

No. 19-73124

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

KARLENA DAWSON, A [REDACTED] 249,
Petitioner,

v.

MERRICK B. GARLAND, U.S. Attorney General,
Respondent.

**ON PETITION FOR REHEARING OR REHEARING EN BANC
OF PETITION FOR REVIEW OF AN ORDER
OF THE BOARD OF IMMIGRATION APPEALS**

**BRIEF OF AMICI CURIAE IMMIGRATION AND DOMESTIC
VIOLENCE NON-PROFIT ORGANIZATIONS IN SUPPORT OF
REHEARING OR REHEARING EN BANC**

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Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, each Amicus Curiae certifies that it does not have a parent corporation and no publicly held corporation owns 10 percent or more of the stock of amicus.

Dated: September 7, 2021

s/Neela Chakravartula
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INTEREST OF AMICI

Amici Curiae (Amici) submit this brief pursuant to Rule 29(a) of the Federal Rules of Appellate Procedure and Ninth Circuit Rule 29-2. The undersigned counsel certifies that all parties have consented to the filing of this amicus brief.

Amici are non-profit organizations across the country with expertise in domestic violence and/or organizations who represent, advocate for, and support women fleeing torture and seeking safety in the United States. Amici have a strong interest in ensuring that federal laws and regulations are interpreted to afford torture protection as Congress intended and the United States' international obligations require. Amici support this petition for rehearing because the issues are critical to Amici's core focus on ensuring protections for survivors of domestic violence and on ensuring that protections under U.S. law comport with our international obligations. The Appendix lists all Amici.

RULE 29(a)(4)(E) CERTIFICATION

No person or entity other than counsel for Amici authored or contributed funds intended for the preparation or submission of this brief.

s/ Neela Chakravartula
Neela Chakravartula

INTRODUCTION

Rehearing is warranted under Rule 35(b)(1)(A) and (B) of the Federal Rules of Appellate Procedure both to secure and maintain uniformity of this Court's decisions and to address a question of exceptional importance concerning the role that past torture plays in determining whether petitioners are entitled to relief under the Convention Against Torture (CAT).

Petitioner Karlena Dawson seeks relief under the CAT on the basis of years of rape and unspeakable violence inflicted by an abusive partner.¹ An immigration judge and the Board of Immigration Appeals (BIA) denied Ms. Dawson's CAT claim only by failing to acknowledge much of the torture, including the repeated rapes. Over a dissent by

¹ There are two forms of relief under the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85, 113, Art. 3: withholding of removal and deferral of removal. 8 C.F.R. § 1208.16(c)(3). Because eligibility for either form of relief requires the same analysis, precedents involving both forms of relief are relevant, even though this case involves a claim for only deferral of removal. *See Maldonado v. Lynch*, 786 F.3d 1155, 1162 n.7 (9th Cir. 2015) (en banc) (discussing CAT withholding and CAT deferral precedents in a case raising only CAT deferral).

Judge Milan Smith, a divided panel of this Court affirmed. *Dawson v. Garland*, 998 F.3d 876 (9th Cir. 2021).

The panel majority's opinion conflicts with numerous prior decisions of this Court. The panel majority divided Ms. Dawson's claim into distinct periods of time and declined to assess how her past torture affected the likelihood that she would again be tortured if forced to return to Jamaica. But this Court has repeatedly made clear that the determination of whether future torture is likely must turn on a consideration of all the relevant evidence; that past torture, where it exists, is the principal factor in the analysis; and that the BIA's failure to recount key evidence indicates that it has not considered all evidence relevant to a CAT claim. Thus, as Ms. Dawson argues (Pet. for Reh'g 7-13), rehearing en banc is warranted to maintain the uniformity of this Court's precedents.

Rehearing en banc is also warranted because the Court's opinion involves a question of exceptional importance: the role that past torture plays in the adjudication of CAT claims arising out of domestic violence. Social science research demonstrates that past violence by intimate partners is a documented predictor of future violence; that intimidation

and harassment even if not accompanied by physical harms indicate ongoing abuse that will likely result in future violence; and that a survivor is at an especially increased risk of violence if she attempts to separate from or leave an abusive partner. Although these well-documented dynamics have previously been acknowledged by both this Court and the Department of Justice, the panel majority's opinion ignores them. As a result, domestic violence survivors seeking protection may have their cases improperly and unfairly assessed.

For these and the other reasons in Ms. Dawson's petition for rehearing, amici respectfully urge this Court to review the panel's opinion en banc.

STATEMENT OF FACTS

Ms. Dawson suffered years of brutal violence and control at the hands of her abusive partner, Robert Hinds.² When Ms. Dawson was in Jamaica, Hinds sought to control every aspect of her life, locking her in the house and forcing her to give him access to her bank account. He

² The facts of Ms. Dawson's case are set out in detail in Ms. Dawson's Opening Brief (at 2-21), Ms. Dawson's Petition for Rehearing (at 4-5), and Judge Milan Smith's dissent, *Dawson*, 998 F.3d at 886-88. Therefore only key facts are recounted here.

beat and raped Ms. Dawson constantly and repeatedly threatened to kill her. He hit Ms. Dawson in the head with a water bottle, kicked and pushed her into burning coals, beat her to the ground, and stomped on her stomach. Certified Administrative Record (AR) 227–28.

Even after Ms. Dawson managed to obtain a temporary protection order in 2016, Hinds physically assaulted her twice, and he and his police officer friends regularly harassed and threatened her. AR 160. In 2018, Ms. Dawson obtained a five-year stay away order, but far from relenting, Hinds’ harassment grew more threatening. AR 170–71. After moving to a friend’s house did not abate the danger, Ms. Dawson fled the country. AR 171, 173. Following her escape, Hinds left a bullet on her friend’s porch. AR 232, 246.

ARGUMENT

I. The Panel Majority Decision Conflicts with Circuit Precedent and Undermines the Uniformity of this Court’s Decisions Holding Past Torture is the Principal Factor for Evaluating a Likelihood of Future Torture

Amici support Petitioner’s argument (Pet. For Reh’g 7–11) that en banc review is required because the panel’s majority decision conflicts with settled circuit precedent. Specifically, the majority opinion contravenes Ninth Circuit law requiring the consideration of “*all*

evidence relevant to the possibility of future torture” when assessing eligibility for CAT relief, *Cole v. Holder*, 659 F.3d 762, 772 (9th Cir. 2011) (emphasis in original); accord, e.g., *Plancarte v. Garland*, No. 19-73312, 2021 WL 3700406, at *7 (9th Cir. Aug. 20, 2021); *Parada v. Sessions*, 902 F.3d 901, 914–15 (9th Cir. 2018); *Kamalthas v. INS*, 251 F.3d 1279, 1282 (9th Cir. 2001); see 8 C.F.R. § 1208.16(c)(3). It further contravenes circuit precedent holding that past torture is “the principal factor” for evaluating the likelihood of future torture. *Xochihua-Jaimes v. Barr*, 962 F.3d 1175, 1188 (9th Cir. 2020) (quoting *Avendano-Hernandez v. Lynch*, 800 F.3d 1072, 1080 (9th Cir. 2015)); *Nuru v. Gonzales*, 404 F.3d 1207, 1218 (9th Cir. 2005); see also, e.g., *Soto-Soto v. Garland*, 1 F.4th 655 (9th Cir. 2021) (holding previous restraint, beating, suffocation, and gunpoint threats for hours by police and an outstanding arrest warrant sufficed to establish a likelihood of future torture).

On the basis of those settled rules, the Court has repeatedly reversed the BIA when its opinion provides “any indication” that the BIA did not consider all of the relevant evidence. *Cole*, 659 F.3d at 771. This includes misstatements of the record by the BIA or a failure to

mention highly probative facts, and as explained above, past torture is recognized as highly probative to the likelihood of future torture. *Id.* Faithful application of the rules would have dictated a reversal here, too, because the BIA ignored much of the torture that Ms. Dawson suffered, including the fact that Hinds repeatedly raped her. AR 228 at ¶ 38. (Dawson Decl.). This omission is particularly telling, because this Court has recognized rape as “an egregious violation of humanity” that, standing alone, constitutes torture. *Akosung v. Barr*, 970 F.3d 1095, 1105 (9th Cir. 2020) (citation omitted).

The majority, however, did not apply this Court’s settled rules. Instead, it discounted the extensive past torture inflicted on Ms. Dawson because it believed that her personal circumstances had changed significantly after she obtained a protective order. *Dawson*, 998 F.3d at 883. Indeed, like the BIA, the majority did not even discuss much of the relevant torture that occurred prior to Ms. Dawson receiving a temporary protective order in 2016, omitting daily stalking, explicit and gory death threats, and two years of routinized rape and beatings, including one assault so violent that she vomited blood from a blood clot. *Id.* at 879-80; *contra id.* at 886 (M. Smith, J., dissenting).

And having discounted the past torture on that ground, the majority held that Hinds' post-protective order conduct, standing alone, does not "constitute torture or compel a finding that future torture is likely." *Id.* at 883. Thus, as Judge Milan Smith's dissent put the point, the majority "turn[ed] blind eyes" to the past torture, removing it from the equation. *Id.* at 886 (M. Smith, J., dissenting).

Cases decided both before and after *Dawson* demonstrate the anomalous nature of the panel majority's opinion. In *Xochihua-Jaimes*, the petitioner was repeatedly raped as a child, and then both raped and subjected to extreme domestic violence by a partner. 962 F.3d at 1179. By the time the petitioner's case reached this Court, the precise personal circumstances that gave rise to her past torture had shifted: the petitioner was no longer a child, and her abusive partner (unlike Hinds) could not directly harm her, because he was serving a 37-year prison sentence. *See id.* at 1180. The panel nevertheless held that three factors combined to show a likelihood of future torture. The principal factor, as in many previous cases, was the fact that the petitioner, like Ms. Dawson, had suffered past torture. *Id.* at 1188. The second factor was that the petitioner, again like Ms. Dawson, had suffered ongoing

threats—in *Xochihua-Jaimes*, from a cousin of the imprisoned partner. *Id.* And the third factor was that, as in Ms. Dawson’s case,³ there was no showing that country conditions had changed in ways that would negate any inference of future torture. *Id.* In short, there is good reason for Judge Smith’s observation in dissent that Ms. Dawson’s “case most closely resembles *Xochihua-Jaimes*.” *Dawson*, 998 F.3d at 888 (M. Smith, J., dissenting). The two cases have directly analogous fact patterns, but they led to different results—and it is *Xochihua-Jaimes*, not the panel majority’s opinion here, that conforms to governing circuit case law.

Most recently, in *Soto-Soto v. Garland*, 1 F.4th 655 (9th Cir. 2021), the Court reversed the denial of CAT relief to a Mexican woman who had suffered past torture at the hands of the police. In doing so, the Court applied the pre-*Dawson* rule reiterated in *Xochihua-Jaimes* that “[p]ast torture is ordinarily the principal factor on which we rely when

³ It is undisputed that there has been no change in the country conditions faced by women experiencing domestic violence in Jamaica since Ms. Dawson fled. *Dawson*, 998 F.3d at 887 (M. Smith, J., dissenting). The country conditions evidence of record instead reflects Ms. Dawson’s experiences and underscores her high level of risk. *See, e.g.*, AR 347.

an applicant who has been previously tortured seeks relief under [CAT].” *Id.* at 662 (quoting *Xochihua-Jaimes*, 962 F.3d at 1188). The Court’s application of that rule in *Soto-Soto* triggered a dissent arguing that the “principal factor” rule is inconsistent with the decision of the panel majority in *Dawson*. *Id.* at 665 (Wallace, J., dissenting in part). In response, the Court in *Soto-Soto* noted that “the rule that past torture is the principal factor for evaluating the likelihood of future torture was established long before *Dawson*.” *Id.* at 662 n.4.

Xochihua-Jaimes and *Soto-Soto* leave no doubt that the panel majority’s opinion is inconsistent with this Court’s prior (and subsequent) precedents. Rehearing in this case is accordingly necessary to restore uniformity to this Court’s decisions and forestall future confusion.

II. Past Torture is Particularly Important to Assessing a Likelihood of Future Torture in Domestic Violence Cases Given the Cyclical and Escalating Nature of Abusive Relationships

The panel majority’s departure from precedent is especially troubling in the context of this case for two reasons. First, past torture inflicted by an intimate partner is highly predictive of future torture.

Second, a survivor's attempt to separate from an abusive partner often increases the likelihood of future torture.

There are good reasons for this Court's precedent treating past torture as the principal factor to consider in determining whether future torture is likely. The fact that an actor has inflicted torture on the petitioner in the past reveals "much about how an individual or a government will behave in the future." *Nuru*, 404 F.3d at 1217; *accord Soto-Soto*, 1 F.4th at 662; *Xochihua-Jaimes*, 962 F.3d at 1188; *Avendano-Hernandez*, 800 F.3d at 1080. The fact of past torture is also probative because it is "particular to the petitioner; it indicates the methods likely to be used; it identifies who the perpetrator(s) will be; and it sheds light on the state of mind of the potential torturer." *Perez v. Sessions*, 889 F.3d 331, 335 (7th Cir. 2018).

A. Past abuse is a strong predictor of future behavior

These considerations, while important in every case, take on special significance in cases involving torture inflicted as domestic violence. Decades of social science research have shown, and the U.S. Department of Justice itself has acknowledged, that domestic violence survivors "report patterns of abuse—rather than single, isolated

incidents—that tend to include the repeated use of physical, sexual and emotional abuse, threats, intimidation, isolation and economic coercion.” INS, *Asylum and Withholding Definitions*, 65 Fed. Reg. 76,588, 76,595 (proposed Dec. 7, 2000) (citing Anne L. Ganley, *Understanding Domestic Violence, in Improving The Health Care Response To Domestic Violence: A Resource Manual For Health Care Providers* 15 (Debbie Lee *et al.* eds., 1996)). Thus, “in relationships involving domestic violence, past behavior is a strong predictor of future behavior by the abuser.” 65 Fed. Reg. at 76,595 (citing C. Clarke, R. Esfandiary, *Understanding Domestic Violence: A Handbook for Victims and Professionals*, U.S. Department of Justice).

Further, harassment, intimidation, and threats directed toward a torture survivor are not separate from the torture. They instead spring from the same place as physical torture—the abusive partner’s desire for “power and control over” the survivor—and are part of the same overall pattern of abusive behavior. 65 Fed. Reg. at 76,595. As this Court has previously stated, “although a relationship may appear to be predominantly tranquil and punctuated only infrequently by episodes of violence, abusive behavior does not occur as a series of discrete events

but rather pervades the entire relationship.” *Hernandez v. Ashcroft*, 345 F.3d 824, 836–37 (9th Cir. 2003) (quotation omitted). And the record in Ms. Dawson’s case makes clear that the dynamics of domestic violence in Jamaica are no exception to these typical patterns. *See* AR 347 (stating that “consistent with international research, controlling behaviours” in Jamaica are “closely related to the prevalence of all forms of intimate partner violence”).

The panel majority’s opinion ignores and obscures these crucial facts. The panel majority expressly treats the past torture that Hinds inflicted on Ms. Dawson as separate from, and irrelevant to, the likelihood that Hinds would inflict future torture on Ms. Dawson. But this Court’s prior opinions, statements by the Department of Justice, and decades of research all make clear that, because Hinds previously kept Ms. Dawson locked in his home, beat and raped her, and inflicted violence so severe that she was hospitalized for months, he is likely to do so again.

The panel majority also minimized Hinds’ ongoing campaign of intimidation. Hinds constantly violated the protection order against him, finding her every two days, once dragging her bodily from her

house and once shooting at the house with a gun, and he also had his police officer friends constantly harass and intimidate Ms. Dawson. *Dawson*, 998 F.3d at 883; *id.* at 887 (M. Smith, J., dissenting). The majority erroneously read these actions as disconnected from both the past torture Hinds inflicted on Ms. Dawson and the likelihood that he would inflict future torture on her. But this Court’s precedents, statements from the Department of Justice, and decades of research all teach that Hinds’ “obsessive[] fixat[ion] on stalking [Ms. Dawson], hurting her, and even killing her” (*Dawson*, 998 F.3d at 887 (M. Smith, J., dissenting)) are the actions of an abusive partner engaged in ongoing attempts to control a survivor—and who will be likely to inflict severe physical violence in the future in order to secure and maintain that control.

B. Separation or attempted separation increases the risk of future violence

The panel majority’s opinion also disregards another crucial fact about domestic violence. Because domestic violence centers on power and control over the survivor, an abusive partner will often “escalate the violence to attempt to regain or reassert control” after a survivor flees, or attempts to flee, the abusive relationship. 65 Fed. Reg. at

76,595 (citing U.S. Dep’t of Justice, *Stalking and Domestic Violence: The Third Annual Report to Congress Under the Violence Against Women Act* (1998) and Barbara J. Hart, *The Legal Road to Freedom in BATTERING AND FAMILY THERAPY: A FEMINIST PERSPECTIVE* 13 (Hansen & Harway eds., 1993)). A domestic violence survivor is thus at an increased risk of abuse—including an “increased risk of lethality,” 65 Fed. Reg. at 76,595—when an abusive partner believes she has left, or is about to leave, the relationship (such as reporting abuse to authorities or fleeing the country). Ganley, *supra*, at 32. There is thus no basis for any conclusion that time lessens the interest of an intimate partner who is also a torturer in inflicting future violence. To the contrary, as demonstrated by the circumstances present in this case, an attempt to leave “typically increases the abuser’s motivation to locate and harm” in order to reestablish control. 65 Fed. Reg. at 76,595.⁴ And some survivors experience “the time period between discrete episodes of serious violence—a time period during which the woman may never

⁴ A former domestic partner will also be better equipped than many others to track a survivor, because of his intimate knowledge of the survivor’s life and network of support.

know when the next incident will occur, and may continue to live with ongoing psychological abuse—as a continuing ‘state of siege.’” Mary Ann Dutton, *Understanding Women’s Responses to Domestic Violence: A Redefinition of Battered Woman Syndrome*, 21 Hofstra L. Rev. 1191, 1208 (1993).

This Court has previously recognized as much. In *Hernandez v. Ashcroft*, 345 F.3d 824 (9th Cir. 2003), the petitioner sought suspension of deportation under the Violence Against Women Act on the basis of “life-threatening violence” inflicted by her husband, a legal permanent resident of the United States. *Id.* at 827. In determining whether the violence constituted “extreme cruelty” under the statute, the Court discussed the “cycle of violence” that recurs as part of “[a]buse within intimate relationships.” *Id.* at 836. In that discussion, the Court expressly stated that survivors “are often at the highest risk of severe abuse or death when they attempt to leave their abusers.” *Id.* at 837 (citing Dutton, *supra* at 1212 (1993), and H.R. Rep. No. 103–395 (1993)).

The reality Ms. Dawson faces if she is removed to Jamaica is that she will be returned to the control of an abusive partner who never

relented in his attempts to control her—and who is, based on settled understandings of patterns of domestic violence, likely to escalate his violence upon her return after a failed attempt to escape to the United States. And because these patterns are not unique to Ms. Dawson’s personal circumstances or to Jamaica, the panel majority’s failure to grapple with basic facts about domestic violence presents an issue of exceptional importance that will affect all survivors who seek relief under the CAT. Rehearing en banc is appropriate for that reason as well as to resolve the conflicts between the panel majority’s decision and this Court’s longstanding precedents.

CONCLUSION

For the reasons above, and the other reasons advanced by Ms. Dawson, the Court should grant the petition for rehearing en banc.

Dated: September 7, 2021

Respectfully submitted,

/s/ Neela Chakravartula
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CERTIFICATE OF COMPLIANCE

This document complies with the type-volume limitation of the Federal Rule of Appellate Procedure 29(a)(5) and Circuit Rules 29-2(c) and 40-1 because, excluding the parts of the document exempted by the Federal Rule of Appellate Procedure 32(f), this document contains 3,168 words. This word count was calculated by Microsoft Word 2016, the word processing system used to prepare this brief.

Dated: September 7, 2021

s/ Neela Chakravartula
Neela Chakravartula

Attorney for Amici Curiae

CERTIFICATE OF SERVICE

I hereby certify that on September 7, 2021, I electronically filed this Brief of Amici Curiae Immigration and Domestic Violence Non-Profit Organizations In Support of Rehearing Or Rehearing En Banc with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the CM/ECF system, which will automatically send an email notification of such filing to the attorneys of record who are registered CM/ECF users.

Dated: September 7, 2021

s/ Neela Chakravartula
Neela Chakravartula

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APPENDIX

List of Amici

1. The Advocates for Human Rights, Minneapolis, MN
2. Aldea, the People's Justice Center, Reading, PA
3. Americans for Immigrant Justice, Miami, FL
4. Center for Gender & Refugee Studies at University of California Hastings College of the Law, San Francisco, CA
5. Columbia Law School Immigrants' Rights Clinic, New York City, NY
6. Community Legal Services in East Palo Alto, East Palo Alto, CA
7. Dolores Street Community Services, San Francisco, CA
8. Family Violence Law Center, Oakland, CA
9. Florence Immigrant & Refugee Rights Project, Tucson, AZ
10. Human Rights Initiative of North Texas, Dallas, TX
11. Immigrant Defenders Law Center, Los Angeles, CA
12. Innovation Law Lab, Portland, OR
13. Jewish Family & Community Services – East Bay, Concord, CA
14. La Raza Community Resource Center, San Francisco, CA
15. Latin Advocacy Network – LATINAN, San Francisco, CA
16. Los Angeles Center for Law and Justice, Los Angeles, CA
17. Loyola New Orleans University Stuart H. Smith Law Clinic and Center for Social Justice, New Orleans, LA
18. Mississippi Center for Justice, Jackson, MS

19. Oasis Legal Services, Berkeley, CA
20. Open Immigration Legal Services, Oakland, CA
21. Oxfam America, Boston, MA
22. Public Law Center, Santa Ana, CA
23. Refugee and Immigrant Center for Education and Legal Services (RAICES), San Antonio, TX
24. Rocky Mountain Immigrant Advocacy Network, Westminster, CO
25. San Joaquin College of the Law – New American Legal Clinic, Clovis, CA
26. Southwestern School of Law – Removal Defense Clinic
27. Tahirih Justice Center, Falls Church, VA