting would be futile or expose the victim to greater danger. *See Cardozo v. Att’y Gen.*, 505 F. App’x 135, 138 (3d Cir. 2012) (citing *Ornelas-Chavez v. Gonzales*, 458 F.3d 1052, 1058 (9th Cir. 2006)).

them with “death by burning or beheading.”¹²¹ Mr. Doe fled and sought safety with a friend, as he was “[t]oo frightened to call the police, or seek medical care.”¹²² Still fearing for his life with his friend, Mr. Doe fled to Togo and then to Ecuador, where he began his trek to the U.S.¹²³ Mr. Doe heard that after his escape, his father “publicly disowned him for being gay” and that he said he would kill Mr. Doe if he found him.¹²⁴

Mr. Doe did not report the harm he suffered to Ghanaian authorities because he believed that if he reported, he would have exposed his sexual orientation to authorities and could have been “arrested, prosecuted and incarcerated” for up to three years because of the criminalization of same-sex male relationships in Ghana.¹²⁵ He testified that “I know that [homosexuality] is not something that is acceptable in my country, I know that the police would not like it as well, so my heart was racing, I was afraid. I was very afraid.”¹²⁶ He added that members of the mob who discovered and attacked him wanted to report him to the police to punish him, as they feared no consequences for their own violent actions.¹²⁷ Mr. Doe’s country conditions evidence supported his fears that reporting would have exposed him to greater danger. It included a U.S. State Department report that LGBTQIA+ people “faced police harassment and extortion” in Ghana and that “[t]here were reports police were reluctant to investigate claims of assault or violence against LGBTI persons.”¹²⁸ The reports also described widespread societal discrimination, blackmail, harassment, violence, and political rhetoric against LGBTQIA+ people in Ghana.¹²⁹

Denying Mr. Doe relief, the IJ found, among other things, that “country conditions do not indicate” that the Ghanaian government would be unable or unwilling to protect Mr. Doe and that “there [was] no reason to believe that [Mr. Doe] would not be able to live a full life, especially if he were to continue to keep his homosexuality a secret.”¹³⁰ On appeal, while the BIA disagreed with the IJ’s assessment that Mr. Doe would be able to live a “full life” by hiding his identity, it agreed with the denial of relief because while Ghana criminalized same-sex male relationships, “the offense is only a misdemeanor.”¹³¹

121. *Doe*, 956 F.3d at 138–39.

122. *Id.* at 139.

123. *Id.*

124. *Id.* at 139–40.

125. *Id.* at 147.

126. *Id.* at 148 (alteration in original) (internal quotation marks omitted).

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.* at 140, 149 (alteration in original) (internal quotation marks omitted).

131. *Id.* at 149.

Before the Third Circuit, the government argued that Mr. Doe could not meet the “unable or unwilling” requirement “because he did not report the assault to the police,” which it believed to be “fatal” to his claim.¹³² The Third Circuit soundly rejected this contention, pointing to other circuits, as well as the BIA’s decision in *S-A-*, that rejected per se reporting requirements in favor of a futility or danger exception.¹³³ Applying that test to Mr. Doe’s case, the court found that the “record is replete with evidence that Ghanaian law deprives gay men such as [Mr. Doe] of any meaningful recourse to government protection and that reporting his incident would have been futile and potentially dangerous.”¹³⁴ For example, the court found that the fact that Mr. Doe’s persecutors threatened to call the police on him “is compelling, if not dispositive, evidence that [Mr. Doe] had no meaningful recourse against his father’s and the mob’s homophobic violence. At best, seeking help from the police would have been counterproductive.”¹³⁵ Finding that the IJ and BIA “disregarded, mischaracterized and understated evidence” in support of Mr. Doe’s claim that the Ghanaian state was unable or unwilling to protect him, the court found that Mr. Doe qualified as a refugee.¹³⁶

3. Fourth Circuit

In 2021, the Fourth Circuit, sitting en banc, rejected a per se reporting requirement.¹³⁷ In that case, the Salvadoran petitioner, Mr. Portillo Flores, suffered severe repeated beatings and death threats from a leader and members of the notorious MS-13 gang.¹³⁸ On one occasion, he nearly died from the beatings.¹³⁹ When Mr. Portillo-Flores tried to flee to his uncle’s house, the police—accompanied by an MS-13 member—appeared at his home and demanded that he turn himself in to the gang.¹⁴⁰ Mr. Portillo-Flores then fled El Salvador for the U.S.¹⁴¹ He feared that if he had stayed in El Salvador, MS-13

132. *Id.* at 146.

133. *Id.* at 146–47 (citing *Bringas-Rodriguez v. Sessions*, 850 F.3d 1051, 1066 (9th Cir. 2017) (en banc); *Hernandez-Avalos v. Lynch*, 784 F.3d 944, 952 (4th Cir. 2015); *In re S-A-*, 22 I. & N. Dec. 1328, 1330, 1333, 1335 (B.I.A. 2000)).

134. *Id.* at 147.

135. *Id.* at 148.

136. *Id.* at 149, 156.

137. *Portillo-Flores v. Garland*, 3 F.4th 615, 621, 635–36 (4th Cir. 2021) (en banc).

138. *Id.* at 622. MS-13 targeted Mr. Portillo-Flores because the gang’s leader, El Pelón, had demanded to date Mr. Portillo-Flores’s sister (who was in the tenth grade and fled to the United States to escape his advances) and targeted Mr. Portillo-Flores (who was only fourteen at the time) because he refused to disclose his sister’s whereabouts. *Id.* at 623.

139. *Id.* at 623.

140. *Id.*

141. *Id.* at 624.

“would have killed [him] because the last time they beat [him] up, . . . [he] almost died. And [he] believe[d] that they could have taken more reprisals against [him].”¹⁴²

Mr. Portillo-Flores testified that he did not report the threats and violence to the police, not only because the police openly supported MS-13’s pursuit of him, but also because he “knew that the police did not have the capacity to protect [him] from th[e] gang.”¹⁴³ He also testified that when his friend tried to report MS-13 to the police, he “turned up dead inside of a well.”¹⁴⁴ An expert also testified on Mr. Portillo-Flores’ behalf, explaining that not only did Salvadoran authorities fail to protect the population from MS-13, but they also openly collaborated with the gang.¹⁴⁵ According to the expert, contacting law enforcement could have put Mr. Portillo-Flores at greater risk of harm because gangs like MS-13 “seek to obtain the name of the person who reported [their activity] via their sources within the police, government and community and take revenge to send the message that others should not report similar crimes.”¹⁴⁶

The IJ denied all relief.¹⁴⁷ Among other things, the IJ found that MS-13’s violent attacks and threats “did not occur at the hands of the El Salvadoran government or an agent that the government is unwilling or unable to control” because Mr. Portillo-Flores “did not report any of the threats or the beatings that he received to the police.”¹⁴⁸ The IJ further found that while El Salvador has a high rate of crime, the government had measures to address “gang members and corrupt police officers.”¹⁴⁹ The BIA found no clear error and “emphasized” Mr. Portillo-Flores’s failure to report.¹⁵⁰

The Fourth Circuit initially upheld the BIA’s decision.¹⁵¹ However, on rehearing en banc, a divided court granted Mr. Portillo-Flores’s petition for review.¹⁵² The majority noted that the court had previously “rejected a per se

142. *Id.* (alterations in original) (internal quotation marks omitted).

143. *Id.* (alterations in original).

144. *Id.* (internal quotation marks omitted).

145. *Id.*

146. *Id.* (alterations in original) (internal quotation marks omitted). Mr. Portillo-Flores also submitted U.S. State Department reports describing “widespread corruption” and “weak rule of law” in El Salvador, “which contributed to high levels of impunity and government abuse” despite the government’s attempts to weed out “bad actors.” *Id.* at 624–25 (internal quotation marks omitted).

147. *Id.* at 625.

148. *Id.*

149. *Id.*

150. *Id.*

151. *Portillo-Flores v. Barr*, 973 F.3d 230, 246 (4th Cir. 2020), *rev’d en banc sub nom. Portillo-Flores v. Garland*, 3 F.4th 615 (4th Cir. 2021).

152. *Portillo-Flores*, 3 F.4th at 622, 637.

reporting requirement” when an applicant can demonstrate that reporting would be futile or lead to further danger.¹⁵³ The court ordered remand, “admonish[ing] the agency to meaningfully consider [Mr. Portillo-Flores’s] evidence as to why he did not report his abuse to the police” and to do so with a “child-sensitive” manner, given his young age at the time of the harm.¹⁵⁴ The majority found that the “IJ and BIA abdicated their responsibility to address [Mr. Portillo-Flores’s] evidence that he could not safely or effectively report the violence to the police” and warned that the IJ and BIA must offer “specific, cogent reasons” for dismissing “credible, significant, and un rebutted evidence.”¹⁵⁵ “Although our standard of review is deferential to an agency’s considered determination,” the majority concluded that “it does not authorize us to excuse misapplication of the law or to create a post hoc justification for an unexplained conclusion. We must require agencies to do their jobs so that we can do ours.”¹⁵⁶

4. Sixth Circuit

The Sixth Circuit has several recent (and, at times, inconsistent) published opinions addressing per se reporting requirements. In a July 2021 decision, *Ortiz v. Garland*, the court acknowledged that reporting was a factor that an IJ or the BIA could consider when determining the state’s ability or willingness to protect an applicant.¹⁵⁷ Later that year, however, the court struck down the application of a bright-line reporting requirement in *Zometa-Orellana v. Barr*.¹⁵⁸ In that case, the Salvadoran petitioner, Ms. Zometa-Orellana, fled an abusive domestic partner, who repeatedly physically, sexually, and verbally abused her.¹⁵⁹ He also seized her phone and locked her inside “to prevent her from seeking help.”¹⁶⁰ She escaped and sought safety with her parents, who encouraged her to flee the country.¹⁶¹ Ms. Zometa-Orellana chose to seek protection in the U.S., in part because she did not trust that Salvadoran authorities would protect her and because she feared retaliation from her partner.¹⁶² The IJ found—and the BIA agreed—that Ms. Zometa Orellana did not demonstrate that Salvadoran authorities were unable or unwilling to protect

153. *Id.* at 635 (citing *Tassi v. Holder*, 660 F.3d 710, 725 (4th Cir. 2011)).

154. *Id.* at 635–36.

155. *Id.* at 636.

156. *Id.* at 637.

157. 6 F.4th 685, 690 (6th Cir. 2021) (“We have repeatedly upheld the Board’s rejection of a claim that the government was unable or unwilling to control a private party in part because the asylum applicant did not notify the government of the abuse.”).

158. 19 F.4th 970, 979–80 (6th Cir. 2021).

159. *Id.* at 974.

160. *Id.*

161. *Id.*

162. *Id.* at 979.

her, “rel[ying] exclusively on the fact that Zometa-Orellana did not report the incidents regarding her abuse to the police department.”¹⁶³

On appeal, the Sixth Circuit rejected the IJ and BIA’s imposition of a *per se* reporting requirement and granted Ms. Zometa-Orellana’s petition for review.¹⁶⁴ Noting from a prior case, *K.H. v. Barr*, that “a government’s specific response to a petitioner’s persecution cannot be the only relevant evidence an immigration judge considers,” the court held that an IJ should consider both “the Government’s actual response to an asylum applicant’s persecution when it was reported” as well as country conditions evidence.¹⁶⁵ Here, the court found that in imposing a bright-line reporting requirement, the IJ and BIA “completely disregarded and failed to address the documentary evidence” as to the danger and futility of reporting.¹⁶⁶ Bolstering Ms. Zometa-Orellana’s testimony describing her apprehensions of retaliation and police inaction, this documentary evidence included a report from the Immigration and Refugee Board of Canada concluding that “‘in light of inadequate protection systems,’ many women [in El Salvador] feared reporting their domestic violence incidents to the police and ‘making a report puts the victim even more at risk of further violence by her abuser.’”¹⁶⁷ The record also contained a report from the Office of the U.N. High Commissioner for Refugees (UNHCR) report describing the Salvadoran state’s failure to protect women fleeing domestic violence, noting the account of one victim “standing in front of the police, bleeding, and the police said, ‘Well, he’s your husband.’”¹⁶⁸ Finding that “[n]either the BIA nor the IJ grappled with the significance of these reports in the context of Zometa-Orellana’s failure to report the abuse she suffered to the El Salvadoran authorities,” the court remanded the case for consideration of this issue and others.¹⁶⁹

163. *Id.*

164. *Id.* at 973, 979–80.

165. *Id.* at 979 (quoting *K.H. v. Barr*, 920 F.3d 470, 476 (6th Cir. 2019)).

166. *Id.* at 979–80.

167. *Id.* at 980.

168. *Id.*

169. *Id.* at 980. In 2022, a divided Sixth Circuit panel issued the published opinion, *Palucho v. Garland*, which declined to disturb the IJ’s determination (upheld by the BIA) that the family of petitioners failed to prove that the Salvadoran government was unable or unwilling to protect them from gang threats and violence. 49 F.4th 532, 542 (6th Cir. 2021). One of the two lead petitioners, Mr. Palucho, did not report the gang’s extortion to the police because he believed that the gangs had infiltrated the police and because the gangs threatened to kill his family if he contacted the authorities. *Id.* at 534, 542–543. Mr. Palucho had contacted the authorities about other issues, however. *Id.* at 535. The petitioners also submitted country conditions reports that indicated that many Salvadorans do not report gang violence due to fears of retaliation and that the government could not guarantee safety against gang violence. *Id.* at 535. On the other hand, the reports also noted recent government efforts

5. Ninth Circuit

The Ninth Circuit was one of the first circuits to explicitly reject a per se reporting requirement with 2006 opinion, *Ornelas-Chavez v. Gonzales*.¹⁷⁰ However, after that point, the court struggled with the precise legal significance of a report (or lack thereof), culminating in its 2017 en banc decision, *Bringas-Rodriguez v. Sessions*.¹⁷¹ There, the petitioner fled his native Mexico after suffering severe abuse by his father, uncle, cousins, and neighbor as a child because of his gay identity.¹⁷² This harm included repeated physical and sexual abuse—including demands for sex, beatings, and rapes—as well as slurs and threats.¹⁷³ Mr. Bringas-Rodriguez’s did not report the harm to the authorities because he believed that doing so would be “futile and potentially dangerous.”¹⁷⁴ First, his abusers threatened to harm his grandmother if he did report.¹⁷⁵ He also credibly testified that when his friends who were also gay attempted to report rapes and abuse in Veracruz, the officers “laugh[ed] [in] their faces.”¹⁷⁶ He also supported his testimony with U.S. Department of State Country Reports for Mexico and news articles that reflected that even though Mexican laws were “becoming increasingly tolerant of gay rights,” violence against LGBTQIA+ communities in the country continued to rise.¹⁷⁷

The IJ denied all relief.¹⁷⁸ Among other things, the IJ found that the court “[did] not have any evidence whatsoever that the police in Mexico or the authorities do not take any action whatsoever” to offer protection to child victims of sexual abuse.¹⁷⁹ On appeal, the BIA also rejected Mr. Bringas-Rodriguez’s claims, finding, among other things, that the Mexican government “has taken numerous positive steps to address the rights of homosexuals.”¹⁸⁰

to remove public officials with gang ties and observed that public trust in the police was increasing. *Id.* The IJ denied relief, finding that the petitioners did not show that El Salvador was unable or unwilling to control MS-13. *Id.* The BIA agreed. *Id.* at 544. While the Sixth Circuit’s majority noted that an “immigrant’s failure to report crimes to the police will make it more difficult to show that the government was unable or unwilling to control the criminals,” it denied the petition on substantial evidence grounds rather than a per se rule. *Id.* at 537–40.

170. 458 F.3d 1052, 1058 (9th Cir. 2006).

171. 850 F.3d 1051, 1072 (9th Cir. 2017) (en banc).

172. *Id.* at 1056.

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.* at 1057 (alternation in original).

177. *Id.*

178. *Id.* at 1057; see also *id.* at 1079–80 (Bea, J., dissenting).

179. *Id.* at 1077 (Clifton, J., concurring); see also *id.* at 1079 (Bea, J., dissenting).

180. *Id.* at 1057.

On appeal to the Ninth Circuit, a divided panel denied Mr. Bringas-Rodriguez's petition for review.¹⁸¹ As to the Mexican government's inability or unwillingness to protect Mr. Bringas-Rodriguez, the court noted that it did not require reporting.¹⁸² However, it stated that where there is no report, petitioners like Mr. Bringas-Rodriguez faced a "gap in proof about how the government would have responded" and "b[ore] the burden to 'fill in the gaps' by showing how the government would have responded had he reported the abuse."¹⁸³ One way to address the gap would be to show that "private persecution of a particular sort is widespread and well-known but not controlled by the government or . . . that others have made reports of similar incidents to no avail."¹⁸⁴ Applied to Mr. Bringas-Rodriguez's case, the panel's majority gave diminished weight to Mr. Bringas-Rodriguez's country conditions evidence and agreed with the BIA that he did not meet his burden of showing the Mexican state's inability or unwillingness to provide protection.¹⁸⁵ The dissenting judge noted that while Ninth Circuit precedent did not mandate reporting, "today's decision effectively require[s] just that."¹⁸⁶

The court then granted rehearing en banc, withdrew its prior opinion, and overruled *Castro-Martinez*, the case upon which the majority of the court's three-member panel heavily based its prior decision.¹⁸⁷ After a thorough review of its prior cases on reporting, the court's majority determined that framing the lack of a police report as an evidentiary "gap" ended up unjustly penalizing those who most needed protection—and most likely faced heightened barriers and danger in reporting.¹⁸⁸ The court noted that this standard, especially after *Castro-Martinez*, "transformed the 'gap' into a 'gulf,' never to be quite filled, especially for those who were victimized as children, the least likely persons to

181. *Bringas-Rodriguez v. Lynch*, 805 F.3d 1171, 1178 (9th Cir. 2015), *withdrawn*, 850 F.3d 1051 (9th Cir. 2017) (en banc).

182. *Id.* at 1178.

183. *Id.* (citing *Castro-Martinez v. Holder*, 674 F.3d 1073 (9th Cir. 2011), *overruled by Bringas-Rodriguez v. Sessions*, 850 F.3d 1051, 1057 (9th Cir. 2017) (en banc)).

184. *Id.* at 1178 (quoting *Rahimzadeh v. Holder*, 613 F.3d 916, 922 (9th Cir. 2010)) (alteration in original).

185. *Id.* For example, the panel's majority found that the country conditions reports in the record provided little evidence of government persecution based on sexual orientation and that Mr. Bringas-Rodriguez "ha[d] put forward no evidence that Mexico tolerates the sexual abuse of children, or that Mexican officials would refuse to protect an abused child based on the gender of his or her abusers." *Id.* at 1182. The majority also gave diminished weight to Mr. Bringas-Rodriguez's testimony concerning his friends' negative experiences with the police, determining that he provided "no details about his friends' accounts" and could not connect their specific experiences with "general police practices in the state or city of Veracruz." *Id.* at 1180.

186. *Id.* at 1192 (Fletcher, J., dissenting).

187. *Bringas-Rodriguez v. Sessions*, 850 F.3d 1051, 1056, 1070–73 (9th Cir. 2017) (en banc).

188. *Id.* at 1062–72.

report their abuse to authorities.”¹⁸⁹ Rather, the court found that “our law is clear that the agency, and we, upon review, must examine *all* the evidence in the record that bears on the question of whether the government is unable or unwilling to control a private persecutor.”¹⁹⁰

Here, the court found that a victim of abuse may not report due to the effects of trauma and fears of retaliation, “not just from his abusers, but from police, society, even family members.”¹⁹¹ It noted that child victims like Mr. Bringas-Rodriguez face additional barriers, as child abuse victims may have more difficulty contacting the police (especially if they live with their abusers), understanding that the harm they suffered is abuse, and articulating the details of the abuse to law enforcement, meaning they “may be more easily dismissed or not taken seriously by the officials concerned.”¹⁹² Because of these additional barriers, the court discerned that “it is similarly unlikely that country reports or other evidence will be able to document the police response, or lack thereof, to the sexual abuse of children.”¹⁹³ Therefore, treating the lack of a police report as an evidentiary gap—as the majority initially did in *Bringas-Rodriguez* following *Castro-Martinez*—“generally was . . . tantamount to imposing a reporting requirement on sexually abused children: either the petitioner must have reported in his own case, or other children must have reported to create the basis for a country report on the general response.”¹⁹⁴ The en banc majority found this burden “inappropriate, both because it reflected a heightened gap-filling proof requirement and because it focused on evidence regarding the treatment of gay children rather than the treatment of gay Mexicans generally.”¹⁹⁵ Reassessing the record under this standard, the court’s majority

189. *Id.* at 1070.

190. *Id.* at 1069 (emphasis added).

191. *Id.* at 1070–71 (internal quotations omitted).

192. *Id.* at 1071 (quoting UNHCR, *Guidelines on International Protection-Child Asylum Claims Under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol Relation to the Status of Refugees*, ¶ 36, U.N. Doc HCR/GIP/09/08 (Dec. 22, 2009), <https://www.unhcr.org/sites/default/files/legacy-pdf/50ae46309.pdf> [<https://perma.cc/46TL-GSLM>]).

193. *Id.*

194. *Id.* at 1071–72.

195. *Id.* at 1072. The majority also criticized *Castro-Martinez* on the existence of laws protecting LGBTI+ people without adequately considering their implementation. Citing the UNHCR’s amicus brief, the court noted that “a country’s laws are not always reflective of actual country conditions” and that “[i]t is not unusual that a country’s ‘*de jure*’ commitments to LGBTI protection do not align with the *de facto* reality of whether the State is able and willing to provide protection.” *Id.* at 1072. Indeed, the court noted its observation from another recent opinion that despite greater legal protections, LGBTI+ Mexicans actually faced increased violence. *Id.* (citing *Avendano-Hernandez v. Lynch*, 800 F.3d 1072, 1081 (9th Cir. 2015)). It also observed that reforms on the federal level do not necessarily reflect law enforcement practices in the state or local levels. *Id.* at 1072.

determined that the Mexican government was unable or unwilling to control Mr. Bringas-Rodriguez's persecutors.¹⁹⁶

Two subsequent unpublished decisions from 2023, however, raise possible limits to *Bringas-Rodriguez*. In *Juarez v. Garland*, the court found—as with some other circuits—that an applicant's "mere subjective belief that [the state] would not help" is insufficient to demonstrate the danger or futility of reporting.¹⁹⁷ In *de Ruiz v. Garland*, the court refused to disturb the BIA's determination that the lead petitioner should have reported her abusive husband to the police for a second time—even though, after she reported him the first time, the police released him the next day without charges and her husband "threatened to kill her" if she reported again.¹⁹⁸ The court found that the record demonstrated that she reported the abuse only once and received a "positive police response."¹⁹⁹ The court acknowledged that while the State Department Human Rights Reports in the record indicated that "police often do not respond to domestic violence complaints and convictions for intrafamily violence are rare," they also demonstrated that "legal protections exist and the government is working to provide services for survivors of domestic violence."²⁰⁰ Beyond that discussion, the court did not discuss the danger or futility of reporting.

c. Courts with Unclear or Inconsistent Positions on Per Se Reporting Requirements

The remaining five courts' positions are unclear. The Second Circuit appears to reject per se reporting requirements but has repeatedly declined to do so definitively. The Eighth, Tenth, and Eleventh Circuits may also currently reject per se reporting requirements; however, they have most recently denied applicants' petitions for review under the substantial evidence standard. Therefore, it is unclear how much evidence an applicant would need to demonstrate futility, danger, or both, in these circuits. The Fifth Circuit, on the other hand, has most recently approved of a per se reporting requirement in a published opinion, yet has rejected the application of one in a subsequent unpublished decision.

196. *Id.* at 1073.

197. No. 22-625, 2023 WL 6972426, at *2 (9th Cir. Oct. 23, 2023) (citing *Castro-Perez v. Gonzales*, 409 F.3d 1069, 1072 (9th Cir. 2005)).

198. No. 18-70265, 2023 WL 2261401, at *1 (9th Cir. Feb. 28, 2023).

199. *Id.*

200. *Id.*

1. Second Circuit

The Second Circuit has declined to definitively reject per se reporting requirements.²⁰¹ However, it has rejected the IJ and BIA's application of a per se reporting requirement in an individual case in a 2015 published opinion.²⁰² In that case, the petitioner, Mr. Pan, suffered verbal attacks, multiple beatings (including one that left him unconscious "for a few hours"), and other harm in his native Kyrgyzstan because of his Korean ethnicity and Evangelical Christian faith.²⁰³ Mr. Pan only reported the abuse once, after which the police refused to investigate "because he had not seen his assailant."²⁰⁴ On other occasions, Mr. Pan and his family did not report the harm they suffered because they believed the police were corrupt, demanded bribes, and could make matters worse.²⁰⁵ In addition, the police themselves harassed, detained, and interrogated Mr. Pan's father while he conducted Christian services.²⁰⁶ Mr. Pan's aunt offered credible testimony describing an attack against Mr. Pan's father's church in which "[t]here was no reaction whatsoever" from the police, "as [was] usually the case."²⁰⁷ She also described that when the family tried to report the attack, police would demand that she, Mr. Pan's father, and others "answer questions about [their] faith" and threaten to "take action against members of the church 'who attract people to church' if more ethnic [Kyrgyz] joined."²⁰⁸ Mr. Pan also submitted the U.S. State Department's Human Rights Report in his support, which described corruption as "endemic" in Kyrgyz

201. *Pan v. Holder*, 777 F.3d 540, 544 (2d Cir. 2015). The court reached a similar conclusion but again refused to decide the question of "whether [a petitioner's] unwillingness to confront the police is fatal to [her] asylum claim" in *Martinez-Segovia v. Sessions*, 696 F. App'x 12, 14 (2d Cir. 2017) (quoting *Pan*, 777 F.3d at 544–45). Yet in *Espinoza-Tenelcia v. Barr*, the court agreed with the petitioner that "her failure to seek police protection, alone, would be insufficient to support the agency's decision [that the government was unable or unwilling to protect her]." 839 F. App'x 617, 619 (2d Cir. 2020). The court reached a similar result in its 2023 unpublished opinion, *Khan v. Garland*, where the court held that "'a failure to ask for police help is not enough, by itself, to preclude' a finding that the government would be unwilling to protect," but denied the petition for review in part because Mr. Khan "ha[d] not 'reinforced' his claims with objective evidence . . . that report discrimination by [government] authorities." No. 20-3350, 2023 WL 4926199, at *2 (2d Cir. Aug. 2, 2023) (alteration in original) (quoting *Quintanilla-Mejia v. Garland*, 3 F.4th 569, 593 (2d Cir. 2021) for the proposition that the failure to report alone is insufficient to preclude a finding of the state's inability or unwillingness to protect and *Pavlova v. INS*, 441 F.3d 82, 92 (2d Cir. 2006) for the necessity to reinforce claims). The passage cited from *Quintanilla-Mejia* originally applied to a Convention Against Torture—rather than asylum—analysis. *Quintanilla-Mejia*, 3 F.4th at 593.

202. *Pan*, 777 F.3d at 544–45.

203. *Id.* at 541–42, 544–45.

204. *Id.* at 542.

205. *Id.* at 542, 545.

206. *Id.* at 542.

207. *Id.* (internal quotation marks omitted) (alterations in original).

208. *Id.*

society and that “officials engaged in corrupt practices with impunity.”²⁰⁹ The report also highlighted a 2009 Kyrgyz law that banned several activities associated with Christian Evangelism, including “proselytizing, religious conversions, [and] private religious education.”²¹⁰

Denying Mr. Pan’s asylum application, the IJ found that the harm that Mr. Pan suffered “represented, at best, hate crimes.”²¹¹ The IJ also found that Mr. Pan did not establish that the Kyrgyz government was unable or unwilling to protect him because he did not report many of the harms he suffered to the police and could not identify his attacker on the one occasion he did.²¹² The IJ refused to consider Mr. Pan’s aunt’s testimony, while finding it credible, because she lacked “personal knowledge of [his] experiences.”²¹³ The BIA affirmed, agreeing with the IJ that Mr. Pan did not suffer past persecution and finding more broadly that Mr. Pan did not show that the Kyrgyz government was unable or unwilling to protect him.²¹⁴

The Second Circuit rejected both findings.²¹⁵ As to the government’s ability or unwillingness to protect Mr. Pan, the court found that both the IJ and BIA impermissibly ignored Mr. Pan’s credible testimony of police corruption, his aunt’s testimony, and the corroborating information in the Department of State’s Human Rights report.²¹⁶ The court vacated and remanded, finding that “both the IJ and BIA ignored ample record evidence tending to show that the Kyrgyz police were unwilling to investigate the abuse suffered by Pan and his family.”²¹⁷ At the same time, however, the court declined to definitively decide the issue of whether an individual’s “unwillingness to confront the police is fatal to [their] asylum claim.”²¹⁸

2. Fifth Circuit

The Fifth Circuit has been inconsistent in its treatment of per se reporting requirements in recent years.²¹⁹ The court’s only published opinion on the issue,

209. *Id.*

210. *Id.*

211. *Id.* at 543.

212. *Id.*

213. *Id.* at 545.

214. *Id.* at 543.

215. *Id.* at 544–45.

216. *Id.* at 545.

217. *Id.* at 544–45.

218. *Id.* at 544.

219. *Sanchez-Amador v. Garland*, 30 F.4th 529, 533–35 (5th Cir. 2022). In 2019, the Fifth Circuit denied the petition of review of a Honduran asylum seeker who did not report the abuse she suffered to the police. *Arevalo-Velasquez v. Whitaker*, 752 F. App’x 200, 201–02 (5th Cir. 2019) (per

Sanchez-Amador v. Garland, upheld an IJ’s application of a per se reporting requirement.²²⁰ However, the court has rejected reporting requirements in unpublished opinions both before and after *Sanchez-Amador*. Therefore, while *Sanchez-Amador* remains binding precedent, these unpublished opinions demonstrate the court’s repeated inconsistent positions on the issue.

In the 2021 unpublished case of *Rehvach-Rodriguez v. Wilkinson*, the Fifth Circuit relied in part on a per se reporting requirement when denying the petition of review of a Guatemalan asylum seeker who received death threats.²²¹ While the opinion provided little factual background on the case, the court upheld the BIA’s determination that Ms. Rehvach-Rodriguez failed to prove that the Guatemalan government was or would be unable or unwilling to protect her, “especially considering that Rehvach-Rodriguez did not report the death threats” and because the government had previously provided her uncle with protection.²²² Notably, the Fifth Circuit also found that “[t]his holding, on its own, is dispositive of Rehvach-Rodriguez’s claims regarding *both* past persecution *and her well-founded fear of future persecution.*”²²³

While the court did acknowledge *S-A-* in another unpublished case in the interim,²²⁴ it doubled down its approval of per se reporting requirements in a 2022 published decision.²²⁵ There, the Honduran petitioner, Ms. Sanchez-Amador, had suffered childhood sexual abuse at the hands of her stepfather, uncle, cousin, and her landlord’s son.²²⁶ She testified that she did not report the abuse to police as she “believed that the police would not help her unless she could provide . . . physical evidence,” that “Honduran police often do not act on sexual assault claims,” and that “Honduran women in general are vulnerable to sexual assault due to a culture of ‘machismo.’”²²⁷ She also received extortion demands from members of MS-13, who also threatened that if she could not

curiam). The court acknowledged *In re S-A-*, and that “the BIA did not establish a rule that an applicant is required to report her abuse,” but found that a “subjective belief that it would have been futile,” without more, was insufficient to meet the burden of showing government inability or unwillingness to protect. *Id.* Notably, the opinion states that Ms. Arevalo-Velasquez submitted evidence that “few women make such reports ‘because the judicial procedure is skewed against them’” and argued for a reporting exception under *In re S-A-*. *Id.* (citing *In re S-A-*, 22 I. & N. Dec. 1328, 1332–33 (B.I.A. 2000)).

220. *Sanchez-Amador*, 30 F.4th at 533–35.

221. 835 F. App’x 793, 793–94 (5th Cir. 2021) (per curiam).

222. *Id.* at 793–94.

223. *Id.* at 794 (emphasis added).

224. Valdez Coria v. Garland, No. 19-60707, at 11 n.3 (5th Cir. Nov. 29, 2021) (GovInfo) (citing *In re S-A-*, 22 I. & N. Dec. at 1333; *Arevalo-Velasquez*, 752 F. App’x at 201–02).

225. *Sanchez-Amador v. Garland*, 30 F.4th 529, 533–35 (5th Cir. 2022).

226. *Id.* at 531.

227. *Id.* at 532.

pay after one week, they would force her to be one gang member's "woman."²²⁸ Ms. Sanchez-Amador reported the threats to the police, who said "they would investigate but that it would take two weeks."²²⁹ Instead of waiting past MS-13's one-week deadline, Ms. Sanchez-Amador fled to the U.S. to seek asylum.²³⁰

The IJ found Ms. Sanchez-Amador to be credible, but denied relief.²³¹ Among other reasons, the IJ found that Ms. Sanchez-Amador did not show that the government of Honduras was unable or unwilling to protect her "because she never reported the sexual abuse she suffered, and she left before the police could complete their investigation into [MS-13's] threats."²³² The BIA adopted the IJ's decision and affirmed.²³³

The Fifth Circuit focused on the "dispositive question" of "whether an applicant's subjective belief that the authorities would be unwilling or unable to help them is sufficient for asylum eligibility when paired with country condition evidence supporting that belief, notwithstanding that the underlying events do not support that conclusion."²³⁴ As applied to the sexual abuse Ms. Sanchez-Amador suffered, the court found that she waived that challenge because she failed to sufficiently argue it in her brief.²³⁵ But the court found that even if she had, Ms. Sanchez-Amador's *subjective* belief that the police would not help her "is not sufficient to overturn the BIA under the substantial evidence standard."²³⁶ However, Ms. Sanchez-Amador did not support her claim with her subjective belief alone. The court acknowledged that Ms. Sanchez-Amador "presented substantial country condition evidence speaking to how ineffective the authorities have been at combatting domestic violence."²³⁷ Nevertheless, without analyzing that evidence, the court concluded that "one would be hard-pressed to find that the authorities were unable or unwilling to help her if she never gave them the opportunity to do so."²³⁸ As to MS-13, the court found that "the fact that the police could not complete their investigation to Sanchez-Amador's satisfaction within a single week does not compel the conclusion that they were unable or unwilling to help

228. *Id.*

229. *Id.*

230. *Id.*

231. *Id.*

232. *Id.*

233. *Id.*

234. *Id.* at 531.

235. *Id.* at 534.

236. *Id.*

237. *Id.*

238. *See id.*

her.”²³⁹ The court’s analysis made no mention of *S-A-* or of the one-week deadline that MS-13 imposed on Ms. Sanchez-Amador.²⁴⁰

Despite these opinions, in April 2023, the court rejected the application of a *per se* reporting requirement in a subsequent unpublished opinion, *Reyes-Hoyes v. Garland*.²⁴¹ In that case, the court found that the BIA erred in failing to meaningfully address the petitioner’s (and her witness’s) testimony explaining the futility and danger of reporting.²⁴² While *Sanchez-Amador* remains binding precedent in the Fifth Circuit, *Reyes-Hoyes* indicates that challenges to reporting requirements may be fruitful in that circuit.

3. Eighth Circuit

The Eighth Circuit has vacillated in its stance on *per se* reporting requirements. While the court rejected the application of a reporting requirement in a 2008 published opinion, *Ngengwe v. Mukasey*,²⁴³ it upheld one with approval in a 2016 unpublished case, *Lucas v. Lynch*.²⁴⁴ However, in 2020, the Eighth Circuit again recognized *S-A-* and *Ngengwe* in a published case, *Galloso v. Barr*; although it ultimately denied the petition for review.²⁴⁵ There, the petitioner, Ms. Prudencia Galloso, sought asylum and related protections after suffering physical and sexual violence at the hands of two partners in her native Mexico.²⁴⁶ She only contacted the authorities during one instance of abuse when her second partner locked her outside of the home with their child.²⁴⁷ When Ms. Galloso sought protection in the U.S., she testified that she did not contact law enforcement and would not if forced to return because “the police are corrupt and would not help her.”²⁴⁸ In support of this belief, she submitted country conditions evidence describing police corruption in Mexico and noting that “70 percent of female homicide victims in Mexico were killed by their intimate partners” and that “the majority of these women had sought help from government authorities, but that nothing had been done because this type of violence was considered a private matter.”²⁴⁹ The IJ denied relief and

239. *Id.*

240. *Id.*

241. No. 20-60133, 2023 WL 3075064, at *10 (5th Cir. Apr. 25, 2023) (*per curiam*) (citing *Arevalo-Velasquez v. Whitaker*, 752 F. App’x 200, 201–02 (5th Cir. 2019) (*per curiam*)).

242. *Id.*

243. 543 F.3d 1029, 1035–36 (8th Cir. 2008).

244. 654 F. App’x 256, 258, 260 (8th Cir. 2016) (*per curiam*) (omitting any mention of its precedential decision in *Ngengwe*).

245. *See Galloso v. Barr*, 954 F.3d 1189, 1193 (8th Cir. 2020).

246. *Id.* at 1191.

247. *Id.*

248. *Id.*

249. *Id.*

the BIA affirmed, finding that “[w]hile the country condition reports indicate that the justice system in Mexico is corrupt, the respondent has not met her burden to prove that the government either condoned the behavior of her abusers or that the government was unable to prevent the abuse.”²⁵⁰

On appeal to the Eighth Circuit, the court found that the evidence did not compel a finding that Mexican authorities were unable or unwilling to protect Ms. Galloso.²⁵¹ The court acknowledged an exception to reporting; however, it noted that “[b]ecause Galloso testified that she never contacted the police when she was abused in Mexico, she must provide some evidence to show the Mexican government would be unable or unwilling to help her” and cited *Ngengwe* and *S-A*.²⁵² The court found that the reports were “too general” and that while “[t]he percentage of female homicide victims killed by their intimate partners is a disturbing statistic,” the record did not indicate the total number of women abused or killed by intimate partners in Mexico.²⁵³ As to reporting, the court found that “the fact that the majority of the female homicide victims had previously sought help from governmental authorities, while troubling, does not help Galloso because she undisputedly did not contact the police and testified that she would not contact the police in the future.”²⁵⁴ The court held that “[b]ased on the country reports and her own testimony that she did not and would not contact the Mexican police, Galloso failed to show that the Mexican government is unable or unwilling to protect her.”²⁵⁵

4. Tenth Circuit

The Tenth Circuit has neither approved of nor rejected a per se reporting requirement outright. Reporting appears to be a factor that the IJ and BIA may consider in determining a state’s willingness and ability to protect, but within the context of country conditions evidence.²⁵⁶ In a 2021 unpublished case, *Chhetri v. Rosen*, the court denied a Nepalese asylum seeker’s petition for review, finding that—among other things—he failed to meet his burden to

250. *Id.* (internal quotation marks omitted).

251. *Id.* at 1192.

252. *Id.* at 1192–93. This assertion contradicts the opinion’s facts section that recounts that Ms. Galloso contacted the police once. *See id.* at 1191.

253. *Id.* at 1193.

254. *Id.*

255. *Id.* The court reached a similar result the following year when it found in another unpublished case that the applicant “never reported the gang-related incident to the police. Nor did he turn to them for protection. And the country-conditions evidence demonstrates that the Salvadoran government has attempted to curtail gang violence, including forming an anti-extortion task force.” *Lopez-Flores v. Garland*, 857 F. App’x 882, 883 (8th Cir. 2021). Therefore, the threshold that an applicant must meet to demonstrate danger, futility, or both, in the Eighth Circuit is unclear.

256. *See Chhetri v. Rosen*, 844 F. App’x. 23, 28 (10th Cir. 2021).

demonstrate that the Nepalese government would be unable or unwilling to protect him from harm.²⁵⁷ There, the petitioner, Mr. Chhetri, was a member of the Nepalese Congress Party (NCP) receiving repeated threats from the opposition Maoist Party.²⁵⁸ Mr. Chhetri testified that he did not report the threats to the Nepalese authorities because he did not know how to contact them and did not have proof of the threats.²⁵⁹

Among other things, the IJ found that Mr. Chhetri did not demonstrate that the government of Nepal would be unable or unwilling to protect him, “noting Mr. Chhetri’s testimony that he declined to contact the police.”²⁶⁰ The IJ added that the record indicated evidence of “some general political violence in Nepal, the political parties had co-existed peacefully since 2006 and 2007, especially in the Kathmandu area.”²⁶¹ The BIA affirmed.²⁶²

The Tenth Circuit agreed with the IJ and BIA.²⁶³ The court found that it was Mr. Chhetri’s burden to show that the Nepalese government “could *not* protect him” and agreed with the BIA that Mr. Chhetri provided “no persuasive argument that the information contained in the background evidence establishes clear error in the [IJ’s] predictive findings of fact.”²⁶⁴ By pointing to the background evidence, this decision indicates that the court will review country conditions evidence to assess whether substantial evidence supports the agency’s finding regarding the state’s inability or unwillingness to protect; however, the type and quantity of evidence that would meet this burden is unclear.

5. Eleventh Circuit

While the Eleventh Circuit outright rejected per se reporting requirements in a 2007 published decision, *Lopez v. Attorney General*, that disapproval has eroded over time. In *Lopez*, the BIA’s decision below rested on a conclusion that “appear[ed] to be that the failure to seek protection without more is enough to defeat a claim for asylum.”²⁶⁵ While the court found that “the failure to report persecution to local government authorities generally is fatal to an asylum claim,” it noted that the BIA in *S-A-* found an exception “where the petitioner convincingly demonstrates that those authorities would have been unable or

257. *Id.*

258. *Id.* at 25.

259. *Id.*

260. *Id.*

261. *Id.*

262. *Id.* at 25–26, 28.

263. *Id.* at 28.

264. *Id.* at 25–26, 28.

265. *Lopez v. Att’y Gen.*, 504 F.3d 1341, 1345 (11th Cir. 2007).

unwilling to protect her, and for that reason she could not rely on them.”²⁶⁶ Therefore, it found that the BIA’s decision was “not fully consistent with *In re S-A*.”²⁶⁷ Because neither the IJ nor the BIA considered the petitioner’s argument that reporting would have been futile, the court ordered remand.²⁶⁸

Yet the court appeared to waver in *Bautista-Lopez v. Attorney General*, a 2020 unpublished opinion.²⁶⁹ There, the Salvadoran applicant, Ms. Bautista-Lopez, fled a romantic partner, Rolando, who beat, slapped, and threatened to kill her “on numerous occasions.”²⁷⁰ While Ms. Bautista-Lopez tried three times to flee to her parents’ house, each time, Rolando called and threatened to “take her back by force” and harm her family if she did not return.²⁷¹ Ms. Bautista-Lopez and her family did not report Rolando’s abuses “because they feared that he would carry out his threats” and because he was connected to a gang in El Salvador.²⁷² Ms. Bautista-Lopez also testified that the Salvadoran police do “‘nothing’ to protect people” and instead “‘immediately release those they detain’—making aggressors more violent towards their victims.”²⁷³ In support of her testimony, Ms. Bautista-Lopez submitted a U.S. Department of State country report, a declaration from a Salvadoran women’s rights attorney, and a letter from a U.S. professor “specializing in international women’s rights.”²⁷⁴

The IJ denied asylum and withholding of removal after finding, among other things, that Ms. Bautista-Lopez did not demonstrate that the Salvadoran government would be unable or unwilling to protect her.²⁷⁵ The BIA affirmed, finding that “the IJ did not clearly err in finding that Bautista-Lopez provided insufficient evidence to ‘convincingly demonstrate’ that the laws and customs in El Salvador would prevent her from obtaining protection.”²⁷⁶ The Eleventh Circuit agreed. In denying Ms. Bautista-Lopez’s petition for review, the court found that:

Bautista-Lopez did not report the violence or threats perpetrated by Rolando to the police. As we said in *Lopez*, a failure to report is ‘generally fatal’ to an asylum claim. Nor is

266. *Id.* (citing *Mazariegos v. Att’y Gen.*, 241 F.3d 1320, 1327 (11th Cir. 2001); *In re S-A*, 22 I. & N. Dec. 1328, 1335 (B.I.A. 2000)).

267. *Id.* at 1345 (citing *In re S-A*, 22 I. & N. Dec. at 1335).

268. *Id.*

269. 813 F. App’x 430, 434–35 (11th Cir. 2020) (per curiam).

270. *Id.* at 432.

271. *Id.*

272. *Id.*

273. *Id.*

274. *Id.* at 435.

275. *Id.* at 432–33.

276. *Id.* at 433.

this a situation where the police were the persecutors, such as in *Ayala*. Instead, Bautista-Lopez suffered from the criminal actions of a private individual. Therefore, she must have proven that ‘it would have been useless’ to report the domestic violence to government authorities.²⁷⁷

The court did not specifically analyze the sufficiency of evidence demonstrating that reporting would have been futile or dangerous, nor did it mention *S-A*.²⁷⁸ Instead, the court made a general finding that while “domestic violence is a pervasive problem in El Salvador, with less than effective enforcement to combat the problem,” it pointed to “efforts taken by the El Salvadoran government to address these problems”—particularly laws, public awareness campaigns, and government services for domestic violence victims.²⁷⁹ In upholding the BIA’s decision, the court found that “[o]ur standard of review compels us to affirm the BIA on the basis of the substantial evidence in the record that the Salvadoran government has undertaken efforts to prevent domestic violence and protect victims of it.”²⁸⁰

iv. A New BIA Rebuke of Reporting Requirements?

Following two decades of failing to follow *In re S-A* consistently, the BIA revisited per se reporting requirements in September 2023 and rejected them in another published opinion, *In re C-G-T*.²⁸¹ In the proceedings below, the IJ imposed a per se reporting requirement on Mr. C.G.T., whose father subjected him to physical and verbal abuse as a child in the Dominican Republic because he believed that Mr. C.G.T. was gay.²⁸² Mr. C.G.T. testified that he did not report the abuse because, as a child, it would have been futile.²⁸³ He also feared reporting may have worsened his father’s abuse.²⁸⁴ Nevertheless, because Mr.

277. *Id.* at 434–35 (citations omitted).

278. *See id.* at 434–36.

279. *Id.* at 435. To support this conclusion, the court relied upon *In re A-B-I*, which it noted had been “reversed on other grounds.” *Id.* (citing *In re A-B- (A-B-I)*, 27 I. & N. Dec. 316, 320 (Att’y Gen. 2018), *vacated*, *In re A-B- (A-B-III)*, 28 I. & N. Dec. 307 (Att’y Gen. 2021)). In *A-B-I*, the Attorney General contended that “[t]he mere fact that a country may have problems effectively policing certain crimes . . . or that certain populations are more likely to be victims of crime, cannot itself establish an asylum claim.” *Bautista-Lopez*, 813 F. App’x at 435 (quoting *A-B-I*, 27 I. & N. Dec. at 320). Yet in 2021, the Attorney General *vacated A-B-I* and its companion case, *A-B-II*, “in their entirety,” noting, among other things, that *A-B-I* “spawned confusion among courts,” including concerning the interpretation of the “‘unable or unwilling’ standard.” *A-B-III*, 28 I. & N. Dec. at 307, 309.

280. *Bautista-Lopez*, 813 F. App’x at 435.

281. *In re C-G-T*, 28 I. & N. Dec. 740, 743 (B.I.A. 2023).

282. *Id.* at 741.

283. *Id.* at 743.

284. *See id.* at 744.

C.G.T. did not report, the IJ found that Mr. C.G.T. failed to demonstrate that the Dominican Republic was unable or unwilling to protect him from harm.²⁸⁵

On appeal, the BIA found clear error in the IJ's imposition of a per se reporting requirement.²⁸⁶ The BIA cited and quoted First Circuit opinions that held that while an applicant's subjective belief alone that reporting would be futile would be insufficient to find that the authorities were unable or unwilling to protect,²⁸⁷ non-reporting is "'not necessarily fatal' to a claim of persecution if the applicant 'can demonstrate that reporting private abuse to government authorities would have been futile' or dangerous."²⁸⁸ In support of its decision, the BIA cited its own decision in *In re S-A-*, along with decisions from the Fourth and Ninth Circuits analyzing the multiple barriers that children may face in reporting.²⁸⁹

In remanding the case, the BIA directed the IJ to "consider the reasonableness of [Mr. C.G.T.'s] failure to seek assistance from the authorities in his country as part of considering all evidence regarding whether the government was unable or unwilling to protect [him]."²⁹⁰ The BIA added that such a determination should consider the entire record—in this case, to include Mr. C.G.T.'s "testimony, available corroborating evidence, and country conditions reports."²⁹¹ The BIA reiterated that "[a] mere 'subjective belief' that reporting would be futile is not sufficient to establish that a government is unable or unwilling to provide protection."²⁹²

III. THE LEGAL AND POLICY FAILURES OF PER SE REPORTING REQUIREMENTS

As these cases demonstrate, per se reporting requirements severely undermine asylum protections (and the rule of law more generally) in several ways. Most importantly, they place the safety and lives of asylum seekers at risk. They gut protections from the most vulnerable while emboldening persecutors and the governments that support them. In doing so, they also severely undermine the rule of law. They encourage adjudicators and courts to

285. *Id.* at 743. Mr. C.G.T. also feared future persecution in the Dominican Republic because after he left, his mother confirmed to his father that he was gay—resulting in his father's beating her—as well as his HIV-positive diagnosis, which he received after fleeing to the U.S. *Id.* at 741.

286. *See id.* at 743–45.

287. *Id.* at 744 (citing *Morales-Morales v. Sessions*, 857 F.3d 130, 135 (1st Cir. 2017)).

288. *Id.* at 743 (quoting *Rosales Justo v. Sessions*, 895 F.3d 154, 165 (1st Cir. 2018)).

289. *Id.* at 743–44 (citing *In re S-A-*, 22 I. & N. Dec. 1328, 1332–33 (B.I.A. 2000); *Portillo-Flores v. Garland*, 3 F.4th 615, 635–36 (4th Cir. 2023) (en banc); *Bringas-Rodriguez v. Sessions*, 850 F.3d 1051, 1071 (9th Cir. 2017) (en banc)).

290. *Id.* at 744.

291. *Id.*

292. *Id.* (quoting *Morales-Morales v. Sessions*, 857 F.3d 130, 135 (1st Cir. 2017)).

ignore binding precedent and to breach their duty to consider the record meaningfully. They allow courts to arbitrarily foreclose pathways to asylum protection without legal basis and violate U.S. treaty obligations in certain cases. Given the patchwork application of per se reporting requirements nationwide, they also highlight and exacerbate the tremendous geographic disparities in asylum law, effectively making some areas of the country “asylum free zones.”²⁹³ Each of these reasons alone is sufficient justification to eliminate per se reporting requirements. Considering the reasons jointly, however, underscores the extent of per se reporting requirements’ harm and the urgent need for their abolition.

A. Force Asylum Seekers into Greater Danger

First, per se reporting requirements deny protection to some of the most vulnerable asylum seekers, pushing them into even greater danger. These requirements bar inquiry into whether non-state persecutors may retaliate against victims who report with additional violence, including death. In the cases above, Mr. Rosales Justo credibly testified that gangs “would find him and kill him” if he reported, and submitted reports that state and local police in Mexico were “involved in kidnapping, extortion, and providing protection for or directly acting on behalf of organized crime and drug traffickers.”²⁹⁴ Ms. Zometa-Orellana feared increased domestic violence if she were to report, supported by country conditions evidence concluding that in her native El Salvador, “making a report puts the victim even more at risk of further violence by her abuser.”²⁹⁵

These requirements flout the possibility that persecutors may weaponize the authorities to assist them in their persecution. In the Third Circuit case above, because of Mr. Doe’s gay identity, his family and neighbors in Ghana subjected him to beatings and threats, including threats of burning, beheading, and calling the very authorities to whom a per se rule would require him to report.²⁹⁶ The Third Circuit found this weaponization of the authorities to be “compelling, if not dispositive, evidence that [Mr. Doe] had no meaningful recourse against his father’s and the mob’s homophobic violence.”²⁹⁷

293. See *Right to Asylum in the United States—“Asylum Free Zones”*, CTR. FOR GENDER & REFUGEE STUD., <https://cgrs.uchastings.edu/our-work/right-asylum-united-states%E2%80%94%94Asylum-free-zones%E2%80%94%94> [https://perma.cc/5B29-EBSY] (describing the concept of “asylum free zones”).

294. *Rosales Justo v. Sessions*, 895 F.3d 154, 158, 160 (1st Cir. 2018) (internal quotation marks omitted).

295. *Zometa-Orellana v. Garland*, 19 F.4th 970, 980 (6th Cir. 2021).

296. *Doe v. Att’y Gen.*, 956 F.3d 135, 138–39, 148 (3d Cir. 2020).

297. *Id.* at 148.

They also dismiss situations in which authorities operate together with persecutors, as in Marta's case. In Mr. Portillo-Flores's case in the Fourth Circuit, four "policemen working with the gang members" demanded that Mr. Portillo-Flores turn himself in to MS-13.²⁹⁸ An expert in his case also testified that Salvadoran law enforcement at times shared reporters' names with the gangs, leading gangs to "take revenge to send the message that others should not report similar crimes."²⁹⁹ Indeed, after Mr. Portillo-Flores's friend reported MS-13's aggression, he "turned up dead inside of a well."³⁰⁰

Apart from danger, these reporting requirements also fail to acknowledge the grave risk that could arise when reporting would be futile. Where evidence demonstrates that law enforcement likely will not assist an applicant (at least in a reasonable time), forcing an applicant to report and wait for an unknown period only increases the risk that their persecutor may find and harm them. For example, in the Fifth Circuit case of *Sanchez-Amador v. Garland*, members of MS-13 demanded that if she did not comply with their extortion demands within two weeks, they would force her to become a gang member's "woman."³⁰¹ When she did report, the police told her the investigation would take two weeks.³⁰² Rather than wait past MS-13's deadline, Ms. Sanchez-Amador fled her native Honduras.³⁰³ In spite of uncontroverted evidence that the police would not respond until a week after MS-13's deadline and that Ms. Sanchez-Amador "presented substantial country condition evidence speaking to how ineffective the authorities have been at combatting domestic violence,"³⁰⁴ the Fifth Circuit's approach requires violence victims to wait, like sitting ducks, for protection that likely will not materialize in time to save them.

In each of the cases above, had the applicants attempted to report (or waited for official action) before fleeing, the record evidence suggests they could have faced serious harm—including death. On the other hand, if they did not report (or wait), fled to the U.S., and faced an adjudicator applying a per se reporting requirement, this potentially fatal result is merely delayed. If a per se reporting requirement forecloses protection, the denial of relief will likely force their removal back to the very place where they fear persecution. Therefore, this policy not only penalizes vulnerable applicants, but forces them—either way—into the hands of their persecutors.

298. *Portillo-Flores v. Garland*, 3 F.4th 615, 623 (4th Cir. 2021) (en banc).

299. *Id.* at 624.

300. *Id.* (internal quotation marks omitted).

301. 30 F.4th 529, 532 (5th Cir. 2022).

302. *Id.*

303. *Id.*

304. *Id.* at 534.

B. Encourage Adjudicators and Courts to Breach Their Duty to Consider the Record Meaningfully

The imposition of per se reporting requirements also undermines the charge in the regulations for immigration courts and the BIA to meaningfully consider the record. The regulations require IJs to “receive and consider material and relevant evidence,” among other duties.³⁰⁵ All courts of appeals, moreover, require the IJ and the BIA to meaningfully consider evidence in the record—and the failure to do so constitutes reversible error.³⁰⁶

Five courts of appeals have rejected per se reporting requirements at least in part because of this duty, as did the BIA in *In re C-G-T*.³⁰⁷ In asylum and related protections, the record often contains country conditions evidence that explains not only the reasons why the applicant fled and fears return, but also why they did not—or could not—report. Yet per se reporting requirements embolden adjudicators and courts to ignore this evidence wholesale because,

305. 8 C.F.R. § 1240.1(c).

306. *See, e.g.,* *Cordero-Trejo v. INS*, 40 F.3d 482, 492 (1st Cir. 1994) (ordering remand when the BIA “ma[de] no mention” of material evidence and “no effort to engage in the inquiry necessitated by regulation”); *Chen v. Gonzales*, 417 F.3d 268, 272 (2d Cir. 2005) (“We have previously granted petitions for review, vacated decisions of the BIA, and remanded where the IJ or BIA failed to consider relevant evidence.”); *Espinosa-Cortez v. Att’y Gen.*, 607 F.3d 101, 113–14 (3d Cir. 2010) (“[T]he BIA may not simply overlook evidence in the record that supports the applicant’s case.”); *Rodriguez-Arias v. Whitaker*, 915 F.3d 968, 974 (4th Cir. 2019) (“It is an abuse of discretion for the BIA or IJ to arbitrarily ignore relevant evidence.”); *Abdel-Masieh v. INS*, 73 F.3d 579, 585 (5th Cir. 1996) (“While we do not require that the BIA address evidentiary minutiae or write any lengthy exegesis, its decision must reflect meaningful consideration of the relevant substantial evidence supporting the alien’s claims.”) (citation omitted); *Mostafa v. Ashcroft*, 395 F.3d 622, 626 (6th Cir. 2005) (ordering remand after finding that BIA failed to analyze the applicant’s CAT claim “in light of relevant country conditions and applicable legal precedent”); *Joshi v. Ashcroft*, 389 F.3d 732, 736–37 (7th Cir. 2004) (“A decision that resolves a critical factual question without mention of the principal evidence cannot be considered adequately reasoned.”); *Habtemicael v. Ashcroft*, 370 F.3d 774, 783 (8th Cir. 2004) (“When an agency makes a finding of fact without mentioning or analyzing significant evidence, its decision should be reconsidered.”); *Flores Molina v. Garland*, 37 F.4th 626, 638 (9th Cir. 2022) (quoting *Cole v. Holder*, 659 F.3d 762, 771–72 (9th Cir. 2011)) (“Where the BIA fails to consider highly probative record evidence, its ‘decision cannot stand.’”); *Karki v. Holder*, 715 F.3d 792, 800 (10th Cir. 2013) (quoting *Espinosa-Cortez*, 607 F.3d at 107) (“[T]he BIA is not permitted simply to ignore or misconstrue evidence in the asylum applicant’s favor.”) (alteration in original); *Forgue v. Att’y Gen.*, 401 F.3d 1282, 1287 (11th Cir. 2005) (“[T]he [Immigration Judge] must . . . consider *all* evidence introduced by the applicant.”); *In re C-G-T*, 28 I. & N. Dec. 740, 744 (B.I.A. 2023) (holding that the adjudicator must consider the entire record in determining the reasonableness of not reporting).

307. *Rosales Justo v. Sessions*, 895 F.3d 154, 157, 166 (1st Cir. 2018); *Doe v. Att’y Gen.*, 956 F.3d 135, 147–49, 156 (3d Cir. 2020); *Portillo-Flores v. Garland*, 3 F.4th 615, 635–36 (4th Cir. 2021) (en banc); *Zometa-Orellana v. Garland*, 19 F.4th 970, 979–80 (6th Cir. 2021); *Bringas-Rodriguez v. Sessions*, 850 F.3d 1051, 1069 (9th Cir. 2017). In addition, while the Second Circuit has not outright rejected per se reporting requirements, it did order remand in individual cases on this basis where the agency denied relief based on per se reporting requirements. *See supra* Section II.B.iii.c.1.

under these standards, the reason for non-reporting is irrelevant. This duty should be all the more critical in asylum cases, however, when applicants' safety and lives are at stake.

C. Impermissibly Foreclose an Independent Showing of a Well-Founded Fear of Future Persecution

Additionally, these requirements may impermissibly foreclose findings of an independent well-founded fear of future persecution, even without past persecution. U.S. asylum law makes clear that an applicant may demonstrate a well-founded fear of future persecution, even without a showing of past persecution.³⁰⁸ This may be the case when an applicant has fled harm—such as verbal threats or sporadic physical harm—that some adjudicators and courts of appeals may not consider persecution in itself but may escalate to persecution should the applicant be forced to return.³⁰⁹ It may also include circumstances when an applicant did not fear returning upon their arrival to the U.S., but now fears persecution because of changed conditions in the country to which they would be forced to return. In the former case, a police report may be unlikely, even if the applicant did not believe that reporting would have been dangerous or futile. In the latter case, a police report would be largely impossible. But the Fifth Circuit—at least in an unpublished opinion—appears to have extended the per se rule to claims of *future* harm as well. In *Rehvach-Rodriguez*, discussed above, the court suggested that reporting is necessary *both* to demonstrate past persecution as well as a well-founded fear of future persecution.³¹⁰ The court based its decision in large part on the petitioner's failure to report and found that “[t]his holding, on its own, is dispositive of *Rehvach-Rodriguez's* claims regarding *both* past persecution *and her well-founded fear of future persecution.*”³¹¹ This interpretation clearly contravenes both the letter and spirit of asylum law.

308. See 8 C.F.R. § 1208.13(b) (“The applicant may qualify as a refugee either because he or she has suffered past persecution or because he or she has a well-founded fear of future persecution.”).

309. Compare, e.g., *Trochez Castellanos v. Barr*, 816 F. App'x 929, 933 (5th Cir. 2020) (noting that the “court has consistently affirmed determinations that death threats, without more, are not persecution,” but that the court “may also treat unfulfilled death threats as a question of future—not past—persecution”), with *Diallo v. Atty. Gen.*, 596 F.3d 1329, 1333–34 (11th Cir. 2010) (“A credible death threat by a person who has the immediate ability to act on it constitutes persecution regardless of whether the threat is successfully carried out.”).

310. See *Rehvach-Rodriguez v. Wilkinson*, 835 F. App'x 793, 793–94 (5th Cir. 2021) (per curiam).

311. *Id.* at 794 (emphasis added).

D. Arise from Illegitimate Justifications

Neither the U.S. code nor the regulations impose per se reporting requirements. Indeed, as mentioned above, a federal court struck down a regulation that, among other things, would have imposed per se reporting requirements in asylum cases.³¹² Nevertheless, per se reporting requirements continue to persist on a flawed foundation.

Proponents of per se reporting requirements often assert that applicants should report in every case, because otherwise, it is impossible to tell whether a government would be unable or unwilling to provide protection.³¹³ The “unable or unwilling” analysis does not exist in a vacuum, however. It is not divorced from the country conditions that forced the applicant to flee and seek safety in the first place, nor the fact that the applicant may have already suffered past persecution from which the government did not protect them.³¹⁴ An applicant’s own credible testimony and country conditions evidence in the record may provide critical background explaining the perils, futility, or impossibility of reporting. Yet per se reporting requirements would mandate that adjudicators and courts ignore this context wholesale.

Similarly, supporters may also raise concerns that without per se reporting requirements, applicants may meet their burden to show that a state was (or would be) unwilling or unable to protect them by merely claiming futility or danger, without proving more. This conclusion, too, is incorrect. Applicants bear the burden of demonstrating to the adjudicator that they meet the refugee definition.³¹⁵ As part of this burden, applicants must sufficiently demonstrate to the adjudicator that the state is unable or unwilling to protect them from a non-state persecutor.³¹⁶ Neither *In re S-A-*, *In re C-G-T-*, nor any of the decisions from the courts of appeals rejecting reporting requirements remove this burden from the applicant; rather, they permit the applicant to meet it if they can sufficiently demonstrate to the adjudicator that reporting was, or would be, futile, dangerous, or otherwise unreasonable.³¹⁷ Instead, these requirements are nothing more than convenient mechanisms to ignore evidence and inappropriately foreclose claims for protection.

312. See Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, 85 Fed. Reg. 80274, 80394 (Dec. 11, 2020) (codified at 8 C.F.R. pts. 208, 235, 1003, 1208, and 1235), *enjoined by* Pangea Legal Servs. v. U.S. Dep’t of Homeland Sec., 512 F. Supp. 3d 966, 977 (N.D. Cal. 2021); *see also* Pangea Legal Servs., 512 F. Supp. 3d at 977.

313. See *supra* Section II.B.iii.a.

314. See *infra* Section IV.B.

315. 8 U.S.C. § 1158(b)(1)(B)(i).

316. See *supra* Section II.A.

317. See *supra* Section I.B.ii.–iv.

E. Violate the United States' Treaty Obligations

Per se reporting requirements also violate U.S. treaty obligations, insofar as their application results in the removal of applicants to countries where their lives or freedom would be threatened on account of a protected ground. This concern particularly applies to applicants of withholding of removal under 8 U.S.C. § 1231(b)(3).³¹⁸ Withholding of removal is a form of relief that in many ways resembles asylum; however, withholding of removal offers protection to applicants who may be disqualified for asylum protection based on circumstances that include their failure to meet the one-year filing deadline (where an exception does not apply), reentry after a removal order, and certain criminal histories.³¹⁹ The analysis of withholding and asylum is similar, and as with asylum, the BIA and the courts of appeals have held that IJs considering withholding of removal must determine the state is “unable or unwilling” to protect the applicant in the case of a non-state persecutor.³²⁰ However, there are notable differences between the remedies. For one, *withholding* applicants bear a higher burden of proof—they must face a “clear probability of persecution” on account of a protected ground rather than asylum’s lower “well-founded fear” standard.³²¹ Additionally, while asylum is discretionary in the U.S., once a withholding applicant demonstrates eligibility for relief, protection is mandatory.³²²

This mandatory language arises from the international law principle of *non-refoulement*, which “constitutes the cornerstone of international refugee

318. 8 U.S.C. § 1231(b)(3). The United States also offers withholding of removal under the U.N. Convention Against Torture (CAT). 8 C.F.R. § 208.16(c). However, because a CAT analysis requires different elements, this Article will focus on withholding of removal under 8 U.S.C. § 1231(b)(3) only.

319. *See supra* note 13; 8 U.S.C. § 1231(b)(3); 8 C.F.R. § 208.16. Importantly, the benefits that withholding of removal offers is not as robust—for example, it includes no pathway to permanent residence as asylum does. *See* 8 C.F.R. § 209.2(a) (making asylees who meet certain conditions eligible for lawful permanent residence).

320. The Immigration and Nationality Act and the Code of Federal Regulations do not explicitly include an “unable or unwilling” requirement for the separate relief of withholding of removal under 8 U.S.C. § 1231(b)(3). *See* 8 U.S.C. § 1231(b)(3); 8 C.F.R. § 208.16(c). Nevertheless, the BIA and courts have applied this requirement to withholding of removal claims as well. *See, e.g., In re A-M-*, 23 I. & N. Dec. 737, 741 (B.I.A. 2005) (applying an “unable or unwilling” analysis in determining a “pattern or practice of persecution” under 8 C.F.R. § 208.16(b)(2)(i)); *Gomez-Medina v. Barr*, 975 F.3d 27, 33 (1st Cir. 2020) (applying an unable or unwilling analysis to the “even higher” standard of withholding of removal) (internal quotation marks omitted). The propriety of applying an “unable or unwilling” analysis to withholding of removal claims under 8 U.S.C. § 1231(b)(3) is an important question, but outside the scope of this Article.

321. 8 C.F.R. § 208.16(b); *INS v. Stevic*, 467 U.S. 407, 413 (1984).

322. 8 U.S.C. § 1231(b)(3); 8 C.F.R. § 208.16; *Stevic*, 467 U.S. at 421 n.15.

protection.”³²³ In modern U.S. law, the *non-refoulement* obligation arises from the 1967 U.N. Protocol Relating to the Status of Refugees, to which the U.S. acceded in 1968.³²⁴ The Protocol incorporated the provisions of the 1951 U.N. Convention Relating to the Status of Refugees but removed the Convention’s geographic and temporal limits.³²⁵ Therefore, while the U.S. was not a party to the 1951 Convention, it agreed to its substantive provisions by acceding to the 1967 Protocol.³²⁶

Article 33 of the 1951 U.N. Refugee Convention became the basis for the U.S. remedy of withholding of removal: “No Contracting State shall expel or return (*refouler*) a refugee in any manner whatsoever to the frontiers of territories where his [or her] life or freedom would be threatened on account of his [or her] race, religion, nationality, membership of a particular social group or political opinion.”³²⁷ The U.N. interprets this principle to apply to everyone who meets the definition of a refugee, whether or not a government formally recognizes them as such.³²⁸ While *non-refoulement* “does not . . . entail a right of the individual to be granted asylum in a particular State,” it “does mean . . . that where States are not prepared to grant asylum to persons who are seeking international protection on their territory, they must adopt a course that does not result in their removal, directly or indirectly, to a place where their lives or freedom would be [threatened]” on account of a protected ground.³²⁹ In the U.S., this protection comes through the form of withholding of removal.³³⁰

Instead of upholding this duty, *per se* reporting requirements mock it. In many cases, an applicant’s personal characteristics that give rise to a claim for protection are often the same characteristics that make reporting futile, dangerous, or even impossible. For example, domestic violence survivors often face isolation by their abusers and may receive threats of further harm and death

323. UNHCR, *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol*, ¶ 5, (Jan. 26, 2007) [hereinafter U.N. Advisory Opinion], <https://www.unhcr.org/4d9486929.pdf> [<https://perma.cc/W458-KHJN>].

324. Refugee Protocol, *supra* note 16; *Stevic*, 467 U.S. at 416, 421–22. The Refugee Act of 1980 added the mandatory language for withholding of removal to comply with Article 33. Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (codified as amended in scattered sections of 8 and 22 U.S.C.); *Stevic*, 467 U.S. at 421–22; *see also* U.N. Advisory Opinion, *supra* note 323, at ¶¶ 7–8 (describing the *non-refoulement* obligation).

325. Refugee Protocol, *supra* note 16.

326. *Stevic*, 467 U.S. at 416.

327. United Nations Convention Relating to the Status of Refugees, art. 33, July 28, 1951, 189 U.N.T.S. 150 (emphasis added).

328. U.N. Advisory Opinion, *supra* note 323, at ¶ 6.

329. *Id.* at ¶ 8.

330. *Stevic*, 467 U.S. at 416–24.

if they seek outside assistance.³³¹ They also may face misogynistic law enforcement officers, who may respond with apathy, relegating domestic violence claims to “family matters” or with aggression, by blaming the victims or reporting them to their abusers.³³² Children may lack the independence, transportation, or knowledge necessary to seek out law enforcement—even where the authorities may be helpful.³³³ Applicants with disabilities may face physical, mental, or emotional barriers, as well as stigma, in accessing the authorities.³³⁴ In some countries, LGBTQIA+ applicants may face stigma, further discrimination, and abuse (including arrest and imprisonment because of their orientation, gender expression, or gender identity) and even death if they try to report.³³⁵ Individuals who have suffered racist violence may face that same overt racism from police, or the systemic effects of racism—such as limited resources or infrastructure—may hinder or prevent reporting.³³⁶ One also should not overlook trauma’s impact on reporting: according to the U.N., trauma may cause applicants “to fear persons in authority, or they may fear rejection and/or reprisals from their family and/or community.”³³⁷

Given these reasons, the United Nations rejects per se reporting requirements. Under its *Guidelines on International Protection No. 9*, “a claimant does not need to show that he or she approached the authorities for protection before flight. Rather he or she has to establish that the protection was

331. Natalie Schreyer, *Too Terrified to Speak Up: Domestic Abuse Victims Afraid to Call Police*, USA TODAY (Apr. 9, 2018, 7:33 AM), <https://www.usatoday.com/story/news/nation/2018/04/09/too-terrified-speak-up-domestic-abuse-victims-afraid-call-police/479855002/> [https://perma.cc/7VHB-5T7A].

332. See *supra* note 4; Section II.B.iii.

333. See *Bringas-Rodriguez v. Sessions*, 850 F.3d 1051, 1070–72 (9th Cir. 2017) (en banc) (outlining heightened barriers that children may face in reporting physical and sexual abuse).

334. *Fact Sheets: Disability*, WORLD HEALTH ORG. (Mar. 7, 2023), <https://www.who.int/news-room/fact-sheets/detail/disability-and-health> [https://perma.cc/4X5A-CV6S].

335. See generally Lucas Ramón Mendos, Kellyn Botha, Rafael Carrano Lelis, Enrique López de la Peña, Iliia Savelev & Daron Tan, *State-Sponsored Homophobia: Global Legislation Overview Update*, ILGA WORLD (2020), https://ilga.org/downloads/ILGA_World_State_Sponsored_Homophobia_report_global_legislation_overview_update_december_2020.pdf [https://perma.cc/94YE-FGNX].

336. U.N. High Comm’r for Human Rights, *Addressing and Responding to Racial Discrimination in the Criminal Justice System* (May 18, 2022), <https://www.ohchr.org/en/statements/2022/05/addressing-and-responding-racial-discrimination-criminal-justice-system> [https://perma.cc/263M-LRNB].

337. UNHCR, *Guidelines on Int’l Protection No. 1*, ¶ 35, U.N. Doc. HCR/GIP/02/01 (May 7, 2002), <https://www.refworld.org/policy/legalguidance/unhcr/2002/en/31754> [https://perma.cc/2JT2-Q2FW].

not or unlikely to be available or effective upon return.”³³⁸ The U.S.’s obligation to uphold the principle of *non-refoulement* requires the same result.

F. Exacerbate Stark Geographical Disparities in Asylum Adjudications

Finally, because per se reporting requirements also exist in a patchwork fashion nationwide, they effectively foreclose most asylum claims based on non-state persecutors in some immigration courts while allowing exceptions in others. While most courts of appeals appear to reject per se reporting requirements, the immigration courts in the two circuits that have most recently cited them with approval—the Fifth and the Seventh—had a combined 415,063 pending cases in fiscal year 2022.³³⁹ These cases alone represent over 22% of all pending immigration court cases nationwide during that period.³⁴⁰ (This number does not include the nationwide BIA and individual IJs outside of these circuits, which, as described above, have at times approved of and imposed per se reporting requirements despite the continuing precedential value of *In re S-A-*.³⁴¹) In these circuits, applicants fleeing domestic abusers and other non-state persecutors who did not report the harm they suffered may face near automatic rejections—regardless of the danger or futility of reporting.

These findings also support prior scholarship highlighting geographical disparities in U.S. asylum adjudications more generally. In their groundbreaking study, *Refugee Roulette: Disparities in Asylum Adjudication*, Professors Jaya Ramji-Nogales, Andrew I. Schoenholtz, and Philip G. Schrag identified and analyzed significant disparities in asylum adjudications among U.S. asylum offices, immigration courts, the BIA, and circuit courts.³⁴² Discussing the wide disparities in asylum interpretation and remand rates among the courts of appeals nationwide, the authors concluded that while “all of these circuits are applying the same national asylum law . . . it seems odd to us that the rights of refugees seeking asylum in the United States should turn significantly on the region of the United States in which they happen to file their applications.”³⁴³ Certainly, for applicants fleeing non-state persecutors, the location of filing could be a matter of life or death.

338. UNHCR, *Guidelines on Int’l Protection No. 9*, ¶ 36, U.N. Doc. HCR/GIP/12/09 (Oct. 23, 2012), <https://www.refworld.org/policy/legalguidance/unhcr/2012/en/89548> [<https://perma.cc/FNA8-CHHJ>].

339. *Immigration Court Backlog Tool: Pending Cases and Length of Wait in Immigration Courts*, TRAC: IMMIGR. (Dec. 2022), https://trac.syr.edu/phptools/immigration/court_backlog/ [<https://perma.cc/N7VM-XQL2>].

340. *Id.*

341. *See supra* Section II.B.ii.

342. *See* Ramji-Nogales, Schoenholtz & Schrag, *supra* note 37.

343. *Id.* at 375–76; *see also* Scott Rempell, *Asylum Discord: Disparities in Persecution Assessments*, 15 NEV. L.J. 142, 194–95 (2014) (discussing disparities in asylum outcomes).

IV. THE PATH TO ABOLISHING PER SE REPORTING REQUIREMENTS

The grave legal, policy, and humanitarian concerns that per se reporting requirements raise require bold and swift action. Congress, the President—and executive agencies under his or her control—and the courts of appeals all present possible opportunities for reform. As each avenue offers its own set of benefits, challenges, and limitations, this Article will address each in turn.

While *In re C-G-T-* is a welcome development in rebuking per se reporting requirements, the decision is only one step towards their abolition. As noted *supra*, even after the BIA's original rebuke of reporting requirements in *In re S-A-*, IJs, the BIA itself, and some courts of appeals continued to apply them.³⁴⁴ Indeed, as Section II.B.iii *supra* demonstrates, the courts of appeals have developed over two decades of caselaw addressing reporting requirements after *S-A-*.³⁴⁵ Moreover, while *C-G-T-* expands the acceptable reasons for not reporting to cases where it would be unreasonable (rather than only futile or dangerous), in stressing that the unreasonability cannot arise from the applicant's subjective belief alone, it raises concerns regarding proof—particularly for pro se applicants, who may be more likely to rely on credible testimony alone to support a claim for protection.³⁴⁶ Therefore, continued advocacy is necessary to ensure that immigration courts and the BIA itself do not impose reporting requirements.

A. Amending the Immigration and Nationality Act

The most permanent avenue for reform would be for Congress to amend the Immigration and Nationality Act (INA) to abolish per se reporting requirements. As legislative reform would have nationwide impact, it would also resolve the circuit split and uncertainty. Yet legislative reform is the least likely for two reasons. First, as Professor Jason A. Cade has noted, “comprehensive reform of statutory immigration law is notoriously difficult to accomplish.”³⁴⁷ This hurdle is largely due to increasing political polarization in Congress that is unlikely to resolve in the near future, even for “remedial

344. See *supra* Section II.B.iii.

345. *Id.*

346. *In re C-G-T-*, 28 I. & N. Dec. 740, 744 (B.I.A. 2023). Some courts of appeals have adopted this position as well. See, e.g., *Juarez v. Garland*, No. 22-625, 2023 WL 6972426, at *2 (9th Cir. 2023) (finding that an applicant's “mere subjective belief that [the state] would not help” is insufficient to demonstrate the danger or futility of reporting); see also *infra* Section IV.B.i (discussing the establishment of asylum eligibility through credible testimony alone, along with the court's duty to develop the record, especially in the case of pro se applicants).

347. Jason A. Cade, *Enforcing Immigration Equity*, 84 *FORDHAM L. REV.* 661, 669 (2015).

fixes.”³⁴⁸ Second, the structure of immigration law makes administrative regulations a more appropriate fit for addressing reporting requirements. While statutory immigration law serves as the “backbone” of immigration law, it is merely skeletal. Section 208 of the INA, which addresses asylum, only addresses general questions, including who can apply, procedures for applying, conditions for granting protection, formal exceptions to protection, and the legal significance of a grant or termination of asylum status.³⁴⁹ On the other hand, as the following subsection outlines, administrative regulations are far more detailed and largely provide the substance within the INA’s structure.³⁵⁰ Therefore, abolishing per se reporting requirements through statutory changes is an unlikely approach.

B. Administrative Rulemaking

For this reason, the abolition of per se reporting requirements more appropriately fits within the purview of administrative rulemaking, which is a process governed primarily by the Administrative Procedure Act (APA).³⁵¹ The INA specifically authorizes the executive branch to establish “requirements and procedures” related to asylum through the rulemaking process.³⁵² Title 8, Part 208, Subpart A of the Code of Federal Regulations contains twenty-five of these provisions governing asylum, in addition to withholding of removal and protection under the U.N. Convention Against Torture.³⁵³ An ideal location to address and prohibit per se reporting requirements would be 8 C.F.R. § 208.13, which establishes a detailed framework for demonstrating asylum eligibility, including standards for determining past persecution, a well-founded fear of future persecution, the reasonableness of internal relocation, and burdens of proof.³⁵⁴

348. See, e.g., Nichole Narea, *Democrats’ Latest Attempt at Immigration Reform is Doomed*, VOX (Dec. 16, 2021, 6:55 PM), <https://www.vox.com/policy-and-politics/2021/12/16/22822205/senate-parliamentarian-macdonough-immigration-reform-build-back-better> [<https://perma.cc/H8H5-A2ML>] (“With only a narrow majority in the House, a 50-50 Senate, and intense polarization on immigration, there is little room for [Democrats] to pass remedial fixes for undocumented immigrants living under the threat of deportation—let alone the kind of far-reaching systemic reforms that they have promised voters for years. And to the extent that there is any such opportunity for smaller reform, it may evaporate next year if Republicans gain control of the House or the Senate or both.”).

349. 8 U.S.C. § 1158.

350. See *infra* Section IV.B.

351. 5 U.S.C. § 551.

352. 8 U.S.C. § 1158(b)(1)(A).

353. See 8 C.F.R. § 208.

354. 8 C.F.R. § 208.13.

Like legislation, administrative rules (also known as regulations) would have a nationwide application and would resolve circuit splits. It is also easier to promulgate rules, as they do not require congressional action.³⁵⁵ On the other hand, the administrative rulemaking process is not without its difficulties and limitations. For one, regulations are more susceptible to legal attack than legislation since immigration law is highly politicized and rules must carefully comply with the APA and other laws and policies impacting administrative rulemaking.³⁵⁶ Moreover, administrative regulations require a sympathetic presidential administration to promulgate them—and subsequent presidential administrations may seek to alter (or even abolish) them through the same rulemaking process, or by refusing to defend the prior rule in pending litigation.³⁵⁷

With the political will, and when done in compliance with the APA, administrative rules can be a powerful tool for reform. They can both abolish the imposition of per se reporting requirements, and, in cases where an applicant demonstrates past persecution, they can establish a rebuttable presumption that the state is unable or willing to protect the applicant. Both remedies would address the ills of per se reporting requirements outlined above and would restore lifesaving protections for asylum seekers fleeing non-state persecutors.

355. See 5 U.S.C. §§ 551, 558 (explaining rulemaking process and its effect).

356. Indeed, the Trump administration's attempt to *impose* what would have effectively been a per se reporting requirement faced a swift legal challenge and injunction. Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, 85 Fed. Reg. 80274, 80394 (Dec. 11, 2020) (codified at 8 C.F.R. pts. 208, 235, 1003, 1208, and 1235), *enjoined by* Pangea Legal Servs. v. U.S. Dep't of Homeland Sec., 512 F. Supp. 3d 966, 977 (N.D. Cal. 2021). The court granted the injunction, finding that the plaintiffs "demonstrated a likelihood of success in establishing that the proposed rulemaking was done without authority of law"—specifically, that Acting Secretary of Homeland Security, Chad Wolf, did not have authority to authorize the rule because he was not properly appointed. Pangea Legal Servs. v. U.S. Dep't of Homeland Sec., 512 F. Supp. 3d 966, 972–75 (N.D. Cal. 2021). The court did not address the plaintiffs' additional arguments under the APA, finding that this reason was sufficient to enjoin the rule. *Id.* at 975.

357. See, e.g., Public Charge Ground of Inadmissibility, 87 Fed. Reg. 55472 (published Sept. 9, 2022) (largely replacing the Trump administration's highly controversial 2019 Inadmissibility on Public Charge Grounds, 84 Fed. Reg. 41292 (published Aug. 14, 2019, *enjoined by* Make the Road N.Y. v. Cuccinelli, 419 F. Supp. 3d 647 (S.D.N.Y. 2019)). Before promulgating the 2022 public charge rule, the Biden administration declined to enforce or defend the Trump era public charge rule. *DHS Secretary Statement on the 2019 Public Charge Rule*, U.S. DEP'T OF HOMELAND SEC. (Mar. 9, 2021), <https://www.dhs.gov/news/2021/03/09/dhs-secretary-statement-2019-public-charge-rule> [<https://perma.cc/BRZ9-88SL>]. The Biden administration's rule has survived its legal challenges, including a suit by thirteen states pushing for the reimposition of the Trump era rule that reached the U.S. Supreme Court. *Arizona v. City & Cnty. of San Francisco*, 142 S. Ct. 1926, 1927–28 (2022) (Roberts, C.J., concurring). The Court dismissed the writ of certiorari as "improvidently granted." *Id.* at 1926.

i. Abolition of Per Se Reporting Requirements

First, an administrative rule should expressly prohibit the application of per se reporting requirements. In addition, rather than merely creating “exceptions” for futility, danger, or even unreasonability, it should establish a framework for analyzing a state’s inability or unwillingness to protect an applicant that fully considers the nuances and complexities of an applicant’s particular circumstances.³⁵⁸ The regulations governing claims under the U.N. Convention Against Torture are a fitting model for this approach. Under them, an adjudicator *must* consider “all evidence relevant to the possibility of future torture shall be considered, including, but not limited to” several factors, including past torture, the viability of safe internal relocation, “[e]vidence of gross, flagrant or mass violations of human rights within the country of removal, where applicable,” and “other relevant” evidence of country conditions in the country of removal.³⁵⁹

As with the Torture Convention regulations, a rule abolishing per se reporting requirements should also require adjudicators to consider “all evidence relevant” to the state’s inability or unwillingness to protect the applicant.³⁶⁰ Also like the Torture Convention regulations, the rule should provide a series of factors that an adjudicator *must* consider (in addition to other relevant factors that may arise in a particular case) when making such a determination. These factors should include the applicant’s own credible testimony, the applicant’s particular vulnerabilities (including, for example, the applicant’s age, race, ethnicity, gender, gender expression, sexual orientation, language, disability, prior trauma) that may prohibit them from reporting or that make reporting more difficult, the outcomes of the applicant’s past attempts to report the harm (if applicable), and country conditions regarding the state’s inability or unwillingness to provide protection to people in similar positions as the applicant.³⁶¹

Additionally, the regulations should clarify that an applicant’s credible testimony alone may sufficiently explain non-reporting, in accordance with 8 U.S.C. § 1158(b)(1)(B)(ii). As noted *supra*, the BIA and some courts of appeals have dismissed as insufficient an applicant’s “mere ‘subjective belief’” that

358. This approach is more generally inspired by the Ninth Circuit’s majority opinion in *Bringas-Rodriguez v. Sessions*, 850 F.3d 1051, 1069 (9th Cir. 2017) (en banc) (“[O]ur law is clear that the agency, and we, upon review, must examine all the evidence in the record that bears on the question of whether the government is unable or unwilling to control a private persecutor.”).

359. 8 C.F.R. § 1208.16(c)(3).

360. *See* 8 C.F.R. § 1208.16(c)(3) (mandating that adjudicators consider “all evidence relevant to the possibility of future torture”).

361. *See* 8 C.F.R. § 1208.16(c)(3)(i)–(iv) (outlining non-exhaustive factors that an adjudicator must consider when considering the possibility of future torture).

reporting would be futile, dangerous, or unreasonable.³⁶² This development not only undermines 8 U.S.C. § 1158(b)(1)(B)(ii), but it also particularly harms pro se asylum seekers, who may be detained with limited access to resources and may depend on their own testimony alone to support their claims.

This approach provides clarity to adjudicators and parties, and a uniform, nationwide standard. It requires adjudicators to consider claims fully and meaningfully, including acknowledging and grappling with the complex and case-specific realities that prevent many applicants from turning to the authorities in their countries of origin. Additionally, should an adjudicator refuse to comply with the regulations, it would offer the applicant a strong argument for reversal on appeal. It also fosters compliance with U.S. treaty obligations, and most importantly, it may save lives.

ii. Rebuttable Presumption of the State's Inability/Unwillingness to Protect in Cases of Past Persecution

A new rule abolishing *per se* reporting requirements should also create a rebuttable presumption that the state is unable or unwilling to protect an applicant who has suffered past harm. Former IJ Jeffrey S. Chase has proposed this approach.³⁶³ As Judge Chase argues, forcing applicants to prove the state's inability or unwillingness to protect them after they have already suffered harm:

[I]s to measure how well a government acted to close a barn door after the horse had already escaped. The test is the equivalent of measuring the owner of a china shop's ability to protect its wares from breakage by studying how quickly and efficiently it cleaned up the broken shards and restocked the shelves after the fact.³⁶⁴

Instead, Judge Chase's approach borrows from the tort law doctrine of *res ipsa loquitur*—or “the thing speaks for itself”—to argue that past persecution, in itself, should provide a strong indication as to the government's inability or unwillingness to protect an applicant.³⁶⁵ Under this test, applicants who have suffered past harm would need only to make an initial showing that (1) the persecution they suffered “would not ordinarily have occurred if the government had been able and willing to provide the protection necessary to have prevented it from happening” and (2) that the harm occurred in the

362. See *supra* note 346.

363. Jeffrey S. Chase, *A Better Approach to “Unable or Unwilling” Analysis?*, JEFFREY S. CHASE: OPINIONS/ANALYSIS ON IMMIGR. LAW (Apr. 21, 2019), <https://www.jeffreyschase.com/blog/2019/4/21/a-better-approach-to-unable-or-unwilling-analysis> [<https://perma.cc/JBP3-SMT6>].

364. *Id.*

365. See *id.*

territory under the national government's jurisdiction.³⁶⁶ Here, the applicant's burden would be "rather low."³⁶⁷

Once an applicant makes this showing, the burden would shift to the prosecutor, the Department of Homeland Security (DHS), to demonstrate that the government in the applicant's country of persecution "had the effective ability and will to prevent the persecution from happening in the first place (as opposed to prosecuting those responsible afterwards)." DHS could not meet its burden by pointing to the government's subsequent response.³⁶⁸ Instead, DHS must show that the government in the applicant's country "provides sufficient protection to its citizens to prevent such harm from occurring in the first instance, and that what happened to the asylum applicant was a true aberration."³⁶⁹

Administrative rulemaking would be an ideal vehicle for establishing this test. For one, the rules already outline a rebuttable presumption that applicants who have suffered past persecution also hold a well-founded fear of future persecution.³⁷⁰ Additionally, administrative rulemaking would implement this critical reform on a nationwide basis, edifying both the integrity of the U.S. asylum system and its ability to protect lives. As Judge Chase convincingly argues, this approach would be "more efficient, more humane, and likely to reach a more accurate result" than forcing victims of past persecution to bear the burden of proving the state's inability or unwillingness to protect them from harm they have already suffered.³⁷¹

C. Legal Advocacy

Without legislative or administrative abolition of per se reporting requirements, the primary vehicle to challenge per se reporting requirements will be legal advocacy before the asylum offices, immigration courts, BIA, and courts of appeals.

i. Asylum Offices and Immigration Courts

In cases where an applicant seeking protection did not report past harm due to danger, futility, or other bases that would make reporting unreasonable, effective challenges will begin in the asylum offices and immigration courts. In those cases, counsel should assert *In re C-G-T*, engage relevant circuit law

366. *Id.*

367. *Id.*

368. *Id.*

369. *Id.*

370. See 8 C.F.R. § 208.13(b)(1).

371. See Chase, *supra* note 363.

(including addressing adverse precedent), and anticipate and forcefully challenge arguments from the government that a per se reporting requirement should apply. Counsel must also develop a strong record detailing the unreasonableness of reporting, including detailed client testimony on the basis for their belief as well as witness statements and, where applicable, country conditions evidence—including reports, news articles, and expert testimony—that support their client's views. Building such a record is particularly important in the wake of *C-G-T*- and other decisions finding that the applicant's subjective belief alone to be insufficient in demonstrating the unreasonableness of reporting.³⁷²

ii. Appeals

The purpose of building a strong record, raising *In re C-G-T*, and addressing relevant circuit law is not only to support a grant of protection in the first instance, but also to prepare possible grounds for appeal in the case of denial. As appellate review is generally limited to the record and the issues raised below,³⁷³ effective challenges to per se reporting requirements are particularly important before the BIA and courts of appeals. On appeal, counsel should raise *In re S-A*-, especially before the BIA where it remains binding precedent. However, as the discussion of the circuits above indicates, the BIA fails to follow its own precedent with some frequency.³⁷⁴ These inconsistent results may stem, in part, from advocates' failure to challenge the imposition of per se reporting requirements below or to build a sufficient record.

Before the courts of appeals, counsel should continue to challenge per se reporting requirements and argue for the application of favorable circuit law. If circuit law is unclear or supports a per se reporting requirement, counsel should be prepared to argue for a clear rule rejecting per se reporting requirements or to distinguish and challenge the unfavorable case(s), depending on the circumstances.³⁷⁵ In either case, counsel should thoroughly develop the legal and policy arguments—including those outlined above—against per se reporting requirements.³⁷⁶

372. *In re C-G-T*, 28 I. & N. Dec. 740, 744 (B.I.A. 2023).

373. See 8 C.F.R. § 1003.1(d)(3) (defining the scope of review of the BIA); FED. R. APP. P. 16 (defining the record on review or enforcement of an agency order before the courts of appeals); *Singleton v. Wulff*, 428 U.S. 106, 120 (1976) (noting that “[i]t is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below”).

374. See *supra* Section II.B.ii.

375. Where applicable, counsel may argue that immigration courts and asylum offices are bound to follow *In re S-A*-. See *supra* Section II.B.i-ii.

376. See *supra* Part III.

V. CONCLUSION

Per se reporting requirements are an overlooked—but deadly—threat to asylum protections in the U.S. and push asylum seekers into greater danger. When persecutors have the support of the authorities, as is often the case with domestic abusers, gangs, and cartels, these requirements push asylum seekers into even greater danger—and sometimes back into the hands of their persecutors. Where reporting would be futile, this requirement forces asylum seekers to wait for non-existent protection in their home country, giving their persecutors additional opportunities to harm them. These requirements also impermissibly punish applicants whose very vulnerabilities that make them eligible for protection also make reporting to authorities futile, dangerous, or otherwise unreasonable or impossible. They permit courts and adjudicators to ignore evidence of the danger or futility of reporting—even when it is overwhelming and uncontested.

These provisions are a deadly end run around asylum protections and merit swift and forceful correction. Congress, administrative agencies, and courts should recognize the myriad legal errors in applying per se reporting requirements, ranging from putting the lives of asylum seekers at risk to undermining the rule of law and U.S. treaty obligations. Advocates, moreover, must be mindful of per se reporting requirements, build strong records demonstrating the danger, futility, or both, of reporting where applicable, and forcefully challenge the government's application of per se reporting requirements, either by opposing counsel or adjudicators. The lives of asylum seekers depend on it.