

Drawing the Interpretive Lines for Victims of Coercive Population Control: Why the Definition of “Refugee” Should Include Spouses of Individuals Fleeing China’s One-Child Policy

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I. INTRODUCTION

On the morning of October 5, 1995, just one month after the birth of Wang He's second son, ten Chinese government officials forcibly entered his home.¹ The officials held Mr. He against a wall, forced his wife out of the house, and drove her to the hospital.² Mr. He rented a motorized tricycle³ and pedaled to the hospital as fast as he could. But Mr. He was too late. Mr. He saw his wife wobbling out of the hospital doors supported by two nurses.⁴ Mr. He and his wife looked at each other, but neither could speak.⁵ That day, Mr. He walked out of the hospital with a sterilization certificate in hand,⁶ and his wife with a scar on her abdomen.⁷ Mr. He subsequently fled China on a smuggler's boat.⁸

The Ninth Circuit, in addressing Mr. He's asylum request on the basis of his wife's past persecution through involuntary sterilization,⁹ adopted the holding of *In re C—Y—Z*— that “the forced sterilization of one spouse . . . is an act of persecution against the other spouse.”¹⁰ In the Second Circuit case *Lin v. U.S. Department of Justice*, the asylum applicants' experiences with the harsh enforcement of China's “one-child” policy were very similar to those of Mr. He.¹¹ However, while the Ninth Circuit held that Mr. He was automatically eligible for asylum,¹² the Second Circuit in *Lin* held that spouses like Mr. He were not.¹³

¹ See *He v. Ashcroft*, 328 F.3d 593, 595 (9th Cir. 2003).

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *He v. Ashcroft*, 328 F.3d 593, 595 (9th Cir. 2003).

⁹ *Id.* at 593.

¹⁰ *Id.* at 605.

¹¹ *Lin v. Dep't of Justice*, 494 F.3d 296 (2d Cir. 2007).

¹² *He*, 328 F.3d at 604.

¹³ *Lin*, 494 F.3d at 304.

Lin created a split among the circuits by holding that the Board of Immigration Appeals (“Board” or “BIA”¹⁴) erred by extending refugee status to spouses of coercive population control (“CPC”) victims.¹⁵ The amendment section 601(a) to the Immigration and Nationality Act (hereinafter “CPC Refugee definition”¹⁶) specifically addresses this issue.¹⁷ The amendment states that an individual who was persecuted or has a well-founded fear of future persecution under CPC policies will be “deemed to have been persecuted on account of political opinion.”¹⁸

The Fifth, Sixth, Seventh, and Ninth Circuits have all deferred to the BIA’s interpretation of the CPC Refugee definition.¹⁹ Most recently, the Third Circuit adopted the BIA’s interpretation of the CPC Refugee definition in *Chen v. Attorney General of the United States*²⁰ over a vigorous dissent. The Second Circuit’s departure from this precedent suggests that the issue is ripe for clarification by the Supreme Court or Congress. This comment argues that the definition of CPC Refugee should apply to both spouses.

Prior to the enactment of the CPC Refugee definition in 1996, there was some controversy as to whether the “one-child” policy constituted persecution on account of political opinion.²¹ In re *Chang*, one of the most influential cases addressing the issue, held that victims of persecution under the “one-child” policy could not establish a nexus to any protected characteristic under the Immigration and Nationality Act.²² The 1996 amendment overturned *Chang*, establishing that a CPC victim is entitled to a presumption of well-founded fear of persecution on account of political opinion.²³

¹⁴ See *infra* Part II.B.

¹⁵ *Id.* at 304.

¹⁶ See *infra* Part II.C.

¹⁷ Immigration and Nationality Act, § 101(a)(42), 8 U.S.C. § 1101(a)(42) (2006), as amended by the Illegal Immigrant Reform and Immigrant Responsibility Act of 1996, Division C, Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104–208, § 601(a)(1), 110 Stat. 3009, 3009–689.

¹⁸ *Id.*

¹⁹ *Li v. Ashcroft*, 82 Fed. App’x 357, 358 (5th Cir. 2003) (unpublished per curiam opinion); *Huang v. Ashcroft*, 113 Fed. App’x 695, 700 (6th Cir. 2004) (unpublished opinion); *Zhang v. Gonzales*, 434 F.3d 993, 1001 (7th Cir. 2006); *He*, 328 F.3d, at 604.

²⁰ *Chen v. Att’y Gen.*, 491 F.3d 100 (3d Cir. 2007).

²¹ CHARLES GORDON, STANLEY MAILMAN & STEPHEN YALE-LOEHR, IMMIGRATION LAW AND PROCEDURE § 33.04, at 26 (2007).

²² *In re Chang*, 20 I. & N. Dec. 38 (BIA 1989).

²³ *Id.*; GORDON ET AL., *supra* note 21.

Chinese government officials strictly enforce the “one-child” policy.²⁴ A couple that does not comply often faces threats of fines, property damage, and job loss, in addition to physical persecution such as involuntarily sterilization and abortion.²⁵ Chinese immigrants seeking asylum in the United States based on persecution under the “one-child” policy may qualify as refugees under the Immigration and Nationality Act (“Act”).²⁶ The BIA, in a number of precedential statutory interpretations of the Immigration and Nationality Act and the CPC Refugee definition amendment, has recognized a clear Congressional intent to extend the scope of the Act’s protection to spouses.²⁷ This comment argues that courts should also interpret the Immigration and Nationality Act in light of the United States’s family reunification policy, “one of the principal goals” of U.S. immigration law.²⁸

The BIA, in the case *In re C—Y—Z—*, held that one spouse can establish past persecution on the basis of the other spouse’s coerced abortion or sterilization.²⁹ The Board supported its decision with strong language from a 1996 Immigration and Naturalization Service (“INS”) memorandum.³⁰ Despite strong dissenting opinions in *C—Y—Z—*, in 2006 the BIA re-affirmed its holding in *C—Y—Z—* in the case *In re S—L—L—*.³¹ There, the Board focused on the couple’s shared rights and the overall purpose of the amendment, using support from the amendment’s legislative history.³² These two Board decisions found that the spouse of

²⁴ See Xiaorong Li, *License to Coerce: Violence Against Women, State Responsibility, and Legal Failures in China’s Family-Planning Program*, 8 YALE J.L. & FEMINISM 145, 152–55 (1996). See also *infra* Part II.A.

²⁵ *In re S—L—L—*, 24 I. & N. Dec. 1, 2006 BIA. LEXIS 21, at *14 (BIA Sept. 19, 2006) (citing BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, U.S. DEP’T OF STATE, CHINA—PROFILE OF ASYLUM CLAIMS AND COUNTRY CONDITIONS 41 (Oct. 2005) at 21).

²⁶ Immigration and Nationality Act, § 101(a)(42), 8 U.S.C. § 1101(a)(42) (2006), as amended by the Illegal Immigrant Reform and Immigrant Responsibility Act of 1996, Division C, Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104–208, § 601(a)(1), 110 Stat. 3009, 3009–689.

²⁷ See *In re C—Y—Z—*, 21 I. & N. Dec. 915 (BIA 1997); *In re S—L—L—*, 24 I. & N. Dec. 1, 2006 BIA LEXIS 21 (BIA Sept. 19, 2006).

²⁸ *Fornalik v. Perryman*, 223 F.3d 523, 525 (7th Cir. 2000); see also *Fiallo v. Bell*, 430 U.S. 787 (1977); *Lau v. Kiley*, 563 F.2d 543, 545 (2d Cir. 1977) (recognizing that the Immigration and Nationality Act is designed to reunite families); *Perales v. Casillas*, 903 F.2d 1043, 1051 (5th Cir. 1990) (stating that Congress enacted the visa preference provisions to reunite families); *Kaho v. Ilchert*, 765 F.2d 877, 879 n.1 (9th Cir. 1985) (stating that reuniting families is one of the basic objectives of the Immigration and Nationality Act).

²⁹ *In re C—Y—Z—*, 21 I. & N. Dec. at 917.

³⁰ *Id.*

³¹ *In re S—L—L—*, 24 I. & N. Dec. 1, 2006 BIA LEXIS 21, at *1 (BIA Sept. 19, 2006).

³² *Id.* at *8, 10.

a victim directly persecuted through CPC policies is *per se* eligible for asylum; however, circuit courts have struggled to determine precisely *who* is eligible for asylum under the CPC Refugee definition when applying it to different types of personal relationships.

While both the Ninth and Seventh Circuits have expanded the scope of protection of the CPC Refugee definition to spouses, the Third Circuit has gone beyond the BIA's interpretations. In *He v. Ashcroft*, the Ninth Circuit upheld the BIA's interpretation, reiterating the ruling in *C—Y—Z—* that “the forced sterilization of one spouse . . . is an act of persecution against the other spouse.”³³ The Ninth Circuit, in *Ma v. Ashcroft*, also stretched the scope of relief of the CPC Refugee amendment to protect husbands in government-sanctioned marriages, as well as marriages that would be sanctioned “but for China's [] [CPC] policies.”³⁴ Although deviating a bit from the scope of the BIA rule, the court focused its interpretation on avoiding “the separation of a husband and wife, the break-up of a family, a result that is at odds not only with the provision at issue here, but also with significant parts of our overall immigration policy.”³⁵

The Seventh Circuit in *Zhang v. Gonzales* expanded protection to a former spouse, noting that the husband suffered a loss that the subsequent break-up of the marriage could not lessen.³⁶ Most recently, the Third Circuit upheld the BIA's interpretation of the CPC Refugee definition in *Chen v. Attorney General of the United States*.³⁷ The court based its conclusion on the amendment's legislative history, considerations of the loss of reproductive opportunities by the couple, sympathetic harm experienced by the husband, and China's punishment of married couples for violations of the “one-child” policy.³⁸

Despite the developing trend of expanding the scope of the CPC Refugee definition, the Second Circuit took a comparatively narrow view. *Lin* held that spouses of involuntary abortion or sterilization victims could not obtain automatic refugee status under the CPC Refugee definition.³⁹ In so holding, the court focused on the language of the CPC Refugee definition but misinterpreted its legislative history.⁴⁰ By hastily neglecting to follow a BIA interpretation that had been relied on for the

³³ *He v. Ashcroft*, 328 F.3d 593, 604 (9th Cir. 2003) (citing *In re C—Y—Z—*, 21 I. & N. Dec. 915, 919–20 (BIA 1997)).

³⁴ *Ma v. Ashcroft*, 361 F.3d 553, 561 (9th Cir. 2004).

³⁵ *Id.*

³⁶ *Zhang v. Gonzales*, 434 F.3d 993, 1001 (7th Cir. 2006).

³⁷ *Chen v. Att'y Gen.*, 491 F.3d 100, 108 (3d Cir. 2007).

³⁸ *Id.*

³⁹ *Lin*, 494 F.3d 296 at 300.

⁴⁰ *Id.* at 310.

past decade, *Lin* failed to consider the crucial policy considerations informing the provision and the effects the decision would have on thousands of lives.⁴¹ Because of *Lin*, spouses of individuals persecuted under CPC policies are no longer entitled to asylum in the Second Circuit. The *Lin* decision has already destroyed the lives of thirty-three families.⁴²

This comment argues that if the Supreme Court were to resolve the circuit split, it should interpret the CPC Refugee definition in favor of the BIA's interpretation. The BIA's viewpoint is entitled to *Chevron*⁴³ deference and is reasonable.⁴⁴ Moreover, the legislative history of the CPC Refugee definition supports the BIA's interpretation.⁴⁵ The BIA's interpretation of the CPC Refugee definition also provides an additional basis of relief to spouses of CPC victims when remedies under the derivative asylum statute are unavailable.⁴⁶

⁴¹ *Id.*

⁴² *See, e.g.,* Wang v. Mukasey, No. 06–5191–ag, 2008 U.S. App. LEXIS 3298, at *2 (2d Cir. Feb. 15, 2008) (“Wang is not *per se* eligible for asylum on account of his wife’s alleged forced abortion procedure.”); Qian v. United States Dep’t of Justice, No. 06–5729–ag, 2008 U.S. App. LEXIS 3294, at *3 (2d Cir. Feb. 15, 2008) (“Qian was not entitled to asylum based solely on his girlfriend’s forced abortion, regardless of the couple’s marital status.”); Zheng v. Mukasey, No. 07–1613–ag, 2008 U.S. App. LEXIS 3138, at *4 (2d Cir. Feb. 13, 2008) (“Zheng did not claim that he participated in any form of resistance to China’s family planning policy other than impregnating his girlfriend, and therefore his ‘other resistance’ claim fails under *Shi Liang Lin*, 494 F.3d at 312 (“[I]t is clear that the fact that an individual’s spouse has been forced to have an abortion or undergo involuntary sterilization does not, on its own, constitute resistance to coercive family planning policies.”); Chen v. INS, No. 06–5707–ag, 2008 U.S. App. LEXIS 2718, at *2 (2d Cir. Feb. 7, 2008) (“[In *Lin*,] [w]e held that 8 U.S.C. § 1101(a)(42), the statute on which Chen relies, does not apply to a spouse such as him who was not personally subject to coercive birth control measures and who was not personally mistreated as a consequence of opposing the mistreatment of a spouse. We are obligated to apply this intervening precedent.”); Weng v. Mukasey, No. 05–4794–ag, 2008 U.S. App. LEXIS 1909, at *2 (2d Cir. Jan. 29, 2008) (“The agency correctly determined that Weng’s wife’s forced abortion does not constitute past persecution of Weng.”); Jiang v. Mukasey, No. 07–2067–ag, 2008 U.S. App. LEXIS 314, at *2 (2d Cir. Jan. 8, 2008) (“Jiang is not *per se* eligible for asylum based on the forced abortion that was allegedly inflicted upon his wife, Chen, whom he married in a traditional Chinese wedding ceremony.”).

⁴³ *See Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984); *see also infra* Part II.B.

⁴⁴ *See Li v. Ashcroft*, 82 Fed. App’x 357, 358 (5th Cir. 2003) (unpublished per curiam opinion); *Huang v. Ashcroft*, 113 Fed. App’x 695, 700 (6th Cir. 2004) (unpublished opinion); *Zhang v. Gonzales*, 434 F.3d 993, 1001 (7th Cir. 2006); *He v. Ashcroft*, 328 F.3d 593, 604 (9th Cir. 2003).

⁴⁵ *Chen v. Att’y Gen.*, 491 F.3d 100, 108 (3d Cir. 2007).

⁴⁶ *Id.* at 325 (Katzman, J., concurring) (*See Chen v. Att’y Gen.*, 491 F.3d 100, 107 (3d Cir. 2007) (“We . . . do not believe that the existence of derivative asylum status under a statute implies that Congress intended to foreclose additional pathways to asylum specific to spouses.”).

Alternatively, Congress should effectively overturn *Lin* by amending the CPC Refugee definition to explicitly include spouses, because the Chinese government places responsibility on both the husband and the wife for complying with the “one-child” policy.⁴⁷ Accordingly, the CPC Refugee definition should protect persecuted wives and their husbands. In addition, Congress should take action because *Lin* contradicts United States (“U.S.”) family reunification policy. If Congress were to amend the statute to explicitly include spouses, it would establish a clear delineation for asylum in marriage,⁴⁸ which promotes certainty in the application of the CPC Refugee definition, an especially desirable feature in immigration law.⁴⁹ For all of these reasons, *Lin* should be overturned and the Supreme Court or Congress should articulate that the CPC Refugee Definition includes spouses of victims subject to CPC.

II. THE UNITED STATES GRANTS ASYLUM TO VICTIMS OF CHINA’S ONE-CHILD POLICY

Every year, thousands of Chinese immigrants who have faced or fear China’s “one-child” policy seek asylum in the United States under the Immigration and Nationality Act.⁵⁰ Those who do not comply with the “one-child” policy face not only physical persecution, but social ostracism and other pressures.⁵¹ Through the CPC Refugee definition, Congress expanded the scope of the Immigration and Nationality Act by explicitly including CPC in the definition of persecution on account of political opinion.⁵² Congress enacted this legislation to put an end to the regulatory uncertainty about whether a CPC victim was eligible for asylum under the Immigration and Nationality Act.⁵³ A 1996 INS memorandum regarding the new legislation also stated that “an applicant

⁴⁷ XIAN FA [Constitution] art.49 (1982) (P.R.C.).

⁴⁸ *In re S—L—L—*, 24 I. & N. Dec. 1, 2006 BIA LEXIS 21, at *21 (BIA Sept. 19, 2006).

⁴⁹ *Lin v. Dep’t of Justice*, 494 F.3d 296, 316 (2d Cir. 2007) (Katzman, J., concurring), (“[I]t would be unsound for each of the several Courts of Appeals to elaborate a potentially nonuniform body of law”) (describing uniformity as “especially desirable in cases such as these”) *Id.* at 316. (citing *Jian Hui Shao v. BIA*, 465 F.3d 497, 502 (2d Cir. 2006)). *Id.*

⁵⁰ See OFFICE OF IMMIGRATION STATISTICS, U.S. DEP’T OF HOMELAND SECURITY: ANNUAL FLOW REPORT: REFUGEES AND ASYLEES: 2006, 4 tbl. 6 (2007).

⁵¹ *In re S—L—L—*, 24 I. & N. Dec. 1, 2006 BIA LEXIS 21, *14 (BIA Sept. 19, 2006) (citing BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, U.S. DEPT. OF STATE, CHINA—PROFILE OF ASYLUM CLAIMS AND COUNTRY CONDITIONS 41 (Oct. 2005) at 21).

⁵² *Id.*

⁵³ GORDON ET AL., *supra* note 21.

whose spouse was forced to undergo an abortion or involuntary sterilization has suffered past persecution, and may thereby be eligible for asylum under the terms of the new refugee definition.”⁵⁴ Congress, through expanding the statute, did not intend for the amendment to result in the separation of families, which is contrary to the core goals of the U.S. family reunification policy.⁵⁵

A. China's One-Child Policy

The Chinese government implemented its “one-child” birth control policy to resolve a significant overpopulation problem.⁵⁶ The “one-child” policy limits most couples to bearing only one child.⁵⁷ The policy and its vigorous enforcement by the Chinese government in urban areas “has had a great effect on the lives of nearly a quarter of the world’s population for a quarter of a century.”⁵⁸ The Chinese government began the “one-child” policy in 1979, claiming that the policy would help China achieve its goal of becoming a voluntary small-family culture.⁵⁹ This policy is still in force.⁶⁰

Generally, the “one-child” policy restricts all couples to bearing only one child.⁶¹ However, the Chinese government will allow certain couples, for example those having only one daughter, to have a second child after five years.⁶² Despite this, the Chinese government strictly forbids third and higher-order childbearing.⁶³

The “one-child” policy “depends on virtually universal access to contraception and abortion.”⁶⁴ One study indicated that “a total of eighty-seven percent of all married women use contraception”⁶⁵ as compared

⁵⁴ Memorandum from David A. Martin, Gen. Counsel, Immigration & Naturalization Serv., Asylum Based On Coercive Family Planning Policies—Section 601 of the Illegal Immigration Reform and Immigration Responsibility Act of 1996 (Oct. 21, 1996) available at <http://immigration.com/news/a-family-planning.html>.

⁵⁵ See cases cited, *supra* note 28.

⁵⁶ Therese Hesketh, Li Lu, & Zhu Wei Xing, *The Effect of China's One-Child Family Policy after 25 Years*, 353 NEW ENG. J. MED. 1171 (2005).

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ XIAN FA [Constitution] art. 25, 49 (1982) (P.R.C.); see generally Xiaorong Li, *License to Coerce: Violence Against Women, State Responsibility, and Legal Failures in China's Family-Planning Program*, 8 YALE J.L. & FEMINISM 145, 152–55 (1996).

⁶¹ Hesketh, *supra* note 56.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.* (citing Yin Q, *Theses collection of 2001 National Family Planning and Reproductive Health Survey*. Beijing: China Population Publishing House, 116–26 (2003)).

with “about one third in most developing countries.”⁶⁶ The Chinese government offers no choice in contraception for most women.⁶⁷ A recent study found that eighty percent of women “had no choice and just accepted the contraceptive method recommended by the family-planning worker” employed by the Chinese government.⁶⁸ Those women who choose to continue a non-sanctioned pregnancy are often hesitant to use obstetric services “because [these women] fear they will face pressure to have an abortion or [will be] fine[d] for violating the one-child policy.”⁶⁹

Often without the assistance of any trained personnel, many non-sanctioned deliveries of babies occur at home.⁷⁰ This practice “is associated with the risk of maternal or neonatal mortality.”⁷¹ In 1990, a study carried out in the rural province of Sichuan, China reported “a doubling of maternal deaths for unapproved pregnancies” as compared with those pregnancies sanctioned by the Chinese government.⁷²

The Chinese government places responsibility for adherence to family planning policies on both the husband and wife.⁷³ The Constitution of the People’s Republic of China stipulates that the state should promote the practice of family planning.⁷⁴ A married couple that does not voluntarily submit to an abortion may face social ostracism and other pressures.⁷⁵ Historically, such couples have been threatened with fines, property damage or confiscation, demotion at work, “job loss, or other economic sanctions for refusing to agree to an abortion.”⁷⁶ However, the Chinese government may ultimately impose an abortion, sterilization, or government infanticide upon the couple if the couple refuses to comply with the policy.⁷⁷

⁶⁶ Hesketh, *supra* note 56.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.* at 1172.

⁷⁰ *Id.*

⁷¹ Therese Hesketh, Li Lu, & Zhu Wei Xing, *The Effect of China’s One-Child Family Policy after 25 Years*, 353 *NEW ENG. J. MED.* 1171 (2005).

⁷² *Id.* at 1172.

⁷³ XIAN FA [Constitution] art.49 (1982) (P.R.C.) (Art. 49, entitled “Marriage, the family, and mother and child are protected by the state” indicates, in relevant part, that “[b]oth husband and wife have the duty to practice family planning.”).

⁷⁴ *Id.* at art. 25.

⁷⁵ *Id.*

⁷⁶ *Id.* See also *In re S—L—L—*, 24 I. & N. Dec. 1, 2006 BIA LEXIS 21, *14 (BIA Sept. 19, 2006) (citing BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, U.S. DEPT. OF STATE, CHINA—PROFILE OF ASYLUM CLAIMS AND COUNTRY CONDITIONS 41 (Oct. 2005) at 21).

⁷⁷ *In re S—L—L—*, 24 I. & N. Dec. 1, 2006 BIA LEXIS 21, *14 (BIA Sept. 19, 2006)

B. The Board of Immigration Appeals is the Most Competent Entity to Handle Asylum Cases

With regard to the application and interpretation of immigration laws, the BIA “is the highest administrative body [in the United States].”⁷⁸ The Attorney General, who has power determine deportation, exclusion, and removal cases,⁷⁹ established the BIA as an appellate body to review decisions of immigration judges and district directors of the Department of Homeland Security.⁸⁰ The Board, composed of eleven Board Members including the Chairman and Vice Chairman, “identif[ies] clear errors of fact or errors of law in decisions under review, . . . provide[s] guidance and direction to the immigration judges, and . . . issue[s] precedential interpretations as an appellate body.”⁸¹ The Board also makes unpublished decisions that only bind the parties in the decision.⁸² In contrast, the BIA’s published decisions serve as legal precedent that binds immigration judges unless the Attorney General modifies or overrules the decision.⁸³ Through these precedential decisions, the BIA has contributed to the creation of a considerable amount of immigration law.⁸⁴

Increasing case loads led to a number of reforms and revisions of the Board’s structure over time. In 1999, further increases prompted the Attorney General to implement streamlining initiatives to facilitate appeals for legally and factually uncomplicated cases by assigning the cases for adjudication by one BIA member.⁸⁵ In 2002, the Attorney General implemented more reforms, which mandated review by a single BIA member of certain specified types of cases.⁸⁶

⁷⁸ Board of Immigration Appeals, <http://www.justice.gov/eoir/biainfo.htm> (last visited Feb. 8, 2008).

⁷⁹ CHARLES GORDON, STANLEY MAILMAN & STEPHEN YALE-LOEHR, IMMIGRATION LAW AND PROCEDURE § 3.05, at 1 (2007).

⁸⁰ 8 C.F.R. § 1003.1(d) (2006).

⁸¹ Board of Immigration Appeals: Procedural Reforms to Improve Case Management, 67 Fed. Reg. 54,878, 54,880 (Aug. 26, 2002).

⁸² BOARD OF IMMIGRATION APPEALS PRACTICE MANUAL (2004), available at <http://www.justice.gov/eoir/vll/qapracmanual/pracmanual/chap1.pdf>.

⁸³ 8 C.F.R. § 1003.1(g) (2006).

⁸⁴ Evelyn H. Cruz, *Symposium: Globalization, Security & Human Rights: Immig[ra]tion in the Twenty-First Century: Double the Injustice, Twice the Harm: The Impact of the Board of Immigration Appeals’s Summary Affirmance Procedures*, 16 STAN. L. & POL’Y REV. 481, 499–500 (2005).

⁸⁵ GORDON ET AL., *supra* note 79, at 2 (citing Executive Office for Immigration Review; Board of Immigration Appeals: Streamlining, 64 Fed. Reg. 56,135 (Oct. 18, 1999)).

⁸⁶ *Id.* (citing Board of Immigration Appeals: Procedural Reforms to Improve Case Management, 67 Fed. Reg. 54,878 (Aug. 26, 2002) (codified at 8 C.F.R. § 1003.1(e) (2006))).

Some think of these changes not as “reforms” but as political moves to deter immigrants from seeking so many appeals, and have challenged them on due process grounds under the Administrative Procedure Act (“APA”).⁸⁷ In addition, the adoption of the CPC Refugee definition is also viewed by some as imposing greater restrictions on those seeking asylum. For example, the amendment implemented a one year filing limit and restrictions on judicial review.⁸⁸ One scholar also criticized the executive branch for interpreting immigration laws in “an exceedingly narrow manner.”⁸⁹

BIA decisions are entitled to limited judicial review,⁹⁰ and are entitled to *Chevron* deference for issues of statutory interpretation.⁹¹ The Board, however, “is not bound by decisions of the lower federal courts . . . unless the Board accepts [a district court’s] conclusions;” however, the circuit law governing the case binds the BIA.⁹² Moreover, just because the government fails to appeal a BIA decision “does not necessarily indicate acquiescence, since the failure to appeal may be based on inadequacy of the record or other factors unrelated to the merits.”⁹³ Precedential Board decisions “apply to all proceedings involving the adjudicated issues” unless the Board itself, Congress, the Attorney General, or a federal court modifies or overrules the Board’s decision.⁹⁴

BIA decisions “have become more meaningful as Congress has sought to limit the availability of circuit court appellate review.”⁹⁵

⁸⁷ See *Capital Area Immigrants’ Rights Coalition v. United States*, 264 F. Supp. 2d 14 (D.D.C. 2003); see also *Albathani v. INS*, 318 F.3d 365 (1st Cir. 2003).

⁸⁸ Immigration and Nationality Act § 101(a)(42), 8 U.S.C. § 1101(a)(42) (2006), as amended by the Illegal Immigrant Reform and Immigrant Responsibility Act of 1996 (“IIRIRA”), Division C, Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104–208, § 601(a)(1), 110 Stat. 3009, 3009–689.

⁸⁹ See generally Lori A. Nessel, *Article: Forced to Choose: Torture, Family Reunification, and United States Immigration Policy*, 78 TEMP. L. REV. 897, 944 n.303 (2005) (noting that “the BIA has interpreted key terms under the Torture Convention in an unduly restrictive manner”) *Id.*

⁹⁰ See GORDON ET AL., *supra* note 79, at 10.

⁹¹ See *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984). The Supreme Court in *Chevron* noted that “[i]f the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.” *Id.* at 842–43. See also *INS v. Cardoza-Fonseca*, 480 U.S. 421, 447–48 (1987). Under this first inquiry, “[s]ilence on a particular matter germane to the provisions of a statute suggests a gap of the sort that the administering agency may fill.” *Chen v. Att’y Gen.*, 491 F.3d 100, 107 (3d Cir. 2007). The Court in *Chevron* asserted that only “if the statute is silent or ambiguous,” should a court turn to the second inquiry and ask whether the BIA’s interpretation represents “a permissible construction of the statute.” *Chevron*, 467 U.S. at 843.

⁹² GORDON ET AL., *supra* note 79, at 11.

⁹³ *Id.*

⁹⁴ *Id.* at 12.

⁹⁵ Cruz, *supra* note 84.

Pursuant to Congress's enactment of a series of laws, the circuit courts were denied of the power to review a number of types of decisions.⁹⁶ As a result, the last forum an immigrant can visit for relief is often the BIA.⁹⁷ Despite this, "circuit courts have not been overly concerned about the BIA's summary affirmance procedures" because the circuit courts trust that remanding the case to the immigration courts corrects any errors.⁹⁸

Some have referred to this process of "remand, remand, remand" akin to a procedural "ping-pong" game where individuals regard the BIA as a mere stepping stone to review from the circuit courts, with nominal Board review.⁹⁹ Although the BIA has reported that its backlog has been reduced as a result, "the circuit courts' backlog of immigration cases has soared as immigrants discontent with summary affirmances seek a fair forum."¹⁰⁰ The Seventh Circuit has even criticized the BIA for overlooking its own precedents and causing further litigation.¹⁰¹ In the Seventh Circuit case *Iao v. Gonzales*,¹⁰² the court cited to instances where the BIA had simply affirmed immigration judges' opinions that contained "manifest errors of fact and logic."¹⁰³ These errors cause concern for some circuit courts as to whether the BIA "lacks the national oversight and guidance that the BIA once provided."¹⁰⁴

Despite criticisms of the summary affirmance procedures, the Board clearly has greater institutional competence than the circuit courts to interpret immigration law consistently with Congressional policy goals

⁹⁶ *Id.* (noting that the Immigration Reform Act of 1996 denied the circuit courts the power to address certain types of cases).

⁹⁷ *Id.*

⁹⁸ *Id.* at 508 (citing *Falcon Carriche v. Ashcroft*: "the most serious risk of erroneous removal of an alien arises from the fact that the procedures conceal the basis for the BIA's decision." Cruz noted, "The risk, however, according to Judge McKeown, can be mitigated by remanding those cases and through the BIA's own procedures to correct mistakes through motions to reconsider") *Id.*

⁹⁹ *Lin v. Dep't of Justice*, 494 F.3d 296, 313 (2d Cir. 2007); Cruz, *supra* note 84 at 508.

¹⁰⁰ Cruz, *supra* note 84, at 508 (citing Office of Planning & Analysis, Executive Office for Immigration Review FY2003: Statistical Yearbook U1 (2004) and *Dorsey & Whitney LLP, Board of Immigration Appeals: Procedural Reforms to Improve Case Management* (2003) at app. 27. (noting that appeals to circuit courts have climbed from an average of 300 a month per circuit to over 800 per month)).

¹⁰¹ *Iao v. Gonzales*, 400 F.3d 530, 533-36 (7th Cir. 2005) (referring to a number of circuits' citations to six types of errors committed by immigration judges).

¹⁰² *Id.*

¹⁰³ *Id.* at 535.

¹⁰⁴ See Lory Diana Rosenberg, *Aggressive Circuit Court or Administrative Neglect: Just Who is Failing to Follow BIA Asylum Precedent?—Part I: Membership in a Particular Social Group and Homosexuality*, 10-9 BENDER'S IMMIGR. BULL., May 1, 2005, at 3.

and objectives. Under *Chevron* deference, the BIA is vested with gap-filling authority in the event of statutory silence on a matter.¹⁰⁵ The Supreme Court would not have granted such a deferential standard of review to BIA interpretations if the Court believed that the agency and the circuits were equivalent in terms of institutional competence when deciding issues of immigration law.

C. Congress Amends the Refugee Definition to Respond to China's One-Child Policy

The Refugee Act of 1980 implemented Article 1 of the United Nations Convention relating to the Status of Refugees within the United States, and provided asylum protection to individuals meeting the Immigration and Nationality Act's definition of "refugee."¹⁰⁶ The Refugee Act defines asylum as "a form of protection that allows individuals who are in the United States to stay . . . and eventually to adjust their status to lawful permanent resident."¹⁰⁷

The statute requires an individual to prove three elements to qualify for asylum.¹⁰⁸ The first element is persecution, which is highly fact-dependent and must be determined on a case-by-case basis. In order to constitute persecution, the "conduct in question . . . must rise above the level of mere 'harassment.'"¹⁰⁹ The second element is a well-founded fear of persecution, which may be shown by past persecution or a fear of future harm.¹¹⁰ The third element is a causal connection between the persecution and one of five enumerated grounds: "race, religion, nationality, membership in a particular social group, or political opinion."¹¹¹ In the past, immigrants fearing persecution because of China's "one-child" policy have argued that they were singled out because of political opinion in order to satisfy the Immigration and Nationality Act's definition of "refugee."¹¹² This argument was initially met with some resistance by the BIA.

¹⁰⁵ *Chen v. Att'y Gen.*, 491 F.3d 100, 107 (3d Cir. 2007).

¹⁰⁶ Immigration and Nationality Act, § 101(a)(42), 8 U.S.C. § 1101(a)(42) (2006), as added by the Refugee Act of 1980, Pub. L. No. 96-212, § 201(a), 94 Stat. 102.

¹⁰⁷ U.S. Citizenship and Immigration Services: Asylum, available at <http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnnextoid=3a82ef4c766fd010VgnVCM1000000ecd190aRCRD&vgnnextchannel=3a82ef4c766fd010VgnVCM1000000ecd190aRCRD>.

¹⁰⁸ Immigration and Nationality Act, § 101(a)(42), 8 U.S.C. § 1101(a)(42) (2006), as added by the Refugee Act of 1980, Pub. L. No. 96-212, § 201(a), 94 Stat. 102.

¹⁰⁹ *Sofinet v. INS*, 196 F.3d 742, 746 (7th Cir. 1999).

¹¹⁰ Immigration and Nationality Act, § 101(a)(42), 8 U.S.C. § 1101(a)(42) (2006), as added by the Refugee Act of 1980, Pub. L. No. 96-212, § 201(a), 94 Stat. 102.

¹¹¹ *Id.*

¹¹² *Id.*

The BIA addressed the issue of whether people seeking asylum based on China's "one-child" policy constituted persecution based on political opinion, in the case *In re Chang*.¹¹³ The BIA ruled that China's "one-child" policy did not amount to persecution on its face because the applicant was unable to establish a nexus between the persecution and a protected characteristic.¹¹⁴ The BIA stated that a persecution claim could prevail only if China selectively applied the "one-child" policy based on "race, religion, nationality, political opinion, or membership in a particular social group."¹¹⁵ This language in *Chang* implied that an individual's violation of the "one-child" policy could not be an expression of his or her political opinion.¹¹⁶

In response to *Chang* and similar Board decisions, seven years later in 1996, Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA") section 601(a).¹¹⁷ In this provision, Congress enlarged the scope of the Immigration and Nationality Act by expressly including CPC within the definition of a refugee.¹¹⁸ The amendment effectively overruled *Chang*.¹¹⁹ Specifically, the amendment states that an individual who was persecuted or has a well founded fear of future persecution under CPC policies will be "deemed to have been persecuted on account of political opinion."¹²⁰ In light of this statutory change, courts have struggled to interpret just exactly *who* is eligible for asylum under the new legislation, particularly when legally-married spouses, as well as boyfriends and fiancés of women subjected to coercive population controls, attempt to obtain refugee status.¹²¹

¹¹³ *In re Chang*, 20 I. & N. Dec. 38 (BIA 1989).

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 44.

¹¹⁶ *See id.*

¹¹⁷ Immigration and Nationality Act, § 101(a)(42), 8 U.S.C. § 1101(a)(42) (2006), as amended by the Illegal Immigrant Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Division C, Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, § 601(a)(1), 110 Stat. 3009, 3009-689.

¹¹⁸ *Id.*

¹¹⁹ *See In re Chang*, 20 I. & N. Dec. 38 (BIA 1989).

¹²⁰ Immigration and Nationality Act, § 101(a)(42), 8 U.S.C. § 1101(a)(42) (2006), as amended by the Illegal Immigrant Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Division C, Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, § 601(a)(1), 110 Stat. 3009, 3009-689.

¹²¹ *See Chen v. Att'y Gen.*, 491 F.3d 100 (3d Cir. 2007); *Lin v. Dep't of Justice*, 494 F.3d 296, 299 (2d Cir. 2007).

D. The BIA, the Courts, and Congress Have Endorsed an Immigration Policy That Favors U.S. Family Reunification

The Supreme Court and various circuit courts have acknowledged that family unity remains “one of the principal goals of the statutory and regulatory apparatus” in U.S. immigration law.¹²² Both the BIA and the courts have recognized that persecution of one member of a family amounts to persecution of the nuclear family as one entity.¹²³ The BIA has stated that, for asylum purposes, the family is considered to be a particular social group.¹²⁴ The ability of families to unite after traumatic interference with fundamental human rights is a dominant focus of immigration policy in the United States.¹²⁵ The BIA and the courts also recognize the family “as the prototypical social group that warrants protection from persecution in asylum jurisprudence.”¹²⁶

Family reunification policy may sometimes be at odds with immigration law policy. One scholar, Lori Nessel, has noted that claim interpretation involving international protection from persecution must take into account that “withholding of deportation alone is an insufficient mechanism for restoring the human dignity that torture or persecution strips away.”¹²⁷ Professor Nessel remarked that, only with the presence of a victim’s spouse can the victim facilitate with the emotional healing and assimilation processes.¹²⁸ Her argument stresses that family

¹²² See cases cited, *supra* note 28.

¹²³ See *Tchoukhrova v. Gonzales*, 404 F.3d 1181 (9th Cir. 2005); *In re S—L—L—*, 24 I. & N. Dec. 1, 2006 BIA LEXIS 21, *13 (BIA Sept. 19, 2006).

¹²⁴ *In re Acosta*, 19 I. & N. Dec. 211, 233 (BIA 1985).

¹²⁵ *Abebe v. Ashcroft*, 379 F.3d 755, 764 (9th Cir. 2004) (Ferguson, J., dissenting) (quoting THOMAS ALEXANDER ALEINIKOFF ET AL., IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 319 (4th ed. 1998)). In addition, international human rights law recognizes family reunification rights—the Universal Declaration of Human Rights specifies that “[t]he family is the natural and fundamental group unit of society and is entitled to protection by society and the State.” Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3d. Sess., Pt. 1, P 16(3), U.N. Doc. A/RES/217 (Dec. 10, 1948). See also International Covenant on Civil and Political Rights, Dec. 19, 1966, art. 23, 99 U.N.T.S. 171, 179 (entered into force Mar. 23, 1976); International Covenant on Economic, Social and Cultural Rights, opened for signature Dec. 16, 1966, art. 10(1), 993 U.N.T.S. 4, 7 (entered into force Jan. 3, 1976) (“The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society”); African Charter on Human and Peoples’ Rights, adopted June 27, 1981, art. 18, 21 I.L.M. 58 (entered into force Oct. 21, 1986) (“The family shall be the natural unit and basis of society.”).

¹²⁶ Lori A. Nessel, *Forced to Choose: Torture, Family Reunification, and United States Immigration Policy*, 78 TEMP. L. REV. 897, 940 (2005).

¹²⁷ *Id.*

¹²⁸ *Id.*

reunification is the only way a persecution victim could have his or her dignity restored.¹²⁹

The derivative asylum statute, 8 U.S.C. § 1158(b)(3), reflects Congress's encouragement of family unity.¹³⁰ According to *Lin*, section 1158(b)(3)(A) states:

[A]n individual whose spouse or parent has been granted asylum on the basis of having undergone or been threatened with the prospect of a forced abortion or sterilization is automatically eligible for derivative asylum: “[a] spouse or child . . . of an alien who is granted asylum under this subsection may, if not otherwise eligible for asylum under this section, be granted the same status as the alien if accompanying, or following to join, such alien.”¹³¹

Here, Congress allowed a spouse or child to obtain automatic derivative asylum on the basis of a grant of asylum to the individual persecuted under a CPC policy. The *Federal Register* indicates that “[d]erivative benefits for refugees and asylees are intended to expediently reunite families in order for them to make the difficult transition to a new life with the support of their immediate family members by avoiding lengthy delays due to visa quotas.”¹³² According to *Lin*, under section 1158(b)(3)(A), Congress first extends protection to the direct victim, then to the spouse and their children.¹³³ Congress created this structure to “encourage[] couples to remain together, or, in circumstances where this is not possible, facilitate[] reunion.”¹³⁴ While the spouse of an asylee may achieve derivative asylum status, section 1158(b)(3) “does not allow one spouse to stand in the shoes of the other to independently obtain asylum based on a threat to the other spouse.”¹³⁵

In summary, Chinese immigrants seeking asylum in the U.S. on account of persecution based on the “one-child” policy look to qualify as a “refugee” under the CPC Refugee definition. The BIA has issued a number of precedential statutory interpretations of the Immigration and Nationality Act and the 1996 amendment¹³⁶ and recognized that Congress, by explicitly including CPC in the definition of persecution on

¹²⁹ *Id.*

¹³⁰ *Lin v. Dep't of Justice*, 494 F.3d 296, 312 (2d Cir. 2007).

¹³¹ *Id.* at 312.

¹³² Procedures for Filing a Derivative Petition (Form I-730) for a Spouse and Unmarried Children of a Refugee/Asylee, 63 Fed. Reg. 3,792, 3,793 (Jan. 27, 1998).

¹³³ *Lin*, 494 F.3d at 312.

¹³⁴ *Id.*

¹³⁵ *Chen v. Att'y Gen.*, 491 F.3d 100, 105 (3d Cir. 2007).

¹³⁶ See *In re C—Y—Z—*, 21 I. & N. Dec. 915 (BIA 1997); *In re S—L—L—*, 24 I. & N. Dec. 1, 2006 BIA LEXIS 21 (BIA Sept. 19, 2006).

account of political opinion, clearly meant to extend the scope of the Immigration and Nationality Act's protection.¹³⁷ Because family unity remains "one of the principal goals" of U.S. immigration law and the CPC Refugee definition has been interpreted in a way that effectuates these goals, it is questionable whether Congress intended the separation of families.

III. APPLICATION OF THE CPC REFUGEE DEFINITION BY THE BIA

A. *In re C—Y—Z—*

Soon after Congress amended the Immigration and Nationality Act with the CPC Refugee definition, the BIA decided *In re C—Y—Z—*.¹³⁸ In this case, Chinese government officials forcibly sterilized the applicant's wife, who chose to remain in China with the couple's children.¹³⁹ The threshold issue on appeal was whether an asylum applicant could establish past persecution of one spouse because of coerced abortion or sterilization of the other spouse.¹⁴⁰ The immigration judge denied the applicant's petition for asylum on the basis that the applicant could not establish past persecution or a reasonable fear of future persecution.¹⁴¹

On appeal, the BIA reversed, holding that one spouse can establish past persecution on the basis of the other spouse's coerced abortion or sterilization.¹⁴² To reach that decision, the Board cited to the CPC Refugee definition language stating that an individual who was persecuted or has a well founded fear of future persecution under CPC policies will be "deemed to have been persecuted on account of political opinion"¹⁴³ and also considered a 1996 I.N.S. memorandum stating that "an applicant whose spouse was forced to undergo an abortion or involuntary sterilization has suffered past persecution, and may thereby be eligible for asylum under the terms of the new refugee definition."¹⁴⁴

¹³⁷ *In re S—L—L—*, 24 I. & N. Dec. 1, 2006 BIA LEXIS 21, at *10–11 (BIA Sept. 19, 2006).

¹³⁸ *In re C—Y—Z—*, 21 I. & N. Dec. 915 (BIA 1997) (Rosenberg, B.M., concurring).

¹³⁹ *Id.* at 916.

¹⁴⁰ *Id.* at 917.

¹⁴¹ *Id.* at 916.

¹⁴² *Id.*

¹⁴³ Immigration and Nationality Act, § 101(a)(42), 8 U.S.C. § 1101(a)(42) (2006), as amended by the Illegal Immigrant Reform and Immigrant Responsibility Act of 1996, Division C, Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104–208, § 601(a)(1), 110 Stat. 3009, 3009–689.

¹⁴⁴ Memorandum from David A. Martin, Gen. Counsel, Immigration & Naturalization Serv., Asylum Based On Coercive Family Planning Policies—Section 601 of the Illegal Immigration Reform and Immigration Responsibility Act of 1996 (Oct. 21, 1996) available at <http://immigration.com/news/a-family-planning.html>.

The BIA additionally noted that the purpose of the 1996 amendment was to “afford refugee status to persons whose fundamental human rights were violated by a government’s application of its coercive family planning policy.”¹⁴⁵

In a concurring opinion, Board Member Lory Rosenberg agreed, noting the specific statutory language, but also “the relevant precedent decisions of this Board, the Federal courts, and the Supreme Court.”¹⁴⁶ Board Member Rosenberg added that the existence of the CPC Refugee definition “does not obviate the applicability of existing standards and principles which make up established refugee doctrine.”¹⁴⁷ She argued that one who opposes or resists the “one-child” policy because he or she believes that it is wrong holds a political opinion.¹⁴⁸ As such, the persecutor does not necessarily achieve his objective upon sterilizing the couple, as there is still a basis for persecution motivated by the victim’s failure to conform as well as the “encouragement of others not to do so.”¹⁴⁹ Moreover, the fact that an asylum applicant witnesses or experiences a family member’s persecution also would tend to support the applicant’s own fear of future persecution.¹⁵⁰

Several of the board members dissented from the opinion. The dissent by Board Member Filppu argued for remand to determine whether the applicant was entitled to asylum and to examine the “murky” reasoning behind the I.N.S.’s position on “joint spousal persecution.”¹⁵¹ Board Member Vacca opined in his dissent that the applicant did not show past persecution or well founded fear of future persecution because the statute specifically includes only those individuals who were forced to be sterilized or have an abortion, or those who were persecuted for failure to do so.¹⁵² Board Member Villageliu also dissented based on his views that the BIA should interpret the statute narrowly in light of the 1,000 annual cap on asylum grants based on resistance to CPC policies.¹⁵³ He further argued that the courts should also construe the

¹⁴⁵ Coercive Population Control in China: Hearings Before the Subcomm. On Int’l Operations & Human Rights of the House Comm. On Int’l Relations, 104th Cong (1995).

¹⁴⁶ *In re C—Y—Z—*, 21 I. & N. Dec. 915, 920 (BIA 1997) (Rosenberg, B.M., concurring).

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 922.

¹⁴⁹ *Id.* at 923.

¹⁵⁰ *Id.* at 926.

¹⁵¹ *In re C—Y—Z—*, 21 I. & N. Dec. at 928–29 (Filppu, B.M., dissenting in part).

¹⁵² *In re C—Y—Z—*, 21 I. & N. Dec. at 933 (Vacca, B.M., dissenting).

¹⁵³ *In re C—Y—Z—*, 21 I. & N. Dec. at 936 (Villageliu, B.M., dissenting). The 1000 annual cap placed on the number of asylees admitted pursuant to section 601(a) has been repealed. See REAL ID Act of 2005, Div. B of Pub. L. No. 109–13, § 101(g)(2), 119 Stat. 231, 305 (repealing former section 207(a)(5) of the Act, 8 U.S.C. § 1157(a)(5) (2000)).

statute narrowly in the specific facts of that case because the applicant's wife was not currently in the U.S. applying for asylum herself.¹⁵⁴ He found "implausible . . . [a] natural reaction of a husband whose wife has been sterilized, and who deems it persecutive, . . . to then proceed to the United States seeking asylum, leaving her behind."¹⁵⁵ Despite these strong dissents, the holding from *In re C—Y—Z—* was reaffirmed some nine years later by the BIA in the case *In re S—L—L—*.¹⁵⁶

B. In re S—L—L—

In the *S—L—L—* case, the applicant was a native and citizen of China who claimed asylum based on the allegation that "in September 1990 [the Chinese] government forced his girlfriend to abort their child."¹⁵⁷ The applicant argued that the BIA should extend the holding in *C—Y—Z—* to the applicant's situation.¹⁵⁸ An immigration judge refused, concluding that the *C—Y—Z—* holding was limited to spouses, and denied the applicant asylum.¹⁵⁹ Without issuing an opinion, the BIA affirmed the immigration judge's decision prompting the applicant to appeal to the Second Circuit.¹⁶⁰ The Second Circuit remanded the case to the BIA with instructions that it further explain its rationale in *In re C—Y—Z—* for construing the CPC Refugee definition to grant *per se* asylum eligibility to the spouses of direct persecution under CPC policies.¹⁶¹

On remand, the BIA reaffirmed, and made clear that *In re C—Y—Z—*'s holding was limited to applicants who "opposed to a spouse's abortion or sterilization" and who was legally married to the spouse at the time of the forced abortion or sterilization.¹⁶² The Board noted that "[t]he interpretive lines, no matter where drawn, will be vulnerable to criticism that they are over-inclusive, under-inclusive, inadequately tied to statutory language, or unmanageable in practice."¹⁶³ However, the Board concluded that the result of *In re C—Y—Z—* was consistent with the legislative history regarding the CPC amendment.¹⁶⁴ The Board also noted Congress's repeal of the 1,000 person annual maximum on asylum

¹⁵⁴ *In re C—Y—Z—*, 21 I. & N. Dec. at 936 (Villageliu, B.M., dissenting).

¹⁵⁵ *Id.* at 935.

¹⁵⁶ *In re S—L—L—*, 24 I. & N. Dec. 1, 2006 BIA LEXIS 21 (BIA Sept. 19, 2006).

¹⁵⁷ *Id.* at *2-3.

¹⁵⁸ *Id.* at *3.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *In re S—L—L—*, 24 I. & N. Dec. 1, 2006 BIA LEXIS 21, at *1 (BIA Sept. 19, 2006).

¹⁶² *Id.* at *7.

¹⁶³ *Id.* at *8.

¹⁶⁴ *Id.*

grants with respect to CPC-based claims as evidence of Congress's intent not to limit the scope of protection.¹⁶⁵

While the BIA acknowledged that the CPC Refugee definition does not specifically refer to spouses, it noted that the amendment "does not . . . preclude an applicant from demonstrating past persecution based on harm inflicted on a spouse when both spouses are harmed by government acts motivated by a couple's shared protected characteristic."¹⁶⁶ The BIA explained that the purpose of the amendment was to "afford refugee status to persons whose fundamental human rights were violated by a government's application of its coercive family planning policy."¹⁶⁷ Further, The Board noted that when Congress enacted the amendment, it appeared concerned with the persecution of the woman as well as the persecution of the couple as one entity through governmental interference in a married couple's family planning decisions.¹⁶⁸

The Board reasoned that a forced abortion or sterilization is an infringement on a married couple's shared reproductive rights.¹⁶⁹ According to the BIA, Chinese family planning policies impose shared responsibility on a couple for complying with the law, so the Board was "willing to presume, in absence of evidence to the contrary, that the [g]overnment focuses on the married couple as a unit when it intervenes to force an abortion."¹⁷⁰ The Board recognized that "a husband can also suffer emotional and sympathetic harm arising from his spouse's mistreatment" and that this constituted a deprivation of rights to the couple as an entity.¹⁷¹ Therefore, the BIA interpreted the forced abortion and sterilization clause of section 101(a)(42) "in light of the overall purpose of the amendment, to include both parties to a marriage."¹⁷²

¹⁶⁵ *Id.* at *9. See REAL ID Act of 2005, Div. B of Pub. L. No. 109-13, § 101(g)(2), 119 Stat. 231, 305 (repealing former section 207(a)(5) of the Act, 8 U.S.C. § 1157(a)(5) (2000)).

¹⁶⁶ *In re S—L—L—*, 24 I. & N. Dec. 1, 2006 BIA LEXIS 21, at *10 (BIA Sept. 19, 2006).

¹⁶⁷ *Id.* at *11. See Coercive Population Control in China: Hearings Before the Subcomm. On Int'l Operations & Human Rights of the House Comm. On Int'l Relations, 104th Cong (1995); *Ma v. Ashcroft*, 361 F.3d 553, 559 (9th Cir. 2004) (stating that "Congress's goal in passing the amendments [was] to provide relief for 'couples' persecuted on account of an 'unauthorized' pregnancy and to keep families together." (citing H.R. REP. NO. 104-469(I), at 174 (1996))).

¹⁶⁸ *In re S—L—L—*, 24 I. & N. Dec. 1, 2006 BIA LEXIS 21, at *13 (BIA Sept. 19, 2006).

¹⁶⁹ *Id.* at *16.

¹⁷⁰ *Id.* at *14; see XIAN FA [Constitution] art. 25, 49 (1982) (P.R.C.).

¹⁷¹ *In re S—L—L—*, 24 I. & N. Dec. 1, 2006 BIA LEXIS 21, at *16 (BIA Sept. 19, 2006); *Chen v. Ashcroft*, 381 F.3d 221, 225-26 (3d Cir. 2004).

¹⁷² *In re S—L—L—*, 24 I. & N. Dec. 1, 2006 BIA LEXIS 21, at *18-19 (BIA Sept. 19, 2006).

The BIA, however, drew the line at current husbands.¹⁷³ The Board refused to extend the holding from *In re C—Y—Z—* to an applicant with a girlfriend or fiancée that was a victim of a forced abortion.¹⁷⁴ The BIA noted that, “[f]rom the point of view of the wife, the local community, and the government, a husband shares significantly more responsibility in determining, with his wife, whether to bear a child in face of societal pressure and government incentives than does a boyfriend or fiancé for the resolution of a pregnancy of a girlfriend or fiancée.”¹⁷⁵

In a concurring and dissenting opinion, Board Member Filppu criticized the majority’s lack of analysis of the statutory text and the majority’s reliance on the “construct of family entity persecution” in reaching its decision.¹⁷⁶ He argued that, by interpreting the statute “in light of the overall purpose” of the amendment, the majority “never explain[ed] . . . how [that] text is actually ambiguous on the question of covering married couples, as opposed to all couples or just individuals.”¹⁷⁷ Board Member Filppu also rejected the contention mentioned in Board Member Pauley’s concurrence that the majority ruling should be upheld because of *stare decisis*.¹⁷⁸ *Stare decisis*, Board Member Filppu argued, was “an insufficient basis for defending our rule as against the law enacted by Congress, and conforming to that law is surely a sound reason for departing from past precedent.”¹⁷⁹

Despite Board Member Filppu’s arguments, the Third Circuit’s decision in *Chen v. Attorney General of the United States* further established the principle that one spouse can impute a forced abortion or sterilization to the other spouse.¹⁸⁰

While the majority in *C—Y—Z—* arrived at its holding by focusing on the clear intent of Congress, the majority in *S—L—L—* reaffirmed the *C—Y—Z—*’s holding using a broader analysis to include considerations of the couple’s shared, protected characteristics.¹⁸¹ Despite the BIA’s unambiguous interpretation of the CPC Refugee definition, the circuit courts have struggled to determine who is eligible for asylum under this new legislation.

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* at *19.

¹⁷⁶ *In re S—L—L—*, 24 I. & N. Dec. 1, 2006 BIA LEXIS 21 at *44 (Filppu, B.M., concurring and dissenting).

¹⁷⁷ *Id.* at *36.

¹⁷⁸ *Id.* at *49–50.

¹⁷⁹ *Id.* at 50.

¹⁸⁰ *Chen v. Att’y Gen.*, 491 F.3d 100 (3d Cir. 2007).

¹⁸¹ *In re C—Y—Z—*, 21 I. & N. Dec. 915, 917 (BIA 1997); *In re S—L—L—*, 24 I. & N. Dec. 1, 2006 BIA LEXIS 21, at *1 (BIA Sept. 19, 2006).

IV. INTERPRETATIONS OF THE CPC REFUGEE DEFINITION IN THE CIRCUIT COURTS

Several circuits have adopted, and in some cases, even extended the BIA's interpretation of the CPC Refugee definition.¹⁸² The Ninth Circuit in *He v. Ashcroft* upheld the BIA's interpretation as reasonable,¹⁸³ and in *Ma v. Ashcroft*, it extended asylum to spouses in illegal marriages, such as those who marry in traditional ceremonies not recognized by the applicant's government.¹⁸⁴ In *Zhang v. Gonzales*, the Seventh Circuit also expanded its interpretation of the scope of asylum protection under the CPC Refugee definition to former spouses.¹⁸⁵ Finally, the Third Circuit in *Chen v. Attorney General of the United States* upheld the BIA's interpretation of the statute, granting *per se* asylum eligibility to a spouse of a victim directly persecuted through CPC policies.¹⁸⁶

A. *He v. Ashcroft*

The Ninth Circuit case *He v. Ashcroft* involved a petitioner requesting asylum on the basis of his wife's past persecution from involuntary sterilization.¹⁸⁷ Initially, the BIA found that the petitioner, Mr. He, was not credible, and declined to find persecution by the Chinese government against Mr. He when it subjected his wife to involuntary sterilization.¹⁸⁸ On appeal, the Ninth Circuit reversed, finding Mr. He eligible for asylum adopting the holding of *C—Y—Z—* that "the forced sterilization of one spouse . . . is an act of persecution against the other spouse."¹⁸⁹ The court explained that, if on remand the BIA accepted Mr. He's claims as true, then Mr. He would necessarily be eligible for asylum under the BIA's interpretation of the CPC Refugee definition.¹⁹⁰

B. *Ma v. Ashcroft*

After *He v. Ashcroft* upheld the BIA's interpretation of the CPC Refugee definition, *Ma v. Ashcroft* extended the application of the definition. In *Ma v. Ashcroft*, the Ninth Circuit addressed whether the

¹⁸² *Chen v. Att'y Gen.*, 491 F.3d 100 (3d Cir. 2007); *Zhang v. Gonzales*, 434 F.3d 993 (7th Cir. 2006); *Ma v. Ashcroft*, 361 F.3d 553 (9th Cir. 2004); *He v. Ashcroft*, 328 F.3d 593 (9th Cir. 2003).

¹⁸³ *He v. Ashcroft*, 328 F.3d 593, 605 (9th Cir. 2003).

¹⁸⁴ *Ma v. Ashcroft*, 361 F.3d 553, 561 (9th Cir. 2004).

¹⁸⁵ *Zhang v. Gonzales*, 434 F.3d 993, 1001 (7th Cir. 2006).

¹⁸⁶ *Chen v. Att'y Gen. of the United States*, 491 F.3d 100, 108 (3d Cir. 2007).

¹⁸⁷ *He*, 328 F.3d at 593.

¹⁸⁸ *Id.* at 594.

¹⁸⁹ *Id.* at 604 (quoting *In re C—Y—Z—*, 21 I. & N. Dec. 915, 919–20 (BIA 1997)).

¹⁹⁰ *He*, 328 F.3d at 604.

court should deny *per se* asylum eligibility to husbands within marriages not sanctioned by the Chinese government.¹⁹¹ The court acknowledged that the BIA's rule restricted relief to legally registered spouses; however, the *Ma* court extended relief to Ma's husband even though their marriage was "underage" and could not be "legally registered."¹⁹²

The Ninth Circuit justified its deviation from the BIA's interpretation by stating that the "[a]pplication of the BIA's rule would result in the separation of a husband and wife, the break-up of a family, a result that is at odds not only with the provision at issue here, but also with significant parts of our overall immigration policy."¹⁹³ Accordingly, the court of appeals held that the CPC Refugee definition protected husbands in government-sanctioned marriages, as well as those marriages the government disapproved of, "but for China's coercive family planning policies."¹⁹⁴ Because the prohibition of "underage" marriages is essential to the success of CPC policies and the reduction of child-bearing in China, the court held that limiting asylum to exclude spouses of underage marriages would conflict with the policies and purposes of the amendment.¹⁹⁵

C. *Zhang v. Gonzales*

While the Ninth Circuit held extended refugee status to spouses of CPC victims in underage marriages, the Seventh Circuit faced the question of whether CPC Refugee status could be applied to former spouses of the CPC victims. In the Seventh Circuit case *Zhang v. Gonzales*, Mr. Zhang, a native of China, claimed the government forced his wife to have an abortion when he and his wife had not yet attained the legal marrying age in China.¹⁹⁶ Because his wife was undoubtedly a direct victim of China's CPC policies, the court found that "Zhang was a victim as well."¹⁹⁷ Therefore, the court held that the forced abortion deprived Zhang not only of his unborn child, but also his ability to parent that unborn child, a loss that the subsequent break-up of the marriage could not lessen.¹⁹⁸

The Seventh Circuit noted that the BIA and other courts have rejected arguments that a spouse whose wife was a victim of forced

¹⁹¹ *Ma v. Ashcroft*, 361 F.3d 553, 559 (9th Cir. 2004).

¹⁹² *Id.* at 561.

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ *Id.* at 560.

¹⁹⁶ *Zhang v. Gonzales*, 434 F.3d 993, 995 (7th Cir. 2006).

¹⁹⁷ *Id.* at 1001.

¹⁹⁸ *Id.*

sterilization “had no fear of future persecution because her involuntary sterilization removed any threat of future sterilization or forcible abortions.”¹⁹⁹ The court of appeals cited to *Qu v. Gonzales*, a Ninth Circuit case that asserted, “the act of forced sterilization is not a discrete act, but rather a permanent and continuous form of persecution that deprives the couple of the child or children who might have eventually been born to them.”²⁰⁰ The *Zhang* decision received further support from the BIA’s holding in *Y—T—L—* that “persons who have suffered involuntary sterilization have a well-founded fear of future persecution because they will be persecuted for the remainder of their lives due to that sterilization.”²⁰¹

D. *Chen v. Attorney General of the United States*

Since the enactment of the CPC Refugee amendment, the Ninth and Seventh Circuits have extended the BIA’s interpretation of the CPC definition. Markedly, the Third Circuit recently upheld the BIA’s interpretation over a vigorous dissent. In *Chen v. Attorney General of the United States*, the court upheld that the BIA’s interpretation of the CPC Refugee definition permitting one spouse to impute the forced abortion or involuntary sterilization to the other spouse to be reasonable and applicable to claims based on “persecution [that] lies exclusively in the future.”²⁰²

The court based this conclusion on the considerations of loss of reproductive opportunities by the couple, the sympathetic harm experienced by the husband, and China’s punishment of the married couple for violations of the “one-child” policy.²⁰³ The Third Circuit also noted that the legislative history behind the CPC Refugee definition “does not run counter” to *Chen*’s holding and that Congress has suggested a desire to expand relief to spouses.²⁰⁴

Judge McKee, concurring in part and dissenting in part, suggested that because Congress did not include the word “spouse” in the statute, therefore the majority was prohibited from extending the language to include spouses.²⁰⁵ According to Judge McKee, the court erred in looking beyond the current language of the CPC Refugee definition in deciding

¹⁹⁹ *Id.* (citing *Qu v. Gonzales*, 399 F.3d 1195 (9th Cir. 2004) and *In re Y—T—L—*, 23 I. & N. Dec. 601 (BIA 2003)).

²⁰⁰ *Zhang*, 434 F.3d at 1001–02 (citing *Qu*, 399 F.3d at 1202).

²⁰¹ *Zhang*, 434 F.3d at 1002 (citing *Y—T—L—*, 23 I. & N. Dec. at 607).

²⁰² *Chen v. Att’y Gen.*, 491 F.3d 100, 108–09 (3d Cir. 2007).

²⁰³ *Id.* at 108.

²⁰⁴ *Id.*

²⁰⁵ *Chen*, 491 F.3d at 113 (McKee, J., concurring in part and dissenting in part).

the case.²⁰⁶ He added that the Board had no more expertise on “notion of the marital relationship” than it did on “parenting, matters of religion, or the proper temperature for cooking leg of lamb.”²⁰⁷ Therefore, Judge McKee was unwilling to defer to the BIA’s interpretations of procreation and marriage.²⁰⁸

Because the individuals seeking asylum based on persecution under the “one-child” policy are in different types of personal relationships with the CPC victim, the circuit courts have struggled to interpret who is eligible for asylum under the Immigration and Nationality Act, as amended by the CPC Refugee definition.²⁰⁹ Despite the differences in marital status in each of the cases discussed above, the courts either adopted or extended the BIA’s interpretation of the CPC Refugee definition because such an interpretation furthered the purposes of the amendment to protect those whose human rights have been violated by CPC policies.²¹⁰ However, the Second Circuit’s subsequent decision in *Lin v. United States Department of Justice* reached a contradictory conclusion.

V. LIN V. UNITED STATES DEPARTMENT OF JUSTICE

In contrast to the holdings of the cases mentioned above, in *Lin v. United States Department of Justice*, the Second Circuit overlooked the BIA’s interpretation of the CPC Refugee definition.²¹¹ The court held that the provision did not grant automatic refugee status to spouses of individuals subjected to an involuntary abortion or sterilization.²¹² The Second Circuit acknowledged that, in the past, the court had followed the BIA’s holding in *C—Y—Z—*, but explained that for the *Lin* holding, “[t]o the extent that deference implicit in these cases can be read to say that deference is due, they are overruled.”²¹³

²⁰⁶ *Id.* at 114.

²⁰⁷ *Id.* at 116.

²⁰⁸ *Id.*

²⁰⁹ Immigration and Nationality Act § 101(a)(42), 8 U.S.C. § 1101(a)(42) (2006), as amended by the Illegal Immigrant Reform and Immigrant Responsibility Act of 1996 (“IIRIRA”), Division C, Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104–208, § 601(a)(1), 110 Stat. 3009, 3009–689.

²¹⁰ *In re S—L—L—*, 24 I. & N. Dec. 1, 2006 BIA LEXIS 21, at *11 (BIA Sept. 19, 2006); See Coercive Population Control in China: Hearings Before the Subcomm. On Int’l Operations & Human Rights of the House Comm. On Int’l Relations, 104th Cong (1995); *Ma v. Ashcroft*, 361 F.3d 553, 559 (9th Cir. 2004) (stating that “Congress’s goal in passing the amendments [was] to provide relief for ‘couples’ persecuted on account of an ‘unauthorized’ pregnancy and to keep families together.” (citing H.R. REP. NO. 104—469(I), at 174 (1996))).

²¹¹ *Lin v. Dep’t of Justice*, 494 F.3d 296 (2d Cir. 2007).

²¹² *Lin*, 494 F.3d at 300.

²¹³ *Id.* at 305.

In *S—L—L—*, the BIA had observed that there was “no clear or obvious answer to the scope of the protections afforded by the amendment to partners of persons forced to submit to an abortion or sterilization.”²¹⁴ However, the Second Circuit applied the *Chevron* test and disagreed with the BIA to find that Congress had spoken unambiguously.²¹⁵

The *Lin* court focused on the plain language of the statute, which refers to “a person” rather than “a couple.”²¹⁶ The court noted that “[n]othing in the general definition of refugee would permit ‘any person’ who has *not personally* experienced persecution or a well founded fear of future persecution on a protected ground to obtain asylum, as the BIA’s *per se* rule would permit.”²¹⁷ The court added that “[i]f this conclusion is inconsistent with Congress’s intentions, it can, if it so chooses, of course, amend the statute”²¹⁸

However, the court did not articulate *why* a husband whose wife had a forced abortion or sterilization is not personally subject to persecution in the form of infringement on his reproductive rights, emotional and sympathetic suffering, and his exposure to punishment for violations of the “one-child” policy. In holding the statute unambiguous, the Second Circuit found no need to consider its legislative history;²¹⁹ however, the court proceeded to examine the legislative history to find further support that its holding comported with the Congressional intent behind the amendment.²²⁰ Nonetheless, the court misinterpreted the legislative history of the statute.²²¹ In *C—Y—Z—*,²²² the BIA first announced the rule that one spouse could attain *per se* refugee status based on past persecution by coerced abortion or sterilization of the other spouse. Because the BIA’s decision in *S—L—L—*²²³ reaffirmed *C—Y—Z—*, the Second Circuit in *Lin* saw “no reason to remand yet again—ping

²¹⁴ *In re S—L—L—*, 24 I. & N. Dec. 1 2006 BIA LEXIS 21, at *8 (BIA Sept. 19, 2006).

²¹⁵ *Lin*, 494 F.3d at 304–05.

²¹⁶ *Id.* at 305.

²¹⁷ *Id.* at 306.

²¹⁸ *Id.* at 309 n.10.

²¹⁹ *Id.* at 310.

²²⁰ *Id.* The court found that the Congress did not intend to extend relief to those who were not subjected to persecution themselves. *Lin*, 494 F.3d, at 310–11. In arriving at this conclusion, the court relied on a House of Representatives report which did not explicitly mention spouses of forced abortion or sterilization victims. *Id.* (citing H.R. REP. NO. 104–469(I), at 173–74 (1996)).

²²¹ *See id.*

²²² *In re C—Y—Z—*, 21 I. & N. Dec. 915 (BIA 1997).

²²³ *In re S—L—L—*, 24 I. & N. Dec. 1, 2006 BIA LEXIS 21, at *15–21 (BIA Sept. 19, 2006).

pong style—when the BIA has had ten years and several opportunities to reconsider a rule that has no basis in statutory text.”²²⁴

Judge Katzman’s concurring opinion noted that “the majority has gone out of its way to create a circuit split where none need exist . . . thereby frustrating the BIA’s uniform enforcement of a national immigration policy.”²²⁵ The judge also suggested that the majority should have examined the context and “the entirety of [the Immigration and Nationality Act] 8 U.S.C. § 1101(a)(42) to determine whether the statute is ambiguous.”²²⁶ Instead, Judge Katzman accused the majority of finding “in silence clear evidence of Congress’s intent.”²²⁷ He further added that Congress had done nothing to foreclose automatic extension of relief to spouses “since the amendment’s enactment, notwithstanding that the BIA interpreted § 1101(a)(42) to cover spouses *a decade ago* and numerous courts of appeals have upheld this interpretation as reasonable.”²²⁸

In a concurring opinion, Judge Sotomayor argued that the question reached by the majority was unnecessary to resolve.²²⁹ She also noted that in the immigration context “judicial deference to the Executive Branch is especially appropriate.”²³⁰ Judge Sotomayor added that the majority had “started a domino effect that may have significant and unforeseen repercussions” in failing to accord such deference.²³¹

Judge Calabresi, in his dissent, also stressed a fear of repercussions, explaining that “70-80 percent of the [petitioners in our court] are Chinese seeking asylum to escape their homeland’s family planning policies.”²³² Judge Calabresi added that “the majority opinion keeps the

²²⁴ *Lin v. Dep’t of Justice*, 494 F.3d 296, 313 n.15 (2d Cir. 2007).

²²⁵ *Lin*, 494 F.3d at 316 (Katzman, J., concurring), (“[I]t would be unsound for each of the several Courts of Appeals to elaborate a potentially nonuniform body of law’ and describing uniformity as ‘especially desirable in cases such as these.’” *Lin*, 494 F.3d at 316 (citing *Jian Hui Shao v. BIA*, 465 F.3d 497, 502 (2d Cir. 2006))).

²²⁶ *Lin*, 494 F.3d at 317–18 (Katzman, J., concurring).

²²⁷ *Id.* at 319 n.7.

²²⁸ *Id.* at 323. *See, e.g.*, *Zhang v. Gonzales*, 434 F.3d 993, 999 (7th Cir. 2006); *Yuan v. Dep’t of Justice*, 416 F.3d 192, 197 (2d Cir. 2005) (noting the Second Circuit followed the lead of the BIA, “affording the INS the typical deference it deserves when interpreting its own regulations”); *Ma v. Ashcroft*, 361 F.3d 553, 559 (9th Cir. 2004) (“The BIA and the courts have uniformly applied that statute’s protections to husbands whose wives have undergone abortions or sterilization procedures, as well as to the wives themselves.”) (citations omitted).

²²⁹ *Lin*, 494 F.3d at 334 (Sotomayor, J., concurring).

²³⁰ *Id.* (citing *INS v. Aguirre-Aguirre*, 526 U.S. 415, 425 (1999) (quoting *INS v. Abudu*, 485 U.S. 94, 110 (1988))).

²³¹ *Lin*, 494 F.3d at 334.

²³² *Lin*, 494 F.3d at 338 (Calabresi, J., dissenting in part) (citing *BIA Appeals Remain High in 2nd and 9th Circuits*, The Third Branch: Newsletter of the Fed. Cts. (Admin. Office of the U.S. Cts. Office of Pub. Affairs, D.C.), Feb. 2005, available at

agency from doing what administrative agencies do best, namely, using their expertise to covert general statutes into specific rules that best reflect an underlying legislative intent.”²³³ He warned, “[i]t is not proper for appellate courts to speak for the BIA . . . before the agency has had a full and focused opportunity to make its position clear.”²³⁴

By failing to adhere to the BIA’s interpretation of the CPC Refugee definition as other circuit courts had done, the Second Circuit’s decision in *Lin* court created a circuit split.²³⁵ This lack of uniform interpretation is undesirable as it undermines uniform national immigration policy²³⁶ and contradicts family reunification goals.²³⁷ With every passing day, the Second Circuit’s decision tears more families apart because derivative asylum is an unavailable remedy.²³⁸ Consequently, the Supreme Court should address *Lin*’s holding and interpret the CPC Refugee definition in favor of the BIA’s interpretation, or Congress should overturn *Lin* by amending the CPC Refugee definition to explicitly include the words “spouse” or “couple.”

VI. THE *LIN* DECISION SHOULD BE OVERTURNED

As a result of the *Lin* decision, families victimized by CPC are being separated²³⁹ and there has been a surge in the number of appeals before the BIA from those applicants in the Second Circuit.²⁴⁰ If the

<http://www.uscourts.gov/ttb/feb05ttb/bia/index.html> (citing statement of Elizabeth Cronin)).

²³³ *Lin*, 494 F.3d at 338–39 (Calabresi, J., dissenting in part).

²³⁴ *Id.* at 343 n.6.

²³⁵ *Lin*, 494 F.3d at 300 n.4. Regarding section 601(a), a number of circuits have given deference to the BIA’s interpretation. *See, e.g.*, Sun Wen Chen v. Att’y Gen., 491 F.3d 100 (3d Cir. 2007); Zhang v. Gonzales, 434 F.3d 993, 1001 (7th Cir. 2006); Huang v. Ashcroft, 113 Fed. App’x 695, 700 (6th Cir. 2004) (unpublished opinion); Li v. Ashcroft, 82 Fed. App’x 357, 358 (5th Cir. 2003) (unpublished per curiam opinion); He v. Ashcroft, 328 F.3d 593, 604 (9th Cir. 2003).

²³⁶ *Lin*, 494 F.3d at 316 (Katzman, J., concurring).

²³⁷ *In re S—L—L—*, 24 I. & N. Dec. 1, 2006 BIA LEXIS 21, at *11 (BIA Sept. 19, 2006) (*see* Coercive Population Control in China: Hearings Before the Subcomm. On Int’l Operations & Human Rights of the House Comm. On Int’l Relations, 104th Cong (1995); *see also*, Ma v. Ashcroft, 361 F.3d 553, 559 (9th Cir. 2004) (stating that “Congress’s goal in passing the amendments [was] to provide relief for ‘couples’ persecuted on account of an ‘unauthorized’ pregnancy and to keep families together.” (citing H.R. REP. NO. 104—469(I), at 174 (1996))).

²³⁸ *See* cases cited, *supra* note 42.

²³⁹ Ma v. Ashcroft, 361 F.3d 553, 561 (9th Cir. 2004).

²⁴⁰ *See Lin*, 494 F.3d at 338 (Calabresi, J., dissenting in part) (citing *BIA Appeals Remain High in 2nd and 9th Circuits*, The Third Branch: Newsletter of the Fed. Cts. (Admin. Office of the U.S. Cts. Office of Pub. Affairs, D.C.), Feb. 2005, *available at* <http://www.uscourts.gov/ttb/feb05ttb/bia/index.html> (citing statement of Elizabeth Cronin)).

Supreme Court assumes the issue presented by *Lin*, it must take into account a number of considerations. The erroneous interpretation of the CPC Refugee definition by the *Lin* court could have been avoided by correctly applying *Chevron* deference to the BIA's interpretation of the CPC Refugee definition. Additionally, this interpretation is reasonable, given that the purpose of the CPC Refugee definition is to protect those whose human rights have been violated.²⁴¹ Here, the rights of both members in the couple have been violated and are deserving of asylum protection. Such interpretation is also supported by the statute's legislative history.²⁴² Moreover, applying the BIA's interpretation of the CPC Refugee definition provides an additional basis of asylum for spouses of CPC victims that is not foreclosed by the availability of derivative asylum.²⁴³

Alternatively, Congress should effectively overturn *Lin* by amending the CPC Refugee definition. Because the Chinese government imposes responsibility on both the husband and wife to comply with the "one-child" policy,²⁴⁴ the CPC Refugee definition must accordingly protect both members of the couple. Congress should also confront the *Lin* decision because it undermines family reunification—"one of the principal goals" of established refugee doctrine and U.S. immigration policy.²⁴⁵ Amending the statute to explicitly include spouses of CPC victims would promote certainty in the application of refugee law²⁴⁶ and ensure uniformity among the circuit courts. Either the Supreme Court or Congress should exercise respective powers to ensure that the CPC Refugee definition is properly extended to spouses of CPC victims.

A. The Lin Court Failed to Properly Apply BIA Deference

As an administrative agency with expertise in immigration matters, the BIA's statutory interpretations are entitled to *Chevron* deference. The

²⁴¹ *In re S—L—L—*, 24 I. & N. Dec. 1, 2006 BIA LEXIS 21, at *11 (BIA 2006). See Coercive Population Control in China: Hearings Before the Subcomm. on Int'l Operations & Human Rights of the House Comm. on Int'l Relations, 104th Cong (1995); *Ma v. Ashcroft*, 361 F.3d 553, 559 (9th Cir. 2004) (stating that "Congress's goal in passing the amendments [was] to provide relief for 'couples' persecuted on account of an 'unauthorized' pregnancy and to keep families together." (citing H.R. REP. NO. 104—469(1), at 174 (1996))).

²⁴² *In re S—L—L—*, 24 I. & N. Dec. 1, 2006 BIA LEXIS 21, at *16.

²⁴³ *Lin*, 494 F.3d at 325 (Katzman, J., concurring); see also *Chen*, 491 F.3d at 107 ("We . . . do not believe that the existence of derivative asylum status under a statute implies that Congress intended to foreclose additional pathways to asylum specific to spouses.").

²⁴⁴ XIAN FA [Constitution] art. 49 (1982) (P.R.C.).

²⁴⁵ See cases cited, *supra* note 28.

²⁴⁶ See *Lin*, 494 F.3d at 316 (Katzman, J., concurring).

Chevron doctrine specifically grants agency interpretations of Congressional statutes higher deference.²⁴⁷ Sister circuits that find the CPC Refugee definition ambiguous have addressed the second inquiry in *Chevron* to conclude that the BIA's interpretation is reasonable.²⁴⁸ The BIA itself noted that "[t]he interpretive lines, no matter where drawn, will be vulnerable to criticism"²⁴⁹

On the other hand, the Second Circuit found the statutory language to be unambiguous.²⁵⁰ The court reasoned that, because the statute only mentioned a "person" and not a "spouse" or "couple," therefore asylum did not extend beyond the female victim of persecution.²⁵¹ The *Lin* court erred in failing to recognize the CPC Refugee definition as ambiguous, which would warrant deference to the BIA's interpretation under the *Chevron* analysis.²⁵² The CPC Refugee definition "contains an ambiguity that the BIA is empowered to fill"²⁵³ and was enacted to expand the availability of asylum relief.²⁵⁴ Because of this error, the court never embarked on the second inquiry in *Chevron*²⁵⁵ to determine whether the BIA's interpretation constituted "a permissible construction of the statute."²⁵⁶ By mistakenly concluding that the CPC Refugee definition was unambiguous, the Second Circuit failed to give proper deference to the BIA's interpretation of the CPC Refugee definition.²⁵⁷ The *Lin* holding has thus frustrated the BIA's efforts to achieve uniformity in U.S. national immigration policy.²⁵⁸

The BIA's interpretation of the CPC Refugee definition was most recently upheld by the courts as reasonable in *Chen*, when the Third Circuit extended CPC Refugee status to spouses of individuals directly persecuted under CPC policies.²⁵⁹ The BIA has addressed whether the text of the CPC Refugee definition is clear or ambiguous "in light of the

²⁴⁷ *Chevron*, 467 U.S. at 837.

²⁴⁸ See, e.g., *Zhang v. Gonzales*, 434 F.3d 993, 1001 (7th Cir. 2006); *Huang v. Ashcroft*, 113 Fed. App'x 695, 700 (6th Cir. 2004) (unpublished opinion); *Li v. Ashcroft*, 82 Fed. App'x 357, 358 (5th Cir. 2003) (unpublished per curiam opinion); *He v. Ashcroft*, 328 F.3d 593, 604 (9th Cir. 2003).

²⁴⁹ *In re S—L—L—*, 24 I. & N. Dec. 1, 2006 BIA LEXIS 21, at *8 (BIA Sept. 19, 2006).

²⁵⁰ *Lin*, 494 F.3d at 304.

²⁵¹ *Id.* at 305.

²⁵² *Lin v. Dep't of Justice*, 494 F.3d 296, 304 (2d Cir. 2007).

²⁵³ *Chen v. Att'y Gen.*, 491 F.3d 100, 105 (3d Cir. 2007).

²⁵⁴ *Lin*, 494 F.3d at 307 n.8.

²⁵⁵ See *id.*

²⁵⁶ *Id.* (citing *Chevron*, 467 U.S. at 843).

²⁵⁷ *Lin*, 494 F.3d at 327–29 (2d Cir. 2007) (Sotomayer, J., concurring).

²⁵⁸ *Lin*, 494 F.3d at 316 (Katzman, J., concurring).

²⁵⁹ *Chen v. Att'y Gen.*, 491 F.3d 100, 108 (3d Cir. 2007).

overall purpose” of the coercive population control amendment.²⁶⁰ In addition, “the lack of such a reference” to spouses in the text of the CPC Refugee definition amendment, “however, does not necessarily preclude an applicant from demonstrating past persecution based on harm inflicted on a spouse when both spouses are harmed by government acts motivated by a couple’s shared protected characteristic.”²⁶¹

In *Chen*, the Third Circuit recognized that persecution of one spouse “will directly affect the reproductive opportunities of the other spouse,” and thereby concluded that the BIA’s interpretation was reasonable.²⁶² The BIA acknowledged that the CPC amendment does not explicitly address spouses, but based on the Board’s notion of the marital relationship and knowledge of China’s one-child policy, the BIA concluded “that the scope of this particular type of persecution extend[ed] to both spouses.”²⁶³ The BIA has employed its gap-filling authority in a reasonable manner.²⁶⁴ Its interpretation is particularly reasonable when viewed in the context of the distinct purpose of the CPC Refugee amendment to protect individuals whose human rights have been violated through CPC policies.²⁶⁵ When enforcement of CPC policies against a married couple results in an infringement on the couple’s reproductive opportunities,²⁶⁶ it is reasonable to conclude that the husband’s human rights have been violated and deserve the protection the CPC Refugee definition is meant to provide.

The legislative history of the Immigration and Nationality Act and the CPC Refugee definition also supports the BIA’s interpretation.²⁶⁷ Congress enacted the CPC Refugee definition to provide an expansion of asylum relief to people suffering violations of fundamental human rights through governmental applications of CPC policies.²⁶⁸ Congress’s

²⁶⁰ *In re S—L—L—*, 24 I. & N. Dec. 1, 2006 BIA LEXIS 21, at *18.

²⁶¹ *Id.* at *10.

²⁶² *Chen*, 491 F.3d at 108.

²⁶³ *Id.* at 107 (citing *In re S—L—L—*, 24 I. & N. Dec. 1, 7 (BIA 2006)).

²⁶⁴ *Chen*, 491 F.3d at 108.

²⁶⁵ *In re S—L—L—*, 24 I. & N. Dec. 1, 2006 BIA LEXIS 21, at *11 (BIA 2006). *See* Coercive Population Control in China: Hearings Before the Subcomm. On Int’l Operations & Human Rights of the House Comm. On Int’l Relations, 104th Cong (1995); *Ma v. Ashcroft*, 361 F.3d 553, 559 (9th Cir. 2004) (stating that “Congress’s goal in passing the amendments [was] to provide relief for ‘couples’ persecuted on account of an ‘unauthorized’ pregnancy and to keep families together.” (citing H.R. REP. NO. 104—469(1), at 174 (1996))).

²⁶⁶ *In re S—L—L—*, 24 I. & N. Dec. 1, 2006 BIA LEXIS 21, at *16.

²⁶⁷ *Id.*

²⁶⁸ *Lin v. Dep’t of Justice*, 494 F.3d 296, 318–21 (2d Cir. 2007) (Katzman, J., concurring) (referencing the House Committee Report regarding section 601 which explained that “Congress’s ‘primary intent’ in amending the definition of refugee was ‘to

intention to expand relief is also evidenced by the repeal of the 1,000 annual cap of asylum grants.²⁶⁹ In light of this Congressional intent, the BIA is correct in interpreting the statutory language within context, and the *Lin* court should not have rejected such a reasonable interpretation.

Courts including the Third and Ninth Circuits have explicitly concluded that Congress's intention in enacting the 1996 amendment was to protect both members of a couple.²⁷⁰ In particular, the *Ma* case emphasized the need to keep families together.²⁷¹ Over ten years ago in *C—Y—Z—*, the BIA interpreted the CPC Refugee definition to acknowledge these principles, and numerous courts of appeals have since upheld the BIA's interpretation as reasonable.²⁷² Under these circumstances, "judicial deference to the Executive Branch is especially appropriate."²⁷³

Moreover, the BIA's interpretation of the CPC Refugee definition to afford relief to spouses of individuals who were directly persecuted under CPC policies comports with the derivative asylum statute, because the BIA is able to provide an additional basis for asylum relief to spouses.²⁷⁴ Although the majority in *Lin* claimed that providing *per se* eligibility to spouses would conflict with the derivative asylum status granted under section 1158,²⁷⁵ the availability of derivative asylum relief does not necessarily preclude the BIA "from providing an additional

overturn several decisions of the [BIA], principally *Matter of Chang* and *Matter of G—*. . ."²⁶⁹ *Id.* at 320. (citing H.R. REP. NO. 104-469, pt. I, at 173 (1996)).

²⁶⁹ REAL ID Act of 2005, Div. B of Pub. L. No. 109-13, § 101(g)(2), 119 Stat. 231, 305 (2005) (repealing former section 207(a)(5) of the Act, 8 U.S.C. § 1157(a)(5) (2000)).

²⁷⁰ *Ma v. Ashcroft*, 361 F.3d 553, 561 (9th Cir. 2004); *Chen v. Att'y Gen.*, 491 F.3d 100, 108 (3d Cir. 2007).

²⁷¹ *Ma*, 361 F.3d at 561.

²⁷² *Lin*, 494 F.3d at 323 (Katzman, J., concurring); *see, e.g., Zhang v. Gonzales*, 434 F.3d 993, 999 (7th Cir. 2006); *Yuan v. Dep't of Justice*, 416 F.3d 192, 197 (2d Cir. 2005) (noting that the Second Circuit followed the lead of the BIA, "affording the INS the typical deference it deserves when interpreting its own regulations.") *Id.* (citations omitted); *Ma*, 361 F.3d at 559 (9th Cir. 2004) ("The BIA and the courts have uniformly applied that statute's protections to husbands whose wives have undergone abortions or sterilization procedures, as well as to the wives themselves.") *Id.* (citations omitted).

²⁷³ *Lin*, 494 F.3d at 334 (Sotomayer, J., concurring) ("[T]he majority should never have reached the question it has taken upon itself to resolve, particularly in the immigration context where the Supreme Court has long recognized 'that judicial deference to the Executive Branch is especially appropriate . . . where officials 'exercise especially sensitive political functions that implicate questions of foreign relations.'" *Id.* (citing *INS v. Aguirre-Aguirre*, 526 U.S. 415, 425 (1999) (quoting *INS v. Abudu*, 485 U.S. 94, 110 (1988)).

²⁷⁴ *Chen*, 491 F.3d at 107.

²⁷⁴ *Id.*

²⁷⁵ *Lin*, 494 F.3d at 312.

basis of relief.”²⁷⁶ As Judge Katzman’s concurrence in *Lin* recognizes, the derivative asylum statute does not prevent the BIA from extending CPC refugee status under the 1996 amendment.²⁷⁷ There is clearly no tension between these two distinct forms of relief.²⁷⁸

In addition, derivative asylum may not be an adequate remedy in many types of cases, such as those situations where marriages have ended in death or divorce.²⁷⁹ In other instances, the spouse may precede his family to the U.S. for economic and other social reasons,²⁸⁰ but under the *Lin* rule, that same spouse would not be eligible for asylum derivatively if the spouse claiming protection under the CPC Refugee definition is still in the home country. While these spouses are arguably eligible under the derivative asylum statute, the BIA’s interpretation of the CPC Refugee definition would allow such spouse to have an independent basis for asylum when derivative asylum proves to be an unavailable remedy.²⁸¹ In an ideal world, the entire family could then emigrate at the same time; however, economic and social realities make that situation rare.

If the Supreme Court was to address this issue, the Court should heed these considerations. When applying *Chevron* deference to BIA decisions, the Court should find that the CPC Refugee definition is ambiguous to begin the second inquiry of the analysis—whether such interpretation constitutes “a permissible construction of the statute.”²⁸² The Court should also find that the BIA’s interpretation is reasonable give the purposes and legislative history of the CPC Refugee definition. Finally, the Court should acknowledge that providing an additional form of relief to spouses of CPC victims is encouraged and not foreclosed simply through the availability of derivative asylum.²⁸³ Alternatively, if

²⁷⁶ *Id.* at 325 (Katzman, J., concurring); *See Chen*, 491 F.3d at 107 (“We . . . do not believe that the existence of derivative asylum status under a statute implies that Congress intended to foreclose additional pathways to asylum specific to spouses.”).

²⁷⁷ *Id.*

²⁷⁸ *Id.*

²⁷⁹ *In re S—L—L—*, 24 I. & N. Dec. 1, 2006 BIA LEXIS 21, at *41 (Filppu, B.M., concurring and dissenting).

²⁸⁰ Millions of immigrants follow the practice of the husband entering the U.S. before his wife: “The men come first; the husband and father forges the way for the wife and children, who follow when he has established a place to live and a means to support them.” *In re C—Y—Z—*, 21 I. & N. Dec. 915, 927 (BIA 1997) (Rosenberg, B.M., concurring).

²⁸¹ *See Chen v. Att’y Gen.*, 491 F.3d 100, 105 (3d Cir. 2007).

²⁸² *Lin v. Dep’t of Justice*, 494 F.3d 296, 307 (2d Cir. 2007) (citing *Chevron*, 467 U.S. at 843).

²⁸³ *Id.* at 325 (Katzman, J., concurring); *see also Chen*, 491 F.3d at 107 (“We . . . do not believe that the existence of derivative asylum status under a statute implies that Congress intended to foreclose additional pathways to asylum specific to spouses.”).

the Supreme Court does not address this issue, Congress should effectively overturn the *Lin* decision by amending the CPC Refugee definition to expressly include the words “spouse” or “couple.”

B. The CPC Refugee Definition Should Protect Persecuted Couples Because the Chinese Government Persecutes Both Members for Violations of the One-Child Policy and the U.S. Promotes Family Reunification

China’s “one-child” policy persecutes the married couple as an entity and “deprive[s] the couple of the natural fruits of conjugal life.”²⁸⁴ This policy, as well as the Constitution of the People’s Republic of China, grants both the husband and wife a shared responsibility for decisions relating to having a family.²⁸⁵ Therefore, the government explicitly directs action against both husband and wife.²⁸⁶ A husband of a spouse who has undergone a forced abortion or sterilization “also suffers emotional and sympathetic harm.”²⁸⁷ The husband suffers as a result of his wife’s persecution, so courts should therefore extend automatic asylum eligibility to the husband.²⁸⁸

Furthermore, the *Lin* decision will create a domino effect,²⁸⁹ leading to many negative consequences, including the unnecessary splintering of families when a wife is granted asylum without her husband,²⁹⁰ a spike in the immigration docket,²⁹¹ and a disturbing failure to defer to agency interpretations—a result that could undermine the maintenance of a uniform national immigration policy.²⁹²

The *Lin* court acknowledged that its holding would substantially impact families, but simply suggested that Congress had the power to overturn the judicial precedent.²⁹³ This statement casts serious doubt on the court’s assessment of the statute’s unambiguity. By simply relying on

²⁸⁴ *Chen*, 491 F.3d at 108 (quoting *In re Y—T—L—*, 23 I. & N. Dec. 601, 607 (BIA 2003)).

²⁸⁵ *In re S—L—L—*, 24 I. & N. Dec. 1, 2006 BIA LEXIS 21, at *13 (BIA Sept. 19, 2006).

²⁸⁶ *Id.* at *14.

²⁸⁷ *Id.* at *16.

²⁸⁸ *See Chen*, 491 F.3d at 108.

²⁸⁹ *Lin*, 494 F.3d at 334 (Sotomayer, J., concurring).

²⁹⁰ *Ma v. Ashcroft*, 361 F.3d 553, 561 (9th Cir. 2004).

²⁹¹ *See Lin*, 494 F.3d at 338 (Calabresi, J., dissenting in part) (citing *BIA Appeals Remain High in 2nd and 9th Circuits*, The Third Branch: Newsletter of the Fed. Cts. (Admin. Office of the U.S. Cts. Office of Pub. Affairs, D.C.), Feb. 2005, available at <http://www.uscourts.gov/ttb/feb05ttb/bia/index.html> (citing statement of Elizabeth Cronin)).

²⁹² *Lin*, 494 F.3d at 316 (Katzman, J., concurring); *Lin*, 494 F.3d at 334 (Sotomayer, J., concurring).

²⁹³ *Lin*, 494 F. 3d at 309 n.10.

Congress to eventually amend the statute, the Second Circuit has carelessly disregarded the fate of thousands of asylum seekers and families that are forcibly separated in the interim.²⁹⁴ Husbands of future CPC victims whose cases will be decided under *Lin* will not be able to obtain *per se* refugee status along with their wives, resulting in the separation of families.²⁹⁵ Since 70–80 percent of the appellants in the Second Circuit are Chinese citizens seeking asylum “to escape their homeland’s family planning policies,”²⁹⁶ the *Lin* decision will undoubtedly create “sweeping ramifications” on the court’s immigration law docket.²⁹⁷ Thousands of families will suffer separation in addition to persecution, due to the Second Circuit’s haste in neglecting to follow a workable BIA interpretation that has been in place for over a decade.²⁹⁸

Most importantly, the purpose of the 1996 amendment seeks to provide protection for victims of persecution from China’s coercive family planning policies.²⁹⁹ However, this protection remains incomplete if a victim is afforded asylum without her spouse,³⁰⁰ because the presence of a spouse allows the victim to establish herself more quickly in our society by facilitating the integration process.³⁰¹ As one scholar explained, family reunification is the only way to restore a persecution victim’s dignity.³⁰² The break-up of a family is not only “a result that is at odds with the provision at issue here,” but is also at odds “with significant parts of our overall immigration policy.”³⁰³

²⁹⁴ See generally *Lin*, 494 F.3d at 334 (Sotomayer, J., concurring).

²⁹⁵ *Lin*, 494 F.3d at 300.

²⁹⁶ *Lin*, 494 F.3d at 338 (Calabresi, J., dissenting in part) (citing *BIA Appeals Remain High in 2nd and 9th Circuits*, The Third Branch: Newsletter of the Fed. Cts. (Admin. Office of the U.S. Cts. Office of Pub. Affairs, D.C.), Feb. 2005, available at <http://www.uscourts.gov/ttb/feb05ttb/bia/index.html>. (citing statement of Elizabeth Cronin)).

²⁹⁷ *Id.*

²⁹⁸ *Id.*

²⁹⁹ *In re S—L—L—*, 24 I. & N. Dec. 1, 2006 BIA LEXIS 21, at *11 (BIA Sept. 19, 2006); see *Coercive Population Control in China: Hearings Before the Subcomm. On Int’l Operations & Human Rights of the House Comm. On Int’l Relations, 104th Cong (1995)*; see also *Ma v. Ashcroft*, 361 F.3d 553, 559 (9th Cir. 2004) (stating that “Congress’s goal in passing the amendments [was] to provide relief for ‘couples’ persecuted on account of an ‘unauthorized’ pregnancy and to keep families together.” (citing H.R. REP. NO. 104—469(I), at 174 (1996))).

³⁰⁰ Nessel, *supra* note 126.

³⁰¹ *Id.*

³⁰² Nessel, *supra* note 89.

³⁰³ *Ma v. Ashcroft*, 361 F.3d 553, 561 (9th Cir. 2004); see, e.g., *Perales v. Casillas*, 903 F.2d 1043, 1051 (5th Cir. 1990) (stating that Congress enacted the visa preference provisions to reunite families); *Kaho v. Ilchert*, 765 F.2d 877, 879 n.1 (9th Cir. 1985) (stating that reuniting families is one of the basic objectives of the Immigration and Nationality Act); *Lau v. Kiley*, 563 F.2d 543, 545 (2d Cir. 1977) (recognizing that the Immigration and Nationality Act is designed to reunite families).

The executive branch treats the nuclear family as one unit, “even when temporary immigration status is at issue.”³⁰⁴ Because the courts have recognized the family unit’s crucial societal role and family reunification policy underlies U.S. immigration policy in general,³⁰⁵ the BIA’s interpretation of the statute is reasonable and accords with the overall purpose of the statute. Thus, the Second Circuit in *Lin* erred in determining the statute as unambiguous, and in failing to defer to the BIA’s reasonable interpretation.

Although the three appellants in *Lin* were all unmarried,³⁰⁶ the court unnecessarily proceeded to decide how the CPC Refugee definition applied to legally married spouses,³⁰⁷ and in doing so, created a split among the circuits. Moreover, the Second Circuit also held that the statute did not extend *per se* asylum status to “boyfriends or fiancés of individuals who have been persecuted directly under [CPC] policies.”³⁰⁸ However, the Third Circuit in *Chen* noted that characterizing reliance on marital status in *C—Y—Z—* as arbitrary and capricious would be absurd because benefits and presumptions based on marriage are prevalent in other areas of law.³⁰⁹

The BIA has stated that the marriage requirement “is a practical and manageable approach which takes into account the language and purpose of the statutory definition in light of the general principles of asylum law.”³¹⁰ Hence, the marriage requirement creates certainty and administrative feasibility, which is desirable particularly in immigration law.³¹¹

The Second Circuit in *Lin* was incorrect in refusing to extend automatic refugee status to spouses of individuals persecuted by an involuntary abortion or sterilization. To avoid further damaging applications of the CPC Refugee definition, Congress should amend the statute to explicitly include both members of the couple. Such an amendment would clarify the CPC Refugee definition to guarantee protection to both members of the couple, in tandem with the explicit responsibility the Chinese government places on couples to comply with

³⁰⁴ *Id.*

³⁰⁵ See cases cited, *supra* note 28.

³⁰⁶ *Lin*, 494 F.3d at 299.

³⁰⁷ *Id.* at 300.

³⁰⁸ *Id.* at 314.

³⁰⁹ *In re S—L—L—*, 24 I. & N. Dec. 1, 2006 BIA LEXIS 21, at *21 (BIA Sept. 19, 2006) (citing *Chen v. Att’y Gen.*, 491 F.3d 100, 227 n.6 (3d Cir. 2007)).

³¹⁰ *Id.*

³¹¹ *Lin*, 494 F.3d at 316 (Katzman, J., concurring) (stating that “it would be unsound for each of the several Courts of Appeals to elaborate a potentially nonuniform body of law” and describing uniformity as “especially desirable in cases such as these.”) *Lin*, 494 F.3d at 316 (citing *Jian Hui Shao v. BIA*, 465 F.3d 497, 502 (2d Cir. 2006)).

the “one-child” policy.³¹² Ensuring that the spouse of a CPC victim is afforded protection under the CPC Refugee definition promotes the goals of U.S. family reunification policy³¹³ and ensures judicial certainty in the application of the statute.³¹⁴ Therefore, either the Supreme Court or Congress should assert powers to rectify the Second Circuit’s interpretation of the CPC Refugee definition in *Lin*.

VII. CONCLUSION

The *Lin* decision has frustrated any uniform application of the CPC Refugee definition.³¹⁵ Consequently, the holding will likely impose “sweeping ramifications”³¹⁶ on the immigration law docket. In similar cases, deference to the executive branch is appropriate.³¹⁷ By incorrectly finding the CPC Refugee definition unambiguous, the *Lin* court answered an unnecessary question.³¹⁸ The Second Circuit’s decision is inconsistent with the legislative history of the CPC Refugee definition and fails to offer complete protection to both persecuted members of the couple, who are *equally* responsible for adhering to the “one-child” policy under the Constitution of the People’s Republic of China.³¹⁹

Most importantly, an interpretation of the CPC Refugee definition that includes spouses ensures that families stay together. Granting asylum only to a wife is insufficient without also granting her husband the same protection; a wife cannot achieve the restoration of her dignity nor peace of mind unless her husband is also granted asylum.³²⁰ Furthermore, derivative asylum is not always available to the husband, particularly when the spouse claiming protection under the CPC Refugee definition is still located in the home country.³²¹ This necessitates

³¹² XIAN FA [Constitution] art.49 (1982) (P.R.C.).

³¹³ *In re S—L—L—*, 24 I. & N. Dec. 1, 2006 BIA LEXIS 21, at *11 (BIA Sept. 19, 2006) (see *Coercive Population Control in China: Hearings Before the Subcomm. On Int’l Operations & Human Rights of the House Comm. On Int’l Relations, 104th Cong* (1995); see also *Ma v. Ashcroft*, 361 F.3d 553, 559 (9th Cir. 2004) (stating that “Congress’s goal in passing the amendments [was] to provide relief for ‘couples’ persecuted on account of an ‘unauthorized’ pregnancy and to keep families together.” (citing H.R. REP. NO. 104—469(I), at 174 (1996))).

³¹⁴ *Lin v. Dep’t of Justice*, 494 F.3d 296, 316 (2d Cir. 2007) (Katzman, J., concurring).

³¹⁵ *Id.* at 316 (Katzman, J., concurring).

³¹⁶ *Lin*, 494 F.3d at 338 (Calabresi, J., dissenting in part).

³¹⁷ *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984).

³¹⁸ *Lin*, 494 F.3d at 316 (Katzman, J., concurring).

³¹⁹ XIAN FA [Constitution] art.49 (1982) (P.R.C.).

³²⁰ See Nessel, *supra* note 126.

³²¹ *In re S—L—L—*, 24 I. & N. Dec. 1, 2006 BIA LEXIS 21, at *41 (Filppu, B.M., concurring and dissenting).

automatic asylum for the husband of a CPC victim, to enable him to petition for protection from CPC policies on the basis on his own individual persecution.

Though some criticize the BIA for the deteriorating quality of its work, *C—Y—Z—* and *S—L—L—* signify the Board's strength as an interpretive body when it issues well-reasoned decisions instead of summary affirmances.³²² In light of *C—Y—Z—* and *S—L—L—*, the circuit courts still struggle to apply the BIA's interpretation of *who* is eligible for automatic asylum under the CPC Refugee definition.³²³ Accordingly, the Supreme Court or Congress must act.

The Court must address the interpretation of the CPC Refugee definition or Congress must effectively overturn *Lin* by amending the CPC Refugee definition to explicitly provide relief to both spouses. If the Second Circuit decision is not overturned, or if other circuits adopt its approach, thousands of husbands will be denied their human right to raise a family—a denial in the hands of the circuit courts of appeals. The freedoms, values, and ideals in the United States of America create a refuge for those suffering persecution on a daily basis in their home countries, and by denying a husband of a CPC victim the asylum he deserves, the Second Circuit shattered the basic rights of the family institution that America so vigorously protects.

³²² See *In re C—Y—Z—*, 21 I. & N. Dec. 915 (BIA 1997); *In re S—L—L—*, 24 I. & N. Dec. 1, 2006 BIA LEXIS 21 (BIA Sept. 19, 2006).

³²³ See *Chen v. Att'y Gen.*, 491 F.3d 100 (3d Cir. 2007); *Lin v. Dep't of Justice*, 494 F.3d 296, 299 (2d Cir. 2007).