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Matter of A-B- One Year Later:
Winning Back Gender-Based
Asylum Through Litigation
and Legislation

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Abstract:

In June 2018, the Attorney General's decision in Matter of A-B- upended U.S. asylum jurisprudence on domestic violence claims. This article draws on a unique dataset of twelve months of reported decisions from the Board of Immigration Appeals and immigration courts to survey Matter of A-B-'s devastating impact in its first year, as well as the continued viability of such claims. It also discusses how Matter of A-B- has fared in the federal courts, including the resounding repudiation of the decision in Grace v. Whitaker and more mixed treatment at the courts of appeals level. The Article concludes by arguing that Congress must act to ensure that gender-based violence claims are adjudicated in a manner consistent with international law, by making simple clarifications to the Immigration and Nationality Act on the particular social group and nexus elements of the refugee definition.

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I. Introduction

After one year of experience with *Matter of A-B-*,¹ it is apparent that former Attorney General Jefferson Sessions' decision has closed the door on many meritorious asylum claims by survivors of domestic violence, gang brutality, and other harms inflicted by non-state actors. However, at the same time, some adjudicators and courts continue to recognize these types of claims. This article reports on case outcomes since *Matter of A-B-* was decided in June 2018, with pointers for advocates and adjudicators. It also proposes language for Congress to clarify the elements of both "a particular social group" and "on account of" in the refugee definition, in order to reverse the Justice Department's impermissible interpretations of the law and to realign the United States with international law.

It was clear from the outset that the Attorney General intended to strike a blow against domestic violence survivors.² First, the case law underlying Ms. A.B.'s straightforward claim to asylum based on domestic violence was well settled, and the Board of Immigration Appeals' (BIA or Board) three-judge panel had unanimously reversed³ the immigration judge's mistaken denial of her claim.⁴ Second, the question posed in the briefing invitation was in no way related to any legal positions taken by Ms. A.B.'s attorney or by the Department of Homeland Security (DHS).⁵ This led observers to fear that asylum for survivors of intimate partner violence was itself at risk, a concern borne out when the Attorney General issued his decision in June 2018.⁶

In vacating *Matter of A-R-C-G-*,⁷ a precedential Board decision recognizing that domestic violence may be a basis for asylum, the Attorney General took precisely the action which both

¹ *Matter of A-B-*, 27 I. & N. Dec. 316 (A.G. 2018).

² *Matter of A-B-*, 27 I. & N. Dec. 227 (A.G. 2018) (briefing invitation).

³ The BIA's reversal was an unpublished decision.

⁴ Immigration Judge Stuart Couch's decision "was one of 10 domestic violence-related cases in 2017 in which the Board of Immigration Appeals found his rulings 'clearly erroneous.' In all 10, Couch rejected the claims of Central American women who had been beaten, raped and otherwise abused by their husbands or partners. The cases were made public as part of a Freedom of Information Act request by immigration attorney Bryan Johnson." Tal Kopan, *AG William Barr promotes immigration judges with high asylum denial rates*, SAN FRANCISCO CHRONICLE, Aug. 23, 2019, <https://www.sfchronicle.com/politics/article/AG-William-Barr-promotes-immigration-judges-with-14373344.php>. In August 2019, Judge Couch was promoted to the BIA. *Id.*

⁵ "In revisiting the issue, Sessions is not attempting to resolve a dispute, as no such dispute exists." Jeffrey S. Chase, *Briefs Filed in Matter of A-B-*, JEFFREY S. CHASE: OPINIONS/ANALYSIS/IMMIGR. L. (May 6, 2018), <https://www.jeffreyschase.com/blog/2018/5/6/7r3izq486dxxtzlrsythpmr2kg35j3>.

⁶ *A-B-*, 27 I. & N. Dec. 316.

⁷ *Matter of A-R-C-G-*, 26 I. & N. Dec. 388 (B.I.A. 2014).

parties and eleven of twelve amici had urged against.⁸ He sent a clear message that domestic violence claims, as well as claims from applicants fearing gang violence, should generally not be approved. Although *Matter of A-B-*'s holding, properly read, is narrow, the decision to a great extent had its intended effects: to sow fear and dismay among immigrant communities; to create confusion among practitioners on how best to navigate the new legal landscape; to give license to adjudicators who wish to deny such claims "as a matter of law," coupled with extra work and professional risk for those who still decide each claim on its individual merits; and, until it was blocked by a permanent nationwide injunction, to eliminate these claims as a means of establishing a credible fear of persecution in the expedited removal process.

This article assesses the impact of the first year of decisions taken under *Matter of A-B-* in the federal courts and in proceedings before the Department of Justice and suggests how the problems it created can be addressed by individual practitioners, immigration judges, and Congress. Section II.A provides a brief overview of asylum claims based on domestic violence before *Matter of A-B-*, as well as the decision in *Matter of A-B-* itself. Section II.B traces how the federal courts have treated *Matter of A-B-*, including in *Grace v. Whitaker*. Section II.C analyzes how domestic violence claims have fared before the immigration courts and the BIA since *Matter of A-B-* was decided, drawing on a unique dataset compiled by the Center for Gender & Refugee Studies (CGRS), and lays out strategy considerations for practitioners. Finally, Section III provides Congress with a blueprint to fix the consequences of *Matter of A-B-*, with sensible clarifications to address restrictive interpretations not only of particular social group but also of nexus, to ensure that the United States realigns itself with international law and practice and restores Congressional intent in passing the Refugee Act of 1980.

II. Background

A. Domestic Violence Claims Before *Matter of A-B-* and the Attorney General's June 2018 Decision

After decades of creative, persistent lawyering, by 2014, advocates had largely succeeded in establishing that people could suffer gender-related forms of persecution, including domestic

⁸ All briefs are available at *Matter of A-B- Briefing Shared Link*, <https://uchastings.app.box.com/s/tt1ydliq5ttm1i2zxlz4rname4bk29s7/folder/49170299851>. The outlier brief was filed by the Immigration Law Reform Institute.

violence, and/or could be persecuted for gender-related reasons.⁹ A survivor of domestic violence seeking asylum must establish each element of the refugee definition: (1) that she has suffered harm rising to the level of persecution or has a well-founded fear that she will suffer such harm; (2) that at least one central reason her persecutor acted or will act is due to race, religion, nationality, membership in a particular social group, or political opinion; and (3) that her government was or will be unable or unwilling to protect her.¹⁰ Though some early cases analyzed gender-related claims under the grounds of religion or political opinion,¹¹ domestic violence claims in the United States have most often been analyzed in terms of the particular social group ground.¹²

As early as 1985, the BIA in *Matter of Acosta* stated that “sex” is an example of an “immutable or fundamental characteristic” that members of a social group must share in order for the group to be cognizable under U.S. law.¹³ *Acosta* established the framework for analyzing particular social group claims, including those based on gender. *Acosta* held that a particular social group is a group of persons, all of whom share a common, immutable characteristic, i.e., a characteristic that either is beyond the power of the individual members to change or is so

⁹ For a more detailed overview of the history of gender-based asylum in the United States, see, e.g., Karen Musalo, *Personal Violence, Public Matter: Evolving Standards in Gender-Based Asylum Law*, HARVARD INT’L REV. 45 (Fall 2014/Winter 2015), https://cgrs.uchastings.edu/sites/default/files/Personal_Violence%2C_Public%20Matter.pdf; Deborah E. Anker, *Legal Change from the Bottom Up: The Development of Gender Asylum Jurisprudence in the United States*, GENDER IN REFUGEE LAW: FROM THE MARGINS TO THE CENTRE 46 (Efrat Arbel, Catherine Dauvergne & Jenni Millbank eds., 2014); Karen Musalo, *A Short History of Gender Asylum in the United States: Resistance and Ambivalence May Very Slowly Be Inching Towards Recognition of Women’s Claims*, 29 REFUGEE SURVEY Q. 46 (2010), https://cgrs.uchastings.edu/sites/default/files/short_history_of_gender_asylum_Musalo_2010_0.pdf. The United Nations High Commissioner for Refugees (UNHCR) has also interpreted international refugee law to encompass gender-based claims for protection. See, e.g., UNHCR, GUIDELINES ON INTERNATIONAL PROTECTION NO. 1: GENDER-RELATED PERSECUTION WITHIN THE CONTEXT OF ARTICLE 1A(2) OF THE 1951 CONVENTION AND/OR ITS 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES, HCR/GIP/02/01 (May 7, 2002), <https://www.refworld.org/docid/3d36f1c64.html>.

¹⁰ See Immigration & Nationality Act (INA) § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A). This refugee definition mirrors that set forth in the United Nations Convention relating to the Status of Refugees, art. 1A(2), July 28, 1951, 189 U.N.T.S. 137, <https://www.refworld.org/docid/3be01b964.html>, and the Protocol relating to the Status of Refugees, art. 1(2), Oct. 4, 1967, 606 U.N.T.S. 267, <https://www.refworld.org/docid/3ae6b3ae4.html>. The United States is a party to the 1967 Protocol.

¹¹ See, e.g., *Fatin v. INS*, 12 F.3d 1233, 1242 (3d Cir. 1993) (“[W]e have little doubt that feminism qualifies as a political opinion within the meaning of the relevant statutes.”); *Lazo-Majano v. INS*, 813 F.2d 1432 (9th Cir. 1987), *overruled on other grounds by* *Fisher v. INS*, 79 F.3d 955 (9th Cir. 1996) (characterizing as a political opinion the applicant’s opposition to the belief that men have the right to dominate); *Matter of S-A-*, 22 I. & N. Dec. 1328 (B.I.A. 2000) (granting asylum to a woman who suffered and feared persecution from her father on account of her more liberal religious views regarding the role of women in society).

¹² See generally Blaine Bookey, *Domestic Violence as a Basis for Asylum: An Analysis of 206 Case Outcomes in the United States from 1994 to 2012*, 24 HASTINGS WOMEN’S L.J. 107 (2013).

¹³ *Matter of Acosta*, 19 I. & N. Dec. 211, 233 (B.I.A. 1985).

fundamental to their identities or consciences that it ought not be required to be changed.¹⁴

Following *Acosta*, U.S. asylum jurisprudence began to recognize that persecution inflicted or feared on account of a particular social group defined wholly or in part by gender falls squarely within the refugee definition.¹⁵

But even though some domestic violence cases have been granted on the basis of a social group defined solely by gender and nationality such as “Guatemalan women,” adjudicators have often been resistant to this simple and seemingly obvious social group formulation. This has particularly been the case, in light of the Board’s increasingly restrictive definition of a “particular social group” in recent years, with the extraneous addition of requirements that the social group be both particular¹⁶ and socially distinct¹⁷ in order to be cognizable under U.S. law.¹⁸

These extraneous criteria have been rejected by some federal courts of appeals and criticized by scholars and practitioners as contrary to the approach of *Acosta*, which employed rules of statutory construction to place social group analysis firmly in the context of the analysis

¹⁴ *Id.*

¹⁵ For example, in *Matter of Kasinga*, the Board granted asylum to a woman who feared female genital mutilation on the basis of membership in a particular social group of young women of her tribe who have not had female genital mutilation, as practiced by that tribe, and who oppose the practice. *Matter of Kasinga*, 21 I. & N. Dec. 357 (B.I.A. 1996).

¹⁶ See generally *Matter of M-E-V-G-*, 26 I. & N. Dec. 227 (B.I.A. 2014); *Matter of W-G-R-*, 26 I. & N. Dec. 208 (B.I.A. 2014) (requiring characteristics that provide a clear benchmark for determining inclusion); *Matter of A-M-E- & J-G-U-*, 24 I. & N. Dec. 69 (B.I.A. 2007) (rejecting the proposed group as “too amorphous” to provide an adequate benchmark for determining group membership).

¹⁷ See generally *M-E-V-G-*, 26 I. & N. Dec. 227; *W-G-R-*, 26 I. & N. Dec. 208 (renaming the “social visibility” requirement as “social distinction” to clarify that it does not require “ocular” visibility); *Matter of C-A-*, 23 I. & N. Dec. 951 (B.I.A. 2006) (using the term “social visibility” to examine how recognizable members of the group would be to others in their society).

¹⁸ Between 2006 and the March 2018 briefing request in *Matter of A-B-*, the BIA published seven asylum decisions on whether the applicant had presented a viable particular social group: *C-A-*, 23 I. & N. Dec. 951; *A-M-E- and J-G-U-*, 24 I. & N. Dec. 69; *Matter of S-E-G-*, 24 I. & N. Dec. 579 (B.I.A. 2008); *Matter of E-A-G-*, 24 I. & N. Dec. 591 (B.I.A. 2008); *M-E-V-G-*, 26 I. & N. Dec. 227; *W-G-R-*, 26 I. & N. Dec. 208; and *Matter of A-R-C-G-*, 26 I. & N. Dec. 388 (B.I.A. 2014). These developments coincided with politically motivated changes in the Board’s membership. As noted by Jeffrey S. Chase, “[i]n 2006, the Board of Immigration Appeals published its decision in *Matter of C-A-*, the first in a line of cases creating significant restrictions on what constitutes a cognizable particular social group in claims for asylum. It is worth noting that three years earlier, then Attorney General John Ashcroft purged the BIA of its five most liberal members; two other Board members who clearly would have been removed as well left just prior to the purge. Therefore, the ensuing line of BIA precedents addressing particular social group issues were something of a one-sided affair, with no liberal voices to temper or dissent from the majority.” Jeffrey S. Chase, *Particular Social Group: Errors in the BIA’s Post-Acosta Analysis*, JEFFREY S. CHASE: OPINIONS/ANALYSIS ON IMMIGR. L. (Sept. 14, 2017), <https://www.jeffreyschase.com/blog/2017/9/14/particular-social-group-errors-in-the-bias-post-acosta-analysis>.

of the other four grounds.¹⁹ Nevertheless, many advocates have felt obliged to propose a more narrowly defined social group.

In a non-precedential domestic violence case subject to a decade of litigation, *Matter of R-A-*, DHS proposed one such group: “married women in Guatemala who are unable to leave the relationship.”²⁰ In another unpublished case, *Matter of L-R-*, DHS offered two alternate frameworks which it believed satisfied the BIA’s three-part test: “Mexican women in domestic relationships who are unable to leave” and “Mexican women who are viewed as property by virtue of their positions within a domestic relationships.”²¹ Since neither of these cases was binding on adjudicators, a significant victory for survivors of domestic violence was the 2014 decision in *Matter of A-R-C-G-*.²² This was the BIA’s first precedent decision granting asylum to a woman who had suffered violence at the hands of her husband. In this case, the social group was defined as “married women in Guatemala who are unable to leave their relationship,” similar to DHS’s proposals in *Matter of R-A-* and *Matter of L-R-*. After *Matter of A-R-C-G-*, advocates began using that formulation or a similar one to argue for protection for survivors of domestic violence.²³

¹⁹ See Jaclyn Kelley-Widmer & Hillary Rich, *A Step Too Far: Matter of A-B-, ‘Particular Social Group,’ and Chevron*, CORNELL LEGAL STUDIES RESEARCH PAPER NO. 19-30 (July 15, 2019), <https://ssrn.com/abstract=3410556>.

²⁰ See DHS’s Position on Respondent’s Eligibility for Relief, *Matter of R-A-*, 23 I. & N. Dec. 694 (A.G. 2005) [hereinafter “DHS *Matter of R-A-* Brief”], <https://cgrs.uchastings.edu/sites/default/files/Matter%20of%20R-A-%20DHS%20brief.pdf>.

²¹ DHS’s Supplemental Brief, *Matter of L-R-* (B.I.A. 2010) [hereinafter “DHS *Matter of L-R-* Brief”], https://cgrs.uchastings.edu/sites/default/files/Matter_of_LR_DHS_Brief_4_13_2009.pdf. In both cases, the immigration judge eventually granted asylum based on the stipulation of the parties.

²² *A-R-C-G-*, 26 I. & N. Dec. 388.

²³ Blaine Bookey, *Gender-Based Asylum Post-Matter of A-R-C-G-: Evolving Standards and Fair Application of the Law*, 22 SOUTHWESTERN J. INT’L L. 1 (2016).

Matter of A-B- reversed the BIA’s grant of asylum to Ms. A.B. and overruled *Matter of A-R-C-G-*. As the decision has been thoroughly analyzed²⁴ and thoughtfully critiqued,²⁵ we note only a few salient points here. Under a proper reading of *Matter of A-B-*, the only legally binding aspect of the decision is that asylum seekers can no longer rely on *Matter of A-R-C-G-*.²⁶ This alone cannot preclude domestic violence survivors from finding protection—*Matter of A-R-C-G-* was neither a catch-all solution for all domestic violence asylum claims nor the only framework under which gender asylum claims found past success.

Notwithstanding this narrow holding, the Attorney General clearly intended to instruct adjudicators that they should subject claims by domestic violence survivors to, at the very least, heightened standards and unique scrutiny. For example, he stated that “[g]enerally, claims by aliens pertaining to domestic violence or gang violence perpetrated by non-governmental actors will not qualify for asylum.”²⁷ This “general rule” should be properly read as dictum, as it reaches beyond Ms. A.B.’s own claim to speculate on future cases; indeed, Ms. A.B.’s case did not even involve gang-related violence. Moreover, foreclosing an entire category of asylum claims would violate the longstanding legal principle that adjudicators must analyze asylum claims on a case-by-case basis, under the specific facts and record evidence of the case.²⁸ The

²⁴ See CGRS, CHALLENGING *MATTER OF A-B-* IN THE COURTS OF APPEALS: ADMINISTRATIVE LAW ARGUMENTS (July 2019); CGRS, ONE YEAR AFTER *MATTER OF A-B-*: LITIGATION UPDATE (July 2019); American Civil Liberties Union & CGRS, *GRACE V. WHITAKER* (Mar. 2019), <https://www.aclu.org/legal-document/grace-v-whitaker-practice-advisory>; CGRS, POST-*MATTER OF A-B-* LITIGATION UPDATE (Dec. 2018); CGRS, *MATTER OF A-B-* (July 2018). CGRS resources are available upon request to practitioners at <https://cgrs.uchastings.edu/assistance/request>. See also National Immigrant Justice Center, ASYLUM PRACTICE ADVISORY: APPLYING FOR ASYLUM AFTER *MATTER OF A-B-* (Jan. 2019), <https://immigrantjustice.org/sites/default/files/content-type/page/documents/2019-01/Matter%20of%20A-B-%20Practice%20Advisory%20-%201.2019%20Update%20-%20Final.pdf>; Immigrant Legal Resource Center, *MATTER OF A-B-* CONSIDERATIONS (Oct. 2018), https://www.ilrc.org/sites/default/files/resources/matter_a_b_considerations-20180927.pdf.

²⁵ See Fātmā Marouf, *Becoming Unconventional: Constricting the ‘Particular Social Group’ Ground for Asylum*, 44 N.C. J. INT’L L. 487 (2019); Fatma Marouf, *Executive Overreaching in Immigration Adjudication*, 93 TUL. L. REV. 708 (2019); Jaclyn Kelley-Widmer & Hillary Rich, *supra* note 19; Theresa A. Vogel, *Critiquing Matter of A-B-: An Uncertain Future in Asylum Proceedings for Women Fleeing Intimate Partner Violence*, 52 U. MICH. J.L. REFORM 345 (2019); Sarah Sherman-Stokes, *Reparations for Central American Refugees*, 96 DENV. L. REV. 585 (2019).

²⁶ The Attorney General indicated that the Board in *Matter of A-R-C-G-* did not perform “the rigorous analysis required” because it accepted DHS’s stipulations on severity of harm, social group cognizability and membership, and nexus. *Matter of A-B-*, 27 I. & N. Dec. 316, 319 (A.G. 2018).

²⁷ *Id.* at 320.

²⁸ See, e.g., *Matter of Acosta*, 19 I. & N. Dec. 211, 233 (B.I.A. 1985); *Matter of M-E-V-G-*, 26 I. & N. Dec. 227, 251 (B.I.A. 2014); *Paiz-Morales v. Lynch*, 795 F.3d 238, 245 (1st Cir. 2015); *Pirir-Boc v. Holder*, 750 F.3d 1077, 1084 (9th Cir. 2014).

Attorney General himself recognized that he cannot rule that domestic violence (and gang-related violence) “may never serve as the basis” for an asylum claim.²⁹

The Attorney General’s primary critique of *Matter of A-R-C-G-* was that the particular social group included the characteristic of “inability to leave the relationship.” In his opinion, this attribute is the result of domestic violence, so therefore he re-characterized the group as “women in Guatemala who are victims of domestic violence.”³⁰ This reflects the Attorney General’s ignorance of both the dynamics of domestic violence as well as the case law setting forth the circularity standard, which requires that the group not be defined exclusively by the harm suffered or feared. First, there are various societal, cultural, religious, and legal norms impeding women’s ability to leave abusive relationships beyond the violence itself, so “inability to leave” is not coextensive with persecution.³¹ Second, even assuming *arguendo* that “inability to leave” is related to the persecution, case law from the Board and courts of appeals requires only that social groups not be defined *solely* by the persecution.³² The social group need not be completely independent of the persecution where there are other immutable characteristics in the formulation—for example, gender, nationality, and relationship status in the case of the *Matter of A-R-C-G-* social group.

In addition to rejecting the social group in *Matter of A-R-C-G-*, the Attorney General also addressed the “on account of” standard (i.e., nexus) in domestic violence claims. He speculated

²⁹ *A-B-*, 27 I. & N. Dec. at 320.

³⁰ *Id.* at 331, 335.

³¹ DHS itself previously acknowledged this in *Matter of R-A-* and *Matter of L-R-*. See DHS *Matter of R-A-* Brief, *supra* note 20, at 28-31 (assessing whether there are “religious, cultural, legal, or circumstantial constraints that would render divorce an unreasonable expectation”); DHS *Matter of L-R-* Brief, *supra* note 21, at 14-21 (“DHS believes that there are circumstances in which an applicant’s status within a domestic relationship is immutable, within the meaning of *Acosta* [T]his might be the case where economic, social, physical or other constraints made it impossible for the applicant to leave the relationship”).

³² See, e.g., *Matter of A-M-E- & J-G-U-*, 24 I. & N. Dec. 69, 74 (B.I.A. 2007) (“A social group cannot be defined *exclusively* by the fact that its members have been subjected to harm”) (emphasis added); *Matter of W-G-R-*, 26 I. & N. Dec. 208, 215 (B.I.A. 2014) (“Persecutory conduct aimed at a social group cannot *alone* define the group, which must exist independently of the persecution. Circuit courts have long recognized that a social group must have ‘defined boundaries’ or a ‘limiting characteristic,’ *other* than the risk of being persecuted, in order to be recognized.”) (emphasis added); *Perez-Rabanales v. Sessions*, 881 F.3d 61, 67 (1st Cir. 2018); *Castillo-Arias v. U.S. Att’y Gen.*, 446 F.3d 1190, 1198 (11th Cir. 2006); see also *Cece v. Holder*, 733 F.3d 662, 671 (7th Cir. 2013) (en banc) (“Even if the group were defined in part by the fact of persecution . . . the Board of Immigration Appeals has never required complete independence of any relationship to the persecutor.”); *Escobar v. Holder*, 657 F.3d 537, 545-46 (7th Cir. 2011) (“The Board itself has never demanded an utter absence of any link to the persecutor . . . [and] just because all members of a group do experience persecution, that does not mean that this is the only thing that links them.”).

that “[w]hen private actors inflict violence based on a personal relationship with a victim, then the victim’s membership in a larger group may well not be ‘one central reason’ for the abuse.”³³ The Attorney General’s suggestion that the persecutor’s “preexisting personal relationship”³⁴ with the applicant undermines nexus has no basis in asylum law, which is not limited to harms inflicted by strangers.³⁵ Under the “mixed motives” standard for nexus, a protected ground need not be the sole or even primary reason for the persecution.³⁶ Moreover, the Attorney General’s statements reflect an antiquated and misguided perception of domestic abuse as a mere “personal” matter, independent of societal norms regarding the role of women or lack of political will to address harms against women, both of which encourage perpetrators to act with impunity.³⁷ Along the same lines, the Attorney General further suggested that, in order to satisfy nexus, the persecutor must persecute other members of the social group besides the applicant.³⁸ This reasoning is also unfounded. While the persecutor’s personal relationship may inform *which* group member he persecutes, this alone does not explain *why* he seeks to persecute her to begin with, which is the proper inquiry under the nexus requirement.³⁹

Matter of A-B-’s statements on social group cognizability and nexus are most pertinent to domestic violence claims. Therefore, the following sections focus on how the federal courts, the BIA, and individual immigration judges have applied these pronouncements, as well as on

³³ *A-B-*, 27 I. & N. Dec. at 338-39.

³⁴ *Id.*

³⁵ *See, e.g.*, *Faruk v. Ashcroft*, 378 F.3d 940, 943 (9th Cir. 2004) (“There is no exception to the asylum statute for violence from family members; if the government is unable or unwilling to control persecution, it matters not who inflicts it.”); *Matter of S-A-*, 22 I. & N. Dec. 1328, 1335 (B.I.A. 2000) (granting asylum to a woman who was persecuted by her father).

³⁶ *See, e.g.*, *Shaikh v. Holder*, 702 F.3d 897, 902 (7th Cir. 2012) (“[T]he REAL ID Act modifies our earlier mixed motive cases only to require among that mix of motives a protected ground qualifying as a central reason. Indeed, that ground may be a secondary (or tertiary, etc.) reason and still justify asylum.”); *Aldana-Ramos v. Holder*, 757 F.3d 9, 18-19 (1st Cir. 2014); *Ndayshimiye v. U.S. Att’y Gen.*, 557 F.3d 124, 129-30 (3d Cir. 2009). For purposes of asylum, the INA provides that “[t]he applicant must establish that race, religion, nationality, membership in a particular social group, or political opinion was or will be *at least one central reason* for persecuting the applicant.” INA § 208(b)(1)(B)(i), 8 U.S.C. § 1158(b)(1)(B)(i) (emphasis added). For purposes of withholding of removal, on the other hand, the INA provides that the persecution must be “*because of* the alien’s race, religion, nationality, membership in a particular social group, or political opinion.” INA § 208(b)(3)(A); 8 U.S.C. § 1231(b)(3)(A) (emphasis added). In *Barajas-Romero v. Lynch*, the Ninth Circuit determined that the statutory language for withholding of removal required the protected ground to be only “a reason” for the persecution, an even lower standard than the nexus standard for asylum. *Barajas-Romero v. Lynch*, 846 F.3d 351, 360 (9th Cir. 2017).

³⁷ “[P]ersecution cannot be evaluated in a vacuum . . . without reference to the relevant circumstances in which the claim arises.” *Castro v. Holder*, 597 F.3d 93, 106 (2d Cir. 2010).

³⁸ *A-B-*, 27 I. & N. Dec. at 339.

³⁹ As the Seventh Circuit has aptly explained: “Imagine the neo-Nazi who burns down the house of an African-American family. We would never say that this was a personal dispute because the neo-Nazi did not burn down all of the houses belonging to African-Americans in the town.” *Sarhan v. Holder*, 658 F.3d 649, 657 (7th Cir. 2011).

legislative proposals to address the renewed confusion surrounding these two elements of asylum eligibility.⁴⁰

B. Matter of A-B- in the Federal Courts

The fullest discussion of *Matter of A-B-* by a federal court thus far has been Judge Sullivan’s decision in *Grace v. Whitaker*, decided in December 2018.⁴¹ *Grace* challenges the use of *Matter of A-B-*, and related policy memoranda issued by U.S. Citizenship and Immigration Services (USCIS),⁴² in the context of expedited removal.⁴³

The Attorney General in his decision⁴⁴ and USCIS in its memoranda⁴⁵ had instructed that since asylum claims involving domestic violence or fear of gangs would “generally” not be eligible, they did not warrant a positive credible fear determination in expedited removal.⁴⁶ The D.C. District Court issued a permanent nationwide injunction against the use of *Matter of A-B-* and the related USCIS memoranda in credible fear proceedings. Specifically, it found the following four elements of *Matter of A-B-* and the USCIS guidance to be arbitrary, capricious, and contrary to law:

- a. [t]he general rule against claims relating to domestic and gang violence[;]
- b. [t]he requirement that a noncitizen whose claim involves non-governmental persecutors “show the government condoned the private actions or at least demonstrated a complete helplessness to protect the victim”[;]

⁴⁰ *Matter of A-B-* also includes ill-informed and unfounded conjectures on other elements of asylum eligibility, including government inability or unwillingness to protect, internal relocation, discretion, and credibility. These include broader implications for claims involving other forms of non-state actor persecution besides domestic violence, which are beyond the scope of this article. See generally *A-B-*, 27 I. & N. Dec. 316.

⁴¹ The government has appealed Judge Sullivan’s decision to the Court of Appeals for the D.C. Circuit. *Grace v. Whitaker*, 344 F. Supp. 3d 96 (D.D.C. 2018), appeal docketed, *Grace v. Barr*, No. 19-5013 (D.C. Cir. argued Dec. 9, 2019).

⁴² USCIS, PM-602-0162, Guidance for Processing Reasonable Fear, Credible Fear, Asylum, and Refugee Claims in Accordance with *Matter of A-B-*, AILA Doc. No. 18061930 (July 11, 2018), <https://www.aila.org/infonet/uscis-guidance-processing-fear-matter-of-a-b->; USCIS, Asylum Division Interim Guidance – *Matter of A-B-*, 27 I. & N. Dec. 316. AILA Doc. No. 18071200 (A.G. 2018) (June 13, 2018), <https://www.aila.org/infonet/vo-x-obtains-uscis-interim-guidance-matter-of-a-b->.

⁴³ In expedited removal, an asylum officer will interview an individual who expresses a fear of return to her home country or a desire to apply for asylum. The legal standard for such an interview is whether the individual has a “significant possibility” of establishing eligibility for asylum. The screening standard was set by Congress to be intentionally generous, lower than the standard required to prove an asylum claim on the merits, given the extremely limited due process protections in the expedited removal process and the potentially deadly consequences of making an erroneous decision. If the asylum officer makes a negative credible fear determination, the only level of review available to the individual is at the immigration court level. No further appeal is allowed.

⁴⁴ *A-B-*, 27 I. & N. Dec. at 320 n.1.

⁴⁵ See USCIS, PM-602-0162, *supra* note 42.

⁴⁶ The American Civil Liberties Union (ACLU) and CGRS challenged the decision and memoranda in the D.C. District Court under the jurisdictional provisions governing expedited removal; for this reason, Judge Sullivan’s decision applies only to credible fear determinations, not to merits hearings.

- c. [t]he Policy Memorandum’s rule that domestic violence-based particular social group definitions that include “inability to leave” a relationship are impermissibly circular and therefore not cognizable in credible fear proceedings[; and]
- d. [t]he Policy Memorandum’s directive that asylum officers conducting credible fear interviews should apply federal circuit court case law only “to the extent that those cases are not inconsistent with *Matter of A-B-*.”⁴⁷

While the court’s injunction and decision are not binding outside the expedited removal process, the findings above are based on Judge Sullivan’s interpretation of key statutory terms of the refugee definition and should be adopted by advocates and adjudicators as persuasive authority on the merits of asylum claims.⁴⁸

As of September 2019, the time of writing, the Fifth Circuit was the only other federal court to explicitly address whether *Matter of A-B-* is consistent with and a reasonable interpretation of existing asylum law. In *Gonzales-Veliz v. Barr*,⁴⁹ the Fifth Circuit reached a conclusion largely contrary to that of the D.C. District Court. It agreed with the petitioner that “the Attorney General did not create a categorical ban against groups based on domestic violence.”⁵⁰ Nonetheless, the court found that in the petitioner’s case the Board had reasonably relied on the rationale in *Matter of A-B-* regarding social groups because her proffered group of “Honduran women unable to leave their relationship” was “substantially similar” to those in *Matter of A-B-* and *Matter of A-R-C-G-*.⁵¹ Despite finding that *Matter of A-B-* did not preclude domestic violence claims *generally*, it concluded that the Attorney General’s reasoning around circularity, particularity, and social distinction “squarely foreclose[d]” the petitioner’s *social*

⁴⁷ *Grace v. Whitaker*, 344 F. Supp. 3d 96 (D.D.C. 2018) (order) (internal citations omitted). The Court made two additional findings specific to the low screening standard used in expedited removal.

⁴⁸ See Karen Musalo, *New Guidance to IJs and AOs pursuant to Grace v. Whitaker*, LEXIS NEXIS, Jan. 14, 2019, <https://www.lexisnexis.com/legalnewsroom/immigration/b/insideneews/posts/new-guidance-to-ijs-and-aos-pursuant-to-grace-v-whitaker>; ACLU & CGRS, PRACTICE ADVISORY: *GRACE V. WHITAKER* (Mar. 7, 2019), <https://www.aclu.org/legal-document/grace-v-whitaker-practice-advisory>.

⁴⁹ *Gonzales-Veliz v. Barr*, 938 F.3d 219 (5th Cir. 2019).

⁵⁰ *Id.* at 232.

⁵¹ *Id.* (“As an adjudicatory body, the BIA necessarily relies on established precedents to decide matters pending before it and to avoid re-inventing the wheel.”). The Eleventh Circuit followed suit in December 2019, deferring to the Attorney General’s interpretation of “particular social group” in *Matter of A-B-* and rejecting the petitioner’s proffered group of “women in Mexico who are unable to leave their domestic relationship.” *Amezcu-Preciado v. U.S. Att’y Gen.*, 943 F.3d 1337, 1344 (11th Cir. 2019). In a previous post-*Matter of A-B-* decision, the Fifth Circuit rejected the petitioner’s social group of “Honduran sons in domestic familial relationship who are unable to leave.” *Quintanilla-Miranda v. Barr*, No. 18-60613, 2019 WL 3437658 (5th Cir. July 30, 2019). However, the court did so on the basis of particularity, not circularity, because it believed the group “could include almost any Honduran son.” *Id.* at *2.

group.⁵² As such, the court did not separately assess the facts, evidence, or country in question in *Gonzales-Veliz*.⁵³ In addition, the court found that the Attorney General’s commentary surrounding nexus in the context of preexisting personal relationships to be consistent with existing asylum law.⁵⁴

Other courts of appeals, however, have for the most part bypassed critiquing or adopting the Attorney General’s decision. At best, they have distinguished claims from *Matter of A-B-* or remanded to the agency for reconsideration in light of other precedent or to factor in the impact of *Matter of A-B-*, if any, on the cases at hand. At worst, they have found the claims before them untenable even under *Matter of A-R-C-G-* or denied on alternate grounds.

With respect to the cognizability of social groups defined in part by “inability to leave,” the Third Circuit’s unpublished decision in *Padilla-Maldonado v. U.S. Att’y Gen.* comes closest to repudiating preclusion of such groups, unlike the Fifth Circuit’s conclusion. The Third Circuit noted that, “[w]hile the overruling of *A-R-C-G-* weakens [the petitioner’s] case, it does not automatically defeat her claim that she is a member of a cognizable particular social group of ‘Salvadoran women in domestic relationships who are unable to leave.’”⁵⁵ The court then remanded for the immigration judge to determine the cognizability of the group post-*Matter of A-B-* in the first instance.⁵⁶

Nevertheless, in most decisions involving “inability to leave” social groups, the courts of appeals have denied such claims on failure to establish other grounds of eligibility, namely lack

⁵² *Gonzales-Veliz*, 938 F.3d at 232.

⁵³ Recall that social group cognizability is a case-by-case determination, so a social group rejected in one case may still be viable under the facts and record of another case. *See also* *Matter of Acosta*, 19 I. & N. Dec. 211, 233 (B.I.A. 1985); *Matter of M-E-V-G-*, 26 I. & N. Dec. 227, 251 (B.I.A. 2014); *Paiz-Morales v. Lynch*, 795 F.3d 238, 245 (1st Cir. 2015); *Pirir-Boc v. Holder*, 750 F.3d 1077, 1084 (9th Cir. 2014).

⁵⁴ *Gonzales-Veliz*, 938 F.3d at 234. The court determined that *Matter of A-B-* did not change legal standards concerning social group cognizability, nexus, or state protection, and therefore was not an arbitrary and capricious change in policy. *Id.* at 233-34. It further held that even if it had read *Matter of A-B-* to constitute a policy change, the Attorney General’s explanation was not only reasonable, but “a much more faithful interpretation of the INA.” *Id.* at 234-35.

⁵⁵ *Padilla-Maldonado v. U.S. Att’y Gen.*, 751 F. App’x 263, 268 (3d Cir. 2018).

⁵⁶ *Id.* at 269.

of group membership, in lieu of addressing social group cognizability.⁵⁷ Helpfully, in *Martinez-Martinez v. Sessions*, despite a qualifying “but see” citation to *Matter of A-B-*, the Sixth Circuit assumed the cognizability of the petitioner’s proffered social group and indicated that its affirmance of the BIA’s findings of lack of membership and nexus in the case at hand did not foreclose other claims based on similar social groups.⁵⁸ The court noted: “We would not agree that every woman who is able to escape her husband thereby removes herself from the social group of women who are unable to leave their relationship, or thereby severs the nexus between her group and the persecution she suffers.”⁵⁹

Other decisions have referenced *Matter of A-B-* to cast doubt on, but not conclusively reject, the validity of groups akin to the one in *Matter of A-R-C-G-*. For example, in *Najera v. Whitaker*, the Eighth Circuit suggested that the petitioner’s “proposed particular social group of Salvadorean [sic] females unable to leave a domestic relationship *may* not be cognizable” in light of “[r]ecent guidance from the Attorney General overrul[ing] *Matter of A-R-C-G-*.”⁶⁰ Notwithstanding, the court ultimately concluded that the petitioner had “left” her relationship

⁵⁷ See, e.g., *Godinez v. Barr*, 929 F.3d 598, 602 (8th Cir. 2019) (stating that the court “need not address the difficult questions raised by *Matter of A-R-C-G-* and *Matter of A-B-* in the present case” because the BIA found the petitioner did not belong to the proffered group); *Rivas-Duran v. Barr*, 927 F.3d 26, 31 n.1 (1st Cir. 2019) (concluding that the petitioner failed to show membership “even when *Matter of A-R-C-G-* was in effect,” and declining to reach the issue of social group cognizability “which is where *Matter of A-R-C-G-* would come into play”); *Torres Gonzales v. Barr*, 768 F. App’x 23, 25 (2d Cir. 2019) (upholding the BIA’s determination that “assuming such a group could be recognized in Mexico,” the petitioner did not show she was unable to leave the relationship, and citing to *Matter of A-B-* solely to note the overruling of *Matter of A-R-C-G-*); *Lopez v. Sessions*, 744 F. App’x 574, 578 (10th Cir. 2018) (citing *Matter of A-B-* for the circularity principle and the social distinction test to reject the petitioner’s alternate social groups of “Salvadoran women who refuse to be in domestic relationships with gang members” and “Salvadoran women who refuse to be victims of gang members’ sexual predation,” but affirming the BIA’s finding that the petitioner is not a member of her primary social group of “Salvadoran women unable to leave domestic relationships” without addressing its cognizability or *Matter of A-B-*’s commentary on “inability to leave” social groups). Two other decisions determined that the petitioners could not have relied on *Matter of A-R-C-G-* even when it was good law because the social groups were distinguishable from that in *Matter of A-R-C-G-*. *S.E.R.L. v. Sessions*, 894 F.3d 535, 556-57 (3d Cir. 2018) (finding that although the Attorney General overruled *Matter of A-R-C-G-*, which the petitioner “heavily” relied on, the Board had previously distinguished her “broader” social group of “immediate family members of Honduran women unable to leave a domestic relationship” from the one in *Matter of A-R-C-G-*); *Rivera-Geronimo v. U.S. Att’y Gen.*, No. 18-12120, 2019 WL 4058602, at **4-5 (11th Cir. Aug. 28, 2019) (finding that “Guatemalan women in domestic relationships” was not akin to the social group in *Matter of A-R-C-G-* and rejecting it for lack of particularity and social distinction).

⁵⁸ *Martinez-Martinez v. Sessions*, 743 F. App’x 629, 633-34 (6th Cir. 2018).

⁵⁹ *Id.*

⁶⁰ *Najera v. Whitaker*, 745 F. App’x 670, 671 (8th Cir. 2018) (emphasis added).

and thus was not a member of the group.⁶¹ In *Munguia-Mejia v. U.S. Att’y Gen.*, the Eleventh Circuit stated in even stronger terms that the petitioner “cannot show and does not argue that remand [by the BIA] would result in a different outcome in light of *Matter of A-B-*, which would *preclude* the BIA or [immigration judge] from concluding that her proposed group was legally cognizable”; therefore, she failed to show substantial prejudice by the BIA’s decision not to remand to the immigration judge.⁶² However, even though the court opined that *Matter of A-B-* did foreclose social groups defined in part by “inability to leave,” it concluded that it lacked jurisdiction to review the actual merits of the petitioner’s social group arguments because she did not raise them before the BIA.⁶³

In gender-based and fear-of-gang claims involving social groups other than the ones proffered in *Matter of A-R-C-G-* and *Matter of A-B-*, some courts viewed *Matter of A-B-* as providing “new guidance” on social group cognizability and found that remand was the proper course of action.⁶⁴ Others merely cited to it for the BIA’s existing three-part social group

⁶¹ *Id.* at 671-72. In *Aguilar-Gonzales v. Barr*, the Sixth Circuit similarly noted that while the petitioner’s BIA appeal was pending, “as the Board pointed out, the Attorney General issued a decision *undermining* the IJ’s recognition of her particular social group.” *Aguilar-Gonzales v. Barr*, No. 18-3891, 2019 WL 2896442, at *2 (6th Cir. July 5, 2019) (emphasis added). Even if the proposed group were cognizable, the BIA concluded that the petitioner failed to show either membership in the group or government inability or unwillingness to protect her. The court found that the petitioner failed to “address the BIA’s determination that she was not a member of the particular social group . . . nor does she address the BIA’s other grounds for affirming the denial of her asylum claim,” without commenting further on *Matter of A-B-* or specifying the issue of social group cognizability. *Id.* at *3. *See also* *Tacam-Garcia v. Whitaker*, 744 F. App’x 226, 227 (5th Cir. 2018) (noting that the Attorney General overruled *Matter of A-R-C-G-* and “concluded the claimed particular social group was not cognizable for asylum purposes,” but ultimately determining that “[i]n any event, even if it is assumed that [the petitioner] is a member of a [cognizable] particular social group,” she failed to establish nexus and government inability or unwillingness to protect her).

⁶² *Munguia-Mejia v. U.S. Att’y Gen.*, No. 18-13989, 2019 U.S. App. LEXIS 20714, at *11 (11th Cir. July 12, 2019) (emphasis added).

⁶³ With respect to the petitioner’s due process claim related to the BIA’s decision not to remand, the court again emphasized that the petitioner “offered no argument” that the proffered group is not impermissibly circular or precluded by *Matter of A-B-*. *Id.* The Eleventh Circuit eventually issued a precedential decision in December 2019 in a different case, rejecting an “inability to leave” social group based on the Attorney General’s reasoning in *Matter of A-B-*. *Amezcu-Preciado v. U.S. Att’y Gen.*, 943 F.3d 1337, 1344-45 (11th Cir. 2019).

⁶⁴ *Moncada v. Sessions*, 751 F. App’x 116, 118 (2d Cir. 2018) (remanding to the BIA after finding *Matter of A-B-* “offers substantial new guidance on the viability of asylum ‘claims by aliens pertaining to . . . gang violence’”); *see also* *Alvarez Lagos v. Barr*, 927 F.3d 236, 252 (4th Cir. 2019) (remanding to the BIA after finding *Matter of A-B-* “clarified the agency’s interpretation of ‘particular social group,’ considering whether it extended to a proposed group of women who are unable to leave their relationships because of domestic abuse” and therefore “might affect the Board’s reasoning on remand,” even though the petitioner’s proffered social group of “unmarried mothers living under the control of gangs in Honduras” was distinct from the groups in *Matter of A-R-C-G-* or *Matter of A-B-*). *Cf.* *Juan Pedro v. Sessions*, 740 F. App’x 467, 474 n.1 (Thapar J., concurring in part and dissenting in part) (“[T]he Attorney General’s opinion in *Matter of A-B-* may alter the Board’s subsequent analysis of the Juan-Pedros’ asylum application. . . . The specific effect of that opinion on their application should be left for the Board to determine in the first instance.”).

cognizability test.⁶⁵ In contrast, in an unpublished decision involving gender-based violence, *Silvestre-Mendoza v. Sessions*, the Ninth Circuit did not presume that *Matter of A-B-* “has any bearing on the question” that it remanded to the BIA—whether “Guatemalan women” is a cognizable social group—instead leaving the impact of *Matter of A-B-* to the agency and parties to consider.⁶⁶ Notably, although the petitioner did not propose “Guatemalan women” before the agency, the court found that the BIA erred in failing to assess the cognizability of this group because it “subsumes” the petitioner’s proposed group of “young Guatemalan females who have suffered violence due to female gender” and “is the gravamen of [her] persecution claim.”⁶⁷

The Ninth Circuit has issued at least two other unpublished decisions since *Matter of A-B-* instructing the agency to (re)consider a social group defined by gender and nationality alone. In *Ticas-Guillen v. Whitaker*,⁶⁸ the court rejected the immigration judge’s determination that the social group “women in El Salvador” was “just too broad,” citing to *Perdomo v. Holder*,⁶⁹ a published Ninth Circuit decision predating *Matter of A-R-C-G-* and *Matter of A-B-*, to confirm that “gender and nationality can form a particular social group.”⁷⁰ In *Torres Valdivia v. Barr*, the Ninth Circuit similarly found the Board’s reasons for rejecting the social group “all women in

⁶⁵ Santos Gutierrez v. U.S. Att’y Gen., 747 F. App’x 106, 108 n.2 (3d Cir. 2018) (“Because *Matter of M-E-V-G-* squarely controls, we need not consider the effect, if any, of *Matter of A-B-*, on this case.”) (internal citations and quotation marks omitted) (emphasis added); Patzan v. U.S. Att’y Gen., 754 F. App’x 128, 130 (3d Cir. 2018) (citing to *Matter of A-B-*, among other decisions, with respect to the Board’s social distinction and particularity requirements in its particular social group analysis in a gang-related case); Gonzales-Solares v. Whitaker, 742 F. App’x 277, 277 (9th Cir. 2018) (quoting *Matter of A-B-* for the rule that members of a social group must “share a narrowing characteristic other than their risk of being persecuted” in its particular social group analysis in a gang-related case) (internal quotation marks omitted).

⁶⁶ *Silvestre-Mendoza v. Sessions*, 729 F. App’x 597, 598 (9th Cir. 2018) (emphasis added).

⁶⁷ The petitioner’s proposed social group in *Silvestre-Mendoza* was different from the ones in *Matter of A-R-C-G-* and *Matter of A-B-* and clearly included persecution in the group articulation. Still, the Ninth Circuit’s commentary regarding gender and nationality groups is instructive for asylum seekers who relied on *Matter of A-R-C-G-* in pre-*Matter of A-B-* immigration court proceedings and proposed a group defined in part by “inability to leave.” Depending on the facts and posture of the case, attorneys may argue that the Board and courts of appeals should consider a group defined by gender and nationality on appeal because it is “substantially similar” to the groups proffered before the immigration judge.

⁶⁸ *Ticas-Guillen v. Whitaker*, 744 F. App’x 410, 411 (9th Cir. 2018) (remanding to the Board to determine the cognizability of the social group in the first instance as *Matter of A-B-* “clarifies” the Board’s particular social group standard).

⁶⁹ *Perdomo v. Holder*, 611 F.3d 662, 669 (9th Cir. 2010) (reversing the Board’s finding that “all women in Guatemala” is too “overly broad and internally diverse” to constitute a cognizable particular social group).

⁷⁰ *Ticas-Guillen*, 744 F. App’x, at 410 (internal quotation marks omitted); see also *Gonzales-Solares v. Whitaker*, 742 F. App’x 277 (9th Cir. 2018) (remanding to the BIA to decide whether “young, single women” is cognizable); *Alvarez Lagos v. Barr*, 927 F.3d 236, 250 (4th Cir. 2019) (noting, where the petitioner proffered the social group “unmarried mothers living under the control of gangs in Honduras,” that the size of group is not dispositive of particularity and that “the fact that ‘persecutors torture a wide swath of victims’ is not enough to show that none of those victims are members of socially distinct groups”).

Mexico” erroneous under BIA and circuit precedent.⁷¹ Notably, the court criticized the Board’s misrepresentation of the group as “women who fear violence in Mexico,”⁷² which resembled the Attorney General’s own distortion of the group proposed in *Matter of A-R-C-G*.⁷³ In addition, the Tenth Circuit opined on, without deciding, the cognizability of “females in El Salvador” in *Reyes vs. Sessions*, a post-*Matter of A-B*- domestic violence case:

Although we don’t decide whether a social group based on gender alone would be cognizable under the Act, we note that we have previously said that the focus with respect to such claims should be not on whether either gender constitutes a social group (which both certainly do) but on whether the members of that group are sufficiently likely to be persecuted that one could say that they are persecuted on account of their membership.⁷⁴

In *Reyes*, the court upheld the BIA’s finding of lack of nexus to the petitioner’s membership in the social group of “females in El Salvador,” but did not engage with the nexus analysis in *Matter of A-B*- in support of its conclusion. However, in *Alvarez Lagos v. Barr*, a case involving gang threats against a Honduran woman, the Fourth Circuit explicitly held that *Matter of A-B*- “does not purport to change the standards for measuring nexus.”⁷⁵ It reversed the immigration judge’s finding that the petitioner failed to show nexus to her proposed social group of “unmarried mothers living under the control of gangs in Honduras” and imputed political opinion, citing to patriarchal and *machista* culture in Honduras, the particular vulnerability of women without male protection, and the gendered nature of the persecutor’s slurs and threats.⁷⁶ Similarly, the Sixth and Seventh Circuits have not expressly rejected the nexus analysis in *Matter of A-B*-, but they did reject the immigration court and Board findings that violence by a private actor was merely an individual, personal act. In an unpublished decision, the Sixth Circuit reversed a denial of asylum and withholding of removal to an indigenous Guatemalan woman who was raped by gang members, finding that a central reason the gang targeted her was her

⁷¹ *Torres Valdivia v. Barr*, 777 F. App’x 251 (9th Cir. 2019).

⁷² *Id.*

⁷³ *Matter of A-B*-, 27 I. & N. Dec. 316, 331, 335 (A.G. 2018) (rephrasing the social group proffered in *Matter of A-R-C-G*- as “women in Guatemala who are victims of domestic abuse”).

⁷⁴ *Reyes v. Sessions*, 750 F. App’x 656, 661, note 5 (10th Cir. 2018) (quoting *Niang v. Gonzales*, 422 F.3d 1187, 1199-1200 (10th Cir. 2005)) (internal quotation marks omitted).

⁷⁵ *Lagos*, 927 F.3d at 250 n. 2.

⁷⁶ *Id.*

ethnicity, and not merely “criminal intent, personal vendetta, or personal desires for revenge.”⁷⁷ In a published decision, the Seventh Circuit reversed a denial of asylum and withholding to a Salvadoran man who faced death threats from gang members due to his relationship to his brother.⁷⁸ Specifically, the court found it “improper for the [immigration judge] to rely on a lack of harm to other family members, without more, to find that [the petitioner] was not targeted on account of his kinship ties.”⁷⁹ Even though the case did not relate to domestic violence, the court’s holding undermines the implication in *Matter of A-B-* that an applicant cannot show nexus when the persecutor only harmed a single victim, rather than other members of the social group.⁸⁰

Notwithstanding the Fifth Circuit’s harmful approval of *Matter of A-B-* in *Gonzales-Veliz*, the fact that a few other post-*Matter of A-B-* federal court decisions narrowly construe the Attorney General’s commentary on social groups and nexus reflects some unease with finding domestic claims foreclosed as a matter of law. The following section discusses patterns in the treatment of *Matter of A-B-* by the BIA and immigration judges across the country, which also demonstrate the ongoing viability of domestic violence claims despite the hurdles imposed by the Attorney General.

C. Matter of A-B- Before the Executive Office for Immigration Review

CGRS maintains a unique database of BIA and immigration court outcomes information and unpublished written decisions from gender-based asylum and other fear-of-return cases

⁷⁷ *Juan-Pedro v. Sessions*, 740 F. App’x 467, 470 (6th Cir. 2018) (internal quotation marks omitted).

⁷⁸ *W.G.A. v. Sessions*, 900 F.3d 957 (7th Cir. 2018).

⁷⁹ *Id.* at 967.

⁸⁰ *Matter of A-B-*, 27 I. & N. Dec. 316, 339 (A.G. 2018).

around the country.⁸¹ Below are our observations of certain adjudication patterns based on a review of domestic violence case outcomes issued between June 12, 2018 and June 11, 2019 (i.e., the one-year period following *Matter of A-B-*) that were reported to CGRS's database as of the time of writing.⁸² This section also offers some general practice pointers for litigators in light of these observations.⁸³

1. BIA Decisions

At the time of writing, the BIA has yet to issue a published decision addressing *Matter of A-B-*. However, CGRS's database included at least 50 unpublished Board outcomes from domestic violence and related gender-based claims,⁸⁴ coming out of 11 of the 12 regional

⁸¹ The Executive Office for Immigration Review (EOIR), the branch of the Department of Justice comprised of the immigration courts and the BIA, publishes general statistics on applications for asylum and related proceedings, such as applicants' countries of nationality and decision rates. For reports analyzing these statistics, see Transactional Records Clearinghouse of Syracuse University, <https://trac.syr.edu/immigration>. However, EOIR does not publish immigration court decisions or make publicly available the vast majority of non-precedential BIA decisions. Nor does it publish statistics regarding the types of persecution or rationale underlying its unpublished decisions. CGRS collects outcomes information and unpublished decisions primarily from attorneys who received resources, consultations, or other litigation support through CGRS's technical assistance program. See CGRS, *Report an Outcome in Your Case*, <https://cgrs.uchastings.edu/request-assistance/report-outcome-your-case>. Since *Matter of A-B-*, CGRS has also made a concerted effort to compile relevant outcomes data that attorneys have shared with CGRS outside of its technical assistance program or circulated on immigration-related listservs. Some additional unpublished BIA decisions are available via electronic databases such as Westlaw. The Immigration & Refugee Appellate Center (IRAC) also compiles an index of select unpublished BIA decisions, updated on a monthly basis. The index is available for purchase directly from IRAC. See IRAC, *Index of Unpublished Decisions of the Board of Immigration Appeals* (2019 edition), <https://www.irac.net/unpublished/index/>. For ease of tracking, CGRS has assigned each of these cases a unique CGRS database case number. We have estimated the figures in this section based on numbers produced from CGRS's database. While CGRS has written decisions on file for some of the case outcomes in its database, information from other case outcomes is based on the attorneys' summaries of the underlying claims and, where applicable, the adjudicators' oral decisions. CGRS is authorized to share some of the written decisions on file with other attorneys representing asylum seekers through its technical assistance program.

⁸² The BIA and immigration court outcomes information described in this section do not reflect the overall grant, denial, or remand rates in domestic violence cases following *Matter of A-B-*. As mentioned earlier, the U.S. government does not publish this information. CGRS's database also collects outcomes information at the asylum office level. However, because approval and referral notices for affirmative asylum cases are generally boilerplate, we cannot know which social group formulations or protected grounds the asylum officer considered or the officer's analysis of other elements of asylum eligibility.

⁸³ For further guidance on post-*Matter of A-B-* legal strategies, we recommend that practitioners representing asylum seekers consult CGRS's practice advisories on this topic. See CGRS, CHALLENGING *MATTER OF A-B-* IN THE COURTS OF APPEALS: ADMINISTRATIVE LAW ARGUMENTS (July 2019); CGRS, ONE YEAR AFTER *MATTER OF A-B-*: LITIGATION UPDATE (July 2019); ACLU & CGRS, *GRACE V. WHITAKER* (Mar. 2019), <https://www.aclu.org/legal-document/grace-v-whitaker-practice-advisory>; CGRS, POST-*MATTER OF A-B-* LITIGATION UPDATE (Dec. 2018); CGRS, *MATTER OF A-B-* (July 2018); see also National Immigrant Justice Center, ASYLUM PRACTICE ADVISORY: APPLYING FOR ASYLUM AFTER *MATTER OF A-B-* (Jan. 2019), <https://immigrantjustice.org/sites/default/files/content-type/page/documents/2019-01/Matter%20of%20A-B-%20Practice%20Advisory%20-%201.2019%20Update%20-%20Final.pdf>; Immigrant Legal Resource Center, *MATTER OF A-B-* CONSIDERATIONS (Oct. 2018), https://www.ilrc.org/sites/default/files/resources/matter_a_b_considerations-20180927.pdf.

⁸⁴ This number includes non-precedential BIA decisions accessible through Westlaw or IRAC's index.

circuits.⁸⁵ Approximately 37 are denials and 13 are remands. Although unpublished decisions are not binding on adjudicators, they shed insight on the Board's interpretation of *Matter of A-B-*.

Many of these decisions are cursory or otherwise brief opinions citing to *Matter of A-B-*'s statement that “[g]enerally, claims by aliens pertaining to domestic violence or gang violence perpetrated by non-governmental actors will not qualify for asylum” to deny such claims without discussion of the underlying facts or record evidence.⁸⁶ In one decision, the Board outright stated that “intervening precedential case law renders [the applicant, a domestic violence survivor] ineligible for asylum based on membership in her proffered particular social group.”⁸⁷ In another decision, the Board explicitly concluded that *Matter of A-B-* “foreclosed the respondent’s arguments.”⁸⁸ Several other Board decisions denied motions to reopen based on lack of notice (with respect to *in absentia* removal orders), ineffective assistance of counsel, or changed country conditions, at least partly because the Board determined the applicant could not even establish prima facie eligibility⁸⁹ for asylum or withholding under *Matter of A-B-*.⁹⁰

As noted earlier, the D.C. District Court’s decision in *Grace v. Whitaker* ruled that this “general rule” against domestic violence claims is unlawful and enjoined its application in

⁸⁵ There are no immigration courts in the District of Columbia.

⁸⁶ *Matter of A-B-*, 27 I. & N. Dec. 316, 320 (A.G. 2018); see, e.g., CGRS Database Case No. 16649 (B.I.A. Aug. 6, 2018) (on file with CGRS); see also CGRS Database Case No. 27172 (B.I.A. July 25, 2018).

⁸⁷ CGRS Database Case No. 29094 (B.I.A. Aug. 21, 2018) (on file with CGRS).

⁸⁸ CGRS Database Case No. 17227 (B.I.A. June 15, 2018) (on file with CGRS) (“The Attorney General has foreclosed the respondent’s arguments. . . . The Attorney General stated that while claims pertaining to violence inflicted by non-governmental actors may be viable in limited circumstances, in practice they are ‘unlikely to satisfy the statutory grounds for proving group persecution that the government is unable or unwilling to address.’”) (quoting *A-B-*, 27 I. & N. Dec. at 320).

⁸⁹ The Supreme Court has held that the probability of persecution may be as low as a one-in-ten chance for purposes of asylum eligibility. *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 431, 440 (1987). It follows, then, that showing prima facie eligibility for asylum eligibility would be a relatively low standard. See *Matter of S-V-*, 22 I. & N. Dec. 1306, 1308 (B.I.A. 2000) (stating that, for purposes of reopening proceedings, the Board has “not required a conclusive showing that eligibility for relief has been established,” but rather that “it would be worthwhile to develop the issues further at a plenary hearing on reopening”) (internal quotation marks omitted).

⁹⁰ See, e.g., *In re Maria Ren-Lopez*, AXXX-XX3-857, 2019 WL 2160109 (B.I.A. Jan. 31, 2019) (CGRS Database Case No. 30830) (noting that the respondent failed to present an application for asylum and for withholding of removal, despite expressing a fear of domestic violence in Guatemala, but even if she did, “a fear of domestic violence in one’s home country is generally not a basis for relief from removal”); see also CGRS Database Case No. 29837 (B.I.A. May 28, 2019) (on file with CGRS) (“While the applicant now seeks withholding of removal on the basis of feared abuse from her husband (as well as by her father and brothers and by criminal cartels), she has not established that she would be likely to prevail on such a claim, particularly in light of the issuance of the Attorney General’s decision in *Matter of A-B-*”); see also CGRS Database Case No. 26628 (B.I.A. July 6, 2018) (on file with CGRS) (noting that under *Matter of A-B-*, “[g]enerally claims by aliens pertaining to domestic violence or gang violence perpetrated by non-governmental actors will not qualify for asylum,” and finding that the respondent, who suffered physical and sexual abuse at the hands of her uncle, therefore has not established prima facie eligibility for relief in order to reopen proceedings).

credible fear proceedings. In at least one decision post-*Grace*, the BIA acknowledged the court’s opinion but found it was bound to apply *Matter of A-B-* in full removal proceedings.⁹¹ Notably, the Board did recognize that *Matter of A-B-* is not a substitute for a case-by-case determination.⁹² And yet in the same decision, the Board simply agreed with the immigration judge’s denial of asylum and withholding in light of the overruling of *Matter of A-R-C-G-* and “the reasoning” in *Matter of A-B*.⁹³ It did not cite to record evidence or make any effort to reconcile this unquestioning support for the “general rule” with its duty to conduct an individualized case assessment. Attorneys litigating appeals before the Board should hold panel members to the long-standing principle of case-by-case adjudication and explain that adjudicators should properly interpret the “general rule” as dictum, not holding.⁹⁴ Attorneys may further consider arguing that the former Attorney General had in fact overruled *Matter of A-R-C-G-* because of the lack of “rigorous analysis”—which is precisely what the Board is guilty of doing when it finds domestic violence claims foreclosed as a matter of law.⁹⁵

Many of the social groups the Board rejected in the aftermath of *Matter of A-B-* were defined in part by the characteristic of “inability to leave,” as in *Matter of A-R-C-G-*.⁹⁶ The BIA generally adopted *Matter of A-B-*’s statements regarding circularity, particularity, and social distinction, rather than identifying why country conditions or other evidence in the case records did not suffice to establish cognizability. In a few other decisions involving domestic violence, the Board also rejected social groups defined in part by the characteristic of being “viewed as

⁹¹ CGRS Database Case No. 27151 (B.I.A. Feb. 22, 2019) (on file with CGRS).

⁹² *Id.*

⁹³ *Id.*

⁹⁴ See *Matter of Acosta*, 19 I. & N. Dec. 211, 233 (B.I.A. 1985); *Matter of M-E-V-G-*, 26 I. & N. Dec. 227, 251 (B.I.A. 2014); *Paiz-Morales v. Lynch*, 795 F.3d 238, 245 (1st Cir. 2015); *Pirir-Boc v. Holder*, 750 F.3d 1077, 1084 (9th Cir. 2014).

⁹⁵ *Matter of A-B-*, 27 I. & N. Dec. 316, 319 (A.G. 2018).

⁹⁶ See, e.g., CGRS Database Case No. 16649 (B.I.A. Aug. 6, 2018) (on file with CGRS) (rejecting social group of “women in Honduras who are unable to leave a common law relationship”); CGRS Database Case No. 17227 (B.I.A. June 15, 2018) (on file with CGRS) (rejecting “Guatemalan women in domestic relationships they are unable to leave”); CGRS Database Case No. 27172 (B.I.A. July 25, 2018) (on file with CGRS) (rejecting “El Salvadoran [sic] women in domestic relationships who are unable to leave”); CGRS Database Case No. 29094 (B.I.A. Aug. 21, 2018) (on file with CGRS) (rejecting “women in Honduras in a de facto union who are unable to leave the relationship with their male partner”); CGRS Database Case No. 16734 (B.I.A. May 2, 2019) (on file with CGRS) (rejecting “Honduran women in domestic relationships who are unable to leave their relationships”); CGRS Database Case No. 32008 (B.I.A. Oct. 18, 2018) (on file with CGRS) (rejecting “Dominican women unable to leave a domestic relationship”).

property,” akin to one of the social groups proposed by DHS in *Matter of L-R*.⁹⁷ While this exact line of social group formulations was not at issue in *Matter of A-B*-, in one decision the Board characterized the formulation as a “minor variation” of the one discussed in *Matter of A-R-C-G*-.⁹⁸ In another decision, the Board cited *Matter of A-B*- to determine that “[t]he common characteristic that binds members of the applicant’s proposed group together is the fact that they are at risk of domestic violence.”⁹⁹ Following the rationale in *Matter of A-B*-, the Board found that the characteristic of being “viewed as property” rendered the social group impermissibly defined by the harm asserted.¹⁰⁰ In contrast, in another case, the BIA remanded to the immigration judge to analyze the applicant’s social group defined in part by “viewed as property.”¹⁰¹ Thus, at least one Board member did not view such social groups precluded as a general matter by *Matter of A-B*-. CGRS’s database also included at least four other unpublished BIA decisions remanding to the immigration judge to consider a social group defined by gender and nationality alone since *Matter of A-B*-.¹⁰²

Section II.C.ii. below discusses how immigration judges from various jurisdictions have addressed these alternative gender-based social groups. Where attorneys proffered a social group before the immigration court similar to the one in *Matter of A-R-C-G*-, attorneys should consider arguing (or reiterating) on appeal why such social groups are not impermissibly circular, including by highlighting any relevant country conditions evidence in the record.¹⁰³ At the same time, attorneys may also explore alternate social groups “substantially similar” to the one raised

⁹⁷ See DHS *Matter of L-R*- Brief, *supra* note 21.

⁹⁸ CGRS Database Case No. 28592 (B.I.A. 2018) (on file with CGRS) (month and date of decision redacted).

⁹⁹ CGRS Database Case No. 19522 (B.I.A. Sept. 6, 2018) (on file with CGRS).

¹⁰⁰ *Id.*

¹⁰¹ CGRS Database Case No. 33593 (B.I.A. 2018) (on file with CGRS) (month and date of decision redacted); *see also, e.g.*, CGRS Database Case No. 29894 (B.I.A. 2018) (on file with CGRS) (month and date of decision redacted) (rejecting the social groups of “[nationality] females,” “[nationality] married women in domestic relationships they are unable to leave,” and “close family members,” but not addressing the cognizability of “married [nationality] women who are viewed as property by virtue of their position within a domestic relationship,” instead denying on the state protection element).

¹⁰² *See, e.g.*, *Matter of T-S-M*-, AXXX XXX 911 (B.I.A. Apr. 16, 2019) (CGRS Database Case No. 28056) (on file with IRAC) (remanding for consideration of whether “Guatemalan women” is a cognizable social group); *Matter of M-D-A*-, AXXX XXX 053 (B.I.A. Feb. 14, 2019) (CGRS Database Case No. 34757) (on file with IRAC) (remanding for consideration of whether “women in El Salvador” is a cognizable social group); *see also* CGRS Database Case No. 20190, *Matter of S-R-P-O*-, AXXX XXX 056 (B.I.A. Dec. 20, 2018) (on file with CGRS) (remanding for consideration of whether “Mexican women” is a cognizable social group); *see also* *Matter of X-G-C-D*-, AXXX XXX 474 (B.I.A. Dec. 11, 2018) (CGRS Database Case No. 34755) (on file with IRAC) (remanding for consideration of whether “women in Mexico” is a cognizable social group).

¹⁰³ *See* Parts A, *supra*, and B.ii, *infra*, for arguments challenging the Attorney General’s circularity analysis of the social group in *Matter of A-R-C-G*-.

before the immigration judge that the Board can take into consideration on appeal, such as groups defined by gender and nationality alone, if supported by the facts of the case.¹⁰⁴

Notwithstanding the social group or protected ground asserted by the applicant, in several cases the Board alternatively denied asylum and withholding based on lack of nexus. For instance, the Board reversed a grant of asylum to a domestic violence survivor based on lack of nexus, where the applicant proffered a feminist political opinion and membership in the social group of “Mexican women.”¹⁰⁵ Though acknowledging the immigration judge’s factual findings on “the ‘pandemic’ of violence against females in [Mexico] and the import of ‘culturally constructed’ and entrenched [gender] identity roles,” the Board noted that *Matter of A-B-* “emphasiz[es] the essentially ‘personal’ nature of domestic disputes.”¹⁰⁶ The BIA then concluded that the record lacked evidence that the applicant’s abuser harmed her for “reasons unrelated to their relationship,” particularly because he did not seek to harm other members of the proposed social group, i.e., other Mexican women. In another decision, the Board denied a child abuse claim in a similar manner, finding that the applicant failed to show that membership in his proposed social groups, even if cognizable, motivated the underlying harm because it would be considered “personal” or “private” under *Matter of A-B-* and thus insufficient for asylum eligibility.¹⁰⁷ As discussed in Section II.C.ii. below, attorneys should remind the Board on appeal that mixed motives are permissible and point to record evidence of broader societal norms underlying so-called “personal” motives in domestic violence cases.

The Board’s treatment of *Matter of A-B-* has been overwhelmingly unfavorable to asylum seekers. Nonetheless, in light of the more nuanced courts of appeals decisions discussed in Section II.B, domestic violence claims remain viable in the aftermath of *Matter of A-B-* through

¹⁰⁴ In a 2018 published decision, the Board held that it will not consider “substantially different” social groups proposed for the first time on appeal. *Matter of W-Y-C- & H-O-B-*, 27 I. & N. Dec. 189, 190-91 (B.I.A. 2018). However, in *Silvestre-Mendoza v. Sessions*, discussed in Section II.B, *supra*, the Ninth Circuit found that the Board erred by not considering “Guatemalan women” as a social group, even though the applicant herself did not proffer this social group. *Silvestre-Mendoza v. Sessions*, 729 F. App’x 597, 598 (9th Cir. 2018). If an applicant’s merits hearing preceded both *Matter of A-B-* and *Matter of W-Y-C- & H-O-B-*, attorneys may also consider requesting remand to the immigration judge to raise additional social groups and protected grounds. The appropriate appellate strategy will depend on the facts of the case, record evidence, and legal arguments presented in the immigration court proceedings below.

¹⁰⁵ CGRS Database Case No. 29252 (B.I.A. Apr. 1, 2019) (on file with CGRS).

¹⁰⁶ *Id.*

¹⁰⁷ CGRS Database Case No. 27979 (B.I.A. 2019) (month and date of decision redacted).

strategic and thorough lawyering and record-building. Moreover, as discussed in the following section, building a strong record and preserving all relevant arguments before the immigration court may in some cases avoid BIA appeal altogether.

2. Immigration Court Decisions

In the months following *Matter of A-B-*, attorneys reported that immigration judges in several jurisdictions ordered applicants for asylum and withholding of removal to file briefs identifying particular social groups or other protected grounds, arguments relating to other asylum eligibility requirements (e.g., nexus, state protection, internal relocation), and/or any arguments distinguishing the applicant's case from *Matter of A-B-*.¹⁰⁸ Some immigration judges reportedly requested briefing on such issues within a few months of the applicant's master calendar hearing, despite scheduling the individual merits hearing in 2020 or later.¹⁰⁹ The intent behind these premature briefing orders was likely to pretermitt domestic violence and/or fear-of-gang claims instead of allowing the case to proceed to an evidentiary hearing.¹¹⁰

These requests have emerged in the wake of two recent Justice Department decisions, building upon the Attorney General's general pronouncement against domestic violence and fear-of-gang claims in *Matter of A-B-*: (1) the Attorney General's 2019 vacatur of the BIA's decision in *Matter of E-F-H-L-* relating to full evidentiary hearings;¹¹¹ and (2) the BIA's 2018 decision in *Matter of W-Y-C- & H-O-B-* requiring applicants to "clearly indicate the exact delineation of any particular social group(s)" before the immigration court.¹¹² This is one example of how *Matter of*

¹⁰⁸ To the authors' knowledge, attorneys have reported receiving briefing orders of this nature from immigration judges in jurisdictions including Arlington, Denver, Houston, and Newark. Samples of the Arlington and Newark court orders are on file with CGRS.

¹⁰⁹ EOIR's Immigration Court Practical Manual states that non-detained individuals must submit pre-hearing filings at least fifteen days in advance of an individual merits hearing. Office of the Chief Immigration Judge, EOIR, IMMIGRATION COURT PRACTICE MANUAL, Ch. 3.1(b)(ii)(A) (released on Sept. 26, 2019), <https://www.justice.gov/eoir/office-chief-immigration-judge-0>. Requiring applicants to file briefs months or years before the merits hearing far exceeds this default fifteen-day guideline.

¹¹⁰ CGRS has on file, for example, a boilerplate notice from a judge at the Miami Immigration Court scheduling a case for a "mini-individual hearing" on the grounds that "the case may be amenable to summary judgment" in light of "Board and/or Eleventh Circuit precedential decisions [that] may preclude an asylum or withholding grant as a matter of law." The notice instructed the applicant to "provide any and all enumerated grounds" as well as "a detailed declaration in which [the applicant] outlines his or her claim in full." CGRS also has on file an order from an immigration judge in Denver denying an applicant's motion to vacate a "PSG hearing" and set an individual merits hearing. Order of the Immigr. Judge (Denver Immigr. Ct. 2019) (on file with CGRS) (month and date of order redacted). The court explained that *if* it finds the delineated social groups cognizable, then the applicant may be "potentially able to advance" to a shorter individual merits hearing. *Id.* (citing to *Matter of W-Y-C- & H-O-B-*, 27 I. & N. Dec. 189, 190-91 (B.I.A. 2018)).

¹¹¹ *Matter of E-F-H-L-*, 27 I. & N. Dec. 226 (A.G. 2018), *vacating* 26 I. & N. Dec. 319 (B.I.A. 2014).

¹¹² *W-Y-C- & H-O-B-*, 27 I. & N. Dec. at 191-92.

A-B- fits into the Administration’s larger project of agency decisions designed to undercut both substantive asylum law and meaningful access to the asylum process itself. In addition to challenging any presumption against the viability of domestic violence and fear-of-gang claims, attorneys should object to any attempts by immigration judges to undermine due process rights by refusing to conduct merits hearings.¹¹³ Even though the Attorney General vacated *Matter of E-F-H-L-*, his decision did not disturb other regulatory, statutory, and case law supporting an applicant’s right to a full evidentiary hearing.¹¹⁴ Furthermore, attorneys should consider reserving the right to amend or add any protected grounds and social group formulations leading up to and even at the merits hearing. *Matter of W-Y-C- & H-O-B-* does not require applicants to articulate their proposed social group formulations at any specific point during the immigration proceedings.

Notwithstanding the intent of some immigration judges to prejudge domestic violence claims post-*Matter of A-B-*, attorneys continued to report grants in such cases at the immigration court level in the one-year period following the decision.¹¹⁵ CGRS’s database included at least 170 asylum or withholding grants from cases involving domestic violence, including partner abuse, child abuse, and other intra-familial abuse.¹¹⁶ DHS counsel waived appeal at the merits hearing in several, but not all, of these cases.

At the same time, attorneys have reported denials in domestic violence cases at the immigration court level. Many denials are either due to the scrutiny of domestic violence claims in general or because of some other discussion in *Matter of A-B-*, for example, the cognizability

¹¹³ “Immigration judges who are prepermitting PSG-based asylum cases without a full hearing may be violating longstanding agency requirements and constitutional due process norms.” Fatma Marouf, *Becoming Unconventional*, *supra* note 25, at 498.

¹¹⁴ See, e.g., INA § 240(b)(4)(B), 8 U.S.C. § 1229a(b)(4)(B) (“[T]he alien shall have a reasonable opportunity . . . to present evidence on the alien’s own behalf”); 8 C.F.R. § 1240.11(c)(3) (“Applications for asylum and withholding of removal . . . will be decided by the immigration judge . . . after an evidentiary hearing to resolve factual issues in dispute. . . . During the removal hearing, the alien . . . may present evidence and witnesses in his or her own behalf.”); *Matter of Fefe*, 20 I. & N. Dec. 116, 118 (B.I.A. 1989) (“In the ordinary course . . . we consider the full examination of an applicant to be an essential aspect of the asylum adjudication process for reasons related to fairness to the parties and to the integrity of the asylum process itself.”).

¹¹⁵ Some of these cases also involved an additional form of persecution, such as gang-related violence or persecution of LGBTQI individuals or persons with disabilities. Because most immigration judges issued oral decisions, in some cases it is unclear which of the claims the adjudicator addressed and the ultimate basis for the outcome.

¹¹⁶ As noted in Section II.A, the Attorney General’s decision also opined on the viability of fear-of-gang and other “private actor” claims. CGRS’s database includes outcomes information and unpublished decisions from fear-of-gang and other asylum and withholding claims following *Matter of A-B-*.

of social groups defined in part by “inability to leave” or nexus in the context of preexisting relationships. CGRS’s database included at least 145 asylum or withholding of removal denials from domestic violence cases. Even *Matter of A-R-C-G-* did not provide a panacea for all asylum and withholding claims based on domestic violence, given the longstanding principle of case-by-case determination of asylum eligibility. Nevertheless, as discussed below, many of the post-*Matter of A-B-* immigration judge denials fail to engage with the facts or record evidence of any given case and instead cite to dicta in *Matter of A-B-* to decline relief.

Social groups defined in part by “inability to leave” remain viable post-*Matter of A-B-*, particularly in light of the D.C. District Court’s persuasive determination in *Grace v. Whitaker* that such groups are not inherently circular.¹¹⁷ An immigration judge in San Francisco granted asylum based on the social group “Honduran women unable to leave a domestic relationship,” reportedly stating that *Grace v. Whitaker* significantly curtailed *Matter of A-B-*.¹¹⁸ A New York City immigration judge recognized that the applicant’s proffered group of “Ecuadorian [sic] women unable to leave their relationships where there are children in common, . . . requires a *separate*, although similar, analysis as that provided in *Matter of A-R-C-G-*.”¹¹⁹ In that case, however, the immigration judge applied *Matter of A-B-*’s reasoning regarding the circularity, social distinction, and particularity of the group in *Matter of A-R-C-G-*, without engaging with the evidence submitted to the court or explaining why the evidence was insufficient to satisfy the cognizability test.¹²⁰ Other immigration judges have similarly rejected “inability to leave” social

¹¹⁷ Since the D.C. District Court’s decision in *Grace v. Whitaker*, at least one immigration judge in New York reportedly requested briefing on the impact of *Grace* on asylum cases coming before the court.

¹¹⁸ CGRS Database Case No. 29359 (San Francisco Immigr. Ct. Apr. 23, 2019) (information reported by applicant’s counsel).

¹¹⁹ CGRS Database Case No. 24939 (New York Immigr. Ct. Oct. 12, 2018) (on file with CGRS) (emphasis added).

¹²⁰ *Id.* (quoting the Attorney General’s rationale in *Matter of A-B-* to conclude that the applicant’s group was “defined by the persecution of its members,” that Ecuadoran society unlikely viewed members as a distinct group as opposed to “victim[s] of a particular abuser in highly individualized circumstances,” and that “social groups defined by their vulnerability to private criminal activity likely lack the particularity required”) (internal quotation marks omitted).

groups by referencing *Matter of A-B-* in lieu of examining the case record.¹²¹ To counter this prejudgment of “inability to leave” social groups, attorneys should highlight the case-by-case adjudication requirement, clearly articulate the links between the record evidence and the BIA’s three-part test for social group cognizability, and point to country conditions evidence of social, political, and legal factors resulting in women’s inability to leave domestic relationship, separate from the abuse itself.

In addition to groups defined in part by “inability to leave,” several immigration judges have addressed social groups defined by gender, nationality, and the status of being “viewed as property” in a relationship. Some immigration judges have rejected “viewed as property” social groups, applying the rationale in *Matter of A-B-* despite the different formulation. For example, finding *Matter of A-B-* “directly applicable” to the case before the court, an immigration judge in El Paso rejected not only those social groups the applicant defined in part by “inability to leave,” but also a social group of “Honduran women who are viewed as property of Honduran men with whom they shared a domestic relationship.”¹²² Specifically, the judge reasoned that the latter characteristic was “dependent and closely connected to [the applicant’s] alleged persecutor,” and that because “the harm she experienced flowed directly from this belief or mind-set,” the asserted groups were not independent of the underlying harm.¹²³

¹²¹ See, e.g., CGRS Database Case No. 30489 (Charlotte Immigr. Ct. Mar. 14, 2019) (on file with CGRS) (rejecting the social group “El Salvadoran [sic] women in domestic partnerships who are unable to leave their relationship”); CGRS Database Case No. 22940 (Seattle Immigr. Ct. Dec. 14, 2018) (on file with CGRS) (rejecting “Guatemalan women unable to leave a domestic relationship”); CGRS Database Case No. 25268 (New Orleans Immigr. Ct. July 18, 2018) (on file with CGRS) (rejecting “Honduran women who are unable to leave a domestic relationship”); CGRS Database Case No. 10950 (Atlanta Immigr. Ct. June 22, 2018) (on file with CGRS) (rejecting “formerly married Honduran women who are unable to leave their relationship”); CGRS Database Case No. 26218 (Los Angeles Immigr. Ct. June 22, 2018) (on file with CGRS) (rejecting “Salvadoran women unable to leave the relationship”).

¹²² CGRS Database Case No. 23508 (El Paso Immigr. Ct. July 17, 2018) (on file with CGRS). The immigration judge interpreted *Matter of A-B-* to hold that “women in abusive relationships are not members of a cognizable particular social group by virtue of their persecution.” Note, however, that “women in abusive relationships” is not the social group that was in question in *Matter of A-B-* or *Matter of A-R-C-G-*. Though the Attorney General recast the social group in *Matter of A-R-C-G-* as “women in Guatemala who are victims of domestic abuse,” this is an entirely different formulation than the group the BIA analyzed in the underlying proceedings.

¹²³ *Id.*; see also, e.g., CGRS Database Case No. 24971 (Miami Immigr. Ct. Aug. 7, 2018) (on file with CGRS) (rejecting the social group “Nicaraguan women viewed as property” as too subjective and “fatally defined by its members’ asserted harm—that is, domestic abuse attendant to being ‘viewed as property’”); CGRS Database Case No. 30465 (Los Angeles Immigr. Ct. July 25, 2018) (on file with CGRS) (rejecting the social group “Ecuadorian [sic] women viewed as property by virtue of their position in a domestic relationship,” citing to *Matter of A-B-* to support its view that “the ‘narrowing characteristic’ of the group . . . is dependent on the fact that its members suffer from domestic violence”).

Even though the judge discussed the “viewed as property” characteristic as primarily the persecutor’s individual belief, in many asylum cases the applicant’s society more broadly views women as male property. These widespread societal attitudes in turn inform the individual persecutor’s perceptions. Furthermore, while societal or individual perceptions may *lead to* persecution, they are not necessarily the same as the harm itself. A Kansas City immigration judge recognized this in another domestic violence case, where the applicant asserted the social groups of “Salvadoran females viewed as property by virtue of their position in a domestic relationship” and “Salvadoran females viewed as property.”¹²⁴ Citing the D.C. District Court’s “instructive” and “logical reasoning concerning the circularity issue” in *Grace*, the immigration judge found the proffered groups were not circular because “the group relies on [the members’] personal traits and position in El Salvador’s society” and not on “terms such as ‘victims of domestic violence’ or ‘rape survivors.’”¹²⁵ CGRS’s database included several other case outcomes where immigration judges from various jurisdictions reportedly recognized social groups defined by “viewed as property” post-*Matter of A-B*.¹²⁶ Attorneys and adjudicators may also look to case law referenced in Section II.A highlighting that the circularity principle requires only that social groups not be defined *solely* by the persecution in question.¹²⁷ Thus, irrespective of the inclusion of “inability to leave” or “viewed as property,” social groups also defined by other characteristics such as gender, nationality, and/or relationship status may be cognizable.

Other immigration judges have, however, moved away from the “inability to leave” and “viewed as property” social group formulations altogether. CGRS’s database included several post-*Matter of A-B*- immigration court outcomes recognizing social groups defined exclusively

¹²⁴ CGRS Database Case No. 28511 (Kansas City Immigr. Ct. May 30, 2019) (on file with CGRS).

¹²⁵ *Id.*

¹²⁶ *See, e.g.*, CGRS Database Case No. 24590 (Chicago Immigr. Ct. Nov. 27, 2018) (on file with CGRS) (recognizing the social group of “married Honduran women who are viewed as property due to patriarchal society norms”); CGRS Database Case No. 29291 (Baltimore Immigr. Ct. Jan. 28, 2019) (recognizing, according to the applicant’s counsel, the social group of “female children in El Salvador viewed as property”); CGRS Database Case No. 26718 (Seattle Immigr. Ct. Sept. 10, 2018) (recognizing, according to the applicant’s counsel, “Honduran children viewed as property”). An attorney also reported that a Memphis immigration judge allowed the applicant to add the social group “Guatemalan women sold into slavery” at the individual merits hearing, and that DHS stipulated to a withholding grant on that basis. CGRS Database Case No. 27063 (Memphis Immigr. Ct. Sept. 13, 2018).

¹²⁷ *See Matter of A-M-E- & J-G-U-*, 24 I. & N. Dec. 69, 74 (B.I.A. 2007); *Matter of W-G-R-*, 26 I. & N. Dec. 208, 215 (B.I.A. 2014); *Perez-Rabanales v. Sessions*, 881 F.3d 61, 67 (1st Cir. 2018); *Castillo-Arias v. U.S. Att’y Gen.*, 446 F.3d 1190, 1198 (11th Cir. 2006); *see also Cece v. Holder*, 733 F.3d 662, 671 (7th Cir. 2013); *Escobar v. Holder*, 657 F.3d 537, 545-46 (7th Cir. 2011).

by gender and nationality.¹²⁸ These opinions cite to *Matter of Acosta* as well as courts of appeals decisions as binding or persuasive authority supporting gender and nationality social groups.¹²⁹ One Denver immigration judge acknowledged that “[t]here are some countries in which women are parceled out as a whole, irrespective of other defining characteristics, and subjected to misogynistic laws or customs that undermine their rights and condone gender-based violence.”¹³⁰

In contrast, other immigration judges have rejected gender and nationality social groups, mostly acknowledging their immutability but asserting they are too broad and diverse to meet the particularity requirement.¹³¹ Attorneys and adjudicators should note case law holding that size, breadth, and diversity do not undermine particularity, including *Perdomo v. Holder* and post-*Matter of A-B-* Ninth Circuit decisions that reject this rationale as a basis for rejecting gender and nationality social groups.¹³² Moreover, under the legal canon of *ejusdem generis* (“of the same

¹²⁸ See, e.g., CGRS Database Case No. 17508 (Philadelphia Immigr. Ct. June 27, 2019) (on file with CGRS) (recognizing social group of “Ecuadorian [sic] women”); CGRS Database Case No. 35186 (Boston Immigr. Ct. June 18, 2019) (on file with CGRS) (recognizing “Guatemalan women”); CGRS Database Case No. 34357 (Philadelphia Immigr. Ct. May 15, 2019) (on file with CGRS) (recognizing “Guatemalan women”); CGRS Database Case No. 26017 (San Francisco Immigr. Ct. Apr. 3, 2019) (on file with CGRS) (recognizing “Guatemalan women”); CGRS Database Case No. 27822 (Baltimore Immigr. Ct. Mar. 7, 2019) (on file with CGRS) (recognizing “El Salvadoran [sic] women”); CGRS Database Case No. 21915 (Arlington Immigr. Ct. 2018) (on file with CGRS) (month and date of decision redacted) (recognizing “women in Honduras”).

¹²⁹ See, e.g., *Matter of Acosta*, 19 I. & N. Dec. 211, 233 (B.I.A. 1985); *Fatin v. INS*, 12 F.3d 1233, 1240 (3d Cir. 1993); *Hassan v. Gonzales*, 484 F.3d 513, 518 (8th Cir. 2007); *Perdomo v. Holder*, 611 F.3d 662, 667-69 (9th Cir. 2010); *Mohammed v. Gonzales*, 400 F.3d 785, 797-98 (9th Cir. 2005); *Niang v. Gonzales*, 422 F.3d 1187, 1199-200 (10th Cir. 2005); *Lopez v. Sessions*, 744 F. App’x 574, 581-82 (10th Cir. 2018) (McJay, J., dissenting).

¹³⁰ CGRS Database Case No. 32808 (Denver Immigr. Ct. Mar. 7, 2019) (on file with CGRS). Although recognizing the particular social group of “Mexican women,” the immigration judge denied the applicant’s alternate proffered groups of “Mexican mothers,” “Mexican women/mothers unable to leave domestic relationships,” and “Mexican women who believe in women’s rights,” partly on the grounds that country conditions evidence suggest that women are subjected to violence regardless of whether they are mothers, in domestic relationships, or believe in women’s rights. While attorneys should preserve as many viable social group formulations as supported by the facts of the case, they should be sure to include country conditions evidence corroborating *each* social group formulation, for example, not only violence against women in general in a given country, but also the heightened risk of any relevant subgroups of women.

¹³¹ See, e.g., CGRS Database Case No. 28816 (Los Angeles Immigr. Ct. June 11, 2019) (on file with CGRS) (rejecting “women in Guatemala” as “overbroad and all encompassing”); CGRS Database Case No. 29251 (Eloy, Oct. 15, 2018) (on file with CGRS) (finding “Salvadoran women” immutable and socially distinct but insufficiently particular because it is “amorphous and could be made up [of] a potentially large and diffuse segment of society”); CGRS Database Case No. 24971 (Miami Immigr. Ct. Aug. 7, 2018) (on file with CGRS) (finding “Nicaraguan women” to be immutable but rejecting it after determining that “the term is too broad and diffusive to have ‘definable boundaries’” given that “Nicaraguan women make up a large segment of Nicaraguan society”); CGRS Database Case No. 26218 (Los Angeles, June 22, 2018) (on file with CGRS) (rejecting women as a social group because it “sweeps incredibly broadly across all segments of society. It covers all social classes, all ethnicities, all religions, and all political views.”).

¹³² See *supra* Section B; see also, e.g., *N.L.A. v. Holder*, 744 F.3d 425, 438 (7th Cir. 2014) (“[I]t would be antithetical to asylum law to deny refuge to a group of persecuted individuals who have valid claims merely because too many have valid claims.”); *Cece v. Holder*, 733 F.3d 662, 673-74 (7th Cir. 2013) (en banc); *Henriquez-Rivas v. Holder*, 707 F.3d 1081, 1093-94 (9th Cir. 2013) (en banc).

kind”) employed in *Matter of Acosta*, membership in a particular social group should be interpreted similarly to the other four protected grounds, all of which include relatively broad and diverse categories.¹³³

A few immigration judges have bypassed the debate surrounding gender and nationality social groups by adding one or more characteristics to the formulation, such as ethnicity. In one domestic violence case, a San Francisco immigration judge reportedly stated that the court would have recognized a social group defined by gender and nationality alone. Nevertheless, the immigration judge granted asylum based on membership in the particular social group of “single Guatemalan indigenous women” upon stipulation by DHS counsel who found “Guatemalan women” too broad.¹³⁴ Therefore, besides preserving a social group defined by gender and nationality where supported by the facts of the case, attorneys may also consider proposing alternate groups defined by additional characteristics.¹³⁵

However, other immigration judges have shied away from membership in a particular social group altogether, preferring instead to grant based on another protected ground, in part to avoid DHS appeal. Attorneys should consider preserving not only multiple social group formulations, but also all applicable protected grounds, particularly political opinion where supported by the facts of the case. CGRS’s database included several grants in domestic violence claims based on political opinion. In some of these cases, the immigration judges reportedly cited

¹³³ Indeed, compared to nationality as a protected ground, social groups like “Guatemalan women” include the narrowing characteristic of gender.

¹³⁴ CGRS Database Case No. 28590 (San Francisco Immigr. Ct. Aug. 22, 2018) (information reported by applicant’s counsel). A July 2018 Guidance Memo by the Immigration and Customs Enforcement (ICE) Office of Principal Legal Advisor (OPLA) instructs DHS counsel not to take a position on the cognizability of social groups defined by gender and nationality alone without consulting headquarters or further guidance. *See* OPLA, LITIGATING DOMESTIC VIOLENCE-BASED PERSECUTION CLAIMS FOLLOWING *MATTER OF A-B-* (July 11, 2018) (Memorandum), <https://www.aila.org/infonet/ice-guidance-on-litigating-domestic-violence>.

¹³⁵ CGRS’s database also includes post-*Matter of A-B-* case outcomes where the immigration judges indicated preference for family-based social groups in domestic violence cases, such as where the abuser targeted not only the applicant but also other family members, such as children in common or female relatives. *See, e.g.*, CGRS Database Case No. 17509 (Philadelphia Immigr. Ct. Oct. 11, 2018) (on file with CGRS); CGRS Database Case No. 26509 (San Francisco Immigr. Ct. Feb. 6, 2019) (on file with CGRS). Despite longstanding courts of appeals precedent recognizing the nuclear and immediate family as “the quintessential particular social group,” *see, e.g.*, *Rios v. Lynch*, 807 F.3d 1123, 1128 (9th Cir. 2015), the Attorney General issued a decision in *Matter of L-E-A-* on July 29, 2019 casting doubt on nuclear or immediate family units as social groups, though not foreclosing them. *Matter of L-E-A-*, 27 I. & N. Dec. 581 (A.G. 2019). For challenges to the Attorney General’s rationale, *see* Catholic Legal Immigration Network, Inc., PRACTICE POINTER: *MATTER OF L-E-A-*, 21 I & N DEC. 581 (A.G. 2019) (Aug. 2, 2019), <https://cliniclegal.org/sites/default/files/resources/defending-vulnerable-populations/Litigation/L-E-A-Practice-Pointer-8-2-2019-Final.pdf>.

to favorable case law on feminist beliefs.¹³⁶ In three other cases, two different immigration judges found *per se* persecution on account of political opinion based on forced abortion or sterilization or resistance to such procedures.¹³⁷

Nonetheless, CGRS's database also included reports of immigration judge denials based on lack of nexus to any protected ground, regardless of the social group or political opinion argument advanced before the court. In declining to find nexus, several immigration judges cited to *Matter of A-B-* and reasoned that the domestic violence was due to "personal reasons"¹³⁸ or a "personal dispute,"¹³⁹ "jealousy,"¹⁴⁰ the abuser's nature as "an aggressive impulsive person,"¹⁴¹ "an angry person and a sociopath,"¹⁴² or a "deranged individual,"¹⁴³ or simply the abuser's "easy

¹³⁶ See, e.g., CGRS Database Case No. 29252 (San Francisco Immigr. Ct. Sept. 13, 2018), *reversed by the BIA* (Apr. 1, 2019) (on file with CGRS) (finding the applicant's political opinion was at least one central reason for her persecution, where she "expressed her belief in the equality of men and women, including equality in opinions, worth, and support," and that "as a woman, she has the right to work") (citing to *Fatin v. INS*, 12 F.3d 1233, 1242 (3d Cir. 1993)); CGRS Database Case No. 25169 (Portland Immigr. Ct. July 5, 2018) (granting asylum, according to the applicant's counsel, based on the applicant's political opinion that women have the right to choose who to be with and that men do not have the right to dominate or hit women) (citing to *Lazo-Majano v. INS*, 813 F.2d 1432 (9th Cir. 1987)); CGRS Database Case No. 17160 (Hartford Immigr. Ct. Apr. 1, 2019) (granting asylum, according to the applicant's counsel, based on the applicant's anti-machismo political opinion); CGRS Database Case No. 19454 (Baltimore Immigr. Ct. Oct. 24, 2018) (granting asylum, according to the applicant's counsel, based on the parties' stipulation that she was eligible under the political opinion ground).

¹³⁷ Under INA § 101(a)(42), 8 U.S.C. § 1101(a)(42), "a person who has been forced to abort a pregnancy or to undergo involuntary sterilization, or who has been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program, shall be deemed to have been persecuted on account of political opinion, and a person who has a well-founded fear that he or she will be forced to undergo such a procedure or subject to persecution for such failure, refusal, or resistance shall be deemed to have a well-founded fear of persecution on account of political opinion." Adjudicators have typically applied section 101(a)(42) to asylum and withholding claims implicating state coercive population control policies. The aforementioned judges, however, found the provision applicable in certain domestic violence situations where the abuser attempted to control the applicant's reproductive decisions. See, e.g., CGRS Database Case No. 16753 (Portland Immigr. Ct. Apr. 22, 2019) (on file with CGRS) (granting asylum based on *per se* political opinion where the domestic violence induced a premature birth followed by neonatal death and the abuser threatened to kill the applicant when she had to undergo sterilization to prevent potentially fatal pregnancies in the future); CGRS Database Case No. 31513 (Portland Immigr. Ct. Apr. 2, 2019) (granting asylum based on *per se* political opinion, according to the applicant's counsel, where the abuser tried to force the applicant to take an abortion pill, threatened to kill her because she refused to have an abortion, and severely beat her with his gang-member friends to induce a miscarriage); CGRS Database Case No. 28300 (Portland Immigr. Ct. Nov. 6, 2018) (granting asylum based on *per se* political opinion, according to the applicant's counsel, where the applicant's abuser forced her to drink a substance to induce an abortion under threat of death).

¹³⁸ See, e.g., CGRS Database Case No. 30489 (Charlotte Immigr. Ct. June 3, 2019) (on file with CGRS); CGRS Database Case No. 26180 (Denver Immigr. Ct. Apr. 3, 2019) (on file with CGRS); CGRS Database Case No. 10950 (Atlanta Immigr. Ct. June 22, 2018) (on file with CGRS).

¹³⁹ See, e.g., CGRS Database Case No. 30465 (Los Angeles Immigr. Ct. July 25, 2018) (on file with CGRS).

¹⁴⁰ See, e.g., CGRS Database Case No. 24939 (New York Immigr. Ct. Oct. 12, 2018) (on file with CGRS).

¹⁴¹ See, e.g., CGRS Database Case No. 25268 (New Orleans Immigr. Ct. July 18, 2018) (on file with CGRS).

¹⁴² See, e.g., CGRS Database Case No. 26218 (Los Angeles Immigr. Ct. June 22, 2018) (on file with CGRS).

¹⁴³ See, e.g., CGRS Database Case No. 26180 (Denver Immigr. Ct. Apr. 3, 2019) (on file with CGRS).

access”¹⁴⁴ to the applicant due to their “close proximity.”¹⁴⁵ As noted in Section II.A, the notion that a “preexisting personal relationship” undermines nexus has fueled this antiquated characterization of domestic violence as a personal matter, ignoring the broader societal and cultural norms that influence persecutors.¹⁴⁶ Moreover, these immigration court decisions, like *Matter of A-B-*, ignore case law establishing that the protected ground need not be the sole reason or even primary reason for the persecution.¹⁴⁷ Attorneys and adjudicators must keep in mind that mixed motives are permissible under this standard and examine the broader societal factors driving domestic violence, such as gender inequality.¹⁴⁸ Notwithstanding the negative decisions discussed above, some immigration judges have continued to find nexus in the context of domestic violence. For instance, one San Francisco immigration judge concluded in a domestic violence case that the applicant’s abuser would not have harmed her “if [she] were not a Guatemalan woman.”¹⁴⁹

While the willingness of some immigration judges to interpret *Matter of A-B-* narrowly and uphold existing case precedent is promising, it is also clear that other judges have been emboldened by the Attorney General’s dicta to deny domestic violence claims. Contrary to the Attorney General’s claim to clarify asylum law, his decision injected further confusion and discord in an already complex area of the law.

¹⁴⁴ See, e.g., *id.*

¹⁴⁵ See, e.g., CGRS Database Case No. 29251 (Eloy Immigr. Ct. Oct. 15, 2018) (on file with CGRS); see also CGRS Database Case No. 30465 (Los Angeles Immigr. Ct. July 25, 2018) (on file with CGRS) (“[T]he Respondent was the unfortunate victim of violence by a private individual because he had the opportunity and means to commit atrocious acts against her.”).

¹⁴⁶ See *Matter of A-B-*, 27 I. & N. Dec. 316, 338-339 (A.G. 2018); see also, e.g., CGRS Database Case No. 26218 (Los Angeles Immigr. Ct. June 22, 2018) (on file with CGRS) (finding the applicant did not establish nexus because her persecutor abused her due to their “preexisting personal relationship”); CGRS Database Case No. 31398 (Chicago Immigr. Ct. Apr. 12, 2019) (on file with CGRS) (same).

¹⁴⁷ See *Shaikh v. Holder*, 702 F.3d 897, 902 (7th Cir. 2012); *Aldana-Ramos v. Holder*, 757 F.3d 9, 18-19 (1st Cir. 2014); *Ndayshimiye v. U.S. Att’y Gen.*, 557 F.3d 124, 129-30 (3d Cir. 2009). Notably, protection under the Convention Against Torture (CAT) does not require nexus to a protected ground. Nor did the Attorney General address CAT protection in *Matter of A-B-*. CGRS’s database included several CAT protection grants where the judge found the applicant failed to establish nexus or where DHS agreed to waive appeal. Attorneys should not waive asylum or statutory withholding eligibility in every case implicating *Matter of A-B-* because CAT protection provides fewer benefits, does not lead to lawful status, and can be terminated more easily. Nonetheless, CAT protection remains a viable form of relief from removal.

¹⁴⁸ See, e.g., *Castro v. Holder*, 597 F.3d 93, 106 (2d Cir. 2010) (“[P]ersecution cannot be evaluated in a vacuum . . . without reference to the relevant circumstances in which the claim arises.”).

¹⁴⁹ CGRS Database Case No. 26017 (San Francisco Immigr. Ct. Apr. 3, 2019) (on file with CGRS).

III. Recommendations: Time for Congress to Step In

As demonstrated in the above sections based on case outcomes in the first year after *Matter of A-B-* was decided, the illogical and illegal state of particular social group jurisprudence in the United States has only become worse.¹⁵⁰ While litigants must fight their cases as best they can in this convoluted and bewildering area of the law, the real solution is fixing the law itself. In this section, we propose amendments to the Immigration and Nationality Act (INA) that Congress must make in order to rescue U.S. asylum law from its current dead-end.¹⁵¹

The decision in *Matter of L-E-A*¹⁵², which seeks to curtail asylum claims founded on family-based particular social groups, strongly suggests that the current Department of Justice is essentially trying to write the social group ground out of the law, making it unavailable for a vast majority of claims. The Refugee Convention enumerates five grounds as part of the refugee definition,¹⁵³ as does the INA.¹⁵⁴ From the earliest days of modern U.S. asylum jurisprudence, it has been accepted that the particular social group ground must have a meaning—it cannot have such a broad scope that it encompasses the other four enumerated grounds and makes them

¹⁵⁰ See Fatma Marouf, *Becoming Unconventional*, *supra* note 25, at 512 (“As the PSG analysis becomes increasingly complex and produces such circuit splits, it will continue to undermine the uniform and consistent application of asylum law.”).

¹⁵¹ A number of commentators agree that only a legislative solution will address the current problems in how the law is being interpreted. See, e.g., Vogel, *supra* note 25, at 434-35; see also Retired Immigration Judges and Former Members of the Board of Immigration Appeals Statement in Response to Attorney General’s Decision in *Matter of A-B-* (June 11, 2018) (available at Jeffrey S. Chase, *Statement in response to Matter of A-B-*, JEFFREY S. CHASE OPINIONS/ANALYSIS ON IMMIGR. L. (June 11, 2018), <https://www.jeffreyschase.com/blog/2018/6/11/statement-in-response-to-matter-of-a-b-?rq=matter%20of%20a-b->). In fact, Chase argues that: “Had Congress not wanted our asylum laws to be flexible, allowing them to be interpreted in myriad ways to respond to changing types of persecution carried out by different types of actors, it could have said so. When the courts found that victims of China’s coercive family planning policies did not qualify for asylum, Congress responded by amending the statutory definition of ‘refugee’ to cover such harm. In the four years following the BIA’s conclusion that victims of domestic violence qualified for asylum, Congress notably did not enact legislation barring such grants. To the contrary, after Jeff Sessions issued his decision with the intent of preventing such grants, a Republican-led Congressional committee unanimously passed a measure barring funding for government efforts to carry out Sessions’ decision, a clear rebuke by the legislative branch of Sessions’s view that such claims are illegitimate.” Jeffrey S. Chase, *“Like Water Seeping Through An Earthen Dam”*, JEFFREY S. CHASE: OPINIONS/ANALYSIS ON IMMIGR. L. (Sep. 15, 2018), <https://www.jeffreyschase.com/blog/2018/9/15/like-water-seeping-through-an-earthen-dam?rq=matter%20of%20a-b->.

¹⁵² *Matter of L-E-A-*, 27 I. & N. Dec. 581 (A.G. 2019).

¹⁵³ U.N. General Assembly, Convention relating to the Status of Refugees, art. 1A(2), July 28, 1951, 189 U.N.T.S. 137, <https://www.refworld.org/docid/3be01b964.html> (requiring “well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion”).

¹⁵⁴ INA § 101(a) 42, 8 U.S.C. § 1101(a) 42 (requiring “persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion”).

superfluous,¹⁵⁵ nor can it have such a narrow remit that it is mere surplusage.¹⁵⁶ Every word in a treaty is to be given meaning,¹⁵⁷ as is every word in a statute.¹⁵⁸ The BIA's decision in *Matter of Acosta* was a careful analysis of the scope of the particular social group ground in the context of the other four enumerated grounds, and a framework for making the case-by-case analysis required by the law. But since the BIA began its project of impermissibly narrowing the particular social group ground by adding unreasonable additional requirements, U.S. asylum law has gone astray.¹⁵⁹

The accompaniment to restrictive interpretations of social group as a ground is the restricted understanding of the “on account of” or nexus requirement. The Supreme Court's decision in *INS v. Elias-Zacarias*,¹⁶⁰ and Congressional enactment of the REAL ID Act of 2005,¹⁶¹ have together created yet another nearly impossible-to-meet element of the refugee definition. For survivors of domestic violence who are able to establish a cognizable social group, and to demonstrate that they are a member of it, the nexus requirement is the next obstacle to surmount. It is all too easy for adjudicators to substitute their own view of the persecutor's motivation for abusing his wife or partner. Recall that Ms. A.B.'s immigration judge focused on her ex-husband's personal shortcomings—his violent and jealous nature and frequent intoxication—as well as his “selfish and criminal demands for sex.”¹⁶² A less biased adjudicator with greater knowledge of country conditions could easily have seen that, in addition to his individual failings, at least one central reason that Ms. A.B.'s ex-husband abused her was that they lived in a culture of male domination and violence sanctioned by nearly complete immunity from legal consequences.

¹⁵⁵ See T. Alexander Aleinikoff, *Protected characteristics and social perceptions: an analysis of the meaning of “membership in a particular social group,”* in UNHCR, REFUGEE PROTECTION IN INTERNATIONAL LAW: UNHCR'S GLOBAL CONSULTATIONS ON INTERNATIONAL PROTECTION 263, 285 (2003), <https://www.refworld.org/docid/4bed15822.html>.

¹⁵⁶ See Kelley-Widmer & Rich, *supra* note 19, at 16.

¹⁵⁷ United Nations, Vienna Convention on the Law of Treaties, art. 31, May 23, 1969, 1155 U.N.T.S. 331, <https://www.refworld.org/docid/3ae6b3a10.html>.

¹⁵⁸ Congressional Research Service, STATUTORY INTERPRETATION: THEORIES, TOOLS, TRENDS 28 (Apr. 5, 2018).

¹⁵⁹ For an excellent survey of recent social group developments, see Fatma Marouf, *Becoming Unconventional*, *supra* note 25.

¹⁶⁰ *INS v. Elias-Zacarias*, 502 U.S. 478 (1992).

¹⁶¹ Real ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 302 (2005) (now codified at 8 U.S.C. § 1158(b)(B)(i)).

¹⁶² Respondent's Opening Brief, Apr. 20, 2018, at 9 (citing Immigr. Judge Dec. at 13), <https://uchastings.app.box.com/s/tt1ydlq5ttm1i2zxlz4rname4bk29s7/file/291241595459>.

Clarifying these two elements of the refugee definition—particular social group, and nexus—is the key to fixing *Matter of A-B-* and social group jurisprudence more generally and restoring the U.S. asylum framework to its original intent of conforming to international law. Only Congress can take the action necessary to ensure that this or subsequent Administrations do not define away our asylum law.¹⁶³

1. Particular Social Group

The failure in recent years to protect applicants with gender-based claims is due in large part to the BIA imposing unwarranted additional requirements for establishing a cognizable particular social group, as noted earlier in this section. Particular social group analysis must return to the basic principles enunciated in *Matter of Acosta*, while the additional requirements of particularity and social distinction must be eliminated. In order to return our asylum jurisprudence to original principles, Congress should make the following amendment to the statute:¹⁶⁴

A particular social group shall be defined, without any additional requirement not listed below, as any group whose members:

- (i) share a characteristic that is immutable; or
- (ii) share a characteristic that is fundamental to identity, conscience, or the exercise of the person's human rights; or
- (iii) share a past experience or voluntary association that due to its historical nature cannot be changed; or
- (iv) are perceived as a group by society.

This proposal specifies that additional requirements other than the ones listed shall not be used. This is to eliminate the BIA's invented criteria of social distinction and particularity. The proposal codifies the approach taken in *Acosta* by clearly specifying three methods for defining a

¹⁶³ Vogel, *supra* note 25; Fatma E. Marouf, *Executive Overreaching in Immigration Adjudication*, *supra* note 25; Sarah Sherman-Stokes, *supra* note 25. Each offers several thoughtful recommendations for legislation and/or regulations.

¹⁶⁴ The proposals presented in this paper derive from discussions with colleagues at CGRS and a number of refugee law scholars, practitioners, and advocacy organizations in the Asylum Working Group and elsewhere. We acknowledge our debt to their thinking while absolving them of responsibility for any of our recommendations.

particular social group, then adding the additional approach recommended by the United Nations High Commissioner for Refugees (UNHCR), that of social perception.¹⁶⁵

Meeting any one of the four tests for social group is sufficient for establishing this element of the refugee definition. Including social perception as an independent, alternative basis for defining a particular social group is critical to address the BIA's willful misreading of UNHCR's 2002 *Guidelines on Particular Social Group*.¹⁶⁶ While UNHCR recommends that adjudicators use the *Acosta* approach or the social perception approach, depending on which test is more relevant given the facts of the claim, the BIA chose to impose social perception (also called social distinction or, previously, social visibility) as an additional requirement. In other words, the BIA mischaracterized UNHCR's guidance as requiring the *Acosta* AND social perception tests to be met in each individual's case, not the *Acosta* OR social perception tests.¹⁶⁷ Congressional action is needed to correct the BIA's erroneous and overly restrictive approach and bring the United States back into compliance with international standards.

¹⁶⁵ Vogel also suggests combining the *Acosta* approach with UNHCR's social perception approach, with the addition of including sex as an example of a common, immutable characteristic. Vogel, *supra* note 25, at 415. While such an addition tracks the language of *Acosta* and the proposed social group regulations, it has the disadvantage of providing an illustrative list of social groups to the possible detriment of other currently recognized groups not listed as examples, and newly proposed groups in the future.

¹⁶⁶ UNHCR, GUIDELINES ON INTERNATIONAL PROTECTION NO. 2: "MEMBERSHIP OF A PARTICULAR SOCIAL GROUP" WITHIN THE CONTEXT OF ARTICLE 1A(2) OF THE 1951 CONVENTION AND/OR ITS 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES, HCR/GIP/02/02 (May 7, 2002), <https://www.refworld.org/docid/3d36f23f4.html>.

¹⁶⁷ See *Matter of C-A-*, 23 I. & N. Dec. 951, 960 (B.I.A. 2006).

The proposal would make a social group defined by gender clearly cognizable under U.S. law.¹⁶⁸ It will obviate the need for ever more complex and detailed descriptions of social groups such as “married women who are unable to leave their relationship,” which were misinterpreted in *Matter of A-B-* to be impermissibly circular,¹⁶⁹ a term used to describe a particular social group defined exclusively by the harm its members have suffered.

Simplifying social group analysis in gender-based and other claims will also limit the harmful impact of another recent BIA decision, *Matter of W-Y-C- & H-O-B-*, which requires asylum applicants to delineate clearly their proposed social group in immigration court, and prohibits them from proposing a different formulation on appeal.¹⁷⁰ Given the complexities that the BIA has imposed on social group analysis and the shifting landscape of cognizability, this decision is shocking in its disregard for the unreasonable burden placed on asylum seekers to

¹⁶⁸ Marouf, *Becoming Unconventional*, *supra* note 25, at 513-14, notes that the unintended (by the Justice Department) effect of *Matter of A-B-* may well be that immigration judges will be more open to considering social groups defined by gender alone. DHS in its *Matter of A-B-* briefing responsive to the Attorney General’s invitation raised this very specter as a means of cautioning against overruling *Matter of A-R-C-G-*, a warning which the Attorney General ignored. See DHS Brief on Referral to the Attorney General, Apr. 20, 2018, at 21-22, <https://uchastings.app.box.com/s/tt1ydlq5ttm1i2zx1z4rname4bk29s7/file/291240839944>. As discussed in Section II.C.ii., *supra*, many immigration judges have in fact recognized gender and nationality social groups in the aftermath of *Matter of A-B-*, though others continue to resist such groups. Despite DHS’s warning that this outcome has significant policy implications, “history demonstrates that the acceptance of gender asylum does not give rise to a skyrocketing number of claims.” Karen Musalo, *Protecting Victims of Gendered Persecution: Fear of Floodgates or Call to (Principled) Action*, 14 VA. J. SOC. POL’Y & L. 119, 120 (2007), https://cgrs.uchastings.edu/sites/default/files/protection_victims_of_gendered_persecution_Musalo_2007.pdf. Domestic violence survivors must, like other applicants, meet the other strict requirements for asylum eligibility besides social group cognizability. The other protected grounds also encompass large segments of society; yet, they have not led to an opening of “floodgates.” Furthermore, a fear of floodgates cannot violate the U.S. government’s obligation under international law not to return individuals who qualify as refugees to situations where they would face persecution. See also Paul Wickham Schmidt, *GENDER-BASED PERSECUTION IN THE FORM OF DOMESTIC VIOLENCE KILLED 87,000 WOMEN LAST YEAR, & UNDOUBTEDLY MAIMED, DISABLED, TORTURED, & DISFIGURED MANY MORE – Jeff Sessions Misrepresented Facts & Manipulated Law To Deny Protection To Victims & Potential Victims In Matter of A-B- — Dead Women Can’t “Get In (The Non-Existent) Line,” Gonzo! – It’s A “Pandemic” Aided, Abetted, & Encouraged By Corrupt Officials Like Sessions*, IMMIGR. COURTSIDE (Nov. 27, 2018), <https://immigrationcourtside.com/2018/11/27/gender-based-persecution-in-the-form-of-domestic-violence-killed-87000-women-last-year-undoubtedly-maimed-disabled-tortured-disfigured-many-more-jeff-sessions-misrepresented-facts/> (“The real ‘particular social group’ staring everyone in the face is ‘women in X country.’ It’s largely immutable and certainly ‘fundamental to identity,’ particularized, and socially distinct. It clearly has a strong nexus to the grotesque forms of harm inflicted on women throughout our world. And, there is an ever-growing body of expert information publicly available to establish that, totally contrary to Sessions’s [sic] bad-faith distortion of the record in A-B-, many countries of the world are unwilling, unable, or both unwilling and unable to offer a reasonable level of protection to women facing gender-based persecution in the form of DV.”).

¹⁶⁹ *Matter of A-B-*, 27 I. & N. Dec. 316, 335-36 (A.G. 2018).

¹⁷⁰ *Matter of W-Y-C- & H-O-B-*, 27 I. & N. Dec. 189 (B.I.A. 2018).

translate their experience of persecution and fear into precisely phrased words that will satisfy the convoluted language of U.S. social group jurisprudence.¹⁷¹

2. The “On Account Of” Requirement

Similarly, many gender-based claims are denied on the basis of the current extremely restrictive interpretation of nexus in U.S. asylum law,¹⁷² arising from the 1992 Supreme Court decision in *Elias-Zacarias*,¹⁷³ which requires evidence that the persecutor’s motive in harming the applicant was on account of her protected characteristic, and from the 2005 Real ID Act,¹⁷⁴ which requires that the protected ground is at least one central reason for the persecution.

The problem with the existing interpretation of the “on account of” requirement is that it puts the focus on the persecutor’s motive, for which there is usually little or no direct or circumstantial evidence.¹⁷⁵ This invites adjudicators to speculate and substitute their interpretation of a persecutory situation for that of the survivor’s or country conditions experts’. Adjudicators will often conclude that, even if the applicant establishes her membership in a particular social group, such membership was not at least one central reason motivating the persecutor to inflict or threaten harm. *Matter of A-B-* notes with approval a number of cases where survivors of domestic violence were found to have been victims of private violence or criminal activity, and were not recognized as having been persecuted on account of their membership in a particular social group, regardless of how that group might have been defined.¹⁷⁶

At an earlier juncture in U.S. asylum jurisprudence when claims based on another gender-related harm, coercive family planning, were often denied for lack of nexus, Congress stepped in

¹⁷¹ See Marouf, *Becoming Unconventional*, *supra* note 25, at 493-94; see also Jeffrey S. Chase, *The Impact of the BIA’s Decision in Matter of W-Y-C- & H-O-B-*, JEFFREY S. CHASE: OPINIONS/ANALYSIS ON IMMIGR. L. (Jan 26, 2018), <https://www.jeffreyschase.com/blog/2018/1/26/0sg8ru1tl0gz4becqimcrtt4ns8yjz>; American Immigration Lawyers Association, PRACTICE POINTER: *MATTER OF W-Y-C- AND H-O-B-* AND ARTICULATING PARTICULAR SOCIAL GROUPS BEFORE THE IMMIGRATION JUDGE (Mar. 13, 2018), <https://www.aila.org/infonet/articulating-particular-social-groups-before-ij>.

¹⁷² See Vogel, *supra* note 25, at 425 (“[i]n *Matter of A-B-*, nexus once again emerged as a barrier”).

¹⁷³ *INS v. Elias-Zacarias*, 502 U.S. 478 (1992).

¹⁷⁴ Real ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 302 (2005) (now codified at 8 U.S.C. § 1158(b)(B)(i)).

¹⁷⁵ *Elias-Zacarias*, 502 U.S. at 483.

¹⁷⁶ *Matter of A-B-*, 27 I. & N. Dec. 316, 321-23 (A.G. 2018).

to ensure that such claims were deemed to be on account of political opinion.¹⁷⁷ That enactment solved the nexus problem for that one specific category of cases, but the larger problem still remains. The limitations of that approach argue strongly against addressing nexus in the context of one type of claim only.¹⁷⁸

To address this limitation on protection and bring the United States into conformity with UNHCR's approach, Congress should enact three possible tests for establishing nexus, where only one of which needs to be met.¹⁷⁹ The "on account of" requirement (nexus) may be established by showing:

- (1) that a protected ground is at least one reason for the applicant's persecution or fear of persecution; or
- (2) that the persecution or feared persecution would not have occurred or would not occur in the future but for a protected ground; or
- (3) that the persecution or feared persecution had or will have the effect of harming the person because of a protected ground.
- (4) Additionally, where past or feared persecution by a non-state actor is unrelated to a protected asylum ground, the causal "nexus" link is established if the state's failure to protect the asylum applicant from the non-state actor is on account of a protected asylum ground.

These three alternative tests reflect the realities of the applicant's situation, who is not in a position to document her persecutor's internal thought processes or inner motivations, and instead correctly returns the focus to an analysis of the social context of the persecutory behavior and the impact of the persecutor's action. Such clarification will eliminate the problem of asylum adjudicators, based on their own limited experience, dismissing gender-based violence as a private matter not covered by any of the protected grounds.

In sum, by clarifying the tests for particular social group and nexus, applicants bringing gender-based claims and other claims will have a fair chance, consistent with international

¹⁷⁷ See INA § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A), which includes the provision: "For purposes of determinations under this chapter, a person who has been forced to abort a pregnancy or to undergo involuntary sterilization, or who has been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program, shall be deemed to have been persecuted on account of political opinion, and a person who has a well-founded fear that he or she will be forced to undergo such a procedure or subject to persecution for such failure, refusal, or resistance shall be deemed to have a well-founded fear of persecution on account of political opinion."

¹⁷⁸ Vogel, *supra* note 25, at 427-28, suggests that perhaps a non-exhaustive list of gender-based persecution could be deemed to be on account of gender, but this does not help other social groups claims such as those based on family (*Matter of L-E-A-*) or fear of gangs (*Matter of A-B-*).

¹⁷⁹ Vogel also endorses the UNHCR approach. *Id.* at 425.

standards, of establishing their eligibility for asylum. The value of this approach is reflected in the Refugee Protection Act of 2019, introduced on November 21, 2019, which includes the language on social group and nexus suggested by the authors.

3. Is a New Sixth Ground of Gender Needed?

In response to the widespread frustration over the constricted category of particular social group jurisprudence even before *Matter of A-B-*, a few voices have argued for also adding gender as a new sixth enumerated ground to the refugee definition.¹⁸⁰ These observers rightly lament the reluctance of adjudicators to recognize gender alone as a particular social group, which drives advocates into the “fruitless particularization”¹⁸¹ of increasingly narrow social group formulations. However, those in favor of adding gender as a sixth ground fail to take into account the significant risks involved in opening up the refugee definition in this hostile political climate. The drawbacks of adding gender as a sixth ground are discussed below.

This discussion of the disadvantages of adding gender as a sixth ground rests on our view that the inclusion of the social group and nexus amendments proposed above alone would address the overly restrictive legal interpretations that have prevented applicants with gender-based claims from being granted asylum. In addition, adding gender as a sixth ground to the definition of refugee is both unnecessary and could result in negative unintended consequences. Our proposal has the added benefit of maintaining U.S. consistency with the refugee definition in international law, thus preserving the relevance and value of UNHCR guidance on its interpretation and application.

i. Adding Gender as a Sixth Ground is Harmful

Changing the refugee definition to add gender as a new sixth ground risks severely negative consequences. First and foremost, adding gender as a new sixth ground would create a

¹⁸⁰ Melanie Randall, *Particularized Social Groups and Categorical Imperatives in Refugee Law: State Failures to Recognize Gender and the Legal Reception of Gender Persecution Claims in Canada, the United Kingdom, and the United States*, 23 AM. U. J. GENDER SOC. POL’Y & L. 529, 566-71 (2015); see also U.N. Committee on the Elimination of Discrimination Against Women (CEDAW), GENERAL RECOMMENDATION NO. 32 ON THE GENDER-RELATED DIMENSIONS OF REFUGEE STATUS, ASYLUM, NATIONALITY AND STATELESSNESS OF WOMEN, CEDAW/C/GC/32 (Nov. 5, 2014), <https://www.refworld.org/docid/54620fb54.html>. For a similar response to *Matter of A-B-*, see Stephen Legomsky, *Gender-related violence should be grounds for asylum. Congress must fix this for women*, USA TODAY, Jan. 2, 2019, <https://www.usatoday.com/story/opinion/2019/01/02/gender-related-violence-grounds-asylum-refugee-women-congress-column/2415093002/>.

¹⁸¹ *Id.* at 570.

rift between U.S. law and the international definition contained in the Refugee Protocol to which we are a party. It is worth noting that UNHCR has specifically stated that “there is no need to add an additional ground” to the refugee definition.¹⁸² As Vogel argues, international efforts have been centered on gender as a particular social group, and guidelines have been developed around this strategy.¹⁸³

Changing the refugee definition is directly contrary to Congressional intent in enacting the Refugee Act of 1980. The clearly expressed will of Congress to bring U.S. asylum law into conformity with international law has been recognized repeatedly by the Supreme Court and the circuit courts of appeal.¹⁸⁴ If the U.S. refugee definition is no longer consistent with the international definition, advocates will be less able and courts may be less willing to refer to UNHCR guidance or comparative jurisprudence, as it will not be directly on point.¹⁸⁵ The Supreme Court’s and federal appellate courts’ frequent acknowledgement of the value of UNHCR’s *Handbook on Procedures and Criteria for Determining Refugee Status* and other more detailed guidance will no longer carry the same weight due to the new discrepancy between the definitions.

Second, there is a risk that if the proposal to add a sixth ground is accepted, it may be seen by those not well-versed in the intricacies of asylum law as the answer to *Matter of A-B-*, to the detriment of the absolutely critical steps outlined above of clarifying particular social group and nexus.¹⁸⁶ It has the potential to confuse the debate, and give an erroneous impression of what is actually needed to correct the flaws in our current asylum jurisprudence. If gender were to be added to the refugee definition, but the above proposals to clarify particular social group

¹⁸² UNHCR, GUIDELINES ON INTERNATIONAL PROTECTION NO. 1: GENDER-RELATED PERSECUTION WITHIN THE CONTEXT OF ARTICLE 1A(2) OF THE 1951 CONVENTION AND/OR ITS 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES, HCR/GIP/02/01, para. 6 (May 7, 2002), <https://www.refworld.org/docid/3d36f1c64.html>.

¹⁸³ Vogel, *supra* note 25, at 418.

¹⁸⁴ *See, e.g.*, *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987).

¹⁸⁵ In rejecting the idea of adding gender as a ground, Vogel, *supra* note 25, at 417, also notes that such an amendment would set U.S. asylum law apart from other countries.

¹⁸⁶ Adding gender, for example, would do nothing to address the dicta in *Matter of A-B-* regarding claims based on fear of gangs.

and nexus are not adopted, the problems faced by applicants presenting gender-based claims will still not be solved.¹⁸⁷

Third, prodding Congress to add an entirely new protected ground poses the risk of opening up the definition to other, more deleterious amendments. Given the extremely polarized nature of the current asylum debate, it is possible that hostile Members of Congress could propose eliminating the social group ground altogether or suggest other harmful changes as the price of agreeing to add gender. Those opposing such negative amendments would no longer be able to point to the need for U.S. law to remain consistent with the international definition. The amendments proposed above to clarify particular social group and nexus do not run the same risk, as they are more in the realm of technical corrections to executive overreaching and judicial misinterpretations of the existing definition, and not changing the definition itself.

Finally, as detailed above, both immigration judges and courts of appeals have recognized that gender and nationality can define a particular social group, while the BIA even after *Matter of A-B-* has remanded cases for the immigration judge to consider such a group. Adding gender as a sixth ground would threaten these positive precedents and confuse the meaning of particular social group.

ii. Adding Gender is Unnecessary

Very few States party to the Refugee Convention and/or Protocol have added gender as an additional ground in their domestic legislation, and those that have done so are primarily civil law countries in Latin America with less developed asylum adjudication systems.¹⁸⁸ Common law countries with sophisticated high-volume asylum adjudication systems most similar to ours—Canada, the United Kingdom, Australia, and New Zealand—do not have gender as a separate ground. Instead, gender-based claims are granted under particular social group or another of the existing grounds.

¹⁸⁷ *Matter of L-E-A-*'s attack on the family, “the quintessential particular social group,” and a social group that several immigration judges had relied on post-*Matter of A-B-* in family violence claims, is another example of how adding gender will not prevent subsequent attacks on social groups and nexus in other claims involving domestic violence or children.

¹⁸⁸ See, e.g., GUATEMALA: ACUERDO GUBERNATIVO NO. 383-2001 DE 2001, REGLAMENTO PARA LA PROTECCIÓN Y DETERMINACIÓN DEL ESTATUTO DE REFUGIADO EN EL TERRITORIO DEL ESTADO DE GUATEMALA, Chapter III, Article 11 (d), Sept. 14, 2001, <https://www.refworld.org/docid/3dbe65954.html>.

Some have suggested that adding gender as a sixth ground would assist *pro se* applicants and *pro bono* attorneys by simplifying one element of the refugee definition. This seems overly optimistic given the large number of obstacles that remain in the path of asylum seekers and their attorneys. These include lack of access to procedures in the first place, prolonged detention, immigration court proceedings that stretch out over many years, evidentiary requirements that are often unrealistic, a heightened emphasis on credibility, and the lack of appointed counsel in an adversarial system. Given the drawbacks of adding gender as a new ground, the worthy goal of assisting *pro se* applicants and *pro bono* attorneys is better served by more fundamental reforms to the system, not a major alteration to the refugee definition itself.

IV. Conclusion

Matter of A-B- has played a critical part in the Administration's attempted dismantling of our asylum system, which continues apace. Our intention in writing this piece is to show that while the decision has had its intended devastating impact on all too many asylum seekers in the first year after it was announced, litigation still offers hope to exceptionally well-prepared and lucky counsel. Meanwhile, Congress must clarify the law on particular social group and on nexus in order to realign the United States with Congressional intent in passing the Refugee Act of 1980 and with international law.