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CILA Children's Immigration Law Academy

Litigation for Unaccompanied Children: Updates and Foundational Cases

A webinar series presented by:
The ABA Children's Immigration Law Academy (CILA) and
The National Immigration Litigation Alliance (NILA)

Webinar 4 of 4, Written Materials

Wednesday, October 19, 2022

Cases reviewed:

Campos-Chaves v. Garland

36 F.4th 627 (5th Cir. 2022) (denying PFR where substantial evidence supported BIA determination that the Haitian government was not unable or unwilling to protect noncitizen; finding "unable to control" and "complete helplessness" standards for assessing such persecution to be identical)

Facts:

Mr. Campos-Chaves was purportedly served a NTA without the date or time of his hearing and, subsequently, a hearing notice with such information. He did not appear in immigration court and was ordered removed in absentia in 2005. In 2018, he filed a motion to reopen and later sought to rescind the in absentia order based on the Fifth Circuit's decision in *Rodriguez v. Garland*, 15 F.4th 351 (5th Cir. 2021), which interpreted 8 U.S.C. § 1229a(b)(5)(C)(ii), the statute requiring rescission of an in absentia order based on lack of notice. The IJ denied the motion and the BIA affirmed the denial. Mr. Campos-Chaves filed a petition for review with the Fifth Circuit.

Holdings:

In a previous case, *Rodriguez v. Garland*, 15 F.4th 351 (5th Cir. 2021), *aff'ed en banc* 31 F.4th 935 (5th Cir. 2022), the Fifth Circuit considered the requirements for rescinding an in absentia removal order based on lack of notice, where an individual's NTA did not contain time or place information. Because the rescission statute, 8 U.S.C. § 1229a(b)(5)(C)(ii), provides for rescission where an individual has not received notice under 8 U.S.C. § 1229(a)(1) or (2), which in turn requires that NTAs include time and place information, the Fifth Circuit found that an individual had not received notice sufficient for in absentia proceedings based on an NTA lacking time and place information. *Rodriguez* was based on the language of the statutes and the Supreme Court's interpretation of the requirements of 8 U.S.C. § 1229(a) in *Pereira v. Sessions*, 138 S. Ct. 2105 (2018), and *Niz-Chavez v. Garland*, 141 S. Ct. 1474 (2021). The Fifth Circuit "require[d] a single document containing the required information," rather than an NTA supplemented by a subsequent hearing notice with time and place information. 15 F.4th at 355.

Yet, in *Campos-Chaves*, the Fifth Circuit found that rescission was *not* required for an individual whose NTA lacked statutorily required information, because the individual purportedly received a subsequent hearing notice. In a short decision without analysis of the statutory language, *Pereira*, or *Niz-Chavez*, the Fifth Circuit held that "a fortiori" a noncitizen "forfeits his right to a *Rodriguez* remand when he in fact receives [a hearing notice with time and place information] (or does not dispute receiving it)." *Campos-Chaves*, 43 F.4th at 448. The Court extended its reasoning from *Spagnol-Bastos v. Garland*, 19 F.4th 802 (5th Cir. 2021), which held that a noncitizen forfeits the right to rescission of an in absentia order for lack of notice where they fail to provide the U.S. Department of Homeland Security their address as required by statute. Notably, no similar statutory language calls for the forfeiture of rights set out *Campos-Chaves*.

Practice Pointers:

- In seeking rescission based on *Rodriguez*, make sure to include evidence of lack of actual notice in any case where that is possible. If your client did not receive a hearing notice following service of an insufficient NTA, include a declaration to that effect.
- Petitioner filed a petition for rehearing en banc. At the Fifth Circuit's request, the Attorney General filed a response in September 2022. The petition for rehearing remains pending.

- The issue of rescission of in absentia removal orders based on insufficient NTAs remains an open question in many circuits, including a petition for review to the First Circuit by the petitioner in *Matter of LaParra*, 28 I&N Dec. 425 (BIA 2022), the BIA's published decision on this issue.

Herrera-Alcala v. Garland

***39 F.4th 233 (4th Cir. 2022)** (holding that the proper venue for a petition for review is the circuit in which the IJ was located, not the circuit where the petitioner was located at the time of the hearing)*

Facts & Holding:

The Immigration and Nationality Act, 8 U.S.C. § 1252(b)(2), provides that a petition for review of an order of removal "shall be filed with the court of appeals for the judicial circuit in which the immigration judge completed the proceedings."

In this case, removal proceedings were conducted by an immigration judge at the Falls Church Immigration Adjudication Center in Virginia (within the Fourth Circuit) and the petitioner was at a correctional facility in Louisiana (within the Fifth Circuit).

Respondent argued that § 1252(b)(2) required that the petition be heard in the Fifth Circuit where Herrera-Alcala appeared for the hearing. Amici argued, consistent with the pre-1996 venue provision, the place where "the immigration judge completed the proceedings" was Minnesota (within the Eighth Circuit) because that was the location of the administrative control court, which performed back-end clerical work (e.g., accepting filings and transmitting the IJ's order).

The court rejected both positions based on the plain language of the statutory text, finding instead that proper venue was the Fourth Circuit, where the immigration judge was located. The court reasoned that, for purposes of § 1252(b)(2), the IJ is the actor and completing the proceedings is the action. It also noted that, in 1996, Congress amended the venue provision to remove the text allowing for venue to lie where administrative proceedings were conducted.

The court further explained that its decision aligned with its prior precedent in *Sorcia v. Holder*, 643 F.3d 117 (4th Cir. 2011) and the Seventh Circuit's decision *Ramos v. Ashcroft*, 371 F.3d 948 (7th Cir. 2004). The court also noted that "[o]ther circuits may have reached different conclusions with little discussion of the statutory text," citing *Luziga v. Att'y Gen.*, 937 F.3d 244, 250 (3d Cir. 2019) (suggesting that "venue is proper where an IJ sitting outside our Circuit appears by video conference within our Circuit"), *Medina-Rosales v. Holder*, 778 F.3d 1140, 1143 (10th Cir. 2015) ("The charging document establishes the hearing location, regardless of the location of the IJ and the holding of a video conference hearing."), and *Llapa-Sinchi v. Mukasey*, 520 F.3d 897, 901 (8th Cir. 2008) (holding that venue depends on "where the administrative hearings were completed").

Practice Pointers:

- If the IJ is in Maryland, North Carolina, South Carolina, Virginia, or West Virginia, Fourth Circuit law should apply to the removal proceeding and venue over any later filed petition for review is proper in the Fourth Circuit.
- A circuit court may transfer a petition for review filed in the wrong venue to another circuit where both venue and jurisdiction exist pursuant to 28 U.S.C. § 1631.
- Transfer is appropriate under § 1631 if three conditions are met: (1) the transferring court lacks jurisdiction; (2) the transferee court could have exercised jurisdiction at the time the action or appeal was filed; and (3) transfer serves the interests of justice.

Lucas R. v. Becerra

No. CV 18-5741-DMG, 2022 WL 3908829 (C.D. Cal. Aug. 30, 2022) *(preliminarily enjoining Office of Refugee Resettlement (ORR) practices related to detention of children in ORR custody)*

Facts & Procedural History:

In 2018, Plaintiffs—children in Office of Refugee Resettlement (ORR) custody and nonprofits serving those children—filed a class action complaint alleging that policies and practices related to the detention of children in ORR custody were unlawful under the William Wilberforce Trafficking Victims Protection Reauthorization Act (TVPRA), the Rehabilitation Act, the consent decree entered in *Flores v. Garland*, No. 85-4544-DMG (AGRx) (C.D. Cal.), and the U.S. Constitution. The court certified five classes of children in ORR custody. Subsequently, both Plaintiffs and Defendants filed motions for summary judgment on several claims, which were both granted in part and denied in part. *See Lucas R. v. Becerra*, No. CV 18-5741-DMG, 2022 WL 2177454 (C.D. Cal. Mar. 11, 2022).

On August 30, the court entered a preliminary injunction related to claims on which Plaintiffs prevailed in the partial summary judgment order. The injunction will take effect on October 29, 2022 and will remain in effect until entry of a final judgment in the case.

The injunction relates to three classes:

1. The unfit custodian class: minors in ORR custody pursuant to the Homeland Security Act of 2002 and/or the TVPRA whom ORR refuses to release to parents or other custodians within 30 days of the custodian's submission of a family reunification packet on the grounds that the custodian may be unfit.
2. The step-up class: minors in ORR custody pursuant to the Homeland Security Act of 2002 and/or the TVPRA placed in or continued to be detained for more than 30 days in a secure, medium-secure, or residential treatment facility without notice and opportunity to be heard regarding the basis for the placement.
3. The legal representation class: minors in ORR custody pursuant to the Homeland Security Act of 2002 and/or the TVPRA who are from non-contiguous countries and to whom ORR impedes legal assistance related to custody, placement, release, or administration of psychotropic drugs.

Preliminary Injunction

As to the unfit custodian class, the injunction requires, inter alia:

- application of certain procedural protections to a broader scope of potential sponsors,
- increased supervisory review of Family Reunification Applications,
- written notice of determinations that children cannot be released to certain potential sponsors and the right to inspect underlying evidence, and
- a specified appeal process for such determinations.

As to the step-up class, the injunction requires ORR to, inter alia:

- have the burden of establishing sufficient grounds for stepping up or continuing to hold a child in restrictive placement,

- promptly and on an ongoing basis provide Notices of Placement (NOP) after stepping up or continuing a child in a restrictive placement,
- provide hearings with certain procedural protections in front of the Placement Review Panel (PRP) upon request to minors in restrictive placements,
- expand procedural protections related to PRP review for children in restrictive placements,
- institute specified automatic administrative reviews of restrictive placements,
- clarify certain standards and criteria for transfer or placement in certain secure facilities.

As to the legal representation class, the injunction requires:

- prompt service of a child's NOP on counsel after step-ups and on an ongoing basis while the child remains in a restrictive placement,
- prompt delivery of a child's case file to counsel upon request, and
- access to counsel at no cost to the government with respect to certain step-up, step-down, and release determinations.

Practice Pointers

- A practice advisory with detailed guidance, FAQs, and case examples related to the preliminary injunction, authored by attorneys representing the classes in the case, from the University of California Davis School of Law Immigration Clinic, the National Center for Youth Law, and the Center for Human Rights and Constitutional Law, is available here: https://youthlaw.org/sites/default/files/attachments/2022-10/Lucas%20R.%20PI%20Practice%20Advisory.pdf.

Matter of Fernandes

***28 I&N Dec. 605 (BIA 2022)** (holding that the time and place requirement for Notices to Appear (NTAs) in 8 U.S.C. § 1229(a)(1) is a non-jurisdictional claim processing rule; permitting timely objections to insufficient NTAs absent a showing of prejudice)*

Facts:

The U.S. Department of Homeland Security provided Mr. Fernandes with an NTA that did not include the date or time of his removal proceedings. Subsequently, the Boston Immigration Court served him with several hearing notices that did include time and place information, and he appeared at those immigration court hearings. At his fourth hearing, Mr. Fernandes appeared with counsel and refused to concede service of the NTA because it did not contain the information required by 8 U.S.C. § 1229(a)(1)(G)(i), as interpreted by the Supreme Court in *Pereira v. Sessions*, 138 S. Ct. 2105 (2018) and *Niz-Chavez v. Garland*, 141 S. Ct. 1474 (2021) (cases which interpreted the NTA statute in the context of the stop-time rule for cancellation of removal). Subsequently, Mr. Fernandes filed a motion seeking termination of proceedings based on the faulty NTA. The immigration judge (IJ) denied the motion and ordered Mr. Fernandes removed. He filed an administrative appeal to the Board of Immigration Appeals (BIA).

Holdings:

The BIA held that the statute requiring NTAs to include time and place information—8 U.S.C. § 1229(a)(1)—is a non-jurisdictional claim processing rule, which means that failure to comply with the rule does not impact immigration courts' authority to hear removal proceedings. However, it is nonetheless a mandatory claim processing rule, which means that, if it is properly and timely raised, the immigration court should ensure that the rule is enforced, although it may be waived or forfeited.

The BIA set a particular deadline for making a timely objection to an NTA to apply in all cases. However, it held that an individual need not object at the time of service, but that objections could not simply be allowed "at any time." 28 I&N Dec. at 610. Objections will "generally" be considered timely if "raised prior to the closing of pleadings before the Immigration Judge." *Id.* at 610-11.

When objecting, an individual need not show that they were prejudiced by the insufficient NTA, because there is no rule requiring a showing of prejudice to enforce a mandatory claim processing rule. The BIA distinguished this rule from the required showings for regulatory violations and due process violations.

Finally, the BIA did not provide a bright-line rule requiring a particular remedy for violations of 8 U.S.C. § 1229(a)(1). While IJs "cannot simply ignore or overlook" timely objections to an insufficient NTA, they are not required to terminate proceedings. 28 I&N Dec. 615-16.

One BIA member dissented from the opinion.

Practice Pointers:

- Remember that there are different contexts in which an individual might object to an insufficient NTA—challenging the application of the stop-time rule for cancellation or voluntary departure, requirements for in absentia removal orders, or requirements for in person removal proceedings. Each may require different actions.

- Practitioners are likely to have more success arguing that DHS has violated 8 U.S.C. § 1229(a)(1) than arguing that, based on regulations like 8 C.F.R. § 1003.14, the immigration court lacks jurisdiction over the proceedings.
- Remember to preserve this argument as early in proceedings as possible—immigration courts are unlikely to accept it following the close of pleadings (or in a motion to reopen).
- The BIA notes that the Seventh Circuit *does* require termination following timely raised objections to insufficient NTAs and has a separate test for assessing whether an objection is timely. *See Arreola-Ochoa v. Garland*, 34 F.4th 603 (7th Cir. 2022).

Matter of Nchifor

28 I&N Dec. 585 (BIA 2022) *(holding that an individual who challenges the lack of time and place information in a Notice to Appear (NTA) for the first time in a motion to reopen has forfeited the objection)*

Facts:

The U.S. Department of Homeland Security provided Mr. Nchifor with an NTA that did not include the date or time of his removal proceedings. Subsequently, the Jena, Louisiana Immigration Court served him with a hearing notice that did include time and place information, and he appeared at the immigration court hearing. Mr. Nchifor conceded removability and sought relief from removal but was ordered removed in April 2020, and the Board of Immigration Appeals (BIA) later dismissed his appeal. He timely filed a motion to reopen to the BIA, arguing that the Supreme Court's interpretation of the NTA time and place requirements in *Niz-Chavez v. Garland*, 141 S. Ct. 1474 (2021) constituted a change in law warranting reopening.

Holdings:

The BIA denied the motion. It found that, because any regulatory requirement regarding time and place information in NTAs is non-jurisdictional—i.e., not impacting the courts' authority to adjudicate cases—individuals who wait too long forfeit their right to object to insufficient NTAs, following the Fifth Circuit's decision in *Pierre-Paul v. Barr*, 930 F.3d 684 (5th Cir. 2019). By raising the objection for the first time in a motion to reopen, Mr. Nchifor waited too long and thus forfeited his right to make the objection. The BIA held that this is true regardless of whether the insufficient NTA prejudiced his case.

However, the BIA found that reopening was warranted based on the impact of *Niz-Chavez* on Mr. Nchifor's eligibility for voluntary departure and so granted reopening to pursue that relief.

Practice Pointers:

- Remember that there are different contexts in which an individual might object to an insufficient NTA—challenging the application of the stop-time rule for cancellation or voluntary departure, requirements for in absentia removal orders, or requirements for in person removal proceedings. Each may require different actions.
- In the context of in-person removal proceedings that do not involve application of the stop-time rule, preserve objections to insufficient NTAs early—before completing pleadings before an immigration judge—to benefit from *Matter of* Fernandes, 28 I&N Dec. 605 (BIA 2022) if you can.
- The BIA notes that the Seventh Circuit *does* allow objections to an NTA regardless of timeliness, if the timing is excusable and the insufficient NTA caused prejudice. *See Arreola-Ochoa v. Garland*, 34 F.4th 603 (7th Cir. 2022).
- Note that *Pierre-Paul* was abrogated in part on other grounds by *Niz-Chavez*. However, the BIA relied on a different part of the decision in this case and thus found that it was still applicable law.

Ndudzi v. Garland

No. 20-60782, 2022 WL 9185369 (5th Cir. revised Oct. 13, 2022) *(originally published as 41 F.4th 686; de-published on October 13, 2022).*

Facts:

Mariana Ndudzi is an Angolan from a region that has long been separatist: "Cabinda is a small, poor, coastal province of Angola that borders the Republic of Congo and the Democratic Republic of Congo. It produces half of Angola's oil but has little local control of its resources and politics." Her protection claim is based on Angolan government forces perceiving her as supporting the Front for the Liberation of the Enclave of Cabinda (FLEC); "FLEC has engaged a violent insurgency against Angola for decades." After attending an independence rally in 2016, Ndudzi was attacked by "three armed men in government uniforms [who] broke into her home and, in front of her children, beat and raped her, leading to a three-day hospital stay."

The immigration judge (IJ) found Ndudzi not credible based on inconsistencies between alleged statements made at her credible fear interview (CFI) and those at her immigration hearing. The IJ labeled FLEC a terrorist organization, although it has not been officially so designated by the U.S. government and considered Ndudzi a FLEC member despite her testimony that she only supported independence through peaceful protest and organizing.

Ndudzi filed a petition for review of the BIA's decision affirming the IJ's denial of asylum, withholding of removal, and CAT relief. Notably, the BIA did not address the IJ's reliance on FLEC as a terrorist organization.

Holding:

The unanimous decision concluded that, "when faced with seeming inconsistencies between the CFI notes and Ndudzi's sworn testimony, the Agency not only declined to credit Ndudzi's sworn testimony, it accepted as true the CFI notes' unsworn, non-verbatim statements, while ignoring evidence to the contrary." The panel did not need to decide whether CFI notes are generally admissible because "even if those notes were properly admitted, they do not support the conclusions the Agency drew from them."

The central adverse credibility ground relied upon by the IJ and BIA was Ndudzi's purported inconsistency about her membership in FLEC. The panel scrutinized the record to conclude that substantial evidence did not support the agency's rationale: "First, the purported 'inconsistencies' between the CFI notes and Ndudzi's sworn testimony are in fact largely consistent. Second, the Agency failed to consider Ndudzi's corroborating evidence." The panel highlighted record evidence that "a common Cabindan saying is 'We are all FLEC'" as well as Ndudzi's partner's representation that she was not a member. Additional corroboration presented included a child support advocate's statement, two experts on Cabinda and Angola, and country conditions evidence.

The panel explained that three remaining grounds relied upon by the BIA and IJ were in fact not inconsistencies, leaving "only the IJ's opinion that Ndudzi's demeanor was 'agitated,' including when asked about 'being separated from her children' for over a year, as evidence she was not credible." The panel noted the general rule of deference to an immigration judge with respect to an asylee's demeanor, "[b]ut we have never held that demeanor alone supports an adverse

credibility finding where the Agency failed to consider an asylee's corroborating evidence." Notably, in depublishing the order, the court removed a detailed footnote observing on "the wealth of contemporary psychological research suggesting that subjective perception of a witness' demeanor is an unreliable indicator of the witness' veracity" as counseling that "[s]uch deference is perhaps unfounded."

Because the adverse credibility determination was also the "almost-exclusive" basis for denying Ndudzi's CAT claim, which the agency similarly failed to evaluate in light of the corroborating evidence, that part of Ndudzi's petition was also granted and remanded.

Practice Pointers:

- Be aware of ongoing developments in this case and this area of law:
    - Mandate issue date is scheduled to be 12/5/2022.
- The opinion may have been depublished because of off-panel en banc interest from one or more judges on the court. The opinion's cf. citation of Seventh and Ninth Circuit precedents may have stood out, as well as separate reliance on two BIA decisions regarding demeanor.
- Moreover, the panel itself acknowledges that this is "a rare case with limited application to other factual scenarios."
- Conversely, motions for publication can be an important tool, after an unpublished disposition issues, for alerting a court to holdings that satisfy publication criteria, eg. 5th Cir. R. 47.5:
  (a) Establishes a new rule of law, alters, or modifies an existing rule of law, or calls attention to an existing rule of law that appears to have been generally overlooked;
  (b) Applies an established rule of law to facts significantly different from those in previous published opinions applying the rule;
  (c) Explains, criticizes, or reviews the history of existing decisional or enacted law;
  (d) Creates or resolves a conflict of authority either within the circuit or between this circuit and another;
  (e) Concerns or discusses a factual or legal issue of significant public interest; or
  (f) Is rendered in a case that has been reviewed previously and its merits addressed by an opinion of the United States Supreme Court.
  An opinion may also be published if it: Is accompanied by a concurring or dissenting opinion; or reverses the decision below or affirms it upon different grounds.

Singh v. Garland

***48 F.4th 1059 (9th Cir. 2022)** (granting in part and denying in part the petition for review because substantial evidence did not support the BIA's holding that the harm Singh suffered did not rise to the level of past persecution, but substantial evidence did support the agency's rulings on past and future torture).*

Facts:

Petitioner Shamsher Singh claimed the BIA erred in rejecting his protection claim based on his brother's and his own roles supporting the Akali Dal (Mann) party for Sikh sovereignty in India. The IJ concluded that the injuries and threats Singh suffered from members of the opposing Congress party were not sufficiently serious to constitute persecution.

Singh came to the U.S. in 2018, shortly before he turned 18. At his removal hearing, he testified about multiple occasions of verbal and physical abuse stemming from his support of the Mann party. His brother Harpreet, who fled to the U.S. in 2017, suffered serious injuries due to attacks by Congress party members. Shamsher was confronted after his brother's departure and interrogated about Harpreet's whereabouts.

The Congress supporters escalated their attention to Shamsher and began attacking him physically. The first incident involved men who "slapped Singh on his face, hit his stomach, threw him to the ground, and started kicking his stomach." The police rejected his report, calling it false, and criticized him for complaining about Congress as the party in power.

A second violent incident referred to Singh's attempted police report: "The men beat Singh with hockey sticks all over his back and arms. They told Singh that they were going to kill him."

Echoing the IJ, the BIA concluded that Singh's injuries did not rise to the level of persecution. While accepting his testimony as credible, in the BIA's view, "the record lacks evidence to show that [Singh] suffered any serious injuries." It focused on the doctor who treated Singh after his second attack because that doctor reported only "small bruises, scratches, blue marks and some part of swollen body." The BIA also found no clear error in the IJ's rejection of Singh's Convention Against Torture (CAT) claim.

Singh filed a petition for review of the BIA's decision affirming the IJ's denial of asylum, withholding of removal, and CAT relief.

Holding:

The panel majority began by noting that the Ninth Circuit has at times reviewed an agency determination regarding past persecution de novo, while at other times the court has conducted substantial-evidence review. The opinion concludes that, even under the more deferential substantial-evidence standard, the BIA's conclusion could not stand.

In analyzing what happened to Singh, the majority employs five factors: "(1) he was forced to flee his home after being repeatedly assaulted; (2) one of those incidents involved a death threat; (3) he was between the ages of 16 and 18 when the attacks occurred; (4) his brother also experienced this violence; and (5) we have already recognized that Mann Party members have faced persistent threats in the region of India where Singh was twice attacked." The opinion

canvasses precedent, relying in particular on *Flores Molina v. Garland*, 37 F.4th 626, 634 (9th Cir. 2022), to show special solicitude to circumstances where asylum-seekers are forced to flee their homes under threat of "severe physical violence or death." That case also re-emphasized the court's rule that death threats alone can constitute persecution.

The BIA erred because "we do not require severe injuries to meet the serious-harm prong of the past-persecution analysis." In addition, the agency failed to consider Singh's age, his brother's experiences, and the court's prior treatment of Mann party-based claims.

The panel majority proceeds to examine cases relied upon by the BIA. The Board cited three Ninth Circuit precedents, but "[n]one of these cases involve multiple instances of physical violence coupled with a death threat." First, *Duran-Rodriguez v. Barr*, 918 F.3d 1025 (9th Cir. 2019), "is dissimilar from the instant case because Singh experienced physical violence in conjunction with a death threat—Duran-Rodriguez did not—and because Singh was subject to the constant threat of violence over the course of two years, not two days."

Second, unlike in *Hoxha v. Ashcroft*, 319 F.3d 1179 (9th Cir. 2003), "[s]ufficient evidence demonstrates that Singh's attackers knew his identity and displayed a continuing interest in him, unlike the attackers in *Hoxha*." Finally, with respect to *Gu v. Gonzales*, 454 F.3d 1014 (9th Cir. 2006), the panel noted that in *Gu* there was "one brief detention, beating, and interrogation by the Chinese police," as opposed to the sustained violence against Singh on multiple occasions.

Apart from relying on *Flores Molina*, the majority dug into similar facts presented by *Aden v. Wilkinson*, 989 F.3d 1073, 1079 (9th Cir. 2021). Ultimately, "Aden, Flores Molina, and Singh were involved in fundamentally the same scenario: a petitioner targeted for his political views, threatened (including a death threat), assaulted (leaving physical wounds), and compelled to flee his home."

Without much analysis, the court concluded that the agency's denial of CAT relief was supported by substantial evidence.

Concurring, Judge Miller noted that while Ninth Circuit precedent was inconsistent, he disagreed with Judge Ikuta's dissent because her argument "that the Board's decision must be upheld 'unless our precedent would compel any reasonable adjudicator to conclude the contrary' is to conflate the Board's factual findings (which we review deferentially) with its application of the legal rules established by our precedent (which we do not)." Judge Miller considered himself bound by *Flores Molina* and *Aden*: "Unless we are to overrule those cases—and, as three-judge panel [*sic*], we are unable to do so—there is no principled basis for reaching a different result here."

Practice Pointers:

- Be aware of ongoing developments in this case and this area of law:
    - Mandate issue date is scheduled to be 11/7/2022.
- Debate about de novo vs. substantial evidence review of agency past persecution determinations also features in *Fon v. Garland*, 34 F.4th 810 (9th Cir. 2022), in which Judges Graber and Collins wrote concurrences addressing the issue.