

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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No. 17-71841  
208-197-645

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DAVID RAMOS-MENDOZA  
AKA JUAN PABLO PLAZA-MENDOZA  
*Petitioner,*  
v.

WILLIAM P. BARR  
*Respondent*

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On Review of an Order of the Board of Immigration Appeals

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**BRIEF OF *AMICI CURIAE* ROUNDTABLE OF FORMER IMMIGRATION  
JUDGES AND FORMER MEMBERS OF THE BOARD OF  
IMMIGRATION APPEALS IN SUPPORT OF PETITIONER'S REQUEST  
FOR PANEL REHEARING**

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## **TABLE OF CONTENTS**

TABLE OF AUTHORITIES .....	ii
CORPORATE DISCLOSURE STATEMENT .....	1
FRAP RULE 29 STATEMENT OF COUNSEL.....	1
INTEREST OF AMICUS CURIAE .....	1
AMICI CURIAE SIGNATORIES.....	2
ARGUMENT .....	8
I.        This Case May Be Favorably Resolved by Crediting Credible Testimony, and Reasonable Inferences from Such Testimony, Regarding the Guatemalan Police’s Active Coordination with the Zetas Gang .....	8
II.       At a Minimum, We Ask The Panel to Correct Its Misstatement of The Legal Standard of Acquiescence And Its Erroneous Creation of A Higher Standard Than The One Created by Congress and Followed by Court Precedent .....	9
CONCLUSION.....	13
CERTIFICATE OF COMPLIANCE .....	14
CERTIFICATE OF SERVICE .....	14

## **TABLE OF AUTHORITIES**

### **Federal Cases**

Bringas-Rodriguez v. Sessions, 850 F.3d 1051 (9th Cir. 2017) (en banc).....	12
Edu v. Holder, 624 F.3d 1137 (9th Cir. 2010).....	8
Garcia-Milian v. Holder, 755 F.3d 1026 (9th Cir. 2014).....	9–11
Ornelas-Chavez v. Gonzales, 458 F.3d 1052 (9th Cir. 2006).....	10
Xochihua-Jaimes v. Barr, 962 F.3d 1175 (9th Cir. 2020).....	12–13
Zheng v. Ashcroft, 332 F.3d 1186 (9th Cir. 2003).....	10

### **Federal Regulations**

8 C.F.R. § 208.18(a)(7) .....	11
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## **CORPORATE DISCLOSURE STATEMENT**

Amici Curiae, Roundtable of Former Immigration Judges and Former Members of the Board of Immigration Appeals, state that they, their subsidiaries and any corporate interests involved in this matter, do not have any monetary interest in the outcome of this case.

## **FRAP RULE 29 STATEMENT OF CONSENT**

Pursuant to Federal Rules of Appellate Procedure, Rule 29(a) and Circuit Rule 29-3, attorneys representing both of the parties consent to the filing of this amicus brief. Amici state that no counsel for the party authored this brief in whole or in part, and no party, party's counsel, or person or entity other than Amici and their counsel contributed money that was intended to fund the preparing or submitting of the brief.

## **INTEREST OF AMICI CURIAE**

Amici curiae are the Roundtable of Former Immigration Judges and Former Members of the Board of Immigration Appeals who have substantial combined years of service and intimate knowledge of the U.S. immigration system. Amici are invested in the resolution of this case because they have dedicated their careers to improving the fairness and efficiency of the U.S. immigration system. Amici have a unique ability to provide insights about the practical impact of the legal

result supported by Amici, which arises from their substantial familiarity with the procedures and reality of immigration proceedings.

### **AMICI CURIAE SIGNATORIES**

The Honorable Steven Abrams served as an Immigration Judge from 1997 to 2013 at the New York, Varick Street, and Queens Wackenhut Immigration Courts in New York City. Prior to his appointment to the bench, he worked as a Special U.S. Attorney in the Eastern District of New York, and before that as District Counsel, Special Counsel for criminal litigation, and general attorney for the former INS. Judge Abrams also previously worked as assistant counsel for the State of New York Commission of Investigation, as assistant counsel for the New York State Department of Social Services Medicaid Fraud and Abuse Unit, and for the Queens County District Attorneys Office, serving first as an assistant district attorney, then as senior assistant in the Homicide Bureau.

The Honorable Teofilo Chapa served as an Immigration Judge in Miami, Florida from 1995 until 2018.

The Honorable Jeffrey S. Chase served as an Immigration Judge in New York City from 1995 to 2007 and was an attorney advisor and senior legal advisor at the Board from 2007 to 2017. He is presently in private practice as an independent consultant on immigration law, and is of counsel to the law firm of DiRaimondo & Masi in New York City. Prior to his appointment, he was a sole practitioner and volunteer staff attorney at Human Rights First. He also was the recipient of the American Immigration Lawyers Association's annual pro bono award in 1994 and chaired AILA's Asylum Reform Task Force.

The Honorable George T. Chew served as an IJ in New York from 1995 to 2017. Previously, he served as a trial attorney at the INS.

The Honorable Joan V. Churchill served as an Immigration Judge from 1980-2005 in Washington DC/Arlington VA, including 5 terms as a Temporary Member of the Board of Immigration Appeals. From 2012-2013 she served as the National President of the National Association of Women Judges.

The Honorable Matthew D'Angelo served as an Immigration Judge in both the Hartford and Boston Immigration Courts from 2003 until his retirement in 2018. From 1987 until 2003, Judge D'Angelo served in various roles with the former

INS specializing in the litigation of detained and criminal noncitizen cases. During this time, from 2000 until 2003, he also served as a Special Assistant U.S. Attorney in the criminal division of the Boston U.S. Attorney's Office.

The Honorable Bruce J. Einhorn served as a United States Immigration Judge in Los Angeles from 1990 to 2007. He now serves as an Adjunct Professor of Law at Pepperdine University School of Law in Malibu, CA, and a Visiting Professor of International, Immigration, and Refugee Law at the University of Oxford, England. He is also a contributing op-ed columnist at D.C.-based The Hill newspaper. He is a member of the Bars of DC, NY, PA, and the Supreme Court of the United States.

The Honorable Cecelia M. Espenosa served as a Member of the Executive Office for Immigration Review (EOIR) Board of Immigration Appeals from 2000-2003 and in the Office of the General Counsel from 2003-2017 where she served as Senior Associate General Counsel, Privacy Officer, Records Officer and Senior FOIA Counsel. She is presently in private practice as an independent consultant on immigration law, and recently served as a member of the World Bank's Access to Information Appeals Board. Prior to her EOIR appointments, she was a law professor at St. Mary's University (1997-2000) and the University of Denver College of Law (1990-1997) where she taught Immigration Law and Crimes and supervised students in the Immigration and Criminal Law Clinics. She has published several articles on Immigration Law. She is a graduate of the University of Utah and the University of Utah S.J. Quinney College of Law. She was recognized as the University of Utah Law School's Alumna of the Year in 2014 and received the Outstanding Service Award from the Colorado Chapter of the American Immigration Lawyers Association in 1997 and the Distinguished Lawyer in Public Service Award from the Utah State Bar in 1989-1990.

The Honorable Noel Ferris served as an Immigration Judge in New York from 1994 to 2013 and an attorney advisor to the Board from 2013 to 2016, until her retirement. Previously, she served as a Special Assistant U.S. Attorney in the Southern District of New York from 1985 to 1990 and as Chief of the Immigration Unit from 1987 to 1990.

The Honorable James R. Fujimoto served as an Immigration Judge in Chicago from 1990 until 2019.

The Honorable John F. Gossart, Jr. served as a U.S. Immigration Judge from 1982 until his retirement in 2013 and is the former president of the National Association of Immigration Judges. At the time of his retirement, he was the third most senior immigration judge in the United States. Judge Gossart was awarded the Attorney General Medal by then Attorney General Eric Holder. From 1975 to 1982, he served in various positions with the former Immigration Naturalization Service, including as general attorney, naturalization attorney, trial attorney, and deputy assistant commissioner for naturalization. He is also the co-author of the National Immigration Court Practice Manual, which is used by all practitioners throughout the United States in immigration court proceedings. From 1997 to 2016, Judge Gossart was an adjunct professor of law at the University of Baltimore School of Law teaching immigration law, and more recently was an adjunct professor of law at the University of Maryland School of Law also teaching immigration law. He has been a faculty member of the National Judicial College, and has guest lectured at numerous law schools, the Judicial Institute of Maryland and the former Maryland Institute for the Continuing Education of Lawyers. He is also a past board member of the Immigration Law Section of the Federal Bar Association. Judge Gossart served in the United States Army from 1967 to 1969 and is a veteran of the Vietnam war.

The Honorable Paul Grussendorf served as an Immigration Judge from 1997 to 2004 in the Philadelphia and San Francisco Immigration Courts.

The Honorable Charles M. Honeyman served as an Immigration Judge in the Philadelphia and New York Immigration Courts from 1995 until 2020.

The Honorable Rebecca Jamil was appointed as an Immigration Judge by Attorney General Loretta Lynch in February 2016 and heard cases at the San Francisco Immigration Court until July 2018. From 2011 to February 2016, Judge Jamil served as assistant chief counsel for U.S. Immigration and Customs Enforcement in San Francisco. From 2006 to 2011, she served as staff attorney in the Research Unit, Ninth Circuit Court of Appeals, in San Francisco, focusing exclusively on immigration cases. Judge Jamil earned a Bachelor of Arts degree in 1998 from Stanford University and a Juris Doctor in 2006 from the University of Washington Law School. Judge Jamil is a member of the Washington State Bar, and is currently in private practice in San Francisco.

The Honorable Elizabeth A. Lamb was appointed as an Immigration Judge in September 1995. She received a Bachelor of Arts degree from the College of Mt. St. Vincent in 1968, and a Juris Doctorate in 1975 from St. John's University. From

1983 to 1995, she was in private practice in New York. Judge Lamb also served as an adjunct professor at Manhattan Community College from 1990 to 1992. From 1987 to 1995, Judge Lamb served as an attorney for the Archdiocese of New York as an immigration consultant. From 1980 to 1983, she worked as senior equal employment attorney for the St. Regis Paper Company in West Mark, New York. From 1978 to 1980, Judge Lamb served as a lawyer for the New York State Division of Criminal Justice Services in New York. She is a member of the New York Bar.

The Honorable Charles Pazar was born in the Bronx, New York, and grew up in suburban New Jersey. He earned a B.A., *magna cum laude* from Boston University and a J.D. from Rutgers University School of Law in Newark, New Jersey. Judge Pazar served in the Drug Enforcement Administration Office of Chief Counsel and the Immigration and Naturalization Service Office of General Counsel. He was a Senior Litigation Counsel in the Office of Immigration Litigation (OIL) immediately preceding his appointment as an Immigration Judge in 1998. He served as an Immigration Judge in Memphis, Tennessee, from 1998 until his retirement in 2017. During his tenure as an Immigration Judge, he was a panelist in conferences sponsored by the Memphis Bar Association, the Tennessee Bar Association, the Federal Bar Association Immigration Law Section, the University of Mississippi, and the Arkansas Association of Criminal Defense Attorneys. The FBA has recognized him for his efforts to encourage pro bono representation. The graduating students at the University of Memphis Cecil C. Humphreys School of Law voted him as graduation speaker in the May, 2017, commencement. Judge Pazar serves as an adjunct professor of law at the University of Memphis. He has also served as an adjunct at the University of Mississippi School of Law. Since retirement, he has continued to teach at the University of Memphis. He has spoken at houses of worship in Memphis and at the Bench Bar Conference of the Memphis Bar Association, and the Immigration Law Section of the Federal Bar Association. In addition to speaking, he has written articles for the *Memphis Bar Journal*, *Tennessee Bar Journal*, and *The Green Card* (FBA Immigration Law Section journal), advocating for increased pro bono participation by attorneys in the Immigration Courts.

The Honorable Laura Ramirez has been a member of the California Bar since 1985. She was appointed an Immigration Judge in San Francisco in 1997, where she served until her retirement from the bench on December 31, 2018.

The Honorable Lory D. Rosenberg served on the Board from 1995 to 2002. She then served as Director of the Defending Immigrants Partnership of the National



Legal Aid & Defender Association from 2002 until 2004. Prior to her appointment, she worked with the American Immigration Law Foundation from 1991 to 1995. She was also adjunct Immigration Professor at AU Washington College of Law from 1997 to 2004. She is the founder of IDEAS Consulting and Coaching, LLC., a consulting service for immigration lawyers, and is the author of *Immigration Law and Crimes*. She currently works as Senior Advisor for the Immigrant Defenders Law Group.

The Honorable Susan Roy started her legal career as a Staff Attorney at the Board of Immigration Appeals, a position she received through the Attorney General Honors Program. She served as Assistant Chief Counsel, National Security Attorney, and Senior Attorney for the DHS Office of Chief Counsel in Newark, NJ, and then became an Immigration Judge, also in Newark, from 2008 until 2010. Sue has been in private practice 5 years, and presently heads her own law firm. She is the Chair-Elect of the NJSBA Immigration Law Section, and serves on the Executive Committee of the NJ-AILA Chapter as Secretary. She also serves on the AILA-National 2019 Convention Due Process Committee. She is a past recipient of the NJ Governor's Jefferson Award for volunteerism, and the NJ Federal Bar Association Pro Bono Service Award. Sue is the NJ AILA Chapter Liaison to EOIR, is the Vice Chair of the Immigration Law Section of the NJ State Bar Association, and in 2016 was awarded the Outstanding Pro Bono Attorney of the Year by the NJ Chapter of the Federal Bar Association.

The Honorable Paul W. Schmidt served as an Immigration Judge from 2003 to 2016 in Arlington, VA. He previously served as Chairman of the Board of Immigration Appeals from 1995 to 2001, and as a Board Member from 2001 to 2003. He authored the landmark decision *Matter of Kasinga*, 21 I&N Dec. 357 (BIA 1995) extending asylum protection to victims of female genital mutilation. He served as Deputy General Counsel of the former INS from 1978 to 1987, serving as Acting General Counsel from 1986-87 and 1979-81. He was the managing partner of the Washington, DC office of Fragomen, DelRey & Bernsen from 1993 to 1995, and practiced business immigration law with the Washington, DC office of Jones, Day, Reavis and Pogue from 1987 to 1992, where he was a partner from 1990 to 1992. He served as an adjunct professor of law at George Mason University School of Law in 1989, and at Georgetown University Law Center from 2012 to 2014 and 2017 to present. He was a founding member of the International Association of Refugee Law Judges (IARLJ), which he presently serves as Americas Vice President. He also serves on the Advisory Board of AYUDA, and assists the National Immigrant Justice Center/Heartland Alliance on various projects; and speaks, writes and lectures at various forums throughout the

country on immigration law topics. He also created the immigration law blog [immigrationcourtside.com](http://immigrationcourtside.com).

The Honorable Ilyce S. Shugall served as an Immigration Judge from 2017 until 2019 in the San Francisco Immigration Court.

The Honorable Helen Sichel served as an Immigration Judge from 1997 until 2020 in the New York Immigration Court.

The Honorable Andrea Hawkins Sloan was appointed an Immigration Judge in 2010 following a career in administrative law. She served on the bench of the Portland Immigration Court until 2017.

The Honorable Polly A. Webber served as an Immigration Judge from 1995 to 2016 in San Francisco, with details in Tacoma, Port Isabel, Boise, Houston, Atlanta, Philadelphia, and Orlando Immigration Courts. Previously, she practiced immigration law from 1980 to 1995 in her own firm in San Jose, California. She served as National President of the American Immigration Lawyers Association from 1989 to 1990 and was a national AILA officer from 1985 to 1991. She also taught Immigration and Nationality Law for five years at Santa Clara University School of Law. She has spoken at seminars and has published extensively in this field, and is a graduate of Hastings College of the Law (University of California), J.D., and the University of California, Berkeley, A.B., Abstract Mathematics.

## **ARGUMENT**

We are advocating for the panel to resolve this petition on a factual basis, and at a minimum, to correct a legal error in the decision.

**I. This Case May Be Favorably Resolved by Crediting Credible Testimony, and Reasonable Inferences from Such Testimony, Regarding the Guatemalan Police’s Active Coordination with the Zetas Gang**

We have reviewed Petitioner’s Petition for Panel Rehearing. We initially note that a favorable resolution of this case is for the panel to hold that substantial evidence compels finding acquiescence. Based on testimony found credible, Mr. Mendoza reported his first kidnapping to the police, and in response, the police laughed at him, refused to take a report, and then told Mr. Mendoza to appear at a time and place and they will bring him to a judge. But at the designated time and place, in what appears to be either a horrifying bait and switch or an astounding coincidence, the Zetas gang met Mr. Mendoza, again kidnapped him, beat him until he lost consciousness, and then threw him over a cliff. *See* Petitioner’s Petition for Panel Rehearing at 1–2 (reciting facts with citations to the record).

Credible testimony includes the acceptance of facts and their reasonable inferences. *See Edu v. Holder*, 624 F.3d 1137, 1143 (9th Cir. 2010) (noting that once facts are “deemed true . . . the question remaining to be answered becomes whether these facts, and their reasonable inferences, satisfy the elements of the claim for relief.”) (internal citation and quotation marks omitted). The most

reasonable inference we draw from Mr. Mendoza's credible testimony is that the Guatemalan police coordinated with the Zetas gang to have them attack Mr. Mendoza in retaliation for his attempt to seek justice. We thus agree with Mr. Mendoza's assertion that "the Guatemalan police not only acquiesced in the gang's mistreatment of Mr. Mendoza, but actually facilitated its re-occurrence."

Petitioner's Petition for Panel Rehearing at 1.

**II. At a Minimum, We Ask The Panel to Correct Its Misstatement of The Legal Standard of Acquiescence And Its Erroneous Creation of A Higher Standard Than The One Created by Congress and Followed by Court Precedent**

We also write separately to request that the panel correct its misstatement of the legal standard of acquiescence to prevent any confusion or misapplication of law in the future. The panel claimed that acquiescence means that "acquiescence requires officials to have an *awareness of the activity* and *to breach their duty to prevent* the activity. . . ." Plaza-Mendoza v. Barr, Memorandum at 5 (Aug. 4, 2020) (citing *Garcia-Milian v. Holder*, 755 F.3d 1026, 1034 (9th Cir. 2014)) (emphasis added).

The panel's interpretation of acquiescence misstates what *Garcia-Milian* had defined the standard to be and creates a much heightened showing of government action than what Congress, the regulations, and case law demand. *Garcia-Milian* established that:

Public officials acquiesce in torture if, ‘prior to the activity constituting torture,’ the officials: (1) have awareness of the activity (***or consciously close their eyes to the fact it is going on***); and (2) breach their ***legal responsibility to intervene*** to prevent the activity because they are unable or unwilling to oppose it.

*Garcia-Milian*, 755 F.3d at 1034 (emphasis added).

First, the panel inexplicably omitted the language from *Garcia-Milian* that provides that the public officials acquiesce either when they are aware of an activity or are willing to turn a blind eye to it. This omission is significant because this Court has “never required that an applicant report [her] alleged torture to public officials to qualify for relief under CAT.” *Ornelas-Chavez v. Gonzales*, 458 F.3d 1052, 1060 (9th Cir. 2006); see *Zheng v. Ashcroft*, 332 F.3d 1186, 1194–97 (9th Cir. 2003) (“We conclude that the BIA’s interpretation of the term ***acquiescence*** to require that Zheng must prove that the government is “willfully accepting of” torture, instead of proving that public officials are aware of the torture, impermissibly narrows Congress’ clear intent in implementing relief under the Convention Against Torture.) (emphasis in original). Although that error does not appear material to this record, Amici respectfully requests that the panel correct its omission to avoid confusion for future litigants.

Second, the panel further erred in rewriting the correct legal standard from “breach their ***duty to intervene*** to prevent the activity” to the more heightened requirement that public officials “breach their ***duty to prevent*** the activity.” The

relevant regulation unequivocally requires only a public official to intervene to prevent, not actually prevent, any crime:

(7) Acquiescence of a public official requires that the public official, prior to the activity constituting torture, have awareness of such activity ***and thereafter breach his or her legal responsibility to intervene*** to prevent such activity.

8 C.F.R. § 208.18(a)(7) (emphasis added).

This distinction is very much one of a difference because Amici is not aware of any law enforcement office—either at home or abroad—that has a duty to prevent a crime, only a duty to intervene, through its actions of investigation, apprehension, prosecution, and when relevant, securing a conviction and imposing imprisonment of the torturer who attempted or executed criminal activity.

Third, when the proper legal standard is applied to the facts on this record, the relevant question is what did the Guatemalan police do when they received information from Mr. Mendoza that he had been attacked by the Zetas gang. At that point, a functioning law enforcement department would have, at a minimum, taken a report and started an investigation. Indeed, even if the police never in fact apprehended the torturers—due to resources or inability to locate the offenders—their efforts to try to do so defeats any showing of acquiescence. *See Garcia-Milian*, 755 F.3d at 1034 (9th Cir. 2014) (noting that “[e]vidence that the police were aware of a particular crime, but failed to bring the perpetrators to justice, is not in itself sufficient to establish acquiescence in the crime”).

But this record does not involve a good faith investigation that was thwarted by time, resources, or misfortune. Instead, when Mr. Mendoza reported the crime against him, the Guatemalan police officers laughed at him, did not initiate an investigation, and then appear to have taken the even more egregious action of coordinating with the Zetas gang to permit them to inflict further harm upon Mr. Mendoza.

This record then is unique in that there is evidence of affirmative coordination between the police and criminal gang. But even short of that misconduct, the panel's legal analysis misapprehends that even short of coordination, the other undisputed facts on this record—specifically the police's initial reaction to laugh at the reporting of the crime, to not undertake any efforts to protect Mr. Mendoza, and to not apprehend the Zetas gang members who attacked him—meet the legal standard of acquiescence. For instance, similar facts arose in *Xochihua-Jaimes* and *Bringas-Rodriguez*:

Petitioner testified that she was personally beaten severely and threatened with death at gunpoint by a member of Los Zetas, while Mexican police officers looked on and did not nothing but laugh. This testimony, which the IJ found credible, establishes the acquiescence of public officials in a past instance of torture. *Cf. Bringas-Rodriguez [v. Sessions]*, 850 F.3d 1051, 1074 [(9th Cir. 2017) (en banc)] (Mexican police laughed at petitioner's gay friend who reported sexual abuse). The BIA erred in concluding that Petitioner's testimony about this incident was insufficient in light of more recent country conditions evidence. As explained above, the country conditions evidence shows that corruption of government officials, especially of the police with regard to drug cartels, and specifically with regard to

Los Zetas, remains a major problem in Mexico.

*Xochihua-Jaimes v. Barr*, 962 F.3d 1175, 1185–86 (9th Cir. 2020).

The panel’s misstatement of the law as applied to even the facts that the panel considered presents a conflict with published authority. To avoid such a conflict, and to prevent confusion for those who will rely on the Court’s decision, Amici respectfully requests that the Court correct this legal error in its decision.

### **CONCLUSION**

For the foregoing reasons, Amici respectfully request that this Court grant the petition for panel rehearing.

Dated: October 29, 2020

Respectfully submitted,

*s/ Kari E. Hong*  
KARI E. HONG  
*Counsel for Amici Curiae*



### **CERTIFICATE OF COMPLIANCE**

I certify that: Pursuant to Fed. R. App. P., Rule 32(a)(7)(B) and (C), Rule (a)(5) and (6), and Ninth Circuit Rules 32-1 and 32-4, the attached brief is proportionally spaced, has a typeface of 14 points or more, and contains approximately 1,521 words, exclusive of the table of contents, table of authorities, corporate disclosure statement, certificates of counsel, signature block, and signatories which is does not exceed the 4,200 word-limit for an amicus brief. The word count includes the FRAP Rule 29 Statement. If the signatories are included in the word count, the brief contains approximately 3,845 words.

### **CERTIFICATE OF SERVICE**

I, Kari Hong, hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: October 29, 2020

Respectfully submitted,

*/s Kari Hong*  
KARI HONG