

# 20-1091

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UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

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**J. M.**

*Petitioner,*

v.

**WILLIAM P. BARR,**  
*United States Attorney General,*  
*Respondent.*

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ON PETITION FOR REVIEW OF AN ORDER  
OF THE BOARD OF IMMIGRATION APPEALS

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**AMICUS CURIAE BRIEF OF CATHOLIC LEGAL IMMIGRATION  
NETWORK, LUTHERAN SOCIAL SERVICES OF NEW YORK'S  
IMMIGRATION LEGAL PROGRAM, CENTRAL AMERICAN LEGAL  
ASSISTANCE, AND UNLOCAL IN SUPPORT OF PETITION FOR REVIEW**

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## **CORPORATE DISCLOSURE STATEMENT**

Amici Catholic Legal Immigration Network (CLINIC), Lutheran Social Services of New York's Immigration Legal Program, Central American Legal Assistance (CALA), and UnLocal are all 501(c)(3) non-profit corporations. None of them has a parent corporation and they do not issue stock.

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## **IDENTITY OF AMICUS CURIAE**

**Catholic Legal Immigration Network, Inc.** (“CLINIC”) is an immigration-focused nonprofit that assists low-income immigrants in their claims for immigration relief. CLINIC partners with a network of nonprofit immigration legal services programs to protect the rights of asylum seekers. CLINIC’s network includes over 380 diocesan and other affiliated immigration programs around the country. CLINIC supports the work of their affiliates through training, technical assistance, and litigation on behalf of the immigrant communities they serve. CLINIC also is a partner in providing pro bono representation to low-income immigrants through various projects, including the BIA Pro Bono Project. CLINIC’s staff has developed numerous resources for immigrants and immigration law practitioners, including a practice advisory on the asylum one-year filing deadline for DACA recipients, a practice advisory on asylum one-year filing deadline for DACA recipients, and a practice advisory on assisting asylum seekers to reopen in absentia removal orders. CLINIC’s work derives from Catholic social teaching to promote the dignity and protect the rights of immigrants in partnership with its network.

**Central American Legal Assistance (CALA)** is a Brooklyn based non-profit organization that has been representing immigrants in removal proceedings since 1986. CALA's client population is comprised primarily of survivors of persecution and trauma from Central America who are applying for asylum, withholding of

removal, and protection under the Convention Against Torture while in removal proceedings in New York City. CALA represents several hundred asylum seekers each year, many of whom fear persecution and torture by non-State actors.

**Lutheran Social Services of New York Immigration Law Program (“LSSNY-ILP”)** provides 7,000 New Yorkers each day with a wide range of social services. LSSNY-ILP provides community-based direct immigration legal services to under-served populations in the New York City metropolitan area. Since 1995, the program has represented thousands of clients seeking asylum, family-based immigration status, citizenship, and other forms of immigration relief. LSSNY-ILP has developed particular expertise in working with young clients pursuing asylum, and attorneys from the program regularly appear on behalf of clients before USCIS and in removal proceedings.

**UnLocal, Inc.** provides free representation to undocumented immigrants who may be eligible to obtain lawful status, most of whom are in removal proceedings. UnLocal clients include hundreds of asylum seekers, both children and adults, many of whom flee persecution committed by private actors. These UnLocal clients have been deeply impacted by changes to determine asylum eligibility.

## INTRODUCTION

Each year, the U.S. Department of State publishes reports on internationally recognized individual, civil, political, and worker rights, as set forth in the Universal Declaration of Human Rights and other international treaties. Bureau of Democracy, Hum. Rts., & Lab., *2019 Country Reports on Human Rights Practices*, U.S. DEP'T OF STATE (Mar. 11, 2020), <https://www.state.gov/reports/2019-country-reports-on-human-rights-practices/>. These State Department Country Condition Reports (“SDRs”) are produced for every nation receiving U.S. assistance and all United Nations Member States. *Id.* The State Department claims that it gathers the information through U.S. embassies and consulates, foreign governments, legal experts, journalists, academics, and activists. *Id.* The reports are used to document foreign human rights abuses, hold violators accountable, inform Congress on foreign aid decisions, and help immigration judges (“IJs”) and asylum officers make determinations on asylum cases. Stephanie Schmid, *The Trump Administration Is Erasing Reproductive Rights at Home and Abroad*, FOREIGN POL'Y (Oct. 23, 2018, 7:00 AM), <https://foreignpolicy.com/2018/10/23/trump-administration-erasing-reproductive-rights/>.

The SDRs play an important role in various stages of the asylum process. Asylum officers use them in initial credible fear interviews for those apprehended at the border and subjected to expedited removal. IJs use the reports to assess country

conditions in merits hearings on applications for asylum, withholding of removal, and protection under the Convention Against Torture.

However, as amici describe below, U.S. Circuit Courts, non-governmental organizations (“NGOs”), and immigration advocates have become increasingly concerned that the SDRs’ comprehensiveness and content have been altered to fit a political agenda that favors restricting access to asylum. The result has been a significant decline in SDRs’ substantive value at the same time the Government has expanded their influence on the asylum determination process.

Amici submit this brief to underscore the damage that can be wrought by an IJ’s improper reliance on an SDR. In this case, the asylum seeker, a Honduran man who described a reasonable fear of future persecution and torture because he was the victim of physical attacks by government and non-state actors, received a remand from the Board of Immigration Appeals. Rather than schedule a new hearing for further testimony in the case, the IJ again denied his claims for relief, relying on the Honduras SDR, and giving little or no weight to the evidence from NGOs that the applicant submitted. As discussed below, amici are concerned that through procedures imposed by the Trump Administration, IJs must increasingly rely on SDRs precisely when those reports have become more politicized and less reliable.

The declining reliability of SDRs is particularly worrisome in the case of Honduras, where the SDR has become incomplete to the point of disingenuousness.

For instance, while U.S. Courts have indicted and convicted Honduran political elites at the highest level for active participation in drug-trafficking, the Honduran SDR fails to mention these developments.<sup>1</sup> Where an asylum seeker is required to show that the Honduran government is unwilling or unable to control organized criminal elements—a point made clear where the government actively collaborates with organized crime—this omission is prejudicial. And where adjudicators are permitted to rely solely on the SDR, ignoring other reliable country conditions evidence in the record that speak to what the SDR leaves out, the omission becomes dispositive and a denial of due process.

Considering the increasingly political nature of today’s SDRs, it is highly inappropriate for an asylum adjudicator to rely solely on them. But that is precisely what happened here. The IJ took administrative notice of the SDR and used it as the sole basis for denying relief. It is improper for any adjudicator— asylum officer, IJ, or the Board of Immigration Appeals—to rely so heavily on SDRs at a time when

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<sup>1</sup> The conviction of Tony Hernandez, brother of the current president of Honduras, on narco-trafficking charges “offered a blueprint for the way drug money penetrated the highest levels of Honduran politics to buy protection and impunity.” Emily Palmer & Elisabeth Malkin, *Honduran President’s Brother Is Found Guilty of Drug Trafficking*, N.Y. TIMES (Oct. 18, 2019), <https://www.nytimes.com/2019/10/18/world/americas/honduras-president-brother-drug-trafficking.html>. Despite the information that emerged from this trial and conviction, which ultimately resulted in the subsequent indictment of the former Honduran Chief of Police, the case was not mentioned in the 2019 SDR. See U.S. DEP’T OF STATE, HONDURAS 2019 HUMAN RIGHTS REPORT (2019).

their use provides an incomplete and biased picture of conditions within an asylum seeker's country of origin.

## ARGUMENT

### **I. Overreliance on the SDRs creates an unfair burden for asylum claimants in cases involving non-state actors under one possible interpretation of the “unwilling-or-unable” standard articulated in *Matter of A-B-* and *Scarlett v. Barr*.**

In cases where the persecutor is a non-governmental actor, asylum seekers must show that their home-state government was unwilling or unable to prevent the persecution the claimant suffered in order to prevail. *Rizal v. Gonzales*, 442 F.3d 84, 92 (2d Cir. 2006); *Matter of A-B-*, 27 I. & N. Dec. 316 (2018). Under one possible interpretation of a recently published decision from this Court, “unwilling or unable” may mean “complete helplessness.” *See Scarlett v. Barr*, 957 F.3d 316, 332 (2d Cir. 2020). This standard makes the non-reliability of SDRs all the more troubling. Historically, the Department of Homeland Security (“DHS”) has found success pointing to the relevant SDR to rebut a claim of inability or unwillingness to control a non-governmental entity. For example, the claimant in *Gjura v. Holder* alleged that the Albanian police repeatedly failed to investigate and prevent attacks against her. 502 Fed. Appx. 91, 91 (2d Cir. 2012). This Court held that the claimant failed to show that the Albanian government was unable or unwilling to control the non-governmental actors solely because the 2006 Albanian SDR indicated that the government had increased prosecutions of sex traffickers and was working to address trafficking-related corruption in its police force. *Id.*

The Government's strategy of cherry picking positive statements from SDRs has also been successful in other circuits. *See, e.g., Susanto v. Attorney General of the United States*, 240 Fed. Appx. 492, 496 (3d Cir. 2007) (finding that claimant was unable to show that the Indonesian government was unwilling or unable to control the non-governmental actor because police responded to an attack, and because the SDR stated that the claimant's faith was recognized by the government, the claimant's ethnic group played a major role in the economy, and the incidence of similar discrimination had declined); *Gomes v. Gonzales*, 429 F.3d 1264, 1267 (9th Cir. 2005) (finding that the government was not indifferent to the murder of claimant's brother because the police issued warrants in the case and the SDR stated that the Bangladesh government did not countenance attacks against Christians).

Given the increasingly non-comprehensive and biased nature of SDRs, it will become easier for the Government to rely on them in rebutting a claim of "complete helplessness." As described more fully below, these reports frequently gloss over countries' human rights violations while referencing reform efforts that may look good on paper but in reality constitute little more than window dressing. With an imprimatur of objectivity enjoyed by no other outside reports, the relevant SDR will likely be all that is necessary for the Government to demonstrate that an asylum seeker's home country is not "completely helpless" in controlling a non-state actor.

**II. Sole reliance on State Department reports to demonstrate country conditions is inappropriate, given their noncomprehensive and politicized nature.**

**A. Federal courts, including the Second Circuit, have long recognized that SDRs are noncomprehensive and only meant to provide an overview of a country's conditions.**

U.S. Circuit Courts, including this Court, have noted that SDRs are not comprehensive. For example, in vacating an adverse BIA decision, this Court characterized SDRs as merely an “overview of conditions in the applicant’s home country” and explained that the reports may not adequately reflect an applicant’s particular circumstances. *Tian-Yong Chen v. INS*, 359 F.3d 121, 130 (2d Cir. 2004). Accordingly, the Court noted that SDRs do not automatically discredit contrary evidence that an applicant presents. *Id.*

This Court also emphasized that decision-makers must consider reliable sources beyond the SDRs, given the limitations noted above. *Id.* at 130 (“[W]here a report suggests that, *in general*, an individual in the applicant’s circumstances would not suffer or reasonably fear persecution in a particular country, the immigration court . . . is obligated to consider also . . . the particular circumstances of the applicant’s case demonstrated by testimony and other evidence.”); *see also Yuk v. Ashcroft*, 355 F.3d 1222, 1236 n.12 (10th Cir. 2004) (“[T]he use of a State Department Report ‘does not substitute for an analysis of the facts of each applicant’s individual circumstances.’” (quoting *Krastev v. INS*, 292 F.3d 1268,

1277 (10th Cir. 2002))). Such additional sources provide immigration officials with a plethora of information that will enable them to accurately and efficiently evaluate an applicant’s credibility and claims. The Department of Justice’s (“DOJ’s”) current online database for country conditions information about Honduras also recommends non-governmental sources such as reports from Amnesty International, Human Rights Watch, and the BBC. *Honduras: Human Rights Reports*, U.S. DEP’T OF JUST., <https://www.justice.gov/eoir/country/honduras-topical> (last visited Oct. 29, 2020).

The Seventh Circuit Court of Appeals shares this Court’s concern about the limited scope of the SDRs. In *Galina v. INS*, the court criticized the BIA for taking administrative notice of SDRs that may not provide fully comprehensive country of origin information. 213 F.3d 955, 958–59 (7th Cir. 2000). Specifically, the court noted that it would be inappropriate for the BIA to “give conclusive weight to statements in those reports that not only are not incontestable, but also are not even facts.” *Id.* at 958.

**B. SDRs are not objective, but rather based on external political considerations and attempts to advance the Government’s political objectives.**

**1. The politicization of SDRs has been criticized by courts, NGOs, and members of Congress.**

U.S. Circuit Courts have also long expressed concerns about the lack of objectivity in SDRs, suggesting that decision-makers should not place undue weight

on them. *See, e.g., Gramatikov v. INS*, 128 F.3d 619, 620 (7th Cir. 1997). In particular, courts have noted that the State Department is known to downplay human rights violations in its reports on countries friendly to the United States. *Id.* Moreover, SDRs “are sometimes skewed toward the governing administration’s foreign-policy goals.” *Tian-Yong Chen v. INS*, 359 F.3d 121, 130 (2nd Cir. 2004) (citing David Sloss, *Hard-Nosed Idealism and U.S. Human Rights Policy*, 46 ST. LOUIS U. L.J. 431, 432 (2002)). For these reasons, the Seventh Circuit stated that IJs should treat SDRs with “healthy skepticism, rather than . . . as Holy Writ.” *Galina v. INS*, 213 F.3d 955, 959 (7th Cir. 2000).

NGOs have also criticized the reliability of SDRs as objective sources on country conditions. In 2018, Amnesty International USA criticized the U.S. Government for an “unprecedented and alarming level of politicized editing” in the SDRs. *See* Tarah Demant, *A Critique of the US Department of State 2017 Country Reports on Human Rights Practices*, MEDIUM: AMNESTY INT’L (May 8, 2018), <https://medium.com/@amnestyusa/a-critique-of-the-us-department-of-state-2017-country-reports-on-human-rights-practices-f313ec5fe8ca>. There is striking evidence to support such a criticism. *See, e.g.,* Amanda Klasing & Elisa Epstein, *US Again Cuts Women from State Department’s Human Rights Reports*, HUM. RTS. WATCH (Mar. 13, 2019), <https://www.hrw.org/news/2019/03/13/us-again-cuts-women-state-departments-human-rights-reports>.

For example, the State Department removed the sections on women’s reproductive health and rights from the 2019 reports while simultaneously limiting assistance to foreign organizations that provide comprehensive reproductive health services. *Id.* Additionally, these particular cuts to the SDRs occurred around the same time the government instituted a rule prohibiting Title X funding for health care clinics that refer women to abortion providers. *See* 84 Fed. Reg. 7,714 (Mar. 4, 2019). Deleting reproductive human rights information from the SDRs promotes the Administration’s political objectives in terms of reproductive access, information, and human rights.

References to human rights issues affecting women and LGBTI (lesbian, gay, bisexual, transgender and intersex) individuals also have diminished. *See* OXFAM, SINS OF OMISSION: WOMEN’S AND LGBTI RIGHTS REPORTING UNDER THE TRUMP ADMINISTRATION 4–19 (2019), [https://assets.oxfamamerica.org/media/documents/Sins\\_of\\_Omission\\_April\\_2019.pdf](https://assets.oxfamamerica.org/media/documents/Sins_of_Omission_April_2019.pdf). For example, overall mentions of LGBTI issues including discrimination and sodomy criminalization decreased by 10% from 2016 to 2018. *Id.* at 10. Reporting on women’s rights issues decreased 29% during the same period. *Id.* Many of these changes affected countries with which the United States has important strategic relations, such as Afghanistan and India, while others affected prominent countries of origin for asylum applicants, such as El Salvador. *Id.* at 7. The State Department has “cut back on discussing women’s rights and issues

to a greater extent for the countries that send the most asylum seekers to the U.S.” despite ongoing dangers to women and high femicide rates in those countries. *Id.* at 11.

In addition to omitting information on reproductive rights, the SDRs scaled back their reporting on LGBTI rights and the right to be free from harm. *Id.* Other examples of omissions from the 2017 reports include rape and domestic violence, protection of refugees, female genital mutilation/cutting, and freedom of expression. *Id.* Such politicized edits result in SDRs that “do not actually speak to the root causes of human rights violations and, in fact, ignore the lived reality of people in relation to those rights.” Demant, *supra*. By ignoring human rights abuses that impact millions of individuals worldwide, the SDRs effectively erase these realities and make it increasingly difficult for victims of these harms to bring successful asylum claims.

NGOs have continued to criticize the reliability of SDRs as recently as October 2020, indicating an ongoing pattern of selective omission. For example, The Asylum Research Centre conducted a line-by-line comparative analysis of five 2016 SDRs to the reports in subsequent years. *See* LIZ WILLIAMS & STEPHANIE HUBER, ASYLUM RSCH. CTR., COMPARATIVE ANALYSIS: U.S. DEPARTMENT OF STATE’S COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES (2016–2019) (Oct. 21, 2020), <https://asylumresearchcentre.org/publications/>. The key findings from this report

further demonstrate a clear effort by the current administration to minimize issues relating to the treatment of women, children, and LGBTI persons, while conveying a misleading sense of improvements of human rights situations in the respective countries. For example, the report noted that the subsection on reproductive rights was replaced with a section titled “coercion in population control” which failed to address issues such as access to contraception, prenatal care, skilled healthcare attendance during childbirth, essential obstetric care, and postpartum care. *Id.* at 8. The report also noted that although many sources continued to document the existence of human rights issues experienced by children and LGBTI persons, the recent SDRs failed to include treatment suffered by citizens in the respective countries. *Id.* at 9. One example of such unjustified omission came from a comparison of the Iraq reports:

It was suggested in 2018 and 2019 that “little information was available” on ISIS’s recruitment and use of children compared to 2016 and 2017 where it was reported that “in previous years ISIS was known to recruit and use children.” However, sources located in the public domain continued to document this practice for both years.

*Id.* at 11. This in-depth comparative analysis lays bare the State Department’s political motivations.

Political influence on SDRs is not new. Members of Congress have raised concerns about political priorities undermining the credibility of the State Department's human rights reporting across several presidential administrations. For example, in 2015 members of Congress noted that the Obama administration may have been attempting to influence an annual report on human trafficking in order to avoid diplomatic consequences for countries that were political priorities at the time. *See* Press Release, U.S. Senate Comm. on Foreign Relations, Corker Fears Politicization of State Department's 2015 Human Trafficking Report Over Questionable Upgrades (Aug. 6, 2015), <https://www.foreign.senate.gov/press/chair/release/corker-fears-politicization-of-state-departments-2015-human-trafficking-report-over-questionable-upgrades->. In particular, lawmakers, including then-Senate Foreign Relations Committee Chairman Bob Corker, were troubled that the Obama Administration may have attempted to cast Malaysia's record in protecting trafficking victims in a more positive light because of its desire to secure a multi-nation trade agreement that included Malaysia. *Id.*

**2. The politicization of SDRs is part of an overall effort by the Trump Administration to restrict access to asylum, particularly at the southern border.**

Politicized editing of SDRs is unlikely to cease any time soon, considering such editing seems to be part of a broader agenda to foreclose asylum claims *en*

*masse*.<sup>2</sup> For example, at a 2018 public meeting at the White House, President Trump referred to migrants attempting to enter the United States as “animals,” and he later backtracked, stating that he was attempting to refer to potential MS-13 criminals from El Salvador making unauthorized border crossings. Julie Hirschfeld Davis & Niraj Chokshi, *Trump Defends ‘Animals’ Remark, Saying It Referred to MS-13*

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<sup>2</sup> See generally Emma Platoff, et al., *While Migrant Seek Shelter from Violence, Trump Administration Narrows Path to Asylum*, TEX. TRIB. (July 10, 2018), <https://www.texastribune.org/2018/07/10/migrant-families-separated-border-crisis-asylum-seekers-donald-trump/>. Moreover, the current Administration is in the process of re-examining the kinds of rights which constitute “human rights.” To wit, the recently formed Commission on Unalienable Rights is responsible for determining the role of human rights in American foreign policy and determining which human rights are truly rights and which are not worth protecting. Michael R. Pompeo, Sec’y of State, Remarks to the Press (July 8, 2019), <https://fi.usembassy.gov/secretary-of-state-michael-r-pompeo-remarks-to-the-press-july-8-2019/>. The Commission is not made up of a group of career, non-partisan human rights experts. Letter from Eliot L. Engel, Rep., U.S. House of Reps., et al., to Michael Pompeo, Sec’y of State, U.S. Dep’t of State (July 18, 2019), <https://foreignaffairs.house.gov/cache/files/2/9/294cc9ed-3391-4fa2-968a-424f8e687dac/6B92FE10FE738FAEB3A6FB2BB7E69BC9.doc139.pdf>. Rather, its members are overwhelmingly politicized. See Letter from Non-Governmental Organization (NGO) Signatories, to Michael Pompeo, Sec’y of State, U.S. Dep’t of State (July 23, 2019), <https://www.humanrightsfirst.org/sites/default/files/Unalienable-Rights-Commission-NGO-Ltr.pdf> (expressing concern that the Committee, when taken as a whole, fails to achieve the legal requirement that a federal advisory committee be fairly balanced in its views). In particular, most members have taken extreme positions opposing LGBTI and reproductive rights. *Id.* As such, the Commission is seemingly set up to push aside modern international human rights norms established by non-partisan experts. Letter from Eliot L. Engel et al. to Michael Pompeo, *supra*. The Commission’s responsibility for advising the State Department on the role of human rights in American foreign policy therefore prompts legitimate concerns that the politicization of State’s human rights reports will only worsen, ultimately decreasing their reliability.

*Gang Members*, N.Y. TIMES (May 17, 2018), <https://www.nytimes.com/2018/05/17/us/trump-animals-ms-13-gangs.html>. Later that year, the President said “[c]riminals and unknown Middle Easterners [were] mixed in” with a “caravan” of largely Central American immigrants travelling to the U.S.-Mexico border, in an apparent reference to suspicions that terrorists could be attempting to make unauthorized crossings through the caravan. Linda Qiu, *Trump’s Evidence-Free Claims About the Migrant Caravan*, N.Y. TIMES (Oct. 22, 2018), <https://www.nytimes.com/2018/10/22/us/politics/migrant-caravan-fact-check.html>. However, third-party fact-checkers and independent Government authorities cast doubt on this claim. *Id.* Additionally, El Salvador was one of the countries to which the President referred when he used profanity to describe the conditions in the countries of origin for asylum seekers, which he implied made them less desirable immigrants. Josh Dawsey, *Trump Derides Protections for Immigrants from ‘Shithole’ Countries*, WASH. POST (Jan. 12, 2018), [https://www.washingtonpost.com/politics/trump-attacks-protections-for-immigrants-from-shithole-countries-in-oval-office-meeting/2018/01/11/bfc0725c-f711-11e7-91af-31ac729add94\\_story.html](https://www.washingtonpost.com/politics/trump-attacks-protections-for-immigrants-from-shithole-countries-in-oval-office-meeting/2018/01/11/bfc0725c-f711-11e7-91af-31ac729add94_story.html).

Moreover, many of the Administrations restrictions on asylum, including the “Migrant Protection Protocols” (“MPP”) and the “Safe Third Country” policy are aimed at restricting access to asylum for those fleeing persecution in the Northern Triangle. Cristobal Ramón, *The Trump Administration’s Responses to Central*

*American Migration*, BIPARTISAN POL'Y CTR. (Sept. 5, 2019), <https://bipartisanpolicy.org/blog/the-trump-administrations-responses-to-central-american-migration/>. Under the MPP, informally known as “Remain in Mexico” asylum seekers arriving at the U.S. southern border—many of whom are from the Northern Triangle—are required to wait in Mexico until an IJ hears their claim. See Vanessa Romo, *U.S. Supreme Court Allows ‘Remain in Mexico’ Program to Continue*, NPR (Mar. 11, 2020, 3:38 PM), <https://www.npr.org/2020/03/11/814582798/u-s-supreme-court-allows-remain-in-mexico-program-to-continue>. Under the Safe Third Country policy, asylum seekers who traveled through El Salvador, Guatemala, or Honduras on their way to the United States may be returned to either of those countries in order to seek asylum. See Nicole Narea, *Trump’s Agreements in Central America Are Dismantling the Asylum System as We Know It*, VOX (Nov. 20, 2019, 3:08 PM), <https://www.vox.com/2019/9/26/20870768/trump-agreement-honduras-guatemala-el-salvador-explained>.

These attempts to restrict access to asylum have infected U.S. intelligence-gathering services. According to a DHS whistleblower complaint, Acting Deputy Secretary and USCIS Acting Director Ken Cuccinelli has attempted to interfere in intelligence gathering related to high levels of violence and corruption in countries that include Honduras, Guatemala, and El Salvador. Whistleblower Reprisal Complaint at 9, *In re Murphy* (Sept. 8, 2020), <https://intelligence.house.gov>

/uploadedfiles/murphy\_wb\_dhs\_oig\_complaint9.8.20.pdf. Mr. Cuccinelli ordered the whistleblower to identify the officers behind the reports and either dismiss or reassign them for their work as “deep state intelligence analysts” who were working to undermine the President’s agenda. *Id.* The whistleblower, along with another DHS undersecretary, ultimately decided not to implement Mr. Cuccinelli’s directive because of the clear unlawfulness of politically motivated retaliation for intelligence assessments. *Id.*

Indeed, political interference runs rampant throughout the Trump Administration’s State Department. *See, e.g.,* Pranshu Verma, *Senate Democrats Issue Scathing Review of Pompeo’s Tenure at State Dept.*, N.Y. TIMES (July 28, 2020), <https://www.nytimes.com/2020/07/28/us/politics/state-pompeo-democrats-report.html>; Lara Jakes, *State Dept. Career Employee Was Targeted as ‘Loyalist’ to Democrats, Inquiry Shows*, N.Y. TIMES (Nov. 14, 2019), <https://www.nytimes.com/2019/11/14/us/politics/state-department-inspector-general.html>. President Trump and Secretary of State Mike Pompeo both have come under harsh criticism from career State Department civil servants and members of the U.S. diplomatic corps, who have accused them of improper political interference in their work. Nahal Toosi, *The Revenge of the State Department*, POLITICO (Oct. 21, 2019, 6:48 AM), <https://www.politico.com/news/2019/10/20/state-department-trump-051564>. As recently as this month, the Government has sought to declare well-regarded

international NGOs such as Oxfam, Human Rights Watch and Amnesty International as anti-Semitic, over the objections of career civil servants and attorneys. Nahal Toosi, *U.S. Weighs Labeling Leading Human Rights Groups ‘anti-Semitic’*, POLITICO (Oct. 21, 2020, 3:42 PM), <https://www.politico.com/news/2020/10/21/state-department-weighs-labeling-several-prominent-human-rights-groups-anti-semitic-430882>.

The documented actions of Secretary Pompeo and the President, combined with those of political officials at other agencies, further call into question the reliability of SDRs, especially those for countries in the Northern Triangle region of Central America.

**3. The increased politicization of SDRs is particularly dangerous because of the Trump Administration’s efforts to raise the evidentiary power of SDRs in the asylum determination process.**

Under current Department of Justice regulations, SDRs and non-governmental reports are accorded equal weight in the asylum-determination process. That is, immigration courts assessing asylum applications may “rely on material provided by the Department of State, the Office of International Affairs, other Service offices, or other credible sources, such as international organizations, private voluntary agencies, news organizations, or academic institutions.” 8 C.F.R. § 1208.12 (2020). This policy is likely to change soon; in September 2020, DOJ issued a notice of proposed rulemaking that would significantly alter this language

and require IJs to give more evidentiary weight to DHS and SDRs than to nongovernmental reports. Under this proposed change, the IJ “may rely on foreign government and nongovernmental sources *if those sources are determined by the judge to be credible and probative,*” but “may rely on material provided by the Department of State . . . or other U.S. government agencies” without the requirement of assessing their probative value or credibility. Procedures for Asylum and Withholding of Removal, 85 Fed. Reg. 59,699 (proposed Sept, 23, 2020) (to be codified at 8 C.F.R. § 1208.12(a)) (emphasis added). This proposed imprimatur on the accuracy of SDRs over nongovernmental sources of information, combined with the increasingly politicized content of SDRs, will prejudice asylum seekers in their effort to avoid persecution in their home country.

Taken together, DOJ’s proposed rule change on the assumed reliability of SDRs and the DHS whistleblower complaint lead to a reasonable inference that the Government is engaged in an interagency effort to politicize the intelligence community’s findings regarding conditions in common countries of origin for asylum seekers. This recurring course of Government action reinforces the observations of courts (including this Court), NGOs, and members of Congress that SDRs are unreliable and non-comprehensive because of their strong connection to the Government’s political interests.

**C. The 2019 State Department Report on Honduras is biased and demonstrates an overreliance on governmental sources.**

Because the petitioner in the instant case is an asylum seeker from Honduras, differences between the 2016 and 2019 SDRs on Honduras are especially relevant. A comparison of the 2016 and 2019 SDRs demonstrates the State Department's recent use of increasingly biased language which portrays governments in a misleadingly positive manner. This comparison also reveals the Department's unjustified reliance on governmental agencies and strategic omission of information provided by NGOs. The biased language and politicized selection of sources demonstrates the Department's intent to use SDRs as political tools in the asylum process.

### **1. The State Department's use of biased language**

From 2016 to 2019, the State Department altered the SDRs' language and tone, minimizing adverse country conditions by overstating the government's remedial actions. For example, the 2019 report inserted the words "alleged" or "allegedly" five times to qualify an action reported as a fact in the 2016 report. *See* CLINIC, DEPARTMENT OF STATE COUNTRY REPORT ON HUMAN RIGHTS PRACTICES: HONDURAS: COMPARISON CHART 2016 AND 2019 (Oct. 20, 2020), <https://cliniclegal.org/resources/asylum-and-refugee-law/clinic-department-state-shifts-human-rights-reports-comparison>. In fact, despite the 2019 report being nearly half the length of the 2016 report, both reports contained the same number of uses of the words "alleged" or "allegedly." *Id.* The 2019 report also used unjustified,

positive language to describe governmental actions. *Id.* at 5 (noting an instance where the 2019 report stated that “the government had implemented . . . actions to promote the . . . dignified return . . . of internally displaced persons” and “continued to strengthen its capacity to provide services” with no indication of actual steps the government had taken nor any future action it planned to implement). Additionally, where the 2016 report included detailed information and specific statistics to support its findings, the 2019 report used more general language and omitted such data. For example, in the Arbitrary Arrest or Detention section—a section many asylum applicants rely on when attempting to corroborate their claims of persecution—the 2016 report contained specific numbers of complaints regarding arbitrary arrests, while the 2019 report merely reported that “authorities at times failed to enforce these requirements effectively.” *Id.* at 3. Without specific data with which to demonstrate the pervasive nature of certain offenses, the SDRs make it difficult for asylum seekers to demonstrate the gravity of their persecution.

## **2. The State Department’s increased selectivity regarding sources of country condition information**

In addition to censored editing and biased writing, SDRs have become increasingly selective with regard to sources of country condition information, thus further limiting the scope of the reports and rendering them subjective and politicized tools of the United States Government. Differences between the 2016 and 2019 SDRs on Honduras demonstrate this increased politicization. One immediately

clear difference is that with 26 pages, the 2019 SDR is nearly half the length of the 2016 SDR, which contained 43 pages. In addition, the 2019 SDR predominantly cites Honduran governmental entities and omits information provided by non-governmental organizations. U.S. DEP'T OF STATE, HONDURAS 2019 HUMAN RIGHTS REPORT (2019) [hereinafter HONDURAS (2019)]. On the other hand, the 2016 report references statistics from Casa Alianza Honduras, citing the NGO in its discussion on violence and hardships facing Honduran children seven times. *See* U.S. DEP'T OF STATE, HONDURAS 2016 HUMAN RIGHTS REPORT (2016) [hereinafter HONDURAS (2016)]. The 2019 report not only omitted references to Casa Alianza, but also severely limited its coverage of conditions affecting children in general. *See* CLINIC, *supra*, at 10–11 (explaining that the 2019 Honduras report wholly eliminated the section on discrimination in birth registration rates, reduces the section on child abuse from four paragraphs to one, reduced the section on displaced children from eight sentences to one, and wholly eliminated the section on institutionalized children).

Moreover, the 2016 report made over thirty references to findings made by NGOs generally, including the organizations Association for a More Just Society, ACI Participa, the Committee of Relatives of the Disappeared in Honduras, Indigenous Lenca Movement of La Paz, Civil Council of Popular and Indigenous Organizations of Honduras (COPINH), National Federation of parents of

Individuals with Disabilities in Honduras, Center for Women’s Rights (CDM), Black Fraternal Organization of Honduras (OFRANEH), and the Honduran Miskito Association of Crippled Drivers (AMHBLI). HONDURAS (2016), *supra*. Meanwhile, the 2019 report omitted references to all of the aforementioned organizations, and made only eight references to NGOs in general. HONDURAS (2019), *supra*. Further, the 2016 report referenced numerous intergovernmental organizations such as the UN Committee Against Torture, UN Committee on Economic, Social, and Cultural Rights (CESCR), Institute for Access to Public Information (IAIP), UN Women, UN Population Fund, International AIDS Society, UN Committee on the Elimination of Racial Discrimination, International Labor Organization Convention (ILO)--none of which are cited in the 2019 report. *Compare* HONDURAS (2016), *supra*, with HONDURAS (2019), *supra*. By ignoring NGO findings, the SDRs for Honduras as well as those for other countries have become politicized, biased, and inadequate to portray a comprehensive picture of human rights conditions.

## **CONCLUSION**

Nearly two decades ago, this Court cast doubt on the reliability of State Department human rights reports playing a deciding role in asylum adjudications. *Tian-Yong Chen*, 359 F.3d 121 at 130. In the time since that decision, the reliability of these reports has only continued to decline because of political interference that renders them less comprehensive and more biased. For the reasons explained above,

amici believe this Court should **GRANT** the petition for review of the Board of Immigration Appeals decision due to its affirmance of the IJ's sole reliance on the 2019 Honduran SDR.

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Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies under Federal Rule of Appellate Procedure 32(g)(1), that this motion complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(a).

1. The brief contains 5307 words. *See* Fed. R. App. P. 32(f).
2. The motion has been prepared in proportionally spaced typeface using Microsoft Word 2020 in 14-point Times New Roman font. As permitted by Fed. R. App. P. 32(g)(1). Counsel has relied on the word count feature of this word processing system in preparing this certificate.

Dated: October 30, 2020 (Resubmitted November 3, 2020 after original brief was rejected for a technical error)

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**CERTIFICATE OF SERVICE**

I hereby certify that on November 3, 2020 the foregoing was served by filing a copy using the Court's ECF filing system, which will send notice of the filing to all counsel of record.

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