New Developments in Federal Policy Toward Domestic Violence Asylum Seekers

Tricia Freshwater, Lopez & Freshwater PLLC
Natalie Nanasi, SMU Dedman School of Law

Roadmap

- "Push Factors" and Detention
- Asylum 101
- Asylum for Survivors of Intimate Partner Violence
- Overview of Immigration Enforcement
- Safety Planning for Immigrant Survivors
- Q & A

Violence in the Northern Triangle

- El Salvador, Guatemala, and Honduras are facing unparalleled levels of violent crime
  - El Salvador and Honduras rank among the top five most violent countries in the world.
- The mass migration of children from Central America primarily consists of "[parents who] are trying to save their children."
  - WH Chief of Staff John Kelley
- Gang violence
- Violence Against Women

Detention and Credible Fear

- U.S. is largest detainer of immigrants in the world
  - Over 400,000 detained daily
  - FY 2019 budget: $2.8 billion (4x more than our current level of assistance to Central America)
- Detention poses many challenges to survivors
- Credible fear interview is precursor to asylum

Applying for Asylum

- **Affirmative**
  - Initial application
  - Not in immigration/removal proceedings
- **Defensive**
  - Referred at the affirmative stage; or
  - Already in removal proceedings (e.g. apprehended at the border and passed a credible fear interview or picked up by local police)

Asylum Definition

A refugee is a person outside of his/her country of origin who is unable or unwilling to return due to past persecution or a well-founded fear of future persecution on account of race, religion, nationality, membership in a particular social group, or political opinion

Exceptions

- Safe Third Country
- Firm Resettlement
- One-Year Filing Deadline
- Persecution of Others
- Particularly Serious Crimes
- Danger to the Security of the U.S.
- Terrorism

Persecution

- "Infliction of suffering or harm upon those who differ"
  - Beatings, rape, severe mental harm, harm to family, threats to life or freedom, female genital mutilation
- By the government or someone the government is unwilling or unable to control
- Past Persecution => presumption of future persecution

Persecution on Account of:

Race	Religion	Nationality	Particular Social Group	Political Opinion

"On Account Of" (Nexus)

- "At least one central reason"
  - Not the only reason
- Persecutor motivated by that attribute to harm client
  - E.g., not sufficient to show you oppose gangs, or you belong to a church that opposes the gangs. Must show that the gangs actually care about your religion or your political opinion in opposition to them and want to harm you for that reason

Particular Social Group (PSG)

Requirements of a cognizable PSG:

- Immutable
- Particular
- Socially distinct
- Not circular

Domestic Violence and Asylum

- *Matter of R-A-*
- *Matter of A-R-C-G-* (2014)
  - "Mexican women in domestic relationships who are unable to leave"
  - "Mexican women who are viewed as property by virtue of their positions within a domestic relationship"
- *Matter of A-B-* (2018)

Matter of A-B-

The "unable to leave" PSG is not cognizable.

Lots of bad dicta:

- "Generally, claims by aliens pertaining to domestic violence or gang violence perpetrated by non-governmental actors will not qualify for asylum."
- "There is significant room for doubt that Guatemalan society views these women, as horrible as their personal circumstances, may be, as members of a distinct group in society, rather than each as a victim of a particular abuser in highly individualized circumstances."
- Harm perpetrated on account of the abuser's "preexisting personal relationship with the victim."

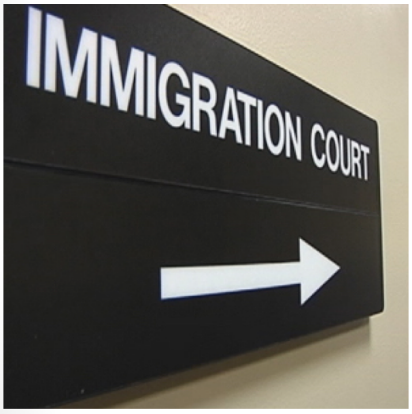
Advocacy after *Matter of A-B-*

- Argue other PSGs
- Argue other grounds for asylum (e.g. feminism as a political opinion or religion)
- Argue for individual adjudication of cases based on evidence
  - PSG depends on country condition evidence
- Federal court litigation – past and future

Advocacy after *Matter of A-B-*: *Grace v. Whitaker*

- Addresses the proper standard to be applied during credible fear interviews
- The District Court held that A-B- and USCIS policies incorporating it violated the law
  - General rule against finding credible fear for gang and domestic violence based claims
  - Standard for non-governmental persecutors
  - The requirement that individuals articulate their PSG during the credible fear interview
  - Requirement that credible fear officers ignore federal circuit court case law if it was inconsistent with A-B-

Overview of Immigration Enforcement



- There are approximately 11 million people currently present in the United States who:
  - Crossed the border unlawfully
  - Entered the United States lawfully but later overstayed their visas
  - Entered the United States lawfully but later violated the terms of their status

Overview of Immigration Enforcement

- Obama Administration: immigration enforcement mostly focused on "priority aliens" for apprehension, detention, and removal
- February 2017 Memo: "Effective immediately . . . Department personnel shall faithfully execute the immigration laws of the United States against **all removable aliens**."
  - "The Department no longer will exempt classes or categories of removable aliens from potential enforcement"

Immigration Enforcement: Victims of Crime

- Obama-era "Prosecutorial Discretion Certain Victims, Witnesses and Plaintiffs" memo stated:
  - "Absent special circumstances or aggravating factors, it is against ICE policy to initiate removal proceedings against an individual known to be the immediate victim or witness to a crime."
- Technically, this memo remains in effect
  - Immigration enforcement at courthouses
  - Pursuing removal orders against crime victims
  - Chilling effect

Immigration Enforcement: Safety Plans

What will she do if. . .

- Her children are alone at home or daycare/school?
  - Who has custody/guardianship of the children?
- She did not pick up her last paycheck?
- The abuser has her passport/ID documents and access to her money?
- She doesn't have money to pay bond (criminal or immigration)?
- What medical concerns, trauma issues will be triggered by an apprehension/detention?

Immigration Enforcement: How You Can Help a Client Safety Plan

- Gather important documents (ID, immigration, medical and financial)
  - Make sure there are written documents re: child care and custody
  - Emergency childcare versus long-term childcare plans
- Keep an Emergency Preparation Sheet
  - Phone numbers (work, school, home in the US and home country), A numbers, medical, vehicle, and financial information
  - Make sure a designated emergency care giver has access to the information
- Financial planning/Powers of Attorney: bank accounts, paychecks, home, business
- Passports for children
- Encourage survivors to talk to their children about the emergency plan
- Refer your clients to:
  - "Family Preparedness" workshops
  - local non-profits/attorneys to assess eligibility for legal status

NATIONAL IMMIGRANT JUSTICE CENTER
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Practice Advisory: Applying for Asylum After *Matter of A-B-*
Updated January 2019

***** *Matter of A-B-* Changes the Complexion of Claims Involving Non-state Actors, but Asylum Fundamentals Remain Strong and Intact *****

On June 11, 2018, Attorney General Sessions issued a precedential decision in *Matter of A-B-*, 27 I&N Dec. 316 (A.G. 2018). The decision overrules a prior decision, *Matter of A-R-C-G-*, 26 I&N Dec. 338 (BIA 2014), which held that in some circumstances, domestic violence survivors could receive asylum protection. Additionally, *A-B-* attacks asylum claims involving harm by non-state actors. While the decision gives the impression that these claims are foreclosed, nearly all the damaging language is dicta, and the Refugee Convention, the Immigration and Nationality Act (INA), and precedential case law at the Courts of Appeals and Board of Immigration Appeals (BIA) continue to support much of what the BIA previously held in *A-R-C-G-*. In short, the holding in *A-B-* is narrow and much of the damage done is a matter of optics, not law. Nonetheless, attorneys must be prepared for adjudicators to view *A-B-* broadly and present their arguments accordingly.

This practice advisory is geared towards lawyers practicing in the Seventh Circuit, but it discusses asylum law broadly and attorneys practicing in all circuits should find it useful.[1] It is intended to explain what *Matter of A-B-* does and *does not* change and equip attorneys to prevail in asylum claims based on harm by non-state actors, while preserving issues for litigation in case asylum is denied. **Part I** provides background regarding the case law leading up to the *A-R-C-G-* and *A-B-* decisions, **Part II** discusses the Seventh Circuit case law that developed parallel to the BIA's decisions, **Part III** discusses *A-B-* specifically, and **Part IV** provides detailed practice tips for attorneys representing asylum seekers with non-state actor claims after *A-B-*, particularly in the Seventh Circuit. Despite difficult case law and a challenging adjudicatory system, asylum matters involving domestic violence and/or gang-based claims remain winnable with proper case preparation and adept lawyering.

I. Background

The next two sections provide historical context leading up to the Attorney General's decision in A-B-, which NIJC believes is critical to understanding that decision. For those familiar with this background, Part III goes directly to A-B-.

[1] Attorneys practicing outside the Seventh Circuit are encouraged to use resources specific to their jurisdiction in addition to this practice advisory.

To qualify for asylum, an individual must demonstrate a well-founded fear of persecution on account of "race, religion, nationality, membership in a particular social group, or political opinion." INA § 101(a)(42)(A). In *Matter of Acosta*, 19 I&N Dec. 211 (BIA 1985), the BIA first defined the term "particular social group." Relying on the doctrine of *ejusdem generis*, "of the same kind," the BIA construed the term in comparison to the other protected grounds within the refugee definition (i.e. race, religion, nationality, and political opinion). It concluded that the other four protected grounds all encompass innate characteristics (like race and nationality) or characteristics that one should not be required to change (like religion or political opinion). *Id*. at 233. To be a protected ground then, particular social group (PSG) membership can be based either on a shared characteristic members cannot change (like gender or sexual orientation) or a characteristic they should not be required to change (like being an uncircumcised woman). *See id*. (listing gender as an immutable characteristic); *see also Matter of Toboso-Alfonso*, 20 I&N Dec. 819 (BIA 1990) (recognizing sexual orientation as an immutable characteristic); *Matter of Kasinga*, 21 I&N Dec. 357, 366 (BIA 1996) (recognizing the status of being an uncircumcised woman as a characteristic one should not be required to change).

Federal courts of appeals have endorsed the *Acosta* standard for discerning PSGs as a valid interpretation of the statute. The *Acosta* test – or a variation of it – has governed the analysis of PSG claims for decades. *See Niang v. Gonzales,* 422 F.3d 1187, 1199 (l0th Cir. 2005); *Castellano-Chacon v. INS,* 341 F.3d 533, 546-48 (6th Cir. 2003); *Lwin v. INS,* 144 F.3d 505, 511 (7th Cir. 1998); *Safaie v. INS,* 25 F.3d 636, 640 (8th Cir. 1994); *Fatin v. INS,* 12 F.3d 1233, 1240 (3d Cir. 1993); *Alvarez-Flares v. INS,* 909 F.2d 1, 7 (1st Cir. 1990). Under the *Acosta* test, gender alone should be sufficient to establish a particular social group.

A. The fight to obtain protection for survivors of domestic violence

Women often experience human rights abuses that are particular to their gender, such as rape, domestic violence, female genital mutilation, forced relationships, honor killing, and human trafficking. Women typically experience these forms of persecution because of their membership in a PSG related to their gender. Historically, adjudicators have rejected gender-based PSGs as being too broad and due to floodgates concerns. Other adjudicators have rejected these claims under the "on account of" or nexus element in the asylum test, finding that the asylum seeker was not persecuted due to her gender, but because of "personal" reasons (for example, because the persecutor found the asylum seeker attractive or because the persecutor was drunk). Though these decisions often misconstrue controlling legal precedent, it has been challenging to convince adjudicators to recognize these claims.

In 1995, the Immigration and Naturalization Service (INS) (the predecessor to U.S. Citizenship and Immigration Services) adopted guidelines known as "Considerations for Asylum Officers Adjudicating Asylum Claims from Women." These guidelines acknowledge women often experience persecution that is different from persecution faced by men, and cite domestic violence

as one form of gender-related persecution that can be the basis of an asylum claim. Although these guidelines applied to asylum officers in particular, they had a persuasive impact on many immigration and federal court judges.

These guidelines, however, did not prompt all adjudicators to grant asylum in domestic violence claims and so for years, practitioners awaited a definitive ruling from the BIA on whether a situation of domestic violence could be the basis for asylum. When the BIA issued its precedential decision in *Matter of R-A-*, 22 I&N Dec. 906 (BIA 1999), advocates were sorely disappointed. The respondent in that matter, Ms. Alvarado, fled Guatemala and applied for asylum after suffering years of horrific persecution by her husband, a Guatemalan army soldier. Ms. Alvarado sought and was refused assistance from the Guatemalan police and the courts. Although the BIA found Ms. Alvarado had been persecuted and her government had failed to provide adequate protection, it determined she was not persecuted on account of a protected ground.

In December 2000, Attorney General Janet Reno and the INS issued proposed rules for adjudicating asylum claims based on domestic violence that called into serious question much of the reasoning in *Matter of R-A-*. In January 2001, Attorney General Reno vacated *Matter of R-A-* and sent it back to the BIA for reconsideration in light of the proposed rules.

In March 2003, Attorney General John Ashcroft certified the case to himself and in February 2004, the Department of Homeland Security (DHS) submitted a brief to Attorney General Ashcroft, articulating its position on Ms. Alvarado's eligibility for relief. The brief conceded that "married women in Guatemala who are unable to leave the relationship" is a viable PSG. DHS subsequently announced that the brief represented its official positon on domestic violence-based asylum claims.

In his last days as Attorney General, John Ashcroft remanded Ms. Alvarado's case back to the BIA and directed the BIA to reconsider its decision once the proposed DOJ rules were published. The rules, however, were never published and as a result, *Matter of R-A-* remained stayed at the BIA level. The majority of domestic violence-based claims that had reached the BIA level were stayed as well. On September 25, 2008, Attorney General Michael Mukasey certified the case to himself, lifted the stay and remanded the case back to the BIA. The BIA then remanded the case to the immigration judge and in December 2009, the judge granted Ms. Alvarado asylum, nearly 15 years after she applied. Significantly, even before Ms. Alvarado had been granted asylum and notwithstanding the lack of clarity from the BIA, many adjudicators granted asylum in domestic violence-based claims during this time, in part due to the DHS position brief.

B. The emergence of gang-based asylum claims

While the state of domestic violence-based asylum law remained unclear, other asylum claims based on PSG membership increased. Many of these claims involved individuals from Central

America who had fled gang-related violence. Some claims involved children who feared persecution for having resisted gang recruitment; others had been harmed for having disobeyed a gang's extortion demands or for having been a witness to a gang crime. The claims of women and girls often involved threats of forced relationships with gang members or domestic violence by a partner who was a gang member.

In what seemed to be a direct response to the increase in Central American asylum seekers with gang-related claims, the BIA issued two precedential decisions in 2008 in cases involving gang-based asylum claims, both affecting the test for establishing membership in a PSG: *Matter of S-E-G-*, 24 I&N Dec. 579 (BIA 2008) and *Matter of E-A-G-*, 24 I&N Dec. 591 (BIA 2008). In these cases, for the first time, the BIA added two new requirements to the PSG test.[2] The BIA held that in order to establish a viable PSG, the group must be based on an immutable characteristic, *and* be socially visible and particularly defined. According to the BIA, "particularity" meant that a group is defined in a manner sufficiently distinct that the group would be recognized, in the society in question, as a discrete class of persons. *S-E-G-*, 25 I&N Dec. at 584. To meet the particularity requirement, a group must not be "too amorphous . . . to create a benchmark for determining group membership." *Id*. The BIA went on to reject the respondent's proposed group in *S-E-G-* under the particularity requirement because the group was made up of "a potentially large and diffuse segment of society." *Id*. at 585. The BIA did not provide a definition of "social visibility" beyond stating that a PSG's shared characteristic "should generally be recognizable by others in the community." *Id*. at 586.

Immigrant advocates harshly criticized these decisions. The BIA's reasoning in *S-E-G-* and *E-A-G-* was often circular and frequently conflated social visibility and particularity with nexus (the "on account of" requirement), which is a separate question from whether the PSG is viable. For example, in analyzing the *S-E-G-* respondents' proposed group of "Salvadoran youth who have resisted gang recruitment, or family members of such Salvadoran youth," the BIA held that the group (1) failed the particularity test because the gang could have had many different motives for targeting Salvadoran youth, and (2) failed the social visibility test because members of the group weren't targeted for harm more frequently than the rest of the population. These justifications relied on a finding that the asylum seekers were not harmed *because of* their status as gang resisters – a nexus issue – and not because the PSG suffers from legal infirmity. The decisions completely ignored the fact that PSGs the BIA had previously accepted, such as young women of a particular tribe who oppose female genital mutilation, or gay men from a particular country, no longer appeared viable under this new test. While many circuits deferred to the BIA's addition of the two new PSG requirements under *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984), others courts – specifically the Seventh and the Third Circuits (see Part II) – rejected the requirements and declined to find that they merited *Chevron* deference.

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[2] Although the BIA had previously referenced the concepts of social visibility and particularity, *see e.g., Matter of A-M-E- & J-G-U-*, 24 I&N Dec. 69 (BIA 2007) and *Matter of C-A-*, 23 I&N Dec. 951 (BIA 2006), it never made them requirements.

In February 2014, the BIA doubled-down on its PSG test and issued two decisions, *Matter of M-E-V-G-*, 26 I&N Dec. 227 (BIA 2014)[3] and *Matter of W-G-R-*, 26 I&N Dec. 20 (BIA 2014), which restated and emphasized the BIA's decision in *S-E-G-*. In *M-E-V-G-*, the BIA clarified that social visibility does not mean literal visibility, but instead refers to whether the PSG is recognized within society as a distinct entity. 26 I&N Dec. at 240-41. The BIA therefore renamed the requirement "social distinction." The decisions did not clarify or interpret the "particularity" requirement, but did include troubling dicta. For example, in *W-G-R-*, the BIA applied the particularity test to a PSG composed of former gang members. The BIA held that such a group failed the "particularity" requirement because "the group could include persons of any age, sex, or background," despite having previously noted in *Matter of C-A-*, 23 I&N Dec. 951, 956-57 (BIA 2006), that homogeneity was *not* a requirement for a PSG. 26 I&N Dec. at 221. According to the BIA, such a group would need to be defined with additional specificity to be viable. *Id*. at 222. NIJC authored a practice advisory on these decisions, which is available on NIJC's website.

Later that year, the BIA issued *Matter of A-R-C-G-*, 26 I&N Dec. 388 (BIA 2014), the case Attorney General Sessions has now overturned. There, the BIA found that the group of "married women in Guatemala who are unable to leave their relationship" was socially distinct and sufficiently particular.[4] While this decision provided the long-awaited recognition that domestic violence survivors can be eligible for asylum, the BIA's particular social group analysis remained inconsistent with prior BIA case law. Understanding the BIA's analysis in *A-R-C-G-* is critical to understanding the Attorney General's errors in *A-B-*.

In *A-R-C-G-*, DHS conceded that the respondent had established persecution on account of the PSG "married women in Guatemala who are unable to leave their relationship." Despite this concession, the BIA examined the PSG and found it to be particularly defined and socially distinct to satisfy both *M-E-V-G-* and *W-G-R-*. *A-R-C-G-*, 26 I&N Dec. at 393-94. In doing so, the BIA noted that "the issue of social distinction will depend on the facts and evidence in each individual case, including documented country conditions, law enforcement statistics, and expert witnesses, if proffered; the respondent's past experiences; and other reliable and credible sources of information." *Id*. at 394-95. The BIA further noted that although DHS had conceded to nexus in this case, in other cases, nexus would be determined on a case-by-case basis and would "depend on the facts and circumstances of the individual claim." *Id*. at 395.

After the BIA's decision, establishing asylum eligibility in domestic violence-based claims became more straightforward, but subject to different challenges, like getting judges to understand that the logic applied to non-marital relationships and to circumstances involving non-traditional

[3] NIJC's amicus brief in support of the respondent in *M-E-V-G-* can be found at http://immigrantjustice.org/sites/immigrantjustice.org/files/Valdiviezo%20NIJC%20Amicus%20FINAL.pdf.
[4] NIJC's amicus brief in support of the respondent in *A-R-C-G-* can be found at http://immigrantjustice.org/press_releases/board-immigration-appeals-rules-guatemalan-mother-who-fled-domestic-violence-can-be-g

forms of domestic violence. Some judges still routinely denied claims involving non-consensual relationships, same-sex relationships, or non-marital relationships because they did not match the *A-R-C-G-* group.

II. Seventh Circuit Law

While the Seventh Circuit has not found occasion to opine directly on *A-R-C-G-*, the Court has a strong body of case law exploring the parameters of PSG-based asylum claims and *A-B-* does not alter that precedent. In *Lwin*, the Seventh Circuit accorded *Chevron* deference to *Matter of Acosta*. 144 F.3d at 511–12. For approximately two decades, the Court applied *Acosta*'s immutable characteristic test to determine whether proposed PSGs were cognizable for asylum purposes. *E.g.*, *Sepulveda v. Gonzales*, 464 F.3d 770 (7th Cir. 2006).

When the BIA added "social visibility" and "particularity" to the PSG analysis in 2008, the Seventh Circuit declined to follow suit and instead rejected the social visibility requirement. *Gatimi v. Holder*, 578 F.3d 611 (7th Cir. 2009). The Court explained that social visibility "cannot be squared" with prior Seventh Circuit or BIA decisions and, "[m]ore important, [social visibility] makes no sense" because many characteristics that are well-recognized for asylum purposes, such as sexual orientation or female genital mutilation, are not outwardly visible or publicly known. *Id.* at 615–16*; see also Benitez Ramos v. Holder*, 589 F.3d 426, 429–31 (7th Cir. 2009) (rejecting any social visibility requirement and holding that the PSG of "tattooed, former Salvadoran gang members" was cognizable under *Acosta*).

In 2013, the Seventh Circuit issued an *en banc* decision in *Cece v. Holder*, 733 F.3d 662 (7th Cir. 2013). Against the backdrop of the *S-E-G-* line of cases, *Cece* reiterated that "[t]his Circuit has deferred to the Board's *Acosta* formulation of social group." *Id.* at 669. The Seventh Circuit recognized that it had "rejected a social visibility analysis," *Id.* at 668 n.1, and also refused to apply the BIA's particularity requirement because "breadth of category has never been a *per se* bar to protected status." *Id.* at 674, 676. Applying only the immutable characteristic test, the Court held that the proposed group of "young Albanian women living alone" was cognizable. *Id.* at 677.

Since the BIA issued *M-E-V-G-* and *W-G-R-* in 2014 – which relabeled "social visibility" as "social distinction" – the Seventh Circuit has continued to apply *Cece* and its predecessor cases in PSG asylum matters. No Seventh Circuit decision has relied on social distinction or particularity to reject a proposed PSG. Instead, the Court's decisions continue to apply *Acosta*'s immutable characteristics test and cite *Cece*. *See, e.g.*, *Orellana-Arias v. Sessions*, 865 F.3d 476, 485 (7th Cir. 2017); *Sibanda v. Holder*, 778 F.3d 676, 681 (7th Cir. 2015). Though the Court has not yet addressed the question of whether *Chevron* deference applies to *M-E-V-G-* and *W-G-R-*[5], it is NIJC's position that

[5] In an August 2018 published decision, the Seventh Circuit noted that "[w]hether the Board's particularity and social distinction requirements are entitled to *Chevron* deference remains an open question in this circuit." *W.G.A. v. Sessions*, 900 F.3d 957, 964 (7th Cir. 2019). The Court "decline[d] to make the *Chevron* determination in this

Chevron deference is unwarranted because the Court has already refused to defer to "social visibility" and rejected the BIA's description of particularity, and as the BIA made clear in *M-E-V-G-* and *W-G-R-*, those decisions are simply new framing of the same issue. For more information, please see NIJC's Particular Social Group Practice Advisory.

In sum, despite some back and forth at the BIA, the unaltered *Acosta* test remains law in the Seventh Circuit. This means that all PSG asylum claims, including matters where the persecutor is a non-governmental actor, must pass the immutable characteristic test and whether those groups are socially distinct or particular is inconsequential.

III. *Matter of A-B-*

Matter of A-B- eliminates *A-R-C-G-* as a precedential decision, but in terms of legal holdings, that is as far as it goes. The decision does not create any new asylum standards, nor does it say that the group identified in *A-R-C-G-* can never be viable. Instead, the Attorney General asserts that he is overruling *A-R-C-G-* because of the manner in which the BIA came to its decision. He otherwise merely restates the BIA's case law regarding the PSG definition and other asylum elements. That said, the decision contains negative dicta that, if taken as law, casts doubt on the viability of all asylum claims involving non-state actors. Attorneys must be prepared to counter this language, even while arguing it is non-binding dicta.

It is important to understand the backstory behind *A-B-*. A-B-'s case was initially heard and denied by Immigration Judge Couch at the Charlotte Immigration Court, a court that is notorious for its harsh attitude towards asylum seekers. Judge Couch has a greater than 85 percent denial rate in asylum cases. In A-B-'s case, he made adverse findings on nearly all elements of her asylum claim. On appeal, the BIA reversed on all grounds, found A-B-'s claim similar to that of *A-R-C-G-*, determined she was eligible for asylum, and remanded the case for issuance of a decision after background checks were completed. On remand, Judge Couch did not follow the BIA's order, but instead attempted to certify the case to the BIA, asserting that *A-R-C-G-*'s viability was no longer clear[6]. At some point thereafter, Attorney General Sessions learned of the decision,[7] certified the case to himself, and issued a request for amicus briefing on the question of whether "being a victim of private criminal activity constitutes a cognizable 'particular social group' for purposes of an application for asylum and withholding of removal." *Matter of A-B-*, 27 I&N Dec.

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case," *Id*. at 965, but noted in a footnote that "W.G.A.'s arguments that the Board's interpretation is unreasonable have some force." *Id*. at 964 n.4.

[6] The case IJ Couch relied on to express concern about the viability of *A-R-C-G-* does not dispute the viability of the underlying particular social group, but instead was decided based on nexus, whereas nexus was not at issue in *A-R-C-G-*. *See Velasquez v. Sessions*, 866 F.3d 188, 195 n.5 (4th Cir. 2017) ("The validity of the social group identified by Velasquez is not at issue in this case. Moreover, *A-R-C-G-* does not bear on our nexus analysis" because there the Government conceded to the nexus element.").

[7] A Freedom of Information Act request was filed to uncover how the Attorney General learned of A-B-'s case.

227 (A.G. 2018) (*A-B-* I). NIJC submitted an amicus brief asserting that the amicus process was flawed and that the Attorney General's amicus invitation effectively asked the wrong question by inappropriately conflating separate inquiries in the asylum analysis.

A. Holding

Matter of A-B- unambiguously overrules the precedent established in *A-R-C-G-* because the Attorney General found that decision was the product of concessions by DHS, not applications of law by the BIA. The Attorney General held that in *A-R-C-G-*, the BIA's analysis establishing that "married women in Guatemala who are unable to leave their relationship" was a cognizable PSG was cursory and did not accurately apply the *M-E-V-G-* and *W-G-R-* precedents regarding social distinction and particularity. This does not mean that some variation of the *A-R-C-G-* PSG can never be a viable; only that such groups must clearly meet the PSG requirements of the jurisdiction where they are proposed.

After overruling *A-R-C-G-*, the Attorney General also found the PSG posited in *A-B-*, "El Salvadorian women who are unable to leave their domestic relationships where they have children in common," is likely not cognizable either, but remanded the case for a new analysis after finding that the BIA had erred in its review of A-B-'s case.

In many ways, more concerning than the narrow holding in *A-B-* is the copious, mean-spirited, non sequitur dicta the Attorney General peppers throughout the decision that casts doubt more broadly on the viability of domestic violence-based PSG claims and other claims involving violence by non-state actors. For example, while the Attorney General does not assert a new asylum standard, he claims that "[g]enerally, claims . . . pertaining to domestic violence or gang violence perpetrated by non-governmental actors will not qualify for asylum." *A-B-*, 27 I&N Dec. at 320.[8] Compounding matters is the Attorney General's chronic conflation of asylum elements throughout the decision. By blending persecution with nexus, nexus with PSG, and PSG with persecution, the decision makes parsing the elements tricky and establishing asylum eligibility more daunting than the statute, regulations, and case law require the process to be.

[8] The Attorney General claims via footnote that "few" gang- or domestic violence-based claims satisfy the lower credible fear standard. Preparing for credible fear interviews and contesting erroneous credible fear findings is beyond the scope of this practice advisory. However, the same arguments set forth here apply in the credible fear context.

B. Preliminary Dicta[9]

The Attorney General's introductory commentary – which precedes the section titled "opinion" – goes further than the decision itself in purporting to restrict asylum. Since these statements are not part of the opinion, they should be considered at most, nonbinding dicta. If these statements were intended to create new law, many would be ultra vires to the regulations. For example, the introductory comments suggest that only in "exceptional circumstances" may victims of harm by non-state actors establish asylum claims. There has never been an "exceptional circumstances" requirement for asylum claims of this nature and the body of this opinion does not introduce one. The commentary also suggests that where a persecutor is a non-state actor, the asylum seeker must establish that the persecutor's actions "can be attributed" to the government. *A-B-*, 27 I&N Dec. at 317. Neither the Refugee Convention nor the implementing laws as interpreted by every circuit impose this requirement. And it is not even what *A-B-* itself requires. While this introduction appears to heighten an asylum seeker's burden in showing the government is unable or unwilling to control a non-state persecutor, nothing in the decision asserts a new standard requiring that the government order or sanction persecution to meet the "unable or unwilling to control" element.

C. Government unwillingness or inability to control the persecutor

U.S. asylum laws have always accounted for the fact that many bona fide refugees – women fleeing female genital mutilation, gay men escaping persecution on account of their sexual orientation, religious minorities who fear harm by members of the majority religion – fled or fear harm by non-state actors and cannot avail themselves of government protection. *See e.g.*, 8 C.F.R. §

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[9] One striking aspect of the Attorney General's decision is that that he opines generally about claims, without expressly making any categorical statement. For instance, in addition to his comment that domestic and gang-based violence "generally" cannot be the basis for asylum, 27 I&N Dec. at 320, in a footnote, he says that "few such claims would satisfy the legal standard to determine whether an alien has a credible fear of persecution." 27 I&N Dec. at 320 n.1. Some adjudicators will likely perceive them as requiring denials of claims.

The statute grants immigration judges the responsibility to "determine" whether an asylum applicant has met her burden. INA § 240(c)(4)(B). Moreover, by regulation, the BIA members "shall exercise their independent judgment and discretion" in deciding cases, subject to the Attorney General's legal rulings. 8 C.F.R. § 1003.1(d)(1)(ii). The Attorney General has no power to decide asylum eligibility in cases he has not certified to himself, and it is highly unlikely that the Attorney General could order the BIA and immigration judges not to exercise their discretion and judgment in a given case. If *A-B-* is intended to tell the BIA and immigration judges what to do, the Attorney General would be attempting "precisely what the regulations forbid him to do: dictating the Board's decision." *United States ex rel. Accardi v. Shaugnessy*, 347 U.S. 260, 267 (1954). Nor is it required that an explicit order be given for the agency to violate the *Accardi* principle: "[i]t would be naive to expect such a heavy-handed way of doing things." *Id.*

It may be useful to remind adjudicators of the *Accardi* principle. The Attorney General cannot order asylum denials in these thousands of cases, unless he takes the responsibility to certify those cases to himself. Under *Accardi*, he can establish legal rules, but he cannot dictate the outcome of cases.

1208.13(b)(1); *Kasinga*, 21 I&N Dec. 357; *Bringas-Rodriguez v. Sessions*, 850 F.3d 1051, 1073-74 (9th Cir. 2017). Despite this well-established principle, *Matter of A-B-* suggests that non-state actor asylum claims are outliers.

Citing Seventh Circuit case law, the Attorney General refers to the "unable or unwilling to control" prong in multiple ways. *See e.g.*, *Hor v. Gonzales*, 400 F.3d 482 (7th Cir. 2005) (*Hor I*)[10]; *Galina v. INS*, 213 F.3d 955 (7th Cir. 2000). Initially, his introductory commentary states that claims involving non-state actors must show that "government protection from such harm is so lacking that their persecutors' actions can be attributed to the government," although no citation is provided for this assertion. *A-B-*, 27 I&N Dec. at 317. Later, the decision cites Seventh Circuit case law referring to a showing that the government "condones" or is helpless to protect victims. *Galina*, 213 F.3d at 958. Ultimately, however, while the decision uses different terms for "unable or unwilling," the Attorney General also repeatedly references "unable or unwilling to control" as the applicable standard and does not claim to change case law on this point.

D. Persecution

One of the Attorney General's primary errors in *A-B-* is his conflation of the different asylum elements. Nowhere is this more apparent than in his description of what is required to establish persecution. Confusingly, the Attorney General suggests that persecution comprises three elements, only one of which relates to whether the harm is sufficiently severe to constitute persecution. 27 I&N Dec. at 337. The other two elements relate to whether the persecution was inflicted on account of a protected ground and whether the persecution was by the government or an entity the government is unable or unwilling to control. *Id*. In reality, these are three separate elements that all asylum seekers must meet, no matter the type of claim. Combining them into the definition of "persecution" will only result in confused and erroneous decisions.

The source for this confusion seems to lie with the Attorney General's misunderstanding of the asylum definition and the sometimes-imprecise way the Courts of Appeals have used the term "persecution." Courts have often referred to "past persecution" as shorthand for the question of whether an asylum seeker has established a presumed fear of future persecution based on "past persecution." 8 C.F.R. § 1208.13(b)(1). When used in that context, the phrase refers to whether the asylum seeker has established past persecution, on account of a protected ground, by the government or an entity the government is unable or unwilling to control – it is only when all of these elements are established as to past persecution that the presumed future fear arises. *See e.g.*, *Yasinskyy v. Holder*, 724 F.3d 983, 989 (7th Cir. 2013) (determining that the harm petitioner suffered

[10] While language in *Hor I* could be misunderstood to suggest a government must have been directly involved in persecution in order to establish a viable claim, on rehearing, *Hor v. Gonzales*, 421 F.3d 497 (7th Cir. 2005) (*Hor II*), which the Attorney General did not cite, clarified that asylum claims are viable if the persecution "emanate[s] from sections of the population that do not accept the laws of the country at issue, sections that the government of that country is either unable or unwilling to control." *Hor II*, 421 F.3d at 501-02 (internal citations omitted).

constituted persecution, "[b]ut that does not help Yasinskyy because he did not demonstrate that the beatings and threats were carried out by the Ukrainian government or by a group that the government was unable or unwilling to control – a necessary element for showing past persecution."). In other words, the regulations create the following standard: Persecution + Nexus + Protected Ground + Unable/Unwilling to Control/State Actor = Presumption of Future Persecution. In contrast, the Attorney General's confused wording would create the following circular standard: Persecution + Nexus + Protected Ground + Unable/Unwilling to Control/State Actor = Persecution.

Ultimately, while the Attorney General's explanation of persecution is a confusing conflation of three different asylum elements, his explanation of those elements does not create any new standard beyond that already established in the statute, regulations, and case law.

E. On account of

The Attorney General affirms that establishing the connection between the harm suffered or feared and the protected characteristic is critical to asylum and finds that the *A-R-C-G-* decision erred in insufficiently analyzing this element. *A-B-*, 27 I&N Dec. at 338. Again, *A-B-* does not announce a new nexus standard but instead criticizes *A-R-C-G-* for failing to adequately apply the existing one. *Id*. at 338. Inarguably, nexus is a critical component to asylum and, indeed, is where some claims fail. *A-B-* cites the well-worn quote from *Cece* that nexus is "where the rubber meets the road." *Id*. at 338 (citing *Cece*, 733 F.3d at 673). It is precisely because nexus is such an important stand-alone concept that it should not be meshed with other elements; an error the Attorney General (and the BIA) make repeatedly. In order to present and evaluate nexus appropriately, practitioners and adjudicators must treat it as a separate element.

The Attorney General also reaffirms the "one central reason" standard that the statute has established for determining nexus. *A-B-*, 27 I&N Dec. at 338. This means that while there may be multiple reasons a persecutor harms a victim, the protected characteristic must be one of the central reasons. The decision does not abrogate the BIA's prior holding that there can be multiple central reasons. *See Matter of J-B-N- & S-M-*, 24 I&N Dec. 208 (BIA 2007). The Attorney General gives an example of a reason harm may be not be on account of a protected ground: if a gang targets an individual for money. But that reason does not preclude *other* central reasons that are connected to a protected ground.

The Attorney General frames domestic violence as "private" and related to a "personal relationship." *A-B-*, 27 I&N Dec. at 337-39. As discussed in greater detail in Part IV, this reflects an inaccurate understanding of the cause and nature of domestic violence, which is not simply the result of "animosity" by the abuser towards his partner. *Id*. at 316.

Finally, the Attorney General implies (after citing the vacated *R-A-*) that asylum seekers should provide evidence that the persecutor is aware of the PSG's existence to prove nexus, rather than just evidence that the persecutor targeted the asylum seeker on account of the characteristic she shares with other group members. *A-B-*, 27 I&N Dec. at 339. This is problematic since it is difficult to know what evidence could be available to show the persecutor's views towards other individuals who share the protected characteristics with the asylum seeker. Critically, however, the Attorney General does not make this a requirement for establishing nexus and does not repudiate well-established case law finding that nexus can be proven through direct *and* circumstantial evidence. *INS v. Elias-Zacarias*, 502 U.S. 478, 483 (1992); *Martinez-Buendia v. Holder*, 616 F.3d 711, 715 (7th Cir. 2010).

F. Particular social group composition

The Attorney General restates the PSG test set out in *S-E-G-/E-A-G-* and clarified in *M-E-V-G-/W-G-R-*, demonstrating that he has not created a new PSG test. The Attorney General also cites another 2018 BIA decision, *Matter of W-Y-C- & H-O-B-*, 27 I&N Dec. 189 (BIA 2018), for the proposition that an asylum seeker must clearly indicate "on the record and before the immigration judge, the exact delineation of any proposed particular social group" and that the BIA cannot consider new PSGs proposed on appeal. *A-B-*, 27 I&N Dec. at 344. This is a troubling requirement given the complexities of PSG case law, particularly for pro se asylum seekers, but it is not a new standard.[11]

The Attorney General also makes several critiques of the *A-R-C-G-* group, but the criticism falls flat. First, the Attorney General implies that Courts of Appeals have found *A-R-C-G-* difficult to implement when, in fact, Courts have demonstrated little trouble applying the PSG; which sets forth clear and straightforward membership requirements. The fact that in some cases, Courts have found an *A-R-C-G-*style PSG not viable based on the facts of the case, or that the asylum seeker was not a member of her proposed group, does not mean that *A-R-C-G-* is not workable, but rather that it *is* a functioning legal tool.

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[11] By contrast, the en banc Seventh Circuit in *Cece* stated regarding Cece's particular social group:

> [W]e must first determine the contours of her social group. Both the parties and the immigration courts were inconsistent, and the description of her social group varied from one iteration to the next. The inconsistencies, however, do not upset the claim. . . . And in one form or another, both Cece and the immigration judge articulated the parameters of the relevant social group. On her application for asylum, Cece explains that she is a "perfect target" of forced prostitution because she is a "young Orthodox woman living alone in Albania." . . . . Cece testified at length that women do not live alone in Albania . . . that she did not know anyone who lived alone . . . that she was afraid to live alone, . . . and most importantly that she was targeted because she was living alone. . . . Similarly, the Albanian expert's testimony was focused on the risk of women who lived alone in Albania.

733 F.3d at 670-71.

Second, the Attorney General commits errors of logic by suggesting that the PSG in *A-R-C-G-* and other gender violence-based asylum claims fail because they are defined by the harm the group members suffered or fear and therefore do not exist independently of the persecution. First, groups defined in part by the persecution are not necessarily doomed. As noted in Part IV, a group can be defined by past harm suffered so long as that PSG is being used for a future fear claim. For example, a group based on the characteristic of having been forcibly recruited as a child soldier includes the harm of forced recruitment as a part of its definition and so would fail as to past persecution. For the claim to be viable, the forcible recruitment cannot be *both* the defining characteristic of the PSG and the harm group members experienced: that is circular. But if vigilantes were targeting children who had been forced to be soldiers, the claim could prevail because the harm feared (e.g. attacks by vigilantes) is different from the harm that places one in the PSG (e.g. forced recruitment). *See e.g.*, *Lukwago v. Ashcroft*, 329 F.3d 157 (3d Cir. 2003). This is an important, but often overlooked, conceptual point.

Additionally, defining a PSG based on being a woman who is "unable to leave" a relationship is not the same as defining the PSG based on being an "abused women." *A-B-* asserts these are functional equivalents, but that is incorrect. The inability to leave a relationship is not the harm suffered or feared. The harm is typically physical beatings, rape, threats of harm, and/or psychological control. Moreover, there may be many reasons (economic, familial, cultural) why a woman is unable to leave a relationship, which in turn make her a target of persecution by her partner. Suggesting, as the Attorney General does, that this group is defined by the harm is seemingly a purposeful misreading of the PSG.[12]

G. *Chevron* and *Brand X*

The Attorney General cites to *Nat'l Cable & Telecomms Ass'n v. Brand X Internet Servc.*, 545 U.S. 967(2005) and *Chevron, U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984) for the point that the Attorney General's reasonable construction of an ambiguous term in the INA, like "membership in a particular social group," is entitled to deference and may displace a prior court interpretation. *A-B-*, 27 I&N Dec. at 326-27. The Seventh Circuit has not had occasion to affirm a PSG based on *A-R-C-G-*. However, longstanding Seventh Circuit law has refused to defer to the particularity and social distinction requirements. NIJC does not see *A-B-* adding significantly to the BIA's prior defense of its three-part test, but it is likely the Seventh Circuit will consider the Attorney General's rationales if and when it addresses those questions. Since the Attorney General did not explicitly state he was intending *A-B-* to overturn Circuit precedent, and he did not instruct adjudicators not to follow Seventh Circuit precedent, NIJC's position is that immigration judges

[12] The Attorney General also devotes significant attention to the notion that the PSG in *A-R-C-G-* is not socially distinct. Since social distinction is not a recognized PSG requirement in the Seventh Circuit, this practice advisory will not address that part of the decision. See NIJC's Particular Social Group Practice Advisory for more information on this point. To the extent social distinction is relevant to the nexus or "on account of" element, it will be discussed in that section below.

within the Seventh Circuit continue to be bound by Seventh Circuit case law. While NIJC encourages attorneys to have a working familiarity with *Chevron* and *Brand X* (and can review NIJC's Particular Social Group Practice Advisory for more information), attorneys should present their arguments based on the premise that *A-B-* does not alter the test for PSG claims within the Seventh Circuit.

IV. Post-*Matter of A-B-* Developments

There has been little published case law discussing the *A-B-* decision since it was issued in June of 2018. In July, the U.S. District Court for the Western District of Pennsylvania issued a published decision in a case related to a federal unlawful reentry charge that briefly referenced *A-B-* in a footnote. *U.S. v. Reyes-Romero*, 327 F.Supp 855, 890 (W.D.Pa. 2018). There, the Court noted that *Matter of A-B-* "does not appear to the Court to call into question the validity of *Crespin-Valladares*," the Fourth Circuit decision that had found cognizable the particular social group of "family members of those who oppose Salvadoran gangs by agreeing to be prosecutorial witnesses." *Id.* at 890 n.42 (*citing Crespin-Valladares v. Holder*, 632 F.3d 117 (4th Cir. 2011)).

The First Circuit has also referenced *A-B-* in two published decision. The first decision, *Rosales Justo v. Sessions*, 895 F.3d 154 (1st Cir. 2018), contrasts the petitioner's case with *A-B-* in relation to the unable or unwilling to control standard. The Court noted that although *A-B-* rejected the BIA's overturning of the IJ's finding that the police were able to protect the applicant where she had reached out to the police and "received various restraining orders and had [the persecutor] arrested on at least one occasion," in the present case, the evidence showed nothing about "the quality of this [police] investigation or its likelihood of catching the perpetrators. Indeed, evidence about law enforcement in Guerrero generally suggested that the investigation was unlikely to make Rosales's family any safer." *Rosales Justo*, 895 F.3d at 164 (internal citation omitted). The Court went on to further note that the evidence showed that "the failures by the police in Guerrero went well beyond a government's failure to protect its citizens from all crime." *Id*. at 166 n.9. Shortly after, however, the First Circuit issued a second published decision in which it noted, in a footnote, that the *A-B-* decision "interpreted the "causal connection" and "government nexus" prongs of [sic] persecution analysis to exclude most domestic violence harms from establishing that [persecution[definition." *Martinez-Pérez v. Sessions*, 897 F.3d 33, 40 n.6 (1st Cir. 2018).

While the Third Circuit referenced *Matter of A-B-* in a published decision that ultimately deferred to the BIA's social distinction and particularity requirements, it provided no real analysis or discussion of the *A-B-* decision itself. *S.E.R.L. v. Att'y Gen.*, 894 F.3d 535 (3d Cir. 2018).[13]

[13] One unpublished decision from the Third Circuit remanded the claim of a woman whose social group had been based on *A-R-C-G-* so that the immigration judge could determine whether her membership in the group of "Salvadoran women in domestic relationships who are unable to leave" is cognizable per the parameters of *A-B-*, noting that while the overruling of *A-R-C-G-* weakened the petitioner's case, "it does not automatically defeat her

The most in-depth analysis of the *A-B-* decision thus far can be found in the decision of the D.C. District Court in *Grace v. Whitaker*, No. 18-cv-01853 (D.D.C., Dec. 19, 2018). *Grace* involved a challenge to the application of *Matter of A-B-* and the ensuing implementing USCIS Policy Memorandum to credible fear interviews (the initial asylum screening required for asylum seekers who request asylum at a U.S. port of entry or are apprehended within a certain distance of the border). While much of the decision relates to the standards to be applied in credible fear interviews and is not necessarily relevant in the asylum context, the decision contain some useful language that can and should be referenced in protection-based cases pending at all levels. For example, in the decision, the Court:

- Notes that the government has taken the position that *A-B-* makes "no such general rule against domestic violence or gang-related claims" and that "the only change to the law in *Matter of A-B-* is that *Matter of A-R-C-G-* was overruled;" thus, according to the government, the rest of the *A-B-* decision is simply "comment[ary]." *Grace,* No. 18-cv-01853 at *19.

- States that "[a] general rule that effectively bars the claims based on certain categories of persecutors (i.e. domestic abusers or gang members) or claims related to certain kinds of violence is inconsistent with Congress' intent to bring the United States refugee law into conformance with the [Refugee Protocol]." *Id*. at *20.

- Finds that the "unable or unwilling to control" standard is not ambiguous; it "was settled at the time the Refugee Act was codified, and therefore, the Attorney General's condoned or complete helplessness standard is not a permissible construction." *Id*. at *22-23.

- Determines that *A-B-* does not change the "one central reason" standard for establishing nexus and "reiterates that . . . the nexus standard . . . does not preclude a positive credible fear determination simply because there is a personal relationship between the persecutor and the victim, so long as the one central reason for the persecution is a protected ground. . . . Indeed, courts have routinely found the nexus requirement satisfied when a personal relationship exists." *Id*. at *23-24.

- Finds that it is "arbitrary, capricious, and contrary to immigration law" for the USCIS Policy Memorandum to assert that particular social groups that include "inability to leave" as a characteristic are impermissibly circular. *Id*. at *24-25.

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claim that she is a member of a cognizable particular social group. *Padilla-Maldonado v. Att'y Gen*¸ No. 17-3097 (3d Cir., Oct. 9, 2018).

V. Presenting Asylum Claims In Light of *Matter of A-B-*

It bears repeating that the actual legal holding of *A-B-* is narrow: it simply overturns the BIA's decisions in *A-R-C-G* and *A-B-*.[14] Nonetheless, given the extensive, anti-immigrant dicta throughout the decision, and the likely possibility that adjudicators will rely on it, presenting the claims of individuals seeking asylum based on persecution by non-state actors will require additional preparation. While asserting and preserving arguments that *A-B-* does not overrule *Cece* and its progeny, practitioners should expect that adjudicators will closely scrutinize claims involving non-state actors, particularly when the claims involve domestic and gang violence. Lawyers representing asylum seekers with these claims must educate adjudicators regarding the actual holdings of the *A-B-* decision and its interplay with Court of Appeals case law, build robust records in support of each element in the claim, and preserve issues for appeal.

> Always preserve the argument that *Matter of A-B-* does not overrule *Cece v. Holder* and other Seventh Circuit precedent.

Finally, attorneys should remind adjudicators that, despite the Attorney General's rhetoric, it is well established that adjudicators must evaluate asylum claims on a case-by-case basis, paying close attention to the particular facts end evidence of the individual case. *See e.g.*, *Acosta*, 19 I&N Dec. at 232-33 ("The particular kind of group characteristic that will qualify under this construction remains to be determined on a case-by-case basis"); *A-R-C-G-*, 26 I&N Dec. at 395 ("In particular, the issue of nexus will depend on the facts and circumstances of an individual claim"); *M-E-V-G-*, 26 I&N Dec. at 251 ("[W]e emphasize that our holdings in *Matter of S-E-G-* and *Matter of E-A-G-* should not be read as a blanket rejection of all factual scenarios involving gangs. . . . Social group determinations are made on a case-by-case basis"); *see also Pirir-Boc v. Holder*, 750 F.3d 1077, 1084 (9th Cir. 2014) (remanding proceedings to the BIA because the BIA failed to make a case-by-case determination regarding the claim, in violation of its own precedent).

A. Corroboration

The one practice tip spanning all of the issues raised in *A-B-* is that importance of corroboration. Attorneys must extensively corroborate all aspects of the claim and avoid relying solely on client affidavits and country condition reports. The statutory language on corroborating evidence is clear: if the adjudicator determines the asylum seeker should provide corroborating evidence, the asylum seeker must provide that evidence or explain why it is not reasonably obtainable. INA § 208(b)(1)(B)(ii). Adjudicators will rarely provide a continuance to obtain corroborating evidence; thus attorneys must corroborate all elements and facts of the claim (or show why such evidence is not reasonably obtainable) and submit the evidence with all other pre-

[14] Significantly, this is the same argument made by the government in *Grace*. No. 18-cv-01853 at *19 ("The government emphasizes that the only change to the law in *Matter of A-B-* is that *Matter of A-R-C-G-* was overruled. . . . The government dismisses the rest of *Matter of A-B-* as mere comment[ary]").

hearing materials (while requesting a continuance, and making objections to denials, if any new corroboration angles emerge during the merits hearing).

Additionally, when considering corroboration, attorneys should be aware of the coordinated effect of *A-B-* and the Department of State's gutting of the 2017 Human Rights Reports issued in May 2018. In these reports, the State Department dramatically minimized – and in some instances cut out entirely – human rights abuses that had been well documented in prior years. This was most obvious in sections of the reports discussing abuses related to sexual orientation and gender, and especially for countries considered allies of the United States.[15] NIJC has never recommended that attorneys rely heavily on the State Department Human Rights Reports as a source of country condition evidence, but in light of the 2017 reports, attorneys may now need to provide additional documentation to disprove the information contained in the State Department report.[16]

B. Persecution

The Attorney General did not dispute that the harm A-R-C-G- suffered was persecution. *A-B-*, 27 I&N Dec. at 336. Nonetheless, as noted above, his discussion conflates the definition of persecution with other elements in the asylum definition (the nexus and governmental action elements) in a way that may confuse adjudicators to the detriment of the asylum claim.[17]

Correct Formulation	Attorney General's Formulation
Persecution + Nexus, Protected Ground, Unable/Unwilling/State Actor Rebuttable Presumption of Future Persecution	Persecution + Nexus, Protected Ground, Unable/Unwilling/State Actor Persecution

Practice Tips

When briefing the persecution element, attorneys should rely primarily on the *Stanojkova* definition, which states that "[p]ersecution involves . . . the use of *significant* physical force against a person's body, or the infliction of comparable physical harm without direct application of force . .

[15] For a particularly vivid example, attorneys can compare the section on women in the Honduran report from 2017 to the 2015 and 2016 reports. *See also*, Robbie Gramer, "Human Rights Groups Bristling at State Department Report," *Foreign Policy* (April 21, 2018), available at https://foreignpolicy.com/2018/04/21/human-rights-groups-bristling-at-state-human-rights-report/.

[16] The Seventh Circuit has criticized adjudicators for over-reliance on the State Department reports and noted their political nature. *See e.g.*, *Koval v. Gonzales*, 418 F.3d 798, 807-08 (7th Cir. 2005).

[17] As explained in Part III, the Courts of Appeals have often referred to "past persecution" as shorthand for the question of whether an asylum seeker has established a presumed fear of future persecution based on "past persecution."

. or nonphysical harm of equal gravity." *Stanojkova v. Holder*, 645 F.3d 943, 948 (7th Cir. 2011). NIJC encourages attorneys to include a brief footnote in response to the confusing description in *A-B-*, explaining the following:

> Although the Attorney General noted in *Matter of A-B-* that the Board has provided three elements to the persecution definition (1. nexus or "intent to target;" 2. severe harm; and 3. inflicted by the government or an entity that the government "was unable or unwilling to control"), this description refers to the requirements for establishing the "past persecution" that gives rise to a presumed future fear of persecution. 8 C.F.R. § 1208.13(b)(1). Establishing that the prior harm suffered constitutes persecution – i.e. is sufficiently severe – is a separate question from the "nexus" and "unable or unwilling to control" elements. *See* e.g., *M-E-V-G-*, 26 I&N Dec. at 242; Cece; 733 F.3d at 673.

Past persecution, however, is not the only way to establish asylum eligibility. Thus, attorneys should be sure to present a clear, *independent* argument that the client has a well-founded fear of future persecution (meaning, a reasonable possibility of future persecution, on account of a protected ground, by the government or an entity the government is unable or unwilling to control). 8 C.F.R. § 1208.13(b)(2); *Ayele v. Holder*, 564 F.3d 862, 868 (7th Cir. 2009). Attorneys should be careful to present this claim independent of the past persecution claim in case the adjudicator does not accept the PSG or nexus argument regarding past persecution.

C. Particular Social Group Membership

The Attorney General does not say anything new regarding the BIA's PSG test or provide any new interpretation or rule. *See A-B-*, 27 I&N Dec. at 335 (reaffirming the three-part PSG test). In fact, as noted above, while the Attorney General overruled *A-R-C-G-*, he did not say the characteristics of gender, nationality, and relationship status could never form a PSG. Rather, he simply found the BIA's analysis of the group in *A-R-C-G-* insufficient. *A-B-*, 27 I&N Dec. at 334-36.

When presenting a PSG-based asylum claim within the Seventh Circuit, it continues to be important to remind adjudicators that the Seventh Circuit has rejected the BIA's social distinction and particularity tests as set out in *S-E-G-*; *E-A-G-*; *M-E-V-G-*, and *W-G-R-*, and affirmed a pure, *Acosta*-only approach. Since the *A-B-* decision does not purport to modify the BIA's test, adjudicators within the Seventh Circuit must continue following an *Acosta*-only approach as well.[18] Because of the BIA's holding in *Matter of W-Y-C-*, 27 I&N Dec. 189, affirmed by the Attorney General in *A-B-*, that new social groups cannot be asserted on appeal, it is important that NIJC *pro bono* attorneys work closely with NIJC to ensure that they have preserved all social groups at the immigration court level because attorneys may be unable to assert new PSGs on appeal. This

[18] For further comparison and analysis of the Seventh Circuit and BIA's particular social group case law, please see NIJC's Particular Social Group Practice Advisory.

generally means that NIJC *pro bono* attorneys should forward their pre-hearing brief to their NIJC point-of-contact **no less than five business days before the filing deadline**.

Practice Tips

When determining the parameters of a PSG, attorneys should first follow these steps:

1) Explore why the persecutor targeted or will target your client and determine whether those reasons are characteristics, your client cannot change or should not be required to change.

2) Be sure to differentiate between the initial reason for targeting and the subsequent targeting based on an action by your client. For example, Central American gangs often target young men for recruitment and the population generally for extortion. But once an individual opposes recruitment or extortion, or takes steps such as reporting the gang to the police, the gang's persecution frequently shifts and becomes more severe. It is generally best to focus on that secondary reason – the act in opposition; the act of filing a police report; the resistance to gang activity – as the characteristic forming the social group, rather than the general socio-economic reasons the gang may have targeted the individual in the first place.

3) Do NOT define the PSG by the harm suffered or feared. Notwithstanding the Attorney General's assertion that PSGs must exist independently of the persecution, *A-B-*, 27 I&N Dec. at 334-35, referencing the harm suffered does not necessarily invalidate the social group, as explained in Part III.[19] However, it will make the nexus element almost impossible to prove because of the circularity problem – "young Salvadoran men who have been targeted by gangs" are not targeted by gangs because they "have been targeted by gangs" and "Guatemalan women who have suffered domestic violence" are not targeted with domestic violence because they "have suffered domestic violence." In many instances, young men in Central American are targeted after taking the irretrievable step of refusing the gang and that is what prompts the harm. Similarly, many women are abused because of their gender. These characteristics – having opposed the gang and/or being female – are immutable characteristics that exist independent of the persecution. Attorneys must clearly explain the difference and be prepared to respond to government attorneys who will assert the characteristic and the harm are one.

> Do not define the PSG by the harm your client suffered or fears.

[19] *See Cece*, 733 F.3d at 671 (Although a social group "cannot be defined merely by the fact of persecution" or "*solely* by the shared characteristic of facing danger" . . . . [t]hat shared trait, however, does not disqualify an otherwise valid group"); *see also Lukwago*, 329 F.3d 157.

4) When looking for supportive case law, look to Seventh Circuit law first and then to BIA precedent that may have found viable social groups in cases with similar rationales, but different countries of origin; and then to other Circuits. For example, the Seventh Circuit has recognized the PSG of "former Salvadoran gang members," *Benitez Ramos,* 589 F.3d at 429; "the educated, landowning class of cattle farmers in Colombia," *Orejuela v. Gonzales*, 423 F.3d 666 (7th Cir. 2005); and "Jordanian women who have allegedly flouted moral norms," *Sarhan v. Holder*, 658 F.3d 649 (7th Cir. 2011). The Seventh Circuit has not yet recognized a group based on resistance to gangs, but it has recognized a group based on resistance to the FARC. *See Escobar v. Holder*, 657 F.3d 537 (7th Cir. 2011). Similarly, the Seventh Circuit had not previously had occasion to recognize a group that followed the *A-R-C-G-* definition, but it has recognized the group of "single women in Albania who live alone." *Cece*, 733 F.3d at 671. Significantly, the BIA has also recognized a particular social group related to gender and resistance to a particular activity. In *Matter of Kasinga*, (which the BIA has repeatedly asserted remains viable even under the BIA's new PSG test, *see M-E-V-G-*), the BIA found viable the PSG of "young women of the Tchamba-Kunsuntu tribe who had not been subjected to female genital mutilation and opposed the practice." 21 I&N Dec. 357.

> To support Central American and Mexican asylum claims, look to Seventh Circuit precedent involving asylum seekers from other countries.

Based on these guidelines, NIJC recommends that attorneys practicing in the Seventh Circuit use PSG formulations in gender and gang-based claims that generally follow these types of definitions (keeping in mind that PSGs are case-specific and must be the reason for the harm experienced and/or feared in order to satisfy the nexus requirement):

Domestic violence/forced relationships claims:
"Ms. X belongs to the particular social group of "Salvadoran women," or more narrowly "Salvadoran women in [domestic/intimate/marital] relationships they are unable to leave" or "women in the X family/immediate family members of Mr. X" or "Salvadoran women who have flouted or resisted Salvadoran social norms."

Gang-based claims:
"Mr. X belongs to the particular social group of "Salvadorans who have opposed or resisted the MS-13;" "Salvadoran small business owners who have opposed the MS-13;" "Salvadorans who have witnessed gang crimes and reported them to law enforcement;" "family members of MS-13 gang members," or more narrowly, "the immediate family members of Mr. X."

After consulting with NIJC and defining the PSGs (making sure to preserve all groups per *W-Y-C-*), NIJC *pro bono* attorneys must defend the PSGs in their legal briefs under Seventh Circuit law and against the Attorney General's decision in *A-B-*. Depending on the case, the latter may need to

be presented more aggressively or could be relegated to a footnote (for example, attorneys with domestic violence-based claims will likely want to clearly and substantially address the impact of *A-B-* on their client's claim). PSG defenses should generally contain the following information:

- **In domestic violence and related claims:** Although the Attorney General in *A-B-* overruled the BIA's decision in *Matter of A-R-C-G-*, the Attorney General simply focused on perceived analytical errors the BIA made when examining *A-R-C-G-*'s particular social group and remanded for a new analysis. He did not assert that the group as defined in *A-R-C-G-* could never be viable.[20] Moreover, the analytical errors identified by the Attorney General focused exclusively on the social distinction and particularity requirements, which the Seventh Circuit has not recognized. Even if these factors were applied in the Seventh Circuit, the evidence demonstrates that Ms. X's groups are socially distinct and particularly defined, especially when viewed in light of other groups recognized by the Seventh Circuit. Furthermore, the group is not defined solely by the past harm suffered, which is the standard set by the Seventh Circuit. [21] *Cece*, 733 F.3d at 671-72. While some women may be unable to leave a relationship due to a threat of violence, others may be unable to leave due to their economic situation; social stigma; other dangers not emanating from the abuser; or child custody concerns.[22]

- **In all PSG claims:** In February 2014, the BIA reaffirmed its particular social group definition as requiring "social distinction/visibility" and "particularity." *Matter of M-E-V-G-*, 26 I&N Dec. 227 (BIA 2014); *Matter of W-G-R-*, 26 I&N Dec. 20 (BIA 2014). These new requirements are impermissible and unreasonable interpretations of "particular social group" and the Seventh Circuit has rejected them. *See Gatimi*, 578 F.3d 611 (rejecting the BIA's social visibility test); *Cece*, 733 F.3d at 674-75 (rejecting breadth (particularity) as a bar to a particular social group). Where the BIA declines to follow binding circuit precedent within a federal circuit, it explicitly says so in a published decision. *See, e.g.*, *Matter of Konan Waldo Douglas*, 26 I&N Dec 197 (BIA 2013). Since the BIA did not purport to overrule Seventh Circuit precedent in *M-E-V-G-* and *WGR-*, the Seventh Circuit's rejection of social distinction and particularity remains binding.

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[20] In fact, in *Grace v. Whitaker*, the government asserted to the Court that the "only change to the law in *Matter of A-B-* is that *Matter of A-R-C-G-* was overruled" and that "*A-B-* only required the BIA to assess each element of an asylum claim and not rely on a party's concession that an element is satisfied." *Grace*, No. 18-cv-01853 at *19.

[21] When defending against circularity concerns in gender-based claims, it is also useful to reference the Court's determination in *Grace* that it was "arbitrary, capricious, and contrary to immigration law" for USCIS to assert – based on its interpretation of the *A-B-* decision – a blanket rule that particular social groups that include "inability to leave" as a characteristic are impermissible circular. *Grace*, No. 18-cv-01853 at *24-25.

[22] Attorneys should document, via the client's affidavit, country condition documents, and other sources, some of the reasons why a woman in the client's community may be unable to leave a relationship outside of the threat of harm from the abuser.

> Moreover, the Seventh Circuit's precedent decisions since *M-E-V-G-* and *W-G-R-* have repeatedly reaffirmed that the Court continues to follow the *Acosta* definition of particular social group, as described in *Cece*. *See Salgado Gutierrez v. Lynch*, 834 F.3d 800, 805 (7th Cir. 2016) (rejecting breadth and homogeneity as requirements for establishing a particular social group); *Lozano-Zuniga v. Lynch*, 832 F.3d 822, 827 (7th Cir. 2016) ("This circuit defines social group as a group "whose membership is defined by a characteristic that is either immutable or is so fundamental to individual identity or conscience that a person ought not be required to change."); *see also W.G.A. v. Sessions*, 900 F.3d 957, 964, 964 n.4 (7th Cir. 2018) (noting that whether the BIA's particularity and social distinction requirements are entitled to *Chevron* deference remains an open question in the Seventh Circuit, but that petitioner's arguments that the two requirements are unreasonable have some force). These decisions make clear that the BIA's new particular social group requirements are not binding in the Seventh Circuit. Even if they were, the evidence demonstrates that Ms. X's groups are socially distinct and particularly defined.

Finally, the importance of asserting all applicable PSGs at the immigration court level cannot be overstated in light of *W-Y-C-*. Proposing more groups than necessary does post some risk that the strongest claims will be diluted or overshadowed by the others. Discussing PSGs with NIJC far in advance of briefing, and sending briefs to NIJC for review far in advance of the merits hearing will help ensure that attorneys are presenting all the necessary groups, without including too many unnecessary ones. Attorneys must also remember that for each social group presented, a full legal argument must be made (regarding whether persecution was or will be on account of that group).

D. Nexus

> Context is critical. Use all forms of evidence (affidavits, country reports, expert statements) to establish context.

The Attorney General examined the persecution A-R-C-G-'s husband inflicted on her as harm occurring exclusively within a relationship between two people. This analysis not only ignores established sociological evidence regarding domestic violence and country condition evidence regarding gender violence in Central America, but it also fails to consider the persecution in the context in which it occurred, in violation of circuit precedent. *See Sarhan*, 658 F.3d at 656 (rejecting the immigration judge's assertion that a threatened honor killing was due to a "personal dispute" and determining instead that the threat was due to a "widely-held social norm in Jordan" that makes such honor killings permissible); *Ndonyi v. Mukasey*, 541 F.3d 702, 711 (7th Cir. 2008) (vacating a removal order after finding that the immigration judge and BIA "utterly fail[ed] to consider the context of [the asylum seeker's] arrest."); *De Brenner v. Ashcroft*, 388 F.3d 629, 638 (8th Cir. 2004); *Osorio v. INS*, 18 F.3d 1017, 1029 (2d Cir. 1994).

Practice Tips

Attorneys presenting PSG-based asylum claims should be sure to heavily corroborate their arguments that their client was and will be persecuted on account of her PSG membership(s).[23]

1) In response to the concerns raised by the Attorney General, this evidence should address whether the persecutor had some understanding of the client's PSG membership (i.e., in a domestic violence-based claim, whether he understood that the client could not leave him and whether he and/or other members of the community recognized the existence of other women who could not leave relationships due to threats of harm; economic concerns, or other issues).[24]

2) Attorneys must present these claims within the broader context of gender violence generally and the country at issue specifically.[25] For example, it is well-established that domestic violence is rooted in power and control, as opposed to attraction or desire. Attorneys should reference and include articles and/or affidavits from experts like Nancy K. D. Lemon, whose affidavit on domestic violence is available via the Center for Gender and Refugee Studies and explains that domestic violence stems from a desire to exercise power and control within a social and cultural construct that enforces men's entitlement to superiority and control over family members. Affidavits from country condition experts and other country condition resources should explain how domestic and sexual violence in the country at issue are based on deep-rooted beliefs that women are subordinate to men. Attorneys should explain what "machismo" is to ensure the adjudicator understands how misplaced it is to view domestic violence as a "private matter."

Place the persecution within the context of a broader policy or practice.

Similarly, in cases involving gangs or cartels, attorneys must place the harm suffered or feared by the client within the context of the country at issue and the policies of the gang or cartel. The Seventh Circuit's analysis in *R.R.D. v. Holder*, 746 F.3d 807 (7th Cir. 2014) is instructive. In that case, the Seventh Circuit rejected the BIA's determination that a former Mexican police officer could not establish a nexus between the persecution he feared from Mexican cartels and his status as a former police officer. The Court determined it was

[23] It is worth noting that in *Grace*, the Court determined that neither *A-B-* nor the USCIS Policy Memorandum changed the "one central reason" standard for establishing nexus. *Grace*, No. 18-cv-01853 at *23.

[24] While the social distinction requirement is not binding in the Seventh Circuit, this form of "social distinction" is relevant to the nexus analysis.

[25] Attorney may also want to reference the Court's reiteration in *Grace* that the nexus standard "does not preclude . . . [establishing asylum eligibility] simply because there is a personal relationship between the persecutor and the victim, so long as the one central reason for the persecution is a protected ground. . . . Indeed, courts have routinely found the nexus requirement satisfied when a personal relationship exists – including cases in which persecutors had a close relationship with the victim." *Grace*, No. 18-cv-01853 at *24.

erroneous for the BIA to have ignored evidence that cartels have *a policy* of targeting former police officers, which, the Court noted, is a "rational way to achieve deterrence" (from the perspective of the cartel). *Id*. at 810. Applying this reasoning, in a claim involving a gay man from Honduras who was targeted by a gang, useful evidence could include an expert who can explain that gangs in Honduras are known to target LGBT people because the group is antithetical to the machismo views of the gangs.

3) Attorneys should focus on country condition documentation and expert affidavits that discuss violence against those who resist extortion or recruitment as part of an intentional policy that is vital to the gang's ability to control territory and maintain its financial stability. Attorneys should also remind adjudicators that while a gang or cartel may target many individuals for many reasons, the relevant question for the client's case is whether he was or will be targeted on account of his protected ground. It is not necessary to establish that the gang targets all members of the group or that the gang does not target anyone but members of the group. *R.R.D.*, 746 F.3d at 809; *see Orejuela*, 423 F.3d at 673 ("While we are sure that FARC would be happy to take the opportunity to rob any Colombian (or foreigner for that matter) of his money, it is those who can be identified and targeted as the wealthy landowners that are at continued risk once they have been approached and refused to cooperate with the FARC's demands."). Similarly, *Sarhan* provides a useful response to the Attorney General's suggestion that an abuser's failure to abuse *other* women who are in relationships they are unable to leave undercuts the nexus element. *A-B-*, 27 I&N Dec. at 339. As the Seventh Circuit noted regarding honor killing:

> [T]he families are not taking this step [honor killing] to make a personal statement. They do it because their society tells them . . . their own social standing will suffer if they do nothing. The fact that Besem has not killed others says nothing about whether his persecution of Desi will be on account of her membership in a particular social group. 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. The situation here is analogous.

658 F.3d at 657.

4) Finally, in gender-related claims, NIJC recommends that attorneys break their nexus argument into three sections.

Prove Nexus Through:
1) Statements made by the persecutor and others
2) Discussion of the type of harm itself and how it demonstrates nexus
3) Country condition evidence demonstrating the persecution occurs because the government has deemed it a permissible way to treat the people who share the protected ground.

First, provide the direct evidence (primarily, the specific statements made by the persecutor and others) demonstrating the client was persecuted on account of her social group membership. Second, demonstrate that the harm itself is evidence of the reason for the harm.[26] Third, establish that the country condition evidence provides circumstantial evidence of the reason for the harm, explaining that when there is governmental inaction in the face of overwhelming evidence of gender violence, the country condition evidence itself demonstrates persecution on account of a gender-based protected ground. *See Sarhan*, 658 F.3d at 656 ("[The asylum seeker's brother] is killing her because society has deemed that this is a permissible . . . course of action and the government has withdrawn its protection from the victims.").

E. Unable or Unwilling to Control

The Seventh Circuit has a long line of cases establishing the viability of asylum claims when the persecutor is a non-state actor the government is unable or unwilling to control. *See e.g.*, *Vahora v. Holder*, 707 F.3d 904, 908-09 (7th Cir. 2013) (explaining that asylum is only available if the persecution was inflicted by the government or "by private actors whom the government is unable or unwilling to control" and noting that reporting non-state violence to law enforcement isn't necessary to meet this requirement if doing so would have been futile); *Cece*, 733 F.3d at 675 ("T]he

[26] In *Kasinga*, 21 I&N Dec. at 366, the BIA recognized that female genital mutilation ("FGM") is a form of "sexual oppression that is based on the mutilation of women's sexuality in order to assure male dominance and exploitation." In an asylum claim based on a fear of FGM, it is therefore not required for the persecutor to state a desire to control the female victim's sexuality in order to establish the nexus element; the reason for the harm is implicit in the act itself. *See Karouni v. Gonzales*, 399 F.3d 1163, 1174 (9th Cir. 2005) (finding that the shooting of the petitioner in the anus was "essentially *res ipsa loquitor* evidence" that he was shot because he was gay).

Rape, stalking, domestic violence, sexual assault, and femicide, similar to FGM, are particular types of harm inflicted on women and used to demonstrate and assert power over them. *See Angoucheva v. INS*, 106 F.3d 781, 793 n.2 (7th Cir. 1997) (Rovner, J., concurring) (stating that "[r]ape and sexual assault are generally understood today . . . as acts of violent aggression that stem from the perpetrator's power or and desire to harm his victim"); *Garcia-Martinez v. Ashcroft*, 371 F.3d 1066, 1076 (9th Cir. 2004) (asserting that "[r]ape is . . . about power and control") (citation omitted). The Department of Justice has described domestic violence as one of several "forms of mistreatment *primarily directed at girls and women*" that "may serve as evidence of past persecution on account of one or more of the five grounds." Phyllis Coven, U.S. Dep't of Justice, Considerations for Asylum Officers Adjudicating Asylum Claims From Women, at 4 (May 26, 1995) (emphasis added) *available at* http://www.unhcr.org/refworld/docid/3ae6b31e7.html.

standard is not just whether the government of Albania was involved in the incident or interested in harming Cece . . . but also whether it was unable or unwilling to take steps to prevent the harm"); *Hor II*, 421 F.3d at 502 (explaining that where the government had effectively told the petitioner he would have to protect himself because they could not protect him, the individual would have a "solid claim for asylum"); *see also Tarraf v. Gonzales*, 495 F.3d 525, 527 n.2 (7th Cir. 2007) (explaining that while *Hor I*, could be read broadly to suggest "that when an alien has been targeted by an armed insurgency . . . he can never establish" asylum eligibility, *Hor II* clarified that "persecution by private actors *can* give rise to viable asylum claims" and so *Hor I* "should not be over-read").

Notwithstanding the Attorney General's initial comment that "[g]enerally, claims by aliens pertaining to domestic violence or gang violence perpetrated by non-governmental actors will not qualify for asylum . . . [because] such claims are unlikely to satisfy the statutory grounds for proving group persecution that the government is unable or unwilling to address," *A-B-*, 27 I&N Dec. at 320, this broad statement cannot take the place of an individualized analysis, based on the facts of the specific case, and under the established case law regarding the unable/unwilling to control standard.[27] It is important that attorneys work to ensure adjudicators understand that the Attorney General did not change or re-interpret the standard for establishing the government is unable or unwilling to control a non-state persecutor.

Matter of A-B- does not raise the standard for establishing the unable/unwilling to control element in claims based on non-state actor violence.

Practice Tips

While the Attorney General did not establish a new law or standard for demonstrating the unable or unwilling to control element, NIJC anticipates that adjudicators will pay greater attention to this asylum element moving forward and in fact, post-*A-B-* Asylum Office guidance focuses on this element, although some of that guidance has now been rejected by the District Court in *Grace*.[28] For this reason, it is important that attorneys provide sufficient evidence to demonstrate that the government is unable or unwilling to control their client's non-state persecutor and fully address this element in their legal brief. NIJC recommends that attorneys take the following steps in preparing their cases related to this particular element:

[27] As the Court noted in *Grace*, "[a] general rule that effectively bars the claims based on certain categories of persecutors (i.e. domestic abusers or gang members) or claims related to certain kinds of violence is inconsistent with Congress' intent to bring United States refugee law into conformance with the [Refugee Protocol]." *Grace*, No. 18-cv-01853 at *20 (internal citation omitted).

[28] "Guidance for Processing Reasonable Fear, Credible Fear, Asylum, and Refugee Claims in Accordance with *Matter of A-B-*," USCIS, July 11, 2018, available at https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2018/2018-06-18-PM-602-0162-USCIS-Memorandum-Matter-of-A-B.pdf [last accessed December 23, 2018]; *Grace*, No. 18-cv-01853 at *21-22.

- Remind and be prepared to educate the adjudicator regarding the fact that the Attorney General's decision did not change the standard for establishing the "unable or unwilling to control" element; in fact, the Attorney General heavily cites Seventh Circuit case law when addressing this element in his decision. Some Seventh Circuit case law seems to establish a slightly higher standard for meeting this element. *See A-B-*, 27 I&N Dec. at 337 (citing *Galina*, 213 F.3d at 958, for the requirement that "the government condoned the private actions or at least demonstrated a complete helplessness to protect the victims."). However, as noted above, a significant number of Seventh Circuit cases simply refer to the "unable or unwilling to control" standard and the Attorney General did so as well in his decision, providing no indication that he was changing the legal standard in any way. Nor could he, since, as the D.C. District Court recently noted, the "unable or unwilling to control" element for establishing past or future persecution is not ambiguous.[29] Moreover, the standard for "unable or unwilling to control" remains lower than the "willful blindness" standard for demonstrating governmental acquiescence in the Convention Against Torture (CAT) context. *See e.g.*, *Matter of S-V-*, 22 I&N Dec. 1306, 1312-13 (BIA 2000).[30]

- Consider whether there is any reasonable argument that the client's persecutor was a governmental entity, even an informal governmental entity like an auxiliary, community chief, or elder. In some cases, attorneys may want to argue that a paramilitary, guerilla force, or gang has so extensively infiltrated or colluded with the government or obtained a parallel level of power and control that it is effectively operating as the government.

- If there is no reasonable argument that that the persecutor was a governmental entity, then carefully consider what evidence will specifically corroborate the argument that the government is unable or unwilling to control the persecutor and how to best present that evidence to the adjudicator.
  1. Evidence (police reports, judicial documents, affidavits) that the client attempted to seek protection some way.
  2. If the client did not seek protection, evidence that doing so would have been futile and would have placed her into greater danger. *Matter of S-A-*, 22 I&N Dec. 1328 (BIA 2000). If it is necessary to make

> Establish and corroborate all attempts to seek governmental protection and if no attempt was made, establish why doing so would have been unsafe and futile (and corroborate that claim).

[29] The Court determined in *Grace* that the "unable or unwilling to control" standard as it relates to persecution is not ambiguous and thus, the interpretation of the term as requiring that the government "condoned" the persecution or was "completely helpless" to prevent it, as asserted in *A-B-* and the Policy Memorandum, fails at *Chevron* step one. *Grace*, No. 18-cv-01853 at *21-22.

[30] In the CAT context, where the "acquiescence" standard is higher than the "unable or unwilling to control" standard, the Seventh Circuit has held that an individual need not show that the entire government was complicit or even that multiple government officials were complicit in order to establish relief. *Rodriguez-Molinero v. Lynch*, 808 F.3d 1134, 1138-39 (7th Cir. 2015).

this futility argument, be sure to include detailed information in the client's affidavit to explain why she believed this, and corroborate this belief with other direct and circumstantial evidence (other fact witnesses; mental health evaluations; country condition documentation).

3. Evidence, including both country condition documentation and statements from the client and other witnesses, documenting the government's general inability or unwillingness to control the type of persecutor/persecution involved in the asylum seeker's claim (e.g., news reports, country condition reports, expert affidavits).

- Given the Attorney General's attempt in *A-B-* to compare domestic violence in El Salvador to domestic violence in the United States and the decisions of U.S. police officers not to act on certain reports, attorneys should spend some time in their brief documenting the difference in levels of violence and attitudes towards that violence (especially gender-based violence) in the United States and the country at issue, while also asserting that focusing on the United States is improper, particularly given the size of the United States and the freedom of movement within.

F. Relocation

As noted above, the Attorney General instructed adjudicators to consider whether internal relocation "presents a reasonable alternative before granting asylum," although this is not a new test or standard, nor something that only applies to survivors of non-state violence. While the Attorney General did not make the burden shifting and presumptions related to the relocation standard clear in his decision, attorneys should remember (and remind adjudicators) that if an asylum seeker has established past persecution (on account of a protected ground, by the government or an entity the government is unable or unwilling to control), the burden is on DHS to rebut the presumed future fear of persecution that arises by demonstrating that the asylum seeker can safely and reasonably relocate to another part of her country of citizenship.[31] 8 C.F.R. § 1208.13(b)(1)(i). It is only if the asylum seeker has failed to establish the presumption of future fear, that the burden switches to the asylum seeker to demonstrate that relocation is not safe or reasonable in the first instance. 8 C.F.R. § 1208.13(b)(3)(i).[32] Moreover, when the persecutor is the government, relocation is presumed unreasonable. 8 C.F.R. § 1208.13(b)(3).

[31] DHS can also rebut a presumed future fear of persecution by demonstrating a "fundamental change in circumstances such that the applicant no longer has a well-founded fear of persecution." 8 C.F.R. § 1208.13(b)(1)(i)(A).

[32] Notwithstanding this burden shifting and the fact that DHS frequently doesn't present evidence regarding relocation, immigration judges often analyze the relocation element without looking specifically to DHS's burden, so attorneys should affirmatively address relocation even if their client has a strong past persecution claim.

Finally, both the regulations and Seventh Circuit law require that adjudicators analyze whether internal relocation would be safe *and* reasonable; creating a two-prong test for the relocation element. 8 C.F.R. § 1208.13(b)(1)(i)(B); *Oryakhil v. Mukasey*, 528 F.3d 993, 998 (7th Cir. 2008). The regulations provide a non-exhaustive list of the factors adjudicators should consider when determining the reasonableness of any internal relocation options, including "ongoing civil strife within the country; . . . economic . . . infrastructure; geographic limitations; and social and cultural constraints, such as age, gender, health, social and familial ties." 8 C.F.R. § 1208.13(b)(3).

> Remember: relocation must be both safe and reasonable.

Practice Tips

Attorneys should divide the relocation section of their briefs into two sections, making clear that relocation is neither a safe nor a reasonable option.

- **Regarding safety**: Attorneys should address in their client's affidavit whether he attempted to relocate within the country of origin; the distance between the relocated destination and the location where the persecution occurred; and the outcome of that relocation attempt. Attorneys should corroborate this attempt with affidavits from fact witnesses or explain why such witness statements are not reasonably obtainable. If the asylum seeker did not attempt to relocate internally before fleeing, his affidavit should explain in detail why an attempt was not made.[33]

  Whether or not relocation was attempted, the attorney should also address the "safety" prong by providing evidence to corroborate why relocation would not make the asylum seeker safe. In gang-based claims, the attorney should provide affidavits and country condition documentation establishing the nation-wide reach of the gangs and their ability to find a target throughout the country at issue. In gender violence cases, the attorney should look at any specific factors that may make it easier for the persecutor to find the asylum seeker, such as children or family in common.

- **Regarding reasonableness**: Attorneys should provide evidence regarding other factors – aside from the persecutor – that would make relocation challenging to the point of unreasonableness. For example:

[33] An amicus brief submitted to the Fifth Circuit in an NIJC case helps explain why moving away from an abuser does not mean the domestic violence survivor is safe, and that the very act of leaving may place the survivor in a more dangerous position. A redacted version of the brief is available on NIJC's website: http://immigrantjustice.org/sites/immigrantjustice.org/files/Unable%20to%20Leave%20Amicus%20Brief-5COA-2016_0.pdf

- A single mother with children may be unable to secure housing and financially support her children if she moves to a location where she has no familial support. This should be established through the affidavit of the asylum seeker and other fact witnesses.
- In many countries with strong gang or criminal networks, it may be completely unfeasible to move to a different part of the country because the criminal organizations perceive strangers as spies or as affiliated with rival gangs or criminal groups from their hometown. This fact should be established through affidavits and country condition documentation.

Corroborate the unreasonableness of relocation.

- In some countries, locations of residence may be based on clan or ethnicity or it may be culturally unacceptable for a woman to live alone.
- Pay attention to geographic limitations. If some parts of the country are uninhabitable jungles; have ongoing civil strife; or are so rural that the client and her children would be forced to live in extremely poor conditions, the attorney could establish that relocation is not reasonable.
- The Seventh Circuit has held that living in hiding is not an acceptable form of relocation. *N.L.A. v. Holder*, 744 F.3d 425,435-36 (7th Cir. 2014). Likewise, attorneys should argue that restricting an asylum seeker to a small section of the country that might be safe is also not "reasonable."[34]

G. Discretion

One of the more disturbing parts of the Attorney General's decision was the blatant suggestion that adjudicators should consider denying asylum as a matter of discretion where government documents indicate that the asylum seeker failed to tell a border immigration official that she wanted asylum or where the asylum seeker entered the United States without inspection, rather than requesting asylum at a port of entry. *A-B-*. 27 I&N Dec. at 354. Attorneys often gloss over discretion when there are no obvious, negative discretionary factors in a case (such as a criminal history), but NIJC encourages attorneys to spend a little more time addressing discretion in light of the Attorney General 's decision.[35]

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[34] In sexual orientation or gender identity-based claims, DHS or the adjudicator often assert that there is a "gay friendly" city where the asylum seeker could live, even if the asylum seeker would face danger in the rest of the country.

[35] Attorneys should also note or be prepared to argue that to the extent the Attorney General is encouraging adjudicators to deny asylum as a matter of discretion because an asylum seeker entered the country without inspection or did not immediately express a desire to apply for asylum, doing so would be inconsistent with the BIA's decision in *Matter of Pula*, 19 I&N Dec. 467, 473 (BIA 1987), which holds that manner of entry is "only one of a number of factors which should be balanced in exercising discretion." In particular, the BIA noted that if an individual has established asylum eligibility, "the discretionary factors should be carefully evaluated . . . the danger of persecution should generally outweigh all but the most egregious adverse factors." *Id*. at 474.

Practice Tips

As with the other asylum elements, there is well-established law regarding how adjudicators should make discretionary determinations in asylum cases and the Attorney General's decision does not purport to change this law. In addition, while NIJC does not recommend heavily relying on international law when addressing discretion, the UNCHR has made clear that an asylum seeker cannot be penalized based on her manner of entry into the United States. *See Garcia v. Sessions*, 856 F.3d 27, 57-59 (1st Cir. 2017) (Stahl, J., dissenting) (discussing Article 31's prohibition against penalizing asylum seekers based on manner of entry). Finally, there is substantial documentation and case law regarding the unreliability of immigration records related to border interviews and attorneys should address issues regarding border statements in the following way:

- File a Freedom of Information Act (FOIA) request with USCIS to get copies of documents regarding border interviews and any other interaction with immigration. This is one of the first steps attorneys should take when beginning representation of an asylum seeker. Instructions for filing a USCIS FOIA can be found in NIJC's Asylum Manual.

- If any inconsistent statements are found, discuss these with the client to determine whether the border interview records are accurate and if they are, why the asylum seeker might not have immediately expressed a fear of return when questioned by immigration officials.

- Look to Seventh Circuit case law discussing the unreliability of records from border interviews. *See e.g.*, *Jimenez-Ferreira v. Lynch*, 831 F.3d 803 (7th Cir. 2016); *Moab v. Gonzales*, 500 F.3d 656 (7th Cir. 2007). Attorneys may also want to consider citing to other sources that have documented the long-standing issues with border interview records. *See e.g.*, "Barriers to Protection," U.S. Commission on Int'l Religious Freedom (Aug. 3, 2016), available at http://www.uscirf.gov/reports-briefs/special-reports/barriers-protection-the-treatment-asylum-seekers-in-expedited-removal; Elise Foley, "Infants and Toddlers are Coming to the U.S. to Work, According to Border Patrol," *HuffPost* (June 16, 2015), available at https://www.huffingtonpost.com/2015/06/16/border-patrol-babies_n_7594618.html.

> Preserve arguments that documents regarding border interviews and border statements are not reliable.

- Be prepared to object in court to attempts by DHS to rely on these documents or offer them into evidence, particularly when DHS has not made the author of the documents available for cross-examination. *See e.g.*, INA § 240(b)(4)(B) ("[In proceedings] the alien shall have a reasonable opportunity to examine the evidence against the alien, to present evidence on the alien's own behalf, and to cross-examine witnesses presented by the Government.").

H. Final thoughts

As described throughout this practice advisory, the holding in *Matter of A-B-* is narrow; the bigger concern is the impression created by the Attorney General's tone and dicta throughout the decision. For this reason, NIJC emphasizes the importance of understanding this decision within the context of the Administration broad-based attack on asylum generally and specifically on Central American and Mexican asylum seekers.

It will likely take time before attorneys have a full picture of how adjudicators are responding to the *A-B-* decision and whether they are treating the negative dicta as law. To that end, NIJC recommends preserving certain arguments in pre-hearing briefs through concise paragraphs or footnotes, even though the immigration judge may be unable to reach many of the points:

1) To the extent the Attorney General's statements regarding the asylum elements are intended to create new standards for establishing asylum eligibility, they would be ultra vires and impermissible and the Court should disregard them.
2) To the extent the Attorney General is attempting to decide the asylum eligibility of individual asylum seekers by dictating how adjudicators decide their cases, he would be violating the Accardi Principle (see n.9 above). *United States ex rel. Accardi v. Shaugnessy*, 347 U.S. 260, 267 (1954).
3) If the Attorney General intended his decision to be understood as rejecting wholesale the *A-R-C-G-* group in all cases, he would be violating well-established BIA and Circuit precedent requiring that adjudicators analyze asylum cases and PSGs on a case-by-case basis.
4) While the Attorney General has not asserted that *A-B-* creates any new law, assuming arguendo that new law has been created in cases involving domestic violence-based claims, that standard cannot be applied retroactively to asylum seekers who had filed for asylum prior to *A-B-*, relying on the particular social group established in *Matter of A-R-C-G-*. *See e.g., Montgomery Ward & Co., Inc. v. F.T.C.*, 691 F.2d 1322, 1333 (9th Cir. 1982); *Garfias-Rodriguez- v. Holder*, 702 F.3d 504, 520 (9th Cir. 2012).

* * *

Matter of A-B- is a disappointing decision that seeks to walk back much of the progress advocates have made to secure recognition of persecution on account of gender as protected by U.S. asylum law. Nonetheless, through skilled lawyering and carefully developed records, survivors of gender violence were able to obtain protection before *A-R-C-G-* and through the same efforts, will continue to do so even without *A-R-C-G-*'s support.

For more information on representing asylum seekers, including NIJC's asylum manual, please review the resources on NIJC's website at https://www.immigrantjustice.org/useful-documents-attorneys-representing-asylum-seekers. Attorneys representing asylum clients through NIJC are encouraged to consult with NIJC regarding any questions about their case.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

GRACE, *et al.*, Plaintiffs, v. MATTHEW G. WHITAKER,[1] Acting Attorney General of the United States, *et al.*, Defendants.	No. 18-cv-01853 (EGS)

MEMORANDUM OPINION

When Congress passed the Refugee Act in 1980, it made its intentions clear: the purpose was to enforce the "historic policy of the United States to respond to the urgent needs of persons subject to persecution in their homelands." Refugee Act of 1980, § 101(a), Pub. L. No. 96–212, 94 Stat. 102 (1980). Years later, Congress amended the immigration laws to provide for expedited removal of those seeking admission to the United States. Under the expedited removal process, an alien could be summarily removed after a preliminary inspection by an immigration officer, so long as the alien did not have a credible fear of persecution by his or her country of origin. In

[1] Pursuant to Rule 25(d) of the Federal Rules of Civil Procedure, the Court substitutes the current Acting Attorney General as the defendant in this case. "Plaintiffs take no position at this time regarding the identity of the current Acting Attorney General of the United States." Civil Statement, ECF No. 101.

creating this framework, Congress struck a balance between an efficient immigration system and ensuring that "there should be no danger that an alien with a genuine asylum claim will be returned to persecution." H.R. REP. NO. 104-469, pt. 1, at 158 (1996).

Seeking an opportunity for asylum, plaintiffs, twelve adults and children, alleged accounts of sexual abuse, kidnappings, and beatings in their home countries during interviews with asylum officers.[2] These interviews were designed to evaluate whether plaintiffs had a credible fear of persecution by their respective home countries. A credible fear of persecution is defined as a "significant possibility" that the alien "could establish eligibility for asylum." 8 U.S.C. § 1225(b)(1)(B)(v). Although the asylum officers found that plaintiffs' accounts were sincere, the officers denied their claims after applying the standards set forth in a recent precedential immigration decision issued by then-Attorney General, Jefferson B. Sessions, *Matter of A-B-*, 27 I. & N. Dec. 316 (A.G. 2018).

Plaintiffs bring this action against the Attorney General alleging violations of, *inter alia*, the Administrative Procedure Act ("APA") and the Immigration and Nationality Act ("INA"),

[2] Plaintiffs Grace, Carmen, Gio, Gina, Maria, Mina, Nora, and Mona are proceeding under pseudonyms.

arguing that the standards articulated in *Matter of A-B-*, and a subsequent Policy Memorandum issued by the Department of Homeland Security ("DHS") (collectively "credible fear policies"), unlawfully and arbitrarily imposed a heightened standard to their credible fear determinations.

Pending before the Court are: (1) plaintiffs' combined motions for a preliminary injunction and cross-motion for summary judgment; (2) plaintiffs' motion to consider evidence outside the administrative record; (3) the government's motion to strike exhibits supporting plaintiffs' motion for summary judgment; and (4) the government's motion for summary judgment. Upon consideration of the parties' memoranda, the parties' arguments at the motions hearings, the arguments of *amici*,[3] the administrative record, the applicable law, and for the reasons discussed below, the Court finds that several of the new credible fear policies, as articulated in *Matter of A-B-* and the Policy Memorandum, violate both the APA and INA. As explained in this Memorandum Opinion, many of these policies are inconsistent with the intent of Congress as articulated in the INA. And because it is the will of Congress—not the whims of the Executive—that determines the standard for expedited removal, the Court finds that those policies are unlawful.

[3] The Court appreciates the illuminating analysis provided by the *amici*.

Part I of this Opinion sets forth background information necessary to resolve plaintiffs' claims. In Part II, the Court considers plaintiffs' motion to consider evidence outside the administrative record and denies the motion in part. In Part III, the Court considers the parties' cross-motions for summary judgment. In Part III.A, the Court considers the government's arguments that this case is not justiciable and holds that this Court has jurisdiction to hear plaintiffs' challenges to the credible fear policies. In Part III.B, the Court addresses the legal standards that govern plaintiffs' claims. In Part III.C, the Court turns to the merits of plaintiffs' claims and holds that, with the exception of two policies, the new credible fear policies are arbitrary, capricious, and in violation of the immigration laws. In Part III.D, the Court considers the appropriate form of relief and vacates the unlawful credible fear policies. The Court further permanently enjoins the government from continuing to apply those policies and from removing plaintiffs who are currently in the United States without first providing credible fear determinations consistent with the immigration laws. Finally, the Court orders the government to return to the United States the plaintiffs who were unlawfully deported and to provide them with new credible fear determinations consistent with the immigration laws.

I. Background

Because the claims in this action center on the expedited removal procedures, the Court discusses those procedures, and the related asylum laws, in detail.

A. Statutory and Regulatory Background

1. The Refugee Act

In 1980, Congress passed the Refugee Act, Pub. L. No. 96-212, 94 Stat. 102, which amended the INA, Pub. L. No. 82-414, 66 Stat. 163 (1952)(codified as amended in sections of 8 U.S.C.). The "motivation for the enactment of the Refugee Act" was the "United Nations Protocol Relating to the Status of Refugees ["Protocol"]," *INS v. Cardoza-Fonseca*, 480 U.S. 421, 424 (1987), "to which the United States had been bound since 1968," *id.* at 432–33. Congress was clear that its intent in promulgating the Refugee Act was to bring the United States' domestic laws in line with the Protocol. *See id.* at 437 (stating it is "clear from the legislative history of the new definition of 'refugee,' and indeed the entire 1980 Act . . . that one of Congress' primary purposes was to bring United States refugee law into conformance with the [Protocol]."). The Board of Immigration Appeals ("BIA"), has also recognized that Congress' intent in enacting the Refugee Act was to align domestic refugee law with the United States' obligations under the Protocol, to give statutory meaning to "our national commitment to human rights

and humanitarian concerns," and "to afford a generous standard for protection in cases of doubt." *In Re S-P-*, 21 I. & N. Dec. 486, 492 (B.I.A. 1998)(quoting S. REP. NO. 256, 96th Cong., 2d Sess. 1, 4, reprinted in 1980 U.S.C.C.A.N. 141, 144).

The Refugee Act created a statutory procedure for refugees seeking asylum and established the standards for granting such requests; the INA currently governs that procedure. The INA gives the Attorney General discretion to grant asylum to removable aliens. 8 U.S.C. § 1158(b)(1)(A). However, that relief can only be granted if the alien is a "refugee." *Id.* The term "refugee" is defined as:

> [A]ny person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.

8 U.S.C. § 1101(a)(42)(A). "Thus, the 'persecution or well-founded fear of persecution' standard governs the Attorney General's determination [of] whether an alien is eligible for asylum." *Cardoza-Fonseca*, 480 U.S. at 428. To establish refugee status, the alien must show he or she is someone who: (1) has suffered persecution (or has a well-founded fear of persecution) (2) on account of (3) one of five specific protected grounds:

race, religion, nationality, membership in a particular social group, or political opinion. *See* 8 U.S.C. § 1101(a)(42)(A). An alien fearing harm by non-governmental actors is eligible for asylum if the other criteria are met, and the government is "unable or unwilling to control" the persecutor. *Matter of Acosta*, 19 I. & N. Dec. 211, 222 (BIA 1985) *overruled on other grounds* by *Matter of Mogharrabi*, 19 I. & N. Dec. 439 (BIA 1987).

2. Expedited Removal Process

Before seeking asylum through the procedures outlined above, however, many aliens are subject to a streamlined removal process called "expedited removal." 8 U.S.C. § 1225. Prior to 1996, every person who sought admission into the United States was entitled to a full hearing before an immigration judge, and had a right to administrative and judicial review. *See Am. Immigration Lawyers Ass'n v. Reno*, 18 F. Supp. 2d 38, 41 (D.D.C. 1998)(describing prior system for removal). The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA") amended the INA to provide for a summary removal process for adjudicating the claims of aliens who arrive in the United States without proper documentation. As described in the IIRIRA Conference Report, the purpose of the expedited removal procedure

> is to expedite the removal from the United States of aliens who indisputably have no authorization to be admitted . . . , while

> providing an opportunity for such an alien who claims asylum to have the merits of his or her claim promptly assessed by officers with full professional training in adjudicating asylum claims.

H.R. REP. NO. 104-828, at 209-10 (1996)("Conf. Rep.").

Consistent with that purpose, Congress carved out an exception to the expedited removal process for individuals with a "credible fear of persecution." *See* 8 U.S.C. § 1225(b)(1)(B)(ii). If an alien "indicates either an intention to apply for asylum . . . or a fear of persecution," the alien must be referred for an interview with a U.S. Citizenship and Immigration Services ("USCIS") asylum officer. *Id.* § 1225(b)(1)(A)(ii). During this interview, the asylum officer is required to "elicit all relevant and useful information bearing on whether the applicant has a credible fear of persecution or torture[.]" 8 C.F.R. § 208.30(d). The asylum officer must "conduct the interview in a nonadversarial manner." *Id.*

Expediting the removal process, however, risks sending individuals who are potentially eligible for asylum to their respective home countries where they face a real threat, or have a credible fear of persecution. Understanding this risk, Congress intended the credible fear determinations to be governed by a low screening standard. *See* 142 CONG. REC. S11491-02 ("The credible fear standard . . . is intended to be a low

screening standard for admission into the usual full asylum process"); *see also* H.R. REP. NO. 104-469, pt. 1, at 158 (1996)(stating "there should be no danger that an alien with a genuine asylum claim will be returned to persecution"). A credible fear is defined as a "significant possibility, taking into account the credibility of the statements made by the alien in support of the alien's claim and such other facts as are known to the officer, that the alien could establish eligibility for asylum." 8 U.S.C. § 1225(b)(1)(B)(v).

If, after a credible fear interview, the asylum officer finds that the alien does have a "credible fear of persecution" the alien is taken out of the expedited removal process and referred to a standard removal hearing before an immigration judge. *See* 8 U.S.C. § 1225(b)(1)(B)(ii), (v). At that hearing, the alien has the opportunity to develop a full record with respect to his or her asylum claim, and may appeal an adverse decision to the BIA, 8 C.F.R. § 208.30(f), and then, if necessary, to a federal court of appeals, *see* 8 U.S.C. § 1252(a)-(b).

If the asylum officer renders a negative credible fear determination, the alien may request a review of that determination by an immigration judge. 8 U.S.C. § 1225(b)(1)(B)(iii)(III). The immigration judge's decision is "final and may not be appealed" 8 C.F.R. § 1208.30(g)(2)(iv)(A),

except in limited circumstances. *See* 8 U.S.C. § 1252(e).

3. Judicial Review

Section 1252 delineates the scope of judicial review of expedited removal orders and limits judicial review of orders issued pursuant to negative credible fear determinations to a few enumerated circumstances. *See* 8 U.S.C. § 1252(a). The section provides that "no court shall have jurisdiction to review . . . the application of [section 1225(b)(1)] to individual aliens, including the [credible fear] determination made under section 1225(b)(1)(B)." 8 U.S.C. § 1252(a)(2)(A)(iii). Moreover, except as provided in section 1252(e), the statute prohibits courts from reviewing: (1) "any individual determination or to entertain any other cause or claim arising from or relating to the implementation or operation of an [expedited removal] order;" (2) "a decision by the Attorney General to invoke" the expedited removal regime; and (3) the "procedures and policies adopted by the Attorney General to implement the provisions of section 1225(b)(1)." *Id.* § 1252(a)(2)(A)(i), (ii) & (iv).

Section 1252(e) provides for judicial review of two types of challenges to removal orders pursuant to credible fear determinations. The first is a habeas corpus proceeding limited to reviewing whether the petitioner was erroneously removed because he or she was, among other things, lawfully admitted for

permanent residence, or had previously been granted asylum. 8 U.S.C. § 1252(e)(2)(C). As relevant here, the second proceeding available for judicial review is a systemic challenge to the legality of a "written policy directive, written policy guideline, or written procedure issued by or under the authority of the Attorney General to implement" the expedited removal process. *Id.* § 1252(e)(3)(A)(ii). Jurisdiction to review such a systemic challenge is vested solely in the United States District Court for the District of Columbia. *Id.* § 1252(e)(3)(A).

B. Executive Guidance on Asylum Claims

1. Precedential Decision

The Attorney General has the statutory and regulatory authority to make determinations and rulings with respect to immigration law. *See, e.g.*, 8 U.S.C. § 1103(a)(1). This authority includes the ability to certify cases for his or her review and to issue binding decisions. *See* 8 C.F.R. §§ 1003.1(g)-(h)(1)(ii).

On June 11, 2018, then-Attorney General Sessions did exactly that when he issued a precedential decision in an asylum case, *Matter of A-B-*, 27 I. & N. Dec. 316 (A.G. 2018). In *Matter of A-B-*, the Attorney General reversed a grant of asylum to a Salvadoran woman who allegedly fled several years of domestic violence at the hands of her then-husband. *Id.* at 321, 346.

The decision began by overruling another case, *Matter of A-R-C-G-*, 27 I. & N. Dec. 388 (BIA 2014). *Id.* at 319. In *A-R-C-G-*, the BIA recognized "married women in Guatemala who are unable to leave their relationship" as a "particular social group" within the meaning of the asylum statute. 27 I. & N. Dec. at 392. The Attorney General's rationale for overruling *A-R-C-G-* was that it incorrectly applied BIA precedent, "assumed its conclusion and did not perform the necessary legal and factual analysis" because, among other things, the BIA accepted stipulations by DHS that the alien was a member of a qualifying particular social group. *Matter of A-B-,* 27 I. & N. Dec. at 319. In so doing, the Attorney General made clear that "[g]enerally, claims by aliens pertaining to domestic violence or gang violence perpetrated by non-governmental actors will not qualify for asylum," *id.* at 320,[4] and "[a]ccordingly, few such claims would satisfy the legal standard to determine whether an alien has a credible fear of persecution." *Id.* at 320 n.1 (citing 8 U.S.C. § 1225(b)(1)(B)(v)).

The Attorney General next reviewed the history of BIA precedent interpreting the "particular social group" standard and again explained, at length, why *A-R-C-G-* was wrongly

[4] Although *Matter of A-B-* discusses gang-related violence at length, the applicant in *Matter of A-B-* never claimed gang members had any involvement in her case. *Id.* at 321 (describing persecution related to domestic violence).

decided. In so ruling, the Attorney General articulated legal standards for determining asylum cases based on persecution from non-governmental actors on account of membership in a particular social group, focusing principally on claims by victims of domestic abuse and gang violence. He specifically stated that few claims pertaining to domestic or gang violence by non-governmental actors could qualify for asylum or satisfy the credible fear standard. *See id.* at 320 n.1.

The Attorney General next focused on the specific elements of an asylum claim beginning with the standard for membership in a "particular social group." The Attorney General declared that "[s]ocial groups defined by their vulnerability to private criminal activity likely lack the particularity required" under asylum laws since "broad swaths of society may be susceptible to victimization." *Id.* at 335.

The Attorney General next examined the persecution requirement, which he described as having three elements: (1) an intent to target a belief or characteristic; (2) severe harm; and (3) suffering inflicted by the government or by persons the government was unable or unwilling to control. *Id.* at 337. With respect to the last element, the Attorney General stated that an alien seeking to establish persecution based on the violent conduct of a private actor may not solely rely on the government's difficulty in controlling the violent behavior. *Id.*

Rather, the alien must show "the government condoned the private actions or at least demonstrated a complete helplessness to protect the victims." *Id.* (citations and internal quotation marks omitted).

The Attorney General concluded with a discussion of the requirement that an asylum applicant demonstrate that the persecution he or she suffered was on account of a membership in a "particular social group." *Id.* at 338–39. He explained that "[i]f the ill-treatment [claimed by an alien] was motivated by something other than" one of the five statutory grounds for asylum, then the alien "cannot be considered a refugee for purpose of asylum." *Id.* at 338 (citations omitted). He continued to explain that when private actors inflict violence based on personal relationships with a victim, the victim's membership in a particular social group "may well not be 'one central reason' for the abuse." *Id.* Using *Matter of A-R-C-G-* as an example, the Attorney General stated that there was no evidence that the alien was attacked because her husband was aware of, and hostile to, her particular social group: women who were unable to leave their relationship. *Id.* at 338-39. The Attorney General remanded the matter back to the immigration judge for further proceedings consistent with his decision. *Id.* at 346.

2. Policy Memorandum

Two days after the Attorney General issued *Matter of A-B-*, USCIS issued Interim Guidance instructing asylum officers to apply *Matter of A-B-* to credible fear determinations. Asylum Division Interim Guidance -- *Matter of A-B-*, 27 I. & N. Dec. 316 (A.G. 2018) ("Interim Guidance"), ECF No. 100 at 15–18.[5] On July 11, 2018, USCIS issued final guidance to asylum officers for use in assessing asylum claims and credible fear determinations in light of *Matter of A-B-*. USCIS Policy Mem., Guidance for Processing Reasonable Fear, Credible Fear, Asylum, and Refugee Claims in Accordance with *Matter of A-B-*, July 11, 2018 (PM-602-0162) ("Policy Memorandum"), ECF No. 100 at 4–13.

The Policy Memorandum adopts the standards set forth in *Matter of A-B-* and adds new directives for asylum officers. First, like *Matter of A-B-*, the Policy Memorandum invokes the expedited removal statute. *Id.* at 4 (citing section 8 U.S.C. § 1225 as one source of the Policy Memorandum's authority). The Policy Memorandum further acknowledges that "[a]lthough the alien in *Matter of A-B-* claimed asylum and withholding of removal, the Attorney General's decision and this [Policy Memorandum] apply also to refugee status adjudications and

[5] When citing electronic filings throughout this Memorandum Opinion, the Court cites to the ECF header page number, not the original page number of the filed docket.

reasonable fear and credible fear determinations." *Id.* n.1 (citations omitted).

The Policy Memorandum also adopts the standard for "persecution" set by *Matter of A-B-*: In cases of alleged persecution by private actors, aliens must demonstrate the "government is unwilling or unable to control" the harm "such that the government either 'condoned the behavior or demonstrated a complete helplessness to protect the victim.'" *Id.* at 5 (citing *Matter of A-B-*, 27 I. & N. Dec. at 337). After explaining the "condoned or complete helplessness" standard, the Policy Memorandum explains that:

> **In general, in light of the [standards governing persecution by a non-government actor], claims based on membership in a putative particular social group defined by the members' vulnerability to harm of domestic violence or gang violence committed by non-government actors will not establish the basis for asylum, refugee status, or a credible or reasonable fear of persecution.**

Id. at 9 (emphasis in original).

Furthermore, the Policy Memorandum made clear that because *Matter of A-B-* "explained the standards for eligibility for asylum . . . based on a particular social group . . . if an applicant claims asylum based on membership in a particular social group, then officers must factor [the standards explained in *Matter of A-B-*] into their determination of whether an

applicant has a credible fear . . . of persecution." *Id.* at 12 (citations and internal quotation marks omitted).

The Policy Memorandum includes two additional directives not found in *Matter of A-B-*. First, it instructs asylum officers to apply the "case law of the relevant federal circuit court, to the extent that those cases are not inconsistent with *Matter of A-B-*." *Id.* at 11. Second, although acknowledging that the "relevant federal circuit court is the circuit where the removal proceedings ***will take place*** if the officer makes a positive credible fear or reasonable fear determination," the Policy Memorandum instructs asylum officers to "apply precedents of the Board, and, if necessary, the circuit where the alien is ***physically located*** during the credible fear interview." *Id.* at 11-12. (emphasis added).

The Policy Memorandum concludes with the directive that "[asylum officers] should be alert that under the standards clarified in *Matter of A-B-*, few gang-based or domestic-violence claims involving particular social groups defined by the members' vulnerability to harm may . . . pass the 'significant probability' test in credible-fear screenings." *Id.* at 13.

C. Factual and Procedural Background

Each of the plaintiffs, twelve adults and children, came to the United States fleeing violence from Central America and seeking refuge through asylum. Plaintiff Grace fled Guatemala

after having been raped, beaten, and threatened for over twenty years by her partner who disparaged her because of her indigenous heritage. Grace Decl., ECF No. 12-1 ¶ 2.[6] Her persecutor also beat, sexually assaulted, and threatened to kill several of her children. *Id.* Grace sought help from the local authorities who, with the help of her persecutor, evicted her from her home. *Id.*

Plaintiff Carmen escaped from her country with her young daughter, J.A.C.F., fleeing several years of sexual abuse by her husband, who sexually assaulted, stalked, and threatened her, even after they no longer resided together. Carmen Decl., ECF No. 12-2 ¶ 2. In addition to Carmen's husband's abuse, Carmen and her daughter were targeted by a local gang because they knew she lived alone and did not have the protection of a family. *Id.* ¶ 24. She fled her country of origin out of fear the gang would kill her. *Id.* ¶ 28.

Plaintiff Mina escaped from her country after a gang murdered her father-in-law for helping a family friend escape from the gang. Mina Decl., ECF No. 12-3 ¶ 2. Her husband went to the police, but they did nothing. *Id.* at ¶ 10. While her husband was away in a neighboring town to seek assistance from another police force, members of the gang broke down her door and beat

[6] The plaintiffs' declarations have been filed under seal.

Mina until she could no longer walk. *Id.* ¶ 15. She sought asylum in this country after finding out she was on a "hit list" compiled by the gang. *Id.* ¶¶ 17–18.

The remaining plaintiffs have similar accounts of abuse either by domestic partners or gang members. Plaintiff Gina fled violence from a politically-connected family who killed her brother, maimed her son, and threatened her with death. Gina Decl., ECF No. 12-4 ¶ 2. Mona fled her country after a gang brutally murdered her long-term partner—a member of a special military force dedicated to combating gangs—and threatened to kill her next. Mona Decl., ECF No. 12-5 ¶ 2. Gio escaped from two rival gangs, one of which broke his arm and threatened to kill him, and the other threatened to murder him after he refused to deal drugs because of his religious convictions. Gio Decl., ECF No. 12-6 ¶ 2. Maria, an orphaned teenage girl, escaped a forced sexual relationship with a gang member who targeted her after her Christian faith led her to stand up to the gang. Maria Decl., ECF No. 12-7 ¶ 2. Nora, a single mother, together with her son, A.B.A., fled an abusive partner and members of his gang who threatened to rape her and kill her and her son if she did not submit to the gang's sexual advances. Nora Decl., ECF No. 12-8 ¶ 2. Cindy, together with her young child, A.P.A., fled rapes, beatings, and shootings [redacted]

[redacted]. Cindy Decl., ECF No. 12-9 ¶ 2.[7]

Each plaintiff was given a credible fear determination pursuant to the expedited removal process. Despite finding that the accounts they provided were credible, the asylum officers determined that, in light of *Matter of A-B-*, their claims lacked merit, resulting in a negative credible fear determination. Plaintiffs sought review of the negative credible fear determinations by an immigration judge, but the judge affirmed the asylum officers' findings. Plaintiffs are now subject to final orders of removal or were removed pursuant to such orders prior to commencing this suit.[8]

Facing imminent deportation, plaintiffs filed a motion for preliminary injunction, ECF No. 10, and an emergency motion for stay of removal, ECF No. 11, on August 7, 2018. In their motion for stay of removal, plaintiffs sought emergency relief because two of the plaintiffs, Carmen and her daughter J.A.C.F., were "subject to imminent removal." ECF No. 11 at 1.

The Court granted the motion for emergency relief as to the plaintiffs not yet deported. The parties have since filed cross-

[7] Each plaintiffs' harrowing accounts were found to be believable during the plaintiffs' credible fear interviews. Oral Arg. Hr'g Tr., ECF No. 102 at 37.

[8] Since the Court's Order staying plaintiffs' removal, two plaintiffs have moved for the Court to lift the stay and have accordingly been removed. *See* Mot. to Lift Stay, ECF Nos. 28 (plaintiff Mona), 60 (plaintiff Gio).

motions for summary judgment related to the Attorney General's precedential decision and the Policy Memorandum issued by DHS. Further, plaintiffs have filed an opposed motion to consider evidence outside the administrative record.

II. Motion to Consider Extra Record Evidence

Plaintiffs attach several exhibits to their combined application for a preliminary injunction and cross-motion for summary judgment, *see* ECF Nos. 10–2 to 10–7, 12-1 to 12-9, 64-3 to 64-8, which were not before the agency at the time it made its decision. These exhibits include: (1) declarations from plaintiffs; (2) declarations from experts pertaining to whether the credible fear policies are new; (3) government training manuals, memoranda, and a government brief; (4) third-party country reports or declarations; (5) various newspaper articles; and (6) public statements from government officials. Pls.' Evid. Mot., ECF No. 66-1 at 7–16. The government moves to strike these exhibits, arguing that judicial review under the APA is limited to the administrative record, which consists of the "materials that were before the agency at the time its decision was made." Defs.' Mot. to Strike, ECF No. 88-1 at 20.

A. Legal Standard

"[I]t is black-letter administrative law that in an APA case, a reviewing court 'should have before it neither more nor less information than did the agency when it made its

decision.'" *Hill Dermaceuticals, Inc. v. Food & Drug Admin.*, 709 F.3d 44, 47 (D.C. Cir. 2013)(quoting W*alter O. Boswell Mem'l Hosp. v. Heckler*, 749 F.2d 788, 792 (D.C. Cir. 1984)). This is because, under the APA, the court is confined to reviewing "the whole record or those parts of it cited by a party," 5 U.S.C. § 706, and the administrative record only includes the "materials 'compiled' by the agency that were 'before the agency at the time the decision was made,'" *James Madison Ltd. by Hecht v. Ludwig*, 82 F.3d 1085, 1095 (D.C. Cir. 1996)(citations omitted).

Accordingly, when, as here, plaintiffs seek to place before the court additional materials that the agency did not review in making its decision, a court must exclude such material unless plaintiffs "can demonstrate unusual circumstances justifying departure from th[e] general rule." *Am. Wildlands v. Kempthorne*, 530 F.3d 991, 1002 (D.C. Cir. 2008)(citation omitted). Aa court may appropriately consider extra-record materials: (1) if the agency "deliberately or negligently excluded documents that may have been adverse to its decision," (2) if background information is needed to "determine whether the agency considered all of the relevant factors," or (3) if the agency "failed to explain [the] administrative action so as to frustrate judicial review." *Id.*

Plaintiffs make three arguments as to why the Court should

consider their proffered extra-record materials: (1) to evaluate whether the government's challenged policies are an impermissible departure from prior policies; (2) to consider plaintiffs' due process cause of action[9]; and (3) to evaluate plaintiffs' request for permanent injunctive relief. Pls.' Evid. Mot., ECF No. 66-1 at 2–12. The Court considers each argument in turn.

B. Analysis

1. Evidence of Prior Policies

Plaintiffs first argue that the Court should consider evidence of the government's prior policies as relevant to determining whether the policies in *Matter of A-B-* and the subsequent guidance deviated from prior policies without explanation. *Id.* at 8–11. The extra-record materials at issue include government training manuals, memoranda, and a government brief, *see* Decl. of Sarah Mujahid ("Mujahid Decl."), ECF No. 10-3 Exs. E–J; Second Decl. of Sarah Mujahid ("Second Mujahid Decl."), ECF No. 64-4, Exs. 1–3, and declarations from third parties explaining the policies are new, Decl. of Rebecca Jamil and Ethan Nasr, ECF No. 65-5.

The Court will consider the government training manuals,

[9] The Court does not reach plaintiffs' due process claims, and therefore will not consider the extra-record evidence related to that claim. *See* Second Mujahid Decl., ECF No. 64-4, Exs. 4–7; Second Mujahid Decl., ECF No. 64-4, Exs. 8-9; ECF No. 64-5.

memoranda, and government brief, but not the declarations explaining them. Plaintiffs argue that the credible fear policies are departures from prior government policies, which the government changed without explanation. Pls.' Evid. Mot., ECF No. 66-1 at 7–11. The government's response is the credible fear policies are not a departure because they do not articulate any new rules. *See* Defs.' Mot., ECF No. 57-1 at 17. Whether the credible fear policies are new is clearly an "unresolved factual issue" that the "administrative record, on its own, . . . is not sufficient to resolve." *See United Student Aid Funds, Inc. v. Devos*, 237 F. Supp. 3d 1, 6 (D.D.C. 2017). The Court cannot analyze this argument without reviewing the prior policies, which are not included in the administrative record. Under these circumstances, it is "appropriate to resort to extra-record information to enable judicial review to become effective." *Id.* at 3 (citing *Esch v. Yeutter*, 876 F.2d 976, 991 (D.C. Cir. 1989)).

The government agrees that "any claim that *A-B-* or the [Policy Memorandum] breaks with past policies . . . is readily ascertainable by simply reviewing the very 'past policies.'" Defs.' Mot. to Strike, ECF No. 88-1 at 24. However, the government disagrees with the types of documents that are considered past policies. *Id.* According to the government, the only "past policies" at issue are legal decisions issued by the

Attorney General, BIA, or courts of appeals. *Id.* The Court is not persuaded by such a narrow interpretation of the evidence that can be considered as past policies. *See Leadership Conference on Civil Rights v. Gonzales*, 404 F. Supp. 2d 246, 255 (D.D.C. 2005)(finding training manual distributed as informal guidance "at a minimum" reflected the policy of the "Elections Crimes Branch if not the Department of Justice").

Admitting third party-declarations from a retired immigration officer and former immigration judge, on the other hand, are not necessary for the Court in its review. Declarations submitted by third-parties regarding putative policy changes would stretch the limited extra-record exception too far. Accordingly, the Court will not consider these declarations when determining whether the credible fear policies constitute an unexplained change of position.

2. Evidence Supporting Injunctive Relief

The second category of information plaintiffs ask the Court to consider is extra-record evidence in support of their claim that injunctive relief is appropriate. Pls.' Evid. Mot., ECF No. 66-1 at 13–16. The evidence plaintiffs present includes plaintiffs' declarations, ECF Nos. 12-1 to 12-9 (filed under seal); several reports describing the conditions of plaintiffs' native countries, Mujahid Decl., ECF No. 10-3, Exs. K-T; and four United Nations High Commissioner for Refugees ("UNHCR")

reports, Second Mujahid Decl., ECF No. 64-4 Exs. 10–13. The materials also include three declarations regarding humanitarian conditions in the three home countries. Joint Decl. of Shannon Drysdale Walsh, Cecilia Menjívar, and Harry Vanden ("Honduras Decl."), ECF No. 64-6; Joint Decl. of Cecilia Menjívar, Gabriela Torres, and Harry Vanden ("Guatemala Decl."), ECF No. 64-7; Joint Decl. of Cecilia Menjívar and Harry Vanden ("El Salvador Decl."), ECF No. 64-8.

The government argues that the Court need not concern itself with the preliminary injunction analysis because the Court's decision to consolidate the preliminary injunction and summary judgment motions under Rule 65 renders the preliminary injunction moot. Defs.' Mot. to Strike, ECF No. 88-1 at 12 n.1. The Court concurs, but nevertheless must determine if plaintiffs are entitled to a permanent injunction, assuming they prevail on their APA and INA claims. Because plaintiffs request specific injunctive relief with respect to their expedited removal orders and credible fear proceedings, the Court must determine whether plaintiffs are entitled to the injunctive relief sought. *See Eco Tour Adventures, Inc. v. Zinke*, 249 F. Supp. 3d 360, 370, n.7 (D.D.C. 2017)("it will often be necessary for a court to take new evidence to fully evaluate" claims "of irreparable harm . . . and [claims] that the issuance of the injunction is in the public interest.")(citation omitted). Thus, the Court will

consider plaintiffs' declarations, the UNHCR reports, and the country reports only to the extent they are relevant to plaintiffs' request for injunctive relief.[10]

In sum, the Court will consider extra-record evidence only to the extent it is relevant to plaintiffs' contentions that the government deviated from prior policies without explanation or to their request for injunctive relief. The Court will not consider any evidence related to plaintiffs' due process claim. Accordingly, the Court will not consider the following documents: (1) evidence related to the opinions of immigration judges and attorneys, Second Mujahid Decl., ECF No. 64-4, Exs. 8–9, 14–17 and ECF No. 64-5; (2) statements of various public officials, Second Mujahid Decl., ECF No. 64-4, Exs. 4–7; and (3) various newspaper articles, Mujahid Decl., ECF No. 10-3, Exs. R-T, and Second Mujahid Decl., ECF No. 64-4, Exs. 14–17.

III. Motion for Summary Judgment

A. Justiciability

The Court next turns to the government's jurisdictional arguments that: (1) the Court lacks jurisdiction to review plaintiffs' challenge to *Matter of A-B-*; and (2) because the Court lacks jurisdiction to review *Matter of A-B-*, the

[10] The Court will not consider three newspaper articles, Mujahid Decl., ECF No. 10-3, Exs. R–T, however, since they are not competent evidence to be considered at summary judgment. *See* Fed. R. Civ. P. 56(c).

government action purportedly causing plaintiffs' alleged harm, the plaintiffs lack standing to challenge the Policy Memorandum. Federal district courts are courts of limited jurisdiction. *See Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). A court must therefore resolve any challenge to its jurisdiction before it may proceed to the merits of a claim. *See Galvan v. Fed. Prison Indus.*, 199 F.3d 461, 463 (D.C. Cir. 1999). The Court addresses each argument in turn.

1. The Court has Jurisdiction under Section 1252(e)(3)

a. *Matter of A-B-*

The government contends that section 1252 forecloses judicial review of plaintiffs' claims with respect to *Matter of A-B-*. Defs.' Mot., ECF No. 57-1 at 30–34. Plaintiffs argue that the statute plainly provides jurisdiction for this Court to review their claims. Pls.' Mot., ECF No. 64-1 at 26–30. The parties agree that to the extent jurisdiction exists to review a challenge to a policy implementing the expedited removal system, it exists pursuant to subsection (e) of the statute.

Under section 1252(a)(2)(A), no court shall have jurisdiction over "procedures and policies adopted by the Attorney General to implement the provisions of section 1225(b)(1)" except "as provided in subsection [1252](e)." Section 1252(e)(3) vests exclusive jurisdiction in the United States District Court for the District of Columbia to review

"[c]hallenges [to the] validity of the [expedited removal] system." *Id.* § 1252(e)(3)(A). Such systemic challenges include challenges to the constitutionality of any provision of the expedited removal statute or to its implementing regulations. *See id.* § 1252(e)(3)(A)(i). They also include challenges claiming that a given regulation or written policy directive, guideline, or procedure is inconsistent with law. *Id.* § 1252(e)(3)(A)(ii). Systemic challenges must be brought within sixty days of the challenged statute or regulation's implementation. *Id.* § 1252(e)(3)(B); *see also Am. Immigration Lawyers Ass'n*, 18 F. Supp. 2d at 47 (holding that "the 60-day requirement is jurisdictional rather than a traditional limitations period").

Both parties agree that the plain language of section 1252(e)(3) is dispositive. It reads as follows:

> (3) Challenges on validity of the system
>
> (A) In general
>
> Judicial review of determinations under section 1225(b) of this title and its implementation is available in an action instituted in the United States District Court for the District of Columbia, but shall be limited to determinations of--
>
> (i) whether such section, or any regulation issued to implement such section, is constitutional; or
>
> (ii) whether such a regulation, or a written policy directive, written policy guideline, or

> written procedure issued by or under the authority of the Attorney General to implement such section, is not consistent with applicable provisions of this subchapter or is otherwise in violation of law.

8 U.S.C. § 1252(e)(3).

The government first argues that *Matter of A-B-* does not implement section 1225(b), as required by section 1252(e)(3). Defs.' Mot., ECF No. 57-1 at 30–32. Instead, the government contends *Matter of A-B-* was a decision about petitions for asylum under section 1158. *Id.* The government also argues that *Matter of A-B-* is not a written policy directive under the Act, but rather an adjudication that determined the rights and duties of the parties to a dispute. *Id.* at 32.

The government's argument that *Matter of A-B-* does not "implement" section 1225(b) is belied by *Matter of A-B-* itself. Although A-B- sought asylum, the Attorney General's decision went beyond her claims explicitly addressing "the legal standard to determine whether an alien has a credible fear of persecution" under 8 U.S.C. section 1225(b). *Matter of A-B-*, 27 I. & N. Dec. at 320 n.1 (citing standard for credible fear determinations). In the decision, the Attorney General articulated the general rule that claims by aliens pertaining to either domestic violence, like the claim in *Matter of A-B-*, or gang violence, a hypothetical scenario not at issue in *Matter of A-B-*, would likely not satisfy the credible fear determination

standard. *Id.* (citing 8 U.S.C. § 1225(b)). Because the Attorney General cited section 1225(b) and the standard for credible fear determinations when articulating the new general legal standard, the Court finds that *Matter of A-B-* implements section 1225(b) within the meaning of section 1252(e)(3).

The government also argues that, despite *Matter of A-B-'s* explicit invocation of section 1225 and articulation of the credible fear determination standard, *Matter of A-B-* is an "adjudication" not a "policy," and therefore section 1252(e)(3) does not apply. Defs.' Mot., ECF No. 57-1 at 32–34. However, it is well-settled that an "administrative agency can, of course, make legal-policy through rulemaking or by adjudication." *Kidd Commc'ns v. F.C.C.*, 427 F.3d 1, 5 (D.C. Cir. 2005)(citing *SEC v. Chenery Corp.*, 332 U.S. 194, 202–03 (1947)). Moreover, "[w]hen an agency does [make policy] by adjudication, because it is a policymaking institution unlike a court, its dicta can represent an articulation of its policy, to which it must adhere or adequately explain deviations." *Id.* at 5. *Matter of A-B-* is a sweeping opinion in which the Attorney General made clear that asylum officers must apply the standards set forth to subsequent credible fear determinations. *See NRLB v. Wyman Gordon Co.*, 394 U.S. 759, 765 (1969)("Adjudicated cases may and do, of course, serve as vehicles for the formulation of agency policies, which are applied and announced therein.").

Indeed, it is difficult to reconcile the government's argument with the language in *Matter of A-B-*: "When confronted with asylum cases based on purported membership in a particular social group, the Board, *immigration judges*, and *asylum officers must analyze the requirements as set forth in this opinion,* which restates and where appropriate, *elaborates upon*, the requirements [for asylum]." 27 I. & N. Dec. at 319 (emphasis added). This proclamation, coupled with the directive to asylum officers that claims based on domestic or gang-related violence generally would not "satisfy the standard to determine whether an alien has a credible fear of persecution," *id.* at 320 n.1, is clearly a "written policy directive" or "written policy guidance" sufficient to bring *Matter of A-B-* under the ambit of section 1252(e)(3). *See Kidd*, 427 F.3d at 5 (stating agency can "make legal-policy through rulemaking or by adjudication"). Indeed, one court has regarded *Matter of A-B-* as such. *See Moncada v. Sessions*, 2018 WL 4847073 *2 (2d Cir. Oct. 5, 2018)(characterizing *Matter of A-B-* as providing "***substantial new guidance*** on the viability of asylum 'claims by aliens pertaining to . . . gang violence'")(emphasis added)(citation omitted).

The government also argues that because the DHS Secretary, rather than the Attorney General, is responsible for implementing most of the provisions in section 1225, the

Attorney General lacks the requisite authority to implement section 1225. Defs.' Reply, ECF No. 85 at 25. Therefore, the government argues, *Matter of A-B-* cannot be "issued by or under the authority of the Attorney General to implement [section 1225(b)]" as required by the statute. *See* 8 U.S.C. § 1252(e)(3)(A)(ii). The government fails to acknowledge, however, that the immigration judges who review negative credible fear determinations are also required to apply *Matter of A-B-*. 8 C.F.R. § 1208.30(g)(2); 8 C.F.R. § 103.10(b)(stating decisions of the Attorney General shall be binding on immigration judges). And it is the Attorney General who is responsible for the conduct of immigration judges. *See, e.g.*, 8 U.S.C. § 1101(b)(4)("An immigration judge shall be subject to such supervision and shall perform such duties as the Attorney General shall prescribe."). Therefore, the Attorney General clearly plays a significant role in the credible fear determination process and has the authority to "implement" section 1225.

Finally, the Court recognizes that even if the jurisdictional issue was a close call, which it is not, several principles persuade the Court that jurisdiction exists to hear plaintiffs' claims. First, there is the "familiar proposition that only upon a showing of clear and convincing evidence of a contrary legislative intent should the courts restrict access to

judicial review." *Bd. of Governors of the Fed. Reserve Sys. v. MCorp. Fin., Inc.*, 502 U.S. 32, 44 (1991)(citations and internal quotation marks omitted). Here, there is no clear and convincing evidence of legislative intent in section 1252 that Congress intended to limit judicial review of the plaintiffs' claims. To the contrary, Congress has explicitly provided this Court with jurisdiction to review systemic challenges to section 1225(b). *See* 8 U.S.C. § 1252(e)(3).

Second, there is also a "strong presumption in favor of judicial review of administrative action." *INS v. St. Cyr*, 533 U.S. 289, 298 (2001). As the Supreme Court has recently explained, "legal lapses and violations occur, and especially so when they have no consequence. That is why [courts have for] so long applied a strong presumption favoring judicial review of administrative action." *Weyerhaeuser Co. v. United States Fish and Wildlife Servs.*, 586 U.S. __,__ (2018)(slip op., at 11). Plaintiffs challenge the credible fear policies under the APA and therefore this "strong presumption" applies in this case.

Third, statutory ambiguities in immigration laws are resolved in favor of the alien. *See Cardoza-Fonseca*, 480 U.S. at 449. Here, any doubt as to whether 1252(e)(3) applies to plaintiffs' claims should be resolved in favor of plaintiffs. *See INS v. Errico*, 385 U.S. 214, 225 (1966)("Even if there were some doubt as to the correct construction of the statute, the

doubt should be resolved in favor of the alien.").

In view of these three principles, and the foregoing analysis, the Court concludes that section 1252(a)(2)(A) does not eliminate this Court's jurisdiction over plaintiffs' claims, and that section 1252(e)(3) affirmatively grants jurisdiction.

b. Policy Memorandum

The government also argues that the Court lacks jurisdiction to review the Policy Memorandum under section 1252(e) for three reasons. First, according to the government, the Policy Memorandum "primarily addresses the asylum standard" and therefore does not implement section 1225(b) as required by the statute. Defs.' Reply, ECF No. 85 at 30. Second, since the Policy Memorandum "merely explains" *Matter of A-B-*, the government argues, it is not reviewable for the same reasons *Matter of A-B-* is not reviewable. *Id.* Finally, the government argues that sections 1225 and 1252(e)(3) "indicate" that Congress only provided judicial review of agency guidelines, directives, or procedures which create substantive rights as opposed to interpretive documents, like the Policy Memorandum, which merely explain the law to government officials. *Id.* at 31-33.

The Court need not spend much time on the government's first two arguments. First, the Policy Memorandum, entitled "Guidance for Processing Reasonable Fear, Credible Fear, Asylum,

and Refugee Claims in Accordance with *Matter of A-B-*" expressly applies to credible fear interviews and provides guidance to credible fear adjudicators. Policy Memorandum, ECF No. 100 at 4 n.1 ("[T]he Attorney General's decision and this [Policy Memorandum] apply also to . . . credible fear determinations."). Furthermore, it expressly invokes section 1225 as the authority for its issuance. *Id.* at 4. The government's second argument that the Policy Memorandum is not reviewable for the same reasons *Matter of A-B-* is not, is easily dismissed because the Court has already found that *Matter of A-B-* falls within section 1252(e)(3)'s jurisdictional grant. *See supra,* at 27-38.

The government's third argument is that section 1252(e)(3) only applies when an agency promulgates legislative rules and not interpretive rules. Defs.' Reply, ECF No. 85 at 30–33. Although not entirely clear, the argument is as follows: (1) the INA provides DHS with significant authority to create legislative rules; (2) Congress barred judicial review of such substantive rules in section 1252(a); (3) therefore Congress must have created a mechanism to review these types of legislative rules, and only legislative rules, in section 1252(e)(3)). *Id.* at 30–31. Folded into this reasoning is also a free-standing argument that because the Policy Memorandum is not a final agency action, it is not reviewable under the APA. *Id.* at 32.

Contrary to the government's assertions, section 1252(e)(3) does not limit its grant of jurisdiction over a "written policy directive, written policy guideline, or written procedure" to only legislative rules or final agency action. Nowhere in the statute did Congress exclude interpretive rules. *Cf.* 5 U.S.C. § 553(b)(3)(A)(stating subsection of statute does not apply to "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice."). Rather, Congress used broader terms such as policy "guidelines," "directives," or "procedures" which do not require notice and comment rulemaking or other strict procedural prerequisites. *See* 8 U.S.C. § 1252(e)(3). There is no suggestion that Congress limited the application of section 1252(e)(3) to only claims involving legislative rules or final agency action, and this Court will not read requirements into the statute that do not exist. *See Keene Corp. v. U.S.*, 508 U.S. 200, 208 (1993)(stating courts have a "duty to refrain from reading a phrase into the statute when Congress has left it out").

In sum, section 1252(a)(2)(A) is not a bar to this Court's jurisdiction because plaintiffs' claims fall well within section 1252(e)(3)'s grant of jurisdiction. Both *Matter of A-B-* and the Policy Memorandum expressly reference credible fear determinations in applying the standards articulated by the Attorney General. Because *Matter of A-B-* and the Policy

Memorandum are written policy directives and guidelines issued by or under the authority of the Attorney General, section 1252(e)(3) applies, and this Court has jurisdiction to hear plaintiffs' challenges to the credible fear policies.

2. Plaintiffs have Standing to Challenge the Policy Memorandum

The government next challenges plaintiffs' standing to bring this suit with respect to their claims against the Policy Memorandum only. Defs.' Mot., ECF No. 57-1 at 35–39. To establish standing, a plaintiff "must, generally speaking, demonstrate that he has suffered 'injury in fact,' that the injury is 'fairly traceable' to the actions of the defendant, and that the injury will likely be redressed by a favorable decision." *Bennett v. Spear*, 520 U.S. 154, 162 (1997)(citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992); *Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc.*, 454 U.S. 464, 471–72 (1982)). Standing is assessed "upon the facts as they exist at the time the complaint is filed." *Natural Law Party of U.S. v. Fed. Elec. Comm'n*, 111 F. Supp. 2d 33, 41 (D.D.C. 2000).

As a preliminary matter, the government argues that plaintiffs lack standing to challenge any of the policies in the Policy Memorandum that rest on *Matter of A-B-* because the Court does not have jurisdiction to review *Matter of A-B-*. *See* Defs.'

Mot., ECF No. 57-1 at 35, 37–39. Therefore, the government argues, plaintiffs' injuries would not be redressable or traceable to the Policy Memorandum since they stem from *Matter of A-B-*. This argument fails because the Court has found that it has jurisdiction to review plaintiffs' claims related to *Matter of A-B-* under 1252(e)(3). *See supra*, at 27-38.

The government also argues that because plaintiffs do not have a legally protected interest in the Policy Memorandum—an interpretive document that creates no rights or obligations—plaintiffs do not have an injury in fact. Defs.' Reply, ECF No. 85 at 33. The government's argument misses the point. Plaintiffs do not seek to enforce a right under a prior policy or interpretive guidance. *See* Pls.' Reply, ECF No. 92 at 17–18. Rather, they challenge the validity of their credible fear determinations pursuant to the credible fear policies set forth in *Matter of A-B-* and the Policy Memorandum. Because the credible fear policies impermissibly raise their burden and deny plaintiffs a fair opportunity to seek asylum and escape the persecution they have suffered, plaintiffs argue, the policies violate the APA and immigration laws. *See id.*

The government also argues that even if the Court has jurisdiction, all the claims, with the exception of one, are time-barred and therefore not redressable. Defs.' Mot., ECF No. 57-1 at 39–41. The government argues that none of the policies

are in fact new and each pre-date the sixty days in which plaintiffs are statutorily required to bring their claims. *Id.* at 39–41. The government lists each challenged policy and relies on existing precedent purporting to apply the same standard espoused in the Policy Memorandum prior to its issuance. *See id.* at 39–41. The challenge in accepting this theory of standing is that it would require the Court to also accept the government's theory of the case: that the credible fear policies are not "new." In other words, the government's argument "assumes that its view on the merits of the case will prevail." *Defs. of Wildlife v. Gutierrez*, 532 F.3d 913, 924 (D.C. Cir. 2008). This is problematic because "in reviewing the standing question, the court must be careful not to decide the questions on the merits for or against the plaintiff, and must therefore assume that on the merits the plaintiffs would be successful in their claims." *City of Waukesha v. EPA*, 320 F.3d 228, 235 (D.C. Cir. 2003)(citations omitted).

Whether the credible fear policies differ from the standards articulated in the pre-policy cases cited by the government, and are therefore new, is a contested issue in this case. And when assessing standing, this Court must "be careful not to decide the questions on the merits" either "for or against" plaintiffs, "and must therefore assume that on the merits the plaintiffs would be successful in their claims." *Id.*

Instead, the Court must determine whether an order can redress plaintiffs' injuries in whole or part. *Gutierrez*, 532 F.3d at 925. There is no question that the challenged policies impacted plaintiffs. *See* Defs.' Mot., ECF No. 57-1 at 28 (stating an "asylum officer reviewed each of [plaintiffs] credible fear claims and found them wanting in light of *Matter of A-B-*"). There is also no question that an order from this Court declaring the policies unlawful and enjoining their use would redress those injuries. *See Carpenters Indus. Council v. Zinke*, 854 F.3d 1, 6 n.1 (D.C. Cir. 2017)(stating when government actions cause an injury, enjoining that action will usually redress the injury).

Because plaintiffs have demonstrated that they have: (1) suffered an injury; (2) the injury is fairly traceable to the credible fear policies; and (3) action by the Court can redress their injuries, plaintiffs have standing to challenge the Policy Memorandum. Therefore, the Court may proceed to the merits of plaintiffs' claims.

B. Legal Standard for Plaintiffs' Claims

Although both parties have moved for summary judgment, the parties seek review of an administrative decision under the APA. *See* 5 U.S.C. § 706. Therefore, the standard articulated in Federal Rule of Civil Procedure 56 is inapplicable because the Court has a more limited role in reviewing the administrative

record. *Wilhelmus v. Geren*, 796 F. Supp. 2d 157, 160 (D.D.C. 2011)(internal citation omitted). "[T]he function of the district court is to determine whether or not as a matter of law the evidence in the administrative record permitted the agency to make the decision it did." *See Sierra Club v. Mainella*, 459 F. Supp. 2d 76, 90 (D.D.C. 2006)(internal quotation marks and citations omitted). "Summary judgment thus serves as the mechanism for deciding, as a matter of law, whether the agency action is supported by the administrative record and otherwise consistent with the APA standard of review." *Wilhelmus*, 796 F. Supp. 2d at 160 (internal citation omitted).

Plaintiffs bring this challenge to the alleged new credible fear policies arguing they violate the APA and INA. Two separate, but overlapping, standards of APA review govern the resolution of plaintiffs' claims. First, under 5 U.S.C. § 706(2)(a), agency action must not be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." To survive an arbitrary and capricious challenge, an agency action must be "the product of reasoned decisionmaking." *Fox v. Clinton*, 684 F.3d 67, 74–75 (D.C. Cir. 2012). The reasoned decisionmaking requirement applies to judicial review of agency adjudicatory actions. *Id.* at 75. A court must not uphold an adjudicatory action when the agency's judgment "was neither adequately explained in its decision nor supported by agency

precedent." *Id.* (citing *Siegel v. SEC*, 592 F.3d 147, 164 (D.C. Cir. 2010)). Thus, review of *Matter of A-B-* requires this Court to determine whether the decision was the product of reasoned decisionmaking. *See id.* at 75.

Second, plaintiffs' claims also require this Court to consider the degree to which the government's interpretation of the various relevant statutory provisions in *Matter of A-B-* is afforded deference. The parties disagree over whether this Court is required to defer to the agency's interpretations of the statutory provisions in this case. "Although balancing the necessary respect for an agency's knowledge, expertise, and constitutional office with the courts' role as interpreter of laws can be a delicate matter," the familiar *Chevron* framework offers guidance. *Id.* at 75 (citing *Gonzales v. Oregon*, 546 U.S. 243, 255 (2006)).

In reviewing an agency's interpretation of a statute it is charged with administering, a court must apply the framework of *Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). *See Halverson v. Slater*, 129 F.3d 180, 184 (D.C. Cir. 1997). Under the familiar *Chevron* two-step test, the first step is to ask "whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed

intent of Congress." *Chevron*, 467 U.S. at 842–43. In making that determination, the reviewing court "must first exhaust the 'traditional tools of statutory construction' to determine whether Congress has spoken to the precise question at issue." *Natural Res. Def. Council, Inc. v. Daley*, 209 F.3d 747, 572 (2000)(citation omitted). The traditional tools of statutory construction include "examination of the statute's text, legislative history, and structure . . . as well as its purpose." *Id.* (internal citations omitted). If these tools lead to a clear result, "then Congress has expressed its intention as to the question, and deference is not appropriate." *Id.*

If a court finds that the statute is silent or ambiguous with respect to a particular issue, then Congress has not spoken clearly on the subject and a court is required to proceed to the second step of the *Chevron* framework. *Chevron*, 467 U.S. at 843. Under *Chevron* step two, a court's task is to determine if the agency's approach is "based on a permissible construction of the statute." *Id.* To make that determination, a court again employs the traditional tools of statutory interpretation, including reviewing the text, structure, and purpose of the statute. *See Troy Corp. v. Browder*, 120 F.3d 277, 285 (D.C. Cir. 1997)(noting that an agency's interpretation must "be reasonable and consistent with the statutory purpose"). Ultimately, "[n]o matter how it is framed, the question a court faces when

confronted with an agency's interpretation of a statute it administers is always, simply, whether the agency has stayed within the bounds of its statutory authority." *District of Columbia v. Dep't of Labor*, 819 F.3d 444, 459 (D.C. Cir. 2016)(citation omitted).

The scope of review under both the APA's arbitrary and capricious standard and *Chevron* step two are concededly narrow. *See Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)(stating "scope of review under the 'arbitrary and capricious' standard is narrow and a court is not to substitute its judgment for that of the agency"); *see also Judulang v. Holder*, 565 U.S. 42, 52 n.7 (2011)(stating the *Chevron* step two analysis overlaps with arbitrary and capricious review under the APA because under *Chevron* step two a court asks "whether an agency interpretation is 'arbitrary or capricious in substance'"). Although this review is deferential, "courts retain a role, and an important one, in ensuring that agencies have engaged in reasoned decision making." *Judulang*, 565 U.S. at 53; *see also Daley*, 209 F.3d at 755 (stating that although a court owes deference to agency decisions, courts do not hear cases "merely to rubber stamp agency actions").

With these principles in mind, the Court now turns to plaintiffs' claims that various credible fear policies based on

Matter of A-B-, the Policy Memorandum, or both, are arbitrary and capricious and in violation of the immigration laws.

C. APA and Statutory Claims

Plaintiffs challenge the following alleged new credible fear policies: (1) a general rule against credible fear claims related to domestic or gang-related violence; (2) a heightened standard for persecution involving non-governmental actors; (3) a new rule for the nexus requirement in asylum; (4) a new rule that "particular social group" definitions based on claims of domestic violence are impermissibly circular; (5) the requirements that an alien articulate an exact delineation of the specific "particular social group" at the credible fear determination stage and that asylum officers apply discretionary factors at that stage; and (6) the Policy Memorandum's requirement that adjudicators ignore circuit court precedent that is inconsistent with *Matter of A-B-*, and apply the law of the circuit where the credible fear interview takes place. The Court addresses each challenged policy in turn.

1. The General Rule Foreclosing Domestic Violence and Gang-Related Claims Violates the APA and Immigration Laws

Plaintiffs argue that the credible fear policies establish an unlawful general rule against asylum petitions by aliens with credible fear claims relating to domestic and gang violence. Pls.' Mot., ECF No. 64-1 at 28.

A threshold issue is whether the *Chevron* framework applies to this issue at all. "Not every agency interpretation of a statute is appropriately analyzed under *Chevron*." *Alabama Educ. Ass'n v. Chao*, 455 F.3d 386, 392 (D.C. Cir. 2006). The government acknowledges that the alleged new credible fear policies are not "entitled to blanket *Chevron* deference." Defs.' Reply, ECF No. 85 at 39 (emphasis in original). Rather, according to the government, the Attorney General is entitled to *Chevron* deference when he "interprets any *ambiguous* statutory terms in the INA." *Id.* (emphasis in original). The government also argues that the Attorney General is entitled to *Chevron* deference to the extent *Matter of A-B-* states "long-standing precedent or interpret[s] prior agency cases or regulations through case-by-case adjudication." *Id.* at 40.

To the extent *Matter of A-B-* was interpreting the "particular social group" requirement in the INA, the *Chevron* framework clearly applies. The Supreme Court has explained that "[i]t is clear that principles of *Chevron* deference are applicable" to the INA because that statute charges the Attorney General with administering and enforcing the statutory scheme. *I.N.S. v. Aguirre-Aguirre*, 526 U.S. 415, 424–25 (quoting 8 U.S.C. §§ 1103(a)(1), 1253(h)). In addition to *Chevron* deference, a court must also afford deference to an agency when it is interpreting its own precedent. *U.S. Telecom Ass'n v.*

F.C.C., 295 F.3d 1326, 1332 (D.C. Cir. 2002)("We [] defer to an agency's reasonable interpretation of its own rules and precedents.").

In this case, the Attorney General interpreted a provision of the INA, a statute that Congress charged the Attorney General with administering. *See* 8 U.S.C. § 1103(a)(1). *Matter of A-B-* addressed the issue of whether an alien applying for asylum based on domestic violence could establish membership in a "particular social group." Because the decision interpreted a provision of the INA, the *Chevron* framework applies to *Matter of A-B-*.[11] *See Negusie v. Holder*, 555 U.S. 511, 516 (2009)(stating it "is well settled" that principles of *Chevron* deference apply to the Attorney General's interpretation of the INA).

a. *Chevron* Step One: The Phrase "Particular Social Group" is Ambiguous

The first question within the *Chevron* framework is whether, using the traditional tools of statutory interpretation including evaluating the text, structure, and the overall

[11] The Policy Memorandum is not subject to *Chevron* deference. The Supreme Court has warned that agency "[i]nterpretations such as those in opinion letters—like interpretations contained in *policy statements*, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant *Chevron*-style deference." *Christensen v. Harris Cnty*, 529 U.S. 576, 587 (2000). Rather, interpretations contained in such formats "are entitled to respect . . . only to the extent that those interpretations have the power to persuade." *Id.* (citations omitted).

statutory scheme, as well as employing common sense, Congress has "supplied a clear and unambiguous answer to the interpretive question at hand." *Pereira v. Sessions*, 138 S. Ct. 2105, 2113 (2018)(citation omitted). The interpretive question at hand in this case is the meaning of the term "particular social group."

Under the applicable asylum provision, an "alien who is physically present in the United States or who arrives in the United States . . . irrespective of such alien's status" may be granted asylum at the discretion of the Attorney General if the "Attorney General determines that such alien is a refugee within the meaning of section 1101(a)(42)(A)." 8 U.S.C. § 1158. The term "refugee" is defined in section 1101(a)(42)(A) as, among other things, an alien who is unable or unwilling to return to his or her home country "because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1101(a)(42)(A). At the credible fear stage, an alien needs to show that there is a "significant possibility . . . that the alien could establish eligibility for asylum." 8 U.S.C. § 1225(b)(1)(B)(v).

The INA itself does not shed much light on the meaning of the term "particular social group." The phrase "particular social group" was first included in the INA when Congress enacted the Refugee Act of 1980. Pub. L. No. 96-212, 94 Stat.

102 (1980). The purpose of the Refugee Act was to protect refugees, i.e., individuals who are unable to protect themselves from persecution in their native country. *See id.* § 101(a)("The Congress declares that it is the historic policy of the United States to respond to the urgent needs of persons subject to persecution in their homelands, including . . . humanitarian assistance for their care and maintenance in asylum areas."). While the legislative history of the Act does not reveal the specific meaning the members of Congress attached to the phrase "particular social group," the legislative history does make clear that Congress intended "to bring United States refugee law into conformance with the [Protocol], 19 U.S.T. 6223, T.I.A.S. No. 6577, to which the United States acceded in 1968." *Cardoza-Fonseca*, 480 U.S. at 436-37. Indeed, when Congress accepted the definition of "refugee" it did so "with the understanding that it is based directly upon the language of the Protocol and it is intended that the provision be construed consistent with the Protocol." *Id.* at 437 (citations omitted). It is therefore appropriate to consider what the phrase "particular social group" means under the Protocol. *See id.*

In interpreting the Refugee Act in accordance with the meaning intended by the Protocol, the language in the Act should be read consistently with the United Nations' interpretation of the refugee standards. *See id.* at 438–39 (relying on UNHCR's

interpretation in interpreting the Protocol's definition of "well-founded fear"). The UNHCR defined the provisions of the Convention and Protocol in its Handbook on Procedures and Criteria for Determining Refugee Status ("UNHCR Handbook").[12] *Id.* As the Supreme Court has noted, the UNHCR Handbook provides "significant guidance in construing the Protocol, to which Congress sought to conform . . . [and] has been widely considered useful in giving content to the obligations that the protocol establishes." *Id.* at 439 n.22 (citations omitted). The UNHCR Handbook codified the United Nations' interpretation of the term "particular social group" at that time, construing the term expansively. The UNHCR Handbook states that "a 'particular social group' normally comprises persons of similar background, habits, or social status." UNHCR Handbook at Ch. II B(3)(e) ¶ 77.

The clear legislative intent to comply with the Protocol and Congress' election to not change or add qualifications to the U.N.'s definition of "refugee" demonstrates that Congress intended to adopt the U.N.'s interpretation of the word "refugee." Moreover, the UNHCR's classification of "social

[12] Handbook of Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and 1967 Protocol Relating to the Status of Refugees, OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, *available at* http://www.unhcr.org/4d93528a9.pdf.

group" in broad terms such as "similar background, habits, or social status" suggests that Congress intended an equally expansive construction of the same term in the Refugee Act. Furthermore, the Refugee Act was enacted to further the "historic policy of the United States to respond to the urgent needs of persons subject to persecution in their homelands . . . [and] it is the policy of the United States to encourage all nations to provide assistance and resettlement opportunities to refugees to the fullest extent possible." *Maharaj v. Gonzales*, 450 F.3d 961, 983 (9th Cir. 2006)(O'Scannlain, J. concurring in part)(citing Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102).

Although the congressional intent was clear that the meaning of "particular social group" should not be read too narrowly, the Court concludes that Congress has not "spoken directly" on the precise question of whether victims of domestic or gang-related persecution fall into the particular social group category. Therefore, the Court proceeds to *Chevron* step two to determine whether the Attorney General's interpretation, which generally precludes domestic violence and gang-related claims at the credible fear stage, is a permissible interpretation of the statute.

b. *Chevron* Step Two: Precluding Domestic and Gang-Related Claims at the Credible Fear Stage is an Impermissible Reading of the Statute and is Arbitrary and Capricious

As explained above, the second step of the *Chevron* analysis overlaps with the arbitrary and capricious standard of review under the APA. *See Nat'l Ass'n of Regulatory Util. Comm'rs v. ICC*, 41 F.3d 721, 726 (D.C. Cir. 1994)("[T]he inquiry at the second step of *Chevron* overlaps analytically with a court's task under the [APA]."). "To survive arbitrary and capricious review, an agency action must be the product of reasoned decisionmaking." *Fox v. Clinton*, 684 F.3d 67, 74–75 (D.C. Cir. 2012). "Thus, even though arbitrary and capricious review is fundamentally deferential—especially with respect to matters relating to an agency's areas of technical expertise—no deference is owed to an agency action that is based on an agency's purported expertise where the agency's explanation for its action lacks any coherence." *Id.* at 75 (internal citations and alterations omitted).

Plaintiffs argue that the Attorney General's near-blanket rule against positive credible fear determinations based on domestic violence and gang-related claims is arbitrary and capricious for several reasons. First, they contend that the rule has no basis in immigration law. Pls.' Mot., ECF No. 64-1 at 39–40. Plaintiffs point to several cases in which immigration

judges and circuit courts have recognized asylum petitions based on gang-related or gender-based claims. *See id.* at 38–39 (citing cases). Second, plaintiffs argue that the general prohibition is arbitrary and capricious and contrary to the INA because it constitutes an unexplained change to the long-standing recognition that credible fear determinations must be individualized based on the facts of each case. *Id.* at 40–41.

The government's principal response is straightforward: no such general rule against domestic violence or gang-related claims exists. Defs.' Reply, ECF No. 85 at 44–47. The government emphasizes that the only change to the law in *Matter of A-B-* is that *Matter of A-R-C-G-* was overruled. *Id.* at 43. The government also argues that *Matter of A-B-* only required the BIA to assess each element of an asylum claim and not rely on a party's concession that an element is satisfied. *Id.* at 45. Thus, according to the government, the Attorney General simply "eliminated a loophole created by *A-R-C-G-*." *Id.* at 45. The government dismisses the rest of *Matter of A-B-* as mere "comment[ary] on problems typical of gang and domestic violence related claims." *Id.* at 46.

And even if a general rule does exist, the government contends that asylum claims based on "private crime[s]" such as domestic and gang violence have been the center of controversy for decades. Defs.' Reply, ECF No. 85 at 44. Therefore, the

government concludes, that *Matter of A-B-* is a lawful interpretation and restatement of the asylum laws, and is entitled to deference. *Id.* Finally, the government argues that Congress designed the asylum statute as a form of limited relief, not to "provide redress for all misfortune." *Id.*

The Court is not persuaded that *Matter of A-B-* and the Policy Memorandum do not create a general rule against positive credible fear determinations in cases in which aliens claim a fear of persecution based on domestic or gang-related violence. *Matter of A-B-* mandates that "[w]hen confronted with asylum cases based on purported membership in a particular social group . . . immigration judges, and asylum officers must analyze the requirements as set forth" in the decision. 27 I. & N. Dec. at 319. The precedential decision further explained that "[g]enerally, claims by aliens pertaining to domestic violence or gang violence perpetrated by non-governmental actors will not qualify for asylum." *Id.* at 320. *Matter of A-B-* also requires asylum officers to "analyze the requirements as set forth in" *Matter of A-B-* when reviewing asylum related claims including whether such claims "would satisfy the legal standard to determine whether an alien has a credible fear of persecution." *Id.* at 320 n.1 (citing 8 U.S.C. § 1225(b)). Furthermore, the Policy Memorandum also makes clear that the sweeping statements in *Matter of A-B-* must be applied to credible fear

determinations: "if an applicant claims asylum based on membership in a particular social group, then officers must factor the [standards explained in *Matter of A-B-*] *into their determination of whether an applicant has a credible fear or reasonable fear of persecution*." Policy Memorandum, ECF No. 100 at 12 (emphasis added).

Not only does *Matter of A-B-* create a general rule against such claims at the credible fear stage, but the general rule is also not a permissible interpretation of the statute. First, the general rule is arbitrary and capricious because there is no legal basis for an effective categorical ban on domestic violence and gang-related claims. Second, such a general rule runs contrary to the individualized analysis required by the INA. Under the current immigration laws, the credible fear interviewer must prepare a case-specific factually intensive analysis for each alien. *See* 8 C.F.R. § 208.30(e)(requiring individual analysis including material facts stated by the applicant, and additional facts relied upon by officer). Credible fear determinations, like requests for asylum in general, must be resolved based on the particular facts and circumstances of each case. *Id.*

A general rule that effectively bars the claims based on certain categories of persecutors (i.e. domestic abusers or gang members) or claims related to certain kinds of violence is

inconsistent with Congress' intent to bring "United States refugee law into conformance with the [Protocol]." *Cardoza-Fonseca*, 480 U.S. at 436-37. The new general rule is thus contrary to the Refugee Act and the INA.[13] In interpreting "particular social group" in a way that results in a general rule, in violation of the requirements of the statute, the Attorney General has failed to "stay[] within the bounds" of his statutory authority.[14] *District of Columbia v. Dep't of Labor*, 819 F.3d at 449.

The general rule is also arbitrary and capricious because it impermissibly heightens the standard at the credible fear stage. The Attorney General's direction to deny most domestic violence or gang violence claims at the credible fear

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[13] The new rule is also a departure from previous DHS policy. *See* Mujahid Decl., Ex. F ("2017 Credible Fear Training") ("Asylum officers should evaluate the entire scope of harm experienced by the applicant to determine if he or she was persecuted, taking into account the individual circumstances of each case."). It is arbitrary and capricious for that reason as well. *Lone Mountain Processing, Inc. v. Sec'y of Labor*, 709 F.3d 1161, 1164 (D.C. Cir. 2013)("[A]n agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, *not casually ignored*.")(emphasis added).

[14] The Court also notes that domestic law may supersede international obligations only by express abrogation, *Chew Heong v. United States*, 112 U.S. 536, 538 (1884), or by subsequent legislation that irrevocably conflicts with international obligations, *Reid v. Covert*, 354 U.S. 1, 18 (1957). Congress has not expressed any intention to rescind its international obligations assumed through accession to the 1967 Protocol via the Refugee Act of 1980.

determination stage is fundamentally inconsistent with the threshold screening standard that Congress established: an alien's removal may not be expedited if there is a "significant possibility" that the alien could establish eligibility for asylum. 8 U.S.C. § 1225(b)(1)(B)(v). The relevant provisions require that the asylum officer "conduct the interview in a nonadversarial manner" and "elicit all relevant and useful information bearing on whether the applicant has a credible fear of persecution or torture." 8 C.F.R. § 208.30(d). As plaintiffs point out, to prevail at a credible fear interview, the alien need only show a "significant possibility" of a one in ten chance of persecution, i.e., a fraction of ten percent. *See* 8 U.S.C. § 1225(b)(1)(B)(v); *Cardoza-Fonseca*, 480 U.S. at 439–40 (describing a well-founded fear of persecution at asylum stage to be satisfied even when there is a ten percent chance of persecution). The legislative history of the IIRIRA confirms that Congress intended this standard to be a low one. *See* 142 CONG. REC. S11491-02 ("[t]he credible fear standard . . . is intended to be a low screening standard for admission into the usual full asylum process"). The Attorney General's directive to broadly exclude groups of aliens based on a sweeping policy applied indiscriminately at the credible fear stage, was neither adequately explained nor supported by agency precedent. Accordingly, the general rule against domestic violence and

gang-related claims during a credible fear determination is arbitrary and capricious and violates the immigration laws.

2. Persecution: The "Condoned or Complete Helplessness" Standard Violates the APA and Immigration Laws

Plaintiffs next argue that the government's credible fear policies have heightened the legal requirement for all credible fear claims involving non-governmental persecutors. Pls.' Mot., ECF No. 64-1 at 48.

To be eligible for asylum, an alien must demonstrate either past "persecution or a well-founded fear of persecution." 8 U.S.C. § 1101(a)(42)(A). When a private actor, rather than the government itself, is alleged to be the persecutor, the alien must demonstrate "some connection" between the actions of the private actor and "governmental action or inaction." *See Rosales Justo v. Sessions*, 895 F.3d 154, 162 (1st Cir. 2018). To establish this connection, a petitioner must show that the government was either "unwilling or unable" to protect him or her from persecution. *See Burbiene v. Holder*, 568 F.3d 251, 255 (1st Cir. 2009).

Plaintiffs argue that *Matter of A-B-* and the Policy Memorandum set forth a new, heightened standard for government involvement by requiring an alien to "show the government condoned the private actions or at least demonstrated a complete helplessness to protect the victim." *Matter of A-B-*, 27 I. & N.

Dec. at 337; Policy Memorandum, ECF No. 100 at 9. The government argues that the "condone" or "complete helplessness" standard is not a new definition of persecution; and, in any event, such language does not change the standard. Defs.' Reply, ECF No. 85 at 55.

a. *Chevron* Step One: The Term "Persecution" is Not Ambiguous[15]

Again, the first question under the *Chevron* framework is whether Congress has "supplied a clear and unambiguous answer to the interpretive question at hand." *Pereira*, 138 S. Ct. at 2113. Here, the interpretive question at hand is whether the word "persecution" in the INA requires a government to condone the persecution or demonstrate a complete helplessness to protect the victim.

The Court concludes that the term "persecution" is not ambiguous and the government's new interpretation is inconsistent with the INA. The Court is guided by the longstanding principle that Congress is presumed to have incorporated prior administrative and judicial interpretations of language in a statute when it uses the same language in a subsequent enactment. *See Sekhar v. United States*, 570 U.S. 729, 733 (2013)(explaining that "if a word is obviously transplanted

[15] Because the government is interpreting a provision of the INA, the *Chevron* framework applies.

from another legal source, whether the common law or other legislation, it brings the old soil with it"); *Lorillard v. Pons*, 434 U.S. 575, 580 (1978)(stating Congress is aware of interpretations of a statute and is presumed to adopt them when it re-enacts them without change).

The seminal case on the interpretation of the term "persecution," *Matter of Acosta*, 19 I. & N. Dec. 211 (BIA 1985), is dispositive. In *Matter of Acosta*, the BIA recognized that harms could constitute persecution if they were inflicted "either by the government of a country or by persons or an organization that the government was unable or unwilling to control." *Id.* at 222 (citations omitted). The BIA noted that Congress carried forward the term "persecution" from pre-1980 statutes, in which it had a well-settled judicial and administrative meaning: "harm or suffering . . . inflicted either by the government of a country or by persons or an organization that the government was unable or unwilling to control." *Id.* Applying the basic rule of statutory construction that Congress carries forward established meanings of terms, the BIA adopted the same definition. *Id.* at 223.

The Court agrees with this approach. When Congress uses a term with a settled meaning, its intent is clear for purposes of *Chevron* step one. *cf. B & H Med., LLC v. United States*, 116 Fed. Cl. 671, 685 (2014)(a term with a "judicially settled meaning"

is "not ambiguous" for purposes of deference under *Auer v. Robbins*, 519 U.S. 452 (1997)). As explained in *Matter of Acosta*, Congress adopted the "unable or unwilling" standard when it used the word "persecution" in the Refugee Act. 19 I. & N. Dec. at 222, *see also Shapiro v. United States*, 335 U.S. 1, 16 (1948)(Congress presumed to have incorporated "settled judicial construction" of statutory language through re-enactment). Indeed, the UNHCR Handbook stated that persecution included "serious discriminatory or other offensive acts . . . committed by the local populace . . . if they are knowingly tolerated by the authorities, or if the authorities refuse, or prove unable, to offer *effective* protection." *See* UNHCR Handbook ¶ 65 (emphasis added). It was clear at the time that the Act was passed by Congress that the "unwilling or unable" standard did not require a showing that the government "condoned" persecution or was "completely helpless" to prevent it. Therefore, the government's interpretation of the term "persecution" to mean the government must condone or demonstrate complete helplessness to help victims of persecution fails at *Chevron* step one.

The government relies on circuit precedent that has used the "condoned" or "complete helplessness" language to support its argument that the standard is not new. Defs.' Reply, ECF No. 85 at 55. There are several problems with the government's argument. First, upon review of the cited cases it is apparent

that, although the word "condone" was used, in actuality, the courts were applying the "unwilling or unable" standard. For example, in *Galina v. INS*, 213 F.3d 955 (7th Cir. 2005), an asylum applicant was abducted and received threatening phone calls in her native country. *Id.* at 957. The applicant's husband called the police to report the threatening phone calls, and after the police located one of the callers, the calls stopped. *Id.* The Court recognized that a finding of persecution ordinarily requires a determination that the government condones the violence or demonstrated a complete helplessness to protect the victims. *Id.* at 958. However, relying on the BIA findings, the Court found that notwithstanding the fact "police might take some action against telephone threats" the applicant would still face persecution if she was sent back to her country of origin because she could have been killed. *Id.* Therefore, the Court ultimately concluded that an applicant can still meet the persecution threshold when the police are unable to provide effective help, but fall short of condoning the persecution. *Id.* at 958. Despite the language it used to describe the standard, the court did not apply the heightened "condoned or complete helplessness" persecution standard pronounced in the credible fear policies here.

Second, and more importantly, under the government's formulation of the persecution standard, no asylum applicant who

received assistance from the government, regardless of how ineffective that assistance was, could meet the persecution requirement when the persecutor is a non-government actor.[16] *See* Policy Memorandum, ECF No. 100 at 17 (stating that in the context of credible fear interviews, "[a]gain, the home government must either condone the behavior or demonstrate a complete helplessness to protect victims of such alleged persecution"). That is simply not the law. For example, in *Rosales Justo v. Sessions*, the United States Court of Appeals for the First Circuit held that a petitioner satisfied the "unable or unwilling" standard, even though there was a significant police response to the claimed persecution. 895 F.3d 154, 159 (1st Cir. 2018). The petitioner in *Rosales Justo* fled Mexico after organized crime members murdered his son. *Id.* at 157–58. Critically, the "police took an immediate and active interest in the [petitioner's] son's murder." *Id.* The Court noted that the petitioner "observed seven officers and a forensic team at the scene where [the] body was recovered, the police took statements from [petitioner] and his wife, and an

[16] The Court notes that this persecution requirement applies to all asylum claims not just claims based on membership in a "particular social group" or claims related to domestic or gang-related violence. *See Matter of A-B-*, 27 I. & N. Dec. at 337 (describing elements of persecution). Therefore, such a formulation heightens the standard for every asylum applicant who goes through the credibility determination process.

autopsy was performed." *Id.* The Court held that, despite the extensive actions taken by the police, the "unwilling or unable" standard was satisfied because although the government was willing to protect the petitioner, the evidence did not show that the government was able to make the petitioner and his family any safer. *Id.* at 164 (reversing BIA's conclusion that the immigration judge clearly erred in finding that the police were willing but unable to protect family). As *Rosales Justo* illustrates, a requirement that police condone or demonstrate complete helplessness is inconsistent with the current standards under immigration law.[17]

Furthermore, the Court need not defer to the government's interpretation to the extent it is based on an interpretation of court precedent. Indeed, in "case after case, courts have affirmed this fairly intuitive principle, that courts need not, and should not, defer to agency interpretations of opinions written by courts." *Citizens for Responsibility & Ethics in*

[17] This departure is also wholly unexplained. As the Supreme Court has held, "[u]nexplained inconsistency is . . . a reason for holding an interpretation to be an arbitrary and capricious change from agency practice under the [APA]." *See Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 46–57 (1983). The credible fear policies do not acknowledge a change in the persecution standard and are also arbitrary and capricious for that reason. *See Fox Television Stations, Inc.*, 556 U.S. at 514, 515 (2009)("[T]he requirement that an agency provide reasoned explanation for its action would ordinarily demand that it display awareness that it is changing [its] position.").

Washington v. Fed. Election Comm'n, 209 F. Supp. 3d 77, 87 (D.D.C. 2016)(listing cases). "There is therefore no reason for courts—the supposed experts in analyzing judicial decisions—to defer to agency interpretations of the Court's opinions." *Univ. of Great Falls v. NLRB*, 278 F.3d 1335, 1341 (D.C. Cir. 2002); *see also Judulang*, 565 U.S. at 52 n.7 (declining to apply *Chevron* framework because the challenged agency policy was not "an interpretation of any statutory language").

To the extent the credible fear policies established a new standard for persecution, it did so in purported reliance on circuit opinions. The Court gives no deference to the government's interpretation of judicial opinions regarding the proper standard for determining the degree to which government action, or inaction, constitutes persecution. *Univ. of Great Falls*, 278 F.3d at 1341. The "unwilling or unable" persecution standard was settled at the time the Refugee Act was codified, and therefore the Attorney General's "condoned" or "complete helplessness" standard is not a permissible construction of the persecution requirement.

3. Nexus: The Credible Fear Policies Do Not Pose a New Standard for the Nexus Requirement

Plaintiffs next argue that the formulation of the nexus requirement articulated in *Matter of A-B*-that when a private actor inflicts violence based on a personal relationship with

the victim, the victim's membership in a larger group may well not be "one central reason" for the abuse—violates the INA, Refugee Act, and APA. The nexus requirement in the INA is that a putative refugee establish that he or she was persecuted "on account of" a protected ground such as a particular social group.[18] *See* 8 U.S.C. § 1158(b)(1)(B)(i).

The parties agree that the precise interpretive issue is not ambiguous. The parties also endorse the "one central reason" standard and the need to conduct a "mixed-motive" analysis when there is more than one reason for persecution. *See* Defs.' Mot., 57-1 at 47; Pls.' Mot., ECF No. 64-1 at 53–54. The INA expressly contemplates mixed motives for persecution when it specifies that a protected ground must be "one central reason" for the persecution. 8 U.S.C. § 1158(b)(1)(B)(i). Where the parties disagree is whether the credible fear policies deviate from this standard.

With respect to the nexus requirement, the government's reading of *Matter of A-B-* on this issue is reasonable. In *Matter of A-B-*, the Attorney General relies on the "one central reason" standard and provides examples of a criminal gang targeting people because they have money or property or "simply because

[18] Similar to the Attorney General's directives related to the "unwilling or unable" standard, this directive applies to all asylum claims, not just claims related to domestic or gang-related violence.

the gang inflicts violence on those who are nearby." 27 I. & N. Dec. at 338–39. The decision states that "purely personal" disputes will not meet the nexus requirement. *Id.* at 339 n.10. The Court discerns no distinction between this statement and the statutory "one central reason" standard.

Similarly, the Policy Memorandum states that "when a private actor inflicts violence based on a personal relationship with the victim, the victim's membership in a larger group often will not be 'one central reason' for the abuse." Policy Memorandum, ECF No. 100 at 9 (citing *Matter of A-B-*, 27 I. & N. Dec. at 338–39). Critically, the Policy Memorandum explains that in "a particular case, the evidence may establish that a victim of domestic violence was attacked ***based solely*** on her preexisting personal relationship with her abuser." *Id.* (emphasis added). This statement is no different than the statement of the law in *Matter of A-B-*. Because the government's interpretation is not inconsistent with the statute, the Court finds the government's interpretation to be reasonable.

The Court reiterates that, although the nexus standard forecloses cases in which ***purely*** personal disputes are the impetus for the persecution, it does not preclude a positive credible fear determination simply because there is a personal relationship between the persecutor and the victim, so long as the one central reason for the persecution is a protected

ground. *See Aldana Ramos v. Holder*, 757 F.3d 9, 18–19 (1st Cir. 2014)(recognizing that "multiple motivations [for persecution] can exist, and that the presence of a non-protected motivation does not render an applicant ineligible for refugee status"); *Qu v. Holder*, 618 F.3d 602, 608 (6th Cir. 2010)("[I]f there is a nexus between the persecution and the membership in a particular social group, the simultaneous existence of a personal dispute does not eliminate that nexus."). Indeed, courts have routinely found the nexus requirement satisfied when a personal relationship exists—including cases in which persecutors had a close relationship with the victim. *See, e.g.*, *Bringas-Rodriguez*, 850 F.3d at 1056 (persecution by family members and neighbor on account of applicant's perceived homosexuality); *Nabulwala v. Gonzalez*, 481 F.3d 1115, 1117–18 (8th Cir. 2007)(applicant's family sought to violently "change" her sexual orientation).

Matter of A-B- and the Policy Memorandum do not deviate from the "one central reason" standard articulated in the statute or in BIA decisions. *See* 8 U.S.C. § 1158(b)(1)(B)(i). Therefore, the government did not violate the APA or INA with regards to its interpretation of the nexus requirement.

4. Circularity: The Policy Memorandum's Interpretation of the Circularity Requirement Violates the APA and Immigration Laws

Plaintiffs argue that the Policy Memorandum establishes a

new rule that "particular social group" definitions based on claims of domestic violence are impermissibly circular and therefore not cognizable as a basis for persecution in a credible fear determination. Pls.' Mot., ECF No. 64-1 at 56–59. Plaintiffs argue that this new circularity rule is inconsistent with the current legal standard and therefore violates the Refugee Act, INA, and is arbitrary and capricious.[19] *Id.* at 57. The parties agree that the formulation of the anti-circularity rule set forth in *Matter of M-E-V-G-*, 26 I. & N. Dec. 227, 242 (BIA 2014)—"that a particular social group cannot be defined exclusively by the claimed persecution"—is correct. *See* Defs.' Reply, ECF No. 85 at 62; Pls.' Reply., ECF No. 92 at 30–31. Accordingly, the Court begins with an explanation of that opinion.

[19] The government contends that plaintiffs' argument on this issue has evolved from the filing of the complaint to the filing of plaintiffs' cross-motion for summary judgment. Defs.' Reply, ECF No. 85 at 61. In plaintiffs' complaint, they objected to the circularity issue by stating the new credible fear policies erroneously conclude "that groups defined in part by the applicant's inability to leave the relationship are impermissibly circular." ECF No. 54 at 24. In their cross-motion for summary judgment, plaintiffs argue that the government's rule is inconsistent with well-settled law that the circularity standard only applies when the group is defined exclusively by the feared harm. Pls.' Mot., ECF No. 64-1 at 57. The Court finds that plaintiffs' complaint was sufficient to meet the notice pleading standard. *See 3E Mobile, LLC v. Glob. Cellular, Inc.*, 121 F. Supp. 3d 106, 108 (D.D.C. 2015)(explaining that the notice-pleading standard does not require a plaintiff to "plead facts or law that match every element of a legal theory").

The question before the BIA in *Matter of M-E-V-G-*, was whether the respondent had established membership in a "particular social group," namely "Honduran youth who have been actively recruited by gangs but who have refused to join because they oppose the gangs." 26 I. & N. Dec. at 228. The BIA clarified that a person seeking asylum on the ground of membership in a particular social group must show that the group is: (1) composed of members who share an immutable characteristic; (2) defined with particularity; and (3) socially distinct within the society in question. *Id.* at 237. In explaining the third element for membership, the BIA confirmed the rule that "a social group cannot be defined exclusively by the fact that its members have been subjected to harm." *Id.* at 242. The BIA explained that for a particular social group to be distinct, "persecutory conduct alone cannot define the group." *Id.*

The BIA provided the instructive example of former employees of an attorney general. *Id.* The BIA noted that such a group may not be valid for asylum purposes because they may not consider themselves a group, or because society may not consider the employees to be meaningfully distinct in society in general. *Id.* The BIA made clear, however, that "such a social group determination must be made on a case-by-case basis, because it is possible that under certain circumstances, the society would

make such a distinction and consider the shared past experience to be a basis for distinction within that society." *Id.* "Upon their maltreatment," the BIA explained "it is possible these people would experience a sense of 'group' and society would discern that this group of individuals, who share a common immutable characteristic, is distinct in some significant way." *Id.* at 243 (recognizing that "[a] social group cannot be defined *merely* by the fact of persecution or *solely* by the shared characteristic of facing dangers in retaliation for actions they took against alleged persecutors . . . but that the shared trait of persecution does not disqualify an otherwise valid social group")(citations and internal quotation marks omitted). The BIA further clarified that the "act of persecution by the government may be the catalyst that causes the society to distinguish [a group] in a meaningful way and consider them a distinct group, but the immutable characteristic of their shared past experience exists independent of the persecution." *Id.* at 243. Thus, such a group would not be circular because the persecution they faced was not the sole basis for their membership in a particular social group. *Id.*

With this analysis in mind, the Court now focuses on the dispute at issue. Here, plaintiffs do not challenge *Matter of A-B-*'s statements with regard to the rule against circularity, but rather challenge the Policy Memorandum's articulation of the

rule. Pls.' Mot., ECF No, 64-1 at 57–58. Specifically, they challenge the Policy Memorandum's mandate that domestic violence-based social groups that include "inability to leave" are not cognizable. *Id.* at 58 (citations and internal quotation marks omitted). The Policy Memorandum states that "married women . . . who are unable to leave their relationship" are a group that would not be sufficiently particular. Policy Memorandum, ECF No. 100 at 6. The Policy Memorandum explained that "even if 'unable to leave' were particular, the applicant must show something more than the danger of harm from an abuser if the applicant tried to leave because that would amount to circularly defining the particular social group by the harm on which the asylum claim is based." *Id.*

The Policy Memorandum's interpretation of the rule against circularity ensures that women unable to leave their relationship will always be circular. This conclusion appears to be based on a misinterpretation of the circularity standard and faulty assumptions about the analysis in *Matter of A-B-*. First, as *Matter of M-E-V-G-* made clear, there cannot be a general rule when it comes to determining whether a group is distinct because "it is possible that under certain circumstances, the society would make such a distinction and consider the shared past experience to be a basis for distinction within that society." 26 I. & N. Dec. at 242. Thus, to the extent the Policy

Memorandum imposes a general circularity rule foreclosing such claims without taking into account the independent characteristics presented in each case, the rule is arbitrary, capricious, and contrary to immigration law.

Second, the Policy Memorandum changes the circularity rule as articulated in settled caselaw, which recognizes that if the proposed social group definition contains characteristics independent from the feared persecution, the group is valid under asylum law. *Matter of M-E-V-G-*, 26 I. & N. Dec. at 242 (Particular social group may be cognizable if "immutable characteristic of their shared past experience exists independent of the persecution."). Critically, the Policy Memorandum does not provide a reasoned explanation for, let alone acknowledge, the change. *See F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 514 (2009)("[T]he requirement that an agency provide reasoned explanation for its action would ordinarily demand that it display awareness that it is changing [its] position."). *Matter of A-B-* criticized the BIA for failing to consider the question of circularity in *Matter of A-R-C-G-* and overruled the decision based on the BIA's reliance on DHS's concession on the issue. 27 I. & N. Dec. at 334-35, 33. Moreover, *Matter of A-B-* suggested only that the social group at issue in *Matter of A-R-C-G-* might be "effectively" circular. *Id.* at 335. The Policy Memorandum's formulation of the circularity

standard goes well beyond the Attorney General's explanation in *Matter of A-B-*. As such, it is unmoored from the analysis in *Matter of M-E-V-G-* and has no basis in *Matter of A-B-*. It is therefore, arbitrary, capricious, and contrary to immigration law.

5. Discretion and Delineation: The Credible Fear Policies Do Not Contain a Discretion Requirement, but the Policy Memorandum's Delineation Requirement is Unlawful

Plaintiffs next argue that the credible fear policies "unlawfully import two aspects of the ordinary removal context into credible fear proceedings." Pls.' Reply, ECF No. 92 at 32. The first alleged requirement is for aliens to delineate the "particular social group" on which they rely at the credible fear stage. *Id.* The second alleged requirement is that asylum adjudicators at the credible fear stage take into account certain discretionary factors when making a fair credibility determination and exercise discretion to deny relief.[20] *Id.* at 32–33.

[20] These discretionary factors include but are not limited to: "the circumvention of orderly refugee procedures; whether the alien passed through any other countries or arrived in the United States directly from her country; whether orderly refugee procedures were in fact available to help her in any country she passed through; whether he or she made any attempts to seek asylum before coming to the United States; the length of time the alien remained in a third country; and his or her living conditions, safety, and potential for long-term residency there." Policy Memorandum, ECF No. 100 at 10.

The government agrees that a policy which imposes a duty to delineate a particular social group at the credible fear stage would be a violation of existing law. Defs.' Reply, ECF No. 85 at 67. The government also agrees that requiring asylum officers to consider the exercise of discretion at the credible fear stage "would be inconsistent with section 1225(b)(1)(B)(v)." *Id.* at 68. The government, however, argues that no such directives exist. *Id.* at 67–69.

The Court agrees with the government. There is nothing in the credible fear policies that support plaintiffs' arguments that asylum officers are to exercise discretion at the credible fear stage. The Policy Memorandum discusses discretion only in the context of when an alien has established that he or she is eligible for asylum. Policy Memorandum, ECF No. 100 at 5 ("[I]f eligibility is established, the USCIS officer must then consider whether or not to exercise discretion to grant the application."). *Matter of A-B-* also discusses the discretionary factors in the context of granting asylum. 27 I. & N. Dec. at 345 n.12 (stating exercising discretion should not be glossed over "solely because an applicant *otherwise meets the burden of proof* for asylum eligibility under the INA")(emphasis added). Eligibility for asylum is not established, nor is an asylum application granted, at the credible fear stage. *See* 8 U.S.C. § 1225(b)(1)(B)(ii)(stating if an alien receives a positive

credibility determination, he or she shall be detained for "further consideration of the application of asylum"). Since the credible fear policies only direct officers to use discretion once an officer has determined that an applicant is eligible for asylum, they do not direct officers to consider discretionary factors at the credible fear stage. *See* Policy Memorandum, ECF No. 100 at 10.

The Court also agrees that, with respect to *Matter of A-B-*, the decision does not impose a delineation requirement during a credible fear determination. The decision only requires an applicant seeking asylum to clearly indicate "an exact delineation of any proposed particular social group" when the alien is "on the record and before the immigration judge." 27 I. & N. Dec. at 344. Any delineation requirement therefore would not apply to the credible fear determination which is not on the record before an immigration judge.

The Policy Memorandum, however, goes further than the decision itself and incorporates the delineation requirement into credible fear determinations. Unlike the mandate to use discretion, the Policy Memorandum does not contain a limitation that officers are to apply the delineation requirement to asylum interviews only, as opposed to credible fear interviews. In fact, it does the opposite and explicitly requires asylum officers to apply that requirement to credible fear

determinations. Policy Memorandum, ECF No. 100 at 12. The Policy Memorandum makes clear that "if an applicant claims asylum based on membership in a particular social group, then officers must factor the [standards explained in *Matter of A-B-*] *into their determination of whether an applicant has a credible fear or reasonable fear of persecution*." *Id.* at 12. In directing asylum officers to apply *Matter of A-B-* to credible fear determinations, the Policy Memorandum refers back to all the requirements explained by *Matter of A-B-* including the delineation requirement. *See id.* (referring back to section explaining delineation requirement). In light of this clear directive to "factor" in the standards set forth in *Matter of A-B-*, into the "determination of whether an applicant has a credible fear" and its reference to the delineation requirement, it is clear that the Policy Memorandum incorporates that requirement into credible fear determinations. *See id.*[21]

The government argues, that to the extent the Policy Memorandum is ambiguous, the Court should defer to its

[21] The Policy Memorandum also reiterates that "few gang-based or domestic-violence claims involving particular social groups defined by the members' vulnerability to harm may . . . pass the 'significant possibility' test in credible-fear screenings." Policy Memorandum, ECF No. 100 at 10. For this proposition, the Policy Memorandum refers to the "standards clarified in *Matter of A-B-*." *Id.* This requirement for an alien to explain how they fit into a particular social group independent of the harm they allege, further supports the fact that there is a delineation requirement at the credible fear stage.

interpretation as long as it is reasonable. The government cites no authority to support its claim that deference is owed to an agency's interpretations of its policy documents like the Policy Memorandum. However, the Court acknowledges the government's interpretation is "entitled to respect . . . only to the extent that those interpretations have the 'power to persuade.'" *Christensen v. Harris Cnty*, 529 U.S. 576, 587 (2000)(citation omitted). For the reasons stated above, however, such a narrow reading of the Policy Memorandum is not persuasive. Because the Policy Memorandum requires an alien—at the credible fear stage—to present facts that clearly identify the alien's proposed particular social group, contrary to the INA, that policy is arbitrary and capricious.

6. The Policy Memorandum's Requirements Related to Asylum Officer's Application of Circuit Law are Unlawful

Plaintiffs' final argument is that the Policy Memorandum's directives instructing asylum officers to ignore applicable circuit court of appeals decisions is unlawful. Pls.' Mot., ECF No. 64-1 at 63.

The relevant section of the Policy Memorandum reads as follows:

> When conducting a credible fear or reasonable fear interview, an asylum officer must determine what law applies to the applicant's claim. The asylum officer should apply all applicable precedents of the Attorney General and the BIA, *Matter of E-L-H-*, 23 I&N Dec.

> 814, 819 (BIA 2005), which are binding on all immigration judges and asylum officers nationwide. The asylum officer should also apply the case law of the relevant federal circuit court, to the extent that those cases are not inconsistent with *Matter of A-B-*. *See, e.g.*, *Matter of Fajardo Espinoza*, 26 I&N Dec. 603, 606 (BIA 2015). The relevant federal circuit court is the circuit where the removal proceedings will take place if the officer makes a positive credible fear determination. *See Matter of Gonzalez*, 16 I&N Dec. 134, 135–36 (BIA 1977); *Matter of Waldei*, 19 I&N Dec. 189 (BIA 1984). But removal proceedings can take place in any forum selected by DHS, and not necessarily the forum where the intending asylum applicant is located during the credible fear or reasonable fear interview. Because an asylum officer cannot predict with certainty where DHS will file a Notice to appear . . . the asylum officer should faithfully apply precedents of the Board and, if necessary, the circuit where the alien is physically located during the credible fear interview.

Policy Memorandum, ECF No. 100 at 11–12. Plaintiffs make two independent arguments regarding this policy. First, they argue that the Policy Memorandum's directive to disregard circuit law contrary to *Matter of A-B-*, violates the APA, INA, and the separation of powers. Pls.' Mot., ECF No. 64-1 at 64–68. Second, plaintiffs argue that the Policy Memorandum's directive requiring asylum officers to apply the law of the circuit where the alien is physically located during the credible fear interview violates the APA and INA. *Id.* 68–71.

a. The Policy Memorandum's Directive to Disregard Contrary Circuit Law Violates *Brand X*

Plaintiffs' first argument is that the Policy Memorandum's directive that asylum officers who process credible fear interviews ignore circuit law contrary to *Matter of A-B-* is unlawful. Pls.' Mot., ECF No. 64-1 at 63–68. Because the policy requires officers to disregard all circuit law regardless of whether the provision at issue is entitled to deference, plaintiffs maintain that the policy exceeds an agency's limited ability to displace circuit precedent on a specific question of law to which an agency decision is entitled to deference. *Id.*

An agency's ability to disregard a court's interpretation of an ambiguous statutory provision in favor of the agency's interpretation stems from the Supreme Court's decision in *Nat'l Cable & Telecomm's Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005). At issue in *Brand X* was the proper classification of broadband cable services under Title II of the Communications Act of 1934, as amended by the Telecommunications Act of 1996. *Id.* at 975. The Federal Communications Commission ("Commission") had issued a Declaratory Rule providing that broadband internet service was an "information service" but not a "telecommunication service" under the Act, such that certain regulations would not apply to cable companies that provided broadband service. *Id.* at 989. The circuit court vacated the

Declaratory Rule because a prior circuit court opinion held that a cable modem service was in fact a telecommunications service. *Id.* (citing *AT&T Corp. v. Portland*, 216 F.3d 871 (9th Cir. 2000). The Supreme Court concluded that the circuit court erred in relying on a prior court's interpretation of the statute without first determining if the Commission's contrary interpretation was reasonable. *Id.* at 982.

The Supreme Court's holding relied on the same principles underlying the *Chevron* deference cases. *Id.* at 982 (stating that the holding in *Brand X* "follows from *Chevron* itself"). The Court reasoned that Congress had delegated to the Commission the authority to enforce the Communications Act, and under the principles espoused in *Chevron*, a reasonable interpretation of an ambiguous provision of the Act is entitled to deference. *Id.* at 981. Therefore, regardless of a circuit court's prior interpretation of a provision, the agency's interpretation is entitled to deference as long as the court's prior construction of the provision does not "follow[] from the unambiguous terms of the statute and thus leaves no room for agency discretion." *Id.* at 982. In other words, an agency's interpretation of a provision may override a prior court's interpretation if the agency is entitled to *Chevron* deference and the agency's interpretation is reasonable. If the agency is not entitled to deference or if the agency's interpretation is unreasonable, a

court's prior decision interpreting the same statutory provision controls. *See Petit v. U.S. Dep't of Educ.*, 675 F.3d 769, 789 (D.C. Cir. 2012)(citation omitted)(finding that a court decision interpreting a statute overrides the agency's interpretation only if it holds "that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion").

The government argues that the Policy Memorandum's mandate to ignore circuit law contrary to *Matter of A-B-* is rooted in statute and sanctioned by *Brand X*. Defs.' Reply, ECF No. 85 at 70. Moreover, the government contends that the requirement "simply states the truism that the INA requires all line officers to follow binding decisions of the Attorney General." *Id.* (citing 8 U.S.C. § 1103(a))("determination and ruling by the Attorney General with respect to all questions of law shall be controlling"). The government also argues that plaintiffs have failed to point to any decisions that are inconsistent with *Matter of A-B-*, and therefore any instruction for an officer to apply *Matter of A-B-* notwithstanding prior circuit precedent to the contrary is permissible. The Policy Memorandum, according to the government, "simply require[s] line officers to follow [*Matter of A-B-*] unless and until a circuit court of appeals declares some aspect of it contrary to the plain text of the INA." Defs.' Reply, ECF No. 85 at 72.

The government, again, minimizes the effect of the Policy Memorandum. As an initial matter, *Brand X* would only allow an agency's interpretation to override a prior judicial interpretation if the agency's interpretation is entitled to deference. *Brand X*, 545 U.S. at 982 (stating "agency construction *otherwise entitled to Chevron deference*" may override judicial construction under certain circumstances)(emphasis added). In this case, the government contends that *Matter of A-B-* only interprets one statutory provision: "particular social group." *See* Defs.' Mot., ECF No. 57-1 at 56 (stating "[t]he language that the Attorney General interpreted in [*Matter of*] *A-B-*, [is] the meaning of the phrase 'particular social group' as part of the asylum standard"). The Policy Memorandum, however, directs officers to ignore federal circuit law to the extent that the law is inconsistent with *Matter of A-B-* in *any* respect, including *Matter of A-B-*'s persecution standard. The directive requires officers performing credible fear determinations to use *Brand X* as a shield against any prior or future federal circuit court decisions inconsistent with the sweeping proclamations made in *Matter of A-B-* regardless of whether *Brand X* has any application under the circumstances of that case.

There are several problems with such a broad interpretation of *Brand X* to cover guidance from an agency when it is far from

clear that such guidance is entitled to deference. First, a directive to ignore circuit precedent when doing so would violate the principles of *Brand X* itself is clearly unlawful. For example, when a court determines a provision is unambiguous, as courts have done upon evaluating the "unwilling and unable" definition, a court's interpretation controls when faced with a contrary agency interpretation. *Brand X*, 545 U.S. at 982. The Policy Memorandum directs officers as a rule not to apply circuit law if it is inconsistent with *Matter of A-B-*, without regard to whether a specific provision in *Matter of A-B-* is entitled to deference in the first place. Such a rule runs contrary to *Brand X*.

Second, the government's argument only squares with the *Brand X* framework if every aspect of *Matter of A-B-* is both entitled to deference and is a reasonable interpretation of a relevant provision of the INA. Indeed, *Brand X* does not disturb any prior judicial opinion that a statute is unambiguous because Congress has spoken to the interpretive question at issue. *Brand X*, 545 U.S. at 982 ("[A] judicial precedent holding that the statute unambiguously forecloses the agency's interpretation, and therefore contains no gap for the agency to fill, displaces a conflicting agency construction."). If a Court does make such a determination, the agency is not free to supplant the Court's

interpretation for its own under *Brand X*. *Id.*[22] Unless an agency's interpretation of a statute is afforded deference, a judicial construction of that provision binds the agency, regardless of whether it is contrary to the agency's view. The Policy Memorandum does not recognize this principle and therefore, the government's reliance on *Brand X* is misplaced. *Cf., e.g.*, *Matter of Marquez Conde*, 27 I. & N. Dec. 251, 255 (BIA 2018)(examining whether the particular statutory question fell within *Brand X*).[23]

The government's statutory justification fares no better. It is true that pursuant to 8 U.S.C. § 1103(a), the Attorney General's rulings with respect to questions of law are controlling; and they are binding on all service employees, 8 C.F.R. § 103.3(c). But plaintiffs do not dispute the fact that

[22] Any assumption that the entirety of *Matter of A-B-* is entitled to deference also falters in light of the government's characterization of most of the decision as dicta. Defs.' Reply, ECF No. 85 at 44-47. (characterizing *Matter of A-B-* "comment[ary] on problems typical of gang and domestic violence related claims.") According to the government, the only legal effect of *Matter of A-B-* is to overrule *Matter of A-R-C-G-*. Any other self-described dicta would not be entitled to deference under *Chevron* and therefore *Brand X* could not apply. *Brand X*, 545 U.S. at 982 (agency interpretation must at minimum be "otherwise entitled to deference" for it to supersede judicial construction). Simply put, *Brand X* is not a license for agencies to rely on dicta to ignore otherwise binding circuit precedent.

[23] *Matter of A-B-* invokes *Brand X* only as to its interpretation of particular social group. 27 I. & N. Dec. at 327. As the Court has explained above, that interpretation is not entitled to deference.

asylum officers must follow the Attorney General's decisions. The issue is that the Policy Memorandum goes much further than that. Indeed, the government's characterization of the Policy Memorandum's directive to ignore federal law only highlights the flaws in its argument. According to the government, the directive at issue merely instructs officers to listen to the Attorney General. Defs.' Reply, ECF No. 85 at 70. Such a mandate would be consistent with section 1103 and its accompanying regulations. In reality, however, the Policy Memorandum requires officers conducting credible fear interviews to follow the precedent of the relevant circuit only "to the extent that those cases are not inconsistent with *Matter of A-B-*." Policy Memorandum, ECF No. 100 at 11. The statutory and regulatory provisions cited by the government do not justify a blanket mandate to ignore circuit law.

b. The Policy Memorandum's Relevant Circuit Law Policy Violates the APA and INA

Plaintiffs next argue that the Policy Memorandum's directive to asylum officers to apply the law of the "circuit where the alien is physically located during the credible fear interview" violates the immigration laws. Pls.' Mot., ECF No. 64-1, 68–71; Policy Memorandum, ECF No. 100 at 12. Specifically, Plaintiffs argue that this policy conflicts with the low screening standard for credible fear determinations established

by Congress, and therefore violates the APA and INA. Pls.' Reply, ECF No. 92 at 35–36. The credible fear standard, plaintiffs argue, requires an alien to be afforded the benefit of the circuit law most favorable to his or her claim because there is a possibility that the eventual asylum hearing could take place in that circuit. *Id.*

The government responds by arguing that it is hornbook law that the law of the jurisdiction in which the parties are located governs the proceedings. Defs.' Reply, ECF No. 85 at 73. The government cites the standard for credible fear determinations and argues that it contains no requirement that an alien be given the benefit of the most favorable circuit law. *Id.* The government also argues that, to the extent there is any ambiguity, the government's interpretation is entitled to some deference, even if not *Chevron* deference. *Id.* at 74.

This issue turns on an interpretation of 8 U.S.C. § 1225(b)(1)(B)(v), which provides the standard for credible fear determinations. That section explicitly defines a "credible fear of persecution" as follows:

> For purposes of this subparagraph, the term "credible fear of persecution" means that there is a significant possibility, taking into account the credibility of the statements made by the alien in support of the alien's claim and such other facts as are known to the officer, that the alien could establish eligibility for asylum under section 1158 of this title.

8 U.S.C. § 1225(b)(1)(B)(v). Applicable regulations further explain the manner in which the interviews are to be conducted. Interviews are to be conducted in an "nonadversarial manner" and "separate and apart from the general public." 8 C.F.R. § 208.30(d). The purpose of the interview is to "elicit all relevant and useful information bearing on whether the applicant has a credible fear of persecution or torture[.]" *Id.*

The statute does not speak to which law should be applied during credible fear interviews. *See generally* 8 U.S.C. § 1225(b)(1)(B)(v). However, the Court is not without guidance regarding which law should be applied because Congress explained its legislative purpose in enacting the expedited removal provisions. 142 CONG. REC. S11491-02. When Congress established expedited removal proceedings in 1996, it deliberately established a low screening standard so that "there should be no danger that an alien with a genuine asylum claim will be returned to persecution." H.R. REP. No. 104-469, pt. 1, at 158. That standard "is a low screening standard for admission into the usual full asylum process" and when Congress adopted the standard it "reject[ed] the higher standard of credibility included in the House bill." 142 CONG. REC. S11491-02.

In light of the legislative history, the Court finds plaintiffs' position to be more consistent with the low screening standard that governs credible fear determinations.

The statute does not speak to which law should be applied during the screening, but rather focuses on eligibility at the time of the removal proceedings. 8 U.S.C. § 1225(b)(1)(B)(v). And as the government concedes, these removal proceedings could occur anywhere in the United States. Policy Memorandum, ECF No. 100 at 12. Thus, if there is a disagreement among the circuits on an issue, the alien should get the benefit of that disagreement since, if the removal proceedings are heard in the circuit favorable to the aliens' claim, there would be a significant possibility the alien would prevail on that claim. The government's reading would allow for an alien's deportation, following a negative credible fear determination, even if the alien would have a significant possibility of establishing asylum under section 1158 during his or her removal proceeding. Thus, the government's reading leads to the exact opposite result intended by Congress.[24]

The government does not contest that an alien with a possibility of prevailing on his or her asylum claim could be denied during the less stringent credible fear determination, but rather claims that this Court should defer to the

[24] The government relies on BIA cases to support its argument that the law of the jurisdiction where the interview takes place controls. *See* Defs.' Mot., ECF No. 57-1 at 49. These cases address the law that governs the removal proceedings, an irrelevant and undisputed issue.

government's interpretation that this policy is consistent with the statute. Defs.' Reply, ECF No. 85 at 74–75. Under *Skidmore v. Swift & Co.*, the Court will defer to the government's interpretation to the extent it has the power to persuade.[25] *See* 323 U.S. 134, 140, (1944). However, the government's arguments bolster plaintiffs' interpretation more than its own. As the government acknowledges, and the Policy Memorandum explicitly states, "removal proceedings can take place in any forum selected by DHS, and not necessarily the forum where the intending asylum applicant is located during the credible fear or reasonable fear interview." Policy Memorandum, ECF No. 100 at 12. Since the Policy Memorandum directive would lead to denial of a potentially successful asylum applicant at the credible fear determination, the Court concludes that the directive is therefore inconsistent with the statute. H.R. REP. NO. 104-469 at 158 (explaining that there should be no fear that an alien with a genuine asylum claim would be returned to persecution).[26]

Because the government's reading could lead to the exact

[25] The government cannot claim the more deferential *Auer* deference because *Auer* applies to an agency's interpretation of its own regulations, not to interpretations of policy documents like the Policy Memorandum. *See Auer v. Robbins*, 519 U.S. 452, 461 (1997)(holding agencies may resolve ambiguities in regulations).

[26] The policy is also a departure from prior DHS policy without a rational explanation for doing so. *See* Mujahid Decl., Ex. F (DHS training policy explaining that law most favorable to the applicant applies when there is a circuit split).

harm that Congress sought to avoid, it is arbitrary capricious and contrary to law.

* * * * *

In sum, plaintiffs prevail on their APA and statutory claims with respect to the following credible fear policies, which this Court finds are arbitrary and capricious and contrary to law: (1) the general rule against credible fear claims relating to gang-related and domestic violence victims' membership in a "particular social group," as reflected in *Matter of A-B-* and the Policy Memorandum; (2) the heightened "condoned" or "complete helplessness" standard for persecution, as reflected in *Matter of A-B-* and the Policy Memorandum; (3) the circularity standard as reflected in the Policy Memorandum; (4) the delineation requirement at the credible fear stage, as reflected in the Policy Memorandum; and (5) the requirement that adjudicators disregard contrary circuit law and apply only the law of the circuit where the credible fear interview occurs, as reflected in the Policy Memorandum. The Court also finds that neither the Policy Memorandum nor *Matter of A-B-* state an unlawful nexus requirement or require asylum officers to apply discretionary factors at the credible fear stage. The Court now turns to the appropriate remedy.[27]

[27] Because the Court finds that the government has violated the INA and APA, it need not determine whether there was a

D. Relief Sought

Plaintiffs seek an Order enjoining and preventing the government and its officials from applying the new credible fear policies, or any other guidance implementing *Matter of A-B-* in credible fear proceedings. Pls.' Mot., ECF No. 64-1 at 71–72. Plaintiffs also request that the Court vacate any credible fear determinations and removal orders issued to plaintiffs who have not been removed. *Id.* As for plaintiffs that have been removed, plaintiffs request a Court Order directing the government to return the removed plaintiffs to the United States. *Id.* Plaintiffs also seek an Order requiring the government to provide new credible fear proceedings in which asylum adjudicators must apply the correct legal standards for all plaintiffs. *Id.*

The government argues that because section 1252 prevents all equitable relief the Court does not have the authority to order the removed plaintiffs to be returned to the United States. Defs.' Reply, ECF No. 85 at 75–76. The Court addresses each issue in turn.

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constitutional violation in this case. *See Am. Foreign Serv. Ass'n v. Garfinkel*, 490 U.S. 153, 161 (1989)(per curiam)(stating courts should be wary of issuing "unnecessary constitutional rulings").

1. Section 1252 Does Not Bar Equitable Relief

a. Section 1252(e)(1)

The government acknowledges that section 1252(e)(3) provides for review of "systemic challenges to the expedited removal system." Defs.' Mot., ECF No. 57-1 at 11. However, the government argues 1252(e)(1) limits the scope of the relief that may be granted in such cases. Defs.' Reply, ECF No. 85 at 75–76. That provision provides that "no court may . . . enter declaratory, injunctive, or other equitable relief in any action pertaining to an order to exclude an alien in accordance with section 1225(b)(1) of this title except as specifically authorized in a subsequent paragraph of this subsection." 8 U.S.C. § 1252(e)(1)(a). The government argues that since no other subsequent paragraph of section 1252(e) specifically authorizes equitable relief, this Court cannot issue an injunction in this case. Defs.' Reply, ECF No. 85 at 75–76.

Plaintiffs counter that section 1252(e)(1) has an exception for "any action . . . specifically authorized in a subsequent paragraph." Since section 1252(e)(3) clearly authorizes "an action" for systemic challenges, their claims fall within an exception to the proscription of equitable relief. Pls.' Reply, ECF No. 92 at 38.

This issue turns on what must be "specifically authorized in a subsequent paragraph" of section 1252(e). Plaintiffs argue

the "action" needs to be specifically authorized, and the government argues that it is the "relief." Section 1252(e)(1) states as follows:

> (e) Judicial review of orders under section 1225(b)(1)
>
> (1) Limitations on relief
> Without regard to the nature of the action or claim and without regard to the identity of the party or parties bringing the action, no court may--
>
> (A) enter declaratory, injunctive, or other equitable relief in any action pertaining to an order to exclude an alien in accordance with section 1225(b)(1) of this title except as specifically authorized in a subsequent paragraph of this subsection, or
>
> (B) certify a class under Rule 23 of the Federal Rules of Civil Procedure in any action for which judicial review is authorized under a subsequent paragraph of this subsection.

The government contends that this provision requires that any "*declaratory, injunctive, or other equitable relief*" must be "*specifically authorized in a subsequent paragraph*" of subsection 1252(e) for that relief to be available. Defs.' Reply, ECF No. 85 at 75 (emphasis in original). The more natural reading of the provision, however, is that these forms of relief are prohibited except when a plaintiff brings "any action . . . specifically authorized in a subsequent paragraph." *Id.* § 1252(e)(1)(a). The structure of the statute supports this view. For example, the very next subsection, 1252(e)(1)(b), uses

the same language when referring to an ***action***: "[A court may not certify a class] in *any action for which judicial review is authorized under a subsequent paragraph of this subsection.*" *Id.* § 1252(e)(1)(b)(emphasis added).

A later subsection lends further textual support for the view that the term "authorized" modifies the type of action, and not the type of relief. Subsection 1252(e)(4) limits the remedy a court may order when making a determination in habeas corpus proceedings challenging a credible fear determination.[28] Under section 1252(e)(2), a petitioner may challenge his or her removal under section 1225, if he or she can prove by a preponderance of the evidence that he or she is in fact in this country legally.[29] *See* 8 U.S.C. § 1252(e)(2)(c). Critically, section 1252(e)(4) limits the type of relief a court may grant if the petitioner is successful: "the court may order no remedy or relief other than to require that the petitioner be provided a hearing." *Id.* § 1252(e)(4)(B). If section 1252(e)(1)(a) precluded all injunctive and equitable relief, there would be no need for § 1252(e)(4) to specify that the court could order no

[28] Habeas corpus proceedings, like challenges to the validity of the system under 1252(e)(3), are "specifically authorized in a subsequent paragraph of [1252(e)]." 8 U.S.C. § 1252(e)(1)(a).
[29] To prevail on this type of claim a petitioner must establish that he or she is an "alien lawfully admitted for permanent residence, has been admitted as a refugee under section 1157 of this title, or has been granted asylum under section 1158." 8 U.S.C. § 1252(e)(2).

other form of relief. Furthermore, if the government's reading was correct, there should be a parallel provision in section 1252(e)(3) limiting the relief a prevailing party of a systemic challenge could obtain to only relief specifically authorized by that paragraph.

Indeed, under the government's reading of the statute there could be no remedy for a successful claim under paragraph 1252(e)(3) because that paragraph does not specifically authorize any remedy. However, it does not follow that Congress would have explicitly authorized a plaintiff to bring a suit in the United States District Court for the District of Columbia and provided this Court with exclusive jurisdiction to determine the legality of the challenged agency action, but deprived the Court of any authority to provide *any remedy* (because none are specifically authorized), effectively allowing the unlawful agency action to continue. This Court "should not assume that Congress left such a gap in its scheme." *Jackson v. Birmingham Bd. Of Educ.*, 544 U.S. 167, 180 (2005)(holding Title IX protected against retaliation in part because "all manner of Title IX violations might go umremedied" if schools could retaliate freely).

An action brought pursuant to section 1252(e)(3) is an action that is "specifically authorized in a subsequent paragraph" of 1252(e). *See* 8 U.S.C. § 1252(e)(1). And 1252(e)(3)

clearly authorizes "an action" for systemic challenges to written expedited removal policies, including claims concerning whether the challenged policy "is not consistent with applicable provisions of this subchapter or is otherwise in violation of law." *Id.* § 1252(e)(3). Because this case was brought under that systemic challenge provision, the limit imposed on the relief available to a court under 1252(e)(1)(a) does not apply.[30]

b. Section 1252(f)

The government's argument that section 1252(f) bars injunctive relief fares no better. That provision states in relevant part: "no court (other than the Supreme Court) shall have jurisdiction or authority to enjoin or restrain the operation of [sections 1221–1232] other than with respect to the application of such provisions to an individual alien against whom proceedings under such part have been initiated." 8 U.S.C. § 1252(f)(1). The Supreme Court has explained that "Section 1252(f)(1) thus 'prohibits federal courts from granting

[30] Plaintiffs also argue that section 1252(e)(1) does not apply to actions brought under section 1252(e)(3). Section 1252(e)(1), by its terms, only applies to an "action pertaining to an order to exclude an alien in accordance with section 1225(b)(1)." Plaintiffs argue that the plain reading of section 1252(e)(3) shows that an action under that provision does not pertain to an individual order of exclusion, but rather "challenges the validity of the system." Pls.' Reply, ECF No. 92 at 12 (citing 8 U.S.C. § 1252(e)(3)). Having found that section 1252(e)(3) is an exception to section 1252(e)(1)'s limitation on remedies, the Court need not reach this argument.

classwide injunctive relief against the operation of §§ 1221–123[2].'" *Jennings v. Rodriguez*, 138 S. Ct. 830, 851 (2018)(citing *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 481 (1999)). The Supreme Court has also noted that circuit courts have "held that this provision did not affect its jurisdiction over . . . statutory claims because those claims did not 'seek to enjoin the operation of the immigration detention statutes, but to enjoin conduct . . . not authorized by the statutes." *Id.* (citing *Rodriguez v. Hayes*, 591 F.3d 1105, 1120 (9th Cir. 2010)).

In this case, plaintiffs do not challenge any provisions found in section 1225(b). They do not seek to enjoin the operation of the expedited removal provisions or any relief declaring the statutes unlawful. Rather, they seek to enjoin the government's violation of those provisions by the implementation of the unlawful credible fear policies. An injunction in this case does not obstruct the operation of section 1225. Rather, it enjoins conduct that violates that provision. Therefore, section 1252(f) poses no bar. *See R.I.L-R v. Johnson*, 80 F. Supp. 3d 164, 184 (D.D.C. 2015)(holding section 1252(f) does not limit a court's ability to provide injunctive relief when the injunctive relief "enjoins conduct that allegedly violates [the immigration statute]"); *see also Reid v. Donelan*, 22 F. Supp. 3d 84, 90 (D. Mass. 2014)("[A]n injunction 'will not prevent the law from

operating in any way, but instead would simply force the government to *comply* with the statute.")(emphasis in original)).

Finally, during oral argument, the government argued that even if the Court has the authority to issue an injunction in this case, it can only enjoin the policies as applied in plaintiffs' cases under section 1252(f). *See* Oral Arg. Hr'g Tr., ECF No. 102 at 63. In other words, according to the government, the Court may declare the new credible fear policies unlawful, but DHS may continue to enforce the policies in all other credible fear interviews. To state this proposition is to refute it. It is the province of the Court to declare what the law is, *see Marbury v. Madison*, 5 U.S. 137, 177 (1803), and the government cites no authority to support the proposition that a Court may declare an action unlawful but have no power to prevent that action from violating the rights of the very people it affects.[31] To the contrary, such relief is supported by the APA itself. *See Nat'l Min. Ass'n v. U.S. Army Corps of Eng'rs*,

[31] During oral argument, the government argued for the first time that an injunction in this case was tantamount to class-wide relief, which the parties agree is prohibited under the statute. *See* Oral Arg. Hr'g Tr., ECF No. 102 at 63; 8 U.S.C. § 1252(e)(1)(b)(prohibiting class certification in actions brought under section 1252(e)(3)). The Court finds this argument unpersuasive. Class-wide relief would entail an Order requiring new credible fear interviews for all similarly situated individuals, and for the government to return to the United States all deported individuals who were affected by the policies at issue in this case. Plaintiffs do not request, and the Court will not order, such relief.

145 F.3d 1399, 1409-10 (D.C. Cir. 1998)("We have made clear that '[w]hen a reviewing court determines that agency regulations are unlawful, the ordinary result is that the rules are vacated – not that their application to the individual petitioners is proscribed.'"). Moreover section 1252(f) only applies when a plaintiff challenges the legality of immigration laws and not, as here, when a plaintiff seeks to enjoin conduct that violates the immigration laws. In these circumstances, section 1252(f) does not limit the Court's power.

2. The Court Has the Authority to Order the Return of Plaintiffs Unlawfully Removed

Despite the government's suggestion during the emergency stay hearing that the government would return removed plaintiffs should they prevail on the merits, TRO Hr'g Tr., Aug. 9, 2018, ECF No. 23 at 13-14 (explaining that the Department of Justice had previously represented to the Supreme Court that should a Court find a policy that led to a plaintiffs' deportation unlawful the government "would return [plaintiffs] to the United states at no expense to [plaintiffs]"), the government now argues that the Court may not do so, *see* Defs.' Reply, ECF No. 85 at 78–79.

In support of its argument, the government relies principally on *Kiyemba v. Obama*, 555 F.3d 1022 (D.C. Cir 2009) vacated, 130 S.Ct. 1235, reinstated in amended form, 605 F.3d

1046 (D.C. Cir. 2010). In *Kiyemba*, seventeen Chinese citizens, determined to be enemy combatants, sought habeas petitions in connection with their detention in Guantanamo Bay, Cuba. 555 F.3d at 1024. The petitioners sought release in the United States because they feared persecution if they were returned to China, but had not sought to comply with the immigration laws governing a migrant's entry into the United States. *Id.* After failed attempts to find an appropriate country in which to resettle, the petitioners moved for an order compelling their release into the United States. *Id.* The district court, citing exceptional circumstances, granted the motion. *Id.*

The United States Court of Appeals for the District of Columbia Circuit reversed. The Court began by recognizing that the power to exclude aliens remained in the exclusive power of the political branches. *Id.* at 1025 (citations omitted). As a result, the Court noted, "it is not within the province of any court, unless expressly authorized by law, to review the determination of the political branch of the Government to exclude a given alien." *Id.* at 1026 (citation and internal quotation marks omitted). The critical question was "what law expressly authorized the district court to set aside the decision of the Executive Branch and to order these aliens brought to the United States." *Id.* at 1026 (internal quotation marks omitted).

In this case, the answer to that question is the immigration laws. In fact, *Kiyemba* distinguished Supreme Court cases which "rested on the Supreme Court's interpretation not of the Constitution, but of a provision in the immigration laws." *Id.* at 1028. The Court further elaborated on this point with the following explanation:

> it would . . . be wrong to assert that, by ordering aliens paroled into the country . . . the Court somehow undermined the plenary authority of the political branches over the entry and admission of aliens. The point is that Congress has set up the framework under which aliens may enter the United States. The Judiciary only possesses the power Congress gives it to review Executive action taken within that framework. Since petitioners have not applied for admission, they are not entitled to invoke that judicial power.

Id. at 1028 n.12.

The critical difference here is that plaintiffs have availed themselves of the "framework under which aliens may enter the United States." *Id.* Because plaintiffs have done so, this Court "possesses the power Congress gives it to review Executive action taken within that framework." *Id.* Because the Court finds *Kiyemba* inapposite, the government's argument that this Court lacks authority to order plaintiffs returned to the United States is unavailing.

It is also clear that injunctive relief is necessary for the Court to fashion an effective remedy in this case. The

credible fear interviews of plaintiffs administered pursuant to the policies in *Matter of A-B-* and the Policy Memorandum were fundamentally flawed. A Court Order solely enjoining these policies is meaningless for the removed plaintiffs who are unable to attend the subsequent interviews to which they are entitled. *See, e.g.*, *Walters v. Reno*, 145 F.3d 1032, 1050–51 (9th Cir. 1998)("[A]llowing class members to reopen their proceedings is basically meaningless if they are unable to attend the hearings that they were earlier denied.").

3. Permanent Injunction Factors Require Permanent Injunctive Relief

A plaintiff seeking a permanent injunction must satisfy a four-factor test. *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006). Plaintiffs must demonstrate they have: (1) suffered an irreparable injury; (2) that traditional legal remedies, such as monetary relief, are inadequate to compensate for that injury; (3) the balance of hardships between the parties warrants equitable relief; and (4) the injunction is not contrary to the public interest. *See Morgan Drexen, Inc. v. Consumer Fin. Prot. Bureau*, 785 F.3d 684, 695 (D.C. Cir. 2015).

Plaintiffs seek a permanent injunction, arguing that they have been irreparably harmed and that the equities are in their favor. Pls.' Mot., ECF No. 64-1 at 73–74. The government has not responded to these arguments on the merits, and rests on its

contention that the Court does not have the authority to order such relief. Defs.' Reply, ECF No. 85 at 75–78. Having found that the Court does have the authority to order injunctive relief, *supra,* at 93–104, the Court will explain why that relief is appropriate.

Plaintiffs claim that the credible fear policies this Court has found to be unlawful have caused them irreparable harm. It is undisputed that the unlawful policies were applied to plaintiffs' credible fear determinations and thus caused plaintiffs' applications to be denied. *See* Defs.' Mot., ECF No. 57-1 at 28 (stating an "asylum officer reviewed each of [plaintiffs] credible fear claims and found them wanting in light of Matter of A-B-"). Indeed, plaintiffs credibly alleged at their credible fear determinations that they feared rape, pervasive domestic violence, beatings, shootings, and death in their countries of origin. Based on plaintiffs' declarations attesting to such harms, they have demonstrated that they have suffered irreparable injuries.[32]

The Court need spend little time on the second factor: whether other legal remedies are inadequate. No relief short of enjoining the unlawful credible fear policies in this case could

[32] The country reports support the accounts of the Plaintiffs. *See* Mujahid Decl., ECF No. 10-3, Exs. K-T; Second Mujahid Decl., ECF No. 64-4 Exs. 10–13; Honduras Decl., ECF No. 64-6; Guatemala Decl., ECF No. 64-7; El Salvador Decl., ECF No. 64-8.

provide an adequate remedy. Plaintiffs do not seek monetary compensation. The harm they suffer will continue unless and until they receive a credible fear determination pursuant to the existing immigration laws. Moreover, without an injunction, the plaintiffs previously removed will continue to live in fear every day, and the remaining plaintiffs are at risk of removal.

The last two factors are also straightforward. The balance of the hardships weighs in favor of plaintiffs since the "[g]overnment 'cannot suffer harm from an injunction that merely ends an unlawful practice.'" *R.I.L-R*, 80 F. Supp. at 191 (citing *Rodriguez*, 715 F.3d at 1145). And the injunction is not contrary to the public interest because, of course, "[t]he public interest is served when administrative agencies comply with their obligations under the APA." *Id.* (citations omitted). Moreover, as the Supreme Court has stated, "there is a public interest in preventing aliens from being wrongfully removed, particularly to countries where they are likely to face substantial harm." *Nken v. Holder*, 556 U.S. 418, 436 (2009). No one seriously questions that plaintiffs face substantial harm if returned to their countries of origin. Under these circumstances, plaintiffs have demonstrated they are entitled to a permanent injunction in this case.

IV. Conclusion

For the foregoing reasons, the Court holds that it has jurisdiction to hear plaintiffs' challenges to the credible fear policies, that it has the authority to order the injunctive relief, and that, with the exception of two policies, the new credible fear policies are arbitrary, capricious, and in violation of the immigration laws.

Accordingly, the Court **GRANTS in PART and DENIES in PART** plaintiffs' cross-motion for summary judgment and motion to consider evidence outside the administrative record. The Court also **GRANTS** plaintiffs' motion for a permanent injunction. The Court further **GRANTS in PART and DENIES in PART** the government's motion for summary judgment and motion to strike.

The Court will issue an appropriate Order consistent with this Memorandum Opinion.

SO ORDERED.

Signed: Emmet G. Sullivan
United States District Judge
December 17, 2018

Backgrounder and Briefing on Matter of A-B-

This webpage was last updated in August 2018.

Briefing in the case is available here (https://uchastings.box.com/s/tt1ydliq5ttm1i2zxlz4rname4bk29s7).

CGRS Webinar from June 20, recording and slides, available by emailing CGRS-TA@uchastings.edu (mailto:CGRS-TA@uchastings.edu)

Factual Background for Ms. A.B.'s Claim for Protection

Ms. A.B. was born in El Salvador in the 1970s. She lost her parents at a young age and was subsequently separated from her siblings and placed in the care of a family friend who physically and verbally abused her. When she was in her early 20s, Ms. A.B. met the man who would become her husband. After they married, he began brutalizing her. Over the 15 years that followed, Ms. A.B.'s husband subjected her to horrific physical, sexual, and emotional violence. He beat and raped Ms. A.B. so many times that she lost count. He also frequently threatened to kill her, often brandishing a loaded gun or a knife. Ms. A.B.'s husband was violent even during her pregnancies, on one occasion threatening to hang her with a rope from the roof of their house. When they first met, Ms. A.B. was pursuing her education, but her husband forced her to cut her studies short. He constantly belittled and demeaned her verbally, treating her like a slave. Ms. A.B.'s husband also often falsely accused her of infidelity, going so far as ordering her to undress and show him her genitals so he could see if she had been with another man.

Ms. A.B.'s relationship with her husband was characterized by constant brutality and she often feared for her life. She repeatedly sought protection from the Salvadoran authorities, to no avail. While she was able to obtain two restraining orders against her husband, they went completely unenforced, and he continued to abuse and threaten her. After one particularly terrifying incident in which her husband attacked her with a large knife, Ms. A.B. went to the police and they refused to help, saying instead "if you have any dignity, you will get out of here." Heeding their advice, she left her husband, moving to a town that was two hours away from where they lived together. But he managed to find her there and the abuse continued. Ms. A.B. then sought a divorce, which resulted in escalating threats on her life. A month after the divorce was finalized, her ex-husband, accompanied by his police officer brother, accosted her and told her that the divorce meant nothing and that her life was in danger. Following this incident, Ms. A.B.'s ex-husband and men with whom he associated continued to threaten her, describing in graphic detail how they intended to kill her. One week before she left the country, her ex-husband tracked her down again and physically assaulted her. With nowhere to turn, Ms. A.B. fled El Salvador to seek protection in the United States.

Consideration of Ms. A.B.'s Asylum Claim in the United States

Upon her arrival in the United States, Ms. A.B. was screened in and permitted to apply for asylum after an Asylum Officer found that she had a credible fear of persecution in El Salvador based on the violence she had suffered at the hands of her ex-husband. Ms. A.B.'s case was sent to the Charlotte Immigration Court, one of the courts most notoriously hostile to asylum seekers, to be heard by Immigration Judge V. Stuart Couch, an adjudicator with a long history (https://www.cnn.com/2018/04/28/politics/jeff-sessions-immigration-courts-domestic-violence-asylum/) of denying asylum to domestic violence survivors – and having his decisions overturned on appeal. Judge Couch denied Ms. A.B.'s asylum application, concluding based on perceived omissions in her testimony that she was not credible and thus not eligible for asylum.

Judge Couch also rejected the legal arguments made by Ms. A.B.'s attorney. In order to be found eligible for asylum, an applicant must show that she fears persecution on account of one of five "protected grounds": race, religion, nationality, political opinion, or membership in a particular social group. In addition, in cases where the applicant's persecutor is not a government actor, she must show that her government cannot or will not protect her. In recent years, women fleeing gender-based violence have been able to obtain asylum by demonstrating that they fear persecution based on the "particular social group" ground. Survivors of domestic violence like Ms. A.B. have prevailed in cases where they have shown that their countries lack the resources or willingness to offer them protection from their abusers. In 2014, the Board of Immigration Appeals ("Board"), the appellate court with nationwide jurisdiction over immigration cases, issued a groundbreaking precedent decision in one such case, *Matter of A-R-C-G-*, ruling that women fleeing domestic violence may qualify for asylum. The Board recognized a particular social group defined by gender, nationality, and relationship status – "married women in Guatemala who are unable to leave their relationship" – finding that deeply entrenched patriarchal norms in Guatemala perpetuate widespread gender-based violence that is inflicted with impunity. This decision has been reaffirmed in numerous subsequent cases. Nevertheless, Judge Couch rejected Ms. A.B.'s very similar proposed social group supported by patriarchal conditions in El Salvador that mirror those in Guatemala.

Ms. A.B. appealed Judge Couch's decision, and her case was then heard by the Board. A three-member panel at the Board unanimously reversed Judge Couch's denial, finding Ms. A.B. eligible for asylum based on her experience of domestic violence. The Board overturned Judge Couch's negative credibility finding,

concluding that Ms. A.B. had in fact testified credibly and that the minor omissions in her testimony were a result of the traumatic violence she had endured and its lasting psychological impact. The Board noted that Ms. A.B. had provided extensive documentation corroborating her testimony. The Board also found that Ms. A.B.'s proposed particular social group met the legal requirements for asylum, noting similarities between her case and the Board's *A-R-C-G-* decision. The Board sent the case back to the court in Charlotte to allow it to complete the background checks necessary for Ms. A.B. to be granted asylum.

Attorney General's Rare Review of Ms. A.B.'s Case

The Department of Homeland Security (DHS) completed Ms. A.B.'s background checks, but in a departure from usual practice, Judge Couch refused to issue a new decision in the case. He instead attempted to "recertify" the case *back* to Board for further consideration. In his order, Couch questioned the continued "legal validity" of *A-R-C-G-*. Seven months later, on March 7, 2018, Attorney General Jefferson B. Sessions took advantage of a rarely used power to refer the case to himself for a decision. Sessions requested briefing from Ms. A.B., opposing counsel at DHS, and advocates more broadly on the issue of "whether, and under what circumstances, being a victim of private criminal activity constitutes a cognizable 'particular social group' for purposes of an application for asylum or withholding of removal," a related form of fear-based immigration relief. Ms. A.B. did not base her social group on her identity as a "victim of private criminal activity," and nowhere in the Board's decision was such a group referenced. Sessions' question appeared to contest a legal argument that was never raised. The framing of the question was particularly troubling, because it seemed to be challenging well-established legal principles, some which have existed in legal precedent for decades. For example, adjudicators have long held that victims of persecution by nonstate actors may be found eligible for asylum in situations where their government is unable or unwilling to protect them. The courts have also recognized that harm inflicted by nonstate actors can be considered persecution, even if it also constitutes a crime. Both Ms. A.B. and DHS requested that the Attorney General clarify the briefing question, which he declined to do.

Ms. A.B. contended that due to procedural irregularities the Attorney General was never actually in a position to refer her case to himself and therefore did not have jurisdiction to consider it. Jurisdictional issues aside, the parties agreed that it would have been more appropriate to send the case back to the Board to allow it to consider the issue in the first instance. With respect to her substantive eligibility for asylum, Ms. A.B. argued that the Attorney General should affirm the Board's

decision finding her eligible for asylum and reaffirm the validity of *A-R-C-G-* and its holding that a successful claim for asylum can be based on domestic violence. More broadly, Ms. A.B. and several amicus parties urged the Attorney General to uphold well-settled U.S. law recognizing that asylum seekers can qualify for protection based on persecution perpetrated by nonstate actors in situations where the applicant's government is unwilling or unable to provide protection. DHS agreed that the Attorney General should not overturn *A-R-C-G-* but took no position on Ms. A.B.'s particular claim.

Highlighting the importance of this case, twelve amicus briefs were filed, eleven in support of Ms. A.B., by parties that included:

- American Bar Association
- Catholic Legal Immigration Network
- George Washington University Immigration Clinic
- Harvard Immigration and Refugee Clinical Program et al.
- Former Immigration Judges and Board of Immigration Appeals Members
- Immigration Law Professors
- Innovation Law Lab
- National Immigrant Justice Center
- Tahirih Justice Center et al.
- Private Immigration Attorneys David B. Gardner and the firm of Gonzalez Olivieri et al.

These advocates highlighted the problematic lack of transparency in the Attorney General referral process, asking for reform. They urged the Attorney General to affirm longstanding legal principles recognizing that individuals fleeing private persecution – including not only women fleeing a range of gender harms but also those fleeing religious or sexual orientation related persecution, who could also be impacted by a decision in this case – may qualify for protection if they meet their evidentiary burden. Moreover, they expressed concern that the Attorney General prejudged the broader legal principles implicated in the case and Ms. A.B.'s individual asylum claim, in violation of her due process rights. Sessions has long exhibited open hostility towards immigrants and asylum seekers, as Attorney General and previously as a U.S. Senator. He has also expressed particular skepticism towards asylum claims such as Ms. A.B.'s that are based on gender-related persecution, rather than, for example, religious-based persecution.

Attorney General Attempts to Roll Back Protections for Women Refugees

As feared, in his opinion issued on June 11, 2018, the Attorney General abrogated *A-R-C-G-* , using (https://cgrs.uchastings.edu/news/attorney-general-sessions-attempts-close-door-women-refugees)Ms. A.B.'s case as a political vehicle to undermine asylum protections for women and others fleeing persecution at the hands of nonstate actors. While the legal battle continues, Ms. A.B., who thought her odyssey for protection had ended when the Board reversed the immigration judge's denial, is fearful and anguished by this turn of events, and the uncertainty around her case and her future safety. Ms. A.B. also remains separated from her three children. While her case is pending, she is unable to petition for them to join her in the United States.

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ANTECEDENTES Y MEMORIALES EN ASUNTO DE A-B-

Los memoriales presentados en *Asunto de A-B-* se encuentran disponibles en inglés aquí (https://uchastings.box.com/s/tt1ydliq5ttm1i2zxlz4rname4bk29s7). La **Hoja informativa sobre Asunto de A-B-** se encuentra disponible en línea tanto en inglés (https://cgrs.uchastings.edu/sites/default/files/Matter%20of%20A-B-_One%20Pager_Non%20Legal%20Audiences_FINAL_3.PDF) como en español (https://cgrs.uchastings.edu/sites/default/files/Matter%20of%20A-B-_One%20Pager_Non%20Legal%20Audiences_Spanish_FINAL.pdf).

Este escrito de antecedentes fue actualizado por última vez en agosto de 2018.

HECHOS QUE FUNDAMENTAN LA SOLICITUD DE PROTECCIÓN DE LA SRA. A.B.

La Sra. A.B. nació en la década de los setentas en El Salvador. Sus padres murieron cuando era una niña y como resultado, fue separada de sus hermanos y entregada a un amigo de la familia que la abusó física y verbalmente mientras crecía. Tiempo después, cuando la Sra. A.B. tenía un poco más de 20 años, conoció al hombre que se convertiría en su esposo. Durante 15 años, el esposo de la Sra. A.B. la sometió a una violencia emocional, sexual y física de niveles horripilantes. La golpeó y violó un incontable número de veces. Con frecuencia, también amenazaba con matarla, a menudo mostrando un cuchillo o arma de fuego cuando lo hacía. El esposo de la Sra. A.B. era violento aún cuando ella estaba embarazada, llegando incluso en una oportunidad a amenazarla con colgarla del techo de la casa con una soga. La trataba como una esclava, degradando y

humillándola verbalmente de manera constante. Su esposo también la acusaba falsamente de serle infiel y le ordenaba que se desvistiera y le mostrara sus genitales, supuestamente para poder verificar si había estado con otro hombre.

Uno de los elementos constantes en el matrimonio de la Sra. A.B. fue la violencia brutal a la que se le sometió, lo que la llevó a temer por su vida con frecuencia. Acudió a las autoridades salvadoreñas para que la protegieran varias veces, sin resultado alguno. Mientras que logró obtener dos órdenes de restricción contra su esposo, nunca se ejecutaron y el abuso y las amenazas continuaron. Después de un incidente particularmente aterrador en el que la atacó con un cuchillo, la Sra. A.B. fue a la policía, pero se rehusaron a ayudarla, diciéndole que “si tuviera algo de dignidad, se iría de allí.” Siguiendo sus consejos, dejó a su esposo y se mudó a una ciudad a más de dos horas de distancia del hogar que compartían. No obstante, el logró encontrarla ahí y el abuso continuó. La Sra. A.B. buscó obtener un divorcio, lo que causó que las amenazas contra su vida se intensificaran. Un mes después de que el divorcio se finalizara, su exesposo, acompañado por uno de sus hermanos que es policía, la confrontó y le dijo que el divorcio no significaba nada y que su vida seguía corriendo peligro. Después de este incidente, el exesposo de la Sra. A.B., y los hombres con los que asociaba, continuaron amenazándola y describiendo con detalles gráficos cómo planeaban matarla. Una semana antes de abandonar el país, su exesposo logró encontrarla nuevamente y la abusó físicamente. Sin ninguna otra opción a la que recurrir, la Sra. A.B. huyó de El Salvador en busca de protección en los Estados Unidos.

PRIMERAS ETAPAS DEL PROCESO DEL CASO DE ASILO DE LA SRA. A.B. EN ESTADOS UNIDOS

Después de llegar a Estados Unidos, la Sra. A.B. fue evaluada por un oficial de asilo que determinó que tenía un temor creíble de ser perseguida en El Salvador debido a la violencia que experimentó a manos de su exesposo. El caso de la Sra. A.B. fue enviado a la Corte de Inmigración de Charlotte (Carolina del Norte), una de las cortes más famosas por su hostilidad hacia los solicitantes de asilo, para ser procesado por el juez de inmigración V. Stuart Couch, quién cuenta con un largo historial de negar asilo a víctimas de violencia doméstica y de tener sus decisiones revertidas en apelación. El juez Couch negó la solicitud de asilo de la Sra. A.B., argumentando haber percibido inconsistencias en su testimonio que ponían en duda su credibilidad, haciéndola así inelegible para recibir asilo.

El juez Couch también rechazó los argumentos legales presentados por los abogados de la Sra. A.B.. Para poder ser elegible para recibir asilo, la aplicante debe demostrar que teme ser perseguida por razón de una de las “bases protegidas”, la cuales son: raza, religión, nacionalidad, opinión política, o pertenencia en un grupo social determinado. Además de esto, en los casos en los que el autor de la violencia es un agente no estatal, debe demostrar también que su gobierno no puede protegerla o no la protegerá. En los últimos años, las mujeres que llegan huyendo de violencia de género han podido obtener asilo basándose en su pertenencia en un “grupo social determinado”. Las sobrevivientes de violencia doméstica como la señora A.B. han vencido en casos en lo que han demostrado que sus países no tienen los recursos o la voluntad para protegerlas de sus abusadores. En 2014, la Junta de Apelaciones de Inmigración, la corte de apelaciones con jurisdicción nacional sobre casos de inmigración, emitió una sentencia en uno de estos casos, conocido como Asunto de A-R-C-G-, que estableció un precedente innovador al encontrar que las mujeres que huyen de violencia doméstica pueden ser elegibles para recibir asilo. La Junta reconoció un grupo social determinado definido por elementos de género, nacionalidad, y situación sentimental – “mujeres guatemaltecas casadas que no pueden abandonar su relación” – encontrando que en Guatemala las normas patriarcales están tan arraigadas que perpetúan los ciclos de violencia contra las mujeres y garantizan su impunidad. Esta decisión fue reafirmada en muchos casos subsecuentes. No obstante, el Juez Couch negó el grupo social determinado que presentó la señora A.B., el cual además de ser similar al de A-R-C-G-, estaba respaldado por las condiciones patriarcales en El Salvador, las cuales son similares a las encontradas en Guatemala.

La Sra. A.B. apeló la decisión del juez Couch y su caso fue enviado a la Junta. Un panel de tres de sus jueces revirtió de manera unánime la decisión negativa del juez Couch, encontrando que la Sra. A.B. es elegible para recibir asilo debido a su experiencia como sobreviviente de violencia doméstica. A diferencia del juez Couch, la Junta consideró que el testimonio de la Sra. A.B. fue creíble y que las omisiones menores que se presentaron se dieron como resultado de la violencia traumática qué sufrió, y las secuelas psicológicas de la misma. La Junta notó que la extensa documentación que proporcionó la Sra. A.B. corroboraba su testimonio. También reconoció que el grupo social determinado propuesto por la Sra. A.B. cumplía con los requisitos del asilo, resaltando las similitudes entre su caso y la decisión de la

Junta en Asunto de A-R-C-G-. La Junta envió el caso de regreso a la corte de inmigración en Charlotte para que se realizara la verificación de antecedentes necesaria para que la Sra. A.B. pudiera recibir asilo.

LA EXTRAÑA REVISIÓN DEL CASO DE LA SRA. A.B. POR PARTE DEL FISCAL GENERAL

El Departamento de Seguridad Nacional (DHS, por sus siglas en inglés) completó la verificación de antecedentes de la Sra. A.B. Aun así, y en contravía a todas las prácticas comunes, el juez Couch se rehusó a emitir una nueva decisión en su caso. En cambio, intentó reenviar el caso nuevamente la Junta para su reconsideración, cuestionando la "validez legal" de A-R-C-G-. Siete meses después, el 7 de marzo de 2018, el entonces fiscal general Jefferson B. Sessions se aprovechó de un poder poco invocado para auto referirse el caso de la Sra. A.B. y así poder emitir una decisión. Al hacerlo, Sessions invitó a la Sra A.B., los abogados de DHS y diferentes activistas para que presentaran memoriales en los que dieran sus opiniones sobre la "viabilidad y circunstancias bajo las cuales ser víctima de un crimen cometido por un actor privado puede constituirse en un 'grupo social determinado' reconocible bajo los parámetros de una aplicación de asilo o suspensión de remoción".

La Sra. A.B. no basó su grupo social en su identidad como "víctima de actividad criminal privada" y en ninguna parte de la decisión de la Junta se hace referencia a dicho grupo. La pregunta de Sessions levantó un argumento legal que no había sido alegado. La manera como se planteó la pregunta fue particularmente problemática ya que parecía retar principios legales reconocidos, algunos de los cuales han sido respaldados con precedentes judiciales a lo largo de varias décadas. Por ejemplo, los jueces y adjudicadores han reconocido por mucho tiempo ya que las víctimas de persecución por parte de agentes no estatales pueden ser elegibles para recibir asilo cuando quiera que el gobierno no tuviera la capacidad o voluntad para protegerlas. Las cortes también han reconocido que el daño infligido por agentes no estatales puede ser considerado como persecución, incluso si también puede considerarse como un crimen particular. Tanto la Sra. A.B. como DHS pidieron al fiscal general que aclarara la pregunta que quería se respondiera mediante los memoriales. A pesar de esto, se negó a hacerlo.

La Sra. A.B. alegó que, debido a irregularidades procedimentales, el fiscal general nunca estuvo en la posición para auto referirse el caso y, por tanto, no tenía jurisdicción para emitir una decisión sobre el mismo. Además de los asuntos jurisdiccionales, las partes acordaron que hubiera sido más apropiado enviar el caso

de regreso a la Junta de Apelaciones de Inmigración y permitir que se resolviera en esa instancia. Con respecto al análisis sustancial sobre su elegibilidad para recibir asilo, la Sra. A.B. argumentó que el fiscal general debía confirmar la decisión de la junta que la encontró elegible, y reafirmar la validez de A-R-C-G- y su conclusión legal que las solicitudes de asilo basadas en violencia doméstica pueden ser exitosas.

De manera más general, la Sra. A.B. y varios de los *amicus curiae* urgieron al fiscal general para que defendiera la ya establecida ley de los Estados Unidos que reconoce que los solicitantes de asilo pueden ser elegibles para recibir protección debido a la persecución perpetrada por agente no estatales en situaciones en las que el gobierno del solicitante no tuviera la capacidad o voluntad para proporcionar protección. Si bien el DHS estuvo de acuerdo en que no se revertiera el precedente establecido en A-R-C-G-, no tomó ninguna posición en el caso particular de la Sra. A.B.

Doce escritos en calidad de *amicus curiae* fueron presentados en el caso. Once de ellos apoyaron a la Sra. A.B., e incluyeron a las siguientes partes:

- American Bar Association
- Catholic Legal Immigration Network
- George Washington University Immigration Clinic
- Harvard Immigration and Refugee Clinical Program et al.
- Antiguos Jueces de Inmigración y de la Junta de Apelación de Inmigración
- Profesores de derecho de inmigración
- Innovation Law Lab
- National Immigrant Justice Center
- Tahirih Justice Center et al.
- David B. Gardner, abogado privado de inmigración, y la firma de inmigración Gonzalez Olivieri et al.

Todos estos activistas resaltaron la problemática falta de transparencia en el proceso utilizado por el fiscal para auto referirse el caso. Urgieron al fiscal general a que reconociera los principios legales establecidos que dictan que los individuos que huyen de persecución privada pueden ser elegibles para recibir asilo siempre que cumplan con la carga probatoria requerida. Esto incluyendo no solo a mujeres que huyen de una variedad de formas de violencia de género, sino también a aquellos que son perseguidos por motivos religiosos o de orientación sexual, ya que también podían verse impactados por la decisión. Más aun, expresaron

preocupación por el hecho que el fiscal general estuviera prejuzgando tanto los principios legales generales implicados en el caso, como la solicitud de asilo individual de la Sra. A.B., lo cual iría en contravía de su derecho al debido proceso.

A lo largo del tiempo, tanto en su calidad de fiscal general, como de senador, Sessions ha demostrado una actitud hostil hacia inmigrantes y solicitantes de asilo. También ha expresado escepticismo contra las solicitudes de asilo como las de la Sra. A.B. que se basan en persecución de género, favoreciendo, por ejemplo, las solicitudes basadas en persecución religiosa.

EL FISCAL GENERAL INTENTA RETROCEDER LAS PROTECCIONES PARA MUJERES REFUGIADAS

Como se temió, en la decisión emitida el 11 de junio de 2018, el Fiscal General revocó Asunto de A-R-C-G-, utilizando el caso de la Sra. A.B. como un instrumento político para socavar las protecciones de asilo para las mujeres u otros que son perseguidos por agentes no estatales. Mientras la batalla legal avanza, la Sra. A.B., quién pensó que su odisea para encontrar protección había terminado cuando la Junta revirtió la primera decisión del juez Couch, se encuentra ansiosa y temerosa por este inesperado giro en los acontecimientos, y por la incertidumbre alrededor del caso y su propio futuro. La Sra. A.B. también continúa estando separada de sus tres hijos. Mientras su caso esté pendiente, no podrá pedirlos para que estén junto a ella en Estados Unidos.

UCHASTINGS
CENTER FOR GENDER AND REFUGEE STUDIES
200 McAllister Street
San Francisco, CA 94102

(http://www.uchastings.edu)

From: Lafferty, John L <John.L.Lafferty@uscis.dhs.gov>
Sent: Wednesday, December 19, 2018 11:12 PM
To: RAIO - Asylum HQ; RAIO - Asylum Field Office Managers; RAIO - Asylum Field Office Staff
Cc: RAIO - Executive Leadership; [redacted]; [redacted]; [redacted]
Subject: Today's US DC District Court decision in Grace v. Whitaker and impact on CF processing
Attachments: 2018-06-18-PM-602-0162-USCIS-Memorandum-Matter-of-A-B_Redacted_ 12-19-201....pdf; 105 Summ Judgmnt Order.pdf; 106 Memorandum Opinion.pdf

Asylum Division staff,

On December 17, 2018, the U.S. District Court for the District of Columbia, issued an opinion in *Grace v. Sessions*, No. 18-cv-01853, that impacts the Attorney General's opinion in *Matter of A-B-*, 27 I&N Dec. 316 (A.G. 2018) and the USCIS Policy Memorandum entitled, "Guidance for Processing Reasonable Fear, Credible Fear, Asylum, and Refugee Claims in Accordance with *Matter of A-B-*."

While some aspects of *Matter of A-B-* remain binding precedent, certain changes to USCIS policy must immediately take effect as a result of the Court's decision. As such, and as described below, please see the attached USCIS Policy Memorandum with the provisions enjoined by the court redacted.

Effective immediately, with regard to credible fear processing:

1) There is no general rule against claims involving domestic violence and gang-related violence as a basis for membership in a particular social group. Each claim must be evaluated on its own merits.
2) Asylum officers must determine whether the government in the country of feared persecution is "unable or unwilling to control a persecutor," and cannot use the "condoned" or "complete helplessness" formulation as suggested in *Matter of A-B-*.
3) There is no general rule that proposed particular social groups whose definitions involve an inability to leave a domestic relationship are circular and therefore not cognizable. While a particular social group cannot be defined exclusively by the claimed persecution, each particular social group should be evaluated on its own merits. *See Matter of M-E-V-G-,* 26 I. & N. Dec. 227, 242 (BIA 2014). If the proposed social group definition contains characteristics independent from the feared persecution, the group may be valid. Analysis as to whether a proposed particular social group is cognizable should take into account the independent characteristics presented in each case.
4) In evaluating whether the applicant has established a credible fear of persecution, asylum officers cannot require an applicant to formulate or delineate particular social groups. Asylum officers must consider and evaluate possible formulations of particular social groups.
5) Asylum officers may not disregard contrary circuit law, and may not limit their analysis to the law of the circuit where the alien is located during the credible fear process.

Attached is the court's Order, which was issued today, December 19, 2018. In addition to the above, the Order prevents defendants from removing any plaintiffs currently in the U.S. without first providing each of them a new credible fear process consistent with the court's Order. The Order also requires DHS to bring back to the U.S. any plaintiff removed pursuant to an ER order and provide each such plaintiff with a new credible fear process consistent with the court's

Order. We will need to coordinate with ICE to make sure that all such plaintiffs receive a new CF process. The Order also orders defendants to provide a status report detailing any steps we have taken to comply with this injunction.

Any questions should be directed through your chain of command to Asylum HQ.

Thank you for your continued hard work and dedication to the mission.

John

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Washington, DC 20529-2100

U.S. Citizenship and Immigration Services

July 11, 2018 **PM-602-0162**

Policy Memorandum

SUBJECT: Guidance for Processing Reasonable Fear, Credible Fear, Asylum, and Refugee Claims in Accordance with *Matter of A-B-*

Purpose
This policy memorandum (PM) provides guidance to U.S. Citizenship and Immigration Services (USCIS) officers for determining whether a petitioner is eligible for asylum or refugee status in light of the Attorney General's decision in *Matter of A-B-*. The guidance in this memorandum supersedes all previous guidance dealing specifically with asylum and refugee eligibility that is inconsistent with this guidance.

Scope
This PM applies to and shall be used to guide determinations by all USCIS employees. USCIS personnel are directed to ensure consistent application of the reasoning in *Matter of A-B-* in reasonable fear, credible fear, asylum, and refugee adjudications.

Authority
Sections 101(a)(42), 207, 208, and 235 of the Immigration and Nationality Act (INA) (8 U.S.C. §§ 1101(a)(42), 1157, 1158, 1225); Section 451 of the Homeland Security Act of 2002 (6 U.S.C. § 271); Title 8 Code of Federal Regulations (8 C.F.R.) Parts 207, 208, and 235.

I. Background

On June 11, 2018, the Attorney General published *Matter of A-B-*, 27 I&N Dec. 316 (A.G. 2018), which addresses how to adjudicate protection claims based on "membership in a particular social group" and clarifies the substantive elements of eligibility. The purpose of this memorandum is to provide guidance to asylum and refugee officers on the application of this decision while processing reasonable fear, credible fear, asylum, and refugee claims.[1]

In the decision, the Attorney General overruled the Board of Immigration Appeals' (BIA) precedent decision in *Matter of A-R-C-G-*, 26 I&N Dec. 388 (BIA 2014), on which the BIA had relied in finding

[1] Although the alien in *Matter of A-B-* claimed asylum and withholding of removal, the Attorney General's decision and this PM apply also to refugee status adjudications and reasonable fear and credible fear determinations. *See* INA §§ 207(c)(1), 208(b)(1), 101(a)(42)(A), 235(b)(1); 8 C.F.R. § 208.31.

A-B- eligible for asylum. The Attorney General found that, in analyzing the particular social group at issue in *A-R-C-G-*, "married women in Guatemala who are unable to leave their relationship," the BIA failed to correctly apply the legal standards for a cognizable particular social group set forth in *Matter of M-E-V-G-*, 26 I&N Dec. 227 (BIA 2014), and *Matter of W-G-R-*, 26 I&N Dec. 208 (BIA 2014), *aff'd in relevant part and vacated in part on other grounds in Reyes v. Lynch*, 842 F.3d 1125 (9th Cir. 2016); *cert. denied*, 138 S. Ct. 736 (2018), which require that a group be composed of members who share a common immutable characteristic, be defined with particularity, and be socially distinct within the society in question.

In addition, the Attorney General stressed the requirement that membership in the particular social group must be a central reason for the persecution, and that officers must consider, where applicable and consistent with the regulations, whether internal relocation is reasonably available to avoid future persecution before granting asylum. *See Matter of A-B-*, 27 I&N Dec. at 337-39, 343-45. In cases where the persecutor is a non-government actor, the applicant must show the harm or suffering was inflicted by persons or an organization that his or her home government is unwilling or unable to control, [redacted].

Section 103(a) of the INA provides that "determination and ruling by the Attorney General with respect to all questions of law shall be controlling." Further, under 8 C.F.R. §§ 103.10(b) and 1003.1(g), "decisions of the [BIA], and decisions of the Attorney General, shall be binding on all officers and employees of the Department of Homeland Security" and "shall serve as precedents in all proceedings involving the same issue or issues." Accordingly, the decision in *Matter of A-B-* was effective immediately and is binding on all USCIS officers. Officers should not cite or rely upon *Matter of A-R-C-G-* in any adjudications going forward. Officers should continue to follow other binding precedents [redacted] including *Matter of M-E-V-G-* and *Matter of W-G-R-*, both of which were cited favorably in the Attorney General's decision.

II. USCIS Officers' General Duties

To be eligible for asylum or refugee status, the alien must establish in part that he or she was persecuted or has a well-founded fear of persecution on account of one of the protected grounds, is unable or unwilling to avail himself or herself of the protection of his or her country of nationality (or, if stateless, country of last habitual residence), and does not fall within one of the grounds for ineligibility. Second, if eligibility is established, the USCIS officer must then consider whether or not to exercise discretion to grant the application.

In *Matter of A-B-*, the Attorney General reaffirmed the duty to determine whether the facts of each case satisfy all the elements for asylum. *Matter of A-B-*, 27 I&N Dec. at 340 ("The respondent must present facts that undergird each of these elements, and the asylum officer, immigration judge, or the Board has the duty to determine whether those facts satisfy all of the legal requirements for asylum."). The officer must determine the applicant's credibility in making findings of fact. *Id.* at 341–42. If an asylum application is fatally flawed on one essential ground—"for example, for failure to show membership in a proposed social group"—then a USCIS officer need not examine the remaining elements for asylum. *Id.* at 340.

III. Proving Persecution or a Well-Founded Fear of Persecution Based on Membership in a Particular Social Group

[redacted]

[redacted] Claims based on membership in a particular social group require [redacted]: (1) membership in a particular group, which is composed of members who share a common immutable characteristic, is defined with particularity, and is socially distinct within the society in question; (2) that her membership in that group is a central reason for her persecution; and (3) that the alleged harm is inflicted by the government of her home country or by persons that the government is unwilling or unable to control. INA § 208(b)(1)(B)(i); *Matter of A-B-*, 27 I&N Dec. at 320.

A. Legal Framework for Analysis of Particular Social Group Claims

i. Immutability

The members of a proposed social group must have "a common immutable characteristic." *Matter of A-B-*, 27 I&N Dec. at 320; *see also Matter of M-E-V-G-*, 26 I&N Dec. at 237-38 ("Our interpretation of the phrase 'membership in a particular social group' incorporates the common immutable characteristic standard set forth in *Matter of Acosta*, 19 I&N Dec. [211,] 233 [(BIA 1985)], because members of a particular social group would suffer significant harm if asked to give up their group affiliation, either because it would be virtually impossible to do so or because the basis of affiliation is fundamental to the members' identities or consciences.").

ii. Particularity

The Attorney General reaffirmed that the particular social group also must be defined with particularity. *Matter of A-B-*, 27 I&N Dec. at 320, 335-36. A group is particular if the "group can accurately be described in a manner sufficiently distinct that the group would be recognized, in the society in question, as a discrete class of persons." *Id.* at 330 (citing *Matter of E-A-G-*, 24 I&N Dec. 591, 594 (BIA 2008)). A particular social group must not be "amorphous, overbroad, diffuse, or subjective," and "not every 'immutable characteristic' is sufficiently precise to define a particular social group." *Id.* at 335 (citing *Matter of M-E-V-G-*, 26 I&N Dec. at 239). [redacted] Officers must analyze each case on its own merits in the context of the society where the claim arises. [redacted]

[redacted]

iii. Social Distinction

The Attorney General also reaffirmed that to satisfy the social distinction requirement, a particular social group "must be perceived as a group by society." *Id.* at 330. "[I]f the common immutable characteristic were known, those with the characteristic in the society in question would be meaningfully distinguished from those who do not have it." *Id.* (citing *Matter of M-E-V-G-*, 26 I&N Dec. at 238). In other words, "[m]embers of a particular social group will generally understand their own affiliation with that group, as will other people in their country." *Id.*

[redacted] As with all proposed particular social groups, officers should carefully apply the statutory factors to determine whether the group qualifies under the law.

[2] Asylum officers are reminded that interviews are to be conducted in a nonadversarial manner with the purpose to elicit all relevant and useful information bearing on the applicant's eligibility for asylum. *See* 8 C.F.R. § 208.9(b).

iv. Defined Independently of the Persecution at Issue

The Attorney General reaffirmed in *Matter of A-B-* that, to be cognizable, a particular social group "must exist independently of the harm asserted." 27 I&N Dec. at 334; *see also id.* at 335 ("The individuals in the group must share a narrowing characteristic other than their risk of being persecuted" (quoting *Rreshpja v. Gonzales*, 420 F.3d 551, 556 (6th Cir. 2005))). This requirement is essential because otherwise, "the definition of the group moots the need to establish actual persecution." *Id.*

[redacted]

[redacted]

B. Proving Persecution, Nexus, and Internal Relocation

i. Persecution

Applicants must demonstrate past persecution or the requisite likelihood of future persecution.[3] The Attorney General observed that "persecution" consists of three elements: (1) it involves "an intent to target a belief or characteristic," (2) "the level of harm must be severe," and (3) "the harm or suffering must be inflicted either by the government of a country or by persons or an organization that the government was unable or unwilling to control." *Matter of A-B-*, 27 I&N Dec. at 337 (quotation marks omitted); *see also id.* (observing that "private criminals are more often motivated by greed or vendettas than by an intent to 'overcome the protected characteristic of the victim'" (quoting *Matter of Kasinga*, 21 I&N Dec. 357, 365 (BIA 1996) (alterations omitted))).

[3] Persecution is defined as "a threat to the life or freedom of, or the infliction of suffering or harm upon, those who differ in a way regarded as offensive." *Matter of Acosta*, 19 I&N Dec. 211, 222 (BIA 1985), *modified on other grounds*, *Matter of Mogharrabi*, 19 I&N Dec. 439 (BIA 1987). As used in section 101(a)(42)(A) of the INA, the word "persecution" "clearly contemplates that harm or suffering must be inflicted upon an individual . . . for possessing a belief or characteristic a persecutor seeks to overcome." *Id.* at 223, *as modified by Matter of Kasinga*, 21 I&N Dec. 357, 365 (BIA 1996); *see Matter of A-B-*, 27 I&N Dec. at 337 (citing *Matter of Kasinga*). It "does not embrace harm arising out of civil strife or anarchy," a definition specifically rejected by Congress by excluding the term "displaced persons" from the Senate's version of the Refugee Act of 1980. *Id.*

In a case where the alleged persecutor is not affiliated with the government, the applicant must show the government is unable or unwilling to protect him or her. *Id.* at 337 [redacted]

ii. Nexus

Membership in the particular social group must also be a central reason for the persecution. Aliens may suffer threats to their lives or freedom, or experience suffering or harm for a number of reasons, including social, economic, family, or personal circumstances. But, as the Attorney General emphasized in *Matter of A-B-*, "the asylum statute does not provide redress for all misfortune." *Id.* at 318. The asylum statute was not intended as a remedy for "the numerous personal altercations that invariably characterize economic and social relationships." *Id.* at 322. As such, when a private actor inflicts violence based on a personal relationship with the victim, the victim's membership in a larger group often will not be "one central reason" for the abuse. *Id.* at 338–39. In a particular case, the evidence may establish that a victim of domestic violence was attacked based solely on her preexisting personal relationship with her abuser. Also, even if the persecutor is a member of the government, there is no governmental nexus if the dispute is a "purely personal matter." *Id.* at 339 n.10.

iii. Internal Relocation

All officers must also consider whether internal relocation in the alien's home country presents a reasonable alternative before granting asylum or refugee status. *Id.* at 345 ("Beyond the standards that victims of private violence must meet in proving refugee status in the first instance, they face the

additional challenge of showing that internal relocation is not an option (or in answering DHS's evidence that relocation is possible). When the applicant has suffered personal harm at the hands of only a few specific individuals, internal relocation would seem more reasonable than if the applicant were persecuted, broadly, by her country's government."). If an asylum applicant does not show past persecution, then he or she "bear[s] the burden of establishing that it would not be reasonable for him or her to relocate, unless the persecution is by a government or government-sponsored." 8 C.F.R. § 208.13(b)(3)(i). If the asylum applicant does establish past persecution or if the persecutor is a government or is government-sponsored, then the officer must presume that internal relocation is unreasonable "unless the Service establishes by a preponderance of the evidence that, under all the circumstances, it would be reasonable for the applicant to relocate." *Id.* § 208.13(b)(3)(ii). In cases where internal relocation presents a reasonable solution, the officer should deny the applicant's claim consistent with the regulations. *Id* § 208.13(b)(1)(i)(B), (b)(2)(ii).

C. Evaluating Credibility

An officer must also take into account an applicant's overall credibility when adjudicating a reasonable fear, credible fear, asylum, or refugee claim. There is no presumption of credibility for such claims. Rather, the applicant must demonstrate that he or she is credible. A negative credibility determination alone is sufficient to deny an asylum application and, consequently, to issue a negative credible fear or reasonable fear determination. *See* INA §§ 208(b)(1)(B)(iii), 235(b)(1)(B)(v), 241(b)(3)(C).

To determine whether an applicant or a witness is credible, the officer must consider the totality of the circumstances and all relevant factors, including the demeanor, candor, or responsiveness of the applicant; the inherent plausibility of the applicant's account; the consistency between the applicant's written and oral statements; and any inaccuracies or falsehoods in such statements. INA § 208(b)(1)(B)(iii); *see also Matter of J-Y-C*, 24 I&N Dec. at 262. Whether the inconsistencies, inaccuracies, or falsehoods go to the heart of the applicant's claim are irrelevant. INA § 208(b)(1)(B)(iii); *see also Matter of J-Y-C*, 24 I&N Dec. at 262.

IV. Exercising Discretion

Finally, the Attorney General emphasized in *Matter of A-B-* that asylum is a *discretionary* form of relief from removal. Therefore, once an officer has determined that an applicant is eligible for asylum, he or she must then decide whether to favorably exercise discretion by granting asylum. "[A] favorable exercise of discretion is a discrete requirement for the granting of asylum and should not be presumed or glossed over solely because an applicant otherwise meets the burden of proof for asylum eligibility under the INA." *Id.* at 345 n.12.

In exercising discretion, officers should consider any relevant factor, including but not limited to: "the circumvention of orderly refugee procedures; whether the alien passed through any other countries or arrived in the United States directly from her country; whether orderly refugee procedures were in fact available to help her in any country she passed through; whether he or she made any attempts to seek asylum before coming to the United States; the length of time the alien remained in a third country; and his or her living conditions, safety, and potential for long-term residency there." *Id.* (citing *Matter of Pula*, 19 I&N Dec. 467, 473–74 (BIA 1987)). Of particular note, the BIA has held that unlawful entry

"is a proper and relevant discretionary factor" and can even be a "serious adverse factor," but "should not be considered in such a way that the practical effect is to deny relief in virtually all cases" and that "the totality of the circumstances and actions of an alien in his flight from the country where he fears persecution should be examined in determining whether a favorable exercise of discretion is warranted." *Pula*, 19 I&N at 473. The BIA has also instructed that "[t]he danger of persecution will outweigh all but the most egregious adverse factors." *Matter of Kasinga*, 21 I&N Dec. 357, 367 (BIA 1996).

Specifically, USCIS personnel may find an applicant's illegal entry, including any intentional evasion of U.S. authorities, and including any conviction for illegal entry where the alien does not demonstrate good cause for the illegal entry, to weigh against a favorable exercise of discretion. In particular, "the circumvention of orderly refugee procedures" factor may take into account whether the alien entered the United States without inspection and, if not, whether the applicant had other ways to lawfully enter this country. For example, the applicant might show that the illegal entry was necessary to escape imminent harm and that he or she was thereby prevented from presenting himself or herself at a designated United States POE. An officer should consider whether the applicant demonstrated ulterior motives for the illegal entry that are inconsistent with a valid asylum claim that the applicant wished to present to U.S. authorities.

V. Credible Fear and Reasonable Fear Interviews

When aliens who are inadmissible under INA § 212(a)(6)(C) or § 212(a)(7) indicate either an intention to apply for asylum under INA § 208 or a fear of persecution or torture, an asylum officer will conduct a credible fear interview. INA § 235(b)(1)(A)(ii). Credible fear means a "significant possibility, taking into account the credibility of the statements made by the alien in support of the alien's claim and such other facts as are known to the officer, that the alien could establish eligibility for asylum under section 208." *Id.* § 235(b)(1)(B)(v).

An asylum officer will conduct a reasonable fear interview when an alien is subject to either, (1) a final administrative removal order under INA § 238(b) or (2) a prior reinstated order of removal, exclusion, or deportation under INA § 241(a)(5), and indicates a fear of persecution or torture. The "reasonable possibility" standard is the same standard required to establish eligibility for asylum (the "well-founded fear" standard). The reasonable fear standard in this context is used not as part of an eligibility determination for asylum, but rather as a screening mechanism to determine whether an individual may be able to establish entitlement in Immigration Court to INA § 241(b)(3) withholding of removal, or withholding or deferral of removal pursuant to the regulations implementing the U.S. obligations under Article 3 of the Convention against Torture.

When conducting a credible fear or reasonable fear interview, an asylum officer must determine what law applies to the applicant's claim. The asylum officer should apply all applicable precedents of the Attorney General and the BIA, *Matter of E-L-H-*, 23 I&N Dec. 814, 819 (BIA 2005), which are binding on all immigration judges and asylum officers nationwide. [redacted]

[redacted]

Matter of A-B-, as discussed above in Section III, explained the standards for "eligibility for asylum under section 208" based on a particular social group. Therefore, if an applicant claims asylum based on membership in a particular social group, then officers must factor the above standards into their determination of whether an applicant has a credible fear or reasonable fear of persecution based on membership in a particular social group. Asylum officers should bear in mind that in considering credible or reasonable fear claims, they must "consider whether the alien's case presents novel or unique issues that merit consideration in a full hearing before an immigration judge." 8 C.F.R. § 208.30(a)(4).

VI. Summary

Under current precedent, including *Matter of A-B-*, *Matter of M-E-V-G-*, and *Matter of W-G-R-*, there are at least five basic inquiries that an officer must make in cases involving membership in a particular social group.

First, the officers must consider whether [redacted] the applicant is a member of a clearly-defined particular social group, which is composed of members who share a common immutable characteristic, is defined with particularity, is socially distinct within the society in question, and is not defined by the persecution on which the claim is based.

Second, the officer must require the applicant to prove that membership in the group is a central reason for the applicant's persecution.

Third, if the alleged persecutor is not affiliated with the government, the officer must require the applicant to show that the applicant's home government is unwilling or unable to protect him or her.

Fourth, the officer must analyze whether internal relocation in the applicant's home country is possible, would protect the applicant from the feared persecution, and presents a reasonable alternative to a grant of asylum or refugee status.

Fifth, apart from the eligibility standards above, the officer must determine whether the applicant merits a grant of asylum or refugee status in the officer's discretion.

Of course, the applicant must also satisfy all the other elements of the refugee definition in order to be granted asylum or refugee status. The officer must examine each element separately, even though certain types of evidence may be relevant to several elements. For example, evidence relevant to evaluating social distinction for the purpose of deciding whether a particular social group exists is often also relevant to whether the past or feared harm is "on account of" the applicant's membership (or imputed membership) in the particular social group. The same evidence might also be relevant to the government's willingness or ability to protect an applicant from a non-government persecutor. Social attitudes often may affect both an individual persecutor's motivations and government policies and practice. While there are often facts that are relevant to more than one aspect of the analysis, those facts must be analyzed separately, using the appropriate standard, for each element.

[redacted]

VII. Contact

Questions or suggestions regarding this PM should be addressed through appropriate channels to the Office of Chief Counsel.

VIII. Use

This PM is intended solely for the guidance of USCIS personnel in the performance of their official duties. It is not intended to, does not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law, or by any individual or other party in removal proceedings, in litigation with the United States, or in any other form or manner.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

GRACE, *et al.*, Plaintiffs, v. MATTHEW G. WHITAKER, Acting Attorney General of the United States, *et al.*, Defendants.	No. 1:18-cv-01853 (EGS)

ORDER

The Court has considered the parties' cross-motions for summary judgment, the memoranda and exhibits in support thereof, and the briefs in opposition thereto; plaintiffs' motion to consider extra-record evidence, defendants' motion to strike plaintiffs' extra-record evidence, and the memoranda in support or in opposition thereto; oral argument; and the entire record in this action.

Accordingly, and consistent with the accompanying Memorandum Opinion, the Court hereby **GRANTS IN PART** and **DENIES IN PART** plaintiffs' cross-motion for summary judgment, and **GRANTS IN PART** and **DENIES IN PART** defendants' motion for summary judgment.

This Court hereby:

1. **DECLARES** that the following credible fear policies contained in *Matter of A-B-*, 27 I. & N. Dec. 316 (A.G.

2018), the USCIS Policy Memorandum, Guidance for Processing Reasonable Fear, Credible Fear, Asylum, and Refugee Claims in Accordance with Matter of A-B-, July 11, 2018 (PM-602-0162) (hereinafter "Policy Memorandum"), and/or the Asylum Division Interim Guidance – Matter of A-B-, 27 I. & N. Dec. 316 (A.G. 2018) ("Interim Guidance"), and challenged by plaintiffs, are arbitrary, capricious, and in violation of the immigration laws insofar as those policies are applied in credible fear proceedings:

a. The general rule against credible fear claims relating to domestic and gang violence. *See Matter of A-B-*, 27 I. & N. Dec. at 320 & n.1; Policy Memorandum, ECF No. 100 at 9, 12-13.

b. The requirement that a noncitizen whose credible fear claim involves non-governmental persecutors "show the government condoned the private actions or at least demonstrated a complete helplessness to protect the victim." *Matter of A-B-*, 27 I. & N. at 337; Policy Memorandum, ECF No. 100 at 5, 9, 13; Interim Guidance.

c. The 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. Policy Memorandum, ECF No. 100 at 8.

d. The Policy Memorandum's requirement that, during the credible fear stage, individuals claiming credible fear must delineate or identify any particular social group in order to satisfy credible fear based on the particular social group protected ground. Policy Memorandum, ECF No. 100 at 6, 12.

e. The 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-*." Policy Memorandum, ECF No. 100 at 11.

f. The Policy Memorandum's directive that asylum officers conducting credible fear interviews should

apply only the case law of "the circuit where the alien is physically located during the credible fear interview." Policy Memorandum, ECF No. 100 at 11-12.

2. **VACATES** each of the credible fear policies specified in paragraphs 1.a. through 1.f. above. Accordingly, the Court **PERMANENTLY ENJOINS** defendants and their agents from applying these policies with respect to credible fear determinations, credible fear interviews, or credible fear review hearings issued or conducted by asylum officers or immigration judges. Defendants shall provide written guidance or instructions to all asylum officers and immigration judges whose duties include issuing or conducting credible fear determinations, credible fear interviews, or credible fear review hearings, communicating that each of the credible fear policies specified in paragraphs 1.a. through 1.f. are vacated and enjoined and therefore shall not be applied to any such credible fear proceedings.

3. **VACATES** the negative credible fear determinations and any expedited removal orders issued to each plaintiff.

4. **PERMANENTLY ENJOINS** defendants from removing any plaintiffs currently in the United States without first providing each of them a new credible fear process consistent with the Court's Memorandum Opinion and free from the unlawful policies enumerated in paragraphs 1.a. through 1.f. above or, in the alternative, full immigration court removal proceedings pursuant to 8 U.S.C. § 1229a. To ensure compliance with this injunction, any new credible fear process provided pursuant to this paragraph shall be accompanied by a written record consistent with 8 U.S.C. § 1225(b)(1)(B)(iii).

5. **FURTHER ORDERS** defendants to bring back into the United States, at no expense to plaintiffs, any plaintiff who has been removed pursuant to an expedited removal order prior to this Order and parole them into the United States, and provide each of them a new credible fear process consistent with the Court's Memorandum Opinion and free from the unlawful policies enumerated in paragraphs 1.a. through 1.f. above or, in the alternative, full immigration court removal proceedings

pursuant to 8 U.S.C. § 1229a. To facilitate such plaintiffs' return to the United States, defendants shall meet and confer with plaintiffs' counsel within 7 days to develop a schedule and plan to carry out this portion of the injunction. To ensure compliance with this injunction, any new credible fear process provided pursuant to this paragraph shall be accompanied by a written record consistent with 8 U.S.C. § 1225(b)(1)(B)(iii). Defendants shall work in good faith to carry out the relief ordered in this paragraph and shall communicate periodically with plaintiffs' counsel until the relief ordered in this paragraph is completed.

6. **FURTHER ORDERS** defendants to provide the plaintiffs, within 10 days of this Order, with a status report detailing any steps defendants have taken to comply with this injunction, including copies of all guidance and instructions sent to asylum officers and immigration judges pursuant to paragraph 2 above. Within 30 days and 60 days of this Order, defendants shall provide plaintiffs with a status report detailing any subsequent steps taken to comply with this injunction in the time period since the last report, including copies of all guidance and instructions sent to asylum officers and immigration judges pursuant to paragraph 2 above during that time frame.

The Court **GRANTS** plaintiffs' cross-motion for summary judgment as to their Administrative Procedure Act, Immigration and Nationality Act, and Refugee Act challenges concerning each of the policies enumerated in paragraphs 1.a. through 1.f. above, and defendants' motion for summary judgment is **DENIED** as to these same claims. The Court **DENIES** plaintiffs' cross-motion for summary judgment as to their challenges concerning nexus and discretion, and defendants' motion for summary judgment is **GRANTED** as to these same claims.

Furthermore, consistent with the accompanying Memorandum Opinion, the Court **GRANTS** plaintiffs' motion to consider extra record evidence with respect to evidence relevant to plaintiffs' contentions that the government deviated from prior policies, as well as evidence relevant to plaintiffs' request for injunctive relief. Accordingly, the following evidence submitted by plaintiffs is admitted into the record, and defendants' motion to strike is **DENIED** with respect to this same evidence: Decl. of Sarah Mujahid ("Mujahid Decl."), ECF No. 10-3, Exs. E-J; Second Decl. of Sarah Mujahid ("Second Mujahid Decl."), ECF No. 64-4, Exs. 1-3; ECF Nos. 12-1 to 12-9 (filed under seal); Mujahid Decl., ECF No. 10-3, Exs. K-Q; Second Mujahid Decl., ECF No. 64-4, Exs. 10-13; Joint Decl. of Shannon Drysdale Walsh, Cecilia Menjivar, and Harry Vanden ("Honduras Decl."), ECF No. 64-6; Joint Decl. of Cecilia Menjivar, Gabriela Torres, and Harry Vanden ("Guatemala Decl."), ECF No. 64-7; Joint Decl. of Cecilia Menjivar and Harry Vanden ("El Salvador Decl."), ECF No. 64-8.

Because the Court has declined to consider plaintiffs' due process claim, the Court **GRANTS** defendants' motion to strike with respect to evidence relating to plaintiffs' due process claim. Accordingly, the Court will not consider the following documents relating to plaintiffs' due process

claim: Second Mujahid Decl., ECF No. 64-4, Exs. 4-7, 8-9, 14-17, and ECF No. 64-5; and Mujahid Decl., ECF No. 10-3, Exs. R-T. Plaintiffs' motion to consider extra-record evidence as to these same documents is **DENIED** without prejudice.

The Court also **GRANTS** defendants' motion to strike with respect to the Decl. of Rebecca Jamil and Decl. of Ethan Nasr, and plaintiffs' evidence motion is **DENIED** as to these same documents.

SO ORDERED.

Signed: Emmet G. Sullivan
United States District
December 19, 2018

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

GRACE, *et al.*, Plaintiffs, v. MATTHEW G. WHITAKER,[1] Acting Attorney General of the United States, *et al.*, Defendants.	No. 18-cv-01853 (EGS)

MEMORANDUM OPINION

When Congress passed the Refugee Act in 1980, it made its intentions clear: the purpose was to enforce the "historic policy of the United States to respond to the urgent needs of persons subject to persecution in their homelands." Refugee Act of 1980, § 101(a), Pub. L. No. 96–212, 94 Stat. 102 (1980). Years later, Congress amended the immigration laws to provide for expedited removal of those seeking admission to the United States. Under the expedited removal process, an alien could be summarily removed after a preliminary inspection by an immigration officer, so long as the alien did not have a credible fear of persecution by his or her country of origin. In

[1] Pursuant to Rule 25(d) of the Federal Rules of Civil Procedure, the Court substitutes the current Acting Attorney General as the defendant in this case. "Plaintiffs take no position at this time regarding the identity of the current Acting Attorney General of the United States." Civil Statement, ECF No. 101.

creating this framework, Congress struck a balance between an efficient immigration system and ensuring that "there should be no danger that an alien with a genuine asylum claim will be returned to persecution." H.R. REP. NO. 104-469, pt. 1, at 158 (1996).

Seeking an opportunity for asylum, plaintiffs, twelve adults and children, alleged accounts of sexual abuse, kidnappings, and beatings in their home countries during interviews with asylum officers.[2] These interviews were designed to evaluate whether plaintiffs had a credible fear of persecution by their respective home countries. A credible fear of persecution is defined as a "significant possibility" that the alien "could establish eligibility for asylum." 8 U.S.C. § 1225(b)(1)(B)(v). Although the asylum officers found that plaintiffs' accounts were sincere, the officers denied their claims after applying the standards set forth in a recent precedential immigration decision issued by then-Attorney General, Jefferson B. Sessions, *Matter of A-B-*, 27 I. & N. Dec. 316 (A.G. 2018).

Plaintiffs bring this action against the Attorney General alleging violations of, *inter alia*, the Administrative Procedure Act ("APA") and the Immigration and Nationality Act ("INA"),

[2] Plaintiffs Grace, Carmen, Gio, Gina, Maria, Mina, Nora, and Mona are proceeding under pseudonyms.

arguing that the standards articulated in *Matter of A-B-*, and a subsequent Policy Memorandum issued by the Department of Homeland Security ("DHS") (collectively "credible fear policies"), unlawfully and arbitrarily imposed a heightened standard to their credible fear determinations.

Pending before the Court are: (1) plaintiffs' combined motions for a preliminary injunction and cross-motion for summary judgment; (2) plaintiffs' motion to consider evidence outside the administrative record; (3) the government's motion to strike exhibits supporting plaintiffs' motion for summary judgment; and (4) the government's motion for summary judgment. Upon consideration of the parties' memoranda, the parties' arguments at the motions hearings, the arguments of *amici*,[3] the administrative record, the applicable law, and for the reasons discussed below, the Court finds that several of the new credible fear policies, as articulated in *Matter of A-B-* and the Policy Memorandum, violate both the APA and INA. As explained in this Memorandum Opinion, many of these policies are inconsistent with the intent of Congress as articulated in the INA. And because it is the will of Congress—not the whims of the Executive—that determines the standard for expedited removal, the Court finds that those policies are unlawful.

[3] The Court appreciates the illuminating analysis provided by the *amici*.

Part I of this Opinion sets forth background information necessary to resolve plaintiffs' claims. In Part II, the Court considers plaintiffs' motion to consider evidence outside the administrative record and denies the motion in part. In Part III, the Court considers the parties' cross-motions for summary judgment. In Part III.A, the Court considers the government's arguments that this case is not justiciable and holds that this Court has jurisdiction to hear plaintiffs' challenges to the credible fear policies. In Part III.B, the Court addresses the legal standards that govern plaintiffs' claims. In Part III.C, the Court turns to the merits of plaintiffs' claims and holds that, with the exception of two policies, the new credible fear policies are arbitrary, capricious, and in violation of the immigration laws. In Part III.D, the Court considers the appropriate form of relief and vacates the unlawful credible fear policies. The Court further permanently enjoins the government from continuing to apply those policies and from removing plaintiffs who are currently in the United States without first providing credible fear determinations consistent with the immigration laws. Finally, the Court orders the government to return to the United States the plaintiffs who were unlawfully deported and to provide them with new credible fear determinations consistent with the immigration laws.

I. Background

Because the claims in this action center on the expedited removal procedures, the Court discusses those procedures, and the related asylum laws, in detail.

A. Statutory and Regulatory Background

1. The Refugee Act

In 1980, Congress passed the Refugee Act, Pub. L. No. 96-212, 94 Stat. 102, which amended the INA, Pub. L. No. 82-414, 66 Stat. 163 (1952)(codified as amended in sections of 8 U.S.C.). The "motivation for the enactment of the Refugee Act" was the "United Nations Protocol Relating to the Status of Refugees ["Protocol"]," *INS v. Cardoza-Fonseca*, 480 U.S. 421, 424 (1987), "to which the United States had been bound since 1968," *id.* at 432–33. Congress was clear that its intent in promulgating the Refugee Act was to bring the United States' domestic laws in line with the Protocol. *See id.* at 437 (stating it is "clear from the legislative history of the new definition of 'refugee,' and indeed the entire 1980 Act . . . that one of Congress' primary purposes was to bring United States refugee law into conformance with the [Protocol]."). The Board of Immigration Appeals ("BIA"), has also recognized that Congress' intent in enacting the Refugee Act was to align domestic refugee law with the United States' obligations under the Protocol, to give statutory meaning to "our national commitment to human rights

and humanitarian concerns," and "to afford a generous standard for protection in cases of doubt." *In Re S-P-*, 21 I. & N. Dec. 486, 492 (B.I.A. 1998)(quoting S. REP. NO. 256, 96th Cong., 2d Sess. 1, 4, reprinted in 1980 U.S.C.C.A.N. 141, 144).

The Refugee Act created a statutory procedure for refugees seeking asylum and established the standards for granting such requests; the INA currently governs that procedure. The INA gives the Attorney General discretion to grant asylum to removable aliens. 8 U.S.C. § 1158(b)(1)(A). However, that relief can only be granted if the alien is a "refugee." *Id.* The term "refugee" is defined as:

> [A]ny person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.

8 U.S.C. § 1101(a)(42)(A). "Thus, the 'persecution or well-founded fear of persecution' standard governs the Attorney General's determination [of] whether an alien is eligible for asylum." *Cardoza-Fonseca*, 480 U.S. at 428. To establish refugee status, the alien must show he or she is someone who: (1) has suffered persecution (or has a well-founded fear of persecution) (2) on account of (3) one of five specific protected grounds:

race, religion, nationality, membership in a particular social group, or political opinion. *See* 8 U.S.C. § 1101(a)(42)(A). An alien fearing harm by non-governmental actors is eligible for asylum if the other criteria are met, and the government is "unable or unwilling to control" the persecutor. *Matter of Acosta*, 19 I. & N. Dec. 211, 222 (BIA 1985) *overruled on other grounds* by *Matter of Mogharrabi*, 19 I. & N. Dec. 439 (BIA 1987).

2. Expedited Removal Process

Before seeking asylum through the procedures outlined above, however, many aliens are subject to a streamlined removal process called "expedited removal." 8 U.S.C. § 1225. Prior to 1996, every person who sought admission into the United States was entitled to a full hearing before an immigration judge, and had a right to administrative and judicial review. *See Am. Immigration Lawyers Ass'n v. Reno*, 18 F. Supp. 2d 38, 41 (D.D.C. 1998)(describing prior system for removal). The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA") amended the INA to provide for a summary removal process for adjudicating the claims of aliens who arrive in the United States without proper documentation. As described in the IIRIRA Conference Report, the purpose of the expedited removal procedure

> is to expedite the removal from the United States of aliens who indisputably have no authorization to be admitted . . . , while

> providing an opportunity for such an alien who claims asylum to have the merits of his or her claim promptly assessed by officers with full professional training in adjudicating asylum claims.

H.R. REP. NO. 104-828, at 209-10 (1996)("Conf. Rep.").

Consistent with that purpose, Congress carved out an exception to the expedited removal process for individuals with a "credible fear of persecution." *See* 8 U.S.C. § 1225(b)(1)(B)(ii). If an alien "indicates either an intention to apply for asylum . . . or a fear of persecution," the alien must be referred for an interview with a U.S. Citizenship and Immigration Services ("USCIS") asylum officer. *Id.* § 1225(b)(1)(A)(ii). During this interview, the asylum officer is required to "elicit all relevant and useful information bearing on whether the applicant has a credible fear of persecution or torture[.]" 8 C.F.R. § 208.30(d). The asylum officer must "conduct the interview in a nonadversarial manner." *Id.*

Expediting the removal process, however, risks sending individuals who are potentially eligible for asylum to their respective home countries where they face a real threat, or have a credible fear of persecution. Understanding this risk, Congress intended the credible fear determinations to be governed by a low screening standard. *See* 142 CONG. REC. S11491-02 ("The credible fear standard . . . is intended to be a low

screening standard for admission into the usual full asylum process"); *see also* H.R. REP. NO. 104-469, pt. 1, at 158 (1996)(stating "there should be no danger that an alien with a genuine asylum claim will be returned to persecution"). A credible fear is defined as a "significant possibility, taking into account the credibility of the statements made by the alien in support of the alien's claim and such other facts as are known to the officer, that the alien could establish eligibility for asylum." 8 U.S.C. § 1225(b)(1)(B)(v).

If, after a credible fear interview, the asylum officer finds that the alien does have a "credible fear of persecution" the alien is taken out of the expedited removal process and referred to a standard removal hearing before an immigration judge. *See* 8 U.S.C. § 1225(b)(1)(B)(ii), (v). At that hearing, the alien has the opportunity to develop a full record with respect to his or her asylum claim, and may appeal an adverse decision to the BIA, 8 C.F.R. § 208.30(f), and then, if necessary, to a federal court of appeals, *see* 8 U.S.C. § 1252(a)-(b).

If the asylum officer renders a negative credible fear determination, the alien may request a review of that determination by an immigration judge. 8 U.S.C. § 1225(b)(1)(B)(iii)(III). The immigration judge's decision is "final and may not be appealed" 8 C.F.R. § 1208.30(g)(2)(iv)(A),

except in limited circumstances. *See* 8 U.S.C. § 1252(e).

3. Judicial Review

Section 1252 delineates the scope of judicial review of expedited removal orders and limits judicial review of orders issued pursuant to negative credible fear determinations to a few enumerated circumstances. *See* 8 U.S.C. § 1252(a). The section provides that "no court shall have jurisdiction to review . . . the application of [section 1225(b)(1)] to individual aliens, including the [credible fear] determination made under section 1225(b)(1)(B)." 8 U.S.C. § 1252(a)(2)(A)(iii). Moreover, except as provided in section 1252(e), the statute prohibits courts from reviewing: (1) "any individual determination or to entertain any other cause or claim arising from or relating to the implementation or operation of an [expedited removal] order;" (2) "a decision by the Attorney General to invoke" the expedited removal regime; and (3) the "procedures and policies adopted by the Attorney General to implement the provisions of section 1225(b)(1)." *Id.* § 1252(a)(2)(A)(i), (ii) & (iv).

Section 1252(e) provides for judicial review of two types of challenges to removal orders pursuant to credible fear determinations. The first is a habeas corpus proceeding limited to reviewing whether the petitioner was erroneously removed because he or she was, among other things, lawfully admitted for

permanent residence, or had previously been granted asylum. 8 U.S.C. § 1252(e)(2)(C). As relevant here, the second proceeding available for judicial review is a systemic challenge to the legality of a "written policy directive, written policy guideline, or written procedure issued by or under the authority of the Attorney General to implement" the expedited removal process. *Id.* § 1252(e)(3)(A)(ii). Jurisdiction to review such a systemic challenge is vested solely in the United States District Court for the District of Columbia. *Id.* § 1252(e)(3)(A).

B. Executive Guidance on Asylum Claims

1. Precedential Decision

The Attorney General has the statutory and regulatory authority to make determinations and rulings with respect to immigration law. *See, e.g.*, 8 U.S.C. § 1103(a)(1). This authority includes the ability to certify cases for his or her review and to issue binding decisions. *See* 8 C.F.R. §§ 1003.1(g)-(h)(1)(ii).

On June 11, 2018, then-Attorney General Sessions did exactly that when he issued a precedential decision in an asylum case, *Matter of A-B-*, 27 I. & N. Dec. 316 (A.G. 2018). In *Matter of A-B-*, the Attorney General reversed a grant of asylum to a Salvadoran woman who allegedly fled several years of domestic violence at the hands of her then-husband. *Id.* at 321, 346.

The decision began by overruling another case, *Matter of A-R-C-G-*, 27 I. & N. Dec. 388 (BIA 2014). *Id.* at 319. In *A-R-C-G-*, the BIA recognized "married women in Guatemala who are unable to leave their relationship" as a "particular social group" within the meaning of the asylum statute. 27 I. & N. Dec. at 392. The Attorney General's rationale for overruling *A-R-C-G-* was that it incorrectly applied BIA precedent, "assumed its conclusion and did not perform the necessary legal and factual analysis" because, among other things, the BIA accepted stipulations by DHS that the alien was a member of a qualifying particular social group. *Matter of A-B-,* 27 I. & N. Dec. at 319. In so doing, the Attorney General made clear that "[g]enerally, claims by aliens pertaining to domestic violence or gang violence perpetrated by non-governmental actors will not qualify for asylum," *id.* at 320,[4] and "[a]ccordingly, few such claims would satisfy the legal standard to determine whether an alien has a credible fear of persecution." *Id.* at 320 n.1 (citing 8 U.S.C. § 1225(b)(1)(B)(v)).

The Attorney General next reviewed the history of BIA precedent interpreting the "particular social group" standard and again explained, at length, why *A-R-C-G-* was wrongly

[4] Although *Matter of A-B-* discusses gang-related violence at length, the applicant in *Matter of A-B-* never claimed gang members had any involvement in her case. *Id.* at 321 (describing persecution related to domestic violence).

decided. In so ruling, the Attorney General articulated legal standards for determining asylum cases based on persecution from non-governmental actors on account of membership in a particular social group, focusing principally on claims by victims of domestic abuse and gang violence. He specifically stated that few claims pertaining to domestic or gang violence by non-governmental actors could qualify for asylum or satisfy the credible fear standard. *See id.* at 320 n.1.

The Attorney General next focused on the specific elements of an asylum claim beginning with the standard for membership in a "particular social group." The Attorney General declared that "[s]ocial groups defined by their vulnerability to private criminal activity likely lack the particularity required" under asylum laws since "broad swaths of society may be susceptible to victimization." *Id.* at 335.

The Attorney General next examined the persecution requirement, which he described as having three elements: (1) an intent to target a belief or characteristic; (2) severe harm; and (3) suffering inflicted by the government or by persons the government was unable or unwilling to control. *Id.* at 337. With respect to the last element, the Attorney General stated that an alien seeking to establish persecution based on the violent conduct of a private actor may not solely rely on the government's difficulty in controlling the violent behavior. *Id.*

Rather, the alien must show "the government condoned the private actions or at least demonstrated a complete helplessness to protect the victims." *Id.* (citations and internal quotation marks omitted).

The Attorney General concluded with a discussion of the requirement that an asylum applicant demonstrate that the persecution he or she suffered was on account of a membership in a "particular social group." *Id.* at 338–39. He explained that "[i]f the ill-treatment [claimed by an alien] was motivated by something other than" one of the five statutory grounds for asylum, then the alien "cannot be considered a refugee for purpose of asylum." *Id.* at 338 (citations omitted). He continued to explain that when private actors inflict violence based on personal relationships with a victim, the victim's membership in a particular social group "may well not be 'one central reason' for the abuse." *Id.* Using *Matter of A-R-C-G-* as an example, the Attorney General stated that there was no evidence that the alien was attacked because her husband was aware of, and hostile to, her particular social group: women who were unable to leave their relationship. *Id.* at 338-39. The Attorney General remanded the matter back to the immigration judge for further proceedings consistent with his decision. *Id.* at 346.

2. Policy Memorandum

Two days after the Attorney General issued *Matter of A-B-*, USCIS issued Interim Guidance instructing asylum officers to apply *Matter of A-B-* to credible fear determinations. Asylum Division Interim Guidance -- *Matter of A-B-*, 27 I. & N. Dec. 316 (A.G. 2018) ("Interim Guidance"), ECF No. 100 at 15–18.[5] On July 11, 2018, USCIS issued final guidance to asylum officers for use in assessing asylum claims and credible fear determinations in light of *Matter of A-B-*. USCIS Policy Mem., Guidance for Processing Reasonable Fear, Credible Fear, Asylum, and Refugee Claims in Accordance with *Matter of A-B-*, July 11, 2018 (PM-602-0162) ("Policy Memorandum"), ECF No. 100 at 4–13.

The Policy Memorandum adopts the standards set forth in *Matter of A-B-* and adds new directives for asylum officers. First, like *Matter of A-B-*, the Policy Memorandum invokes the expedited removal statute. *Id.* at 4 (citing section 8 U.S.C. § 1225 as one source of the Policy Memorandum's authority). The Policy Memorandum further acknowledges that "[a]lthough the alien in *Matter of A-B-* claimed asylum and withholding of removal, the Attorney General's decision and this [Policy Memorandum] apply also to refugee status adjudications and

[5] When citing electronic filings throughout this Memorandum Opinion, the Court cites to the ECF header page number, not the original page number of the filed docket.

reasonable fear and credible fear determinations." *Id.* n.1 (citations omitted).

The Policy Memorandum also adopts the standard for "persecution" set by *Matter of A-B-*: In cases of alleged persecution by private actors, aliens must demonstrate the "government is unwilling or unable to control" the harm "such that the government either 'condoned the behavior or demonstrated a complete helplessness to protect the victim.'" *Id.* at 5 (citing *Matter of A-B-*, 27 I. & N. Dec. at 337). After explaining the "condoned or complete helplessness" standard, the Policy Memorandum explains that:

> **In general, in light of the [standards governing persecution by a non-government actor], claims based on membership in a putative particular social group defined by the members' vulnerability to harm of domestic violence or gang violence committed by non-government actors will not establish the basis for asylum, refugee status, or a credible or reasonable fear of persecution.**

Id. at 9 (emphasis in original).

Furthermore, the Policy Memorandum made clear that because *Matter of A-B-* "explained the standards for eligibility for asylum . . . based on a particular social group . . . if an applicant claims asylum based on membership in a particular social group, then officers must factor [the standards explained in *Matter of A-B-*] into their determination of whether an

applicant has a credible fear . . . of persecution." *Id.* at 12 (citations and internal quotation marks omitted).

The Policy Memorandum includes two additional directives not found in *Matter of A-B-*. First, it instructs asylum officers to apply the "case law of the relevant federal circuit court, to the extent that those cases are not inconsistent with *Matter of A-B-*." *Id.* at 11. Second, although acknowledging that the "relevant federal circuit court is the circuit where the removal proceedings ***will take place*** if the officer makes a positive credible fear or reasonable fear determination," the Policy Memorandum instructs asylum officers to "apply precedents of the Board, and, if necessary, the circuit where the alien is ***physically located*** during the credible fear interview." *Id.* at 11-12. (emphasis added).

The Policy Memorandum concludes with the directive that "[asylum officers] should be alert that under the standards clarified in *Matter of A-B-*, few gang-based or domestic-violence claims involving particular social groups defined by the members' vulnerability to harm may . . . pass the 'significant probability' test in credible-fear screenings." *Id.* at 13.

C. Factual and Procedural Background

Each of the plaintiffs, twelve adults and children, came to the United States fleeing violence from Central America and seeking refuge through asylum. Plaintiff Grace fled Guatemala

after having been raped, beaten, and threatened for over twenty years by her partner who disparaged her because of her indigenous heritage. Grace Decl., ECF No. 12-1 ¶ 2.[6] Her persecutor also beat, sexually assaulted, and threatened to kill several of her children. *Id.* Grace sought help from the local authorities who, with the help of her persecutor, evicted her from her home. *Id.*

Plaintiff Carmen escaped from her country with her young daughter, J.A.C.F., fleeing several years of sexual abuse by her husband, who sexually assaulted, stalked, and threatened her, even after they no longer resided together. Carmen Decl., ECF No. 12-2 ¶ 2. In addition to Carmen's husband's abuse, Carmen and her daughter were targeted by a local gang because they knew she lived alone and did not have the protection of a family. *Id.* ¶ 24. She fled her country of origin out of fear the gang would kill her. *Id.* ¶ 28.

Plaintiff Mina escaped from her country after a gang murdered her father-in-law for helping a family friend escape from the gang. Mina Decl., ECF No. 12-3 ¶ 2. Her husband went to the police, but they did nothing. *Id.* at ¶ 10. While her husband was away in a neighboring town to seek assistance from another police force, members of the gang broke down her door and beat

[6] The plaintiffs' declarations have been filed under seal.

Mina until she could no longer walk. *Id.* ¶ 15. She sought asylum in this country after finding out she was on a "hit list" compiled by the gang. *Id.* ¶¶ 17–18.

The remaining plaintiffs have similar accounts of abuse either by domestic partners or gang members. Plaintiff Gina fled violence from a politically-connected family who killed her brother, maimed her son, and threatened her with death. Gina Decl., ECF No. 12-4 ¶ 2. Mona fled her country after a gang brutally murdered her long-term partner—a member of a special military force dedicated to combating gangs—and threatened to kill her next. Mona Decl., ECF No. 12-5 ¶ 2. Gio escaped from two rival gangs, one of which broke his arm and threatened to kill him, and the other threatened to murder him after he refused to deal drugs because of his religious convictions. Gio Decl., ECF No. 12-6 ¶ 2. Maria, an orphaned teenage girl, escaped a forced sexual relationship with a gang member who targeted her after her Christian faith led her to stand up to the gang. Maria Decl., ECF No. 12-7 ¶ 2. Nora, a single mother, together with her son, A.B.A., fled an abusive partner and members of his gang who threatened to rape her and kill her and her son if she did not submit to the gang's sexual advances. Nora Decl., ECF No. 12-8 ¶ 2. Cindy, together with her young child, A.P.A., fled rapes, beatings, and shootings [redacted]

[redacted]. Cindy Decl., ECF No. 12-9 ¶ 2.[7]

Each plaintiff was given a credible fear determination pursuant to the expedited removal process. Despite finding that the accounts they provided were credible, the asylum officers determined that, in light of *Matter of A-B-*, their claims lacked merit, resulting in a negative credible fear determination. Plaintiffs sought review of the negative credible fear determinations by an immigration judge, but the judge affirmed the asylum officers' findings. Plaintiffs are now subject to final orders of removal or were removed pursuant to such orders prior to commencing this suit.[8]

Facing imminent deportation, plaintiffs filed a motion for preliminary injunction, ECF No. 10, and an emergency motion for stay of removal, ECF No. 11, on August 7, 2018. In their motion for stay of removal, plaintiffs sought emergency relief because two of the plaintiffs, Carmen and her daughter J.A.C.F., were "subject to imminent removal." ECF No. 11 at 1.

The Court granted the motion for emergency relief as to the plaintiffs not yet deported. The parties have since filed cross-

[7] Each plaintiffs' harrowing accounts were found to be believable during the plaintiffs' credible fear interviews. Oral Arg. Hr'g Tr., ECF No. 102 at 37.

[8] Since the Court's Order staying plaintiffs' removal, two plaintiffs have moved for the Court to lift the stay and have accordingly been removed. *See* Mot. to Lift Stay, ECF Nos. 28 (plaintiff Mona), 60 (plaintiff Gio).

motions for summary judgment related to the Attorney General's precedential decision and the Policy Memorandum issued by DHS. Further, plaintiffs have filed an opposed motion to consider evidence outside the administrative record.

II. Motion to Consider Extra Record Evidence

Plaintiffs attach several exhibits to their combined application for a preliminary injunction and cross-motion for summary judgment, *see* ECF Nos. 10–2 to 10–7, 12-1 to 12-9, 64-3 to 64-8, which were not before the agency at the time it made its decision. These exhibits include: (1) declarations from plaintiffs; (2) declarations from experts pertaining to whether the credible fear policies are new; (3) government training manuals, memoranda, and a government brief; (4) third-party country reports or declarations; (5) various newspaper articles; and (6) public statements from government officials. Pls.' Evid. Mot., ECF No. 66-1 at 7–16. The government moves to strike these exhibits, arguing that judicial review under the APA is limited to the administrative record, which consists of the "materials that were before the agency at the time its decision was made." Defs.' Mot. to Strike, ECF No. 88-1 at 20.

A. Legal Standard

"[I]t is black-letter administrative law that in an APA case, a reviewing court 'should have before it neither more nor less information than did the agency when it made its

decision.'" *Hill Dermaceuticals, Inc. v. Food & Drug Admin.*, 709 F.3d 44, 47 (D.C. Cir. 2013)(quoting W*alter O. Boswell Mem'l Hosp. v. Heckler*, 749 F.2d 788, 792 (D.C. Cir. 1984)). This is because, under the APA, the court is confined to reviewing "the whole record or those parts of it cited by a party," 5 U.S.C. § 706, and the administrative record only includes the "materials 'compiled' by the agency that were 'before the agency at the time the decision was made,'" *James Madison Ltd. by Hecht v. Ludwig*, 82 F.3d 1085, 1095 (D.C. Cir. 1996)(citations omitted).

Accordingly, when, as here, plaintiffs seek to place before the court additional materials that the agency did not review in making its decision, a court must exclude such material unless plaintiffs "can demonstrate unusual circumstances justifying departure from th[e] general rule." *Am. Wildlands v. Kempthorne*, 530 F.3d 991, 1002 (D.C. Cir. 2008)(citation omitted). Aa court may appropriately consider extra-record materials: (1) if the agency "deliberately or negligently excluded documents that may have been adverse to its decision," (2) if background information is needed to "determine whether the agency considered all of the relevant factors," or (3) if the agency "failed to explain [the] administrative action so as to frustrate judicial review." *Id.*

Plaintiffs make three arguments as to why the Court should

consider their proffered extra-record materials: (1) to evaluate whether the government's challenged policies are an impermissible departure from prior policies; (2) to consider plaintiffs' due process cause of action[9]; and (3) to evaluate plaintiffs' request for permanent injunctive relief. Pls.' Evid. Mot., ECF No. 66-1 at 2–12. The Court considers each argument in turn.

B. Analysis

1. Evidence of Prior Policies

Plaintiffs first argue that the Court should consider evidence of the government's prior policies as relevant to determining whether the policies in *Matter of A-B-* and the subsequent guidance deviated from prior policies without explanation. *Id.* at 8–11. The extra-record materials at issue include government training manuals, memoranda, and a government brief, *see* Decl. of Sarah Mujahid ("Mujahid Decl."), ECF No. 10-3 Exs. E–J; Second Decl. of Sarah Mujahid ("Second Mujahid Decl."), ECF No. 64-4, Exs. 1–3, and declarations from third parties explaining the policies are new, Decl. of Rebecca Jamil and Ethan Nasr, ECF No. 65-5.

The Court will consider the government training manuals,

[9] The Court does not reach plaintiffs' due process claims, and therefore will not consider the extra-record evidence related to that claim. *See* Second Mujahid Decl., ECF No. 64-4, Exs. 4–7; Second Mujahid Decl., ECF No. 64-4, Exs. 8-9; ECF No. 64-5.

memoranda, and government brief, but not the declarations explaining them. Plaintiffs argue that the credible fear policies are departures from prior government policies, which the government changed without explanation. Pls.' Evid. Mot., ECF No. 66-1 at 7–11. The government's response is the credible fear policies are not a departure because they do not articulate any new rules. *See* Defs.' Mot., ECF No. 57-1 at 17. Whether the credible fear policies are new is clearly an "unresolved factual issue" that the "administrative record, on its own, . . . is not sufficient to resolve." *See United Student Aid Funds, Inc. v. Devos*, 237 F. Supp. 3d 1, 6 (D.D.C. 2017). The Court cannot analyze this argument without reviewing the prior policies, which are not included in the administrative record. Under these circumstances, it is "appropriate to resort to extra-record information to enable judicial review to become effective." *Id.* at 3 (citing *Esch v. Yeutter*, 876 F.2d 976, 991 (D.C. Cir. 1989)).

The government agrees that "any claim that *A-B-* or the [Policy Memorandum] breaks with past policies . . . is readily ascertainable by simply reviewing the very 'past policies.'" Defs.' Mot. to Strike, ECF No. 88-1 at 24. However, the government disagrees with the types of documents that are considered past policies. *Id.* According to the government, the only "past policies" at issue are legal decisions issued by the

Attorney General, BIA, or courts of appeals. *Id.* The Court is not persuaded by such a narrow interpretation of the evidence that can be considered as past policies. *See Leadership Conference on Civil Rights v. Gonzales*, 404 F. Supp. 2d 246, 255 (D.D.C. 2005)(finding training manual distributed as informal guidance "at a minimum" reflected the policy of the "Elections Crimes Branch if not the Department of Justice").

Admitting third party-declarations from a retired immigration officer and former immigration judge, on the other hand, are not necessary for the Court in its review. Declarations submitted by third-parties regarding putative policy changes would stretch the limited extra-record exception too far. Accordingly, the Court will not consider these declarations when determining whether the credible fear policies constitute an unexplained change of position.

2. Evidence Supporting Injunctive Relief

The second category of information plaintiffs ask the Court to consider is extra-record evidence in support of their claim that injunctive relief is appropriate. Pls.' Evid. Mot., ECF No. 66-1 at 13–16. The evidence plaintiffs present includes plaintiffs' declarations, ECF Nos. 12-1 to 12-9 (filed under seal); several reports describing the conditions of plaintiffs' native countries, Mujahid Decl., ECF No. 10-3, Exs. K-T; and four United Nations High Commissioner for Refugees ("UNHCR")

reports, Second Mujahid Decl., ECF No. 64-4 Exs. 10–13. The materials also include three declarations regarding humanitarian conditions in the three home countries. Joint Decl. of Shannon Drysdale Walsh, Cecilia Menjívar, and Harry Vanden ("Honduras Decl."), ECF No. 64-6; Joint Decl. of Cecilia Menjívar, Gabriela Torres, and Harry Vanden ("Guatemala Decl."), ECF No. 64-7; Joint Decl. of Cecilia Menjívar and Harry Vanden ("El Salvador Decl."), ECF No. 64-8.

The government argues that the Court need not concern itself with the preliminary injunction analysis because the Court's decision to consolidate the preliminary injunction and summary judgment motions under Rule 65 renders the preliminary injunction moot. Defs.' Mot. to Strike, ECF No. 88-1 at 12 n.1. The Court concurs, but nevertheless must determine if plaintiffs are entitled to a permanent injunction, assuming they prevail on their APA and INA claims. Because plaintiffs request specific injunctive relief with respect to their expedited removal orders and credible fear proceedings, the Court must determine whether plaintiffs are entitled to the injunctive relief sought. *See Eco Tour Adventures, Inc. v. Zinke*, 249 F. Supp. 3d 360, 370, n.7 (D.D.C. 2017)("it will often be necessary for a court to take new evidence to fully evaluate" claims "of irreparable harm . . . and [claims] that the issuance of the injunction is in the public interest.")(citation omitted). Thus, the Court will

consider plaintiffs' declarations, the UNHCR reports, and the country reports only to the extent they are relevant to plaintiffs' request for injunctive relief.[10]

In sum, the Court will consider extra-record evidence only to the extent it is relevant to plaintiffs' contentions that the government deviated from prior policies without explanation or to their request for injunctive relief. The Court will not consider any evidence related to plaintiffs' due process claim. Accordingly, the Court will not consider the following documents: (1) evidence related to the opinions of immigration judges and attorneys, Second Mujahid Decl., ECF No. 64-4, Exs. 8–9, 14–17 and ECF No. 64-5; (2) statements of various public officials, Second Mujahid Decl., ECF No. 64-4, Exs. 4–7; and (3) various newspaper articles, Mujahid Decl., ECF No. 10-3, Exs. R-T, and Second Mujahid Decl., ECF No. 64-4, Exs. 14–17.

III. Motion for Summary Judgment

A. Justiciability

The Court next turns to the government's jurisdictional arguments that: (1) the Court lacks jurisdiction to review plaintiffs' challenge to *Matter of A-B-*; and (2) because the Court lacks jurisdiction to review *Matter of A-B-*, the

[10] The Court will not consider three newspaper articles, Mujahid Decl., ECF No. 10-3, Exs. R–T, however, since they are not competent evidence to be considered at summary judgment. *See* Fed. R. Civ. P. 56(c).

government action purportedly causing plaintiffs' alleged harm, the plaintiffs lack standing to challenge the Policy Memorandum. Federal district courts are courts of limited jurisdiction. *See Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). A court must therefore resolve any challenge to its jurisdiction before it may proceed to the merits of a claim. *See Galvan v. Fed. Prison Indus.*, 199 F.3d 461, 463 (D.C. Cir. 1999). The Court addresses each argument in turn.

1. The Court has Jurisdiction under Section 1252(e)(3)

a. *Matter of A-B-*

The government contends that section 1252 forecloses judicial review of plaintiffs' claims with respect to *Matter of A-B-*. Defs.' Mot., ECF No. 57-1 at 30–34. Plaintiffs argue that the statute plainly provides jurisdiction for this Court to review their claims. Pls.' Mot., ECF No. 64-1 at 26–30. The parties agree that to the extent jurisdiction exists to review a challenge to a policy implementing the expedited removal system, it exists pursuant to subsection (e) of the statute.

Under section 1252(a)(2)(A), no court shall have jurisdiction over "procedures and policies adopted by the Attorney General to implement the provisions of section 1225(b)(1)" except "as provided in subsection [1252](e)." Section 1252(e)(3) vests exclusive jurisdiction in the United States District Court for the District of Columbia to review

"[c]hallenges [to the] validity of the [expedited removal] system." *Id.* § 1252(e)(3)(A). Such systemic challenges include challenges to the constitutionality of any provision of the expedited removal statute or to its implementing regulations. *See id.* § 1252(e)(3)(A)(i). They also include challenges claiming that a given regulation or written policy directive, guideline, or procedure is inconsistent with law. *Id.* § 1252(e)(3)(A)(ii). Systemic challenges must be brought within sixty days of the challenged statute or regulation's implementation. *Id.* § 1252(e)(3)(B); *see also Am. Immigration Lawyers Ass'n*, 18 F. Supp. 2d at 47 (holding that "the 60-day requirement is jurisdictional rather than a traditional limitations period").

Both parties agree that the plain language of section 1252(e)(3) is dispositive. It reads as follows:

> (3) Challenges on validity of the system
>
> (A) In general
>
> Judicial review of determinations under section 1225(b) of this title and its implementation is available in an action instituted in the United States District Court for the District of Columbia, but shall be limited to determinations of--
>
> (i) whether such section, or any regulation issued to implement such section, is constitutional; or
>
> (ii) whether such a regulation, or a written policy directive, written policy guideline, or

> written procedure issued by or under the authority of the Attorney General to implement such section, is not consistent with applicable provisions of this subchapter or is otherwise in violation of law.

8 U.S.C. § 1252(e)(3).

The government first argues that *Matter of A-B-* does not implement section 1225(b), as required by section 1252(e)(3). Defs.' Mot., ECF No. 57-1 at 30–32. Instead, the government contends *Matter of A-B-* was a decision about petitions for asylum under section 1158. *Id.* The government also argues that *Matter of A-B-* is not a written policy directive under the Act, but rather an adjudication that determined the rights and duties of the parties to a dispute. *Id.* at 32.

The government's argument that *Matter of A-B-* does not "implement" section 1225(b) is belied by *Matter of A-B-* itself. Although A-B- sought asylum, the Attorney General's decision went beyond her claims explicitly addressing "the legal standard to determine whether an alien has a credible fear of persecution" under 8 U.S.C. section 1225(b). *Matter of A-B-*, 27 I. & N. Dec. at 320 n.1 (citing standard for credible fear determinations). In the decision, the Attorney General articulated the general rule that claims by aliens pertaining to either domestic violence, like the claim in *Matter of A-B-*, or gang violence, a hypothetical scenario not at issue in *Matter of A-B-*, would likely not satisfy the credible fear determination

standard. *Id.* (citing 8 U.S.C. § 1225(b)). Because the Attorney General cited section 1225(b) and the standard for credible fear determinations when articulating the new general legal standard, the Court finds that *Matter of A-B-* implements section 1225(b) within the meaning of section 1252(e)(3).

The government also argues that, despite *Matter of A-B-'s* explicit invocation of section 1225 and articulation of the credible fear determination standard, *Matter of A-B-* is an "adjudication" not a "policy," and therefore section 1252(e)(3) does not apply. Defs.' Mot., ECF No. 57-1 at 32–34. However, it is well-settled that an "administrative agency can, of course, make legal-policy through rulemaking or by adjudication." *Kidd Commc'ns v. F.C.C.*, 427 F.3d 1, 5 (D.C. Cir. 2005)(citing *SEC v. Chenery Corp.*, 332 U.S. 194, 202–03 (1947)). Moreover, "[w]hen an agency does [make policy] by adjudication, because it is a policymaking institution unlike a court, its dicta can represent an articulation of its policy, to which it must adhere or adequately explain deviations." *Id.* at 5. *Matter of A-B-* is a sweeping opinion in which the Attorney General made clear that asylum officers must apply the standards set forth to subsequent credible fear determinations. *See NRLB v. Wyman Gordon Co.*, 394 U.S. 759, 765 (1969)("Adjudicated cases may and do, of course, serve as vehicles for the formulation of agency policies, which are applied and announced therein.").

Indeed, it is difficult to reconcile the government's argument with the language in *Matter of A-B-*: "When confronted with asylum cases based on purported membership in a particular social group, the Board, *immigration judges*, and *asylum officers must analyze the requirements as set forth in this opinion,* which restates and where appropriate, *elaborates upon*, the requirements [for asylum]." 27 I. & N. Dec. at 319 (emphasis added). This proclamation, coupled with the directive to asylum officers that claims based on domestic or gang-related violence generally would not "satisfy the standard to determine whether an alien has a credible fear of persecution," *id.* at 320 n.1, is clearly a "written policy directive" or "written policy guidance" sufficient to bring *Matter of A-B-* under the ambit of section 1252(e)(3). *See Kidd*, 427 F.3d at 5 (stating agency can "make legal-policy through rulemaking or by adjudication"). Indeed, one court has regarded *Matter of A-B-* as such. *See Moncada v. Sessions*, 2018 WL 4847073 *2 (2d Cir. Oct. 5, 2018)(characterizing *Matter of A-B-* as providing "***substantial new guidance*** on the viability of asylum 'claims by aliens pertaining to . . . gang violence'")(emphasis added)(citation omitted).

The government also argues that because the DHS Secretary, rather than the Attorney General, is responsible for implementing most of the provisions in section 1225, the

Attorney General lacks the requisite authority to implement section 1225. Defs.' Reply, ECF No. 85 at 25. Therefore, the government argues, *Matter of A-B-* cannot be "issued by or under the authority of the Attorney General to implement [section 1225(b)]" as required by the statute. *See* 8 U.S.C. § 1252(e)(3)(A)(ii). The government fails to acknowledge, however, that the immigration judges who review negative credible fear determinations are also required to apply *Matter of A-B-*. 8 C.F.R. § 1208.30(g)(2); 8 C.F.R. § 103.10(b)(stating decisions of the Attorney General shall be binding on immigration judges). And it is the Attorney General who is responsible for the conduct of immigration judges. *See, e.g.*, 8 U.S.C. § 1101(b)(4)("An immigration judge shall be subject to such supervision and shall perform such duties as the Attorney General shall prescribe."). Therefore, the Attorney General clearly plays a significant role in the credible fear determination process and has the authority to "implement" section 1225.

Finally, the Court recognizes that even if the jurisdictional issue was a close call, which it is not, several principles persuade the Court that jurisdiction exists to hear plaintiffs' claims. First, there is the "familiar proposition that only upon a showing of clear and convincing evidence of a contrary legislative intent should the courts restrict access to

judicial review." *Bd. of Governors of the Fed. Reserve Sys. v. MCorp. Fin., Inc.*, 502 U.S. 32, 44 (1991)(citations and internal quotation marks omitted). Here, there is no clear and convincing evidence of legislative intent in section 1252 that Congress intended to limit judicial review of the plaintiffs' claims. To the contrary, Congress has explicitly provided this Court with jurisdiction to review systemic challenges to section 1225(b). *See* 8 U.S.C. § 1252(e)(3).

Second, there is also a "strong presumption in favor of judicial review of administrative action." *INS v. St. Cyr*, 533 U.S. 289, 298 (2001). As the Supreme Court has recently explained, "legal lapses and violations occur, and especially so when they have no consequence. That is why [courts have for] so long applied a strong presumption favoring judicial review of administrative action." *Weyerhaeuser Co. v. United States Fish and Wildlife Servs.*, 586 U.S. __,__ (2018)(slip op., at 11). Plaintiffs challenge the credible fear policies under the APA and therefore this "strong presumption" applies in this case.

Third, statutory ambiguities in immigration laws are resolved in favor of the alien. *See Cardoza-Fonseca*, 480 U.S. at 449. Here, any doubt as to whether 1252(e)(3) applies to plaintiffs' claims should be resolved in favor of plaintiffs. *See INS v. Errico*, 385 U.S. 214, 225 (1966)("Even if there were some doubt as to the correct construction of the statute, the

doubt should be resolved in favor of the alien.").

In view of these three principles, and the foregoing analysis, the Court concludes that section 1252(a)(2)(A) does not eliminate this Court's jurisdiction over plaintiffs' claims, and that section 1252(e)(3) affirmatively grants jurisdiction.

b. Policy Memorandum

The government also argues that the Court lacks jurisdiction to review the Policy Memorandum under section 1252(e) for three reasons. First, according to the government, the Policy Memorandum "primarily addresses the asylum standard" and therefore does not implement section 1225(b) as required by the statute. Defs.' Reply, ECF No. 85 at 30. Second, since the Policy Memorandum "merely explains" *Matter of A-B-*, the government argues, it is not reviewable for the same reasons *Matter of A-B-* is not reviewable. *Id.* Finally, the government argues that sections 1225 and 1252(e)(3) "indicate" that Congress only provided judicial review of agency guidelines, directives, or procedures which create substantive rights as opposed to interpretive documents, like the Policy Memorandum, which merely explain the law to government officials. *Id.* at 31-33.

The Court need not spend much time on the government's first two arguments. First, the Policy Memorandum, entitled "Guidance for Processing Reasonable Fear, Credible Fear, Asylum,

and Refugee Claims in Accordance with *Matter of A-B-*" expressly applies to credible fear interviews and provides guidance to credible fear adjudicators. Policy Memorandum, ECF No. 100 at 4 n.1 ("[T]he Attorney General's decision and this [Policy Memorandum] apply also to . . . credible fear determinations."). Furthermore, it expressly invokes section 1225 as the authority for its issuance. *Id.* at 4. The government's second argument that the Policy Memorandum is not reviewable for the same reasons *Matter of A-B-* is not, is easily dismissed because the Court has already found that *Matter of A-B-* falls within section 1252(e)(3)'s jurisdictional grant. *See supra,* at 27-38.

The government's third argument is that section 1252(e)(3) only applies when an agency promulgates legislative rules and not interpretive rules. Defs.' Reply, ECF No. 85 at 30–33. Although not entirely clear, the argument is as follows: (1) the INA provides DHS with significant authority to create legislative rules; (2) Congress barred judicial review of such substantive rules in section 1252(a); (3) therefore Congress must have created a mechanism to review these types of legislative rules, and only legislative rules, in section 1252(e)(3)). *Id.* at 30–31. Folded into this reasoning is also a free-standing argument that because the Policy Memorandum is not a final agency action, it is not reviewable under the APA. *Id.* at 32.

Contrary to the government's assertions, section 1252(e)(3) does not limit its grant of jurisdiction over a "written policy directive, written policy guideline, or written procedure" to only legislative rules or final agency action. Nowhere in the statute did Congress exclude interpretive rules. *Cf.* 5 U.S.C. § 553(b)(3)(A)(stating subsection of statute does not apply to "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice."). Rather, Congress used broader terms such as policy "guidelines," "directives," or "procedures" which do not require notice and comment rulemaking or other strict procedural prerequisites. *See* 8 U.S.C. § 1252(e)(3). There is no suggestion that Congress limited the application of section 1252(e)(3) to only claims involving legislative rules or final agency action, and this Court will not read requirements into the statute that do not exist. *See Keene Corp. v. U.S.*, 508 U.S. 200, 208 (1993)(stating courts have a "duty to refrain from reading a phrase into the statute when Congress has left it out").

In sum, section 1252(a)(2)(A) is not a bar to this Court's jurisdiction because plaintiffs' claims fall well within section 1252(e)(3)'s grant of jurisdiction. Both *Matter of A-B-* and the Policy Memorandum expressly reference credible fear determinations in applying the standards articulated by the Attorney General. Because *Matter of A-B-* and the Policy

Memorandum are written policy directives and guidelines issued by or under the authority of the Attorney General, section 1252(e)(3) applies, and this Court has jurisdiction to hear plaintiffs' challenges to the credible fear policies.

2. Plaintiffs have Standing to Challenge the Policy Memorandum

The government next challenges plaintiffs' standing to bring this suit with respect to their claims against the Policy Memorandum only. Defs.' Mot., ECF No. 57-1 at 35–39. To establish standing, a plaintiff "must, generally speaking, demonstrate that he has suffered 'injury in fact,' that the injury is 'fairly traceable' to the actions of the defendant, and that the injury will likely be redressed by a favorable decision." *Bennett v. Spear*, 520 U.S. 154, 162 (1997)(citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992); *Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc.*, 454 U.S. 464, 471–72 (1982)). Standing is assessed "upon the facts as they exist at the time the complaint is filed." *Natural Law Party of U.S. v. Fed. Elec. Comm'n*, 111 F. Supp. 2d 33, 41 (D.D.C. 2000).

As a preliminary matter, the government argues that plaintiffs lack standing to challenge any of the policies in the Policy Memorandum that rest on *Matter of A-B-* because the Court does not have jurisdiction to review *Matter of A-B-*. *See* Defs.'

Mot., ECF No. 57-1 at 35, 37–39. Therefore, the government argues, plaintiffs' injuries would not be redressable or traceable to the Policy Memorandum since they stem from *Matter of A-B-*. This argument fails because the Court has found that it has jurisdiction to review plaintiffs' claims related to *Matter of A-B-* under 1252(e)(3). *See supra*, at 27-38.

The government also argues that because plaintiffs do not have a legally protected interest in the Policy Memorandum—an interpretive document that creates no rights or obligations—plaintiffs do not have an injury in fact. Defs.' Reply, ECF No. 85 at 33. The government's argument misses the point. Plaintiffs do not seek to enforce a right under a prior policy or interpretive guidance. *See* Pls.' Reply, ECF No. 92 at 17–18. Rather, they challenge the validity of their credible fear determinations pursuant to the credible fear policies set forth in *Matter of A-B-* and the Policy Memorandum. Because the credible fear policies impermissibly raise their burden and deny plaintiffs a fair opportunity to seek asylum and escape the persecution they have suffered, plaintiffs argue, the policies violate the APA and immigration laws. *See id.*

The government also argues that even if the Court has jurisdiction, all the claims, with the exception of one, are time-barred and therefore not redressable. Defs.' Mot., ECF No. 57-1 at 39–41. The government argues that none of the policies

are in fact new and each pre-date the sixty days in which plaintiffs are statutorily required to bring their claims. *Id.* at 39–41. The government lists each challenged policy and relies on existing precedent purporting to apply the same standard espoused in the Policy Memorandum prior to its issuance. *See id.* at 39–41. The challenge in accepting this theory of standing is that it would require the Court to also accept the government's theory of the case: that the credible fear policies are not "new." In other words, the government's argument "assumes that its view on the merits of the case will prevail." *Defs. of Wildlife v. Gutierrez*, 532 F.3d 913, 924 (D.C. Cir. 2008). This is problematic because "in reviewing the standing question, the court must be careful not to decide the questions on the merits for or against the plaintiff, and must therefore assume that on the merits the plaintiffs would be successful in their claims." *City of Waukesha v. EPA*, 320 F.3d 228, 235 (D.C. Cir. 2003)(citations omitted).

Whether the credible fear policies differ from the standards articulated in the pre-policy cases cited by the government, and are therefore new, is a contested issue in this case. And when assessing standing, this Court must "be careful not to decide the questions on the merits" either "for or against" plaintiffs, "and must therefore assume that on the merits the plaintiffs would be successful in their claims." *Id.*

Instead, the Court must determine whether an order can redress plaintiffs' injuries in whole or part. *Gutierrez*, 532 F.3d at 925. There is no question that the challenged policies impacted plaintiffs. *See* Defs.' Mot., ECF No. 57-1 at 28 (stating an "asylum officer reviewed each of [plaintiffs] credible fear claims and found them wanting in light of *Matter of A-B-*"). There is also no question that an order from this Court declaring the policies unlawful and enjoining their use would redress those injuries. *See Carpenters Indus. Council v. Zinke*, 854 F.3d 1, 6 n.1 (D.C. Cir. 2017)(stating when government actions cause an injury, enjoining that action will usually redress the injury).

Because plaintiffs have demonstrated that they have: (1) suffered an injury; (2) the injury is fairly traceable to the credible fear policies; and (3) action by the Court can redress their injuries, plaintiffs have standing to challenge the Policy Memorandum. Therefore, the Court may proceed to the merits of plaintiffs' claims.

B. Legal Standard for Plaintiffs' Claims

Although both parties have moved for summary judgment, the parties seek review of an administrative decision under the APA. *See* 5 U.S.C. § 706. Therefore, the standard articulated in Federal Rule of Civil Procedure 56 is inapplicable because the Court has a more limited role in reviewing the administrative

record. *Wilhelmus v. Geren*, 796 F. Supp. 2d 157, 160 (D.D.C. 2011)(internal citation omitted). "[T]he function of the district court is to determine whether or not as a matter of law the evidence in the administrative record permitted the agency to make the decision it did." *See Sierra Club v. Mainella*, 459 F. Supp. 2d 76, 90 (D.D.C. 2006)(internal quotation marks and citations omitted). "Summary judgment thus serves as the mechanism for deciding, as a matter of law, whether the agency action is supported by the administrative record and otherwise consistent with the APA standard of review." *Wilhelmus*, 796 F. Supp. 2d at 160 (internal citation omitted).

Plaintiffs bring this challenge to the alleged new credible fear policies arguing they violate the APA and INA. Two separate, but overlapping, standards of APA review govern the resolution of plaintiffs' claims. First, under 5 U.S.C. § 706(2)(a), agency action must not be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." To survive an arbitrary and capricious challenge, an agency action must be "the product of reasoned decisionmaking." *Fox v. Clinton*, 684 F.3d 67, 74–75 (D.C. Cir. 2012). The reasoned decisionmaking requirement applies to judicial review of agency adjudicatory actions. *Id.* at 75. A court must not uphold an adjudicatory action when the agency's judgment "was neither adequately explained in its decision nor supported by agency

precedent." *Id.* (citing *Siegel v. SEC*, 592 F.3d 147, 164 (D.C. Cir. 2010)). Thus, review of *Matter of A-B-* requires this Court to determine whether the decision was the product of reasoned decisionmaking. *See id.* at 75.

Second, plaintiffs' claims also require this Court to consider the degree to which the government's interpretation of the various relevant statutory provisions in *Matter of A-B-* is afforded deference. The parties disagree over whether this Court is required to defer to the agency's interpretations of the statutory provisions in this case. "Although balancing the necessary respect for an agency's knowledge, expertise, and constitutional office with the courts' role as interpreter of laws can be a delicate matter," the familiar *Chevron* framework offers guidance. *Id.* at 75 (citing *Gonzales v. Oregon*, 546 U.S. 243, 255 (2006)).

In reviewing an agency's interpretation of a statute it is charged with administering, a court must apply the framework of *Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). *See Halverson v. Slater*, 129 F.3d 180, 184 (D.C. Cir. 1997). Under the familiar *Chevron* two-step test, the first step is to ask "whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed

intent of Congress." *Chevron*, 467 U.S. at 842–43. In making that determination, the reviewing court "must first exhaust the 'traditional tools of statutory construction' to determine whether Congress has spoken to the precise question at issue." *Natural Res. Def. Council, Inc. v. Daley*, 209 F.3d 747, 572 (2000)(citation omitted). The traditional tools of statutory construction include "examination of the statute's text, legislative history, and structure . . . as well as its purpose." *Id.* (internal citations omitted). If these tools lead to a clear result, "then Congress has expressed its intention as to the question, and deference is not appropriate." *Id.*

If a court finds that the statute is silent or ambiguous with respect to a particular issue, then Congress has not spoken clearly on the subject and a court is required to proceed to the second step of the *Chevron* framework. *Chevron*, 467 U.S. at 843. Under *Chevron* step two, a court's task is to determine if the agency's approach is "based on a permissible construction of the statute." *Id.* To make that determination, a court again employs the traditional tools of statutory interpretation, including reviewing the text, structure, and purpose of the statute. *See Troy Corp. v. Browder*, 120 F.3d 277, 285 (D.C. Cir. 1997)(noting that an agency's interpretation must "be reasonable and consistent with the statutory purpose"). Ultimately, "[n]o matter how it is framed, the question a court faces when

confronted with an agency's interpretation of a statute it administers is always, simply, whether the agency has stayed within the bounds of its statutory authority." *District of Columbia v. Dep't of Labor*, 819 F.3d 444, 459 (D.C. Cir. 2016)(citation omitted).

The scope of review under both the APA's arbitrary and capricious standard and *Chevron* step two are concededly narrow. *See Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)(stating "scope of review under the 'arbitrary and capricious' standard is narrow and a court is not to substitute its judgment for that of the agency"); *see also Judulang v. Holder*, 565 U.S. 42, 52 n.7 (2011)(stating the *Chevron* step two analysis overlaps with arbitrary and capricious review under the APA because under *Chevron* step two a court asks "whether an agency interpretation is 'arbitrary or capricious in substance'"). Although this review is deferential, "courts retain a role, and an important one, in ensuring that agencies have engaged in reasoned decision making." *Judulang*, 565 U.S. at 53; *see also Daley*, 209 F.3d at 755 (stating that although a court owes deference to agency decisions, courts do not hear cases "merely to rubber stamp agency actions").

With these principles in mind, the Court now turns to plaintiffs' claims that various credible fear policies based on

Matter of A-B-, the Policy Memorandum, or both, are arbitrary and capricious and in violation of the immigration laws.

C. APA and Statutory Claims

Plaintiffs challenge the following alleged new credible fear policies: (1) a general rule against credible fear claims related to domestic or gang-related violence; (2) a heightened standard for persecution involving non-governmental actors; (3) a new rule for the nexus requirement in asylum; (4) a new rule that "particular social group" definitions based on claims of domestic violence are impermissibly circular; (5) the requirements that an alien articulate an exact delineation of the specific "particular social group" at the credible fear determination stage and that asylum officers apply discretionary factors at that stage; and (6) the Policy Memorandum's requirement that adjudicators ignore circuit court precedent that is inconsistent with *Matter of A-B-*, and apply the law of the circuit where the credible fear interview takes place. The Court addresses each challenged policy in turn.

1. The General Rule Foreclosing Domestic Violence and Gang-Related Claims Violates the APA and Immigration Laws

Plaintiffs argue that the credible fear policies establish an unlawful general rule against asylum petitions by aliens with credible fear claims relating to domestic and gang violence. Pls.' Mot., ECF No. 64-1 at 28.

A threshold issue is whether the *Chevron* framework applies to this issue at all. "Not every agency interpretation of a statute is appropriately analyzed under *Chevron*." *Alabama Educ. Ass'n v. Chao*, 455 F.3d 386, 392 (D.C. Cir. 2006). The government acknowledges that the alleged new credible fear policies are not "entitled to blanket *Chevron* deference." Defs.' Reply, ECF No. 85 at 39 (emphasis in original). Rather, according to the government, the Attorney General is entitled to *Chevron* deference when he "interprets any *ambiguous* statutory terms in the INA." *Id.* (emphasis in original). The government also argues that the Attorney General is entitled to *Chevron* deference to the extent *Matter of A-B-* states "long-standing precedent or interpret[s] prior agency cases or regulations through case-by-case adjudication." *Id.* at 40.

To the extent *Matter of A-B-* was interpreting the "particular social group" requirement in the INA, the *Chevron* framework clearly applies. The Supreme Court has explained that "[i]t is clear that principles of *Chevron* deference are applicable" to the INA because that statute charges the Attorney General with administering and enforcing the statutory scheme. *I.N.S. v. Aguirre-Aguirre*, 526 U.S. 415, 424–25 (quoting 8 U.S.C. §§ 1103(a)(1), 1253(h)). In addition to *Chevron* deference, a court must also afford deference to an agency when it is interpreting its own precedent. *U.S. Telecom Ass'n v.*

F.C.C., 295 F.3d 1326, 1332 (D.C. Cir. 2002)("We [] defer to an agency's reasonable interpretation of its own rules and precedents.").

In this case, the Attorney General interpreted a provision of the INA, a statute that Congress charged the Attorney General with administering. *See* 8 U.S.C. § 1103(a)(1). *Matter of A-B-* addressed the issue of whether an alien applying for asylum based on domestic violence could establish membership in a "particular social group." Because the decision interpreted a provision of the INA, the *Chevron* framework applies to *Matter of A-B-*.[11] *See Negusie v. Holder*, 555 U.S. 511, 516 (2009)(stating it "is well settled" that principles of *Chevron* deference apply to the Attorney General's interpretation of the INA).

a. *Chevron* Step One: The Phrase "Particular Social Group" is Ambiguous

The first question within the *Chevron* framework is whether, using the traditional tools of statutory interpretation including evaluating the text, structure, and the overall

[11] The Policy Memorandum is not subject to *Chevron* deference. The Supreme Court has warned that agency "[i]nterpretations such as those in opinion letters—like interpretations contained in *policy statements*, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant *Chevron*-style deference." *Christensen v. Harris Cnty*, 529 U.S. 576, 587 (2000). Rather, interpretations contained in such formats "are entitled to respect . . . only to the extent that those interpretations have the power to persuade." *Id.* (citations omitted).

statutory scheme, as well as employing common sense, Congress has "supplied a clear and unambiguous answer to the interpretive question at hand." *Pereira v. Sessions*, 138 S. Ct. 2105, 2113 (2018)(citation omitted). The interpretive question at hand in this case is the meaning of the term "particular social group."

Under the applicable asylum provision, an "alien who is physically present in the United States or who arrives in the United States . . . irrespective of such alien's status" may be granted asylum at the discretion of the Attorney General if the "Attorney General determines that such alien is a refugee within the meaning of section 1101(a)(42)(A)." 8 U.S.C. § 1158. The term "refugee" is defined in section 1101(a)(42)(A) as, among other things, an alien who is unable or unwilling to return to his or her home country "because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1101(a)(42)(A). At the credible fear stage, an alien needs to show that there is a "significant possibility . . . that the alien could establish eligibility for asylum." 8 U.S.C. § 1225(b)(1)(B)(v).

The INA itself does not shed much light on the meaning of the term "particular social group." The phrase "particular social group" was first included in the INA when Congress enacted the Refugee Act of 1980. Pub. L. No. 96-212, 94 Stat.

102 (1980). The purpose of the Refugee Act was to protect refugees, i.e., individuals who are unable to protect themselves from persecution in their native country. *See id.* § 101(a)("The Congress declares that it is the historic policy of the United States to respond to the urgent needs of persons subject to persecution in their homelands, including . . . humanitarian assistance for their care and maintenance in asylum areas."). While the legislative history of the Act does not reveal the specific meaning the members of Congress attached to the phrase "particular social group," the legislative history does make clear that Congress intended "to bring United States refugee law into conformance with the [Protocol], 19 U.S.T. 6223, T.I.A.S. No. 6577, to which the United States acceded in 1968." *Cardoza-Fonseca*, 480 U.S. at 436-37. Indeed, when Congress accepted the definition of "refugee" it did so "with the understanding that it is based directly upon the language of the Protocol and it is intended that the provision be construed consistent with the Protocol." *Id.* at 437 (citations omitted). It is therefore appropriate to consider what the phrase "particular social group" means under the Protocol. *See id.*

In interpreting the Refugee Act in accordance with the meaning intended by the Protocol, the language in the Act should be read consistently with the United Nations' interpretation of the refugee standards. *See id.* at 438–39 (relying on UNHCR's

interpretation in interpreting the Protocol's definition of "well-founded fear"). The UNHCR defined the provisions of the Convention and Protocol in its Handbook on Procedures and Criteria for Determining Refugee Status ("UNHCR Handbook").[12] *Id.* As the Supreme Court has noted, the UNHCR Handbook provides "significant guidance in construing the Protocol, to which Congress sought to conform . . . [and] has been widely considered useful in giving content to the obligations that the protocol establishes." *Id.* at 439 n.22 (citations omitted). The UNHCR Handbook codified the United Nations' interpretation of the term "particular social group" at that time, construing the term expansively. The UNHCR Handbook states that "a 'particular social group' normally comprises persons of similar background, habits, or social status." UNHCR Handbook at Ch. II B(3)(e) ¶ 77.

The clear legislative intent to comply with the Protocol and Congress' election to not change or add qualifications to the U.N.'s definition of "refugee" demonstrates that Congress intended to adopt the U.N.'s interpretation of the word "refugee." Moreover, the UNHCR's classification of "social

[12] Handbook of Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and 1967 Protocol Relating to the Status of Refugees, OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, *available at* http://www.unhcr.org/4d93528a9.pdf.

group" in broad terms such as "similar background, habits, or social status" suggests that Congress intended an equally expansive construction of the same term in the Refugee Act. Furthermore, the Refugee Act was enacted to further the "historic policy of the United States to respond to the urgent needs of persons subject to persecution in their homelands . . . [and] it is the policy of the United States to encourage all nations to provide assistance and resettlement opportunities to refugees to the fullest extent possible." *Maharaj v. Gonzales*, 450 F.3d 961, 983 (9th Cir. 2006)(O'Scannlain, J. concurring in part)(citing Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102).

Although the congressional intent was clear that the meaning of "particular social group" should not be read too narrowly, the Court concludes that Congress has not "spoken directly" on the precise question of whether victims of domestic or gang-related persecution fall into the particular social group category. Therefore, the Court proceeds to *Chevron* step two to determine whether the Attorney General's interpretation, which generally precludes domestic violence and gang-related claims at the credible fear stage, is a permissible interpretation of the statute.

b. *Chevron* Step Two: Precluding Domestic and Gang-Related Claims at the Credible Fear Stage is an Impermissible Reading of the Statute and is Arbitrary and Capricious

As explained above, the second step of the *Chevron* analysis overlaps with the arbitrary and capricious standard of review under the APA. *See Nat'l Ass'n of Regulatory Util. Comm'rs v. ICC*, 41 F.3d 721, 726 (D.C. Cir. 1994)("[T]he inquiry at the second step of *Chevron* overlaps analytically with a court's task under the [APA]."). "To survive arbitrary and capricious review, an agency action must be the product of reasoned decisionmaking." *Fox v. Clinton*, 684 F.3d 67, 74–75 (D.C. Cir. 2012). "Thus, even though arbitrary and capricious review is fundamentally deferential—especially with respect to matters relating to an agency's areas of technical expertise—no deference is owed to an agency action that is based on an agency's purported expertise where the agency's explanation for its action lacks any coherence." *Id.* at 75 (internal citations and alterations omitted).

Plaintiffs argue that the Attorney General's near-blanket rule against positive credible fear determinations based on domestic violence and gang-related claims is arbitrary and capricious for several reasons. First, they contend that the rule has no basis in immigration law. Pls.' Mot., ECF No. 64-1 at 39–40. Plaintiffs point to several cases in which immigration

judges and circuit courts have recognized asylum petitions based on gang-related or gender-based claims. *See id.* at 38–39 (citing cases). Second, plaintiffs argue that the general prohibition is arbitrary and capricious and contrary to the INA because it constitutes an unexplained change to the long-standing recognition that credible fear determinations must be individualized based on the facts of each case. *Id.* at 40–41.

The government's principal response is straightforward: no such general rule against domestic violence or gang-related claims exists. Defs.' Reply, ECF No. 85 at 44–47. The government emphasizes that the only change to the law in *Matter of A-B-* is that *Matter of A-R-C-G-* was overruled. *Id.* at 43. The government also argues that *Matter of A-B-* only required the BIA to assess each element of an asylum claim and not rely on a party's concession that an element is satisfied. *Id.* at 45. Thus, according to the government, the Attorney General simply "eliminated a loophole created by *A-R-C-G-*." *Id.* at 45. The government dismisses the rest of *Matter of A-B-* as mere "comment[ary] on problems typical of gang and domestic violence related claims." *Id.* at 46.

And even if a general rule does exist, the government contends that asylum claims based on "private crime[s]" such as domestic and gang violence have been the center of controversy for decades. Defs.' Reply, ECF No. 85 at 44. Therefore, the

government concludes, that *Matter of A-B-* is a lawful interpretation and restatement of the asylum laws, and is entitled to deference. *Id.* Finally, the government argues that Congress designed the asylum statute as a form of limited relief, not to "provide redress for all misfortune." *Id.*

The Court is not persuaded that *Matter of A-B-* and the Policy Memorandum do not create a general rule against positive credible fear determinations in cases in which aliens claim a fear of persecution based on domestic or gang-related violence. *Matter of A-B-* mandates that "[w]hen confronted with asylum cases based on purported membership in a particular social group . . . immigration judges, and asylum officers must analyze the requirements as set forth" in the decision. 27 I. & N. Dec. at 319. The precedential decision further explained that "[g]enerally, claims by aliens pertaining to domestic violence or gang violence perpetrated by non-governmental actors will not qualify for asylum." *Id.* at 320. *Matter of A-B-* also requires asylum officers to "analyze the requirements as set forth in" *Matter of A-B-* when reviewing asylum related claims including whether such claims "would satisfy the legal standard to determine whether an alien has a credible fear of persecution." *Id.* at 320 n.1 (citing 8 U.S.C. § 1225(b)). Furthermore, the Policy Memorandum also makes clear that the sweeping statements in *Matter of A-B-* must be applied to credible fear

determinations: "if an applicant claims asylum based on membership in a particular social group, then officers must factor the [standards explained in *Matter of A-B-*] *into their determination of whether an applicant has a credible fear or reasonable fear of persecution*." Policy Memorandum, ECF No. 100 at 12 (emphasis added).

Not only does *Matter of A-B-* create a general rule against such claims at the credible fear stage, but the general rule is also not a permissible interpretation of the statute. First, the general rule is arbitrary and capricious because there is no legal basis for an effective categorical ban on domestic violence and gang-related claims. Second, such a general rule runs contrary to the individualized analysis required by the INA. Under the current immigration laws, the credible fear interviewer must prepare a case-specific factually intensive analysis for each alien. *See* 8 C.F.R. § 208.30(e)(requiring individual analysis including material facts stated by the applicant, and additional facts relied upon by officer). Credible fear determinations, like requests for asylum in general, must be resolved based on the particular facts and circumstances of each case. *Id.*

A general rule that effectively bars the claims based on certain categories of persecutors (i.e. domestic abusers or gang members) or claims related to certain kinds of violence is

inconsistent with Congress' intent to bring "United States refugee law into conformance with the [Protocol]." *Cardoza-Fonseca*, 480 U.S. at 436-37. The new general rule is thus contrary to the Refugee Act and the INA.[13] In interpreting "particular social group" in a way that results in a general rule, in violation of the requirements of the statute, the Attorney General has failed to "stay[] within the bounds" of his statutory authority.[14] *District of Columbia v. Dep't of Labor*, 819 F.3d at 449.

The general rule is also arbitrary and capricious because it impermissibly heightens the standard at the credible fear stage. The Attorney General's direction to deny most domestic violence or gang violence claims at the credible fear

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[13] The new rule is also a departure from previous DHS policy. *See* Mujahid Decl., Ex. F ("2017 Credible Fear Training") ("Asylum officers should evaluate the entire scope of harm experienced by the applicant to determine if he or she was persecuted, taking into account the individual circumstances of each case."). It is arbitrary and capricious for that reason as well. *Lone Mountain Processing, Inc. v. Sec'y of Labor*, 709 F.3d 1161, 1164 (D.C. Cir. 2013)("[A]n agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, *not casually ignored*.")(emphasis added).

[14] The Court also notes that domestic law may supersede international obligations only by express abrogation, *Chew Heong v. United States*, 112 U.S. 536, 538 (1884), or by subsequent legislation that irrevocably conflicts with international obligations, *Reid v. Covert*, 354 U.S. 1, 18 (1957). Congress has not expressed any intention to rescind its international obligations assumed through accession to the 1967 Protocol via the Refugee Act of 1980.

determination stage is fundamentally inconsistent with the threshold screening standard that Congress established: an alien's removal may not be expedited if there is a "significant possibility" that the alien could establish eligibility for asylum. 8 U.S.C. § 1225(b)(1)(B)(v). The relevant provisions require that the asylum officer "conduct the interview in a nonadversarial manner" and "elicit all relevant and useful information bearing on whether the applicant has a credible fear of persecution or torture." 8 C.F.R. § 208.30(d). As plaintiffs point out, to prevail at a credible fear interview, the alien need only show a "significant possibility" of a one in ten chance of persecution, i.e., a fraction of ten percent. *See* 8 U.S.C. § 1225(b)(1)(B)(v); *Cardoza-Fonseca*, 480 U.S. at 439–40 (describing a well-founded fear of persecution at asylum stage to be satisfied even when there is a ten percent chance of persecution). The legislative history of the IIRIRA confirms that Congress intended this standard to be a low one. *See* 142 CONG. REC. S11491-02 ("[t]he credible fear standard . . . is intended to be a low screening standard for admission into the usual full asylum process"). The Attorney General's directive to broadly exclude groups of aliens based on a sweeping policy applied indiscriminately at the credible fear stage, was neither adequately explained nor supported by agency precedent. Accordingly, the general rule against domestic violence and

gang-related claims during a credible fear determination is arbitrary and capricious and violates the immigration laws.

2. Persecution: The "Condoned or Complete Helplessness" Standard Violates the APA and Immigration Laws

Plaintiffs next argue that the government's credible fear policies have heightened the legal requirement for all credible fear claims involving non-governmental persecutors. Pls.' Mot., ECF No. 64-1 at 48.

To be eligible for asylum, an alien must demonstrate either past "persecution or a well-founded fear of persecution." 8 U.S.C. § 1101(a)(42)(A). When a private actor, rather than the government itself, is alleged to be the persecutor, the alien must demonstrate "some connection" between the actions of the private actor and "governmental action or inaction." *See Rosales Justo v. Sessions*, 895 F.3d 154, 162 (1st Cir. 2018). To establish this connection, a petitioner must show that the government was either "unwilling or unable" to protect him or her from persecution. *See Burbiene v. Holder*, 568 F.3d 251, 255 (1st Cir. 2009).

Plaintiffs argue that *Matter of A-B-* and the Policy Memorandum set forth a new, heightened standard for government involvement by requiring an alien to "show the government condoned the private actions or at least demonstrated a complete helplessness to protect the victim." *Matter of A-B-*, 27 I. & N.

Dec. at 337; Policy Memorandum, ECF No. 100 at 9. The government argues that the "condone" or "complete helplessness" standard is not a new definition of persecution; and, in any event, such language does not change the standard. Defs.' Reply, ECF No. 85 at 55.

a. *Chevron* Step One: The Term "Persecution" is Not Ambiguous[15]

Again, the first question under the *Chevron* framework is whether Congress has "supplied a clear and unambiguous answer to the interpretive question at hand." *Pereira*, 138 S. Ct. at 2113. Here, the interpretive question at hand is whether the word "persecution" in the INA requires a government to condone the persecution or demonstrate a complete helplessness to protect the victim.

The Court concludes that the term "persecution" is not ambiguous and the government's new interpretation is inconsistent with the INA. The Court is guided by the longstanding principle that Congress is presumed to have incorporated prior administrative and judicial interpretations of language in a statute when it uses the same language in a subsequent enactment. *See Sekhar v. United States*, 570 U.S. 729, 733 (2013)(explaining that "if a word is obviously transplanted

[15] Because the government is interpreting a provision of the INA, the *Chevron* framework applies.

from another legal source, whether the common law or other legislation, it brings the old soil with it"); *Lorillard v. Pons*, 434 U.S. 575, 580 (1978)(stating Congress is aware of interpretations of a statute and is presumed to adopt them when it re-enacts them without change).

The seminal case on the interpretation of the term "persecution," *Matter of Acosta*, 19 I. & N. Dec. 211 (BIA 1985), is dispositive. In *Matter of Acosta*, the BIA recognized that harms could constitute persecution if they were inflicted "either by the government of a country or by persons or an organization that the government was unable or unwilling to control." *Id.* at 222 (citations omitted). The BIA noted that Congress carried forward the term "persecution" from pre-1980 statutes, in which it had a well-settled judicial and administrative meaning: "harm or suffering . . . inflicted either by the government of a country or by persons or an organization that the government was unable or unwilling to control." *Id.* Applying the basic rule of statutory construction that Congress carries forward established meanings of terms, the BIA adopted the same definition. *Id.* at 223.

The Court agrees with this approach. When Congress uses a term with a settled meaning, its intent is clear for purposes of *Chevron* step one. *cf. B & H Med., LLC v. United States*, 116 Fed. Cl. 671, 685 (2014)(a term with a "judicially settled meaning"

is "not ambiguous" for purposes of deference under *Auer v. Robbins*, 519 U.S. 452 (1997)). As explained in *Matter of Acosta*, Congress adopted the "unable or unwilling" standard when it used the word "persecution" in the Refugee Act. 19 I. & N. Dec. at 222, *see also Shapiro v. United States*, 335 U.S. 1, 16 (1948)(Congress presumed to have incorporated "settled judicial construction" of statutory language through re-enactment). Indeed, the UNHCR Handbook stated that persecution included "serious discriminatory or other offensive acts . . . committed by the local populace . . . if they are knowingly tolerated by the authorities, or if the authorities refuse, or prove unable, to offer *effective* protection." *See* UNHCR Handbook ¶ 65 (emphasis added). It was clear at the time that the Act was passed by Congress that the "unwilling or unable" standard did not require a showing that the government "condoned" persecution or was "completely helpless" to prevent it. Therefore, the government's interpretation of the term "persecution" to mean the government must condone or demonstrate complete helplessness to help victims of persecution fails at *Chevron* step one.

The government relies on circuit precedent that has used the "condoned" or "complete helplessness" language to support its argument that the standard is not new. Defs.' Reply, ECF No. 85 at 55. There are several problems with the government's argument. First, upon review of the cited cases it is apparent

that, although the word "condone" was used, in actuality, the courts were applying the "unwilling or unable" standard. For example, in *Galina v. INS*, 213 F.3d 955 (7th Cir. 2005), an asylum applicant was abducted and received threatening phone calls in her native country. *Id.* at 957. The applicant's husband called the police to report the threatening phone calls, and after the police located one of the callers, the calls stopped. *Id.* The Court recognized that a finding of persecution ordinarily requires a determination that the government condones the violence or demonstrated a complete helplessness to protect the victims. *Id.* at 958. However, relying on the BIA findings, the Court found that notwithstanding the fact "police might take some action against telephone threats" the applicant would still face persecution if she was sent back to her country of origin because she could have been killed. *Id.* Therefore, the Court ultimately concluded that an applicant can still meet the persecution threshold when the police are unable to provide effective help, but fall short of condoning the persecution. *Id.* at 958. Despite the language it used to describe the standard, the court did not apply the heightened "condoned or complete helplessness" persecution standard pronounced in the credible fear policies here.

Second, and more importantly, under the government's formulation of the persecution standard, no asylum applicant who

received assistance from the government, regardless of how ineffective that assistance was, could meet the persecution requirement when the persecutor is a non-government actor.[16] *See* Policy Memorandum, ECF No. 100 at 17 (stating that in the context of credible fear interviews, "[a]gain, the home government must either condone the behavior or demonstrate a complete helplessness to protect victims of such alleged persecution"). That is simply not the law. For example, in *Rosales Justo v. Sessions*, the United States Court of Appeals for the First Circuit held that a petitioner satisfied the "unable or unwilling" standard, even though there was a significant police response to the claimed persecution. 895 F.3d 154, 159 (1st Cir. 2018). The petitioner in *Rosales Justo* fled Mexico after organized crime members murdered his son. *Id.* at 157–58. Critically, the "police took an immediate and active interest in the [petitioner's] son's murder." *Id.* The Court noted that the petitioner "observed seven officers and a forensic team at the scene where [the] body was recovered, the police took statements from [petitioner] and his wife, and an

[16] The Court notes that this persecution requirement applies to all asylum claims not just claims based on membership in a "particular social group" or claims related to domestic or gang-related violence. *See Matter of A-B-*, 27 I. & N. Dec. at 337 (describing elements of persecution). Therefore, such a formulation heightens the standard for every asylum applicant who goes through the credibility determination process.

autopsy was performed." *Id.* The Court held that, despite the extensive actions taken by the police, the "unwilling or unable" standard was satisfied because although the government was willing to protect the petitioner, the evidence did not show that the government was able to make the petitioner and his family any safer. *Id.* at 164 (reversing BIA's conclusion that the immigration judge clearly erred in finding that the police were willing but unable to protect family). As *Rosales Justo* illustrates, a requirement that police condone or demonstrate complete helplessness is inconsistent with the current standards under immigration law.[17]

Furthermore, the Court need not defer to the government's interpretation to the extent it is based on an interpretation of court precedent. Indeed, in "case after case, courts have affirmed this fairly intuitive principle, that courts need not, and should not, defer to agency interpretations of opinions written by courts." *Citizens for Responsibility & Ethics in*

[17] This departure is also wholly unexplained. As the Supreme Court has held, "[u]nexplained inconsistency is . . . a reason for holding an interpretation to be an arbitrary and capricious change from agency practice under the [APA]." *See Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 46–57 (1983). The credible fear policies do not acknowledge a change in the persecution standard and are also arbitrary and capricious for that reason. *See Fox Television Stations, Inc.*, 556 U.S. at 514, 515 (2009)("[T]he requirement that an agency provide reasoned explanation for its action would ordinarily demand that it display awareness that it is changing [its] position.").

Washington v. Fed. Election Comm'n, 209 F. Supp. 3d 77, 87 (D.D.C. 2016)(listing cases). "There is therefore no reason for courts—the supposed experts in analyzing judicial decisions—to defer to agency interpretations of the Court's opinions." *Univ. of Great Falls v. NLRB*, 278 F.3d 1335, 1341 (D.C. Cir. 2002); *see also Judulang*, 565 U.S. at 52 n.7 (declining to apply *Chevron* framework because the challenged agency policy was not "an interpretation of any statutory language").

To the extent the credible fear policies established a new standard for persecution, it did so in purported reliance on circuit opinions. The Court gives no deference to the government's interpretation of judicial opinions regarding the proper standard for determining the degree to which government action, or inaction, constitutes persecution. *Univ. of Great Falls*, 278 F.3d at 1341. The "unwilling or unable" persecution standard was settled at the time the Refugee Act was codified, and therefore the Attorney General's "condoned" or "complete helplessness" standard is not a permissible construction of the persecution requirement.

3. Nexus: The Credible Fear Policies Do Not Pose a New Standard for the Nexus Requirement

Plaintiffs next argue that the formulation of the nexus requirement articulated in *Matter of A-B*-that when a private actor inflicts violence based on a personal relationship with

the victim, the victim's membership in a larger group may well not be "one central reason" for the abuse—violates the INA, Refugee Act, and APA. The nexus requirement in the INA is that a putative refugee establish that he or she was persecuted "on account of" a protected ground such as a particular social group.[18] *See* 8 U.S.C. § 1158(b)(1)(B)(i).

The parties agree that the precise interpretive issue is not ambiguous. The parties also endorse the "one central reason" standard and the need to conduct a "mixed-motive" analysis when there is more than one reason for persecution. *See* Defs.' Mot., 57-1 at 47; Pls.' Mot., ECF No. 64-1 at 53–54. The INA expressly contemplates mixed motives for persecution when it specifies that a protected ground must be "one central reason" for the persecution. 8 U.S.C. § 1158(b)(1)(B)(i). Where the parties disagree is whether the credible fear policies deviate from this standard.

With respect to the nexus requirement, the government's reading of *Matter of A-B-* on this issue is reasonable. In *Matter of A-B-*, the Attorney General relies on the "one central reason" standard and provides examples of a criminal gang targeting people because they have money or property or "simply because

[18] Similar to the Attorney General's directives related to the "unwilling or unable" standard, this directive applies to all asylum claims, not just claims related to domestic or gang-related violence.

the gang inflicts violence on those who are nearby." 27 I. & N. Dec. at 338–39. The decision states that "purely personal" disputes will not meet the nexus requirement. *Id.* at 339 n.10. The Court discerns no distinction between this statement and the statutory "one central reason" standard.

Similarly, the Policy Memorandum states that "when a private actor inflicts violence based on a personal relationship with the victim, the victim's membership in a larger group often will not be 'one central reason' for the abuse." Policy Memorandum, ECF No. 100 at 9 (citing *Matter of A-B-*, 27 I. & N. Dec. at 338–39). Critically, the Policy Memorandum explains that in "a particular case, the evidence may establish that a victim of domestic violence was attacked ***based solely*** on her preexisting personal relationship with her abuser." *Id.* (emphasis added). This statement is no different than the statement of the law in *Matter of A-B-*. Because the government's interpretation is not inconsistent with the statute, the Court finds the government's interpretation to be reasonable.

The Court reiterates that, although the nexus standard forecloses cases in which ***purely*** personal disputes are the impetus for the persecution, it does not preclude a positive credible fear determination simply because there is a personal relationship between the persecutor and the victim, so long as the one central reason for the persecution is a protected

ground. *See Aldana Ramos v. Holder*, 757 F.3d 9, 18–19 (1st Cir. 2014)(recognizing that "multiple motivations [for persecution] can exist, and that the presence of a non-protected motivation does not render an applicant ineligible for refugee status"); *Qu v. Holder*, 618 F.3d 602, 608 (6th Cir. 2010)("[I]f there is a nexus between the persecution and the membership in a particular social group, the simultaneous existence of a personal dispute does not eliminate that nexus."). Indeed, courts have routinely found the nexus requirement satisfied when a personal relationship exists—including cases in which persecutors had a close relationship with the victim. *See, e.g.*, *Bringas-Rodriguez*, 850 F.3d at 1056 (persecution by family members and neighbor on account of applicant's perceived homosexuality); *Nabulwala v. Gonzalez*, 481 F.3d 1115, 1117–18 (8th Cir. 2007)(applicant's family sought to violently "change" her sexual orientation).

Matter of A-B- and the Policy Memorandum do not deviate from the "one central reason" standard articulated in the statute or in BIA decisions. *See* 8 U.S.C. § 1158(b)(1)(B)(i). Therefore, the government did not violate the APA or INA with regards to its interpretation of the nexus requirement.

4. Circularity: The Policy Memorandum's Interpretation of the Circularity Requirement Violates the APA and Immigration Laws

Plaintiffs argue that the Policy Memorandum establishes a

new rule that "particular social group" definitions based on claims of domestic violence are impermissibly circular and therefore not cognizable as a basis for persecution in a credible fear determination. Pls.' Mot., ECF No. 64-1 at 56–59. Plaintiffs argue that this new circularity rule is inconsistent with the current legal standard and therefore violates the Refugee Act, INA, and is arbitrary and capricious.[19] *Id.* at 57. The parties agree that the formulation of the anti-circularity rule set forth in *Matter of M-E-V-G-*, 26 I. & N. Dec. 227, 242 (BIA 2014)—"that a particular social group cannot be defined exclusively by the claimed persecution"—is correct. *See* Defs.' Reply, ECF No. 85 at 62; Pls.' Reply., ECF No. 92 at 30–31. Accordingly, the Court begins with an explanation of that opinion.

[19] The government contends that plaintiffs' argument on this issue has evolved from the filing of the complaint to the filing of plaintiffs' cross-motion for summary judgment. Defs.' Reply, ECF No. 85 at 61. In plaintiffs' complaint, they objected to the circularity issue by stating the new credible fear policies erroneously conclude "that groups defined in part by the applicant's inability to leave the relationship are impermissibly circular." ECF No. 54 at 24. In their cross-motion for summary judgment, plaintiffs argue that the government's rule is inconsistent with well-settled law that the circularity standard only applies when the group is defined exclusively by the feared harm. Pls.' Mot., ECF No. 64-1 at 57. The Court finds that plaintiffs' complaint was sufficient to meet the notice pleading standard. *See 3E Mobile, LLC v. Glob. Cellular, Inc.*, 121 F. Supp. 3d 106, 108 (D.D.C. 2015)(explaining that the notice-pleading standard does not require a plaintiff to "plead facts or law that match every element of a legal theory").

The question before the BIA in *Matter of M-E-V-G-*, was whether the respondent had established membership in a "particular social group," namely "Honduran youth who have been actively recruited by gangs but who have refused to join because they oppose the gangs." 26 I. & N. Dec. at 228. The BIA clarified that a person seeking asylum on the ground of membership in a particular social group must show that the group is: (1) composed of members who share an immutable characteristic; (2) defined with particularity; and (3) socially distinct within the society in question. *Id.* at 237. In explaining the third element for membership, the BIA confirmed the rule that "a social group cannot be defined exclusively by the fact that its members have been subjected to harm." *Id.* at 242. The BIA explained that for a particular social group to be distinct, "persecutory conduct alone cannot define the group." *Id.*

The BIA provided the instructive example of former employees of an attorney general. *Id.* The BIA noted that such a group may not be valid for asylum purposes because they may not consider themselves a group, or because society may not consider the employees to be meaningfully distinct in society in general. *Id.* The BIA made clear, however, that "such a social group determination must be made on a case-by-case basis, because it is possible that under certain circumstances, the society would

make such a distinction and consider the shared past experience to be a basis for distinction within that society." *Id.* "Upon their maltreatment," the BIA explained "it is possible these people would experience a sense of 'group' and society would discern that this group of individuals, who share a common immutable characteristic, is distinct in some significant way." *Id.* at 243 (recognizing that "[a] social group cannot be defined *merely* by the fact of persecution or *solely* by the shared characteristic of facing dangers in retaliation for actions they took against alleged persecutors . . . but that the shared trait of persecution does not disqualify an otherwise valid social group")(citations and internal quotation marks omitted). The BIA further clarified that the "act of persecution by the government may be the catalyst that causes the society to distinguish [a group] in a meaningful way and consider them a distinct group, but the immutable characteristic of their shared past experience exists independent of the persecution." *Id.* at 243. Thus, such a group would not be circular because the persecution they faced was not the sole basis for their membership in a particular social group. *Id.*

With this analysis in mind, the Court now focuses on the dispute at issue. Here, plaintiffs do not challenge *Matter of A-B-*'s statements with regard to the rule against circularity, but rather challenge the Policy Memorandum's articulation of the

rule. Pls.' Mot., ECF No, 64-1 at 57–58. Specifically, they challenge the Policy Memorandum's mandate that domestic violence-based social groups that include "inability to leave" are not cognizable. *Id.* at 58 (citations and internal quotation marks omitted). The Policy Memorandum states that "married women . . . who are unable to leave their relationship" are a group that would not be sufficiently particular. Policy Memorandum, ECF No. 100 at 6. The Policy Memorandum explained that "even if 'unable to leave' were particular, the applicant must show something more than the danger of harm from an abuser if the applicant tried to leave because that would amount to circularly defining the particular social group by the harm on which the asylum claim is based." *Id.*

The Policy Memorandum's interpretation of the rule against circularity ensures that women unable to leave their relationship will always be circular. This conclusion appears to be based on a misinterpretation of the circularity standard and faulty assumptions about the analysis in *Matter of A-B-*. First, as *Matter of M-E-V-G-* made clear, there cannot be a general rule when it comes to determining whether a group is distinct because "it is possible that under certain circumstances, the society would make such a distinction and consider the shared past experience to be a basis for distinction within that society." 26 I. & N. Dec. at 242. Thus, to the extent the Policy

Memorandum imposes a general circularity rule foreclosing such claims without taking into account the independent characteristics presented in each case, the rule is arbitrary, capricious, and contrary to immigration law.

Second, the Policy Memorandum changes the circularity rule as articulated in settled caselaw, which recognizes that if the proposed social group definition contains characteristics independent from the feared persecution, the group is valid under asylum law. *Matter of M-E-V-G-*, 26 I. & N. Dec. at 242 (Particular social group may be cognizable if "immutable characteristic of their shared past experience exists independent of the persecution."). Critically, the Policy Memorandum does not provide a reasoned explanation for, let alone acknowledge, the change. *See F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 514 (2009)("[T]he requirement that an agency provide reasoned explanation for its action would ordinarily demand that it display awareness that it is changing [its] position."). *Matter of A-B-* criticized the BIA for failing to consider the question of circularity in *Matter of A-R-C-G-* and overruled the decision based on the BIA's reliance on DHS's concession on the issue. 27 I. & N. Dec. at 334-35, 33. Moreover, *Matter of A-B-* suggested only that the social group at issue in *Matter of A-R-C-G-* might be "effectively" circular. *Id.* at 335. The Policy Memorandum's formulation of the circularity

standard goes well beyond the Attorney General's explanation in *Matter of A-B-*. As such, it is unmoored from the analysis in *Matter of M-E-V-G-* and has no basis in *Matter of A-B-*. It is therefore, arbitrary, capricious, and contrary to immigration law.

5. Discretion and Delineation: The Credible Fear Policies Do Not Contain a Discretion Requirement, but the Policy Memorandum's Delineation Requirement is Unlawful

Plaintiffs next argue that the credible fear policies "unlawfully import two aspects of the ordinary removal context into credible fear proceedings." Pls.' Reply, ECF No. 92 at 32. The first alleged requirement is for aliens to delineate the "particular social group" on which they rely at the credible fear stage. *Id.* The second alleged requirement is that asylum adjudicators at the credible fear stage take into account certain discretionary factors when making a fair credibility determination and exercise discretion to deny relief.[20] *Id.* at 32–33.

[20] These discretionary factors include but are not limited to: "the circumvention of orderly refugee procedures; whether the alien passed through any other countries or arrived in the United States directly from her country; whether orderly refugee procedures were in fact available to help her in any country she passed through; whether he or she made any attempts to seek asylum before coming to the United States; the length of time the alien remained in a third country; and his or her living conditions, safety, and potential for long-term residency there." Policy Memorandum, ECF No. 100 at 10.

The government agrees that a policy which imposes a duty to delineate a particular social group at the credible fear stage would be a violation of existing law. Defs.' Reply, ECF No. 85 at 67. The government also agrees that requiring asylum officers to consider the exercise of discretion at the credible fear stage "would be inconsistent with section 1225(b)(1)(B)(v)." *Id.* at 68. The government, however, argues that no such directives exist. *Id.* at 67–69.

The Court agrees with the government. There is nothing in the credible fear policies that support plaintiffs' arguments that asylum officers are to exercise discretion at the credible fear stage. The Policy Memorandum discusses discretion only in the context of when an alien has established that he or she is eligible for asylum. Policy Memorandum, ECF No. 100 at 5 ("[I]f eligibility is established, the USCIS officer must then consider whether or not to exercise discretion to grant the application."). *Matter of A-B-* also discusses the discretionary factors in the context of granting asylum. 27 I. & N. Dec. at 345 n.12 (stating exercising discretion should not be glossed over "solely because an applicant *otherwise meets the burden of proof* for asylum eligibility under the INA")(emphasis added). Eligibility for asylum is not established, nor is an asylum application granted, at the credible fear stage. *See* 8 U.S.C. § 1225(b)(1)(B)(ii)(stating if an alien receives a positive

credibility determination, he or she shall be detained for "further consideration of the application of asylum"). Since the credible fear policies only direct officers to use discretion once an officer has determined that an applicant is eligible for asylum, they do not direct officers to consider discretionary factors at the credible fear stage. *See* Policy Memorandum, ECF No. 100 at 10.

The Court also agrees that, with respect to *Matter of A-B-*, the decision does not impose a delineation requirement during a credible fear determination. The decision only requires an applicant seeking asylum to clearly indicate "an exact delineation of any proposed particular social group" when the alien is "on the record and before the immigration judge." 27 I. & N. Dec. at 344. Any delineation requirement therefore would not apply to the credible fear determination which is not on the record before an immigration judge.

The Policy Memorandum, however, goes further than the decision itself and incorporates the delineation requirement into credible fear determinations. Unlike the mandate to use discretion, the Policy Memorandum does not contain a limitation that officers are to apply the delineation requirement to asylum interviews only, as opposed to credible fear interviews. In fact, it does the opposite and explicitly requires asylum officers to apply that requirement to credible fear

determinations. Policy Memorandum, ECF No. 100 at 12. The Policy Memorandum makes clear that "if an applicant claims asylum based on membership in a particular social group, then officers must factor the [standards explained in *Matter of A-B-*] *into their determination of whether an applicant has a credible fear or reasonable fear of persecution*." *Id.* at 12. In directing asylum officers to apply *Matter of A-B-* to credible fear determinations, the Policy Memorandum refers back to all the requirements explained by *Matter of A-B-* including the delineation requirement. *See id.* (referring back to section explaining delineation requirement). In light of this clear directive to "factor" in the standards set forth in *Matter of A-B-*, into the "determination of whether an applicant has a credible fear" and its reference to the delineation requirement, it is clear that the Policy Memorandum incorporates that requirement into credible fear determinations. *See id.*[21]

The government argues, that to the extent the Policy Memorandum is ambiguous, the Court should defer to its

[21] The Policy Memorandum also reiterates that "few gang-based or domestic-violence claims involving particular social groups defined by the members' vulnerability to harm may . . . pass the 'significant possibility' test in credible-fear screenings." Policy Memorandum, ECF No. 100 at 10. For this proposition, the Policy Memorandum refers to the "standards clarified in *Matter of A-B-*." *Id.* This requirement for an alien to explain how they fit into a particular social group independent of the harm they allege, further supports the fact that there is a delineation requirement at the credible fear stage.

interpretation as long as it is reasonable. The government cites no authority to support its claim that deference is owed to an agency's interpretations of its policy documents like the Policy Memorandum. However, the Court acknowledges the government's interpretation is "entitled to respect . . . only to the extent that those interpretations have the 'power to persuade.'" *Christensen v. Harris Cnty*, 529 U.S. 576, 587 (2000)(citation omitted). For the reasons stated above, however, such a narrow reading of the Policy Memorandum is not persuasive. Because the Policy Memorandum requires an alien—at the credible fear stage—to present facts that clearly identify the alien's proposed particular social group, contrary to the INA, that policy is arbitrary and capricious.

6. The Policy Memorandum's Requirements Related to Asylum Officer's Application of Circuit Law are Unlawful

Plaintiffs' final argument is that the Policy Memorandum's directives instructing asylum officers to ignore applicable circuit court of appeals decisions is unlawful. Pls.' Mot., ECF No. 64-1 at 63.

The relevant section of the Policy Memorandum reads as follows:

> When conducting a credible fear or reasonable fear interview, an asylum officer must determine what law applies to the applicant's claim. The asylum officer should apply all applicable precedents of the Attorney General and the BIA, *Matter of E-L-H-*, 23 I&N Dec.

> 814, 819 (BIA 2005), which are binding on all immigration judges and asylum officers nationwide. The asylum officer should also apply the case law of the relevant federal circuit court, to the extent that those cases are not inconsistent with *Matter of A-B-*. *See, e.g.*, *Matter of Fajardo Espinoza*, 26 I&N Dec. 603, 606 (BIA 2015). The relevant federal circuit court is the circuit where the removal proceedings will take place if the officer makes a positive credible fear determination. *See Matter of Gonzalez*, 16 I&N Dec. 134, 135–36 (BIA 1977); *Matter of Waldei*, 19 I&N Dec. 189 (BIA 1984). But removal proceedings can take place in any forum selected by DHS, and not necessarily the forum where the intending asylum applicant is located during the credible fear or reasonable fear interview. Because an asylum officer cannot predict with certainty where DHS will file a Notice to appear . . . the asylum officer should faithfully apply precedents of the Board and, if necessary, the circuit where the alien is physically located during the credible fear interview.

Policy Memorandum, ECF No. 100 at 11–12. Plaintiffs make two independent arguments regarding this policy. First, they argue that the Policy Memorandum's directive to disregard circuit law contrary to *Matter of A-B-*, violates the APA, INA, and the separation of powers. Pls.' Mot., ECF No. 64-1 at 64–68. Second, plaintiffs argue that the Policy Memorandum's directive requiring asylum officers to apply the law of the circuit where the alien is physically located during the credible fear interview violates the APA and INA. *Id.* 68–71.

a. The Policy Memorandum's Directive to Disregard Contrary Circuit Law Violates *Brand X*

Plaintiffs' first argument is that the Policy Memorandum's directive that asylum officers who process credible fear interviews ignore circuit law contrary to *Matter of A-B-* is unlawful. Pls.' Mot., ECF No. 64-1 at 63–68. Because the policy requires officers to disregard all circuit law regardless of whether the provision at issue is entitled to deference, plaintiffs maintain that the policy exceeds an agency's limited ability to displace circuit precedent on a specific question of law to which an agency decision is entitled to deference. *Id.*

An agency's ability to disregard a court's interpretation of an ambiguous statutory provision in favor of the agency's interpretation stems from the Supreme Court's decision in *Nat'l Cable & Telecomm's Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005). At issue in *Brand X* was the proper classification of broadband cable services under Title II of the Communications Act of 1934, as amended by the Telecommunications Act of 1996. *Id.* at 975. The Federal Communications Commission ("Commission") had issued a Declaratory Rule providing that broadband internet service was an "information service" but not a "telecommunication service" under the Act, such that certain regulations would not apply to cable companies that provided broadband service. *Id.* at 989. The circuit court vacated the

Declaratory Rule because a prior circuit court opinion held that a cable modem service was in fact a telecommunications service. *Id.* (citing *AT&T Corp. v. Portland*, 216 F.3d 871 (9th Cir. 2000). The Supreme Court concluded that the circuit court erred in relying on a prior court's interpretation of the statute without first determining if the Commission's contrary interpretation was reasonable. *Id.* at 982.

The Supreme Court's holding relied on the same principles underlying the *Chevron* deference cases. *Id.* at 982 (stating that the holding in *Brand X* "follows from *Chevron* itself"). The Court reasoned that Congress had delegated to the Commission the authority to enforce the Communications Act, and under the principles espoused in *Chevron*, a reasonable interpretation of an ambiguous provision of the Act is entitled to deference. *Id.* at 981. Therefore, regardless of a circuit court's prior interpretation of a provision, the agency's interpretation is entitled to deference as long as the court's prior construction of the provision does not "follow[] from the unambiguous terms of the statute and thus leaves no room for agency discretion." *Id.* at 982. In other words, an agency's interpretation of a provision may override a prior court's interpretation if the agency is entitled to *Chevron* deference and the agency's interpretation is reasonable. If the agency is not entitled to deference or if the agency's interpretation is unreasonable, a

court's prior decision interpreting the same statutory provision controls. *See Petit v. U.S. Dep't of Educ.*, 675 F.3d 769, 789 (D.C. Cir. 2012)(citation omitted)(finding that a court decision interpreting a statute overrides the agency's interpretation only if it holds "that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion").

The government argues that the Policy Memorandum's mandate to ignore circuit law contrary to *Matter of A-B-* is rooted in statute and sanctioned by *Brand X*. Defs.' Reply, ECF No. 85 at 70. Moreover, the government contends that the requirement "simply states the truism that the INA requires all line officers to follow binding decisions of the Attorney General." *Id.* (citing 8 U.S.C. § 1103(a))("determination and ruling by the Attorney General with respect to all questions of law shall be controlling"). The government also argues that plaintiffs have failed to point to any decisions that are inconsistent with *Matter of A-B-*, and therefore any instruction for an officer to apply *Matter of A-B-* notwithstanding prior circuit precedent to the contrary is permissible. The Policy Memorandum, according to the government, "simply require[s] line officers to follow [*Matter of A-B-*] unless and until a circuit court of appeals declares some aspect of it contrary to the plain text of the INA." Defs.' Reply, ECF No. 85 at 72.

The government, again, minimizes the effect of the Policy Memorandum. As an initial matter, *Brand X* would only allow an agency's interpretation to override a prior judicial interpretation if the agency's interpretation is entitled to deference. *Brand X*, 545 U.S. at 982 (stating "agency construction *otherwise entitled to Chevron deference*" may override judicial construction under certain circumstances)(emphasis added). In this case, the government contends that *Matter of A-B-* only interprets one statutory provision: "particular social group." *See* Defs.' Mot., ECF No. 57-1 at 56 (stating "[t]he language that the Attorney General interpreted in [*Matter of*] *A-B-*, [is] the meaning of the phrase 'particular social group' as part of the asylum standard"). The Policy Memorandum, however, directs officers to ignore federal circuit law to the extent that the law is inconsistent with *Matter of A-B-* in *any* respect, including *Matter of A-B-*'s persecution standard. The directive requires officers performing credible fear determinations to use *Brand X* as a shield against any prior or future federal circuit court decisions inconsistent with the sweeping proclamations made in *Matter of A-B-* regardless of whether *Brand X* has any application under the circumstances of that case.

There are several problems with such a broad interpretation of *Brand X* to cover guidance from an agency when it is far from

clear that such guidance is entitled to deference. First, a directive to ignore circuit precedent when doing so would violate the principles of *Brand X* itself is clearly unlawful. For example, when a court determines a provision is unambiguous, as courts have done upon evaluating the "unwilling and unable" definition, a court's interpretation controls when faced with a contrary agency interpretation. *Brand X*, 545 U.S. at 982. The Policy Memorandum directs officers as a rule not to apply circuit law if it is inconsistent with *Matter of A-B-*, without regard to whether a specific provision in *Matter of A-B-* is entitled to deference in the first place. Such a rule runs contrary to *Brand X*.

Second, the government's argument only squares with the *Brand X* framework if every aspect of *Matter of A-B-* is both entitled to deference and is a reasonable interpretation of a relevant provision of the INA. Indeed, *Brand X* does not disturb any prior judicial opinion that a statute is unambiguous because Congress has spoken to the interpretive question at issue. *Brand X*, 545 U.S. at 982 ("[A] judicial precedent holding that the statute unambiguously forecloses the agency's interpretation, and therefore contains no gap for the agency to fill, displaces a conflicting agency construction."). If a Court does make such a determination, the agency is not free to supplant the Court's

interpretation for its own under *Brand X*. *Id.*[22] Unless an agency's interpretation of a statute is afforded deference, a judicial construction of that provision binds the agency, regardless of whether it is contrary to the agency's view. The Policy Memorandum does not recognize this principle and therefore, the government's reliance on *Brand X* is misplaced. *Cf., e.g.*, *Matter of Marquez Conde*, 27 I. & N. Dec. 251, 255 (BIA 2018)(examining whether the particular statutory question fell within *Brand X*).[23]

The government's statutory justification fares no better. It is true that pursuant to 8 U.S.C. § 1103(a), the Attorney General's rulings with respect to questions of law are controlling; and they are binding on all service employees, 8 C.F.R. § 103.3(c). But plaintiffs do not dispute the fact that

[22] Any assumption that the entirety of *Matter of A-B-* is entitled to deference also falters in light of the government's characterization of most of the decision as dicta. Defs.' Reply, ECF No. 85 at 44-47. (characterizing *Matter of A-B-* "comment[ary] on problems typical of gang and domestic violence related claims.") According to the government, the only legal effect of *Matter of A-B-* is to overrule *Matter of A-R-C-G-*. Any other self-described dicta would not be entitled to deference under *Chevron* and therefore *Brand X* could not apply. *Brand X*, 545 U.S. at 982 (agency interpretation must at minimum be "otherwise entitled to deference" for it to supersede judicial construction). Simply put, *Brand X* is not a license for agencies to rely on dicta to ignore otherwise binding circuit precedent.

[23] *Matter of A-B-* invokes *Brand X* only as to its interpretation of particular social group. 27 I. & N. Dec. at 327. As the Court has explained above, that interpretation is not entitled to deference.

asylum officers must follow the Attorney General's decisions. The issue is that the Policy Memorandum goes much further than that. Indeed, the government's characterization of the Policy Memorandum's directive to ignore federal law only highlights the flaws in its argument. According to the government, the directive at issue merely instructs officers to listen to the Attorney General. Defs.' Reply, ECF No. 85 at 70. Such a mandate would be consistent with section 1103 and its accompanying regulations. In reality, however, the Policy Memorandum requires officers conducting credible fear interviews to follow the precedent of the relevant circuit only "to the extent that those cases are not inconsistent with *Matter of A-B-*." Policy Memorandum, ECF No. 100 at 11. The statutory and regulatory provisions cited by the government do not justify a blanket mandate to ignore circuit law.

b. The Policy Memorandum's Relevant Circuit Law Policy Violates the APA and INA

Plaintiffs next argue that the Policy Memorandum's directive to asylum officers to apply the law of the "circuit where the alien is physically located during the credible fear interview" violates the immigration laws. Pls.' Mot., ECF No. 64-1, 68–71; Policy Memorandum, ECF No. 100 at 12. Specifically, Plaintiffs argue that this policy conflicts with the low screening standard for credible fear determinations established

by Congress, and therefore violates the APA and INA. Pls.' Reply, ECF No. 92 at 35–36. The credible fear standard, plaintiffs argue, requires an alien to be afforded the benefit of the circuit law most favorable to his or her claim because there is a possibility that the eventual asylum hearing could take place in that circuit. *Id.*

The government responds by arguing that it is hornbook law that the law of the jurisdiction in which the parties are located governs the proceedings. Defs.' Reply, ECF No. 85 at 73. The government cites the standard for credible fear determinations and argues that it contains no requirement that an alien be given the benefit of the most favorable circuit law. *Id.* The government also argues that, to the extent there is any ambiguity, the government's interpretation is entitled to some deference, even if not *Chevron* deference. *Id.* at 74.

This issue turns on an interpretation of 8 U.S.C. § 1225(b)(1)(B)(v), which provides the standard for credible fear determinations. That section explicitly defines a "credible fear of persecution" as follows:

> For purposes of this subparagraph, the term "credible fear of persecution" means that there is a significant possibility, taking into account the credibility of the statements made by the alien in support of the alien's claim and such other facts as are known to the officer, that the alien could establish eligibility for asylum under section 1158 of this title.

8 U.S.C. § 1225(b)(1)(B)(v). Applicable regulations further explain the manner in which the interviews are to be conducted. Interviews are to be conducted in an "nonadversarial manner" and "separate and apart from the general public." 8 C.F.R. § 208.30(d). The purpose of the interview is to "elicit all relevant and useful information bearing on whether the applicant has a credible fear of persecution or torture[.]" *Id.*

The statute does not speak to which law should be applied during credible fear interviews. *See generally* 8 U.S.C. § 1225(b)(1)(B)(v). However, the Court is not without guidance regarding which law should be applied because Congress explained its legislative purpose in enacting the expedited removal provisions. 142 CONG. REC. S11491-02. When Congress established expedited removal proceedings in 1996, it deliberately established a low screening standard so that "there should be no danger that an alien with a genuine asylum claim will be returned to persecution." H.R. REP. No. 104-469, pt. 1, at 158. That standard "is a low screening standard for admission into the usual full asylum process" and when Congress adopted the standard it "reject[ed] the higher standard of credibility included in the House bill." 142 CONG. REC. S11491-02.

In light of the legislative history, the Court finds plaintiffs' position to be more consistent with the low screening standard that governs credible fear determinations.

The statute does not speak to which law should be applied during the screening, but rather focuses on eligibility at the time of the removal proceedings. 8 U.S.C. § 1225(b)(1)(B)(v). And as the government concedes, these removal proceedings could occur anywhere in the United States. Policy Memorandum, ECF No. 100 at 12. Thus, if there is a disagreement among the circuits on an issue, the alien should get the benefit of that disagreement since, if the removal proceedings are heard in the circuit favorable to the aliens' claim, there would be a significant possibility the alien would prevail on that claim. The government's reading would allow for an alien's deportation, following a negative credible fear determination, even if the alien would have a significant possibility of establishing asylum under section 1158 during his or her removal proceeding. Thus, the government's reading leads to the exact opposite result intended by Congress.[24]

The government does not contest that an alien with a possibility of prevailing on his or her asylum claim could be denied during the less stringent credible fear determination, but rather claims that this Court should defer to the

[24] The government relies on BIA cases to support its argument that the law of the jurisdiction where the interview takes place controls. *See* Defs.' Mot., ECF No. 57-1 at 49. These cases address the law that governs the removal proceedings, an irrelevant and undisputed issue.

government's interpretation that this policy is consistent with the statute. Defs.' Reply, ECF No. 85 at 74–75. Under *Skidmore v. Swift & Co.*, the Court will defer to the government's interpretation to the extent it has the power to persuade.[25] *See* 323 U.S. 134, 140, (1944). However, the government's arguments bolster plaintiffs' interpretation more than its own. As the government acknowledges, and the Policy Memorandum explicitly states, "removal proceedings can take place in any forum selected by DHS, and not necessarily the forum where the intending asylum applicant is located during the credible fear or reasonable fear interview." Policy Memorandum, ECF No. 100 at 12. Since the Policy Memorandum directive would lead to denial of a potentially successful asylum applicant at the credible fear determination, the Court concludes that the directive is therefore inconsistent with the statute. H.R. REP. NO. 104-469 at 158 (explaining that there should be no fear that an alien with a genuine asylum claim would be returned to persecution).[26]

Because the government's reading could lead to the exact

[25] The government cannot claim the more deferential *Auer* deference because *Auer* applies to an agency's interpretation of its own regulations, not to interpretations of policy documents like the Policy Memorandum. *See Auer v. Robbins*, 519 U.S. 452, 461 (1997)(holding agencies may resolve ambiguities in regulations).

[26] The policy is also a departure from prior DHS policy without a rational explanation for doing so. *See* Mujahid Decl., Ex. F (DHS training policy explaining that law most favorable to the applicant applies when there is a circuit split).

harm that Congress sought to avoid, it is arbitrary capricious and contrary to law.

* * * * *

In sum, plaintiffs prevail on their APA and statutory claims with respect to the following credible fear policies, which this Court finds are arbitrary and capricious and contrary to law: (1) the general rule against credible fear claims relating to gang-related and domestic violence victims' membership in a "particular social group," as reflected in *Matter of A-B-* and the Policy Memorandum; (2) the heightened "condoned" or "complete helplessness" standard for persecution, as reflected in *Matter of A-B-* and the Policy Memorandum; (3) the circularity standard as reflected in the Policy Memorandum; (4) the delineation requirement at the credible fear stage, as reflected in the Policy Memorandum; and (5) the requirement that adjudicators disregard contrary circuit law and apply only the law of the circuit where the credible fear interview occurs, as reflected in the Policy Memorandum. The Court also finds that neither the Policy Memorandum nor *Matter of A-B-* state an unlawful nexus requirement or require asylum officers to apply discretionary factors at the credible fear stage. The Court now turns to the appropriate remedy.[27]

[27] Because the Court finds that the government has violated the INA and APA, it need not determine whether there was a

D. Relief Sought

Plaintiffs seek an Order enjoining and preventing the government and its officials from applying the new credible fear policies, or any other guidance implementing *Matter of A-B-* in credible fear proceedings. Pls.' Mot., ECF No. 64-1 at 71–72. Plaintiffs also request that the Court vacate any credible fear determinations and removal orders issued to plaintiffs who have not been removed. *Id.* As for plaintiffs that have been removed, plaintiffs request a Court Order directing the government to return the removed plaintiffs to the United States. *Id.* Plaintiffs also seek an Order requiring the government to provide new credible fear proceedings in which asylum adjudicators must apply the correct legal standards for all plaintiffs. *Id.*

The government argues that because section 1252 prevents all equitable relief the Court does not have the authority to order the removed plaintiffs to be returned to the United States. Defs.' Reply, ECF No. 85 at 75–76. The Court addresses each issue in turn.

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constitutional violation in this case. *See Am. Foreign Serv. Ass'n v. Garfinkel*, 490 U.S. 153, 161 (1989)(per curiam)(stating courts should be wary of issuing "unnecessary constitutional rulings").

1. Section 1252 Does Not Bar Equitable Relief

a. Section 1252(e)(1)

The government acknowledges that section 1252(e)(3) provides for review of "systemic challenges to the expedited removal system." Defs.' Mot., ECF No. 57-1 at 11. However, the government argues 1252(e)(1) limits the scope of the relief that may be granted in such cases. Defs.' Reply, ECF No. 85 at 75–76. That provision provides that "no court may . . . enter declaratory, injunctive, or other equitable relief in any action pertaining to an order to exclude an alien in accordance with section 1225(b)(1) of this title except as specifically authorized in a subsequent paragraph of this subsection." 8 U.S.C. § 1252(e)(1)(a). The government argues that since no other subsequent paragraph of section 1252(e) specifically authorizes equitable relief, this Court cannot issue an injunction in this case. Defs.' Reply, ECF No. 85 at 75–76.

Plaintiffs counter that section 1252(e)(1) has an exception for "any action . . . specifically authorized in a subsequent paragraph." Since section 1252(e)(3) clearly authorizes "an action" for systemic challenges, their claims fall within an exception to the proscription of equitable relief. Pls.' Reply, ECF No. 92 at 38.

This issue turns on what must be "specifically authorized in a subsequent paragraph" of section 1252(e). Plaintiffs argue

the "action" needs to be specifically authorized, and the government argues that it is the "relief." Section 1252(e)(1) states as follows:

> (e) Judicial review of orders under section 1225(b)(1)
>
> (1) Limitations on relief
> Without regard to the nature of the action or claim and without regard to the identity of the party or parties bringing the action, no court may--
>
> (A) enter declaratory, injunctive, or other equitable relief in any action pertaining to an order to exclude an alien in accordance with section 1225(b)(1) of this title except as specifically authorized in a subsequent paragraph of this subsection, or
>
> (B) certify a class under Rule 23 of the Federal Rules of Civil Procedure in any action for which judicial review is authorized under a subsequent paragraph of this subsection.

The government contends that this provision requires that any "*declaratory, injunctive, or other equitable relief*" must be "*specifically authorized in a subsequent paragraph*" of subsection 1252(e) for that relief to be available. Defs.' Reply, ECF No. 85 at 75 (emphasis in original). The more natural reading of the provision, however, is that these forms of relief are prohibited except when a plaintiff brings "any action . . . specifically authorized in a subsequent paragraph." *Id.* § 1252(e)(1)(a). The structure of the statute supports this view. For example, the very next subsection, 1252(e)(1)(b), uses

the same language when referring to an ***action***: "[A court may not certify a class] in *any action for which judicial review is authorized under a subsequent paragraph of this subsection.*" *Id.* § 1252(e)(1)(b)(emphasis added).

A later subsection lends further textual support for the view that the term "authorized" modifies the type of action, and not the type of relief. Subsection 1252(e)(4) limits the remedy a court may order when making a determination in habeas corpus proceedings challenging a credible fear determination.[28] Under section 1252(e)(2), a petitioner may challenge his or her removal under section 1225, if he or she can prove by a preponderance of the evidence that he or she is in fact in this country legally.[29] *See* 8 U.S.C. § 1252(e)(2)(c). Critically, section 1252(e)(4) limits the type of relief a court may grant if the petitioner is successful: "the court may order no remedy or relief other than to require that the petitioner be provided a hearing." *Id.* § 1252(e)(4)(B). If section 1252(e)(1)(a) precluded all injunctive and equitable relief, there would be no need for § 1252(e)(4) to specify that the court could order no

[28] Habeas corpus proceedings, like challenges to the validity of the system under 1252(e)(3), are "specifically authorized in a subsequent paragraph of [1252(e)]." 8 U.S.C. § 1252(e)(1)(a).
[29] To prevail on this type of claim a petitioner must establish that he or she is an "alien lawfully admitted for permanent residence, has been admitted as a refugee under section 1157 of this title, or has been granted asylum under section 1158." 8 U.S.C. § 1252(e)(2).

other form of relief. Furthermore, if the government's reading was correct, there should be a parallel provision in section 1252(e)(3) limiting the relief a prevailing party of a systemic challenge could obtain to only relief specifically authorized by that paragraph.

Indeed, under the government's reading of the statute there could be no remedy for a successful claim under paragraph 1252(e)(3) because that paragraph does not specifically authorize any remedy. However, it does not follow that Congress would have explicitly authorized a plaintiff to bring a suit in the United States District Court for the District of Columbia and provided this Court with exclusive jurisdiction to determine the legality of the challenged agency action, but deprived the Court of any authority to provide *any remedy* (because none are specifically authorized), effectively allowing the unlawful agency action to continue. This Court "should not assume that Congress left such a gap in its scheme." *Jackson v. Birmingham Bd. Of Educ.*, 544 U.S. 167, 180 (2005)(holding Title IX protected against retaliation in part because "all manner of Title IX violations might go umremedied" if schools could retaliate freely).

An action brought pursuant to section 1252(e)(3) is an action that is "specifically authorized in a subsequent paragraph" of 1252(e). *See* 8 U.S.C. § 1252(e)(1). And 1252(e)(3)

clearly authorizes "an action" for systemic challenges to written expedited removal policies, including claims concerning whether the challenged policy "is not consistent with applicable provisions of this subchapter or is otherwise in violation of law." *Id.* § 1252(e)(3). Because this case was brought under that systemic challenge provision, the limit imposed on the relief available to a court under 1252(e)(1)(a) does not apply.[30]

b. Section 1252(f)

The government's argument that section 1252(f) bars injunctive relief fares no better. That provision states in relevant part: "no court (other than the Supreme Court) shall have jurisdiction or authority to enjoin or restrain the operation of [sections 1221–1232] other than with respect to the application of such provisions to an individual alien against whom proceedings under such part have been initiated." 8 U.S.C. § 1252(f)(1). The Supreme Court has explained that "Section 1252(f)(1) thus 'prohibits federal courts from granting

[30] Plaintiffs also argue that section 1252(e)(1) does not apply to actions brought under section 1252(e)(3). Section 1252(e)(1), by its terms, only applies to an "action pertaining to an order to exclude an alien in accordance with section 1225(b)(1)." Plaintiffs argue that the plain reading of section 1252(e)(3) shows that an action under that provision does not pertain to an individual order of exclusion, but rather "challenges the validity of the system." Pls.' Reply, ECF No. 92 at 12 (citing 8 U.S.C. § 1252(e)(3)). Having found that section 1252(e)(3) is an exception to section 1252(e)(1)'s limitation on remedies, the Court need not reach this argument.

classwide injunctive relief against the operation of §§ 1221–123[2].'" *Jennings v. Rodriguez*, 138 S. Ct. 830, 851 (2018)(citing *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 481 (1999)). The Supreme Court has also noted that circuit courts have "held that this provision did not affect its jurisdiction over . . . statutory claims because those claims did not 'seek to enjoin the operation of the immigration detention statutes, but to enjoin conduct . . . not authorized by the statutes." *Id.* (citing *Rodriguez v. Hayes*, 591 F.3d 1105, 1120 (9th Cir. 2010)).

In this case, plaintiffs do not challenge any provisions found in section 1225(b). They do not seek to enjoin the operation of the expedited removal provisions or any relief declaring the statutes unlawful. Rather, they seek to enjoin the government's violation of those provisions by the implementation of the unlawful credible fear policies. An injunction in this case does not obstruct the operation of section 1225. Rather, it enjoins conduct that violates that provision. Therefore, section 1252(f) poses no bar. *See R.I.L-R v. Johnson*, 80 F. Supp. 3d 164, 184 (D.D.C. 2015)(holding section 1252(f) does not limit a court's ability to provide injunctive relief when the injunctive relief "enjoins conduct that allegedly violates [the immigration statute]"); *see also Reid v. Donelan*, 22 F. Supp. 3d 84, 90 (D. Mass. 2014)("[A]n injunction 'will not prevent the law from

operating in any way, but instead would simply force the government to *comply* with the statute.")(emphasis in original)).

Finally, during oral argument, the government argued that even if the Court has the authority to issue an injunction in this case, it can only enjoin the policies as applied in plaintiffs' cases under section 1252(f). *See* Oral Arg. Hr'g Tr., ECF No. 102 at 63. In other words, according to the government, the Court may declare the new credible fear policies unlawful, but DHS may continue to enforce the policies in all other credible fear interviews. To state this proposition is to refute it. It is the province of the Court to declare what the law is, *see Marbury v. Madison*, 5 U.S. 137, 177 (1803), and the government cites no authority to support the proposition that a Court may declare an action unlawful but have no power to prevent that action from violating the rights of the very people it affects.[31] To the contrary, such relief is supported by the APA itself. *See Nat'l Min. Ass'n v. U.S. Army Corps of Eng'rs*,

[31] During oral argument, the government argued for the first time that an injunction in this case was tantamount to class-wide relief, which the parties agree is prohibited under the statute. *See* Oral Arg. Hr'g Tr., ECF No. 102 at 63; 8 U.S.C. § 1252(e)(1)(b)(prohibiting class certification in actions brought under section 1252(e)(3)). The Court finds this argument unpersuasive. Class-wide relief would entail an Order requiring new credible fear interviews for all similarly situated individuals, and for the government to return to the United States all deported individuals who were affected by the policies at issue in this case. Plaintiffs do not request, and the Court will not order, such relief.

145 F.3d 1399, 1409-10 (D.C. Cir. 1998)("We have made clear that '[w]hen a reviewing court determines that agency regulations are unlawful, the ordinary result is that the rules are vacated – not that their application to the individual petitioners is proscribed.'"). Moreover section 1252(f) only applies when a plaintiff challenges the legality of immigration laws and not, as here, when a plaintiff seeks to enjoin conduct that violates the immigration laws. In these circumstances, section 1252(f) does not limit the Court's power.

2. The Court Has the Authority to Order the Return of Plaintiffs Unlawfully Removed

Despite the government's suggestion during the emergency stay hearing that the government would return removed plaintiffs should they prevail on the merits, TRO Hr'g Tr., Aug. 9, 2018, ECF No. 23 at 13-14 (explaining that the Department of Justice had previously represented to the Supreme Court that should a Court find a policy that led to a plaintiffs' deportation unlawful the government "would return [plaintiffs] to the United states at no expense to [plaintiffs]"), the government now argues that the Court may not do so, *see* Defs.' Reply, ECF No. 85 at 78–79.

In support of its argument, the government relies principally on *Kiyemba v. Obama*, 555 F.3d 1022 (D.C. Cir 2009) vacated, 130 S.Ct. 1235, reinstated in amended form, 605 F.3d

1046 (D.C. Cir. 2010). In *Kiyemba*, seventeen Chinese citizens, determined to be enemy combatants, sought habeas petitions in connection with their detention in Guantanamo Bay, Cuba. 555 F.3d at 1024. The petitioners sought release in the United States because they feared persecution if they were returned to China, but had not sought to comply with the immigration laws governing a migrant's entry into the United States. *Id.* After failed attempts to find an appropriate country in which to resettle, the petitioners moved for an order compelling their release into the United States. *Id.* The district court, citing exceptional circumstances, granted the motion. *Id.*

The United States Court of Appeals for the District of Columbia Circuit reversed. The Court began by recognizing that the power to exclude aliens remained in the exclusive power of the political branches. *Id.* at 1025 (citations omitted). As a result, the Court noted, "it is not within the province of any court, unless expressly authorized by law, to review the determination of the political branch of the Government to exclude a given alien." *Id.* at 1026 (citation and internal quotation marks omitted). The critical question was "what law expressly authorized the district court to set aside the decision of the Executive Branch and to order these aliens brought to the United States." *Id.* at 1026 (internal quotation marks omitted).

In this case, the answer to that question is the immigration laws. In fact, *Kiyemba* distinguished Supreme Court cases which "rested on the Supreme Court's interpretation not of the Constitution, but of a provision in the immigration laws." *Id.* at 1028. The Court further elaborated on this point with the following explanation:

> it would . . . be wrong to assert that, by ordering aliens paroled into the country . . . the Court somehow undermined the plenary authority of the political branches over the entry and admission of aliens. The point is that Congress has set up the framework under which aliens may enter the United States. The Judiciary only possesses the power Congress gives it to review Executive action taken within that framework. Since petitioners have not applied for admission, they are not entitled to invoke that judicial power.

Id. at 1028 n.12.

The critical difference here is that plaintiffs have availed themselves of the "framework under which aliens may enter the United States." *Id.* Because plaintiffs have done so, this Court "possesses the power Congress gives it to review Executive action taken within that framework." *Id.* Because the Court finds *Kiyemba* inapposite, the government's argument that this Court lacks authority to order plaintiffs returned to the United States is unavailing.

It is also clear that injunctive relief is necessary for the Court to fashion an effective remedy in this case. The

credible fear interviews of plaintiffs administered pursuant to the policies in *Matter of A-B-* and the Policy Memorandum were fundamentally flawed. A Court Order solely enjoining these policies is meaningless for the removed plaintiffs who are unable to attend the subsequent interviews to which they are entitled. *See, e.g.*, *Walters v. Reno*, 145 F.3d 1032, 1050–51 (9th Cir. 1998)("[A]llowing class members to reopen their proceedings is basically meaningless if they are unable to attend the hearings that they were earlier denied.").

3. Permanent Injunction Factors Require Permanent Injunctive Relief

A plaintiff seeking a permanent injunction must satisfy a four-factor test. *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006). Plaintiffs must demonstrate they have: (1) suffered an irreparable injury; (2) that traditional legal remedies, such as monetary relief, are inadequate to compensate for that injury; (3) the balance of hardships between the parties warrants equitable relief; and (4) the injunction is not contrary to the public interest. *See Morgan Drexen, Inc. v. Consumer Fin. Prot. Bureau*, 785 F.3d 684, 695 (D.C. Cir. 2015).

Plaintiffs seek a permanent injunction, arguing that they have been irreparably harmed and that the equities are in their favor. Pls.' Mot., ECF No. 64-1 at 73–74. The government has not responded to these arguments on the merits, and rests on its

contention that the Court does not have the authority to order such relief. Defs.' Reply, ECF No. 85 at 75–78. Having found that the Court does have the authority to order injunctive relief, *supra,* at 93–104, the Court will explain why that relief is appropriate.

Plaintiffs claim that the credible fear policies this Court has found to be unlawful have caused them irreparable harm. It is undisputed that the unlawful policies were applied to plaintiffs' credible fear determinations and thus caused plaintiffs' applications to be denied. *See* Defs.' Mot., ECF No. 57-1 at 28 (stating an "asylum officer reviewed each of [plaintiffs] credible fear claims and found them wanting in light of Matter of A-B-"). Indeed, plaintiffs credibly alleged at their credible fear determinations that they feared rape, pervasive domestic violence, beatings, shootings, and death in their countries of origin. Based on plaintiffs' declarations attesting to such harms, they have demonstrated that they have suffered irreparable injuries.[32]

The Court need spend little time on the second factor: whether other legal remedies are inadequate. No relief short of enjoining the unlawful credible fear policies in this case could

[32] The country reports support the accounts of the Plaintiffs. *See* Mujahid Decl., ECF No. 10-3, Exs. K-T; Second Mujahid Decl., ECF No. 64-4 Exs. 10–13; Honduras Decl., ECF No. 64-6; Guatemala Decl., ECF No. 64-7; El Salvador Decl., ECF No. 64-8.

provide an adequate remedy. Plaintiffs do not seek monetary compensation. The harm they suffer will continue unless and until they receive a credible fear determination pursuant to the existing immigration laws. Moreover, without an injunction, the plaintiffs previously removed will continue to live in fear every day, and the remaining plaintiffs are at risk of removal.

The last two factors are also straightforward. The balance of the hardships weighs in favor of plaintiffs since the "[g]overnment 'cannot suffer harm from an injunction that merely ends an unlawful practice.'" *R.I.L-R*, 80 F. Supp. at 191 (citing *Rodriguez*, 715 F.3d at 1145). And the injunction is not contrary to the public interest because, of course, "[t]he public interest is served when administrative agencies comply with their obligations under the APA." *Id.* (citations omitted). Moreover, as the Supreme Court has stated, "there is a public interest in preventing aliens from being wrongfully removed, particularly to countries where they are likely to face substantial harm." *Nken v. Holder*, 556 U.S. 418, 436 (2009). No one seriously questions that plaintiffs face substantial harm if returned to their countries of origin. Under these circumstances, plaintiffs have demonstrated they are entitled to a permanent injunction in this case.

IV. Conclusion

For the foregoing reasons, the Court holds that it has jurisdiction to hear plaintiffs' challenges to the credible fear policies, that it has the authority to order the injunctive relief, and that, with the exception of two policies, the new credible fear policies are arbitrary, capricious, and in violation of the immigration laws.

Accordingly, the Court **GRANTS in PART and DENIES in PART** plaintiffs' cross-motion for summary judgment and motion to consider evidence outside the administrative record. The Court also **GRANTS** plaintiffs' motion for a permanent injunction. The Court further **GRANTS in PART and DENIES in PART** the government's motion for summary judgment and motion to strike.

The Court will issue an appropriate Order consistent with this Memorandum Opinion.

SO ORDERED.

Signed: Emmet G. Sullivan
United States District Judge
December 17, 2018

From:	Keller, Mary Beth (EOIR)
To:	[redacted]
Cc:	[redacted]
Subject:	FW: Grace v. Whitaker (Injunction Affecting Credible Fear Reviews) - on behalf of MaryBeth Keller, Chief Immigration Judge
Date:	Wednesday, December 19, 2018 4:42:54 PM
Attachments:	106 Memorandum Opinion.pdf 105 Summ Judgmnt Order.pdf OGC Grace v. Whitaker Guidance 12_19_18 Final.pdf

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[redacted]

Fyi.

Mtk

MaryBeth Keller

From: Ortiz-Ang, Susana (EOIR) <Susana.Ortiz-Ang@EOIR.USDOJ.GOV>
Sent: Wednesday, December 19, 2018 4:40 PM
To: All of Judges (EOIR) <All_of_Judges@EOIR.USDOJ.GOV>
Cc: Keller, Mary Beth (EOIR) <MaryBeth.Keller@EOIR.USDOJ.GOV>; All of Court Administrators (EOIR) <All_of_Court_Administrators@EOIR.USDOJ.GOV>; [redacted]
Subject: Grace v. Whitaker (Injunction Affecting Credible Fear Reviews) - on behalf of MaryBeth Keller, Chief Immigration Judge

Good Afternoon All,

Today, a United States District Court Judge in the District of Columbia, issued an opinion and order in connection with a lawsuit challenging certain aspects of the Attorney General's decision in *Matter of A-B-*, 27 I&N Dec. 316 (A.G. 2018) and USCIS's implementing Policy Memorandum as applied to credible fear interviews conducted by asylum officers and credible review hearings conducted by immigration judges. The case is *Grace v. Whitaker*, No. 18-cv-01853 (D.D.C., Judge Sullivan, Dec. 17, 2018). The opinion and order are attached.

The Order enjoins immigration judges from relying on certain aspects of *Matter of A-B-* when conducting negative credible fear review hearings. It also enjoins certain other USCIS interpretations of the Attorney General's decision. The injunction is effective immediately.

It is critical that all immigration judges review the attached guidance to ensure that EOIR does not violate the order and injunction when conducting negative credible fear reviews.

If you have any questions please do not hesitate to contact your ACIJ or Daniel Cicchini at EOIR's Office of General Counsel.

Thank you,

MaryBeth Keller
Chief Immigration Judge
U. S. Department of Justice

Executive Office for Immigration Review
Mary.Beth.Keller@usdoj.gov
703-305-1247

General Counsel

Issued December 19, 2018

GUIDANCE ON *GRACE V. WHITAKER* No. 18-cv-01853 (D.D.C. DEC. 19, 2018)

PURPOSE:	Establishes interim EOIR policy and procedures for compliance with court order in *Grace v. Whitaker,* No. 18-cv-01853 (D.D.C. Dec. 19, 2018, Sullivan, J.)
OWNER:	Office of the General Counsel.
AUTHORITY:	*Grace v. Whitaker,* No. 18-cv-01853 (D.D.C. Dec. 17, 2018, Sullivan, J.) (Opinion) *Grace v. Whitaker,* No. 18-cv-01853 (D.D.C. Dec. 19, 2018, Sullivan, J.) (Order)
CANCELLATION:	None.

On December 19, 2018, a United States District Court for the District of Columbia issued an opinion and order in connection with a lawsuit challenging certain aspects of the Attorney General's decision in *Matter of A-B-*, 27 I&N Dec. 316 (A.G. 2018) and USCIS's implementing Policy Memorandum as applied to credible fear interviews conducted by asylum officers and credible review hearings conducted by immigration judges. The case is *Grace v. Whitaker*, No. 18-cv-01853 (D.D.C., Judge Sullivan, Dec. 17, 2018) (herein "Opinion").

The District Court found that certain aspects of *Matter of A-B-* and the USCIS Policy Memorandum, as applied to the credible fear process, violated the Immigration and Nationality Act and the Administrative Procedure Act. As further discussed below, the Court declared those aspects of the decision and Policy Memorandum unlawful, vacated them, and enjoined the Defendants from relying on them in any credible fear proceeding. The District Court also vacated the negative credible fear determinations for the named Plaintiffs and ordered DHS to provide those individuals with new credible fear determinations (and review hearings as appropriate) consistent with the Order.

This document explains that immigration judges,[1] who are responsible for conducting credible fear review hearings, must take certain steps outlined below to comply with the order and injunction pending any judicial stay or successful further review of the District Court's decision.

For all credible fear review hearings conducted on or after today's date, immigration judges may not rely on the following aspects of *Matter of A-B-* as a basis for affirming a negative credible fear determination:

a. The general rule against credible fear claims relating to domestic and gang violence. *See Matter of A-B-*, 27 I&N Dec. at 320 & n.1. Stated differently, immigration judges may not affirm a negative credible fear determination based solely on the fact that an alien has claimed a fear of persecution based on gang-related or domestic violence.

b. The requirement that an alien whose credible fear claim involves non-governmental persecutors "show the government condoned the private actions or at least demonstrated a complete helplessness to protect the victim." *Matter of A-B-*, 27 I&N Dec. at 337. **Note**: this aspect of the injunction applies to all credible fear claims "not just claims based on membership in a "particular social group" or claims related to domestic or gang related violence." Opinion at 64, n. 16.

Grace v. Whitaker, No. 18-cv-01853, Dkt. 105 at 1-2 (D.D.C. Dec. 19, 2018, Sullivan, J.) ("Order").

Additionally, the District Court enjoined certain aspects of USCIS's Policy Memorandum to asylum officers concerning implementation of *Matter of A-B-* in the credible fear process.

Although an immigration judge applies a *de novo* standard when reviewing a negative credible fear determination rendered by an asylum officer, *see* 8 C.F.R. § 1003.42(d), the immigration judge should ensure that the asylum officer's decision was not based on any enjoined parts of the USCIS Memorandum. Similarly, the immigration judge should not adopt an interpretation of *Matter of A-B-* that is inconsistent with the District Court's Order enjoining particular provisions of the USCIS Memorandum. Specifically, the Court enjoined:

c. The USCIS 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.

d. The USCIS Memorandum's requirement that, during the credible fear stage, individuals claiming credible fear must delineate or identify any particular social group in order to satisfy credible fear based on the particular social group.

e. The USCIS 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-*."

[1] The Board does not have any authority to review an adverse credible fear determination made by an Immigration Judge. *See* 8 C.F.R. § 1003.43(f).

f. The USCIS Memorandum's directive that asylum officers conducting credible fear interviews should apply only the case law of "the circuit where the alien is physically located during the credible fear interview."

Order at 2-3.

Please note that the District Court's opinion and order applies nationwide to all credible fear review hearings conducted by immigration judges after the date of the order. And, to reiterate, the decision applies only to the credible fear process. It has no effect on the conduct of removal hearings.

Please contact your ACIJ if you have any questions.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

GRACE, *et al.*, Plaintiffs, v. MATTHEW G. WHITAKER, Acting Attorney General of the United States, *et al.*, Defendants.	No. 1:18-cv-01853 (EGS)

ORDER

The Court has considered the parties' cross-motions for summary judgment, the memoranda and exhibits in support thereof, and the briefs in opposition thereto; plaintiffs' motion to consider extra-record evidence, defendants' motion to strike plaintiffs' extra-record evidence, and the memoranda in support or in opposition thereto; oral argument; and the entire record in this action.

Accordingly, and consistent with the accompanying Memorandum Opinion, the Court hereby **GRANTS IN PART** and **DENIES IN PART** plaintiffs' cross-motion for summary judgment, and **GRANTS IN PART** and **DENIES IN PART** defendants' motion for summary judgment.

This Court hereby:

1. **DECLARES** that the following credible fear policies contained in *Matter of A-B-*, 27 I. & N. Dec. 316 (A.G.

2018), the USCIS Policy Memorandum, Guidance for Processing Reasonable Fear, Credible Fear, Asylum, and Refugee Claims in Accordance with Matter of A-B-, July 11, 2018 (PM-602-0162) (hereinafter "Policy Memorandum"), and/or the Asylum Division Interim Guidance – Matter of A-B-, 27 I. & N. Dec. 316 (A.G. 2018) ("Interim Guidance"), and challenged by plaintiffs, are arbitrary, capricious, and in violation of the immigration laws insofar as those policies are applied in credible fear proceedings:

a. The general rule against credible fear claims relating to domestic and gang violence. *See Matter of A-B-*, 27 I. & N. Dec. at 320 & n.1; Policy Memorandum, ECF No. 100 at 9, 12-13.

b. The requirement that a noncitizen whose credible fear claim involves non-governmental persecutors "show the government condoned the private actions or at least demonstrated a complete helplessness to protect the victim." *Matter of A-B-*, 27 I. & N. at 337; Policy Memorandum, ECF No. 100 at 5, 9, 13; Interim Guidance.

c. The 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. Policy Memorandum, ECF No. 100 at 8.

d. The Policy Memorandum's requirement that, during the credible fear stage, individuals claiming credible fear must delineate or identify any particular social group in order to satisfy credible fear based on the particular social group protected ground. Policy Memorandum, ECF No. 100 at 6, 12.

e. The 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-*." Policy Memorandum, ECF No. 100 at 11.

f. The Policy Memorandum's directive that asylum officers conducting credible fear interviews should

apply only the case law of "the circuit where the alien is physically located during the credible fear interview." Policy Memorandum, ECF No. 100 at 11-12.

2. **VACATES** each of the credible fear policies specified in paragraphs 1.a. through 1.f. above. Accordingly, the Court **PERMANENTLY ENJOINS** defendants and their agents from applying these policies with respect to credible fear determinations, credible fear interviews, or credible fear review hearings issued or conducted by asylum officers or immigration judges. Defendants shall provide written guidance or instructions to all asylum officers and immigration judges whose duties include issuing or conducting credible fear determinations, credible fear interviews, or credible fear review hearings, communicating that each of the credible fear policies specified in paragraphs 1.a. through 1.f. are vacated and enjoined and therefore shall not be applied to any such credible fear proceedings.

3. **VACATES** the negative credible fear determinations and any expedited removal orders issued to each plaintiff.

4. **PERMANENTLY ENJOINS** defendants from removing any plaintiffs currently in the United States without first providing each of them a new credible fear process consistent with the Court's Memorandum Opinion and free from the unlawful policies enumerated in paragraphs 1.a. through 1.f. above or, in the alternative, full immigration court removal proceedings pursuant to 8 U.S.C. § 1229a. To ensure compliance with this injunction, any new credible fear process provided pursuant to this paragraph shall be accompanied by a written record consistent with 8 U.S.C. § 1225(b)(1)(B)(iii).

5. **FURTHER ORDERS** defendants to bring back into the United States, at no expense to plaintiffs, any plaintiff who has been removed pursuant to an expedited removal order prior to this Order and parole them into the United States, and provide each of them a new credible fear process consistent with the Court's Memorandum Opinion and free from the unlawful policies enumerated in paragraphs 1.a. through 1.f. above or, in the alternative, full immigration court removal proceedings

pursuant to 8 U.S.C. § 1229a. To facilitate such plaintiffs' return to the United States, defendants shall meet and confer with plaintiffs' counsel within 7 days to develop a schedule and plan to carry out this portion of the injunction. To ensure compliance with this injunction, any new credible fear process provided pursuant to this paragraph shall be accompanied by a written record consistent with 8 U.S.C. § 1225(b)(1)(B)(iii). Defendants shall work in good faith to carry out the relief ordered in this paragraph and shall communicate periodically with plaintiffs' counsel until the relief ordered in this paragraph is completed.

6. **FURTHER ORDERS** defendants to provide the plaintiffs, within 10 days of this Order, with a status report detailing any steps defendants have taken to comply with this injunction, including copies of all guidance and instructions sent to asylum officers and immigration judges pursuant to paragraph 2 above. Within 30 days and 60 days of this Order, defendants shall provide plaintiffs with a status report detailing any subsequent steps taken to comply with this injunction in the time period since the last report, including copies of all guidance and instructions sent to asylum officers and immigration judges pursuant to paragraph 2 above during that time frame.

The Court **GRANTS** plaintiffs' cross-motion for summary judgment as to their Administrative Procedure Act, Immigration and Nationality Act, and Refugee Act challenges concerning each of the policies enumerated in paragraphs 1.a. through 1.f. above, and defendants' motion for summary judgment is **DENIED** as to these same claims. The Court **DENIES** plaintiffs' cross-motion for summary judgment as to their challenges concerning nexus and discretion, and defendants' motion for summary judgment is **GRANTED** as to these same claims.

Furthermore, consistent with the accompanying Memorandum Opinion, the Court **GRANTS** plaintiffs' motion to consider extra record evidence with respect to evidence relevant to plaintiffs' contentions that the government deviated from prior policies, as well as evidence relevant to plaintiffs' request for injunctive relief. Accordingly, the following evidence submitted by plaintiffs is admitted into the record, and defendants' motion to strike is **DENIED** with respect to this same evidence: Decl. of Sarah Mujahid ("Mujahid Decl."), ECF No. 10-3, Exs. E-J; Second Decl. of Sarah Mujahid ("Second Mujahid Decl."), ECF No. 64-4, Exs. 1-3; ECF Nos. 12-1 to 12-9 (filed under seal); Mujahid Decl., ECF No. 10-3, Exs. K-Q; Second Mujahid Decl., ECF No. 64-4, Exs. 10-13; Joint Decl. of Shannon Drysdale Walsh, Cecilia Menjivar, and Harry Vanden ("Honduras Decl."), ECF No. 64-6; Joint Decl. of Cecilia Menjivar, Gabriela Torres, and Harry Vanden ("Guatemala Decl."), ECF No. 64-7; Joint Decl. of Cecilia Menjivar and Harry Vanden ("El Salvador Decl."), ECF No. 64-8.

Because the Court has declined to consider plaintiffs' due process claim, the Court **GRANTS** defendants' motion to strike with respect to evidence relating to plaintiffs' due process claim. Accordingly, the Court will not consider the following documents relating to plaintiffs' due process

claim: Second Mujahid Decl., ECF No. 64-4, Exs. 4-7, 8-9, 14-17, and ECF No. 64-5; and Mujahid Decl., ECF No. 10-3, Exs. R-T. Plaintiffs' motion to consider extra-record evidence as to these same documents is **DENIED** without prejudice.

The Court also **GRANTS** defendants' motion to strike with respect to the Decl. of Rebecca Jamil and Decl. of Ethan Nasr, and plaintiffs' evidence motion is **DENIED** as to these same documents.

SO ORDERED.

Signed: Emmet G. Sullivan
United States District
December 19, 2018

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

GRACE, *et al.*, Plaintiffs, v. MATTHEW G. WHITAKER,[1] Acting Attorney General of the United States, *et al.*, Defendants.	No. 18-cv-01853 (EGS)

MEMORANDUM OPINION

When Congress passed the Refugee Act in 1980, it made its intentions clear: the purpose was to enforce the "historic policy of the United States to respond to the urgent needs of persons subject to persecution in their homelands." Refugee Act of 1980, § 101(a), Pub. L. No. 96–212, 94 Stat. 102 (1980). Years later, Congress amended the immigration laws to provide for expedited removal of those seeking admission to the United States. Under the expedited removal process, an alien could be summarily removed after a preliminary inspection by an immigration officer, so long as the alien did not have a credible fear of persecution by his or her country of origin. In

[1] Pursuant to Rule 25(d) of the Federal Rules of Civil Procedure, the Court substitutes the current Acting Attorney General as the defendant in this case. "Plaintiffs take no position at this time regarding the identity of the current Acting Attorney General of the United States." Civil Statement, ECF No. 101.

creating this framework, Congress struck a balance between an efficient immigration system and ensuring that "there should be no danger that an alien with a genuine asylum claim will be returned to persecution." H.R. REP. NO. 104-469, pt. 1, at 158 (1996).

Seeking an opportunity for asylum, plaintiffs, twelve adults and children, alleged accounts of sexual abuse, kidnappings, and beatings in their home countries during interviews with asylum officers.[2] These interviews were designed to evaluate whether plaintiffs had a credible fear of persecution by their respective home countries. A credible fear of persecution is defined as a "significant possibility" that the alien "could establish eligibility for asylum." 8 U.S.C. § 1225(b)(1)(B)(v). Although the asylum officers found that plaintiffs' accounts were sincere, the officers denied their claims after applying the standards set forth in a recent precedential immigration decision issued by then-Attorney General, Jefferson B. Sessions, *Matter of A-B-*, 27 I. & N. Dec. 316 (A.G. 2018).

Plaintiffs bring this action against the Attorney General alleging violations of, *inter alia*, the Administrative Procedure Act ("APA") and the Immigration and Nationality Act ("INA"),

[2] Plaintiffs Grace, Carmen, Gio, Gina, Maria, Mina, Nora, and Mona are proceeding under pseudonyms.

arguing that the standards articulated in *Matter of A-B-*, and a subsequent Policy Memorandum issued by the Department of Homeland Security ("DHS") (collectively "credible fear policies"), unlawfully and arbitrarily imposed a heightened standard to their credible fear determinations.

Pending before the Court are: (1) plaintiffs' combined motions for a preliminary injunction and cross-motion for summary judgment; (2) plaintiffs' motion to consider evidence outside the administrative record; (3) the government's motion to strike exhibits supporting plaintiffs' motion for summary judgment; and (4) the government's motion for summary judgment. Upon consideration of the parties' memoranda, the parties' arguments at the motions hearings, the arguments of *amici*,[3] the administrative record, the applicable law, and for the reasons discussed below, the Court finds that several of the new credible fear policies, as articulated in *Matter of A-B-* and the Policy Memorandum, violate both the APA and INA. As explained in this Memorandum Opinion, many of these policies are inconsistent with the intent of Congress as articulated in the INA. And because it is the will of Congress—not the whims of the Executive—that determines the standard for expedited removal, the Court finds that those policies are unlawful.

[3] The Court appreciates the illuminating analysis provided by the *amici*.

Part I of this Opinion sets forth background information necessary to resolve plaintiffs' claims. In Part II, the Court considers plaintiffs' motion to consider evidence outside the administrative record and denies the motion in part. In Part III, the Court considers the parties' cross-motions for summary judgment. In Part III.A, the Court considers the government's arguments that this case is not justiciable and holds that this Court has jurisdiction to hear plaintiffs' challenges to the credible fear policies. In Part III.B, the Court addresses the legal standards that govern plaintiffs' claims. In Part III.C, the Court turns to the merits of plaintiffs' claims and holds that, with the exception of two policies, the new credible fear policies are arbitrary, capricious, and in violation of the immigration laws. In Part III.D, the Court considers the appropriate form of relief and vacates the unlawful credible fear policies. The Court further permanently enjoins the government from continuing to apply those policies and from removing plaintiffs who are currently in the United States without first providing credible fear determinations consistent with the immigration laws. Finally, the Court orders the government to return to the United States the plaintiffs who were unlawfully deported and to provide them with new credible fear determinations consistent with the immigration laws.

I. Background

Because the claims in this action center on the expedited removal procedures, the Court discusses those procedures, and the related asylum laws, in detail.

A. Statutory and Regulatory Background

1. The Refugee Act

In 1980, Congress passed the Refugee Act, Pub. L. No. 96-212, 94 Stat. 102, which amended the INA, Pub. L. No. 82-414, 66 Stat. 163 (1952)(codified as amended in sections of 8 U.S.C.). The "motivation for the enactment of the Refugee Act" was the "United Nations Protocol Relating to the Status of Refugees ["Protocol"]," *INS v. Cardoza-Fonseca*, 480 U.S. 421, 424 (1987), "to which the United States had been bound since 1968," *id.* at 432–33. Congress was clear that its intent in promulgating the Refugee Act was to bring the United States' domestic laws in line with the Protocol. *See id.* at 437 (stating it is "clear from the legislative history of the new definition of 'refugee,' and indeed the entire 1980 Act . . . that one of Congress' primary purposes was to bring United States refugee law into conformance with the [Protocol]."). The Board of Immigration Appeals ("BIA"), has also recognized that Congress' intent in enacting the Refugee Act was to align domestic refugee law with the United States' obligations under the Protocol, to give statutory meaning to "our national commitment to human rights

and humanitarian concerns," and "to afford a generous standard for protection in cases of doubt." *In Re S-P-*, 21 I. & N. Dec. 486, 492 (B.I.A. 1998)(quoting S. REP. NO. 256, 96th Cong., 2d Sess. 1, 4, reprinted in 1980 U.S.C.C.A.N. 141, 144).

The Refugee Act created a statutory procedure for refugees seeking asylum and established the standards for granting such requests; the INA currently governs that procedure. The INA gives the Attorney General discretion to grant asylum to removable aliens. 8 U.S.C. § 1158(b)(1)(A). However, that relief can only be granted if the alien is a "refugee." *Id.* The term "refugee" is defined as:

> [A]ny person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.

8 U.S.C. § 1101(a)(42)(A). "Thus, the 'persecution or well-founded fear of persecution' standard governs the Attorney General's determination [of] whether an alien is eligible for asylum." *Cardoza-Fonseca*, 480 U.S. at 428. To establish refugee status, the alien must show he or she is someone who: (1) has suffered persecution (or has a well-founded fear of persecution) (2) on account of (3) one of five specific protected grounds:

race, religion, nationality, membership in a particular social group, or political opinion. *See* 8 U.S.C. § 1101(a)(42)(A). An alien fearing harm by non-governmental actors is eligible for asylum if the other criteria are met, and the government is "unable or unwilling to control" the persecutor. *Matter of Acosta*, 19 I. & N. Dec. 211, 222 (BIA 1985) *overruled on other grounds* by *Matter of Mogharrabi*, 19 I. & N. Dec. 439 (BIA 1987).

2. Expedited Removal Process

Before seeking asylum through the procedures outlined above, however, many aliens are subject to a streamlined removal process called "expedited removal." 8 U.S.C. § 1225. Prior to 1996, every person who sought admission into the United States was entitled to a full hearing before an immigration judge, and had a right to administrative and judicial review. *See Am. Immigration Lawyers Ass'n v. Reno*, 18 F. Supp. 2d 38, 41 (D.D.C. 1998)(describing prior system for removal). The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA") amended the INA to provide for a summary removal process for adjudicating the claims of aliens who arrive in the United States without proper documentation. As described in the IIRIRA Conference Report, the purpose of the expedited removal procedure

> is to expedite the removal from the United States of aliens who indisputably have no authorization to be admitted . . . , while

> providing an opportunity for such an alien who claims asylum to have the merits of his or her claim promptly assessed by officers with full professional training in adjudicating asylum claims.

H.R. REP. NO. 104-828, at 209-10 (1996)("Conf. Rep.").

Consistent with that purpose, Congress carved out an exception to the expedited removal process for individuals with a "credible fear of persecution." *See* 8 U.S.C. § 1225(b)(1)(B)(ii). If an alien "indicates either an intention to apply for asylum . . . or a fear of persecution," the alien must be referred for an interview with a U.S. Citizenship and Immigration Services ("USCIS") asylum officer. *Id.* § 1225(b)(1)(A)(ii). During this interview, the asylum officer is required to "elicit all relevant and useful information bearing on whether the applicant has a credible fear of persecution or torture[.]" 8 C.F.R. § 208.30(d). The asylum officer must "conduct the interview in a nonadversarial manner." *Id.*

Expediting the removal process, however, risks sending individuals who are potentially eligible for asylum to their respective home countries where they face a real threat, or have a credible fear of persecution. Understanding this risk, Congress intended the credible fear determinations to be governed by a low screening standard. *See* 142 CONG. REC. S11491-02 ("The credible fear standard . . . is intended to be a low

screening standard for admission into the usual full asylum process"); *see also* H.R. REP. NO. 104-469, pt. 1, at 158 (1996)(stating "there should be no danger that an alien with a genuine asylum claim will be returned to persecution"). A credible fear is defined as a "significant possibility, taking into account the credibility of the statements made by the alien in support of the alien's claim and such other facts as are known to the officer, that the alien could establish eligibility for asylum." 8 U.S.C. § 1225(b)(1)(B)(v).

If, after a credible fear interview, the asylum officer finds that the alien does have a "credible fear of persecution" the alien is taken out of the expedited removal process and referred to a standard removal hearing before an immigration judge. *See* 8 U.S.C. § 1225(b)(1)(B)(ii), (v). At that hearing, the alien has the opportunity to develop a full record with respect to his or her asylum claim, and may appeal an adverse decision to the BIA, 8 C.F.R. § 208.30(f), and then, if necessary, to a federal court of appeals, *see* 8 U.S.C. § 1252(a)-(b).

If the asylum officer renders a negative credible fear determination, the alien may request a review of that determination by an immigration judge. 8 U.S.C. § 1225(b)(1)(B)(iii)(III). The immigration judge's decision is "final and may not be appealed" 8 C.F.R. § 1208.30(g)(2)(iv)(A),

except in limited circumstances. *See* 8 U.S.C. § 1252(e).

3. Judicial Review

Section 1252 delineates the scope of judicial review of expedited removal orders and limits judicial review of orders issued pursuant to negative credible fear determinations to a few enumerated circumstances. *See* 8 U.S.C. § 1252(a). The section provides that "no court shall have jurisdiction to review . . . the application of [section 1225(b)(1)] to individual aliens, including the [credible fear] determination made under section 1225(b)(1)(B)." 8 U.S.C. § 1252(a)(2)(A)(iii). Moreover, except as provided in section 1252(e), the statute prohibits courts from reviewing: (1) "any individual determination or to entertain any other cause or claim arising from or relating to the implementation or operation of an [expedited removal] order;" (2) "a decision by the Attorney General to invoke" the expedited removal regime; and (3) the "procedures and policies adopted by the Attorney General to implement the provisions of section 1225(b)(1)." *Id.* § 1252(a)(2)(A)(i), (ii) & (iv).

Section 1252(e) provides for judicial review of two types of challenges to removal orders pursuant to credible fear determinations. The first is a habeas corpus proceeding limited to reviewing whether the petitioner was erroneously removed because he or she was, among other things, lawfully admitted for

permanent residence, or had previously been granted asylum. 8 U.S.C. § 1252(e)(2)(C). As relevant here, the second proceeding available for judicial review is a systemic challenge to the legality of a "written policy directive, written policy guideline, or written procedure issued by or under the authority of the Attorney General to implement" the expedited removal process. *Id.* § 1252(e)(3)(A)(ii). Jurisdiction to review such a systemic challenge is vested solely in the United States District Court for the District of Columbia. *Id.* § 1252(e)(3)(A).

B. Executive Guidance on Asylum Claims

1. Precedential Decision

The Attorney General has the statutory and regulatory authority to make determinations and rulings with respect to immigration law. *See, e.g.*, 8 U.S.C. § 1103(a)(1). This authority includes the ability to certify cases for his or her review and to issue binding decisions. *See* 8 C.F.R. §§ 1003.1(g)-(h)(1)(ii).

On June 11, 2018, then-Attorney General Sessions did exactly that when he issued a precedential decision in an asylum case, *Matter of A-B-*, 27 I. & N. Dec. 316 (A.G. 2018). In *Matter of A-B-*, the Attorney General reversed a grant of asylum to a Salvadoran woman who allegedly fled several years of domestic violence at the hands of her then-husband. *Id.* at 321, 346.

The decision began by overruling another case, *Matter of A-R-C-G-*, 27 I. & N. Dec. 388 (BIA 2014). *Id.* at 319. In *A-R-C-G-*, the BIA recognized "married women in Guatemala who are unable to leave their relationship" as a "particular social group" within the meaning of the asylum statute. 27 I. & N. Dec. at 392. The Attorney General's rationale for overruling *A-R-C-G-* was that it incorrectly applied BIA precedent, "assumed its conclusion and did not perform the necessary legal and factual analysis" because, among other things, the BIA accepted stipulations by DHS that the alien was a member of a qualifying particular social group. *Matter of A-B-,* 27 I. & N. Dec. at 319. In so doing, the Attorney General made clear that "[g]enerally, claims by aliens pertaining to domestic violence or gang violence perpetrated by non-governmental actors will not qualify for asylum," *id.* at 320,[4] and "[a]ccordingly, few such claims would satisfy the legal standard to determine whether an alien has a credible fear of persecution." *Id.* at 320 n.1 (citing 8 U.S.C. § 1225(b)(1)(B)(v)).

The Attorney General next reviewed the history of BIA precedent interpreting the "particular social group" standard and again explained, at length, why *A-R-C-G-* was wrongly

[4] Although *Matter of A-B-* discusses gang-related violence at length, the applicant in *Matter of A-B-* never claimed gang members had any involvement in her case. *Id.* at 321 (describing persecution related to domestic violence).

decided. In so ruling, the Attorney General articulated legal standards for determining asylum cases based on persecution from non-governmental actors on account of membership in a particular social group, focusing principally on claims by victims of domestic abuse and gang violence. He specifically stated that few claims pertaining to domestic or gang violence by non-governmental actors could qualify for asylum or satisfy the credible fear standard. *See id.* at 320 n.1.

The Attorney General next focused on the specific elements of an asylum claim beginning with the standard for membership in a "particular social group." The Attorney General declared that "[s]ocial groups defined by their vulnerability to private criminal activity likely lack the particularity required" under asylum laws since "broad swaths of society may be susceptible to victimization." *Id.* at 335.

The Attorney General next examined the persecution requirement, which he described as having three elements: (1) an intent to target a belief or characteristic; (2) severe harm; and (3) suffering inflicted by the government or by persons the government was unable or unwilling to control. *Id.* at 337. With respect to the last element, the Attorney General stated that an alien seeking to establish persecution based on the violent conduct of a private actor may not solely rely on the government's difficulty in controlling the violent behavior. *Id.*

Rather, the alien must show "the government condoned the private actions or at least demonstrated a complete helplessness to protect the victims." *Id.* (citations and internal quotation marks omitted).

The Attorney General concluded with a discussion of the requirement that an asylum applicant demonstrate that the persecution he or she suffered was on account of a membership in a "particular social group." *Id.* at 338–39. He explained that "[i]f the ill-treatment [claimed by an alien] was motivated by something other than" one of the five statutory grounds for asylum, then the alien "cannot be considered a refugee for purpose of asylum." *Id.* at 338 (citations omitted). He continued to explain that when private actors inflict violence based on personal relationships with a victim, the victim's membership in a particular social group "may well not be 'one central reason' for the abuse." *Id.* Using *Matter of A-R-C-G-* as an example, the Attorney General stated that there was no evidence that the alien was attacked because her husband was aware of, and hostile to, her particular social group: women who were unable to leave their relationship. *Id.* at 338-39. The Attorney General remanded the matter back to the immigration judge for further proceedings consistent with his decision. *Id.* at 346.

2. Policy Memorandum

Two days after the Attorney General issued *Matter of A-B-*, USCIS issued Interim Guidance instructing asylum officers to apply *Matter of A-B-* to credible fear determinations. Asylum Division Interim Guidance -- *Matter of A-B-*, 27 I. & N. Dec. 316 (A.G. 2018) ("Interim Guidance"), ECF No. 100 at 15–18.[5] On July 11, 2018, USCIS issued final guidance to asylum officers for use in assessing asylum claims and credible fear determinations in light of *Matter of A-B-*. USCIS Policy Mem., Guidance for Processing Reasonable Fear, Credible Fear, Asylum, and Refugee Claims in Accordance with *Matter of A-B-*, July 11, 2018 (PM-602-0162) ("Policy Memorandum"), ECF No. 100 at 4–13.

The Policy Memorandum adopts the standards set forth in *Matter of A-B-* and adds new directives for asylum officers. First, like *Matter of A-B-*, the Policy Memorandum invokes the expedited removal statute. *Id.* at 4 (citing section 8 U.S.C. § 1225 as one source of the Policy Memorandum's authority). The Policy Memorandum further acknowledges that "[a]lthough the alien in *Matter of A-B-* claimed asylum and withholding of removal, the Attorney General's decision and this [Policy Memorandum] apply also to refugee status adjudications and

[5] When citing electronic filings throughout this Memorandum Opinion, the Court cites to the ECF header page number, not the original page number of the filed docket.

reasonable fear and credible fear determinations." *Id.* n.1 (citations omitted).

The Policy Memorandum also adopts the standard for "persecution" set by *Matter of A-B-*: In cases of alleged persecution by private actors, aliens must demonstrate the "government is unwilling or unable to control" the harm "such that the government either 'condoned the behavior or demonstrated a complete helplessness to protect the victim.'" *Id.* at 5 (citing *Matter of A-B-*, 27 I. & N. Dec. at 337). After explaining the "condoned or complete helplessness" standard, the Policy Memorandum explains that:

> **In general, in light of the [standards governing persecution by a non-government actor], claims based on membership in a putative particular social group defined by the members' vulnerability to harm of domestic violence or gang violence committed by non-government actors will not establish the basis for asylum, refugee status, or a credible or reasonable fear of persecution.**

Id. at 9 (emphasis in original).

Furthermore, the Policy Memorandum made clear that because *Matter of A-B-* "explained the standards for eligibility for asylum . . . based on a particular social group . . . if an applicant claims asylum based on membership in a particular social group, then officers must factor [the standards explained in *Matter of A-B-*] into their determination of whether an

applicant has a credible fear . . . of persecution." *Id.* at 12 (citations and internal quotation marks omitted).

The Policy Memorandum includes two additional directives not found in *Matter of A-B-*. First, it instructs asylum officers to apply the "case law of the relevant federal circuit court, to the extent that those cases are not inconsistent with *Matter of A-B-*." *Id.* at 11. Second, although acknowledging that the "relevant federal circuit court is the circuit where the removal proceedings ***will take place*** if the officer makes a positive credible fear or reasonable fear determination," the Policy Memorandum instructs asylum officers to "apply precedents of the Board, and, if necessary, the circuit where the alien is ***physically located*** during the credible fear interview." *Id.* at 11-12. (emphasis added).

The Policy Memorandum concludes with the directive that "[asylum officers] should be alert that under the standards clarified in *Matter of A-B-*, few gang-based or domestic-violence claims involving particular social groups defined by the members' vulnerability to harm may . . . pass the 'significant probability' test in credible-fear screenings." *Id.* at 13.

C. Factual and Procedural Background

Each of the plaintiffs, twelve adults and children, came to the United States fleeing violence from Central America and seeking refuge through asylum. Plaintiff Grace fled Guatemala

after having been raped, beaten, and threatened for over twenty years by her partner who disparaged her because of her indigenous heritage. Grace Decl., ECF No. 12-1 ¶ 2.[6] Her persecutor also beat, sexually assaulted, and threatened to kill several of her children. *Id.* Grace sought help from the local authorities who, with the help of her persecutor, evicted her from her home. *Id.*

Plaintiff Carmen escaped from her country with her young daughter, J.A.C.F., fleeing several years of sexual abuse by her husband, who sexually assaulted, stalked, and threatened her, even after they no longer resided together. Carmen Decl., ECF No. 12-2 ¶ 2. In addition to Carmen's husband's abuse, Carmen and her daughter were targeted by a local gang because they knew she lived alone and did not have the protection of a family. *Id.* ¶ 24. She fled her country of origin out of fear the gang would kill her. *Id.* ¶ 28.

Plaintiff Mina escaped from her country after a gang murdered her father-in-law for helping a family friend escape from the gang. Mina Decl., ECF No. 12-3 ¶ 2. Her husband went to the police, but they did nothing. *Id.* at ¶ 10. While her husband was away in a neighboring town to seek assistance from another police force, members of the gang broke down her door and beat

[6] The plaintiffs' declarations have been filed under seal.

Mina until she could no longer walk. *Id.* ¶ 15. She sought asylum in this country after finding out she was on a "hit list" compiled by the gang. *Id.* ¶¶ 17–18.

The remaining plaintiffs have similar accounts of abuse either by domestic partners or gang members. Plaintiff Gina fled violence from a politically-connected family who killed her brother, maimed her son, and threatened her with death. Gina Decl., ECF No. 12-4 ¶ 2. Mona fled her country after a gang brutally murdered her long-term partner—a member of a special military force dedicated to combating gangs—and threatened to kill her next. Mona Decl., ECF No. 12-5 ¶ 2. Gio escaped from two rival gangs, one of which broke his arm and threatened to kill him, and the other threatened to murder him after he refused to deal drugs because of his religious convictions. Gio Decl., ECF No. 12-6 ¶ 2. Maria, an orphaned teenage girl, escaped a forced sexual relationship with a gang member who targeted her after her Christian faith led her to stand up to the gang. Maria Decl., ECF No. 12-7 ¶ 2. Nora, a single mother, together with her son, A.B.A., fled an abusive partner and members of his gang who threatened to rape her and kill her and her son if she did not submit to the gang's sexual advances. Nora Decl., ECF No. 12-8 ¶ 2. Cindy, together with her young child, A.P.A., fled rapes, beatings, and shootings [redacted]

[redacted]. Cindy Decl., ECF No. 12-9 ¶ 2.[7]

Each plaintiff was given a credible fear determination pursuant to the expedited removal process. Despite finding that the accounts they provided were credible, the asylum officers determined that, in light of *Matter of A-B-*, their claims lacked merit, resulting in a negative credible fear determination. Plaintiffs sought review of the negative credible fear determinations by an immigration judge, but the judge affirmed the asylum officers' findings. Plaintiffs are now subject to final orders of removal or were removed pursuant to such orders prior to commencing this suit.[8]

Facing imminent deportation, plaintiffs filed a motion for preliminary injunction, ECF No. 10, and an emergency motion for stay of removal, ECF No. 11, on August 7, 2018. In their motion for stay of removal, plaintiffs sought emergency relief because two of the plaintiffs, Carmen and her daughter J.A.C.F., were "subject to imminent removal." ECF No. 11 at 1.

The Court granted the motion for emergency relief as to the plaintiffs not yet deported. The parties have since filed cross-

[7] Each plaintiffs' harrowing accounts were found to be believable during the plaintiffs' credible fear interviews. Oral Arg. Hr'g Tr., ECF No. 102 at 37.

[8] Since the Court's Order staying plaintiffs' removal, two plaintiffs have moved for the Court to lift the stay and have accordingly been removed. *See* Mot. to Lift Stay, ECF Nos. 28 (plaintiff Mona), 60 (plaintiff Gio).

motions for summary judgment related to the Attorney General's precedential decision and the Policy Memorandum issued by DHS. Further, plaintiffs have filed an opposed motion to consider evidence outside the administrative record.

II. Motion to Consider Extra Record Evidence

Plaintiffs attach several exhibits to their combined application for a preliminary injunction and cross-motion for summary judgment, *see* ECF Nos. 10–2 to 10–7, 12-1 to 12-9, 64-3 to 64-8, which were not before the agency at the time it made its decision. These exhibits include: (1) declarations from plaintiffs; (2) declarations from experts pertaining to whether the credible fear policies are new; (3) government training manuals, memoranda, and a government brief; (4) third-party country reports or declarations; (5) various newspaper articles; and (6) public statements from government officials. Pls.' Evid. Mot., ECF No. 66-1 at 7–16. The government moves to strike these exhibits, arguing that judicial review under the APA is limited to the administrative record, which consists of the "materials that were before the agency at the time its decision was made." Defs.' Mot. to Strike, ECF No. 88-1 at 20.

A. Legal Standard

"[I]t is black-letter administrative law that in an APA case, a reviewing court 'should have before it neither more nor less information than did the agency when it made its

decision.'" *Hill Dermaceuticals, Inc. v. Food & Drug Admin.*, 709 F.3d 44, 47 (D.C. Cir. 2013)(quoting W*alter O. Boswell Mem'l Hosp. v. Heckler*, 749 F.2d 788, 792 (D.C. Cir. 1984)). This is because, under the APA, the court is confined to reviewing "the whole record or those parts of it cited by a party," 5 U.S.C. § 706, and the administrative record only includes the "materials 'compiled' by the agency that were 'before the agency at the time the decision was made,'" *James Madison Ltd. by Hecht v. Ludwig*, 82 F.3d 1085, 1095 (D.C. Cir. 1996)(citations omitted).

Accordingly, when, as here, plaintiffs seek to place before the court additional materials that the agency did not review in making its decision, a court must exclude such material unless plaintiffs "can demonstrate unusual circumstances justifying departure from th[e] general rule." *Am. Wildlands v. Kempthorne*, 530 F.3d 991, 1002 (D.C. Cir. 2008)(citation omitted). Aa court may appropriately consider extra-record materials: (1) if the agency "deliberately or negligently excluded documents that may have been adverse to its decision," (2) if background information is needed to "determine whether the agency considered all of the relevant factors," or (3) if the agency "failed to explain [the] administrative action so as to frustrate judicial review." *Id.*

Plaintiffs make three arguments as to why the Court should

consider their proffered extra-record materials: (1) to evaluate whether the government's challenged policies are an impermissible departure from prior policies; (2) to consider plaintiffs' due process cause of action[9]; and (3) to evaluate plaintiffs' request for permanent injunctive relief. Pls.' Evid. Mot., ECF No. 66-1 at 2–12. The Court considers each argument in turn.

B. Analysis

1. Evidence of Prior Policies

Plaintiffs first argue that the Court should consider evidence of the government's prior policies as relevant to determining whether the policies in *Matter of A-B-* and the subsequent guidance deviated from prior policies without explanation. *Id.* at 8–11. The extra-record materials at issue include government training manuals, memoranda, and a government brief, *see* Decl. of Sarah Mujahid ("Mujahid Decl."), ECF No. 10-3 Exs. E–J; Second Decl. of Sarah Mujahid ("Second Mujahid Decl."), ECF No. 64-4, Exs. 1–3, and declarations from third parties explaining the policies are new, Decl. of Rebecca Jamil and Ethan Nasr, ECF No. 65-5.

The Court will consider the government training manuals,

[9] The Court does not reach plaintiffs' due process claims, and therefore will not consider the extra-record evidence related to that claim. *See* Second Mujahid Decl., ECF No. 64-4, Exs. 4–7; Second Mujahid Decl., ECF No. 64-4, Exs. 8-9; ECF No. 64-5.

memoranda, and government brief, but not the declarations explaining them. Plaintiffs argue that the credible fear policies are departures from prior government policies, which the government changed without explanation. Pls.' Evid. Mot., ECF No. 66-1 at 7–11. The government's response is the credible fear policies are not a departure because they do not articulate any new rules. *See* Defs.' Mot., ECF No. 57-1 at 17. Whether the credible fear policies are new is clearly an "unresolved factual issue" that the "administrative record, on its own, . . . is not sufficient to resolve." *See United Student Aid Funds, Inc. v. Devos*, 237 F. Supp. 3d 1, 6 (D.D.C. 2017). The Court cannot analyze this argument without reviewing the prior policies, which are not included in the administrative record. Under these circumstances, it is "appropriate to resort to extra-record information to enable judicial review to become effective." *Id.* at 3 (citing *Esch v. Yeutter*, 876 F.2d 976, 991 (D.C. Cir. 1989)).

The government agrees that "any claim that *A-B-* or the [Policy Memorandum] breaks with past policies . . . is readily ascertainable by simply reviewing the very 'past policies.'" Defs.' Mot. to Strike, ECF No. 88-1 at 24. However, the government disagrees with the types of documents that are considered past policies. *Id.* According to the government, the only "past policies" at issue are legal decisions issued by the

Attorney General, BIA, or courts of appeals. *Id.* The Court is not persuaded by such a narrow interpretation of the evidence that can be considered as past policies. *See Leadership Conference on Civil Rights v. Gonzales*, 404 F. Supp. 2d 246, 255 (D.D.C. 2005)(finding training manual distributed as informal guidance "at a minimum" reflected the policy of the "Elections Crimes Branch if not the Department of Justice").

Admitting third party-declarations from a retired immigration officer and former immigration judge, on the other hand, are not necessary for the Court in its review. Declarations submitted by third-parties regarding putative policy changes would stretch the limited extra-record exception too far. Accordingly, the Court will not consider these declarations when determining whether the credible fear policies constitute an unexplained change of position.

2. Evidence Supporting Injunctive Relief

The second category of information plaintiffs ask the Court to consider is extra-record evidence in support of their claim that injunctive relief is appropriate. Pls.' Evid. Mot., ECF No. 66-1 at 13–16. The evidence plaintiffs present includes plaintiffs' declarations, ECF Nos. 12-1 to 12-9 (filed under seal); several reports describing the conditions of plaintiffs' native countries, Mujahid Decl., ECF No. 10-3, Exs. K-T; and four United Nations High Commissioner for Refugees ("UNHCR")

reports, Second Mujahid Decl., ECF No. 64-4 Exs. 10–13. The materials also include three declarations regarding humanitarian conditions in the three home countries. Joint Decl. of Shannon Drysdale Walsh, Cecilia Menjívar, and Harry Vanden ("Honduras Decl."), ECF No. 64-6; Joint Decl. of Cecilia Menjívar, Gabriela Torres, and Harry Vanden ("Guatemala Decl."), ECF No. 64-7; Joint Decl. of Cecilia Menjívar and Harry Vanden ("El Salvador Decl."), ECF No. 64-8.

The government argues that the Court need not concern itself with the preliminary injunction analysis because the Court's decision to consolidate the preliminary injunction and summary judgment motions under Rule 65 renders the preliminary injunction moot. Defs.' Mot. to Strike, ECF No. 88-1 at 12 n.1. The Court concurs, but nevertheless must determine if plaintiffs are entitled to a permanent injunction, assuming they prevail on their APA and INA claims. Because plaintiffs request specific injunctive relief with respect to their expedited removal orders and credible fear proceedings, the Court must determine whether plaintiffs are entitled to the injunctive relief sought. *See Eco Tour Adventures, Inc. v. Zinke*, 249 F. Supp. 3d 360, 370, n.7 (D.D.C. 2017)("it will often be necessary for a court to take new evidence to fully evaluate" claims "of irreparable harm . . . and [claims] that the issuance of the injunction is in the public interest.")(citation omitted). Thus, the Court will

consider plaintiffs' declarations, the UNHCR reports, and the country reports only to the extent they are relevant to plaintiffs' request for injunctive relief.[10]

In sum, the Court will consider extra-record evidence only to the extent it is relevant to plaintiffs' contentions that the government deviated from prior policies without explanation or to their request for injunctive relief. The Court will not consider any evidence related to plaintiffs' due process claim. Accordingly, the Court will not consider the following documents: (1) evidence related to the opinions of immigration judges and attorneys, Second Mujahid Decl., ECF No. 64-4, Exs. 8–9, 14–17 and ECF No. 64-5; (2) statements of various public officials, Second Mujahid Decl., ECF No. 64-4, Exs. 4–7; and (3) various newspaper articles, Mujahid Decl., ECF No. 10-3, Exs. R-T, and Second Mujahid Decl., ECF No. 64-4, Exs. 14–17.

III. Motion for Summary Judgment

A. Justiciability

The Court next turns to the government's jurisdictional arguments that: (1) the Court lacks jurisdiction to review plaintiffs' challenge to *Matter of A-B-*; and (2) because the Court lacks jurisdiction to review *Matter of A-B-*, the

[10] The Court will not consider three newspaper articles, Mujahid Decl., ECF No. 10-3, Exs. R–T, however, since they are not competent evidence to be considered at summary judgment. *See* Fed. R. Civ. P. 56(c).

government action purportedly causing plaintiffs' alleged harm, the plaintiffs lack standing to challenge the Policy Memorandum. Federal district courts are courts of limited jurisdiction. *See Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). A court must therefore resolve any challenge to its jurisdiction before it may proceed to the merits of a claim. *See Galvan v. Fed. Prison Indus.*, 199 F.3d 461, 463 (D.C. Cir. 1999). The Court addresses each argument in turn.

1. The Court has Jurisdiction under Section 1252(e)(3)

a. *Matter of A-B-*

The government contends that section 1252 forecloses judicial review of plaintiffs' claims with respect to *Matter of A-B-*. Defs.' Mot., ECF No. 57-1 at 30–34. Plaintiffs argue that the statute plainly provides jurisdiction for this Court to review their claims. Pls.' Mot., ECF No. 64-1 at 26–30. The parties agree that to the extent jurisdiction exists to review a challenge to a policy implementing the expedited removal system, it exists pursuant to subsection (e) of the statute.

Under section 1252(a)(2)(A), no court shall have jurisdiction over "procedures and policies adopted by the Attorney General to implement the provisions of section 1225(b)(1)" except "as provided in subsection [1252](e)." Section 1252(e)(3) vests exclusive jurisdiction in the United States District Court for the District of Columbia to review

"[c]hallenges [to the] validity of the [expedited removal] system." *Id.* § 1252(e)(3)(A). Such systemic challenges include challenges to the constitutionality of any provision of the expedited removal statute or to its implementing regulations. *See id.* § 1252(e)(3)(A)(i). They also include challenges claiming that a given regulation or written policy directive, guideline, or procedure is inconsistent with law. *Id.* § 1252(e)(3)(A)(ii). Systemic challenges must be brought within sixty days of the challenged statute or regulation's implementation. *Id.* § 1252(e)(3)(B); *see also Am. Immigration Lawyers Ass'n*, 18 F. Supp. 2d at 47 (holding that "the 60-day requirement is jurisdictional rather than a traditional limitations period").

Both parties agree that the plain language of section 1252(e)(3) is dispositive. It reads as follows:

> (3) Challenges on validity of the system
>
> (A) In general
>
> Judicial review of determinations under section 1225(b) of this title and its implementation is available in an action instituted in the United States District Court for the District of Columbia, but shall be limited to determinations of--
>
> (i) whether such section, or any regulation issued to implement such section, is constitutional; or
>
> (ii) whether such a regulation, or a written policy directive, written policy guideline, or

> written procedure issued by or under the authority of the Attorney General to implement such section, is not consistent with applicable provisions of this subchapter or is otherwise in violation of law.

8 U.S.C. § 1252(e)(3).

The government first argues that *Matter of A-B-* does not implement section 1225(b), as required by section 1252(e)(3). Defs.' Mot., ECF No. 57-1 at 30–32. Instead, the government contends *Matter of A-B-* was a decision about petitions for asylum under section 1158. *Id.* The government also argues that *Matter of A-B-* is not a written policy directive under the Act, but rather an adjudication that determined the rights and duties of the parties to a dispute. *Id.* at 32.

The government's argument that *Matter of A-B-* does not "implement" section 1225(b) is belied by *Matter of A-B-* itself. Although A-B- sought asylum, the Attorney General's decision went beyond her claims explicitly addressing "the legal standard to determine whether an alien has a credible fear of persecution" under 8 U.S.C. section 1225(b). *Matter of A-B-*, 27 I. & N. Dec. at 320 n.1 (citing standard for credible fear determinations). In the decision, the Attorney General articulated the general rule that claims by aliens pertaining to either domestic violence, like the claim in *Matter of A-B-*, or gang violence, a hypothetical scenario not at issue in *Matter of A-B-*, would likely not satisfy the credible fear determination

standard. *Id.* (citing 8 U.S.C. § 1225(b)). Because the Attorney General cited section 1225(b) and the standard for credible fear determinations when articulating the new general legal standard, the Court finds that *Matter of A-B-* implements section 1225(b) within the meaning of section 1252(e)(3).

The government also argues that, despite *Matter of A-B-'s* explicit invocation of section 1225 and articulation of the credible fear determination standard, *Matter of A-B-* is an "adjudication" not a "policy," and therefore section 1252(e)(3) does not apply. Defs.' Mot., ECF No. 57-1 at 32–34. However, it is well-settled that an "administrative agency can, of course, make legal-policy through rulemaking or by adjudication." *Kidd Commc'ns v. F.C.C.*, 427 F.3d 1, 5 (D.C. Cir. 2005)(citing *SEC v. Chenery Corp.*, 332 U.S. 194, 202–03 (1947)). Moreover, "[w]hen an agency does [make policy] by adjudication, because it is a policymaking institution unlike a court, its dicta can represent an articulation of its policy, to which it must adhere or adequately explain deviations." *Id.* at 5. *Matter of A-B-* is a sweeping opinion in which the Attorney General made clear that asylum officers must apply the standards set forth to subsequent credible fear determinations. *See NRLB v. Wyman Gordon Co.*, 394 U.S. 759, 765 (1969)("Adjudicated cases may and do, of course, serve as vehicles for the formulation of agency policies, which are applied and announced therein.").

Indeed, it is difficult to reconcile the government's argument with the language in *Matter of A-B-*: "When confronted with asylum cases based on purported membership in a particular social group, the Board, *immigration judges*, and *asylum officers must analyze the requirements as set forth in this opinion,* which restates and where appropriate, *elaborates upon*, the requirements [for asylum]." 27 I. & N. Dec. at 319 (emphasis added). This proclamation, coupled with the directive to asylum officers that claims based on domestic or gang-related violence generally would not "satisfy the standard to determine whether an alien has a credible fear of persecution," *id.* at 320 n.1, is clearly a "written policy directive" or "written policy guidance" sufficient to bring *Matter of A-B-* under the ambit of section 1252(e)(3). *See Kidd*, 427 F.3d at 5 (stating agency can "make legal-policy through rulemaking or by adjudication"). Indeed, one court has regarded *Matter of A-B-* as such. *See Moncada v. Sessions*, 2018 WL 4847073 *2 (2d Cir. Oct. 5, 2018)(characterizing *Matter of A-B-* as providing "***substantial new guidance*** on the viability of asylum 'claims by aliens pertaining to . . . gang violence'")(emphasis added)(citation omitted).

The government also argues that because the DHS Secretary, rather than the Attorney General, is responsible for implementing most of the provisions in section 1225, the

Attorney General lacks the requisite authority to implement section 1225. Defs.' Reply, ECF No. 85 at 25. Therefore, the government argues, *Matter of A-B-* cannot be "issued by or under the authority of the Attorney General to implement [section 1225(b)]" as required by the statute. *See* 8 U.S.C. § 1252(e)(3)(A)(ii). The government fails to acknowledge, however, that the immigration judges who review negative credible fear determinations are also required to apply *Matter of A-B-*. 8 C.F.R. § 1208.30(g)(2); 8 C.F.R. § 103.10(b)(stating decisions of the Attorney General shall be binding on immigration judges). And it is the Attorney General who is responsible for the conduct of immigration judges. *See, e.g.*, 8 U.S.C. § 1101(b)(4)("An immigration judge shall be subject to such supervision and shall perform such duties as the Attorney General shall prescribe."). Therefore, the Attorney General clearly plays a significant role in the credible fear determination process and has the authority to "implement" section 1225.

Finally, the Court recognizes that even if the jurisdictional issue was a close call, which it is not, several principles persuade the Court that jurisdiction exists to hear plaintiffs' claims. First, there is the "familiar proposition that only upon a showing of clear and convincing evidence of a contrary legislative intent should the courts restrict access to

judicial review." *Bd. of Governors of the Fed. Reserve Sys. v. MCorp. Fin., Inc.*, 502 U.S. 32, 44 (1991)(citations and internal quotation marks omitted). Here, there is no clear and convincing evidence of legislative intent in section 1252 that Congress intended to limit judicial review of the plaintiffs' claims. To the contrary, Congress has explicitly provided this Court with jurisdiction to review systemic challenges to section 1225(b). *See* 8 U.S.C. § 1252(e)(3).

Second, there is also a "strong presumption in favor of judicial review of administrative action." *INS v. St. Cyr*, 533 U.S. 289, 298 (2001). As the Supreme Court has recently explained, "legal lapses and violations occur, and especially so when they have no consequence. That is why [courts have for] so long applied a strong presumption favoring judicial review of administrative action." *Weyerhaeuser Co. v. United States Fish and Wildlife Servs.*, 586 U.S. __,__ (2018)(slip op., at 11). Plaintiffs challenge the credible fear policies under the APA and therefore this "strong presumption" applies in this case.

Third, statutory ambiguities in immigration laws are resolved in favor of the alien. *See Cardoza-Fonseca*, 480 U.S. at 449. Here, any doubt as to whether 1252(e)(3) applies to plaintiffs' claims should be resolved in favor of plaintiffs. *See INS v. Errico*, 385 U.S. 214, 225 (1966)("Even if there were some doubt as to the correct construction of the statute, the

doubt should be resolved in favor of the alien.").

In view of these three principles, and the foregoing analysis, the Court concludes that section 1252(a)(2)(A) does not eliminate this Court's jurisdiction over plaintiffs' claims, and that section 1252(e)(3) affirmatively grants jurisdiction.

b. Policy Memorandum

The government also argues that the Court lacks jurisdiction to review the Policy Memorandum under section 1252(e) for three reasons. First, according to the government, the Policy Memorandum "primarily addresses the asylum standard" and therefore does not implement section 1225(b) as required by the statute. Defs.' Reply, ECF No. 85 at 30. Second, since the Policy Memorandum "merely explains" *Matter of A-B-*, the government argues, it is not reviewable for the same reasons *Matter of A-B-* is not reviewable. *Id.* Finally, the government argues that sections 1225 and 1252(e)(3) "indicate" that Congress only provided judicial review of agency guidelines, directives, or procedures which create substantive rights as opposed to interpretive documents, like the Policy Memorandum, which merely explain the law to government officials. *Id.* at 31-33.

The Court need not spend much time on the government's first two arguments. First, the Policy Memorandum, entitled "Guidance for Processing Reasonable Fear, Credible Fear, Asylum,

and Refugee Claims in Accordance with *Matter of A-B-*" expressly applies to credible fear interviews and provides guidance to credible fear adjudicators. Policy Memorandum, ECF No. 100 at 4 n.1 ("[T]he Attorney General's decision and this [Policy Memorandum] apply also to . . . credible fear determinations."). Furthermore, it expressly invokes section 1225 as the authority for its issuance. *Id.* at 4. The government's second argument that the Policy Memorandum is not reviewable for the same reasons *Matter of A-B-* is not, is easily dismissed because the Court has already found that *Matter of A-B-* falls within section 1252(e)(3)'s jurisdictional grant. *See supra,* at 27-38.

The government's third argument is that section 1252(e)(3) only applies when an agency promulgates legislative rules and not interpretive rules. Defs.' Reply, ECF No. 85 at 30–33. Although not entirely clear, the argument is as follows: (1) the INA provides DHS with significant authority to create legislative rules; (2) Congress barred judicial review of such substantive rules in section 1252(a); (3) therefore Congress must have created a mechanism to review these types of legislative rules, and only legislative rules, in section 1252(e)(3)). *Id.* at 30–31. Folded into this reasoning is also a free-standing argument that because the Policy Memorandum is not a final agency action, it is not reviewable under the APA. *Id.* at 32.

Contrary to the government's assertions, section 1252(e)(3) does not limit its grant of jurisdiction over a "written policy directive, written policy guideline, or written procedure" to only legislative rules or final agency action. Nowhere in the statute did Congress exclude interpretive rules. *Cf.* 5 U.S.C. § 553(b)(3)(A)(stating subsection of statute does not apply to "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice."). Rather, Congress used broader terms such as policy "guidelines," "directives," or "procedures" which do not require notice and comment rulemaking or other strict procedural prerequisites. *See* 8 U.S.C. § 1252(e)(3). There is no suggestion that Congress limited the application of section 1252(e)(3) to only claims involving legislative rules or final agency action, and this Court will not read requirements into the statute that do not exist. *See Keene Corp. v. U.S.*, 508 U.S. 200, 208 (1993)(stating courts have a "duty to refrain from reading a phrase into the statute when Congress has left it out").

In sum, section 1252(a)(2)(A) is not a bar to this Court's jurisdiction because plaintiffs' claims fall well within section 1252(e)(3)'s grant of jurisdiction. Both *Matter of A-B-* and the Policy Memorandum expressly reference credible fear determinations in applying the standards articulated by the Attorney General. Because *Matter of A-B-* and the Policy

Memorandum are written policy directives and guidelines issued by or under the authority of the Attorney General, section 1252(e)(3) applies, and this Court has jurisdiction to hear plaintiffs' challenges to the credible fear policies.

2. Plaintiffs have Standing to Challenge the Policy Memorandum

The government next challenges plaintiffs' standing to bring this suit with respect to their claims against the Policy Memorandum only. Defs.' Mot., ECF No. 57-1 at 35–39. To establish standing, a plaintiff "must, generally speaking, demonstrate that he has suffered 'injury in fact,' that the injury is 'fairly traceable' to the actions of the defendant, and that the injury will likely be redressed by a favorable decision." *Bennett v. Spear*, 520 U.S. 154, 162 (1997)(citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992); *Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc.*, 454 U.S. 464, 471–72 (1982)). Standing is assessed "upon the facts as they exist at the time the complaint is filed." *Natural Law Party of U.S. v. Fed. Elec. Comm'n*, 111 F. Supp. 2d 33, 41 (D.D.C. 2000).

As a preliminary matter, the government argues that plaintiffs lack standing to challenge any of the policies in the Policy Memorandum that rest on *Matter of A-B-* because the Court does not have jurisdiction to review *Matter of A-B-*. *See* Defs.'

Mot., ECF No. 57-1 at 35, 37–39. Therefore, the government argues, plaintiffs' injuries would not be redressable or traceable to the Policy Memorandum since they stem from *Matter of A-B-*. This argument fails because the Court has found that it has jurisdiction to review plaintiffs' claims related to *Matter of A-B-* under 1252(e)(3). *See supra*, at 27-38.

The government also argues that because plaintiffs do not have a legally protected interest in the Policy Memorandum—an interpretive document that creates no rights or obligations—plaintiffs do not have an injury in fact. Defs.' Reply, ECF No. 85 at 33. The government's argument misses the point. Plaintiffs do not seek to enforce a right under a prior policy or interpretive guidance. *See* Pls.' Reply, ECF No. 92 at 17–18. Rather, they challenge the validity of their credible fear determinations pursuant to the credible fear policies set forth in *Matter of A-B-* and the Policy Memorandum. Because the credible fear policies impermissibly raise their burden and deny plaintiffs a fair opportunity to seek asylum and escape the persecution they have suffered, plaintiffs argue, the policies violate the APA and immigration laws. *See id.*

The government also argues that even if the Court has jurisdiction, all the claims, with the exception of one, are time-barred and therefore not redressable. Defs.' Mot., ECF No. 57-1 at 39–41. The government argues that none of the policies

are in fact new and each pre-date the sixty days in which plaintiffs are statutorily required to bring their claims. *Id.* at 39–41. The government lists each challenged policy and relies on existing precedent purporting to apply the same standard espoused in the Policy Memorandum prior to its issuance. *See id.* at 39–41. The challenge in accepting this theory of standing is that it would require the Court to also accept the government's theory of the case: that the credible fear policies are not "new." In other words, the government's argument "assumes that its view on the merits of the case will prevail." *Defs. of Wildlife v. Gutierrez*, 532 F.3d 913, 924 (D.C. Cir. 2008). This is problematic because "in reviewing the standing question, the court must be careful not to decide the questions on the merits for or against the plaintiff, and must therefore assume that on the merits the plaintiffs would be successful in their claims." *City of Waukesha v. EPA*, 320 F.3d 228, 235 (D.C. Cir. 2003)(citations omitted).

Whether the credible fear policies differ from the standards articulated in the pre-policy cases cited by the government, and are therefore new, is a contested issue in this case. And when assessing standing, this Court must "be careful not to decide the questions on the merits" either "for or against" plaintiffs, "and must therefore assume that on the merits the plaintiffs would be successful in their claims." *Id.*

Instead, the Court must determine whether an order can redress plaintiffs' injuries in whole or part. *Gutierrez*, 532 F.3d at 925. There is no question that the challenged policies impacted plaintiffs. *See* Defs.' Mot., ECF No. 57-1 at 28 (stating an "asylum officer reviewed each of [plaintiffs] credible fear claims and found them wanting in light of *Matter of A-B-*"). There is also no question that an order from this Court declaring the policies unlawful and enjoining their use would redress those injuries. *See Carpenters Indus. Council v. Zinke*, 854 F.3d 1, 6 n.1 (D.C. Cir. 2017)(stating when government actions cause an injury, enjoining that action will usually redress the injury).

Because plaintiffs have demonstrated that they have: (1) suffered an injury; (2) the injury is fairly traceable to the credible fear policies; and (3) action by the Court can redress their injuries, plaintiffs have standing to challenge the Policy Memorandum. Therefore, the Court may proceed to the merits of plaintiffs' claims.

B. Legal Standard for Plaintiffs' Claims

Although both parties have moved for summary judgment, the parties seek review of an administrative decision under the APA. *See* 5 U.S.C. § 706. Therefore, the standard articulated in Federal Rule of Civil Procedure 56 is inapplicable because the Court has a more limited role in reviewing the administrative

record. *Wilhelmus v. Geren*, 796 F. Supp. 2d 157, 160 (D.D.C. 2011)(internal citation omitted). "[T]he function of the district court is to determine whether or not as a matter of law the evidence in the administrative record permitted the agency to make the decision it did." *See Sierra Club v. Mainella*, 459 F. Supp. 2d 76, 90 (D.D.C. 2006)(internal quotation marks and citations omitted). "Summary judgment thus serves as the mechanism for deciding, as a matter of law, whether the agency action is supported by the administrative record and otherwise consistent with the APA standard of review." *Wilhelmus*, 796 F. Supp. 2d at 160 (internal citation omitted).

Plaintiffs bring this challenge to the alleged new credible fear policies arguing they violate the APA and INA. Two separate, but overlapping, standards of APA review govern the resolution of plaintiffs' claims. First, under 5 U.S.C. § 706(2)(a), agency action must not be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." To survive an arbitrary and capricious challenge, an agency action must be "the product of reasoned decisionmaking." *Fox v. Clinton*, 684 F.3d 67, 74–75 (D.C. Cir. 2012). The reasoned decisionmaking requirement applies to judicial review of agency adjudicatory actions. *Id.* at 75. A court must not uphold an adjudicatory action when the agency's judgment "was neither adequately explained in its decision nor supported by agency

precedent." *Id.* (citing *Siegel v. SEC*, 592 F.3d 147, 164 (D.C. Cir. 2010)). Thus, review of *Matter of A-B-* requires this Court to determine whether the decision was the product of reasoned decisionmaking. *See id.* at 75.

Second, plaintiffs' claims also require this Court to consider the degree to which the government's interpretation of the various relevant statutory provisions in *Matter of A-B-* is afforded deference. The parties disagree over whether this Court is required to defer to the agency's interpretations of the statutory provisions in this case. "Although balancing the necessary respect for an agency's knowledge, expertise, and constitutional office with the courts' role as interpreter of laws can be a delicate matter," the familiar *Chevron* framework offers guidance. *Id.* at 75 (citing *Gonzales v. Oregon*, 546 U.S. 243, 255 (2006)).

In reviewing an agency's interpretation of a statute it is charged with administering, a court must apply the framework of *Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). *See Halverson v. Slater*, 129 F.3d 180, 184 (D.C. Cir. 1997). Under the familiar *Chevron* two-step test, the first step is to ask "whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed

intent of Congress." *Chevron*, 467 U.S. at 842–43. In making that determination, the reviewing court "must first exhaust the 'traditional tools of statutory construction' to determine whether Congress has spoken to the precise question at issue." *Natural Res. Def. Council, Inc. v. Daley*, 209 F.3d 747, 572 (2000)(citation omitted). The traditional tools of statutory construction include "examination of the statute's text, legislative history, and structure . . . as well as its purpose." *Id.* (internal citations omitted). If these tools lead to a clear result, "then Congress has expressed its intention as to the question, and deference is not appropriate." *Id.*

If a court finds that the statute is silent or ambiguous with respect to a particular issue, then Congress has not spoken clearly on the subject and a court is required to proceed to the second step of the *Chevron* framework. *Chevron*, 467 U.S. at 843. Under *Chevron* step two, a court's task is to determine if the agency's approach is "based on a permissible construction of the statute." *Id.* To make that determination, a court again employs the traditional tools of statutory interpretation, including reviewing the text, structure, and purpose of the statute. *See Troy Corp. v. Browder*, 120 F.3d 277, 285 (D.C. Cir. 1997)(noting that an agency's interpretation must "be reasonable and consistent with the statutory purpose"). Ultimately, "[n]o matter how it is framed, the question a court faces when

confronted with an agency's interpretation of a statute it administers is always, simply, whether the agency has stayed within the bounds of its statutory authority." *District of Columbia v. Dep't of Labor*, 819 F.3d 444, 459 (D.C. Cir. 2016)(citation omitted).

The scope of review under both the APA's arbitrary and capricious standard and *Chevron* step two are concededly narrow. *See Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)(stating "scope of review under the 'arbitrary and capricious' standard is narrow and a court is not to substitute its judgment for that of the agency"); *see also Judulang v. Holder*, 565 U.S. 42, 52 n.7 (2011)(stating the *Chevron* step two analysis overlaps with arbitrary and capricious review under the APA because under *Chevron* step two a court asks "whether an agency interpretation is 'arbitrary or capricious in substance'"). Although this review is deferential, "courts retain a role, and an important one, in ensuring that agencies have engaged in reasoned decision making." *Judulang*, 565 U.S. at 53; *see also Daley*, 209 F.3d at 755 (stating that although a court owes deference to agency decisions, courts do not hear cases "merely to rubber stamp agency actions").

With these principles in mind, the Court now turns to plaintiffs' claims that various credible fear policies based on

Matter of A-B-, the Policy Memorandum, or both, are arbitrary and capricious and in violation of the immigration laws.

C. APA and Statutory Claims

Plaintiffs challenge the following alleged new credible fear policies: (1) a general rule against credible fear claims related to domestic or gang-related violence; (2) a heightened standard for persecution involving non-governmental actors; (3) a new rule for the nexus requirement in asylum; (4) a new rule that "particular social group" definitions based on claims of domestic violence are impermissibly circular; (5) the requirements that an alien articulate an exact delineation of the specific "particular social group" at the credible fear determination stage and that asylum officers apply discretionary factors at that stage; and (6) the Policy Memorandum's requirement that adjudicators ignore circuit court precedent that is inconsistent with *Matter of A-B-*, and apply the law of the circuit where the credible fear interview takes place. The Court addresses each challenged policy in turn.

1. The General Rule Foreclosing Domestic Violence and Gang-Related Claims Violates the APA and Immigration Laws

Plaintiffs argue that the credible fear policies establish an unlawful general rule against asylum petitions by aliens with credible fear claims relating to domestic and gang violence. Pls.' Mot., ECF No. 64-1 at 28.

A threshold issue is whether the *Chevron* framework applies to this issue at all. "Not every agency interpretation of a statute is appropriately analyzed under *Chevron*." *Alabama Educ. Ass'n v. Chao*, 455 F.3d 386, 392 (D.C. Cir. 2006). The government acknowledges that the alleged new credible fear policies are not "entitled to blanket *Chevron* deference." Defs.' Reply, ECF No. 85 at 39 (emphasis in original). Rather, according to the government, the Attorney General is entitled to *Chevron* deference when he "interprets any *ambiguous* statutory terms in the INA." *Id.* (emphasis in original). The government also argues that the Attorney General is entitled to *Chevron* deference to the extent *Matter of A-B-* states "long-standing precedent or interpret[s] prior agency cases or regulations through case-by-case adjudication." *Id.* at 40.

To the extent *Matter of A-B-* was interpreting the "particular social group" requirement in the INA, the *Chevron* framework clearly applies. The Supreme Court has explained that "[i]t is clear that principles of *Chevron* deference are applicable" to the INA because that statute charges the Attorney General with administering and enforcing the statutory scheme. *I.N.S. v. Aguirre-Aguirre*, 526 U.S. 415, 424–25 (quoting 8 U.S.C. §§ 1103(a)(1), 1253(h)). In addition to *Chevron* deference, a court must also afford deference to an agency when it is interpreting its own precedent. *U.S. Telecom Ass'n v.*

F.C.C., 295 F.3d 1326, 1332 (D.C. Cir. 2002)("We [] defer to an agency's reasonable interpretation of its own rules and precedents.").

In this case, the Attorney General interpreted a provision of the INA, a statute that Congress charged the Attorney General with administering. *See* 8 U.S.C. § 1103(a)(1). *Matter of A-B-* addressed the issue of whether an alien applying for asylum based on domestic violence could establish membership in a "particular social group." Because the decision interpreted a provision of the INA, the *Chevron* framework applies to *Matter of A-B-*.[11] *See Negusie v. Holder*, 555 U.S. 511, 516 (2009)(stating it "is well settled" that principles of *Chevron* deference apply to the Attorney General's interpretation of the INA).

a. *Chevron* Step One: The Phrase "Particular Social Group" is Ambiguous

The first question within the *Chevron* framework is whether, using the traditional tools of statutory interpretation including evaluating the text, structure, and the overall

[11] The Policy Memorandum is not subject to *Chevron* deference. The Supreme Court has warned that agency "[i]nterpretations such as those in opinion letters—like interpretations contained in *policy statements*, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant *Chevron*-style deference." *Christensen v. Harris Cnty*, 529 U.S. 576, 587 (2000). Rather, interpretations contained in such formats "are entitled to respect . . . only to the extent that those interpretations have the power to persuade." *Id.* (citations omitted).

statutory scheme, as well as employing common sense, Congress has "supplied a clear and unambiguous answer to the interpretive question at hand." *Pereira v. Sessions*, 138 S. Ct. 2105, 2113 (2018)(citation omitted). The interpretive question at hand in this case is the meaning of the term "particular social group."

Under the applicable asylum provision, an "alien who is physically present in the United States or who arrives in the United States . . . irrespective of such alien's status" may be granted asylum at the discretion of the Attorney General if the "Attorney General determines that such alien is a refugee within the meaning of section 1101(a)(42)(A)." 8 U.S.C. § 1158. The term "refugee" is defined in section 1101(a)(42)(A) as, among other things, an alien who is unable or unwilling to return to his or her home country "because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1101(a)(42)(A). At the credible fear stage, an alien needs to show that there is a "significant possibility . . . that the alien could establish eligibility for asylum." 8 U.S.C. § 1225(b)(1)(B)(v).

The INA itself does not shed much light on the meaning of the term "particular social group." The phrase "particular social group" was first included in the INA when Congress enacted the Refugee Act of 1980. Pub. L. No. 96-212, 94 Stat.

102 (1980). The purpose of the Refugee Act was to protect refugees, i.e., individuals who are unable to protect themselves from persecution in their native country. *See id.* § 101(a)("The Congress declares that it is the historic policy of the United States to respond to the urgent needs of persons subject to persecution in their homelands, including . . . humanitarian assistance for their care and maintenance in asylum areas."). While the legislative history of the Act does not reveal the specific meaning the members of Congress attached to the phrase "particular social group," the legislative history does make clear that Congress intended "to bring United States refugee law into conformance with the [Protocol], 19 U.S.T. 6223, T.I.A.S. No. 6577, to which the United States acceded in 1968." *Cardoza-Fonseca*, 480 U.S. at 436-37. Indeed, when Congress accepted the definition of "refugee" it did so "with the understanding that it is based directly upon the language of the Protocol and it is intended that the provision be construed consistent with the Protocol." *Id.* at 437 (citations omitted). It is therefore appropriate to consider what the phrase "particular social group" means under the Protocol. *See id.*

In interpreting the Refugee Act in accordance with the meaning intended by the Protocol, the language in the Act should be read consistently with the United Nations' interpretation of the refugee standards. *See id.* at 438–39 (relying on UNHCR's

interpretation in interpreting the Protocol's definition of "well-founded fear"). The UNHCR defined the provisions of the Convention and Protocol in its Handbook on Procedures and Criteria for Determining Refugee Status ("UNHCR Handbook").[12] *Id.* As the Supreme Court has noted, the UNHCR Handbook provides "significant guidance in construing the Protocol, to which Congress sought to conform . . . [and] has been widely considered useful in giving content to the obligations that the protocol establishes." *Id.* at 439 n.22 (citations omitted). The UNHCR Handbook codified the United Nations' interpretation of the term "particular social group" at that time, construing the term expansively. The UNHCR Handbook states that "a 'particular social group' normally comprises persons of similar background, habits, or social status." UNHCR Handbook at Ch. II B(3)(e) ¶ 77.

The clear legislative intent to comply with the Protocol and Congress' election to not change or add qualifications to the U.N.'s definition of "refugee" demonstrates that Congress intended to adopt the U.N.'s interpretation of the word "refugee." Moreover, the UNHCR's classification of "social

[12] Handbook of Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and 1967 Protocol Relating to the Status of Refugees, OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, *available at* http://www.unhcr.org/4d93528a9.pdf.

group" in broad terms such as "similar background, habits, or social status" suggests that Congress intended an equally expansive construction of the same term in the Refugee Act. Furthermore, the Refugee Act was enacted to further the "historic policy of the United States to respond to the urgent needs of persons subject to persecution in their homelands . . . [and] it is the policy of the United States to encourage all nations to provide assistance and resettlement opportunities to refugees to the fullest extent possible." *Maharaj v. Gonzales*, 450 F.3d 961, 983 (9th Cir. 2006)(O'Scannlain, J. concurring in part)(citing Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102).

Although the congressional intent was clear that the meaning of "particular social group" should not be read too narrowly, the Court concludes that Congress has not "spoken directly" on the precise question of whether victims of domestic or gang-related persecution fall into the particular social group category. Therefore, the Court proceeds to *Chevron* step two to determine whether the Attorney General's interpretation, which generally precludes domestic violence and gang-related claims at the credible fear stage, is a permissible interpretation of the statute.

b. *Chevron* Step Two: Precluding Domestic and Gang-Related Claims at the Credible Fear Stage is an Impermissible Reading of the Statute and is Arbitrary and Capricious

As explained above, the second step of the *Chevron* analysis overlaps with the arbitrary and capricious standard of review under the APA. *See Nat'l Ass'n of Regulatory Util. Comm'rs v. ICC*, 41 F.3d 721, 726 (D.C. Cir. 1994)("[T]he inquiry at the second step of *Chevron* overlaps analytically with a court's task under the [APA]."). "To survive arbitrary and capricious review, an agency action must be the product of reasoned decisionmaking." *Fox v. Clinton*, 684 F.3d 67, 74–75 (D.C. Cir. 2012). "Thus, even though arbitrary and capricious review is fundamentally deferential—especially with respect to matters relating to an agency's areas of technical expertise—no deference is owed to an agency action that is based on an agency's purported expertise where the agency's explanation for its action lacks any coherence." *Id.* at 75 (internal citations and alterations omitted).

Plaintiffs argue that the Attorney General's near-blanket rule against positive credible fear determinations based on domestic violence and gang-related claims is arbitrary and capricious for several reasons. First, they contend that the rule has no basis in immigration law. Pls.' Mot., ECF No. 64-1 at 39–40. Plaintiffs point to several cases in which immigration

judges and circuit courts have recognized asylum petitions based on gang-related or gender-based claims. *See id.* at 38–39 (citing cases). Second, plaintiffs argue that the general prohibition is arbitrary and capricious and contrary to the INA because it constitutes an unexplained change to the long-standing recognition that credible fear determinations must be individualized based on the facts of each case. *Id.* at 40–41.

The government's principal response is straightforward: no such general rule against domestic violence or gang-related claims exists. Defs.' Reply, ECF No. 85 at 44–47. The government emphasizes that the only change to the law in *Matter of A-B-* is that *Matter of A-R-C-G-* was overruled. *Id.* at 43. The government also argues that *Matter of A-B-* only required the BIA to assess each element of an asylum claim and not rely on a party's concession that an element is satisfied. *Id.* at 45. Thus, according to the government, the Attorney General simply "eliminated a loophole created by *A-R-C-G-*." *Id.* at 45. The government dismisses the rest of *Matter of A-B-* as mere "comment[ary] on problems typical of gang and domestic violence related claims." *Id.* at 46.

And even if a general rule does exist, the government contends that asylum claims based on "private crime[s]" such as domestic and gang violence have been the center of controversy for decades. Defs.' Reply, ECF No. 85 at 44. Therefore, the

government concludes, that *Matter of A-B-* is a lawful interpretation and restatement of the asylum laws, and is entitled to deference. *Id.* Finally, the government argues that Congress designed the asylum statute as a form of limited relief, not to "provide redress for all misfortune." *Id.*

The Court is not persuaded that *Matter of A-B-* and the Policy Memorandum do not create a general rule against positive credible fear determinations in cases in which aliens claim a fear of persecution based on domestic or gang-related violence. *Matter of A-B-* mandates that "[w]hen confronted with asylum cases based on purported membership in a particular social group . . . immigration judges, and asylum officers must analyze the requirements as set forth" in the decision. 27 I. & N. Dec. at 319. The precedential decision further explained that "[g]enerally, claims by aliens pertaining to domestic violence or gang violence perpetrated by non-governmental actors will not qualify for asylum." *Id.* at 320. *Matter of A-B-* also requires asylum officers to "analyze the requirements as set forth in" *Matter of A-B-* when reviewing asylum related claims including whether such claims "would satisfy the legal standard to determine whether an alien has a credible fear of persecution." *Id.* at 320 n.1 (citing 8 U.S.C. § 1225(b)). Furthermore, the Policy Memorandum also makes clear that the sweeping statements in *Matter of A-B-* must be applied to credible fear

determinations: "if an applicant claims asylum based on membership in a particular social group, then officers must factor the [standards explained in *Matter of A-B-*] *into their determination of whether an applicant has a credible fear or reasonable fear of persecution*." Policy Memorandum, ECF No. 100 at 12 (emphasis added).

Not only does *Matter of A-B-* create a general rule against such claims at the credible fear stage, but the general rule is also not a permissible interpretation of the statute. First, the general rule is arbitrary and capricious because there is no legal basis for an effective categorical ban on domestic violence and gang-related claims. Second, such a general rule runs contrary to the individualized analysis required by the INA. Under the current immigration laws, the credible fear interviewer must prepare a case-specific factually intensive analysis for each alien. *See* 8 C.F.R. § 208.30(e)(requiring individual analysis including material facts stated by the applicant, and additional facts relied upon by officer). Credible fear determinations, like requests for asylum in general, must be resolved based on the particular facts and circumstances of each case. *Id.*

A general rule that effectively bars the claims based on certain categories of persecutors (i.e. domestic abusers or gang members) or claims related to certain kinds of violence is

inconsistent with Congress' intent to bring "United States refugee law into conformance with the [Protocol]." *Cardoza-Fonseca*, 480 U.S. at 436-37. The new general rule is thus contrary to the Refugee Act and the INA.[13] In interpreting "particular social group" in a way that results in a general rule, in violation of the requirements of the statute, the Attorney General has failed to "stay[] within the bounds" of his statutory authority.[14] *District of Columbia v. Dep't of Labor*, 819 F.3d at 449.

The general rule is also arbitrary and capricious because it impermissibly heightens the standard at the credible fear stage. The Attorney General's direction to deny most domestic violence or gang violence claims at the credible fear

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[13] The new rule is also a departure from previous DHS policy. *See* Mujahid Decl., Ex. F ("2017 Credible Fear Training") ("Asylum officers should evaluate the entire scope of harm experienced by the applicant to determine if he or she was persecuted, taking into account the individual circumstances of each case."). It is arbitrary and capricious for that reason as well. *Lone Mountain Processing, Inc. v. Sec'y of Labor*, 709 F.3d 1161, 1164 (D.C. Cir. 2013)("[A]n agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, *not casually ignored*.")(emphasis added).

[14] The Court also notes that domestic law may supersede international obligations only by express abrogation, *Chew Heong v. United States*, 112 U.S. 536, 538 (1884), or by subsequent legislation that irrevocably conflicts with international obligations, *Reid v. Covert*, 354 U.S. 1, 18 (1957). Congress has not expressed any intention to rescind its international obligations assumed through accession to the 1967 Protocol via the Refugee Act of 1980.

determination stage is fundamentally inconsistent with the threshold screening standard that Congress established: an alien's removal may not be expedited if there is a "significant possibility" that the alien could establish eligibility for asylum. 8 U.S.C. § 1225(b)(1)(B)(v). The relevant provisions require that the asylum officer "conduct the interview in a nonadversarial manner" and "elicit all relevant and useful information bearing on whether the applicant has a credible fear of persecution or torture." 8 C.F.R. § 208.30(d). As plaintiffs point out, to prevail at a credible fear interview, the alien need only show a "significant possibility" of a one in ten chance of persecution, i.e., a fraction of ten percent. *See* 8 U.S.C. § 1225(b)(1)(B)(v); *Cardoza-Fonseca*, 480 U.S. at 439–40 (describing a well-founded fear of persecution at asylum stage to be satisfied even when there is a ten percent chance of persecution). The legislative history of the IIRIRA confirms that Congress intended this standard to be a low one. *See* 142 CONG. REC. S11491-02 ("[t]he credible fear standard . . . is intended to be a low screening standard for admission into the usual full asylum process"). The Attorney General's directive to broadly exclude groups of aliens based on a sweeping policy applied indiscriminately at the credible fear stage, was neither adequately explained nor supported by agency precedent. Accordingly, the general rule against domestic violence and

gang-related claims during a credible fear determination is arbitrary and capricious and violates the immigration laws.

2. Persecution: The "Condoned or Complete Helplessness" Standard Violates the APA and Immigration Laws

Plaintiffs next argue that the government's credible fear policies have heightened the legal requirement for all credible fear claims involving non-governmental persecutors. Pls.' Mot., ECF No. 64-1 at 48.

To be eligible for asylum, an alien must demonstrate either past "persecution or a well-founded fear of persecution." 8 U.S.C. § 1101(a)(42)(A). When a private actor, rather than the government itself, is alleged to be the persecutor, the alien must demonstrate "some connection" between the actions of the private actor and "governmental action or inaction." *See Rosales Justo v. Sessions*, 895 F.3d 154, 162 (1st Cir. 2018). To establish this connection, a petitioner must show that the government was either "unwilling or unable" to protect him or her from persecution. *See Burbiene v. Holder*, 568 F.3d 251, 255 (1st Cir. 2009).

Plaintiffs argue that *Matter of A-B-* and the Policy Memorandum set forth a new, heightened standard for government involvement by requiring an alien to "show the government condoned the private actions or at least demonstrated a complete helplessness to protect the victim." *Matter of A-B-*, 27 I. & N.

Dec. at 337; Policy Memorandum, ECF No. 100 at 9. The government argues that the "condone" or "complete helplessness" standard is not a new definition of persecution; and, in any event, such language does not change the standard. Defs.' Reply, ECF No. 85 at 55.

a. *Chevron* Step One: The Term "Persecution" is Not Ambiguous[15]

Again, the first question under the *Chevron* framework is whether Congress has "supplied a clear and unambiguous answer to the interpretive question at hand." *Pereira*, 138 S. Ct. at 2113. Here, the interpretive question at hand is whether the word "persecution" in the INA requires a government to condone the persecution or demonstrate a complete helplessness to protect the victim.

The Court concludes that the term "persecution" is not ambiguous and the government's new interpretation is inconsistent with the INA. The Court is guided by the longstanding principle that Congress is presumed to have incorporated prior administrative and judicial interpretations of language in a statute when it uses the same language in a subsequent enactment. *See Sekhar v. United States*, 570 U.S. 729, 733 (2013)(explaining that "if a word is obviously transplanted

[15] Because the government is interpreting a provision of the INA, the *Chevron* framework applies.

from another legal source, whether the common law or other legislation, it brings the old soil with it"); *Lorillard v. Pons*, 434 U.S. 575, 580 (1978)(stating Congress is aware of interpretations of a statute and is presumed to adopt them when it re-enacts them without change).

The seminal case on the interpretation of the term "persecution," *Matter of Acosta*, 19 I. & N. Dec. 211 (BIA 1985), is dispositive. In *Matter of Acosta*, the BIA recognized that harms could constitute persecution if they were inflicted "either by the government of a country or by persons or an organization that the government was unable or unwilling to control." *Id.* at 222 (citations omitted). The BIA noted that Congress carried forward the term "persecution" from pre-1980 statutes, in which it had a well-settled judicial and administrative meaning: "harm or suffering . . . inflicted either by the government of a country or by persons or an organization that the government was unable or unwilling to control." *Id.* Applying the basic rule of statutory construction that Congress carries forward established meanings of terms, the BIA adopted the same definition. *Id.* at 223.

The Court agrees with this approach. When Congress uses a term with a settled meaning, its intent is clear for purposes of *Chevron* step one. *cf. B & H Med., LLC v. United States*, 116 Fed. Cl. 671, 685 (2014)(a term with a "judicially settled meaning"

is "not ambiguous" for purposes of deference under *Auer v. Robbins*, 519 U.S. 452 (1997)). As explained in *Matter of Acosta*, Congress adopted the "unable or unwilling" standard when it used the word "persecution" in the Refugee Act. 19 I. & N. Dec. at 222, *see also Shapiro v. United States*, 335 U.S. 1, 16 (1948)(Congress presumed to have incorporated "settled judicial construction" of statutory language through re-enactment). Indeed, the UNHCR Handbook stated that persecution included "serious discriminatory or other offensive acts . . . committed by the local populace . . . if they are knowingly tolerated by the authorities, or if the authorities refuse, or prove unable, to offer *effective* protection." *See* UNHCR Handbook ¶ 65 (emphasis added). It was clear at the time that the Act was passed by Congress that the "unwilling or unable" standard did not require a showing that the government "condoned" persecution or was "completely helpless" to prevent it. Therefore, the government's interpretation of the term "persecution" to mean the government must condone or demonstrate complete helplessness to help victims of persecution fails at *Chevron* step one.

The government relies on circuit precedent that has used the "condoned" or "complete helplessness" language to support its argument that the standard is not new. Defs.' Reply, ECF No. 85 at 55. There are several problems with the government's argument. First, upon review of the cited cases it is apparent

that, although the word "condone" was used, in actuality, the courts were applying the "unwilling or unable" standard. For example, in *Galina v. INS*, 213 F.3d 955 (7th Cir. 2005), an asylum applicant was abducted and received threatening phone calls in her native country. *Id.* at 957. The applicant's husband called the police to report the threatening phone calls, and after the police located one of the callers, the calls stopped. *Id.* The Court recognized that a finding of persecution ordinarily requires a determination that the government condones the violence or demonstrated a complete helplessness to protect the victims. *Id.* at 958. However, relying on the BIA findings, the Court found that notwithstanding the fact "police might take some action against telephone threats" the applicant would still face persecution if she was sent back to her country of origin because she could have been killed. *Id.* Therefore, the Court ultimately concluded that an applicant can still meet the persecution threshold when the police are unable to provide effective help, but fall short of condoning the persecution. *Id.* at 958. Despite the language it used to describe the standard, the court did not apply the heightened "condoned or complete helplessness" persecution standard pronounced in the credible fear policies here.

Second, and more importantly, under the government's formulation of the persecution standard, no asylum applicant who

received assistance from the government, regardless of how ineffective that assistance was, could meet the persecution requirement when the persecutor is a non-government actor.[16] *See* Policy Memorandum, ECF No. 100 at 17 (stating that in the context of credible fear interviews, "[a]gain, the home government must either condone the behavior or demonstrate a complete helplessness to protect victims of such alleged persecution"). That is simply not the law. For example, in *Rosales Justo v. Sessions*, the United States Court of Appeals for the First Circuit held that a petitioner satisfied the "unable or unwilling" standard, even though there was a significant police response to the claimed persecution. 895 F.3d 154, 159 (1st Cir. 2018). The petitioner in *Rosales Justo* fled Mexico after organized crime members murdered his son. *Id.* at 157–58. Critically, the "police took an immediate and active interest in the [petitioner's] son's murder." *Id.* The Court noted that the petitioner "observed seven officers and a forensic team at the scene where [the] body was recovered, the police took statements from [petitioner] and his wife, and an

[16] The Court notes that this persecution requirement applies to all asylum claims not just claims based on membership in a "particular social group" or claims related to domestic or gang-related violence. *See Matter of A-B-*, 27 I. & N. Dec. at 337 (describing elements of persecution). Therefore, such a formulation heightens the standard for every asylum applicant who goes through the credibility determination process.

autopsy was performed." *Id.* The Court held that, despite the extensive actions taken by the police, the "unwilling or unable" standard was satisfied because although the government was willing to protect the petitioner, the evidence did not show that the government was able to make the petitioner and his family any safer. *Id.* at 164 (reversing BIA's conclusion that the immigration judge clearly erred in finding that the police were willing but unable to protect family). As *Rosales Justo* illustrates, a requirement that police condone or demonstrate complete helplessness is inconsistent with the current standards under immigration law.[17]

Furthermore, the Court need not defer to the government's interpretation to the extent it is based on an interpretation of court precedent. Indeed, in "case after case, courts have affirmed this fairly intuitive principle, that courts need not, and should not, defer to agency interpretations of opinions written by courts." *Citizens for Responsibility & Ethics in*

[17] This departure is also wholly unexplained. As the Supreme Court has held, "[u]nexplained inconsistency is . . . a reason for holding an interpretation to be an arbitrary and capricious change from agency practice under the [APA]." *See Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 46–57 (1983). The credible fear policies do not acknowledge a change in the persecution standard and are also arbitrary and capricious for that reason. *See Fox Television Stations, Inc.*, 556 U.S. at 514, 515 (2009)("[T]he requirement that an agency provide reasoned explanation for its action would ordinarily demand that it display awareness that it is changing [its] position.").

Washington v. Fed. Election Comm'n, 209 F. Supp. 3d 77, 87 (D.D.C. 2016)(listing cases). "There is therefore no reason for courts—the supposed experts in analyzing judicial decisions—to defer to agency interpretations of the Court's opinions." *Univ. of Great Falls v. NLRB*, 278 F.3d 1335, 1341 (D.C. Cir. 2002); *see also Judulang*, 565 U.S. at 52 n.7 (declining to apply *Chevron* framework because the challenged agency policy was not "an interpretation of any statutory language").

To the extent the credible fear policies established a new standard for persecution, it did so in purported reliance on circuit opinions. The Court gives no deference to the government's interpretation of judicial opinions regarding the proper standard for determining the degree to which government action, or inaction, constitutes persecution. *Univ. of Great Falls*, 278 F.3d at 1341. The "unwilling or unable" persecution standard was settled at the time the Refugee Act was codified, and therefore the Attorney General's "condoned" or "complete helplessness" standard is not a permissible construction of the persecution requirement.

3. Nexus: The Credible Fear Policies Do Not Pose a New Standard for the Nexus Requirement

Plaintiffs next argue that the formulation of the nexus requirement articulated in *Matter of A-B*-that when a private actor inflicts violence based on a personal relationship with

the victim, the victim's membership in a larger group may well not be "one central reason" for the abuse—violates the INA, Refugee Act, and APA. The nexus requirement in the INA is that a putative refugee establish that he or she was persecuted "on account of" a protected ground such as a particular social group.[18] *See* 8 U.S.C. § 1158(b)(1)(B)(i).

The parties agree that the precise interpretive issue is not ambiguous. The parties also endorse the "one central reason" standard and the need to conduct a "mixed-motive" analysis when there is more than one reason for persecution. *See* Defs.' Mot., 57-1 at 47; Pls.' Mot., ECF No. 64-1 at 53–54. The INA expressly contemplates mixed motives for persecution when it specifies that a protected ground must be "one central reason" for the persecution. 8 U.S.C. § 1158(b)(1)(B)(i). Where the parties disagree is whether the credible fear policies deviate from this standard.

With respect to the nexus requirement, the government's reading of *Matter of A-B-* on this issue is reasonable. In *Matter of A-B-*, the Attorney General relies on the "one central reason" standard and provides examples of a criminal gang targeting people because they have money or property or "simply because

[18] Similar to the Attorney General's directives related to the "unwilling or unable" standard, this directive applies to all asylum claims, not just claims related to domestic or gang-related violence.

the gang inflicts violence on those who are nearby." 27 I. & N. Dec. at 338–39. The decision states that "purely personal" disputes will not meet the nexus requirement. *Id.* at 339 n.10. The Court discerns no distinction between this statement and the statutory "one central reason" standard.

Similarly, the Policy Memorandum states that "when a private actor inflicts violence based on a personal relationship with the victim, the victim's membership in a larger group often will not be 'one central reason' for the abuse." Policy Memorandum, ECF No. 100 at 9 (citing *Matter of A-B-*, 27 I. & N. Dec. at 338–39). Critically, the Policy Memorandum explains that in "a particular case, the evidence may establish that a victim of domestic violence was attacked ***based solely*** on her preexisting personal relationship with her abuser." *Id.* (emphasis added). This statement is no different than the statement of the law in *Matter of A-B-*. Because the government's interpretation is not inconsistent with the statute, the Court finds the government's interpretation to be reasonable.

The Court reiterates that, although the nexus standard forecloses cases in which ***purely*** personal disputes are the impetus for the persecution, it does not preclude a positive credible fear determination simply because there is a personal relationship between the persecutor and the victim, so long as the one central reason for the persecution is a protected

ground. *See Aldana Ramos v. Holder*, 757 F.3d 9, 18–19 (1st Cir. 2014)(recognizing that "multiple motivations [for persecution] can exist, and that the presence of a non-protected motivation does not render an applicant ineligible for refugee status"); *Qu v. Holder*, 618 F.3d 602, 608 (6th Cir. 2010)("[I]f there is a nexus between the persecution and the membership in a particular social group, the simultaneous existence of a personal dispute does not eliminate that nexus."). Indeed, courts have routinely found the nexus requirement satisfied when a personal relationship exists—including cases in which persecutors had a close relationship with the victim. *See, e.g.*, *Bringas-Rodriguez*, 850 F.3d at 1056 (persecution by family members and neighbor on account of applicant's perceived homosexuality); *Nabulwala v. Gonzalez*, 481 F.3d 1115, 1117–18 (8th Cir. 2007)(applicant's family sought to violently "change" her sexual orientation).

Matter of A-B- and the Policy Memorandum do not deviate from the "one central reason" standard articulated in the statute or in BIA decisions. *See* 8 U.S.C. § 1158(b)(1)(B)(i). Therefore, the government did not violate the APA or INA with regards to its interpretation of the nexus requirement.

4. Circularity: The Policy Memorandum's Interpretation of the Circularity Requirement Violates the APA and Immigration Laws

Plaintiffs argue that the Policy Memorandum establishes a

new rule that "particular social group" definitions based on claims of domestic violence are impermissibly circular and therefore not cognizable as a basis for persecution in a credible fear determination. Pls.' Mot., ECF No. 64-1 at 56–59. Plaintiffs argue that this new circularity rule is inconsistent with the current legal standard and therefore violates the Refugee Act, INA, and is arbitrary and capricious.[19] *Id.* at 57. The parties agree that the formulation of the anti-circularity rule set forth in *Matter of M-E-V-G-*, 26 I. & N. Dec. 227, 242 (BIA 2014)—"that a particular social group cannot be defined exclusively by the claimed persecution"—is correct. *See* Defs.' Reply, ECF No. 85 at 62; Pls.' Reply., ECF No. 92 at 30–31. Accordingly, the Court begins with an explanation of that opinion.

[19] The government contends that plaintiffs' argument on this issue has evolved from the filing of the complaint to the filing of plaintiffs' cross-motion for summary judgment. Defs.' Reply, ECF No. 85 at 61. In plaintiffs' complaint, they objected to the circularity issue by stating the new credible fear policies erroneously conclude "that groups defined in part by the applicant's inability to leave the relationship are impermissibly circular." ECF No. 54 at 24. In their cross-motion for summary judgment, plaintiffs argue that the government's rule is inconsistent with well-settled law that the circularity standard only applies when the group is defined exclusively by the feared harm. Pls.' Mot., ECF No. 64-1 at 57. The Court finds that plaintiffs' complaint was sufficient to meet the notice pleading standard. *See 3E Mobile, LLC v. Glob. Cellular, Inc.*, 121 F. Supp. 3d 106, 108 (D.D.C. 2015)(explaining that the notice-pleading standard does not require a plaintiff to "plead facts or law that match every element of a legal theory").

The question before the BIA in *Matter of M-E-V-G-*, was whether the respondent had established membership in a "particular social group," namely "Honduran youth who have been actively recruited by gangs but who have refused to join because they oppose the gangs." 26 I. & N. Dec. at 228. The BIA clarified that a person seeking asylum on the ground of membership in a particular social group must show that the group is: (1) composed of members who share an immutable characteristic; (2) defined with particularity; and (3) socially distinct within the society in question. *Id.* at 237. In explaining the third element for membership, the BIA confirmed the rule that "a social group cannot be defined exclusively by the fact that its members have been subjected to harm." *Id.* at 242. The BIA explained that for a particular social group to be distinct, "persecutory conduct alone cannot define the group." *Id.*

The BIA provided the instructive example of former employees of an attorney general. *Id.* The BIA noted that such a group may not be valid for asylum purposes because they may not consider themselves a group, or because society may not consider the employees to be meaningfully distinct in society in general. *Id.* The BIA made clear, however, that "such a social group determination must be made on a case-by-case basis, because it is possible that under certain circumstances, the society would

make such a distinction and consider the shared past experience to be a basis for distinction within that society." *Id.* "Upon their maltreatment," the BIA explained "it is possible these people would experience a sense of 'group' and society would discern that this group of individuals, who share a common immutable characteristic, is distinct in some significant way." *Id.* at 243 (recognizing that "[a] social group cannot be defined *merely* by the fact of persecution or *solely* by the shared characteristic of facing dangers in retaliation for actions they took against alleged persecutors . . . but that the shared trait of persecution does not disqualify an otherwise valid social group")(citations and internal quotation marks omitted). The BIA further clarified that the "act of persecution by the government may be the catalyst that causes the society to distinguish [a group] in a meaningful way and consider them a distinct group, but the immutable characteristic of their shared past experience exists independent of the persecution." *Id.* at 243. Thus, such a group would not be circular because the persecution they faced was not the sole basis for their membership in a particular social group. *Id.*

With this analysis in mind, the Court now focuses on the dispute at issue. Here, plaintiffs do not challenge *Matter of A-B-*'s statements with regard to the rule against circularity, but rather challenge the Policy Memorandum's articulation of the

rule. Pls.' Mot., ECF No, 64-1 at 57–58. Specifically, they challenge the Policy Memorandum's mandate that domestic violence-based social groups that include "inability to leave" are not cognizable. *Id.* at 58 (citations and internal quotation marks omitted). The Policy Memorandum states that "married women . . . who are unable to leave their relationship" are a group that would not be sufficiently particular. Policy Memorandum, ECF No. 100 at 6. The Policy Memorandum explained that "even if 'unable to leave' were particular, the applicant must show something more than the danger of harm from an abuser if the applicant tried to leave because that would amount to circularly defining the particular social group by the harm on which the asylum claim is based." *Id.*

The Policy Memorandum's interpretation of the rule against circularity ensures that women unable to leave their relationship will always be circular. This conclusion appears to be based on a misinterpretation of the circularity standard and faulty assumptions about the analysis in *Matter of A-B-*. First, as *Matter of M-E-V-G-* made clear, there cannot be a general rule when it comes to determining whether a group is distinct because "it is possible that under certain circumstances, the society would make such a distinction and consider the shared past experience to be a basis for distinction within that society." 26 I. & N. Dec. at 242. Thus, to the extent the Policy

Memorandum imposes a general circularity rule foreclosing such claims without taking into account the independent characteristics presented in each case, the rule is arbitrary, capricious, and contrary to immigration law.

Second, the Policy Memorandum changes the circularity rule as articulated in settled caselaw, which recognizes that if the proposed social group definition contains characteristics independent from the feared persecution, the group is valid under asylum law. *Matter of M-E-V-G-*, 26 I. & N. Dec. at 242 (Particular social group may be cognizable if "immutable characteristic of their shared past experience exists independent of the persecution."). Critically, the Policy Memorandum does not provide a reasoned explanation for, let alone acknowledge, the change. *See F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 514 (2009)("[T]he requirement that an agency provide reasoned explanation for its action would ordinarily demand that it display awareness that it is changing [its] position."). *Matter of A-B-* criticized the BIA for failing to consider the question of circularity in *Matter of A-R-C-G-* and overruled the decision based on the BIA's reliance on DHS's concession on the issue. 27 I. & N. Dec. at 334-35, 33. Moreover, *Matter of A-B-* suggested only that the social group at issue in *Matter of A-R-C-G-* might be "effectively" circular. *Id.* at 335. The Policy Memorandum's formulation of the circularity

standard goes well beyond the Attorney General's explanation in *Matter of A-B-*. As such, it is unmoored from the analysis in *Matter of M-E-V-G-* and has no basis in *Matter of A-B-*. It is therefore, arbitrary, capricious, and contrary to immigration law.

5. Discretion and Delineation: The Credible Fear Policies Do Not Contain a Discretion Requirement, but the Policy Memorandum's Delineation Requirement is Unlawful

Plaintiffs next argue that the credible fear policies "unlawfully import two aspects of the ordinary removal context into credible fear proceedings." Pls.' Reply, ECF No. 92 at 32. The first alleged requirement is for aliens to delineate the "particular social group" on which they rely at the credible fear stage. *Id.* The second alleged requirement is that asylum adjudicators at the credible fear stage take into account certain discretionary factors when making a fair credibility determination and exercise discretion to deny relief.[20] *Id.* at 32–33.

[20] These discretionary factors include but are not limited to: "the circumvention of orderly refugee procedures; whether the alien passed through any other countries or arrived in the United States directly from her country; whether orderly refugee procedures were in fact available to help her in any country she passed through; whether he or she made any attempts to seek asylum before coming to the United States; the length of time the alien remained in a third country; and his or her living conditions, safety, and potential for long-term residency there." Policy Memorandum, ECF No. 100 at 10.

The government agrees that a policy which imposes a duty to delineate a particular social group at the credible fear stage would be a violation of existing law. Defs.' Reply, ECF No. 85 at 67. The government also agrees that requiring asylum officers to consider the exercise of discretion at the credible fear stage "would be inconsistent with section 1225(b)(1)(B)(v)." *Id.* at 68. The government, however, argues that no such directives exist. *Id.* at 67–69.

The Court agrees with the government. There is nothing in the credible fear policies that support plaintiffs' arguments that asylum officers are to exercise discretion at the credible fear stage. The Policy Memorandum discusses discretion only in the context of when an alien has established that he or she is eligible for asylum. Policy Memorandum, ECF No. 100 at 5 ("[I]f eligibility is established, the USCIS officer must then consider whether or not to exercise discretion to grant the application."). *Matter of A-B-* also discusses the discretionary factors in the context of granting asylum. 27 I. & N. Dec. at 345 n.12 (stating exercising discretion should not be glossed over "solely because an applicant *otherwise meets the burden of proof* for asylum eligibility under the INA")(emphasis added). Eligibility for asylum is not established, nor is an asylum application granted, at the credible fear stage. *See* 8 U.S.C. § 1225(b)(1)(B)(ii)(stating if an alien receives a positive

credibility determination, he or she shall be detained for "further consideration of the application of asylum"). Since the credible fear policies only direct officers to use discretion once an officer has determined that an applicant is eligible for asylum, they do not direct officers to consider discretionary factors at the credible fear stage. *See* Policy Memorandum, ECF No. 100 at 10.

The Court also agrees that, with respect to *Matter of A-B-*, the decision does not impose a delineation requirement during a credible fear determination. The decision only requires an applicant seeking asylum to clearly indicate "an exact delineation of any proposed particular social group" when the alien is "on the record and before the immigration judge." 27 I. & N. Dec. at 344. Any delineation requirement therefore would not apply to the credible fear determination which is not on the record before an immigration judge.

The Policy Memorandum, however, goes further than the decision itself and incorporates the delineation requirement into credible fear determinations. Unlike the mandate to use discretion, the Policy Memorandum does not contain a limitation that officers are to apply the delineation requirement to asylum interviews only, as opposed to credible fear interviews. In fact, it does the opposite and explicitly requires asylum officers to apply that requirement to credible fear

determinations. Policy Memorandum, ECF No. 100 at 12. The Policy Memorandum makes clear that "if an applicant claims asylum based on membership in a particular social group, then officers must factor the [standards explained in *Matter of A-B-*] *into their determination of whether an applicant has a credible fear or reasonable fear of persecution*." *Id.* at 12. In directing asylum officers to apply *Matter of A-B-* to credible fear determinations, the Policy Memorandum refers back to all the requirements explained by *Matter of A-B-* including the delineation requirement. *See id.* (referring back to section explaining delineation requirement). In light of this clear directive to "factor" in the standards set forth in *Matter of A-B-*, into the "determination of whether an applicant has a credible fear" and its reference to the delineation requirement, it is clear that the Policy Memorandum incorporates that requirement into credible fear determinations. *See id.*[21]

The government argues, that to the extent the Policy Memorandum is ambiguous, the Court should defer to its

[21] The Policy Memorandum also reiterates that "few gang-based or domestic-violence claims involving particular social groups defined by the members' vulnerability to harm may . . . pass the 'significant possibility' test in credible-fear screenings." Policy Memorandum, ECF No. 100 at 10. For this proposition, the Policy Memorandum refers to the "standards clarified in *Matter of A-B-*." *Id.* This requirement for an alien to explain how they fit into a particular social group independent of the harm they allege, further supports the fact that there is a delineation requirement at the credible fear stage.

interpretation as long as it is reasonable. The government cites no authority to support its claim that deference is owed to an agency's interpretations of its policy documents like the Policy Memorandum. However, the Court acknowledges the government's interpretation is "entitled to respect . . . only to the extent that those interpretations have the 'power to persuade.'" *Christensen v. Harris Cnty*, 529 U.S. 576, 587 (2000)(citation omitted). For the reasons stated above, however, such a narrow reading of the Policy Memorandum is not persuasive. Because the Policy Memorandum requires an alien—at the credible fear stage—to present facts that clearly identify the alien's proposed particular social group, contrary to the INA, that policy is arbitrary and capricious.

6. The Policy Memorandum's Requirements Related to Asylum Officer's Application of Circuit Law are Unlawful

Plaintiffs' final argument is that the Policy Memorandum's directives instructing asylum officers to ignore applicable circuit court of appeals decisions is unlawful. Pls.' Mot., ECF No. 64-1 at 63.

The relevant section of the Policy Memorandum reads as follows:

> When conducting a credible fear or reasonable fear interview, an asylum officer must determine what law applies to the applicant's claim. The asylum officer should apply all applicable precedents of the Attorney General and the BIA, *Matter of E-L-H-*, 23 I&N Dec.

> 814, 819 (BIA 2005), which are binding on all immigration judges and asylum officers nationwide. The asylum officer should also apply the case law of the relevant federal circuit court, to the extent that those cases are not inconsistent with *Matter of A-B-*. *See, e.g.*, *Matter of Fajardo Espinoza*, 26 I&N Dec. 603, 606 (BIA 2015). The relevant federal circuit court is the circuit where the removal proceedings will take place if the officer makes a positive credible fear determination. *See Matter of Gonzalez*, 16 I&N Dec. 134, 135–36 (BIA 1977); *Matter of Waldei*, 19 I&N Dec. 189 (BIA 1984). But removal proceedings can take place in any forum selected by DHS, and not necessarily the forum where the intending asylum applicant is located during the credible fear or reasonable fear interview. Because an asylum officer cannot predict with certainty where DHS will file a Notice to appear . . . the asylum officer should faithfully apply precedents of the Board and, if necessary, the circuit where the alien is physically located during the credible fear interview.

Policy Memorandum, ECF No. 100 at 11–12. Plaintiffs make two independent arguments regarding this policy. First, they argue that the Policy Memorandum's directive to disregard circuit law contrary to *Matter of A-B-*, violates the APA, INA, and the separation of powers. Pls.' Mot., ECF No. 64-1 at 64–68. Second, plaintiffs argue that the Policy Memorandum's directive requiring asylum officers to apply the law of the circuit where the alien is physically located during the credible fear interview violates the APA and INA. *Id.* 68–71.

a. The Policy Memorandum's Directive to Disregard Contrary Circuit Law Violates *Brand X*

Plaintiffs' first argument is that the Policy Memorandum's directive that asylum officers who process credible fear interviews ignore circuit law contrary to *Matter of A-B-* is unlawful. Pls.' Mot., ECF No. 64-1 at 63–68. Because the policy requires officers to disregard all circuit law regardless of whether the provision at issue is entitled to deference, plaintiffs maintain that the policy exceeds an agency's limited ability to displace circuit precedent on a specific question of law to which an agency decision is entitled to deference. *Id.*

An agency's ability to disregard a court's interpretation of an ambiguous statutory provision in favor of the agency's interpretation stems from the Supreme Court's decision in *Nat'l Cable & Telecomm's Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005). At issue in *Brand X* was the proper classification of broadband cable services under Title II of the Communications Act of 1934, as amended by the Telecommunications Act of 1996. *Id.* at 975. The Federal Communications Commission ("Commission") had issued a Declaratory Rule providing that broadband internet service was an "information service" but not a "telecommunication service" under the Act, such that certain regulations would not apply to cable companies that provided broadband service. *Id.* at 989. The circuit court vacated the

Declaratory Rule because a prior circuit court opinion held that a cable modem service was in fact a telecommunications service. *Id.* (citing *AT&T Corp. v. Portland*, 216 F.3d 871 (9th Cir. 2000). The Supreme Court concluded that the circuit court erred in relying on a prior court's interpretation of the statute without first determining if the Commission's contrary interpretation was reasonable. *Id.* at 982.

The Supreme Court's holding relied on the same principles underlying the *Chevron* deference cases. *Id.* at 982 (stating that the holding in *Brand X* "follows from *Chevron* itself"). The Court reasoned that Congress had delegated to the Commission the authority to enforce the Communications Act, and under the principles espoused in *Chevron*, a reasonable interpretation of an ambiguous provision of the Act is entitled to deference. *Id.* at 981. Therefore, regardless of a circuit court's prior interpretation of a provision, the agency's interpretation is entitled to deference as long as the court's prior construction of the provision does not "follow[] from the unambiguous terms of the statute and thus leaves no room for agency discretion." *Id.* at 982. In other words, an agency's interpretation of a provision may override a prior court's interpretation if the agency is entitled to *Chevron* deference and the agency's interpretation is reasonable. If the agency is not entitled to deference or if the agency's interpretation is unreasonable, a

court's prior decision interpreting the same statutory provision controls. *See Petit v. U.S. Dep't of Educ.*, 675 F.3d 769, 789 (D.C. Cir. 2012)(citation omitted)(finding that a court decision interpreting a statute overrides the agency's interpretation only if it holds "that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion").

The government argues that the Policy Memorandum's mandate to ignore circuit law contrary to *Matter of A-B-* is rooted in statute and sanctioned by *Brand X*. Defs.' Reply, ECF No. 85 at 70. Moreover, the government contends that the requirement "simply states the truism that the INA requires all line officers to follow binding decisions of the Attorney General." *Id.* (citing 8 U.S.C. § 1103(a))("determination and ruling by the Attorney General with respect to all questions of law shall be controlling"). The government also argues that plaintiffs have failed to point to any decisions that are inconsistent with *Matter of A-B-*, and therefore any instruction for an officer to apply *Matter of A-B-* notwithstanding prior circuit precedent to the contrary is permissible. The Policy Memorandum, according to the government, "simply require[s] line officers to follow [*Matter of A-B-*] unless and until a circuit court of appeals declares some aspect of it contrary to the plain text of the INA." Defs.' Reply, ECF No. 85 at 72.

The government, again, minimizes the effect of the Policy Memorandum. As an initial matter, *Brand X* would only allow an agency's interpretation to override a prior judicial interpretation if the agency's interpretation is entitled to deference. *Brand X*, 545 U.S. at 982 (stating "agency construction *otherwise entitled to Chevron deference*" may override judicial construction under certain circumstances)(emphasis added). In this case, the government contends that *Matter of A-B-* only interprets one statutory provision: "particular social group." *See* Defs.' Mot., ECF No. 57-1 at 56 (stating "[t]he language that the Attorney General interpreted in [*Matter of*] *A-B-*, [is] the meaning of the phrase 'particular social group' as part of the asylum standard"). The Policy Memorandum, however, directs officers to ignore federal circuit law to the extent that the law is inconsistent with *Matter of A-B-* in *any* respect, including *Matter of A-B-*'s persecution standard. The directive requires officers performing credible fear determinations to use *Brand X* as a shield against any prior or future federal circuit court decisions inconsistent with the sweeping proclamations made in *Matter of A-B-* regardless of whether *Brand X* has any application under the circumstances of that case.

There are several problems with such a broad interpretation of *Brand X* to cover guidance from an agency when it is far from

clear that such guidance is entitled to deference. First, a directive to ignore circuit precedent when doing so would violate the principles of *Brand X* itself is clearly unlawful. For example, when a court determines a provision is unambiguous, as courts have done upon evaluating the "unwilling and unable" definition, a court's interpretation controls when faced with a contrary agency interpretation. *Brand X*, 545 U.S. at 982. The Policy Memorandum directs officers as a rule not to apply circuit law if it is inconsistent with *Matter of A-B-*, without regard to whether a specific provision in *Matter of A-B-* is entitled to deference in the first place. Such a rule runs contrary to *Brand X*.

Second, the government's argument only squares with the *Brand X* framework if every aspect of *Matter of A-B-* is both entitled to deference and is a reasonable interpretation of a relevant provision of the INA. Indeed, *Brand X* does not disturb any prior judicial opinion that a statute is unambiguous because Congress has spoken to the interpretive question at issue. *Brand X*, 545 U.S. at 982 ("[A] judicial precedent holding that the statute unambiguously forecloses the agency's interpretation, and therefore contains no gap for the agency to fill, displaces a conflicting agency construction."). If a Court does make such a determination, the agency is not free to supplant the Court's

interpretation for its own under *Brand X*. *Id.*[22] Unless an agency's interpretation of a statute is afforded deference, a judicial construction of that provision binds the agency, regardless of whether it is contrary to the agency's view. The Policy Memorandum does not recognize this principle and therefore, the government's reliance on *Brand X* is misplaced. *Cf., e.g.*, *Matter of Marquez Conde*, 27 I. & N. Dec. 251, 255 (BIA 2018)(examining whether the particular statutory question fell within *Brand X*).[23]

The government's statutory justification fares no better. It is true that pursuant to 8 U.S.C. § 1103(a), the Attorney General's rulings with respect to questions of law are controlling; and they are binding on all service employees, 8 C.F.R. § 103.3(c). But plaintiffs do not dispute the fact that

[22] Any assumption that the entirety of *Matter of A-B-* is entitled to deference also falters in light of the government's characterization of most of the decision as dicta. Defs.' Reply, ECF No. 85 at 44-47. (characterizing *Matter of A-B-* "comment[ary] on problems typical of gang and domestic violence related claims.") According to the government, the only legal effect of *Matter of A-B-* is to overrule *Matter of A-R-C-G-*. Any other self-described dicta would not be entitled to deference under *Chevron* and therefore *Brand X* could not apply. *Brand X*, 545 U.S. at 982 (agency interpretation must at minimum be "otherwise entitled to deference" for it to supersede judicial construction). Simply put, *Brand X* is not a license for agencies to rely on dicta to ignore otherwise binding circuit precedent.

[23] *Matter of A-B-* invokes *Brand X* only as to its interpretation of particular social group. 27 I. & N. Dec. at 327. As the Court has explained above, that interpretation is not entitled to deference.

asylum officers must follow the Attorney General's decisions. The issue is that the Policy Memorandum goes much further than that. Indeed, the government's characterization of the Policy Memorandum's directive to ignore federal law only highlights the flaws in its argument. According to the government, the directive at issue merely instructs officers to listen to the Attorney General. Defs.' Reply, ECF No. 85 at 70. Such a mandate would be consistent with section 1103 and its accompanying regulations. In reality, however, the Policy Memorandum requires officers conducting credible fear interviews to follow the precedent of the relevant circuit only "to the extent that those cases are not inconsistent with *Matter of A-B-*." Policy Memorandum, ECF No. 100 at 11. The statutory and regulatory provisions cited by the government do not justify a blanket mandate to ignore circuit law.

b. The Policy Memorandum's Relevant Circuit Law Policy Violates the APA and INA

Plaintiffs next argue that the Policy Memorandum's directive to asylum officers to apply the law of the "circuit where the alien is physically located during the credible fear interview" violates the immigration laws. Pls.' Mot., ECF No. 64-1, 68–71; Policy Memorandum, ECF No. 100 at 12. Specifically, Plaintiffs argue that this policy conflicts with the low screening standard for credible fear determinations established

by Congress, and therefore violates the APA and INA. Pls.' Reply, ECF No. 92 at 35–36. The credible fear standard, plaintiffs argue, requires an alien to be afforded the benefit of the circuit law most favorable to his or her claim because there is a possibility that the eventual asylum hearing could take place in that circuit. *Id.*

The government responds by arguing that it is hornbook law that the law of the jurisdiction in which the parties are located governs the proceedings. Defs.' Reply, ECF No. 85 at 73. The government cites the standard for credible fear determinations and argues that it contains no requirement that an alien be given the benefit of the most favorable circuit law. *Id.* The government also argues that, to the extent there is any ambiguity, the government's interpretation is entitled to some deference, even if not *Chevron* deference. *Id.* at 74.

This issue turns on an interpretation of 8 U.S.C. § 1225(b)(1)(B)(v), which provides the standard for credible fear determinations. That section explicitly defines a "credible fear of persecution" as follows:

> For purposes of this subparagraph, the term "credible fear of persecution" means that there is a significant possibility, taking into account the credibility of the statements made by the alien in support of the alien's claim and such other facts as are known to the officer, that the alien could establish eligibility for asylum under section 1158 of this title.

8 U.S.C. § 1225(b)(1)(B)(v). Applicable regulations further explain the manner in which the interviews are to be conducted. Interviews are to be conducted in an "nonadversarial manner" and "separate and apart from the general public." 8 C.F.R. § 208.30(d). The purpose of the interview is to "elicit all relevant and useful information bearing on whether the applicant has a credible fear of persecution or torture[.]" *Id.*

The statute does not speak to which law should be applied during credible fear interviews. *See generally* 8 U.S.C. § 1225(b)(1)(B)(v). However, the Court is not without guidance regarding which law should be applied because Congress explained its legislative purpose in enacting the expedited removal provisions. 142 CONG. REC. S11491-02. When Congress established expedited removal proceedings in 1996, it deliberately established a low screening standard so that "there should be no danger that an alien with a genuine asylum claim will be returned to persecution." H.R. REP. No. 104-469, pt. 1, at 158. That standard "is a low screening standard for admission into the usual full asylum process" and when Congress adopted the standard it "reject[ed] the higher standard of credibility included in the House bill." 142 CONG. REC. S11491-02.

In light of the legislative history, the Court finds plaintiffs' position to be more consistent with the low screening standard that governs credible fear determinations.

The statute does not speak to which law should be applied during the screening, but rather focuses on eligibility at the time of the removal proceedings. 8 U.S.C. § 1225(b)(1)(B)(v). And as the government concedes, these removal proceedings could occur anywhere in the United States. Policy Memorandum, ECF No. 100 at 12. Thus, if there is a disagreement among the circuits on an issue, the alien should get the benefit of that disagreement since, if the removal proceedings are heard in the circuit favorable to the aliens' claim, there would be a significant possibility the alien would prevail on that claim. The government's reading would allow for an alien's deportation, following a negative credible fear determination, even if the alien would have a significant possibility of establishing asylum under section 1158 during his or her removal proceeding. Thus, the government's reading leads to the exact opposite result intended by Congress.[24]

The government does not contest that an alien with a possibility of prevailing on his or her asylum claim could be denied during the less stringent credible fear determination, but rather claims that this Court should defer to the

[24] The government relies on BIA cases to support its argument that the law of the jurisdiction where the interview takes place controls. *See* Defs.' Mot., ECF No. 57-1 at 49. These cases address the law that governs the removal proceedings, an irrelevant and undisputed issue.

government's interpretation that this policy is consistent with the statute. Defs.' Reply, ECF No. 85 at 74–75. Under *Skidmore v. Swift & Co.*, the Court will defer to the government's interpretation to the extent it has the power to persuade.[25] *See* 323 U.S. 134, 140, (1944). However, the government's arguments bolster plaintiffs' interpretation more than its own. As the government acknowledges, and the Policy Memorandum explicitly states, "removal proceedings can take place in any forum selected by DHS, and not necessarily the forum where the intending asylum applicant is located during the credible fear or reasonable fear interview." Policy Memorandum, ECF No. 100 at 12. Since the Policy Memorandum directive would lead to denial of a potentially successful asylum applicant at the credible fear determination, the Court concludes that the directive is therefore inconsistent with the statute. H.R. REP. NO. 104-469 at 158 (explaining that there should be no fear that an alien with a genuine asylum claim would be returned to persecution).[26]

Because the government's reading could lead to the exact

[25] The government cannot claim the more deferential *Auer* deference because *Auer* applies to an agency's interpretation of its own regulations, not to interpretations of policy documents like the Policy Memorandum. *See Auer v. Robbins*, 519 U.S. 452, 461 (1997)(holding agencies may resolve ambiguities in regulations).

[26] The policy is also a departure from prior DHS policy without a rational explanation for doing so. *See* Mujahid Decl., Ex. F (DHS training policy explaining that law most favorable to the applicant applies when there is a circuit split).

harm that Congress sought to avoid, it is arbitrary capricious and contrary to law.

* * * * *

In sum, plaintiffs prevail on their APA and statutory claims with respect to the following credible fear policies, which this Court finds are arbitrary and capricious and contrary to law: (1) the general rule against credible fear claims relating to gang-related and domestic violence victims' membership in a "particular social group," as reflected in *Matter of A-B-* and the Policy Memorandum; (2) the heightened "condoned" or "complete helplessness" standard for persecution, as reflected in *Matter of A-B-* and the Policy Memorandum; (3) the circularity standard as reflected in the Policy Memorandum; (4) the delineation requirement at the credible fear stage, as reflected in the Policy Memorandum; and (5) the requirement that adjudicators disregard contrary circuit law and apply only the law of the circuit where the credible fear interview occurs, as reflected in the Policy Memorandum. The Court also finds that neither the Policy Memorandum nor *Matter of A-B-* state an unlawful nexus requirement or require asylum officers to apply discretionary factors at the credible fear stage. The Court now turns to the appropriate remedy.[27]

[27] Because the Court finds that the government has violated the INA and APA, it need not determine whether there was a

D. Relief Sought

Plaintiffs seek an Order enjoining and preventing the government and its officials from applying the new credible fear policies, or any other guidance implementing *Matter of A-B-* in credible fear proceedings. Pls.' Mot., ECF No. 64-1 at 71–72. Plaintiffs also request that the Court vacate any credible fear determinations and removal orders issued to plaintiffs who have not been removed. *Id.* As for plaintiffs that have been removed, plaintiffs request a Court Order directing the government to return the removed plaintiffs to the United States. *Id.* Plaintiffs also seek an Order requiring the government to provide new credible fear proceedings in which asylum adjudicators must apply the correct legal standards for all plaintiffs. *Id.*

The government argues that because section 1252 prevents all equitable relief the Court does not have the authority to order the removed plaintiffs to be returned to the United States. Defs.' Reply, ECF No. 85 at 75–76. The Court addresses each issue in turn.

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constitutional violation in this case. *See Am. Foreign Serv. Ass'n v. Garfinkel*, 490 U.S. 153, 161 (1989)(per curiam)(stating courts should be wary of issuing "unnecessary constitutional rulings").

1. Section 1252 Does Not Bar Equitable Relief

a. Section 1252(e)(1)

The government acknowledges that section 1252(e)(3) provides for review of "systemic challenges to the expedited removal system." Defs.' Mot., ECF No. 57-1 at 11. However, the government argues 1252(e)(1) limits the scope of the relief that may be granted in such cases. Defs.' Reply, ECF No. 85 at 75–76. That provision provides that "no court may . . . enter declaratory, injunctive, or other equitable relief in any action pertaining to an order to exclude an alien in accordance with section 1225(b)(1) of this title except as specifically authorized in a subsequent paragraph of this subsection." 8 U.S.C. § 1252(e)(1)(a). The government argues that since no other subsequent paragraph of section 1252(e) specifically authorizes equitable relief, this Court cannot issue an injunction in this case. Defs.' Reply, ECF No. 85 at 75–76.

Plaintiffs counter that section 1252(e)(1) has an exception for "any action . . . specifically authorized in a subsequent paragraph." Since section 1252(e)(3) clearly authorizes "an action" for systemic challenges, their claims fall within an exception to the proscription of equitable relief. Pls.' Reply, ECF No. 92 at 38.

This issue turns on what must be "specifically authorized in a subsequent paragraph" of section 1252(e). Plaintiffs argue

the "action" needs to be specifically authorized, and the government argues that it is the "relief." Section 1252(e)(1) states as follows:

> (e) Judicial review of orders under section 1225(b)(1)
>
> (1) Limitations on relief
> Without regard to the nature of the action or claim and without regard to the identity of the party or parties bringing the action, no court may--
>
> (A) enter declaratory, injunctive, or other equitable relief in any action pertaining to an order to exclude an alien in accordance with section 1225(b)(1) of this title except as specifically authorized in a subsequent paragraph of this subsection, or
>
> (B) certify a class under Rule 23 of the Federal Rules of Civil Procedure in any action for which judicial review is authorized under a subsequent paragraph of this subsection.

The government contends that this provision requires that any "*declaratory, injunctive, or other equitable relief*" must be "*specifically authorized in a subsequent paragraph*" of subsection 1252(e) for that relief to be available. Defs.' Reply, ECF No. 85 at 75 (emphasis in original). The more natural reading of the provision, however, is that these forms of relief are prohibited except when a plaintiff brings "any action . . . specifically authorized in a subsequent paragraph." *Id.* § 1252(e)(1)(a). The structure of the statute supports this view. For example, the very next subsection, 1252(e)(1)(b), uses

the same language when referring to an ***action***: "[A court may not certify a class] in *any action for which judicial review is authorized under a subsequent paragraph of this subsection.*" *Id.* § 1252(e)(1)(b)(emphasis added).

A later subsection lends further textual support for the view that the term "authorized" modifies the type of action, and not the type of relief. Subsection 1252(e)(4) limits the remedy a court may order when making a determination in habeas corpus proceedings challenging a credible fear determination.[28] Under section 1252(e)(2), a petitioner may challenge his or her removal under section 1225, if he or she can prove by a preponderance of the evidence that he or she is in fact in this country legally.[29] *See* 8 U.S.C. § 1252(e)(2)(c). Critically, section 1252(e)(4) limits the type of relief a court may grant if the petitioner is successful: "the court may order no remedy or relief other than to require that the petitioner be provided a hearing." *Id.* § 1252(e)(4)(B). If section 1252(e)(1)(a) precluded all injunctive and equitable relief, there would be no need for § 1252(e)(4) to specify that the court could order no

[28] Habeas corpus proceedings, like challenges to the validity of the system under 1252(e)(3), are "specifically authorized in a subsequent paragraph of [1252(e)]." 8 U.S.C. § 1252(e)(1)(a).
[29] To prevail on this type of claim a petitioner must establish that he or she is an "alien lawfully admitted for permanent residence, has been admitted as a refugee under section 1157 of this title, or has been granted asylum under section 1158." 8 U.S.C. § 1252(e)(2).

other form of relief. Furthermore, if the government's reading was correct, there should be a parallel provision in section 1252(e)(3) limiting the relief a prevailing party of a systemic challenge could obtain to only relief specifically authorized by that paragraph.

Indeed, under the government's reading of the statute there could be no remedy for a successful claim under paragraph 1252(e)(3) because that paragraph does not specifically authorize any remedy. However, it does not follow that Congress would have explicitly authorized a plaintiff to bring a suit in the United States District Court for the District of Columbia and provided this Court with exclusive jurisdiction to determine the legality of the challenged agency action, but deprived the Court of any authority to provide *any remedy* (because none are specifically authorized), effectively allowing the unlawful agency action to continue. This Court "should not assume that Congress left such a gap in its scheme." *Jackson v. Birmingham Bd. Of Educ.*, 544 U.S. 167, 180 (2005)(holding Title IX protected against retaliation in part because "all manner of Title IX violations might go umremedied" if schools could retaliate freely).

An action brought pursuant to section 1252(e)(3) is an action that is "specifically authorized in a subsequent paragraph" of 1252(e). *See* 8 U.S.C. § 1252(e)(1). And 1252(e)(3)

clearly authorizes "an action" for systemic challenges to written expedited removal policies, including claims concerning whether the challenged policy "is not consistent with applicable provisions of this subchapter or is otherwise in violation of law." *Id.* § 1252(e)(3). Because this case was brought under that systemic challenge provision, the limit imposed on the relief available to a court under 1252(e)(1)(a) does not apply.[30]

b. Section 1252(f)

The government's argument that section 1252(f) bars injunctive relief fares no better. That provision states in relevant part: "no court (other than the Supreme Court) shall have jurisdiction or authority to enjoin or restrain the operation of [sections 1221–1232] other than with respect to the application of such provisions to an individual alien against whom proceedings under such part have been initiated." 8 U.S.C. § 1252(f)(1). The Supreme Court has explained that "Section 1252(f)(1) thus 'prohibits federal courts from granting

[30] Plaintiffs also argue that section 1252(e)(1) does not apply to actions brought under section 1252(e)(3). Section 1252(e)(1), by its terms, only applies to an "action pertaining to an order to exclude an alien in accordance with section 1225(b)(1)." Plaintiffs argue that the plain reading of section 1252(e)(3) shows that an action under that provision does not pertain to an individual order of exclusion, but rather "challenges the validity of the system." Pls.' Reply, ECF No. 92 at 12 (citing 8 U.S.C. § 1252(e)(3)). Having found that section 1252(e)(3) is an exception to section 1252(e)(1)'s limitation on remedies, the Court need not reach this argument.

classwide injunctive relief against the operation of §§ 1221–123[2].'" *Jennings v. Rodriguez*, 138 S. Ct. 830, 851 (2018)(citing *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 481 (1999)). The Supreme Court has also noted that circuit courts have "held that this provision did not affect its jurisdiction over . . . statutory claims because those claims did not 'seek to enjoin the operation of the immigration detention statutes, but to enjoin conduct . . . not authorized by the statutes." *Id.* (citing *Rodriguez v. Hayes*, 591 F.3d 1105, 1120 (9th Cir. 2010)).

In this case, plaintiffs do not challenge any provisions found in section 1225(b). They do not seek to enjoin the operation of the expedited removal provisions or any relief declaring the statutes unlawful. Rather, they seek to enjoin the government's violation of those provisions by the implementation of the unlawful credible fear policies. An injunction in this case does not obstruct the operation of section 1225. Rather, it enjoins conduct that violates that provision. Therefore, section 1252(f) poses no bar. *See R.I.L-R v. Johnson*, 80 F. Supp. 3d 164, 184 (D.D.C. 2015)(holding section 1252(f) does not limit a court's ability to provide injunctive relief when the injunctive relief "enjoins conduct that allegedly violates [the immigration statute]"); *see also Reid v. Donelan*, 22 F. Supp. 3d 84, 90 (D. Mass. 2014)("[A]n injunction 'will not prevent the law from

operating in any way, but instead would simply force the government to *comply* with the statute.")(emphasis in original)).

Finally, during oral argument, the government argued that even if the Court has the authority to issue an injunction in this case, it can only enjoin the policies as applied in plaintiffs' cases under section 1252(f). *See* Oral Arg. Hr'g Tr., ECF No. 102 at 63. In other words, according to the government, the Court may declare the new credible fear policies unlawful, but DHS may continue to enforce the policies in all other credible fear interviews. To state this proposition is to refute it. It is the province of the Court to declare what the law is, *see Marbury v. Madison*, 5 U.S. 137, 177 (1803), and the government cites no authority to support the proposition that a Court may declare an action unlawful but have no power to prevent that action from violating the rights of the very people it affects.[31] To the contrary, such relief is supported by the APA itself. *See Nat'l Min. Ass'n v. U.S. Army Corps of Eng'rs*,

[31] During oral argument, the government argued for the first time that an injunction in this case was tantamount to class-wide relief, which the parties agree is prohibited under the statute. *See* Oral Arg. Hr'g Tr., ECF No. 102 at 63; 8 U.S.C. § 1252(e)(1)(b)(prohibiting class certification in actions brought under section 1252(e)(3)). The Court finds this argument unpersuasive. Class-wide relief would entail an Order requiring new credible fear interviews for all similarly situated individuals, and for the government to return to the United States all deported individuals who were affected by the policies at issue in this case. Plaintiffs do not request, and the Court will not order, such relief.

145 F.3d 1399, 1409-10 (D.C. Cir. 1998)("We have made clear that '[w]hen a reviewing court determines that agency regulations are unlawful, the ordinary result is that the rules are vacated – not that their application to the individual petitioners is proscribed.'"). Moreover section 1252(f) only applies when a plaintiff challenges the legality of immigration laws and not, as here, when a plaintiff seeks to enjoin conduct that violates the immigration laws. In these circumstances, section 1252(f) does not limit the Court's power.

2. The Court Has the Authority to Order the Return of Plaintiffs Unlawfully Removed

Despite the government's suggestion during the emergency stay hearing that the government would return removed plaintiffs should they prevail on the merits, TRO Hr'g Tr., Aug. 9, 2018, ECF No. 23 at 13-14 (explaining that the Department of Justice had previously represented to the Supreme Court that should a Court find a policy that led to a plaintiffs' deportation unlawful the government "would return [plaintiffs] to the United states at no expense to [plaintiffs]"), the government now argues that the Court may not do so, *see* Defs.' Reply, ECF No. 85 at 78–79.

In support of its argument, the government relies principally on *Kiyemba v. Obama*, 555 F.3d 1022 (D.C. Cir 2009) vacated, 130 S.Ct. 1235, reinstated in amended form, 605 F.3d

1046 (D.C. Cir. 2010). In *Kiyemba*, seventeen Chinese citizens, determined to be enemy combatants, sought habeas petitions in connection with their detention in Guantanamo Bay, Cuba. 555 F.3d at 1024. The petitioners sought release in the United States because they feared persecution if they were returned to China, but had not sought to comply with the immigration laws governing a migrant's entry into the United States. *Id.* After failed attempts to find an appropriate country in which to resettle, the petitioners moved for an order compelling their release into the United States. *Id.* The district court, citing exceptional circumstances, granted the motion. *Id.*

The United States Court of Appeals for the District of Columbia Circuit reversed. The Court began by recognizing that the power to exclude aliens remained in the exclusive power of the political branches. *Id.* at 1025 (citations omitted). As a result, the Court noted, "it is not within the province of any court, unless expressly authorized by law, to review the determination of the political branch of the Government to exclude a given alien." *Id.* at 1026 (citation and internal quotation marks omitted). The critical question was "what law expressly authorized the district court to set aside the decision of the Executive Branch and to order these aliens brought to the United States." *Id.* at 1026 (internal quotation marks omitted).

In this case, the answer to that question is the immigration laws. In fact, *Kiyemba* distinguished Supreme Court cases which "rested on the Supreme Court's interpretation not of the Constitution, but of a provision in the immigration laws." *Id.* at 1028. The Court further elaborated on this point with the following explanation:

> it would . . . be wrong to assert that, by ordering aliens paroled into the country . . . the Court somehow undermined the plenary authority of the political branches over the entry and admission of aliens. The point is that Congress has set up the framework under which aliens may enter the United States. The Judiciary only possesses the power Congress gives it to review Executive action taken within that framework. Since petitioners have not applied for admission, they are not entitled to invoke that judicial power.

Id. at 1028 n.12.

The critical difference here is that plaintiffs have availed themselves of the "framework under which aliens may enter the United States." *Id.* Because plaintiffs have done so, this Court "possesses the power Congress gives it to review Executive action taken within that framework." *Id.* Because the Court finds *Kiyemba* inapposite, the government's argument that this Court lacks authority to order plaintiffs returned to the United States is unavailing.

It is also clear that injunctive relief is necessary for the Court to fashion an effective remedy in this case. The

credible fear interviews of plaintiffs administered pursuant to the policies in *Matter of A-B-* and the Policy Memorandum were fundamentally flawed. A Court Order solely enjoining these policies is meaningless for the removed plaintiffs who are unable to attend the subsequent interviews to which they are entitled. *See, e.g.*, *Walters v. Reno*, 145 F.3d 1032, 1050–51 (9th Cir. 1998)("[A]llowing class members to reopen their proceedings is basically meaningless if they are unable to attend the hearings that they were earlier denied.").

3. Permanent Injunction Factors Require Permanent Injunctive Relief

A plaintiff seeking a permanent injunction must satisfy a four-factor test. *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006). Plaintiffs must demonstrate they have: (1) suffered an irreparable injury; (2) that traditional legal remedies, such as monetary relief, are inadequate to compensate for that injury; (3) the balance of hardships between the parties warrants equitable relief; and (4) the injunction is not contrary to the public interest. *See Morgan Drexen, Inc. v. Consumer Fin. Prot. Bureau*, 785 F.3d 684, 695 (D.C. Cir. 2015).

Plaintiffs seek a permanent injunction, arguing that they have been irreparably harmed and that the equities are in their favor. Pls.' Mot., ECF No. 64-1 at 73–74. The government has not responded to these arguments on the merits, and rests on its

contention that the Court does not have the authority to order such relief. Defs.' Reply, ECF No. 85 at 75–78. Having found that the Court does have the authority to order injunctive relief, *supra,* at 93–104, the Court will explain why that relief is appropriate.

Plaintiffs claim that the credible fear policies this Court has found to be unlawful have caused them irreparable harm. It is undisputed that the unlawful policies were applied to plaintiffs' credible fear determinations and thus caused plaintiffs' applications to be denied. *See* Defs.' Mot., ECF No. 57-1 at 28 (stating an "asylum officer reviewed each of [plaintiffs] credible fear claims and found them wanting in light of Matter of A-B-"). Indeed, plaintiffs credibly alleged at their credible fear determinations that they feared rape, pervasive domestic violence, beatings, shootings, and death in their countries of origin. Based on plaintiffs' declarations attesting to such harms, they have demonstrated that they have suffered irreparable injuries.[32]

The Court need spend little time on the second factor: whether other legal remedies are inadequate. No relief short of enjoining the unlawful credible fear policies in this case could

[32] The country reports support the accounts of the Plaintiffs. *See* Mujahid Decl., ECF No. 10-3, Exs. K-T; Second Mujahid Decl., ECF No. 64-4 Exs. 10–13; Honduras Decl., ECF No. 64-6; Guatemala Decl., ECF No. 64-7; El Salvador Decl., ECF No. 64-8.

provide an adequate remedy. Plaintiffs do not seek monetary compensation. The harm they suffer will continue unless and until they receive a credible fear determination pursuant to the existing immigration laws. Moreover, without an injunction, the plaintiffs previously removed will continue to live in fear every day, and the remaining plaintiffs are at risk of removal.

The last two factors are also straightforward. The balance of the hardships weighs in favor of plaintiffs since the "[g]overnment 'cannot suffer harm from an injunction that merely ends an unlawful practice.'" *R.I.L-R*, 80 F. Supp. at 191 (citing *Rodriguez*, 715 F.3d at 1145). And the injunction is not contrary to the public interest because, of course, "[t]he public interest is served when administrative agencies comply with their obligations under the APA." *Id.* (citations omitted). Moreover, as the Supreme Court has stated, "there is a public interest in preventing aliens from being wrongfully removed, particularly to countries where they are likely to face substantial harm." *Nken v. Holder*, 556 U.S. 418, 436 (2009). No one seriously questions that plaintiffs face substantial harm if returned to their countries of origin. Under these circumstances, plaintiffs have demonstrated they are entitled to a permanent injunction in this case.

IV. Conclusion

For the foregoing reasons, the Court holds that it has jurisdiction to hear plaintiffs' challenges to the credible fear policies, that it has the authority to order the injunctive relief, and that, with the exception of two policies, the new credible fear policies are arbitrary, capricious, and in violation of the immigration laws.

Accordingly, the Court **GRANTS in PART and DENIES in PART** plaintiffs' cross-motion for summary judgment and motion to consider evidence outside the administrative record. The Court also **GRANTS** plaintiffs' motion for a permanent injunction. The Court further **GRANTS in PART and DENIES in PART** the government's motion for summary judgment and motion to strike.

The Court will issue an appropriate Order consistent with this Memorandum Opinion.

SO ORDERED.

Signed: Emmet G. Sullivan
United States District Judge
December 17, 2018