INTERPRETING THE IMMIGRATION AND NATIONALITY ACT IN FEDERAL CIRCUIT COURTS: HOW THE NINTH CIRCUIT BECAME A VESSEL TRAVELING "AT SOME DISTANCE FROM THE MAIN FLEET"

Shannon J. Murphy[*]

ABSTRACT

Congress created the Immigration and Nationality Act to provide uniformity and equality to our nation's immigration system. In doing so, Congress afforded the federal circuit courts with vast authority to review and interpret the Immigration and Nationality Act. Unfortunately, the expansive power vested in the federal circuit courts has resulted in an immigration system where relief and protection are inconsistent and unequal.

The purpose of this Article is to highlight the inequities that riddle our immigration system, and to demonstrate that the current appeals process for immigration cases is no longer feasible, nor fair. Through a hypothetical case study, this Article demonstrates that an individual seeking protection in the United States is more likely to obtain relief or protection under the Immigration and Nationality Act if their application is considered under Ninth Circuit precedent, and less likely to succeed if their application is considered under Second Circuit precedent. This Article concludes by proposing a new appellate review process for our immigration system, where a single federal circuit court maintains the authority to consider any decision appealed from the Executive Office for Immigration Review, instead of the federal circuit court sitting in the same jurisdiction as the immigration court where the applicant's case was initially heard. This proposal, which

[*] Immigration law practitioner. J.D., William & Mary Law School, 2020; BA, University of Kentucky, 2017. I thank Professor Evan Criddle, who oversaw my research while I attended William & Mary Law School and provided indispensable feedback along the way.

was previously introduced by the United States Senate in 2006, is now more feasible—and urgently needed—than ever before.

TABLE OF CONTENTS

INTRODUCTION

In an attempt to streamline administrative proceedings and establish a "consolidated source" for immigration law,

Congress crafted the Immigration and Nationality Act ("INA" or "Act").[1] Ideally, the Act would provide uniform guidelines for any and all individuals seeking admission or protection in the United States.[2] Under the Act, an applicant in removal proceedings who is seeking admission or protection in the United States may have a chance to present their case before an immigration judge.[3] And while immigration judges often employ differing interpretations of the immigration laws governing relief from removal, the Board of Immigration Appeals ("Board" or "BIA"), which is "the highest administrative body for interpreting and applying immigration laws," usually clarifies any disparities.[4] But the Board's unified interpretation is not always accepted at the next stage of an appeal: a petition for review to the federal circuit courts.[5] More often than not, when reviewing petitions regarding relief from removal, the federal circuit courts quickly unravel the once uniform immigration laws laid out in the Act.[6] Each decision

1. *See generally* Immigration Reform and Control Act of 1986, Pub. L. No. 99-603; 7 U.S. CITIZENSHIP & IMMIGR. SERVS., ADJUSTMENT OF STATUS: CHAPTER 1 – PURPOSE & BACKGROUND (2021) (discussing the purpose of immigration law reform and how the INA will serve the judicial process moving forward).

2. *See generally* 8 U.S.C. § 1158(a)(1) (2018) ("*Any alien* who is physically present in the United States or who arrives in the United States . . . may apply for asylum.") (emphasis added).

3. *See generally* 8 U.S.C. § 1229a(a)–(b) (2018) (outlining proceedings before an immigration judge).

4. *See Board of Immigration Appeals*, U.S. DEP'T OF JUST., https://www.justice.gov/eoir/board-of-immigration-appeals (Sept. 14, 2021) (explaining the Board's duty to interpret the immigration laws on review from immigration courts).

5. 8 U.S.C. § 1252(b)(2) (2018) ("The petition for review shall be filed with the court of appeals for the judicial circuit in which the immigration judge completed the proceedings."); *see* Real ID Act, Pub. L. No. 109-13, Div. B., § 106(a), 119 Stat. 231 (2005) (eliminating district court habeas corpus jurisdiction over final orders of deportation or removal, and vesting jurisdiction to review such orders exclusively in the courts of appeals); *see also* Martinez v. Napolitano, 704 F.3d 620, 622 (9th Cir. 2012) ("The exclusive means to challenge an order of removal is the petition for review process.").

6. *See* Brian P. Downey & Angelo A. Stio III, "*Of Course We Believe You, But . . .*" *The Third Circuit's Position on Corroboration of Credible Testimony*, 48 VILL. L. REV. 1281, 1284 (2003) (comparing the Third and the Ninth Circuits' differing interpretations regarding the credibility requirement for asylum applicants). For example, in the context of expedited removal proceedings, circuits are split as to whether an individual must exhaust administrative remedies before filing an appeal. *Compare* Malu v. U.S. Att'y Gen., 764 F.3d 1282, 1288 (11th Cir. 2014), *and* Escoto-Castillo v. Napolitano, 658 F.3d 864, 866 (8th Cir. 2011); Fonseca-Sanchez v.

that comes down from a federal circuit court brings varied interpretations of the Act, uneven application of the laws governing relief from removal, and unequal protection under the immigration laws across every jurisdiction.[7] Because the federal circuit courts' decisions are binding on every immigration court sitting in the same jurisdiction, an applicant's success for relief from removal ultimately hinges not on the facts of their claim, but on the location of their immigration proceedings.[8]

The purpose of this Article is to demonstrate the inequities that asylum and withholding of removal applicants experience across the United States through an individual, hypothetical case study. Part I of this Article provides the background information of the case study. Part II addresses the distinct interpretations of the Act that exist within the Ninth and Second Circuits. Namely, the types of particular social groups that the Ninth and Second Circuits recognize—or do not recognize—as cognizable under the Act, as well as what an applicant must establish to demonstrate a well-founded fear of future persecution.[9] Part III applies the Ninth and Second Circuits' interpretation of the INA to the hypothetical case study, and demonstrates the differing outcomes in each circuit at multiple stages of the removal proceedings. Finally, Part IV of this Article proposes reform at the highest level of review: the

Gonzales, 484 F.3d 439, 443–44 (7th Cir. 2007) (concluding that an individual must exhaust administrative remedies by raising legal arguments during expedited removal proceedings to address the argument on appeal), *with* Valdiviez-Hernandez v. Holder, 739 F.3d 184, 187 (5th Cir. 2013); Etienne v. Lynch, 813 F.3d 135, 141–42 (4th Cir. 2015) (finding that the administrative remedies available to an individual during expedited removal proceedings resolve only factual deficiencies, not legal issues).

7. *See* Downey & Stio III, *supra* note 6, at 1284. As a result of the aforementioned circuit splits, an individual may be able to receive relief under one circuit's interpretation of the INA, but not another's. *See also infra* Section III.A.1–2 (discussing the differences between the Second and Ninth Circuits' interpretation of asylum requirements).

8. *See* NAT'L IMMIGR. F., IMMIGRATION COURTS AND IMMIGRATION JUDGES FACT SHEET 1, 3 (2019), https://immigrationforum.org/wp-content/uploads/2019/04/Immigration-Courts-fact-sheet.pdf; *see also* David North, *Immigration, the Courts, and Statistics*, CTR. FOR IMMIGR. STUD. (Mar. 4, 2016), https://cis.org/North/Immigration-Courts-and-Statistics.

9. *See infra* notes 49–61 and accompanying text.

federal circuit courts. To conclude, this Article will demonstrate how asylum and withholding of removal applicants seeking relief in the Ninth Circuit are afforded numerous additional protections during critical steps of their proceedings, whereas applicants in the Second Circuit face a far less-friendly approach.

This Article will focus on two of the most commonly sought-after forms of protection under the INA: asylum and withholding of removal.[10] Although the two remedies consider the same set of facts, "[a]sylum and withholding of [removal] are two distinct forms of relief" available to an individual seeking protection in the United States.[11] While there are numerous differences between the two forms of protection, the main difference is that a grant of asylum is solely within the Attorney General's discretion, whereas withholding of removal is mandatory.[12] Moreover, provided the individual meets certain requirements, a successful asylum applicant may ultimately become eligible to adjust their[13] status from that of an asylee to a lawful permanent resident.[14] In contrast to asylum, withholding of removal does not allow the individual to automatically remain in the United States indefinitely.[15] Rather, withholding of removal only prevents the United States from removing the individual to the country where persecution is more likely than not to occur.[16]

These two alternative forms of protection will provide an example of the differing interpretations of the INA in each jurisdiction.[17] Indeed, if any areas of immigration law

10. *See* 8 U.S.C. § 1158; 8 U.S.C. § 1231(b)(3)).

11. *See* § 1231(b); *see also* INS v. Cardoza-Fonseca, 480 U.S. 421, 428 n.6 (1987).

12. *See Cardoza-Fonseca*, 480 U.S. at 429; 8 U.S.C. § 1158(b)(1)(A).

13. In an effort to be inclusive of all gender identities, this Article will use "they/them/their(s)" pronouns to refer to a singular person of an unspecified gender.

14. *Cardoza-Fonseca*, 480 U.S. at 429 n.6.

15. *See* 8 U.S.C. § 1231(b)(3)(B).

16. EXEC. OFF. IMMIGR. REV., U.S. DEP'T. J., FACT SHEET: ASYLUM AND WITHHOLDING OF REMOVAL RELIEF CONVENTION AGAINST TORTURE PROTECTIONS 6 (2009) [hereinafter EOIR TORTURE PROTECTIONS].

17. *See* Downey & Stio III, *supra* note 6, at 1283–84; *see also* discussion *infra* Section III.A.1–2.

desperately required uniform guidance, they were—and still are—asylum and withholding of removal.[18] However, despite the Act's attempt to create uniformity, each federal circuit court's interpretation of the laws governing asylum and withholding of removal has contributed to a system that allows an individual to receive relief from removal in one jurisdiction, but not another.

I. FACTUAL AND PROCEDURAL BACKGROUND OF THE CASE STUDY

This Article will follow Ms. Jane Doe's immigration proceedings and application for relief throughout two different jurisdictions: the Ninth Circuit and the Second Circuit. The comparison of each jurisdiction will highlight the vast differences present in what is supposed to be a uniform immigration system. In each scenario, Ms. Doe will initially enter the country unlawfully through the southern border. In the first scenario, Ms. Doe will travel to Los Angeles, California after she is released from custody, and her immigration proceedings will be transferred to an immigration court located within the Ninth Circuit. In the second scenario, Ms. Doe will travel to New York to stay with family after she is released from custody, and her immigration proceedings will be transferred to an immigration court located within the Second Circuit.[19] Throughout this Article, the comparative case study will provide a step-by-step analysis of Ms. Doe's immigration proceedings in both the Ninth and Second Circuits, which will highlight the inequities of our immigration system.

18. *See* Sabrineh Ardalan, *Access to Justice for Asylum Seekers: Developing an Effective Model of Holistic Asylum Representation*, 48 U. MICH. J.L. REFORM 1001, 1002 (2015) (noting the "complexities of the U.S. asylum system").

19. The decision to use Los Angeles, California, and New York, New York for this case study was due in large part to the fact that both courts maintain some of the highest concentration of residents with pending cases in immigration court. *See Hot Spots with Highest Growth in Immigration Court Backlog*, TRAC IMMIGR. (Jan. 23, 2018), https://trac.syr.edu/immigration/reports/497/.

A. *Ms. Doe Unlawfully Crosses the Southern Border*

Jane Doe, a native and citizen of El Salvador, traveled to the United States with her two children in March 2018.[20] Ms. Doe fled El Salvador because she was married to Mr. Doe, a member of one of the local gangs. In El Salvador, gang members often view women as property instead of partners.[21] In an effort to retaliate against Mr. Doe's gang, a rival gang of Mr. Doe's began threatening members of the gang, as well as family members. The rival gang members told Ms. Doe that if she reported the threats to the police, they would find her. While no one acted on these threats, Ms. Doe lived in imminent fear that a physical attack was looming on either herself or her children. Due to the treatment of women around her, Ms. Doe knew her only solution was to leave El Salvador behind her.[22]

Ms. Doe attempted to cross the southern border of the United States near Hidalgo, Texas, on March 27, 2018, but was apprehended with her children. Ms. Doe and her two children were taken into custody by the Department of Homeland Security. They were released from custody the following day after the Department of Homeland Security properly served Ms. Doe and her children with a Notice to Appear ("NTA"). The NTA was filed with the appropriate immigration court on the

20. Ms. Doe is an entirely hypothetical individual and was only created for the purposes of this Article. Her characteristics and application for relief were crafted using common applications for relief and claims made in immigration courts. *See, e.g.*, Isaac T.R. Smith, Note, *Searching for Consistency in Asylum's Protected Grounds*, 100 IOWA L. REV. 1891 (2015) (detailing the differing social groups of individuals seeking asylum); Leonard Birdsong, *"Give Me Your Gays, Your Lesbians, and Your Victims of Gender Violence, Yearning to Breathe Free of Sexual Persecution…": The New Grounds for Grants of Asylum*, 32 VILL. L. REV. 357, 368–69 (2008) ("Problems and inconsistencies prevail in asylum adjudication for a number of reasons, including lack of definitions for certain statutory words.").

21. *See, e.g.*, Sophie Huttner, Essay, *El Salvador's Femicide Crisis*, YALE REV. OF INT'L STUDS. (2020), http://yris.yira.org/essays/3794 ("El Salvador's femicide crisis is fueled by an ingrained culture of virulent machismo, high levels of gang and narco-violence, and a corrupt, unaccountable police force . . . [m]ost men and many women in El Salvador believe that domestic violence is normal; it is what men do . . . Women are treated as property . . . [and] women must accept their role in the home, which includes demands for sex and physical abuse.'").

22. *See id.*

same day and thus, her removal proceedings were initiated on March 28, 2018.[23] Within the next year, Ms. Doe sought relief from removal by filing an application for asylum and withholding of removal.[24] However, unbeknownst to Ms. Doe, the ultimate success of her application—and fate of her immigration status—hinged on the location of her immigration proceedings.

B. *Ms. Doe is Processed at a Port of Entry*

Upon a noncitizen's arrival at a port of entry, such as the southern border or an international airport, a United States Customs and Border Protection Officer must determine whether the noncitizen is admissible.[25] If the Officer concludes that the noncitizen is inadmissible, they are placed in expedited removal proceedings.[26] Typically, expedited removal means the noncitizen will be "removed from the United States without a hearing or further review."[27] But this process contains a narrow exception: if the noncitizen indicates an intent to apply for asylum or presents a well-founded fear of persecution, the noncitizen must receive a credible fear interview with an asylum officer.[28]

23. *See generally* 8 U.S.C. § 1229(a) (explaining the process of removal proceedings); *see also* EXEC. OFF. OF IMMIGR. REV., U.S. DEP'T JUST., FACT SHEET: EXECUTIVE OFFICE FOR IMMIGRATION REVIEW: AN AGENCY GUIDE (2017) [hereinafter EOIR FACT SHEET] ("DHS initiates removal proceedings when it serves an alien with a Notice to Appear (NTA) and files that charging document with one of EOIR's immigration courts.").

24. For purposes of this Article, it is assumed that all of Ms. Doe's filings were timely and in accordance with the Immigration and Nationality Act. *See* 8 U.S.C. §§ 1158, 1231(b)(3) (outlining procedures for asylum and withholding of removal applications under the Act); EOIR TORTURE PROTECTIONS, *supra* note 16, at 6–7. Furthermore, Ms. Doe's application will be addressed under the legal authority of both the Ninth and Second Circuits.

25. *See generally* 8 U.S.C.S. § 1225(b) (2018) (explaining the inspection process of applicants for admission); 8 U.S.C. § 1182(a) (2018) (outlining the "[c]lasses of aliens ineligible for visas or admission"); 8 C.F.R. § 235.1(f) (2020) (outlining an alien's admission requirements at a port of entry).

26. 8 C.F.R. § 235.3(b) (2017).

27. 8 U.S.C. § 1225(b)(1)(A)(i).

28. *See* § 1225(b)(1)(A)(ii); 8 C.F.R. § 208.30(b) (2021).

When Ms. Doe was apprehended near Hidalgo, Texas, she could not prove that she was admissible because she had never entered the country before, nor did she possess the requisite documents.[29] As a result, she would have been placed in expedited removal proceedings.[30] However, because she indicated an intent to apply for asylum and presented a well-founded fear of persecution, she was granted a credible fear interview.[31]

C. *Ms. Doe Receives a Credible Fear Interview at the Border*

A credible fear interview is conducted by an asylum officer.[32] During the credible fear interview, the asylum officer will reach one of two conclusions: either the noncitizen displays a credible fear of persecution, or they do not.[33] If the officer concludes that the noncitizen does not have a fear of persecution in their home country, the noncitizen will likely be removed.[34] However, if an applicant successfully demonstrates a credible fear of persecution, the officer will refer the noncitizen to non-expedited removal proceedings, where they will receive a hearing before an immigration judge.[35]

During her interview, Ms. Doe indicated to the officer that she was seeking protection in the United States and intended to file an application for asylum and withholding of removal. To establish eligibility for asylum, a person must be "unable or unwilling" to return to their home country "because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social

29. *See* 8 U.S.C. § 1225(b) (inspection of applicants for admission); 8 U.S.C. § 1182(a)(7) (documentation requirements); 8 C.F.R. § 235.1(f) (2020) (scope of examination).

30. §§ 1225(b), 1182(a); § 235.1(f).

31. *See* § 1225(b)(1)(A)(ii); *see also* 8 C.F.R. §§ 1208.13(b)(2)(iii)(A), 208.30 (2021). For purposes of this Article, it is assumed that Ms. Doe's children are treated as dependents in her application for relief. *See* 8 C.F.R. § 208.30(c).

32. *See* § 208.30(d).

33. *See* § 1225(b)(1)(B).

34. *Id.*

35. *See* 8 U.S.C. § 1229(b) (governing the non-expedited removal process before an immigration judge); 8 C.F.R. § 235.3(b)(ii)(2).

group, or political opinion."[36] Ms. Doe indicated that she had a well-founded fear of persecution due to her membership in a particular social group—women in El Salvador.[37] The asylum officer found support in Ms. Doe's credible fear interview and served her with an NTA.[38] Ms. Doe's NTA was then filed with an immigration court, and Ms. Doe's non-expedited removal proceedings commenced.[39] Ms. Doe then traveled to either Los Angeles or New York (depending on the hypothetical of the case study), and requested a change of venue to an immigration court in either the Ninth or Second Circuit.[40]

D. *Ms. Doe is Transferred to Non-Expedited Removal Proceedings and Appears Before an Immigration Judge*

Traditional non-expedited removal proceedings occur in an immigration court before an immigration judge.[41] An individual will normally appear before the immigration court that has jurisdiction over their area of residency.[42] Within each immigration court, the immigration judge is bound by federal statutes and regulations, as well as the caselaw that develops out of the federal jurisdiction in which the immigration court sits.[43] At an immigration court hearing, the individual will

36. 8 U.S.C.S. §1101(a)(42)(A) (2018).

37. *See* U.S. CITIZENSHIP & IMMIGR. SERVS, FORM I-589: APPLICATION FOR ASYLUM AND FOR WITHHOLDING OF REMOVAL (2020) (noting that an applicant can denote in their application that they are seeking to withhold removal because of their status in a "particular social group").

38. *See* 8 C.F.R. § 235.3(b)(4); 8 C.F.R. § 235.6(a)(1)(ii) (2021).

39. 8 U.S.C. § 1229a(a)(1); *see also* EOIR TORTURE PROTECTIONS, *supra* note 16.

40. Ms. Doe's location in either Los Angeles or New York depends on which hypothetical scenario is being addressed. Each will be discussed throughout the Article.

41. 8 U.S.C.S. § 1229a(a)(1).

42. *See Facts Sheet: Immigration Courts*, NAT'L IMMIGR. F. (Aug. 7, 2018), https://immigrationforum.org/article/fact-sheet-immigration-courts/; *see also* 8 C.F.R. § 1003.14(a) (2003).

43. 12 U.S. CITIZENSHIP & IMMIGR. SERVS., CITIZENSHIP AND NATURALIZATION: CHAPTER 3 – NATURALIZATION INTERVIEW, https://www.uscis.gov/policy-manual/volume-12-part-b-chapter-3 (Oct. 1, 2021). The citizenship and naturalization policies of the U.S. Citizenship and Immigration Services, operated under the Department of Homeland Security, are applicable in immigration courts, which are run by the Department of Justice, because both departments are bound by the same precedent, statutes, and regulations. *See* U.S. DEP'T OF JUST., EOIR POLICY MANUAL: CHAPTER 1.4 – JURISDICTION, AUTHORITY, AND PRIORITIES,

present their application for relief, which may include an application for asylum and withholding of removal.[44]

When Ms. Doe presented her application for relief in either the Los Angeles or New York immigration courts, her application was denied. For each scenario, the immigration judge determined that her proposed particular social group, women in El Salvador, was not cognizable under the INA.[45] Relying on the Board's precedent, the immigration judge in each scenario was concerned with the lack of a defining, particular characteristic.[46] Both immigration courts also expressed concern with the fact that the group encompassed nearly half of Salvadoran society.[47]

Ms. Doe appealed to the Board. The Board affirmed the immigration judges' decisions from each immigration court. Because the Board affirmed without an opinion, the immigration judge's decision controls for purposes of the subsequent petition for review to federal circuit courts.[48]

II. LEGAL AUTHORITY GOVERNING MS. DOE'S CASE: FRAMEWORK FOR APPLICATIONS FOR RELIEF FROM REMOVAL

To receive relief from removal in the form of asylum or withholding of removal, an applicant must show that they are a refugee, that they either have been or will be subject to persecution, and that the persecution is executed on account of a protected ground.[49] When an individual establishes that they

https://www.justice.gov/eoir/eoir-policy-manual/i/1/4 (Feb. 3, 2021).

44. *See Immigration Benefits in EOIR Removal Proceedings*, U.S. CITIZENSHIP & IMMIGR. SERVS., https://www.uscis.gov/laws-and-policy/other-resources/immigration-benefits-in-eoir-removal-proceedings (Aug. 5, 2020); NAT'L IMMIGR. F., *supra* note 8.

45. *See infra* Part II.

46. *See In re* A-B-, 27 I. & N. Dec. 316 (Op. Att'y Gen. 2018); *see also In re* M-E-V-G-, 26 I. & N. Dec. 227, 238 (B.I.A. 2014) ("The 'particularity' requirement relates to the group's boundaries or, as earlier court decisions described it, the need to put 'outer limits' on the definition of a 'particular social group.'").

47. *See In re M-E-V-G-*, 26 I. & N. Dec. at 239; *see also In re* A-M-E- & J-G-U-, 24 I. & N. Dec. 69, 74–76 (B.I.A. 2007) (requiring the particular social group have well-defined boundaries).

48. *See* 8 C.F.R. § 1003.1I(4) (2021).

49. *See id.* § 1208.13(b). The United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons adopted the 1951 Refugee Convention, a treaty that addressed

suffered past persecution, this triggers a rebuttable presumption that the individual will suffer persecution in the future.[50] However, an applicant may also independently establish a clear probability that they will suffer persecution in the future without demonstrating past persecution.[51]

With respect to the statutorily protected ground requirement, there are five protected grounds under which an applicant can claim protection: race, religion, nationality, political opinion, or membership in a particular social group.[52] The "on account of" requirement is referred to as the "nexus."[53] Finally, an asylum applicant must demonstrate that the protected ground was "one central reason" for their persecution, whereas a

international refugee protection. United Nations Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137, 144. A refugee is defined by the 1967 Protocol to the Refugee Convention. *See* Protocol Relating to the Status of Refugees, art. I, Jan. 31, 1967, 606 U.N.T.S. 267, 268 (incorporating in part the 1951 Convention's definition of "refugee"); *see* 1951 Convention, ch. 1, art. 1A(2). Further, the United States Code defines a refugee as:

> [A]ny person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.

8 U.S.C. § 1101(a)(42)(A) (2018).

50. 8 C.F.R. §§ 208.13(b)(1), 1208.13(b)(1) (2021). The Department of Homeland Security then has the burden of overcoming this presumption. *See* § 208.13(b)(1). The Department can overcome this burden by establishing a "fundamental change of circumstances," which undermines the applicant's well-founded fear, or that it is reasonable for the applicant to relocate within their country of nationality or last habitual residence. 8 C.F.R. §§ 208.13(b)(1)(i)(A), 1208.13(b)(1)(i)(A).

51. 8 C.F.R. §§ 208.13(b)(2), 1208.13(b)(2). A well-founded fear of future persecution requires evidence that:

> (1) the [individual] possesses a belief or characteristic a persecutor seeks to overcome in others by means of punishment of some sort; (2) the persecutor is already aware, or could easily become aware, that the [individual] possesses this belief or characteristic; (3) the persecutor has the capability of punishing the [individual]; and (4) the persecutor has the inclination to punish the [individual].

In re Acosta, 19 I. & N. Dec. 211, 226 (B.I.A. 1985); *see, e.g.*, Garcia v. Holder, 749 F.3d 785, 791 (9th Cir. 2014) (noting that a petitioner may present objective and credible evidence of future persecution "on account of" their membership in a protected class).

52. 8 U.S.C. § 1101(a)(42); 8 C.F.R. §§ 208.13(b)(1)–(2), 1208.13(b)(1)–(2) (2021).

53. *See, e.g.*, Karen Musalo, *Revisiting Social Group and Nexus in Gender Asylum Claims: A Unifying Rationale for Evolving Jurisprudence*, 52 DEPAUL L. REV. 777, 781–83 (2003); *see* 8 U.S.C.S. § 1101(a)(42).

withholding of removal applicant, depending on the circuit they appear in, must demonstrate the protected ground is only "a reason" for their feared persecution.[54] Whether an applicant is a member of a statutorily protected ground is where the federal circuit courts' interpretation of the Act begin to splinter. In fact, the circuits' contradicting interpretations is most apparent in the context of particular social groups and whether they are cognizable.

In *Acosta*, the Board laid out the requirements of a particular social group in great detail.[55] There, the Board explained that when faced with a particular social group claim, courts should consider:

> [P]ersecution that is directed toward an individual who is a member of a group of persons all of whom share a common, immutable characteristic. The shared characteristic might be an innate one such as sex, color, or kinship ties, or in some circumstances it might be a shared past experience such as former military leadership or land ownership. The particular kind of group characteristic that will qualify under the construction remains to be determined on a case-by-case basis . . . . However, [the characteristic must be] . . . beyond the power of an individual to change or [be] . . . so fundamental to individual identity or conscience that it ought not be required to be changed. The determination is made on a case-by-case basis, but the characteristic must be either "beyond the power of an individual to change or . . . so fundamental

54. *See* REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 303 (codified in scattered sections of 8 U.S.C.); 8 U.S.C. § 1158(b)(1)(B)(i) (2018)); *see also* Barajas-Romero v. Lynch, 846 F.3d 351, 358–60 (9th Cir. 2017).

55. *Acosta*, 19 I. & N. at 233–34.

> to individual identity or conscience that it ought not be required to be changed."[56]

Over the years, the Board built upon its explanation in *Acosta*, and outlined three basic components for a cognizable particular social group claim: the group must be "(1) composed of members who share a common immutable characteristic, (2) defined with particularity, and (3) socially distinct within the society in question."[57] First, the common immutable characteristic that defines the group must be one "that the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences."[58] Second, the particularity requirement "relates to the group's boundaries," as there must be "a clear benchmark for determining who falls within the group."[59] The group's boundaries "must not be amorphous, overbroad, diffuse, or subjective."[60] Lastly, the socially distinct element hinges on how the group "is viewed from the perspective of the society writ large."[61] However, despite the clear guidance from the Board, federal circuit courts apply these three requirements in a myriad of ways.

III. ANALYZING MS. DOE'S APPLICATION FOR RELIEF FROM REMOVAL IN BOTH THE NINTH AND SECOND CIRCUITS

As described in Part I, Ms. Doe sought relief from removal by applying for both asylum and withholding of removal.[62] Ms. Doe's application was based on her membership in the

56. *Id.*

57. *In re* M-E-V-G-, 26 I. & N. Dec. 227, 237 (B.I.A. 2014); Garay Reyes v. Lynch, 842 F.3d 1125, 1131 (9th Cir. 2016).

58. *Acosta*, 19 I. & N. Dec. at 233.

59. *M-E-V-G-*, 26 I. & N. Dec. at 238–39 (citing *In re* A-M-E- & J-G-U-, 24 I. & N. Dec. 69, 76 (BIA 2007)).

60. *Id.* at 239.

61. Gallardo-Torres v. Sessions, 735 F. App'x 308, 311 (9th Cir. 2018) (Garay Reyes v. Lynch, 842 F.3d 1125, 1136–37 (9th Cir. 2016)).

62. *See supra* Section I.C.

proposed particular social group of women in El Salvador.[63] To demonstrate that her proposed particular social group is cognizable, Ms. Doe must show that her group is "(1) composed of members who share a common immutable characteristic, (2) defined with particularity, and (3) socially distinct within the society in question."[64]

A. *Ms. Doe's Particular Social Group of Women in El Salvador is Cognizable Under Ninth Circuit Precedent*

When Ms. Doe petitions for review to the Ninth Circuit Court of Appeals, her claim is likely to succeed because the definition of a particular social group in the Ninth Circuit stretches far beyond the specific limitations set by the Board—and by most circuits—under *M-E-V-G*.[65]

Applying Ninth Circuit precedent to the asserted social group of women in El Salvador will likely lead to the conclusion that gender qualifies as the requisite common immutable characteristic.[66] The Ninth Circuit has already established that the particular social group requirement may be satisfied by an innate characteristic, such as one's sexual orientation or status as a gypsy, so long as there is a "unifying relationship or characteristic to narrow th[e] diverse and disconnected group."[67] Indeed, the Ninth Circuit has also explained that in

63. *See supra* Section I.C.

64. *M-E-V-G-*, 26 I & N Dec. at 237; *In re* Acosta, 19 I. & N. Dec. 211, 232–34 (B.I.A. 1985).

65. *See e.g.*, Ramírez-Pérez v. Barr, 934 F.3d 47, 51 (1st Cir. 2019); Hernandez-Chacon v. Barr, 948 F.3d 94, 101 (2nd Cir. 2020); Guzman Orellana v. Att'y Gen. U.S., 956 F.3d 171, 178 (3d Cir. 2020); Del Carmen Amaya-De Sicaran v. Barr, 979 F.3d 210, 214 (4th Cir. 2020); Gonzales-Veliz v. Barr, 938 F.3d 219, 229 (5th Cir. 2019); Rosales-Reyes v. Garland, 7 F.4th 755, 759 (8th Cir. 2021); Plancarte v. Garland, 9 F.4th 1146, 1153 (9th Cir. 2021); Alvarado v. U.S. Att'y Gen., 984 F.3d 982, 989 (11th Cir. 2020); *see In re* M-E-V-G-, 26 I. & N. Dec. 227, 237 (B.I.A. 2014); *see also* Perdomo v. Holder, 611 F.3d 662, 668 (9th Cir. 2010) (describing the specifications adopted by the Ninth Circuit).

66. *See Perdomo*, 611 F.3d at 667.

67. *Id.* at 668 (citing Ochoa v. Gonzales, 406 F.3d 1166, 1171 (9th Cir. 2005)); *see also* Karouni v. Gonzales, 399 F.3d 1163, 1172 (9th Cir. 2005) ("*[A]ll* alien homosexuals are members of a 'particular social group.'"); Mihalev v. Ashcroft, 388 F.3d 722, 726 (9th Cir. 2004) ("There is no question that Gypsies are an identifiable ethnic group and that being a Gypsy is a protected ground [for asylum].").

certain circumstances, the innate characteristic can also be gender.[68]

For example, in *Perdomo v. Holder*, the Board rejected an applicant's proposed particular social group of all women in Guatemala.[69] The Board reasoned that the group lacked a common, immutable characteristic.[70] Perdomo petitioned the Ninth Circuit for review, and on appeal, the Ninth Circuit reversed the Board's decision.[71] In doing so, the Ninth Circuit admitted that the Board had not yet issued a decision as to whether gender by "itself could form the basis of a particular social group."[72] However, it surveyed recent decisions within the Ninth Circuit and concluded that gender alone may be a sufficient innate characteristic for a particular social group.[73] Specifically, the Ninth Circuit relied on its previous decision in *Mohammed v. Gonzales*, where it concluded that females of a certain clan satisfied the definition of a particular social group.[74] By issuing its decision in *Perdomo v. Holder*, the Ninth Circuit appeared to ignore some of its own previous reasonings, as well as guidance from the Board, in an attempt to provide relief to Perdomo.[75]

The Ninth Circuit then went on to effectively undercut the Board's precedent,[76] explaining that the mere fact that Perdomo's proposed particular social group extends to half the population is insufficient to deny its existence.[77] While the

68. *Perdomo*, 611 F.3d at 666–67.

69. *Id.* at 665.

70. *Id.*at 667.

71. *Id.* at 667–69.

72. *Id.* at 666.

73. *Id.* at 667–69.

74. *Id.* at 667; s*ee also* Mohammed v. Gonzales, 400 F.3d 785, 798 (9th Cir. 2005).

75. *See Perdomo*, 611 F.3d at 668–69; Ochoa v. Gonzales, 406 F.3d 1166, 1170–71 (9th Cir. 2005) (quoting Sanchez-Trujillo v. INS, 801 F.2d 1571, 1577 (9th Cir. 1986)) (stating that a particular social group must be narrowly defined and that major segments of the population "will rarely, if ever, constitute a distinct 'social group'").

76. *See generally In re* M-E-V-G-, 26 I & N Dec. 227, 238 (B.I.A. 2014) (quoting *Sanchez-Trujillo*, 801 F.2d at 1576) (emphasizing "the need to put 'outer limits' on the definition of a 'particular social group'").

77. *Perdomo*, 611 F.3d at 669 (citing Singh v. INS, 94 F.3d 1353, 1359–60 (9th Cir. 1996)) (concluding, without addressing the particular social group, that an Indo-Fijian man could

Perdomo court ultimately remanded the case to the Board to first consider whether gender could constitute a particular social group,[78] the Ninth Circuit continued to apply *Perdomo v. Holder*'s reasoning over the following decade.[79]

A few years later, in *Hernandez v. Holder*, the Ninth Circuit was once again presented with a gender-based particular social group claim.[80] Merida Esperanza Hernandez and her sons fled Guatemala to the United States, where she applied for both asylum and withholding of removal.[81] Ms. Hernandez asserted she would suffer persecution based on her membership in the "particular social group of uneducated[,] impoverished Guatemalan women."[82] The immigration judge denied her proposed group because it contained a "large segment" of the Guatemalan population.[83] Ms. Hernandez appealed the agency's decision all the way to the Ninth Circuit where the Ninth Circuit Court of Appeals, unsurprisingly, reversed and remanded the agency's decision.[84] In doing so, the Ninth Circuit explicitly relied on its conclusion in *Perdomo v. Holder*.[85]

Although the Board has since rejected the conclusion that a particular social group of such sweeping magnitude could be cognizable, the Ninth Circuit continues to apply its precedent from *Perdomo*.[86] For example, in *Valdivia v. Barr*, Maria Araceli Torres Valdivia sought relief from removal by applying for protection under the Convention Against Torture and withholding of removal.[87] Ms. Valdivia's asserted protected ground was membership within the particular social group of

potentially qualify for asylum, despite this group potentially constituting half of the population).

78. *Id.* at 669.

79. *See e.g.*, Valdivia v. Barr, 777 F. App'x 251, 252 (9th Cir. 2019); Lopez-Gonzalez v. Lynch, 606 F. App'x 342, 343 (9th Cir. 2015); Guerra v. Holder, 437 F. App'x 590, 591 (9th Cir. 2011).

80. Hernandez v. Holder, 563 F. App'x 552, 553 (9th Cir. 2014).

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.* (citing Perdomo v. Holder, 611 F.3d 662, 669 (9th Cir. 2010)).

86. Valdivia v. Barr, 777 F. App'x 251, 252–53 (9th Cir. 2019).

87. *Id.* at 252.

women in Mexico.[88] Ms. Valdivia's application was denied by the immigration judge who presided over her case.[89] Ms. Valdivia then appealed the immigration judge's decision to the Board. The Board denied Valdivia's application on the grounds that "'all women in Mexico,' lacks particularity and is not socially distinct."[90] Valdivia then petitioned the Ninth Circuit for review. There, the Ninth Circuit Court of Appeals once again reversed and remanded the Board's decision based on Ninth Circuit precedent; namely, its language in *Perdomo*.[91] The Ninth Circuit reasoned that in light of precedent, the Board did not supply "adequate reasons for determining that [the applicant] had not demonstrated that 'all women in Mexico' was a cognizable social group," and remanded the case for further proceedings.[92] Thus, continuing to indicate that gender could constitute an innate characteristic required for a cognizable particular social group, despite the Board's decision to the contrary.

With respect to Ms. Doe's application, the Ninth Circuit would likely reach the same conclusion as it did in *Hernandez*, *Valdivia*, *Perdomo*, and many other cases that have crossed the court's docket over the last decade.[93] Although the immigration judge rejected Ms. Doe's group because it lacked particularity and did not have clear boundaries (and the Board agreed), the Ninth Circuit would likely disagree with the agency's conclusions. Relying on precedent, the Ninth Circuit would likely conclude that the mere fact that the group encompasses nearly half of the El Salvadoran population is an inadequate reason to reject the group.[94] Furthermore, using its language in *Perdomo* as support, the Ninth Circuit would likely reiterate that

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.* at 252–53; *see also* Perdomo v. Holder, 611 F.3d 662, 668 (9th Cir. 2010).

92. *Valdivia*, 777 F. App'x at 253.

93. *See* Hernandez v. Holder, 563 F. App'x 552, 553 (9th Cir, 2014); *Valdivia*, 777 F. App'x at 253; *Perdomo*, 611 F.3d at 665–67.

94. *Hernandez*, 563 F. App'x at 553; *Perdomo*, 611 F.3d at 665–67; *see also* Singh v. INS, 94 F.3d 1353, 1359 (9th Cir. 1996); *Valdivia*, 777 F. App'x at 253.

gender can be an innate characteristic under Ninth Circuit precedent.[95] Absent direct language to the contrary, the Ninth Circuit will likely continue to apply *Perdomo* precedent and find that gender can indeed serve as an innate characteristic. Thus, similar to the court's decisions in *Valdivia* and *Hernandez*, the Ninth Circuit would likely conclude that the immigration judge's reasoning was insufficient to deny Ms. Doe's proposed particular social group.[96]

B. *Ms. Doe's Particular Social Group of Women in El Salvador Is Not Cognizable Under Second Circuit Precedent*

In contrast, when Ms. Doe presents her application for review to the Second Circuit, her claim will likely fail. Initially, the Second Circuit's understanding of the requirements for a particular social group appear to align with the Ninth Circuit precedent. Indeed, the Second Circuit recognizes that a particular social group must be "(1) composed of members who share a common immutable characteristic, (2) defined with particularity, and (3) socially distinct within the society in question."[97] However, unlike the Ninth Circuit, the Second Circuit does not recognize gender as a sufficient fundamental characteristic to form a particular social group.[98]

The Second Circuit recently outlined its interpretation of how gender intertwines with the requirements of a particular social group in *Hernandez-Chacon v. Barr*.[99] Hernandez-Chacon asserted her particular social group as "Salvadoran women

95. *Perdomo*, 611 F.3d at 667.

96. *See Valdivia*, 777 F. App'x at 253; *Hernandez*, 563 F. App'x at 553.

97. *In re* M-E-V-G-, 26 I. & N. Dec. 227, 237 (B.I.A. 2014) (interim decision); *see also* Ucelo-Gomez v. Mukasey, 509 F.3d 70, 72–73 (2d Cir. 2007) (per curiam).

98. *See, e.g.*, Gomez v. INS, 947 F.2d 660, 664 (2d Cir. 1991). In fact, the Second Circuit has expressly declined to follow *Perdomo*. Cortez-Arevalo v. Holder, 470 F. App'x 56, 56 (2d Cir. 2012) ("[T]he Ninth Circuit's decision in *Perdomo* is not binding on the Second Circuit . . . and, thus, did not materially affect its January 26, 2011 decision, [and] the BIA did not abuse its discretion in denying reconsideration.") (citing *In re* Anselmo, 20 I. & N. Dec. 25, 31 (B.I.A. 1989)).

99. Hernandez-Chacon v. Barr, 948 F.3d 94, 101–02 (2d Cir. 2020).

who have rejected the sexual advances of a gang member."[100] The immigration judge found that this particular social group was not cognizable, and the Board affirmed.[101] As a result, Ms. Hernandez-Chacon petitioned for review to the Second Circuit.[102] Upon review of Ms. Hernandez-Chacon's application, the Second Circuit affirmed the Board's decision in part and remanded the case in part.[103] While Ms. Hernandez-Chacon's social group was more particular than "El Salvadoran women," the Second Circuit explained that Ms. Hernandez-Chacon failed to demonstrate how the group was "socially distinct . . . in Salvadoran society," nor did she demonstrate that her particular group was at a greater harm of persecution than anyone else.[104] As a result, the Second Circuit denied her petition for review because her particular social group was not cognizable.[105]

Markaj v. Holder demonstrates another example of how asylum and withholding of removal applicants who assert gender-based particular social group claims like Ms. Doe are often denied relief in the Second Circuit.[106] Xhoana Markaj sought relief from removal by applying for asylum.[107] Ms. Markaj alleged her protected ground was membership in the particular social group of "young women in Albania."[108] Yet the Second Circuit concluded the group was insufficient to establish a nexus to a protected ground because it was "insufficiently particular."[109] In fact, according to the Second Circuit, the particular characteristic of either gender or age was

100. *Id.* at 99.

101. *Id.* at 99–100.

102. *Id.* at 100.

103. *Id.* at 105. The Second Circuit affirmed the Board's decision regarding the petitioner's particular social group claim but remanded the case to the Board for reconsideration of petitioner's political opinion claim. *Id.* at 101.

104. *Id.* at 102.

105. *Id.* at 105. However, the court granted their petition for review with respect to their political opinion claim. *Id.*

106. Markaj v. Holder, 536 F. App'x 148, 149 (2d Cir. 2013).

107. *Id.*

108. *Id.*

109. *Id.*

problematic as they were both "generalized" and "sweeping."[110] In reaching this conclusion, the Second Circuit relied not only on its own precedent, but on the decisions of its sister circuits as well.[111]

Finally, in *Oliva-Flores*, the Second Circuit refused to recognize yet another particular social group defined by similar boundaries as Ms. Doe's.[112] There, the proposed social group was young Guatemalan men who resisted gang recruitment.[113] While the proposed social group was undeniably more descriptive than "young Guatemalan men," the Second Circuit declined to hold that the group was considered particular because "Guatemalan men 'make up a potentially large and diffuse segment of society.'"[114] In reaching this conclusion, the Second Circuit relied on decades of precedent, reiterating that gender characteristics are neither "recognizable" nor "discrete."[115]

Turning to Ms. Doe's application for asylum, the Second Circuit would likely affirm the agency's conclusion that the particular social group of women in El Salvador is not cognizable under the Act. Ms. Doe's proposed group's main characteristic—gender—is nearly identical to the characteristics listed in the aforementioned cases.[116] The Second Circuit has continued to hold that gender alone is insufficiently particular.[117] As a result, the Second Circuit would likely affirm the agency's conclusion. Thus, unlike in the Ninth Circuit where Ms. Doe's application would likely prevail, Ms. Doe's application would likely fail in the Second Circuit.

110. *Id.* (citing Rreshpja v. Gonzales, 420 F.3d 551, 555 (6th Cir. 2005)).

111. *Id.* at 149 (citing Gomez v. INS, 947 F.2d 660, 664 (2d Cir. 1991)); *see also Rreshpja*, 420 F.3d at 555.

112. Oliva-Flores v. Holder, 477 F. App'x 774, 775 (2d Cir. 2012).

113. *Id.*

114. *Id.*; *see also Gomez*, 947 F.2d at 664 (explaining that Gomez failed to "demonstrate[] she is more likely to be persecuted than any other young woman").

115. *Oliva-Flores*, 477 F. App'x. at 775.

116. *See id*; Markaj v. Holder, 536 F. App'x 148, 149 (2d Cir. 2013).

117. *See* Gomez v. INS, 947 F.2d 660, 664 (2d Cir. 1991); *Oliva-Flores*, 477 Fed. App'x at 775.

C. *Under Ninth Circuit Precedent, Ms. Doe's Application Establishes a Well-founded Fear of Future Persecution*

Membership in a particular social group is only one component of a successful asylum and withholding of removal application. Beyond that, the applicant must demonstrate that they have been or will be subject to persecution based on that statutorily protected ground.[118] While the facts provided in Ms. Doe's case do not demonstrate that she suffered any past persecution, the facts may create a well-founded fear of future persecution.[119]

The evidence provided does not demonstrate Ms. Doe suffered past persecution. Past persecution requires more than discrimination alone.[120] Instead, it requires harm akin to "[s]evere and sustained discrimination, or discrimination in combination with other harms."[121] Here, Ms. Doe was unable to demonstrate past persecution because the gang members never attacked her. Indeed, she could only supply evidence that she had been threatened by her husband's rival gang, which occurred before she fled the country.[122] However, these threats, which were not acted upon, were insufficient to demonstrate past persecution.[123] Moreover, Ms. Doe has not encountered any additional threats since she left El Salvador.[124] Therefore, the immigration judge in either circuit would likely have concluded that Ms. Doe did not endure past harm that would rise to the level of persecution.

118. *See* 8 U.S.C. § 1158(b)(1)(B)(i) ("The burden of proof is on the applicant to establish that . . . race, religion, nationality, membership in a particular social group, or political opinion was or will be at least one central reason for persecuting the applicant."); *see also* 8 U.S.C. § 1231(b)(3)(A) ("[T]he Attorney General may not remove an alien to a country if . . . the alien's life or freedom would be threatened in that country because of the alien's race, religion, nationality, membership in a particular social group, or political opinion.").

119. *See supra* Section I.A (discussing how, while Ms. Doe had not been attacked by El Salvador gang members before she left El Salvador, she had lived in imminent fear of a physical attack); 8 C.F.R. § 1208.13(b)(2)(iii) (2021).

120. Wakkary v. Holder, 558 F.3d 1049, 1059 (9th Cir. 2009).

121. *Id.*

122. *See supra* Section I.A.

123. *Id.*

124. *Id.*

Nonetheless, the evidence provided might demonstrate a well-founded fear of future persecution. Even if an asylum and withholding of removal applicant cannot demonstrate past persecution, they may be able to demonstrate eligibility for asylum if they can show they maintain a well-founded fear of future persecution.[125] A well-founded fear of future persecution is typically established through evidence of (1) a pattern or practice of persecution against a group of which the individual is a part of, or (2) an individualized risk.[126] While most jurisdictions apply the regulation requirements in uniform fashion, the Ninth Circuit has diverged from its sister circuits over the years. Recently, the Ninth Circuit has developed a third route to establish a well-founded fear of persecution, known as the "disfavored group" analysis.[127] The Ninth Circuit's actions once again indicate that an applicant's ability to receive relief hinges not on the facts of their application, but on the jurisdiction in which they reside.

In the Ninth Circuit, unlike any other circuit, an asylum and withholding of removal applicant has not just two, but three potential ways through which they can demonstrate a well-founded fear of future persecution.[128] First, the applicant can demonstrate a well-founded fear of future persecution if they show "that there is a 'reasonable possibility' that [they] will be 'singled out individually for persecution' if removed."[129] The Ninth Circuit's precedent focuses on whether the applicant can show that they have a "chance[] of being singled out from the general population." [130]

125. 8 C.F.R. § 1208.13(b)(2)(iii) (2021).

126. *Id.*

127. *See* Wakkary v. Holder, 558 F.3d 1049, 1062 (9th Cir. 2009); Sael v. Ashcroft, 386 F.3d 922, 927 (9th Cir. 2004). Other circuits rarely apply this practice. *See, e.g.*, Salim v. Holder, 728 F.3d 718, 724 (7th Cir. 2013); Chen v. INS, 195 F.3d 198, 203–04 (4th Cir. 1999).

128. *See Wakkary*, 558 F.3d at 1060–62 (outlining the three methods of establishing a well-founded fear of future persecution in the Ninth Circuit).

129. *Id.* at 1060 (citing 8 C.F.R. § 1208.13(b)(2)(iii) (2021)).

130. *Id.* at 1063 (citing Kostasz v. INS, 31 F.3d 847, 853 (9th Cir. 1994)).

Second, the Ninth Circuit considers the widely accepted pattern or practice approach.[131] If an individual seeks to establish future persecution by a pattern or practice, they must first demonstrate that "'in [their] [home] country there is a pattern or practice of persecution of a group of persons similarly situated to the applicant on account of race, religion, nationality, membership in a particular social group, or political opinion.'"[132] Next, they must demonstrate that the persecution is "so systemic or pervasive as to amount to a pattern or practice of persecution."[133] Finally, they must show that by reason of their "inclusion in and identification with such group of persons such that it is more likely than not that [their] . . . life or freedom would be threatened upon return to that country."[134]

Third, the Ninth Circuit considers an alternative, uncommon, judicially created approach known as the disfavored group analysis.[135] In the Ninth Circuit, unlike any other circuits, an individual who cannot establish either an individualized risk of persecution or a pattern or practice may be able to demonstrate a well-founded fear of persecution using the Ninth Circuit's judicially created disfavored group analysis.[136]

In the disfavored group analysis, the Ninth Circuit looks for "'[p]roof that the government or other persecutor has *discriminated against a group* to which [they] belong[] . . . .'"[137] As a result, "once an applicant establishes that he is a member of a

131. *See id.* at 1060–62.

132. *Id.* at 1060; 8 C.F.R. § 208.16(b)(2)(i) (2021).

133. *In re* A-M-, 23 I. & N. Dec. 737, 741 (B.I.A. 2005).

134. 8 C.F.R. § 208.16(b)(2)(ii) (2021). Specifically:

> In evaluating whether it is more likely than not that the applicant's life or freedom would be threatened in a particular country . . . the asylum officer or immigration judge shall not require the applicant to provide evidence that [they] would be singled out individually for such persecution if: (i) The applicant establishes that in that country there is a pattern or practice of persecution of a group of persons similarly situated to the applicant . . . and (ii) The applicant establishes [their] own inclusion in and identification with such group of persons such that it is more likely than not that [their] life or freedom would be threatened upon return to that country.

Id. at § 208.16(b)(2)(i)–(ii).

135. *See* Wakkary v. Holder, 558 F.3d 1049, 1062 (9th Cir. 2009).

136. *See id.* at 1062–63; *see also* text accompanying *supra* note 135.

137. *See Wakkary*, 558 F.3d at 1063 (emphasis added).

group that is broadly disfavored, 'the more egregious the showing of group persecution—the greater the risk to *all* members of the group—the less evidence of *individualized* persecution must be adduced' to meet the objective prong of a well-founded fear showing."[138] Under this third route, an applicant who cannot demonstrate a well-founded fear of future persecution through either an individualized risk or a pattern or practice can still establish a probability of future persecution through the disfavored group analysis by presenting evidence of both an individualized risk *and* a risk to their group in general.[139]

The Ninth Circuit's judicially created disfavored group analysis is problematic because under this approach, an individual need not establish either a pattern or practice of persecution or an individualized risk as the regulations require.[140] Rather, despite the fact that "members of the disfavored groups are not threatened by systematic persecution of the group's entire membership," the Ninth Circuit still considers whether *some* of the group's members may be at risk.[141] Thus, the Ninth Circuit considers both the individualized risk of persecution *and* the group's risk of persecution, even if the persecution against the group is not systematic, and the individualized risk alone is not significant enough to establish eligibility for asylum.[142] Simply put, the asylum and withholding of removal applicant's evidentiary burden becomes a sliding scale: when there is more evidence of group persecution, less evidence of individualized persecution is required.[143] Accordingly, individuals who can demonstrate

138. *Id.* (quoting Kotasz v. INS, 31 F.3d 847, 853 (9th Cir. 1994)); *see, e.g.*, El Himri v. Ashcroft, 378 F.3d 932, 937 (9th Cir. 2004) (holding that the burden on the Palestinians "to show a personalized risk of persecution" when seeking asylum and withholding of removal "is relatively low because Kuwait's policy of discriminating against its entire Palestinian population is well-established").

139. *See Wakkary*, 558 F.3d at 1062–63.

140. *See Kotasz*, 31 F.3d at 847.

141. *Id.* at 853.

142. *See id.*

143. *Id.*

some persecution to a group have a "lesser burden of showing individualized targeting," and therefore, have a greater chance of demonstrating persecution.[144]

A prime example of a pattern or practice claim is outlined in *Knezevic v. Ashcroft*.[145] There, an individual applicant sought asylum based on a well-founded fear of future persecution because of their home country's pattern or practice of ethnically cleansing Serbs from the region.[146] Based on the evidence provided and the country condition report, the Ninth Circuit concluded the applicant had a well-founded fear of future persecution because of the country's acts of ethnically cleansing Serbs, and therefore, remanded the applicant's proceedings for further consideration.[147]

On the other end of the spectrum, *Sael v. Ashcroft* is a clear case that did not demonstrate a pattern or practice of persecution.[148] There, while record evidence indicated that "ethnic Chinese [Christians] are significantly disfavored in Indonesia," the evidence did not establish that ethnic Chinese Christians endure a pattern or practice of persecution.[149] However, despite the fact Sael could not meet their burden through either the individualized risk of persecution or a pattern or practice of persecution against ethnic Chinese Christians in Indonesia, the Ninth Circuit concluded that they could satisfy their evidentiary burden through the judicially created disfavored group analysis.[150] According to the court, Sael demonstrated harm to the proposed particular social group and therefore, had to "demonstrate a 'comparatively low' level of individualized risk in order to prove that [they] ha[d] a well-founded fear of future persecution" under the disfavored group

144. *Id.* at 853–54.
145. *See* Knezevic v. Ashcroft, 367 F.3d 1206, 1212–13 (9th Cir. 2004).
146. *Id.* at 1208–09.
147. *Id.* at 1213–14.
148. *See* Sael v. Ashcroft, 386 F.3d 922, 927 (9th Cir. 2004).
149. *Id.*
150. *Id.* at 929–30.

analysis.[151] Based on the evidence provided, the Ninth Circuit concluded that Sael was able to indicate a risk of future persecution through the disfavored group analysis.[152]

Similar to the petitioner in *Sael*, Ms. Doe could not demonstrate a pattern or practice of persecution. Ms. Doe testified that two of her friends, who were married to gang members, were attacked by their husbands' rival gang members when they were walking home. Ms. Doe also supplied evidence from the 2018 Department of State Country report on El Salvador. While the report did not contain extensive information on gang violence against women, it did contain extensive news articles discussing the violence against women *generally*.[153] The report explained that although the law prohibits violence against women, "in 2016 and 2017, only 5 percent of the 6,326 reported crimes against women went to trial."[154] Moreover, the statistics showed that the "rate of cases involving violence against women was 5,999 per 100,000 and that 574 women were killed in 2015, 524 in 2016, and 469 in 2017."[155] Although the law prohibits sexual harassment, "[t]he government . . . did not enforce sexual harassment laws effectively."[156] Finally, women suffered significant discrimination, leading the report to conclude that "women did not enjoy equal pay or employment opportunities, . . . [and] [female] employees generally did not report [civil rights] violations due to fear of employer reprisals."[157]

Upon review of Ms. Doe's application in the Ninth Circuit, the court would likely conclude that the actions against women were not widespread and systematic enough to establish a pattern or practice of persecution. Moreover, the two incidents

151. *Id.* at 927.

152. *Id.* at 930.

153. *See* U.S. DEP'T OF STATE , EL SALVADOR 2018 HUMAN RIGHTS REPORT 16–17 (2018), https://www.state.gov/wp-content/uploads/2019/03/EL-SALVADOR-2018.pdf.

154. *Id.* at 16.

155. *Id.*

156. *Id.*

157. *Id.* at 17.

Ms. Doe heard about concerning friends from her home country would likely be deemed insufficient to demonstrate systematic persecution. Rather, it appears more akin to general violence. As a result, Ms. Doe cannot demonstrate either an individualized well-founded fear of future persecution, or a well-founded fear of future persecution based on a pattern or practice of persecution against a group. Consequently, Ms. Doe's only chance at success is under the Ninth Circuit's disfavored group analysis.[158]

To succeed under the Ninth Circuit's disfavored group analysis, Ms. Doe will need to present evidence of discrimination and harm against both herself, and towards the group in general.[159] Under this analysis, Ms. Doe can show evidence that the disfavored group (women in El Salvador) suffers harm, which will lead to a lesser burden of demonstrating an individualized risk.[160] The record evidence Ms. Doe provided demonstrates that the group is broadly disfavored.[161] Thus, under the disfavored group analysis, the Ninth Circuit will consider the level of harm present against the group, along with Ms. Doe's proposed individualized risk. Although Ms. Doe's individualized risk is not severe, the harm to the group is well-documented.[162] Thus, similar to the petitioner in *Sael*, Ms. Doe can likely establish that she has a well-founded fear of future persecution as a member of a broadly disfavored group.[163]

D. *Ms. Doe's Application Does Not Survive Under Second Circuit*

158. *See supra* Section III.A (discussing the difference between the Ninth Circuit's interpretation of an individualized risk of persecution, a pattern or practice of persecution, and a disfavored group analysis).

159. *See* Wakkary v. Holder, 558 F.3d 1049, 1060 (9th Cir. 2009).

160. *See* Kotasz v. INS, 31 F.3d 847, 854 (9th Cir. 1994).

161. *See, e.g.*, *Wakkary*, 558 F.3d at 1063; El Himri v. Ashcroft, 378 F.3d 932, 937 (9th Cir. 2004).

162. *See Wakkary*, 558 F.3d at 1063.

163. *See id.* ("'[T]he more egregious the showing of group persecution'—the greater the risk to *all* members of the group—'the less evidence of *individualized* persecution must be adduced' to meet the objective prong of a well-founded fear showing.") (quoting Yong Hao Chen v. United States INS, 195 F.3d 198, 203–04 (4th Cir. 1999)); *see also Ashcroft*, 386 F.3d at 927–28.

Precedent

Even if the Second Circuit concluded that Ms. Doe's proposed particular social group was cognizable, the Second Circuit Court of Appeals would likely still deny her relief because Ms. Doe cannot demonstrate past persecution or a well-founded fear of future persecution.[164] Her claim also lacks the requisite nexus between the harm she alleges and a protected ground.[165] Under Second Circuit precedent, Ms. Doe would not have the ability to present her application under the disfavored group analysis because the Second Circuit has expressly declined to adopt the Ninth Circuit's judicially created approach.[166] As a result, Ms. Doe's asylum and withholding of removal application would likely fail in the Second Circuit.

In *Santoso v. Holder*, the applicant sought relief from removal with an application for asylum.[167] Santoso based their application on the treatment of Chinese and Catholic people in Indonesia.[168] Both the immigration judge and the Board denied Santoso's application.[169] Santoso petitioned the Second Circuit for review.[170] Upon review, the Second Circuit found that the BIA did not err in in its conclusion, and that while there was "discrimination and sporadic violence in various parts of Indonesia," such general violence did "not establish that there [wa]s a pattern or practice of persecution against individuals similarly situated to" Santoso.[171]

Here, even if the court accepted Ms. Doe's particular social group as cognizable, her claim would fail because she cannot

164. Wijaya v. Gonzales, 227 F. App'x. 35, 37 (2d Cir. 2007).

165. *See* Karen Musalo, *Revisiting Social Group and Nexus in Gender Asylum Claims: A Unifying Rationale for Evolving Jurisprudence*, 52 DEPAUL L. REV. 777, 781 (2003).

166. Ponnampalam v. Barr, 769 F. App'x 25, 28 (2d Cir. 2019) ("[T]he Ninth Circuit's 'disfavored group' analysis . . . would not apply even if we were to adopt it, which we decline to do."); *see also Wijaya,* 227 F. App'x at 38 n.1; Kho v. Keisler, 505 F.3d 50, 55 (1st Cir. 2007) (expressing concern regarding the disfavored group analysis).

167. Santoso v. Holder, 580 F.3d 110, 111 (2d Cir. 2009).

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.* at 111–12.

demonstrate a well-founded fear of persecution based on either an individualized risk or a pattern or practice against her group. The Second Circuit would likely find Ms. Doe's individualized fear of future persecution "speculative at best."[172] Thus, her application would hinge on whether there is a pattern or practice of persecution against her proposed group that would establish an objectively well-founded fear of future persecution.[173] But similar to its conclusion in *Santoso*, the Second Circuit is likely to conclude that Ms. Doe failed to establish a pattern or practice against women in El Salvador, and that the evidenced harm against women in El Salvador is only "sporadic" and general.[174] As a result, the success of Ms. Doe's application for asylum would once again hinge not on the facts of her claim, but on the jurisdiction in which she resides.

IV. LOOKING AHEAD: RESTRUCTURING THE APPELLATE REVIEW PROCESS

Many federal circuit court's interpretation of the INA starkly contradicts other circuits. As discussed *supra*, these differing interpretations, which are bound into precedent for each immigration court within the circuit's jurisdiction, have real implications on individuals enduring removal proceedings each and every day.

For example, the Ninth Circuit's unique and often applicant-friendly interpretations of the INA are applied in numerous immigration courts,[175] all of which handle an unparalleled volume of caseloads.[176] Indeed, the immigration courts within the Ninth Circuit's jurisdiction contain the largest pending

172. *See* Jian Xing Huang v. INS, 421 F.3d 125, 129 (2d Cir. 2005).

173. 8 C.F.R. § 1208.13(b)(2)(iii) (2021).

174. *See Santoso*, 580 F.3d at 111.

175. *See supra* Part III.

176. *See Backlog of Pending Cases in Immigration Courts as of September 2021*, TRAC IMMIGR., https://trac.syr.edu/phptools/immigration/court_backlog/apprep_backlog.php (last visited Nov. 1, 2021); *see also* Andrew I. Schoenholtz, Jaya Ramji-Nogales & Philip G. Scrag, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295, 374 (2007) (discussing the voluminous case load in the Ninth Circuit).

caseloads in the country.[177] The Ninth Circuit itself hears 48.70% of the immigration cases that are subsequently appealed nationwide.[178] As such, nearly half of the individuals proceeding through our nation's immigration system have the benefit of appearing before immigration judges who are bound by the Ninth Circuit's applicant-friendly, and often extreme interpretations of the INA.[179] Thus, individuals who appear before immigration courts bound by Ninth Circuit precedent are already a step ahead of most individuals who appear before immigration judges in other jurisdictions, because the Ninth Circuit's interpretation of the INA is often on the applicant's side.

In contrast, individuals who appear before the Second Circuit, the circuit court with the second largest pending caseload, are not a step ahead like those in the Ninth.[180] Instead, individuals appearing before the Second Circuit face immigration judges bound by Second Circuit precedent, which interprets the INA in a significantly less applicant-friendly manner. A surface-level review of Ms. Doe's case demonstrates the likely fatal outcome of her case in the Second Circuit, versus the likely successful outcome in the Ninth Circuit.[181]

While the Ninth Circuit may provide more protection and opportunity to individuals in its jurisdiction, the same opportunities are not available for similarly situated individuals in different circuits.[182] As demonstrated throughout Ms. Doe's case, most circuits do not follow the Ninth Circuit's

177. *See* TRAC IMMIGR., *supra* note 177 (showing California, which is in the Ninth Circuit, having the second highest backlog of pending immigration cases). It should be noted that TRAC Immigration updates routinely with each fiscal quarter.

178. David North, *Immigration, the Courts, and Statistics*, CTR. FOR IMMIGR. STUD. (Mar. 4, 2016), https://cis.org/North/Immigration-Courts-and-Statistics.

179. *See supra* Part III.

180. *See* North, *supra* note 179 (showing that the Second Circuit hears roughly 15.20% of petitions for reviews).

181. *See* Cortez-Arevalo v. Holder, 470 F. App'x 56, 56 (2d Cir. 2012); s*ee also supra* Part III and accompanying text.

182. *See supra* Part III.

interpretations.[183] Indeed, judges who previously sat on the Ninth Circuit have referred to it as a ship "at some distance from the main fleet."[184] As a result, an individual's future in their immigration proceedings depends not on the uniform Act itself, but on the jurisdiction in which they reside. And until each federal circuit court begins to follow the Board's precedent and implement the Act in a uniform manner, similarly situated applicants will continue to receive different levels of protection across the country.

Therefore, as highlighted through Ms. Doe's case, the critical failure of our immigration system lies not in the agency or in the INA; the critical failure lies in the structure of appeals. Looking ahead, changing the appellate review process is the only viable solution.

As the current appeals process stands, any case appealed from the Executive Office of Immigration Review ("EOIR") must be filed with the federal circuit court encompassing the jurisdiction in which the petitioner originally appeared.[185] Accordingly, if an individual appeared before the New York immigration court, they must appeal to the Second Circuit Court of Appeals. However, as demonstrated in Ms. Doe's case, this system has created inequitable results. Thus, the only solution is to create a process in which all appeals are filed with a single federal circuit court. In practice, this process would result in a single circuit court interpreting the application of the Act, instead of various circuits employing differing interpretations of the Act. Creating an appeals process where all petitions for review streamline from the agency to a single

183. *See* Ponnampalam v. Barr, 769 F. App'x 25, 28 (2d Cir. 2019).

184. Mendoza-Perez v. INS, 902 F.2d 760, 768 (9th Cir. 1990).

185. *See* 8 U.S.C. § 1252(b)(2) (2018) ("The petition for review shall be filed with the court of appeals for the judicial circuit in which the immigration judge completed the proceedings."); REAL ID Act of 2005, Pub. L. No. 109–13, Div. B., 119 Stat. 231, 311 (2005) (eliminating district court habeas corpus jurisdiction over final orders of deportation or removal, and vesting jurisdiction to review such orders exclusively in the courts of appeals); *see also* Martinez v. Napolitano, 704 F.3d 620, 622 (9th Cir. 2012) ("The exclusive means to challenge an order of removal is the petition for review process.").

circuit court will achieve a system where each applicant receives fair and equal consideration.[186]

This proposal, however, is not without its challenges. In 2006, the United States Senate introduced a bill that proposed the consolidation of all immigration appeals to one circuit court: the Federal Circuit Court of Appeals.[187] In a committee hearing on the bill, voices of both support and criticism appeared.[188] The sharpest criticism came from Chief Judge of the Federal Circuit Court of Appeals, Judge Michel.[189] Judge Michel's criticism focused on the technical aspects of the consolidation process, including staffing and structural space.[190] Furthermore, he argued that the proposal to consolidate immigration cases to one federal circuit court could threaten Article III judges' independence.[191]

However, Judge Bea of the Ninth Circuit provided detailed counterarguments, pointing out that Judge Michel's concerns, albeit valid, could be cured.[192] Judge Bea explained that the personnel and structural concerns were moot, as the Federal Circuit Court already possesses the capacity to hold hearings "in any of the other circuits and any other cities" under 28 U.S.C. Section 48(a).[193] Furthermore, while the politicization of

186. *See, e.g.*, Veena Reddy, *Judicial Review of Final Orders of Removal in the Wake of the Real ID Act*, 69 OHIO ST. L. J. 557, 559–62 (2008) (discussing the benefits of a single circuit court reviewing petitions for review).

187. S. 2611, 109th Cong. § 707 (2006).

188. *See generally* Senate Judiciary Committee, *Judicial Review of Immigration Reform*, C-SPAN (Apr. 3, 2006), https://www.c-span.org/video/?191891-1/judicial-review-immigration-reform.

189. *See id.*

> At present, we have 15 judges, and just to make a comparison, the Ninth Circuit, which has something like a third of the present petitions for review, has 47 judges. We have 15. The Ninth Circuit has 85 staff attorneys. We have four. The Ninth Circuit has over 110 deputy clerks. We have 20. So when you multiply by a factor of 2 to 3 the Ninth Circuit resources, we would need essentially, as I indicated in my prepared testimony, to triple the size of our staff. That would also require the budget to be magnified at the level of 2 to 3 times, and we would also need the equivalent of another courthouse in order to accommodate all those additional staff members.

Id.

190. *Id.*

191. *Id.*

192. *Id.*

193. *Id.*

judges is always a looming threat, Judge Bea explained that Judge Michel's concern ignores the core value of judges, which is to be independent in their decision, regardless of which administration appointed them.[194]

Then Chairman Specter joined in criticizing the proposal, arguing that even if the Federal Circuit Court of Appeals was authorized to travel to the busiest cities for hearings across the country, such a process would result in vast expenses.[195] While then Chairman Specter's financial concerns were valid at the time, significant technological increases could change the conversation entirely. Since 2006, the capabilities for the judicial system to conduct hearings through alternative means has developed exponentially.[196] Although many courts were initially hesitant to implement these technological features into our judicial system, the COVID-19 pandemic has forced their hand.[197] The pandemic has highlighted that virtual hearings are more than merely feasible; they are quite successful.[198] Indeed, these alternative options have improved the judicial system's overloaded docket, as they provide the courts with the ability to move through cases in a more efficient manner.[199] And of course, these alternative court proceedings require less travel and, in the end, prove to save both time and money.[200]

194. *See id.* ("Judges tend to be very, very independent once they become Article III judges.").

195. *Id.*

196. *See* Ari Kaplan, *Online Courts, the Future of Justice and Being Bold in 2020*, A.B.A. J. (Jan. 2, 2020, 9:49 AM), https://www.abajournal.com/news/article/online-courts-the-future-of-justice-and-being-bold-in-2020 (explaining how online courts "can deliver just outcomes at a more proportionate cost").

197. *Id.*

198. *See id.*

199. Brent Murcia, *COVID-19, Remote Technology, and Due Process in Administrative Hearings*, MINN. J.L. SCI. & TECH.: LAWSCI F. (May 13, 2020), https://mjlst.lib.umn.edu/2020/05/13/covid-19-remote-technology-and-due-process-in-administrative-hearingsbrent/ ("[O]nline hearings can help improve access to justice, addressing backlogs of millions of cases in some courts and agencies."); *see also* Kaplan, *supra* note 197.

200. Murcia, *supra* note 200 ("[T]he Social Security Administration's Office of Disability Adjudication and Review saved $59 million in 2010 from using video hearings.").

CONCLUSION

Our nation's judicial system has changed substantially since 2006. Unfortunately, the interpretations of the INA across federal circuit courts have changed as well. As our immigration system currently stands, each and every individual passing through the immigration courts is controlled not by the INA itself, but rather, by the location of their hearing. As demonstrated in Ms. Doe's case, an individual may successfully apply for asylum or withholding of removal in the Ninth Circuit, but an identical applicant would likely be denied asylum or withholding of removal in the Second Circuit. This system of jurisdictional roulette produces unjust outcomes for individuals seeking refuge and protection in our country. It is time to analyze different procedural options for our immigration system. The first, and most viable option, is the consolidation of the appellate process to one federal circuit court. A single court will likely lead to a more equitable immigration system, as individuals who appeal will have a better understanding of the standards governing their proceedings. Indeed, a single court will lead to a less complex immigration system and will provide each applicant with a fair chance at seeking relief or protection from removal. An appeals process rooted in a single federal circuit court would allow each applicant to be governed not by the jurisdiction in which they reside, but rather, by the facts of their claim.