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## Empathy for the Vulnerable? The Fourth Circuit's Internal Struggle to Grapple With the Trump Administration's Immigration Policies: Part I

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# Empathy for the Vulnerable? The Fourth Circuit's Internal Struggle to Grapple With the Trump Administration's Immigration Policies: Part I

## Authors

Anne Marie Lofaso, Isabella Anderson, Anna Filatova, Blake Humphrey, McKenna Meadows, and Brice Phillips

# EMPATHY FOR THE VULNERABLE? THE FOURTH CIRCUIT'S INTERNAL STRUGGLE TO GRAPPLE WITH THE TRUMP ADMINISTRATION'S IMMIGRATION POLICIES: PART I

Anne Marie Lofaso, Isabella Anderson, Anna Filatova, Blake Humphrey,  
McKenna Meadows, & Brice Phillips\*

I. INTRODUCTION .....	13
II. MARA SALVATRUCHA .....	15
A. <i>The Birth of MS-13, America's Most Dangerous Gang, and Its         Exportation to El Salvador</i> .....	15
B. <i>MS-13 Poses a Safety Threat Throughout the United States</i> ..	18
III. GANG MEETS CHILD: <i>PORTILLO-FLORES V. BARR</i> .....	19
IV. GENERAL REQUIREMENTS FOR ASYLUM, WITHHOLDING OF REMOVAL, AND CAT RELIEF .....	21
V. THE FOURTH CIRCUIT'S DECISION IN <i>PORTILLO-FLORES</i> IS INCONSISTENT WITH GENERAL IMMIGRATION STANDARDS .....	22
A. <i>Aliens Should Not Be Required To Report Persecution to         Police if It Would Be Futile or Subject Them to         Further Abuse</i> .....	22
B. <i>Portillo-Flores Should Have Been Held to a Child-specific         Standard</i> .....	25

## I. INTRODUCTION

The Trump Administration's immigration policies consistently targeted immigrants, refugees, children, victims of gang violence, and individuals classified as "public charges." For example, one of former President Trump's

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first Executive Orders increased detention of immigrants at the border, including women and children, and limited access to asylum nationwide by expanding expedited removal.<sup>1</sup> Another Order issued the very same day cut federal funding to “sanctuary cities”<sup>2</sup>—jurisdictions that refuse to cooperate with federal authorities in enforcing immigration laws for the sake of protecting immigrant communities. And still another<sup>3</sup> originally suspended the issuance of visas to nationals from Iran, Iraq, Sudan, Syria, Libya, Somalia, and Yemen—the so-called “Muslim Travel Ban”;<sup>4</sup> shut down the U.S. refugee program for 120 days; slashed the number of refugees admissible to the U.S. in FY 2017 in half; and halted the resettlement of Syrian refugees indefinitely.<sup>5</sup> Further, in 2018, former U.S. Attorney General Jeff Sessions overruled a 2016 Board of Immigration Appeals (“BIA”) decision, stating that judges generally cannot consider domestic and gang violence as grounds for asylum.<sup>6</sup> And in 2020, the ACLU reported that over 600 children have yet to be reunited with their parents after being subject to a policy of separation at the U.S. border.<sup>7</sup>

Needless to say, appellate courts have become embroiled in disputes over these contentious policy changes. This two-part series of articles reviews two such disputes. Part I describes and analyzes *Portillo-Flores v. Barr*, a case in which the Fourth Circuit, over Judge Stephanie Thacker’s dissent, upheld the

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<sup>1</sup> Exec. Order No. 13767, 82 Fed. Reg. 8793 (Jan. 25, 2017), <https://www.federalregister.gov/documents/2017/01/30/2017-02095/border-security-and-immigration-enforcement-improvements>.

<sup>2</sup> Exec. Order No. 13768, 82 Fed. Reg. 8799 (Jan. 25, 2017), <https://www.federalregister.gov/documents/2017/01/30/2017-02102/enhancing-public-safety-in-the-interior-of-the-united-states>.

<sup>3</sup> Exec. Order No. 13769, 82 Fed. Reg. 8977 (Jan. 27, 2017), <https://www.federalregister.gov/documents/2017/02/01/2017-02281/protecting-the-nation-from-foreign-terrorist-entry-into-the-united-states>.

<sup>4</sup> See, e.g., Abigail Hauslohner, *Undoing Trump’s ‘Muslim Ban’ Could Take Minutes, But Results Could Take Months or Years*, WASH. POST (Dec. 2, 2020, 8:00 AM), <https://www.washingtonpost.com/politics/2020/12/02/biden-trump-muslim-travel-ban/>. Ultimately Iraq, Sudan, and Yemen were removed from this list, while other countries, such as Venezuela, Chad, and North Korea, were added. Compare Exec. Order No. 13769, *supra* note 3, with Exec. Order No. 13780, 82 Fed. Reg. 13209 (Mar. 6, 2017), <https://www.federalregister.gov/documents/2017/03/09/2017-04837/protecting-the-nation-from-foreign-terrorist-entry-into-the-united-states> and Presidential Proclamation 9645, 82 Fed. Reg. 45161 (Sep. 24, 2017), <https://www.federalregister.gov/documents/2017/09/27/2017-20899/enhancing-vetting-capabilities-and-processes-for-detecting-attempted-entry-into-the-united-states-by>.

<sup>5</sup> See Editorial Board, *Trump’s Compassion for Syrians Stops at U.S. Shores*, WASH. POST (Apr. 12, 2018, 7:32 PM), [https://www.washingtonpost.com/opinions/trumps-compassion-for-syrians-stops-at-us-shores/2018/04/12/ad2b211c-3db8-11e8-a7d1-e4efec6389f0\\_story.html](https://www.washingtonpost.com/opinions/trumps-compassion-for-syrians-stops-at-us-shores/2018/04/12/ad2b211c-3db8-11e8-a7d1-e4efec6389f0_story.html).

<sup>6</sup> Elliott Spagat, *Sessions Excludes Domestic, Gang Violence from Asylum Claims*, AP NEWS (June 12, 2018), <https://apnews.com/article/c5b237a0b47649de9f047506f0f07fdf>.

<sup>7</sup> Priscilla Alvarez, *Parents of 628 Migrant Children Separated at Border Still Have Not Been Found, Court Filing Says*, CNN (Dec. 2, 2020, 8:17 PM), <https://www.cnn.com/2020/12/02/politics/family-separation-us-border-children/index.html>.

BIA's denial of asylum to a Salvadorian asylum seeker who, as a child, was beaten nearly to death by MS-13 because Portillo-Flores's sister fled the country to avoid becoming a gang leader's girlfriend.<sup>8</sup> Part II analyzes *Casa de Maryland v. Trump*, a case that upheld the Trump Administration's exceedingly broad definition of the statutory term "public charge," over Judge Robert B. King's dissent.<sup>9</sup> Both cases showcase the extent to which the Fourth Circuit and other reviewing courts are grappling with the Trump Administration's disdain for some of the most vulnerable members of the human race—children, refugees, asylum seekers, and the poor.

## II. MARA SALVATRUCHA

### A. *The Birth of MS-13, America's Most Dangerous Gang, and Its Exportation to El Salvador*

On March 24, 1980, a lone gunman killed Oscar Romero, Archbishop of San Salvador, while saying Mass.<sup>10</sup> Monseñor Romero, whom the year before was nominated for the Nobel Peace Prize, became a target of right-wing factions in El Salvador for preaching human rights for the poor.<sup>11</sup> A U.N. report ultimately found that Major Roberto D'Aubuisson ordered Romero's assassination and "gave precise instructions to members of his security service, acting as a 'death squad', to organize and supervise the assassination."<sup>12</sup> Romero's assassination sparked the beginning of a violent civil war in El Salvador that continues to have transnational repercussions four decades later.<sup>13</sup>

Both the left and right wings of the Salvadorian government used guerilla fighters and national armed forces to fight for 12 years.<sup>14</sup> The civil war gripped the entire nation, as children who had not yet fully learned to read or write were recruited to fight by the Salvadorian army.<sup>15</sup> Salvadorians were forced to either flee their homes and seek refuge in another country or stay and fight to

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<sup>8</sup> 973 F.3d 230, 236 (4th Cir. 2020), *reh'g en banc granted*, 830 F. App'x 125 (4th Cir. 2020) (unpublished).

<sup>9</sup> 971 F.3d 220 (4th Cir. 2020).

<sup>10</sup> Juan J. Fogelbach, *Mara Salvatrucha (MS-13) and Ley Anti Mara: El Salvador's Struggle To Reclaim Social Order*, 7 S.D. INTL. L.J. 223, 226 (2005).

<sup>11</sup> *Id.* at 226–28.

<sup>12</sup> From Madness to Hope: The 12-Year War in El Salvador, Rep. of the Comm. on the Truth for El Salvador (1993), transmitted by Letter dated 29 March 1993 from the Secretary-General Addressed to the President of the Security Council, U.N. Doc. S/25500, at 127 (Apr. 1, 1993), <https://undocs.org/pdf?symbol=en/S/25500>.

<sup>13</sup> Fogelbach, *supra* note 10, at 226–28.

<sup>14</sup> *Id.* at 227.

<sup>15</sup> *Id.*

their deaths.<sup>16</sup> Ultimately, 20% of the population fled the country, while 75,000 became war casualties.<sup>17</sup>

Hundreds of thousands of Salvadorian refugees sought refuge in southern California.<sup>18</sup> Over 52% percent of Salvadorian refugees in the United States settled into the Pico-Union district of west downtown Los Angeles.<sup>19</sup> However, their illegal status made them vulnerable to both the U.S. government and established Mexican and African American gangs.<sup>20</sup> To survive, they banded together, and thus, Mara Salvatrucha (“MS-13”) was born.<sup>21</sup> “Armed with machetes, guns, and guerilla combat training—courtesy of the civil war in El Salvador—[MS-13] rapidly became one of the most violent gangs in Los Angeles.”<sup>22</sup>

By the 1990s, violence in the Pico-Union district reached heightened levels, as MS-13 competed with other gangs for territory in the growing drug market.<sup>23</sup> These gang battles cost many lives, and the California prison system was no match for MS-13’s growing membership.<sup>24</sup> Despite state and national efforts, MS-13 continued to proliferate, spurred by the Salvadorian civil war.<sup>25</sup> The end of this war created a ripened environment for expanding gang territory, as thousands of displaced El Salvadorians became ideal candidates for recruitment.<sup>26</sup> Upon capture or criminal conviction, these refugee children-turned-gang-members were deported to a foreign land: their birthplace, the original battleground, El Salvador.<sup>27</sup> To survive in the unfamiliar land, the deported gang members resumed their Los Angeles lifestyle, thereby exporting the American-made gang to El Salvador.<sup>28</sup>

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<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> Kelly Padgett Lineberger, Note, *The United States-El Salvador Extradition Treaty: A Dated Obstacle in the Transnational War Against Mara Salvatrucha (MS-13)*, 44 VAND. J. TRANSNAT’L L. 187, 190 (2011).

<sup>19</sup> Fogelbach, *supra* note 10, at 226–28.

<sup>20</sup> *Id.* at 227.

<sup>21</sup> *Id.*

<sup>22</sup> Lineberger, *supra* note 18, at 191.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* (“The California prison system—where many of the MS-13 members served sentences for drug offenses and violent crimes—did not deter the violence; instead, it operated more like a ‘finishing school’ for the gang’s members.”).

<sup>25</sup> *Id.* at 192.

<sup>26</sup> *Id.* at 191, 193.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 193–94.

By 2008, the FBI labeled MS-13 as America's most dangerous gang.<sup>29</sup> Although former President Donald Trump treated the gang as a foreign invader,<sup>30</sup> MS-13 began, paradoxically, on Seoul International Park's playground in the Pico-Union neighborhood of Los Angeles, California.<sup>31</sup> While the charge fit Trump's anti-immigrant rhetoric, it was not technically accurate, and it did not help combat the threat posed by the gang that already had a strong-hold in the United States.<sup>32</sup>

MS-13 has a variety of ventures in the criminal economy:<sup>33</sup> extortion; drug peddling; car theft and resale; prostitution; human smuggling; human trafficking; arms trafficking; hitman for hire; international drug trafficking; and money laundering.<sup>34</sup> And sadly, many victims of human trafficking tend to be vulnerable children who come to the United States as unaccompanied minors.<sup>35</sup> Some of the same victims of human trafficking also suffered sexual abuse in El Salvador and neighboring countries that are dominated by MS-13.<sup>36</sup> Gang presence is "inextricably linked" with higher rates of sexual and child abuse in South American countries.<sup>37</sup> Since 2000, homicide rates of young women have drastically risen with the presence of MS-13 in El Salvador.<sup>38</sup> Few perpetrators of violence against these young women ever face justice, and the United States' immigration policies serve as a barrier for the young women who are being increasingly targeted by MS-13.<sup>39</sup>

Violence is also a major staple of MS-13.<sup>40</sup> Although violence can be seen "as an end in and of itself," the violence is thought to be motivated by many

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<sup>29</sup> *Id.* at 188.

<sup>30</sup> Ron Nixon, Liz Robbins & Katie Benner, *Trump Targets MS-13, a Violent Menace, if Not the One He Portrays*, N.Y. TIMES (Mar. 1, 2018), <https://www.nytimes.com/2018/03/01/us/politics/ms13-gang-threat-trump-policy.html>.

<sup>31</sup> Lineberger, *supra* note 18, at 190.

<sup>32</sup> Nixon et al., *supra* note 30.

<sup>33</sup> *MS13 in the Americas: How the World's Most Dangerous Gang Defies Logic, Resists Destruction*, INSIGHT CRIME, <https://www.justice.gov/eoir/page/file/1043576/download> (last visited Feb. 3, 2021),

<sup>34</sup> *Id.*

<sup>35</sup> *The Connection Between the Mara Salvatrucha and Human Trafficking*, HUM. TRAFFICKING SEARCH (2017), <https://humantraffickingsearch.org/the-connection-between-the-mara-salvatrucha-and-human-trafficking> (last visited Feb. 3, 2021).

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> Molly O'Toole, *El Salvador's Gangs Are Targeting Young Girls and the Trump Administration's Immigration Policies Are Certain To Make it Worse*, ATLANTIC (Mar. 4, 2018), <https://www.theatlantic.com/international/archive/2018/03/el-salvador-women-gangs-ms-13-trump-violence/554804>).

<sup>39</sup> *Id.*

<sup>40</sup> *MS-13 In the Americas*, *supra* note 33.

internal and external factors.<sup>41</sup> Primarily, the gang's ability to recruit and its reputation are "intimately linked to its violent reputation."<sup>42</sup> As for external factors, violence serves as a means to establish territory, which in turn secures revenue.<sup>43</sup> Additionally, violence is a primary way to avoid prosecution by targeting those believed to be working with law enforcement.<sup>44</sup> Another strong incentive for violence in El Salvador is the ability to exert social and political control over the less developed government.<sup>45</sup> By wielding social control over gang members, MS-13 leaders are able to achieve government concessions by controlling homicide rates and enforcing rules against crimes such as extortion and domestic violence.<sup>46</sup> Through this control, the gang has secured prison transfers, and even government payments to gang leaders.<sup>47</sup> This is exemplified through the 2012–2014 gang truce.<sup>48</sup> However, when this truce fell apart, the gang ramped up violence in an unsuccessful effort to coerce the government into making more concessions.<sup>49</sup> As of 2018, El Salvador ranked as the most dangerous country in the world in terms of organized crime, terrorism, homicide, and reliability of police forces.<sup>50</sup> In 2017, the country recorded 4,000 murders,<sup>51</sup> even as the homicide rate had been decreasing.<sup>52</sup> Unfortunately for the citizens, the state often provides inadequate protection, which is compounded by corruption and police overreach.<sup>53</sup>

#### B. *MS-13 Poses a Safety Threat Throughout the United States*

Although MS-13's exportation to South America has given those governments the seemingly insurmountable task of controlling the gang's

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<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> Sinisa Vuković & Eric Rahman, *The Gang Truce in El Salvador*, OXFORD RES. GRP. (Apr. 18, 2018), <https://www.oxfordresearchgroup.org.uk/blog/the-gang-truce-in-el-salvador>.

<sup>49</sup> *MS13 in the Americas*, *supra* note 33.

<sup>50</sup> Caitlin Foster, *These Are the World's Most Dangerous Photos Showing What Life Is Like There*, BUS. INSIDER (Nov. 1, 2018), <https://www.businessinsider.com/what-life-is-like-in-some-of-the-worlds-most-dangerous-countries-2018-10>.

<sup>51</sup> *Id.*

<sup>52</sup> *Intentional Homicides (per 100,000 People) - El Salvador*, WORLD BANK, <https://data.worldbank.org/indicator/VC.IHR.PSRC.P5?locations=SV> (last visited Jan. 31, 2021).

<sup>53</sup> Lisa Haugaard, *El Salvador: Gang Violence and Growing Abuses by the State Security Forces*, LATIN AM. WORKING GRP., <https://www.lawg.org/el-salvador-gang-violence-and-growing-abuses-by-state-security-forces/> (last visited Jan. 31, 2021).



criminal activities, the United States faces a similar struggle.<sup>54</sup> In the 1990s, Congress began broadening the category of aggravated felonies to directly target gang members, which reduced gang violence by expediting removal of illegal residents.<sup>55</sup> Nevertheless, MS-13 continued to expand its presence throughout the country.<sup>56</sup> MS-13 currently operates in at least 42 states and Washington, D.C.<sup>57</sup>

The most challenging factor to curbing MS-13 is that gang crime is traditionally under local jurisdiction, but MS-13 is a national and international problem.<sup>58</sup> Moreover, no singular federal agency is tasked with combating gang violence in the United States.<sup>59</sup> Instead, federal agencies work with local law enforcement to combat the threat posed by gangs.<sup>60</sup> In 2005, Congress directed the FBI to establish the National Gang Intelligence Center, which worked to coordinate intelligence between federal and local agencies.<sup>61</sup> But MS-13's growth and expansion has remained undeterred since Congress's initial efforts in the 1990s.<sup>62</sup> Accordingly, MS-13's violent reputation makes it an ideal boogeyman for anti-immigrant rhetoric.<sup>63</sup>

### III. GANG MEETS CHILD: *PORTILLO-FLORES V. BARR*

Hernan Alexander Portillo-Flores, a native and citizen of El Salvador, is one of many MS-13 victims.<sup>64</sup> Hernan was only 13 years old when, in 2013, local MS-13 gang leader "El Pelon" decided that Hernan's sister Paola should be his girlfriend.<sup>65</sup> When Paola refused, El Pelon threatened to harm and even kill her family.<sup>66</sup> To save her life, Paola fled to the United States.<sup>67</sup>

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<sup>54</sup> *MS13 in the Americas*, *supra* note 33.

<sup>55</sup> Lineberger, *supra* note 18, at 191–92.

<sup>56</sup> KRISTIN FINKLEA, CONG. RSCH. SERV., R45292, MS-13 IN THE UNITED STATES AND FEDERAL LAW ENFORCEMENT EFFORTS (2018), <https://fas.org/sgp/crs/homesecc/R45292.pdf>.

<sup>57</sup> *The MS-13 Threat: A National Assessment*, FED. BUREAU OF INVESTIGATIONS (Jan. 14, 2008) [https://archives.fbi.gov/archives/news/stories/2008/january/ms13\\_011408](https://archives.fbi.gov/archives/news/stories/2008/january/ms13_011408).

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Is MS-13 as Dangerous as Trump Suggests?*, WASH. POST: MONKEY CAGE (Dec. 7, 2018), <https://www.washingtonpost.com/news/monkey-cage/wp/2018/12/07/trump-keeps-warning-about-ms-13-is-it-really-as-dangerous-as-he-suggests/>.

<sup>64</sup> *Portillo-Flores v. Barr*, 973 F.3d 230, 236 (4th Cir. 2020), *reh'g en banc granted*, 830 F. App'x 125 (4th Cir. 2020) (unpublished).

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

For several months after Paola's departure, MS-13 members tried to find her.<sup>68</sup> They confronted Hernan several times with knives and handguns, demanding Paola's location.<sup>69</sup> "During this period, [Hernan] would sometimes 'get home without shoes, beaten up, with bruises, and even sometimes without a shirt.'"<sup>70</sup> When the last beating resulted in his near-death, Hernan's mother sent him to his uncle's ranch, where he hid and lived in fear that gangs would find and kill him.<sup>71</sup>

Hernan knew that police, who collaborated with gangs, could not protect him.<sup>72</sup> While Hernan was away, four police officers came to his house, asking his mother about Hernan's location.<sup>73</sup> Two gang members stood nearby.<sup>74</sup> Hiding in another region would not help because MS-13 controlled the entire country.<sup>75</sup> Thus, Hernan had no choice but to escape.<sup>76</sup>

In 2015, Hernan entered the United States as an unaccompanied 15-year-old juvenile.<sup>77</sup> He applied for asylum, withholding of removal, and Convention Against Torture ("CAT") protection. Hernan claimed that, if returned, he would be "harmed, tortured, or killed" by MS-13 and that the Salvadorian police was unwilling to protect him because they work with MS-13.<sup>78</sup> Despite finding Hernan's evidence credible, the immigration judge ("IJ") denied his claims, finding that Hernan's treatment did not rise to the level of persecution, that the harm was not suffered at the hands of the government or an agent that the government was unwilling or unable to control, and that there was no fear of future persecution.<sup>79</sup> The BIA dismissed Hernan's appeal because, among other things, Hernan failed to prove that MS-13's threats rose to the level of persecution and that the government was unwilling or unable to control MS-13, emphasizing that Hernan did not seek police protection.<sup>80</sup>

On appeal, the Fourth Circuit denied Hernan's petition stating that "standards of review, like offensive linemen in a football game, control the outcome of an appeal."<sup>81</sup> The court determined that Hernan was not eligible for

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<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* (quoting J.A. 205).

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* at 237.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* at 236.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at 237.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at 236. Specifically, he argued that (1) the IJ and BIA failed to consider the harms he and his sister suffered from a child's perspective; (2) even from an adult's perspective, the physical

asylum or withholding of removal under the substantial evidence standard.<sup>82</sup> Judge Thacker dissented, explaining that the majority opinion applied the incorrect legal standard and “**completely omitted** the required analysis.”<sup>83</sup> She emphasized that “[a] petitioner whose life is on the line deserves . . . more than the absolute disregard of his relevant evidence exhibited in the IJ and BIA opinions.”<sup>84</sup> On November 25, 2020, the Fourth Circuit granted rehearing *en banc*, and the case is calendared for oral argument in March 2021.<sup>85</sup>

#### IV. GENERAL REQUIREMENTS FOR ASYLUM, WITHHOLDING OF REMOVAL, AND CAT RELIEF

Aliens can file three types of petitions to avoid deportation: application for asylum, withholding of removal, and relief under CAT.<sup>86</sup> Under all three standards, the alien must establish that the home country’s government is unable or unwilling to control the persecution.<sup>87</sup>

First, the Attorney General may grant asylum to foreign nationals who qualify as refugees under the Immigration and Naturalization Act (“INA”).<sup>88</sup> To qualify, an alien needs to establish that he is unable or unwilling to return to his country of national origin “because of persecution or a well-founded fear of persecution on account of race, religion, nationality, or membership in a particular social group.”<sup>89</sup> An alien must establish that the government is unwilling or unable to control alleged persecution.<sup>90</sup>

A withholding-of-removal claim requires the same elements as an asylum claim but under a higher standard of proof.<sup>91</sup> The applicant must establish “a ‘clear probability’ of persecution, rather than the less stringent ‘well-founded fear’ of persecution that will suffice to make out an asylum claim.”<sup>92</sup> The difference in the standard can be explained by the fact that asylum is within the

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abuse rose to the level of persecution; and (3) on their own, MS-13’s threats to kill him constitute persecution. *Id.* at 239.

<sup>82</sup> *Id.* at 246.

<sup>83</sup> *Id.* at 251 (Thacker, J., dissenting) (emphasis in original).

<sup>84</sup> *Id.* at 257.

<sup>85</sup> *Portillo-Flores v. Barr*, 830 F. App’x 125, 126 (4th Cir. 2020) (unpublished).

<sup>86</sup> *See* 8 U.S.C.A. §§ 1158(a)(1), (b)(1)(A) (West 2021); 8 U.S.C.A. § 1231(b)(3)(A). *See also* 8 C.F.R. § 1208.16(c)(2) (West 2021).

<sup>87</sup> *See* 8 U.S.C.A. §§ 1158(a)(1), (b)(1)(A); 8 U.S.C.A. § 1231(b)(3)(A); 8 C.F.R. § 1208.16(c)(2).

<sup>88</sup> *See* 8 U.S.C.A. §§ 1158(a)(1), (b)(1)(A); *Mejia v. Sessions*, 866 F.3d 573, 578 (4th Cir. 2017).

<sup>89</sup> 8 U.S.C.A. § 1101(a)(42)(A).

<sup>90</sup> *See Mulyani v. Holder*, 771 F.3d 190, 198 n.4 (4th Cir. 2014).

<sup>91</sup> *See* 8 U.S.C.A. § 1231(b)(3)(A).

<sup>92</sup> *Portillo-Flores v. Barr*, 973 F.3d 230, 239 (4th Cir. 2020) (citing *Salgado-Sosa v. Sessions*, 882 F.3d 451, 456–57 (4th Cir. 2018)).

Attorney General’s discretion, but withholding of removal is not.<sup>93</sup> If an applicant fails to establish the standard for asylum, he will not meet the higher standard for showing withholding of removal.<sup>94</sup>

To succeed on an application for CAT relief, an applicant “must prove (1) that he is more likely than not to be tortured if removed to [his home country], and (2) that this torture will occur at the hands of the government or with its consent or acquiescence.”<sup>95</sup> Generally, “a petitioner can’t establish government acquiescence unless he has notified government officials of the threats or encounters that give rise to his fear of torture.”<sup>96</sup>

#### V. THE FOURTH CIRCUIT’S DECISION IN *PORTILLO-FLORES* IS INCONSISTENT WITH GENERAL IMMIGRATION STANDARDS

##### A. *Aliens Should Not Be Required To Report Persecution to Police if It Would Be Futile or Subject Them to Further Abuse*

All three claims require that “an applicant alleging past persecution must establish either that the government was responsible for the persecution or that it was unable or unwilling to control the persecutors.”<sup>97</sup> However, most federal courts, “recognizing the troubling reality of police corruption in [many] Central American countries,” refuse to enforce this rule strictly.<sup>98</sup> The courts agreed that an alien is not required to prove that he reported persecution or torture to police if “doing so would (1) have been futile or (2) have subjected [him] to further abuse.”<sup>99</sup> Ten circuits, including the Fourth Circuit, have adopted this or a similar exception.<sup>100</sup>

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<sup>93</sup> *Mejia*, 866 F.3d at 578–79.

<sup>94</sup> *Portillo-Flores*, 973 F.3d at 239 (citing *Mulyani*, 771 F.3d at 198).

<sup>95</sup> *Perez-Morales v. Barr*, 781 F. App’x 192, 198 (4th Cir. 2019) (citing *Turkson v. Holder*, 667 F.3d 523, 526 (4th Cir. 2012)). *See also* 8 C.F.R. § 1208.16(c)(2) (2021).

<sup>96</sup> *Perez-Morales*, 781 F. App’x at 198.

<sup>97</sup> *Mulyani*, 771 F.3d at 198.

<sup>98</sup> *Perez-Morales*, 781 F. App’x at 198.

<sup>99</sup> *Orellana v. Barr*, 925 F.3d 145, 153 (4th Cir. 2019) (citing *Ornelas-Chavez v. Gonzales*, 458 F.3d 1052, 1058 (9th Cir. 2006)).

<sup>100</sup> *See, e.g., Perez-Morales*, 781 F. App’x at 198–99 (holding that the petitioner established that reporting torture to police would have been futile because he believed that police were bought off by gang members and his friend was killed after reporting gangs to police); *Rosales Justo v. Sessions*, 895 F.3d 154, 165 (1st Cir. 2018) (holding that the BIA erred when it relied on petitioner’s failure to report persecution to police as basis for rejecting asylum claim where the BIA failed to take into account evidence of police corruption in *Guerrero* and petitioner’s testimony); *Morehodov v. U.S. Att’y Gen.*, 270 F. App’x 775, 780 (11th Cir. 2008) (holding that the IJ “flatly mischaracterize[d] the evidence” and remand was required because, among other things, the IJ ignored the expert’s testimony regarding hostility of the Ukrainian government toward Baptists); *Ornelas-Chavez*, 458 F.3d at 1058 (holding that petitioner does not have to show that he reported abuse to police in order to establish past persecution). *See also Velasquez-Rodriguez v. Whitaker*, 762 F. App’x 241, 244–45 (6th Cir. 2019) (applying the rule); *Ramos v.*

The Ninth Circuit decision in *Ornelas-Chavez v. Gonzales* is a seminal case.<sup>101</sup> There, Ornelas-Chaves suffered abuse in his native country, Mexico, due to his homosexuality and female sexual identity.<sup>102</sup> Since he was six, he was raped several times by acquaintances and relatives, including instances when his father arranged it.<sup>103</sup> He hid for many years around Mexico until he could flee to the United States to save his life.<sup>104</sup> Five years later, the U.S. Immigration and Customs Enforcement (“ICE”) began to process his removal.<sup>105</sup> The BIA denied Ornelas-Chaves’s application for asylum, withholding of removal, and protection under CAT because, among other things, he failed to report persecution to the police.<sup>106</sup> The BIA found the evidence inconclusive, explaining that Ornelas-Chaves failed to prove that the government was unwilling to control those who may harm him since he never reported the incidents.<sup>107</sup> The court overruled the BIA’s decision explaining that “a reporting requirement conflicts with the way this court has implicitly handled a petitioner’s evidence of governmental unwillingness or inability to control private persecution.”<sup>108</sup> The court stated that “to establish eligibility for withholding of removal” because of “past persecution at the hands of private parties the government is unwilling or unable to control,” an applicant “need not have reported that persecution to the authorities if he can convincingly establish that doing so would have been futile or have subjected him to further abuse.”<sup>109</sup> The court thereby granted [Ornelas-Chaves’s] claims.<sup>110</sup>

The Fourth Circuit has applied this rule several times, including in the context of gang persecution.<sup>111</sup> In *Perez-Morales*, a Guatemalan citizen fled to the United States to escape persecution by Los Zetas gang members because he witnessed the gang commit several murders.<sup>112</sup> The court rejected the BIA’s reasoning that “Perez-Morales didn’t establish a likelihood of government acquiescence in any such torture because he ‘failed to report his encounter with

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Sessions, 732 F. App’x 337, 338 (5th Cir. 2018) (same); *Vahora v. Holder*, 707 F.3d 904, 908–09 (7th Cir. 2013) (same); *Cardozo v. U.S. Att’y Gen.*, 505 F. App’x 135, 138 (3d Cir. 2012) (same); *Alanwoko v. Mukasey*, 538 F.3d 908, 913 (8th Cir. 2008) (same); *Uwais v. U.S. Att’y Gen.*, 478 F.3d 513, 516 (2d Cir. 2007) (same); *Lunaj v. Gonzales*, 199 F. App’x 38 (2d Cir. 2006) (same).

<sup>101</sup> 458 F.3d 1052, 1054 (9th Cir. 2006).

<sup>102</sup> *Id.*

<sup>103</sup> *Id.* at 1054–55.

<sup>104</sup> *Id.* at 1055.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> *Id.* at 1057.

<sup>109</sup> *Id.* at 1058.

<sup>110</sup> *Id.*

<sup>111</sup> *Perez-Morales v. Barr*, 781 F. App’x 192, 197 (4th Cir. 2019).

<sup>112</sup> *Id.* at 194.

the gang members in 2013 to the police.”<sup>113</sup> The court vacated and remanded the case directing BIA “to fully consider the evidence and determine, in accordance with our precedents, whether Perez-Morales can show a likelihood of government acquiescence despite not having reported the Zetas’ threats to the police.”<sup>114</sup>

Despite established practice, the BIA denied Portillo-Flores’s claims, holding that “the record evidence does not compel the conclusion that the Salvadoran government was unwilling or unable to control MS-13” because Portillo-Flores never reported MS-13 to the police.<sup>115</sup> Thus, Portillo-Flores’s “failure to report the threats and beatings was fatal to his claim.”<sup>116</sup> “Full stop.”<sup>117</sup>

Portillo-Flores provided “credible un rebutted, legally significant evidence that reporting the incidents to local police would have been futile or subjected him to further abuse.”<sup>118</sup> Portillo-Flores testified, and his testimony was found credible, that local police were cooperating with MS-13.<sup>119</sup> In support of his allegations, he provided country reports and expert opinion establishing that the El Salvadorian government is not capable of combating gang activities.<sup>120</sup> His allegations at the very least can be proven by the fact that Portillo-Flores’s friend was killed shortly after reporting MS-13 to police.<sup>121</sup> Portillo-Flores’s mother and grandmother testified that police searched inside their home under the supervision of gang members.<sup>122</sup>

The BIA did not analyze this evidence.<sup>123</sup> It was convinced that “some efforts undertaken by El Salvador to address gang activity” would have been enough for Portillo-Flores to live safely in his home country.<sup>124</sup> As Judge Thacker noted, “[y]et even if—fully analyzed—these country reports provide more than a mere scintilla of evidence that El Salvador is willing to attempt gang control, I fail to see how these reports provide evidence that the country is able to do so.”<sup>125</sup> Under these circumstances, the only fair remedy is remand because “[w]hen a man’s life is on the line, he is entitled to know that the court deciding

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<sup>113</sup> *Id.* at 198.

<sup>114</sup> *Id.* at 199.

<sup>115</sup> *Portillo-Flores v. Barr*, 973 F.3d 230, 250–51 (4th Cir. 2020) (Thacker, J., dissenting).

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Id.* at 250.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> *Id.* at 251.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

his claim reviewed all his evidence, understood it, and had a cogent, articulable basis for its determination that his evidence was insufficient.”<sup>126</sup>

*B. Portillo-Flores Should Have Been Held to a Child-specific Standard*

Recognizing the “unique vulnerability and circumstances” of child asylum applicants, INS Guidelines establish “child-sensitive interview procedures and analysis.”<sup>127</sup> Recognizing that children are more impacted by threats than adults,<sup>128</sup> the Guidelines instruct officials to give children the benefit of the doubt because children’s ability to recall and testify can be impacted.<sup>129</sup> Also, it recommends a non-adversarial interview setting<sup>130</sup> and requires officials to consider the stability of the child’s family and home country.<sup>131</sup> Although the Guidelines are not binding, the First, Second, Sixth, Seventh, and Ninth Circuits have adopted them.<sup>132</sup> These circuits consider all events experienced by a child from a child’s perspective, regardless of whether such events happened to the child or his family members.<sup>133</sup>

One persecuted child was Manuel Ordonez-Quino, an indigenous Mayan whose family and community were attacked by the military during the Guatemalan civil war.<sup>134</sup> He recalled how “the military ‘shot at us, bombed us, destroyed our homes[,] and killed our people.’”<sup>135</sup> When he was five years old, a helicopter dropped a bomb near him, causing severe illness, headaches, and near-deafness in both ears.<sup>136</sup> Later, Manuel moved to Guatemala City to work in a textile mill, where he was mistreated and attacked because of his hearing

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<sup>126</sup> *Rodriguez-Arias v. Whitaker*, 915 F.3d 968, 975 (4th Cir. 2019).

<sup>127</sup> U.S. Dep’t of Just., Guidelines for Children’s Asylum Claims, 1998 WL 34032561, at \*1 (defining “child” as every person under the age of 18), \*14.

<sup>128</sup> *Id.* at \*11 (noting that trauma can have a significant impact on a child’s ability to present testimony).

<sup>129</sup> *Id.* at \*12–13.

<sup>130</sup> *Id.* at \*4–10.

<sup>131</sup> *Id.* at \*22.

<sup>132</sup> See *Ordonez-Quino v. Holder*, 760 F.3d 80 (1st Cir. 2014); *Mejilla-Romero v. Holder*, 614 F.3d 572 (1st Cir. 2010); *Liu v. Ashcroft*, 380 F.3d 307 (7th Cir. 2004); *Nabhani v. Holder*, 382 F. App’x 487 (6th Cir. 2004); *Abay v. Ashcroft*, 368 F.3d 634 (6th Cir. 2004). The Third and the Eleventh Circuits have declined to follow the Guidelines. See *Razzak v. Att’y Gen. of U.S.*, 287 F. App’x 208, 210–11 (3d Cir. 2008) (determining that “in this case, however, there is no reason for us to hold that the Immigration Court must follow” the Guidelines); *Gonzalez v. Reno*, 212 F.3d 1338, 1351 n.16 (11th Cir. 2000) (finding that the Guidelines do not have the force of law and declining to follow them). The Fourth, Fifth, Eighth, and Tenth Circuits have not spoken on the issue.

<sup>133</sup> *Id.*

<sup>134</sup> *Ordonez-Quino*, 760 F.3d at 83.

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

disability and inability to understand Spanish.<sup>137</sup> After being horribly beaten by gangs in 2005, he had no choice but to escape to the United States.<sup>138</sup>

After detention by ICE, Manuel petitioned for asylum, withholding of removal, and CAT protection.<sup>139</sup> He had difficulty testifying because of his hearing disability, despite using a hearing aid.<sup>140</sup> The IJ found, and BIA affirmed, that Manuel did not demonstrate persecution.<sup>141</sup> The First Circuit vacated and remanded the case because the BIA did not consider Manuel's suffering from the perspective of a vulnerable child and failed to consider all relevant evidence as a whole.<sup>142</sup> The court emphasized that Manuel's "string of events even more strongly supports a finding of past persecution for a small child, whose formative years were spent in terror and pain." Besides, the BIA did not consider the harms suffered by his family, as required by the Guidelines.<sup>143</sup>

Similarly, even if the applicant is no longer a child, the harm must be considered from a child's perspective.<sup>144</sup> When Manuel Jorge-Tzoc was a child, he and his family were persecuted by the Guatemalan government.<sup>145</sup> Soldiers fatally shot Manuel's sister, her husband, her husband's family, and several other family members.<sup>146</sup> Manuel testified that he saw several dead bodies, including the dead body of his cousin.<sup>147</sup> After emigrating to the United States at the age of 18, Manuel was arrested for illegal entry.<sup>148</sup> The BIA denied his asylum application.<sup>149</sup> The Second Circuit vacated because the agency failed to "address the harms Jorge-Tzoc and his family incurred cumulatively and from the perspective of a small child."<sup>150</sup>

Moreover, a child's reaction to trauma could be worse than an adult's because children depend on their community.<sup>151</sup> For example, brothers

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<sup>137</sup> *Id.*

<sup>138</sup> *Id.* at 84.

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> *Id.* at 85–86.

<sup>142</sup> *Id.* at 91.

<sup>143</sup> *Id.* at 92.

<sup>144</sup> *See* *Jorge-Tzoc v. Gonzales*, 435 F.3d 146 (2d Cir. 2006).

<sup>145</sup> *Id.* at 147.

<sup>146</sup> *Id.* at 147–48.

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> *Id.* at 150.

<sup>151</sup> *See* *Babi v. Sessions*, 707 F. App'x 467 (9th Cir. 2017); *Bringas-Rodriguez v. Sessions*, 850 F.3d 1051 (9th Cir. 2017); *Mendoza-Pablo v. Holder*, 667 F.3d 1308 (9th Cir. 2012); *Winata v. Holder*, 446 F. App'x 923 (9th Cir. 2011); *Hernandez-Ortiz v. Gonzales*, 496 F.3d 1042 (9th Cir. 2007); *Nehimaya-Guerra v. Gonzales*, 171 F. App'x 676 (9th Cir. 2006); *Zhang v. Gonzales*, 408 F.3d 1239 (9th Cir. 2005); *Mansour v. Ashcroft*, 390 F.3d 667 (9th Cir. 2004).



Guillermo and Florentio Hernández–Ortiz were only nine and seven when the Guatemalan army “beat [their] father in front of their mother and took him away.”<sup>152</sup> The family fled to a refugee camp in Mexico where the boys learned that the Guatemalan army killed their older brother.<sup>153</sup> After coming to the United States in 1991, they applied for asylum, but their claims were denied by the BIA.<sup>154</sup>

The Ninth Circuit vacated and remanded the case because the BIA failed to review “the events from [a child’s] perspective, nor measure the degree of their injuries by their impact on children of their ages.”<sup>155</sup> The court explained that “a child’s reaction to injuries to his family is different from an adult’s. The child is part of the family, the wound to the family is personal, the trauma apt to be lasting.”<sup>156</sup>

In *Portillo-Flores*, the BIA “once again failed to provide a meaningful analysis of whether an immigrant established a well-founded fear of future persecution.”<sup>157</sup> The BIA’s failure to apply a child-specific standard will cost Hernan his life, because evidence established that if he returns to El Salvador, he will be persecuted and possibly killed by MS-13.<sup>158</sup> Like many other circuits that have adopted the Guidelines for Children Asylum Claims and apply them to vacate erroneous BIA decisions, the Fourth Circuit, on rehearing en banc, should do the same. The court should remand the case with directions to consider Hernan’s suffering from the perspective of a vulnerable child, which he was at the time of persecution by gangs.

In Part II of this series, we look at another vulnerable group: the public charge.

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<sup>152</sup> *Hernandez-Ortiz*, 496 F.3d at 1044.

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

<sup>155</sup> *Id.* Guillermo and his brother testified and submitted evidence, including a psychotherapist’s report that they had “intense” trauma symptoms. *Id.*

<sup>156</sup> *Id.* at 1045.

<sup>157</sup> *Portillo-Flores v. Barr*, 973 F.3d 230, 255 (4th Cir. 2020) (Thacker, J., dissenting).

<sup>158</sup> *Id.*