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### *Matter of A–B–: How the Attorney General Attempts to Subvert Asylum Law and Dismiss Domestic Violence As a Private Affair*

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## Background

On June 11, 2018, Jefferson Sessions, the Attorney General of the United States, reversed a grant of asylum to Ms A.B., a woman who fled nearly fifteen years of horrific domestic violence at the hands of her ex-husband in El Salvador, one of the most dangerous countries in the world for women.<sup>1</sup> The attorney general further used his decision in this case, *Matter of A-B*,<sup>2</sup> to single-handedly overturn a landmark precedential decision affirming that domestic violence survivors may qualify for asylum. The attorney general purported to clarify the law on asylum claims involving domestic violence, but instead his conjectures confound the separate elements of asylum eligibility, misread (and often disregard) the relevant legal standards, and are inconsistent, particularly with respect to the well-settled principle of fact-specific determinations. Although his decision regresses from decades of a growing recognition of gender-based persecution, the attorney general's attempt to subvert U.S. asylum law should ultimately fail as a legal matter. While subsequent agency guidance treats the dicta in his decision as binding, immigration adjudicators and U.S. courts of appeals should interpret *Matter of A-B* narrowly and continue to analyze domestic violence claims on a case-by-case basis.

## History of U.S. Gender-Based Asylum Law

Asylum allows those who are afraid to return to their country of origin to remain in the United States legally. It stems from our treaty obligations under the 1967 United Nations Protocol Relating to the Status of Refugees,<sup>3</sup> an international agreement signed after World War II that aimed to protect individuals facing harms, including those that Jewish people faced during the Holocaust.<sup>4</sup> To be granted asylum, applicants must prove that they have been "persecuted" (or harmed) in their country of origin in the past, or may be persecuted upon return, because of one of five reasons (also known as protected grounds):

- race,
- religion,
- nationality,
- membership in a particular social group, or
- political opinion.<sup>5</sup>

If the persecutor is not a government official, the applicant must also show that the government of her country of origin is “unable or unwilling” to protect her.<sup>6</sup>

At the time the 1967 Protocol was drafted, the international community’s recognition of harms rooted in patriarchal norms and the rights of women was nascent at best. Nonetheless, in the decades that followed, both U.N. guidance<sup>7</sup> and U.S. jurisprudence made steady progress towards recognizing that gender-based violence may warrant asylum protections. Although gender is not a separate protected ground on its own, an early Board of Immigration Appeals (Board) decision indicated that “sex” is precisely the sort of characteristic that binds members of a “particular social group.”<sup>8</sup> Subsequent decisions by the Board and U.S. courts of appeals interpreted “political opinion” and “religion” to encompass differences in beliefs regarding male dominance or the role of women in society.<sup>9</sup> Most notably, in 1996, in *Matter of Kasinga*, the Board issued its first precedential decision granting asylum to a woman fleeing gender-based persecution, specifically female genital cutting (also referred to as female genital mutilation).<sup>10</sup> Over the next two decades, U.S. courts of appeals recognized that other forms of gender-based violence by non-state actors, such as family members, could amount to persecution on account of a protected ground, including sex trafficking, forced marriage, honor violence, femicide, and imposition of repressive gender norms.<sup>11</sup>

**In its precedential 2014  
decision *Matter of A-R-C-G*-  
the Board finally acknowledged  
that domestic violence may be  
grounds for asylum.**

However, during this same period, neither the Board nor the courts of appeals issued a precedential decision explicitly recognizing that domestic violence may be a basis for asylum—their hesitation owing more to a politicized fear of opening the “floodgates” to asylum seekers rather than substantive asylum law.<sup>12</sup> In the absence of binding agency or federal court rulings, many asylum officers and immigration judges analogized rulings from other gender-based claims to grant

asylum to domestic violence survivors, sometimes with the agreement of U.S. Department of Homeland Security (DHS) counsel.<sup>13</sup> Eventually, in 2014, the Board finally issued a precedential decision, *Matter of A-R-C-G*, acknowledging that domestic violence may be grounds for asylum.<sup>14</sup> *A-R-C-G* addressed only one possible framework for domestic violence asylum claims (as discussed in the two sections that directly follow) and reiterated that adjudicators must consider “the particular facts and evidence on a case-by-case basis,”<sup>15</sup> but the decision nonetheless provided a clear, long-awaited affirmation of the viability of such claims.

### ***Matter of A-R-C-G* Overruled**

On June 11, 2018, the attorney general used his decision in *Matter of A-B* as a vehicle for overruling *Matter of A-R-C-G*, a case that drew on decades of decisions finding social groups based on gender cognizable under the law. He

## **The overruling of *A-R-C-G* creates roadblocks for women seeking domestic violence–based asylum, but it should not foreclose their claims.**

did so despite the urging of both parties in the case and eleven amicus briefs to the contrary. And rather ironically, as subsequent sections detail, the attorney general justified his decision by concluding that the Board’s decision in *Matter of A-R-C-G* lacked “rigorous analysis.”<sup>16</sup>

While the attorney general’s decision undeniably creates roadblocks for women seeking asylum based on domestic violence, under a fair reading, it should not foreclose their claims. The attorney general’s own words—“I do not decide that violence inflicted by non-governmental actors may *never* serve as the basis for an asylum or withholding application . . . .”—leave the door open for future domestic violence or gang-based claims.<sup>17</sup>

Indeed, the sole holding in the case, properly read, is that *Matter of A-R-C-G* is overruled.<sup>18</sup> That would still leave intact all previous precedent that had been used for years to support domestic violence–based asylum claims.<sup>19</sup> Further, the thirty-page decision, as detailed below, contains extremely negative and overtly political<sup>20</sup> dicta (nonbinding opinions of the author).<sup>21</sup> While there is no doubt that the attorney general intended to block most if not *all* claims to asylum by survivors of domestic or gang violence, the only real impact of his decision, under a correct interpretation, should be that applicants can no longer rely on *Matter of A-R-C-G* as they present their claims for asylum.<sup>22</sup>

Finally, the attorney general conflates three distinct elements of asylum eligibility into his definition of “persecution”—the severity of the harm, nexus between the persecution and a protected ground, and the government’s inability or unwillingness to protect an applicant from persecution—and cites no basis for his assertion that such definition is well established.<sup>23</sup> Since this is not a correct articulation of the standard,<sup>24</sup> and each element is discrete, this article addresses each individually in turn.<sup>25</sup>

## **The Attorney General’s “Particular Social Group” Analysis Displays a Fundamental Misunderstanding of Domestic Violence Dynamics**

U.S. jurisprudence on gender-based asylum claims has generally focused on the “particular social group” ground, perhaps because case law interpreting this term has become increasingly complex over the years. The seminal Board decision on particular social group analysis holds that a particular social group must comprise members who share a common “immutable or fundamental characteristic,” defined as a characteristic that cannot be changed or that the asylum seeker should not be required to change because it is “so fundamental to individual identity or conscience.”<sup>26</sup> Significantly, in this early decision dating back to 1985, the Board offered “sex” as an example of such an immutable characteristic.<sup>27</sup> While early gender-based social groups were analyzed and recognized under this relatively straightforward “immutability” standard, by the time the Board issued its decision in *Matter of A-R-C-G*, the test for particular social group validity had become far more elaborate. Under its current framework, the Board requires social groups to be not only (1) immutable, but also (2) “socially distinct”—that is, the society in question perceives the group as such—and (3) “particular”—

that is, the group is defined by terms with commonly accepted definitions in the society in question such that there are “clear benchmarks” for determining who belongs to the group.<sup>28</sup> In *A-R-C-G-*, the Board provided one example of a social group that may meet this three-part test in domestic violence claims (taking into account the facts, evidentiary record, and societal context in any particular case): “married women in Guatemala who are unable to leave their relationship.”<sup>29</sup> The attorney general’s decision in *Matter of A-B-*, properly read, does not disturb the Board’s “particular social group” standard. However, contrary to his claim that his ruling would bring clarity, by overruling *Matter of A-R-C-G-* the attorney general has injected confusion into this area of law.

One of the attorney general’s misplaced concerns regarding the social group in *A-R-C-G-* is that it is defined by the persecution; therefore, he rephrases the group as essentially “victims of domestic abuse.”<sup>30</sup> While arguing that a woman suffered domestic violence on account of her membership in a social group of “victims of domestic abuse” may be deemed circular and is therefore generally impermissible under U.S. asylum law,<sup>31</sup> this was clearly not the social group proposed by the asylum applicant in *A-R-C-G-* or analyzed by the Board.<sup>32</sup>

The attorney general primarily takes issue with the phrase “inability to leave the relationship” in the group formulation, asserting that this characteristic is created by the domestic violence itself. First, this assertion displays a gross ignorance of dynamics in domestic violence situations and the barriers to protection facing women in some of the most dangerous countries in the world. Although violence contributes to and evidences a woman’s inability to leave her relationship with her abuser, advocates and experts on domestic violence issues have documented the litany of other constraints that prevent women from leaving.<sup>33</sup> These include social and cultural norms that subordinate women’s interests and rights to men’s, discourage separation and divorce, and admonish women who leave their partners as bad wives, girlfriends, or mothers. Additionally, institutional barriers—lack of economic opportunities, unfavorable laws, discouragement from religious or community leaders, and dearth of state protection, to name a few—all compound a woman’s inability to safely and reasonably exit her relationship. These factors, in turn, further encourage abusers to harm and threaten their partners.

Second, the attorney general’s concern also ignores precedential decisions from the Board and U.S. courts of appeals establishing that the articulation of a social group need not be completely independent from the persecution suffered; rather,

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the social group must not be defined *exclusively* by the persecution.<sup>34</sup> In fact, the Board has held: “Although a social group cannot be defined exclusively by the fact that its members have been subjected to harm . . . this may be a relevant factor in considering the group’s visibility in society.”<sup>35</sup> Moreover, the Seventh Circuit in an en banc decision warned against a myopic focus on the exact wording of the social group proposed by the asylum applicant and her counsel, instead directing adjudicators to look at the “underlying characteristics [that] account for the fear and vulnerability” of group members.<sup>36</sup> Therefore, even if a woman’s “inability to leave the relationship” reflects the domestic violence she suffered, the social group in *A-R-C-G* is also defined by other characteristics that make her vulnerable to such violence (for example, gender, nationality, and being married or otherwise in a domestic relationship).

Other than his allegations that the social group in *A-R-C-G* is impermissibly circular, the attorney general scrutinizes the evidence that the Board cited to in support of its social group analysis, namely, “that Guatemala has a ‘culture of machismo and family violence’ and that, although Guatemala has laws in place to prosecute domestic violence crimes, ‘enforcement can be problematic because the National Civilian Police often failed to respond to requests for assistance related to domestic violence.’”<sup>37</sup> Ironically, while critiquing the Board’s lack of “rigorous analysis” linking each of these pieces of evidence to the social distinction and particularity requirements of a social group, the attorney general himself makes sweeping, speculative statements doubting the ability of survivors of domestic violence and gang violence (the latter was not even an issue in either *A-R-C-G* or *A-B*) to meet these requirements.<sup>38</sup> In fact, the attorney general concluded summarily that he “must vacate” the Board’s grant of asylum to Ms A.B., “[h]aving overruled *A-R-C-G*,” without engaging the specific facts of Ms A.B.’s case or the robust documentation submitted on conditions in El Salvador (indeed, not even the same country as the one in question in *A-R-C-G*).<sup>39</sup> The attorney general’s categorical pronouncements regarding social groups in domestic violence and gang violence claims fly in the face of longstanding Board and federal court precedent establishing that particular social group cognizability is a case-by-case determination.<sup>40</sup> Under well-settled U.S. asylum law, the fact that a social group may fail under the facts or the evidentiary record of one case does not foreclose the viability of the same social group articulation, let alone alternate formulations, in another case.

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## The Attorney General's Nexus Discussion Reduces Domestic Violence to "Personal Motives"

In his decision, the attorney general also casts doubt on whether a domestic violence victim can establish nexus—that is, whether her abuser harmed her “on account of” the characteristics shared by her social group. The attorney general’s position on nexus in gender-based claims was clear from the moment he certified the case to himself posing the question of “whether . . . being a victim of a *private criminal activity* constitutes a cognizable social group. . . .”<sup>41</sup> Labeling the abuses suffered by Ms A.B. or the applicant in *Matter of A-R-C-G* as “private criminal activity”—a term found nowhere in asylum jurisprudence or the law itself—was an intentional framing, aimed at resurrecting the antiquated interpretation of domestic violence as an individual, personal act, as opposed to one that arises from societal norms and expectations about gender roles.<sup>42</sup> To the contrary, asylum jurisprudence has long required a highly contextual evaluation of a persecutor’s motives including evaluation of legal, social, and cultural norms.<sup>43</sup>

Without citing to any evidence in the record in *Matter of A-R-C-G* supporting such a conclusion, the attorney general asserts that the applicant’s abuser attacked her because of his “preexisting personal relationship” with her, quoting language

**The decision casts domestic abuse as a purely private matter, begging us to ignore years of progress made in understanding the social context that allows such violence to flourish.**

from a vacated Board decision.<sup>44</sup> From that vacated decision’s language, the attorney general draws sweeping and overbroad conclusions that domestic violence-related persecution is motivated by a personal relationship, rather than by the victim’s status as a woman in a domestic relationship that permits her treatment as property. His misreading of the dynamics of domestic violence—placing them as



mere criminal acts, devoid of the social context that subordinates women—only serves to reinforce the abusers’ views that society tolerates such mistreatment of women. Moreover, asylum is not limited to those who are attacked by unknown persecutors.<sup>45</sup> Nexus requires that one see the forest through the trees by framing individual actions within their greater societal norms and constructs. The attorney general’s short-sighted perspective on domestic violence as a purely personal or private matter begs us to ignore years of progress made in understanding the context of domestic violence’s situs within the collective dynamics of power and control.<sup>46</sup>

The attorney general also implies that the fact that a persecutor only harms a single victim somehow defeats a nexus showing.<sup>47</sup> There is, however, no requirement under the law that an applicant establish that her persecutor would harm *all* members of her social group.<sup>48</sup> Perhaps the clearest example of the flawed nature of the attorney general’s logic on this point appears in a Seventh Circuit opinion, where the court reasons “[i]magine 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.”<sup>49</sup> A proper nexus inquiry asks about the reasons for inflicting the harm in the first place, and not why a persecutor harmed one group member instead of another.

At issue in *A-B-* is also the extent to which a persecutor must be *aware* of the social group’s existence. The attorney general implies that to meet the nexus requirement, a persecutor must be aware of a word-for-word match to the proposed social group formulation.<sup>50</sup> To suggest that the abuser in *Matter of A-R-C-G-*, a man from rural Guatemala, would recognize word-for-word the terms that the applicant’s legal counsel crafted to describe her group under the law is absurd.<sup>51</sup> What her abuser should be required to and did recognize were the underlying characteristics captured in that legally viable group formulation—things like her being a woman, or having married him. The attorney general’s contentions should not be construed to impose a new requirement that a persecutor have any awareness of the exact social group formulation. Instead, adjudicators should continue to weigh whether or not a persecutor has targeted an asylum applicant on account of the characteristics that underpin her social group.

Finally, the attorney general quotes from a Sixth Circuit case that misstates a statutory standard to imply that the presence of *any* reason beyond the protected

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characteristic defeats nexus entirely.<sup>52</sup> Both the plain language of the statute<sup>53</sup> and jurisprudence make clear that a protected characteristic need only be “one central” motivation, thereby permitting “mixed motives” of the persecutor.<sup>54</sup> Nothing in *A-B-* justifies a departure of the longstanding recognition of mixed motives, and adjudicators should treat the attorney general’s conclusions on nexus as the dicta that they are: mere opinions that do not bind. While he dedicated a significant portion of the *A-B-* decision to his exploration of nexus, ultimately, the standard under a proper reading remains untouched.

### **The Attorney General’s Inconsistent Treatment of the “Government Protection” Element**

The attorney general articulates the “government protection” standard in three different ways throughout the decision. First, in his introductory commentary with no citation or indication that he intends to create a new standard, he suggests that claims involving non-state actors must demonstrate that “government protection from such harm is so lacking that their persecutors’ actions can be *attributed* to the government” and suggests that only in “exceptional circumstances” may victims of harm by non-state actors establish asylum eligibility.<sup>55</sup> Then, in addition to articulating the correct standard—government inability or unwillingness to protect the applicant—he quotes from an outlier strain of cases to require a showing that the government “condoned” or was “completely helpless” to protect the applicant.<sup>56</sup> His ping-ponging between different articulations of the standard is confusing and completely unfounded when considered in light of related jurisprudence.

First, the attorney general’s suggestion of a heightened standard requiring attribution of the persecutor’s acts to the government would render the entire concept of persecution by non-state actors superfluous. After all, the drafters of the 1951 U.N. Convention Relating to the Status of Refugees,<sup>57</sup> the Board, and all U.S. courts of appeals have long recognized persecution emanating from non-state actors where a government is “unable or unwilling” to control the persecutor.<sup>58</sup> Such a drastic departure and arguably ultra vires position certainly require more thoughtful analysis and explanation than simply inserting the term “attributed” into introductory commentary.<sup>59</sup> Adjudicators should, therefore, treat the attorney general’s use of the word “attributed” as nothing more than the imprecise use of inequivalent terminology that it is.

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Next, applying a literal “complete helplessness” standard would effectively require an applicant to show that there is no chance that her government would be able to protect her, which conflicts with the plain language of the Immigration and Nationality Act that recognizes asylum for those with a “well-founded fear” of harm, rather than those with a *completely certain* fear of harm.<sup>60</sup> Heightening the “unable or unwilling” standard to the level of “complete helplessness” or requiring the government “condone” the persecutor’s actions would also catapult the asylum standard beyond the widely regarded more stringent standard of government “acquiescence” (generally interpreted as “willful blindness”) required for protection under the Convention Against Torture,<sup>61</sup> a form of relief different from asylum.<sup>62</sup> To keep the asylum standard in line with relative standards of government involvement, and in light of the longstanding and well-settled jurisprudence, it is most reasonable to apply the disjunctive “unable or unwilling” standard as opposed to any of the others that the attorney general refers to in *Matter of A-B*. Even in the isolated cases the attorney general quoted in support of an ostensibly heightened standard, the courts ultimately found that the government was unable or unwilling to protect the asylum applicant despite evidence of *some* police intervention, indicating that the standard was only loosely worded as “condoned” or “completely helpless” and that such language was not meant to be interpreted so literally.<sup>63</sup>

Finally, one of the questions that the courts of appeals have long grappled with is: precisely what level of efficacy of a government’s actions indicates an inability to protect an asylum seeker?<sup>64</sup> Similarly, the attorney general wrestles with efficacy in twice comparing El Salvador’s efforts in combating domestic violence to those of the United States. First, he argues that the local police’s inaction “on a particular report of an individual crime does not necessarily mean that the government is unwilling or unable to control crime, any more than it would in the United States.”<sup>65</sup> However, courts recognize that police inaction is often a symptom of more systemic ineffectiveness and “may provide powerful evidence with respect to the government’s willingness or ability to protect the requestor.”<sup>66</sup> Second, the attorney general argues that

[t]he persistence of domestic violence in El Salvador . . . does not establish that El Salvador was unable or unwilling to protect A-B from her husband, any more than the persistence of domestic violence in the United States means that our government is unwilling and unable to protect victims of domestic violence.<sup>67</sup>

Taken to their logical end, the attorney general's comparisons to the United States here would mean that asylum seekers who are fleeing harms like those that occur or "persist" in the United States are automatically ineligible for protection. And yet the courts have ad nauseam found that cases of rape and other harms that are perpetrated in the United States every day are viable claims for asylum. The question is not "Does the United States have similar problems?"; the question is "How effective is the asylum seeker's government in addressing and combating those problems?" Adjudicators must continue to engage in a fact-specific analysis of the evidence before them, to assess the government's level of efficacy rather than be deterred by the attorney general's attempt to obscure long-held legal standards with his dicta.

### **The Attorney General's Cursory Analysis of Internal Relocation Ignores Federal Regulations**

An asylum applicant who has established that she suffered past persecution on account of a protected ground, and that the government was unable or unwilling to protect her, is presumed to have a well-founded fear of future persecution, unless DHS shows that circumstances have changed or she can safely *and* reasonably relocate within her country of origin.<sup>68</sup> The attorney general opines that "[w]hen 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."<sup>69</sup> Even though the attorney general uses *Matter of A-B-* as an opportunity to offer his speculative opinion on women's and other asylum seekers' ability to relocate within their countries, he ultimately does not rule on internal relocation in Ms A.B.'s case, and his cursory statements should be construed as nothing more than dicta.

Furthermore, although the attorney general uses the word "reasonable" in this statement, it is clear that he confuses reasonableness for safety and conflates the two prongs of the test for internal relocation. Even if the asylum seeker were able to escape her abuser by moving to another part of her country, it may not be reasonable to expect her to do so under her particular circumstances or more widespread conditions in her country. Indeed, the attorney general's conjecture overlooks federal regulations, which he is bound by, listing factors that could potentially be relevant to determine the reasonableness of internal relocation, including: "other serious harm in the place of suggested relocation; any ongo-

ing strife within the country; administrative, economic, or judicial infrastructure; geographical limitations; and social and cultural constraints, such as age, *gender*, health, and social and familial ties.”<sup>70</sup> The specific inclusion of “gender” in these regulations reflects the reality that women all too often encounter barriers to relocation in numerous countries. In fact, in societies where women are expected to be dependent on their families and societal discrimination against women is rampant, it can be nearly impossible for a woman to make ends meet outside of her own community.<sup>71</sup> Adjudicators should take direction from federal regulations, instead of the attorney general’s misleading internal relocation analysis, and hold DHS to its full burden of showing that relocation would be not only safe but also reasonable, given an asylum seeker’s particular circumstances and the broader societal context.

### **The Attorney General’s Statements on Discretionary Considerations Reflect Prejudicial Views Toward Asylum Seekers and Contradict Case Precedent**

In addition to determining whether an asylum applicant meets the statutory definition of a “refugee,” adjudicators must determine whether that applicant merits asylum in a favorable exercise of discretion. While declining to address discretionary factors in Ms A.B.’s own case, the attorney general makes perfunctory statements on discretion, in a footnote toward the end of his opinion, signaling to adjudicators that that they should consider denying asylum as a matter of discretion more often than they may have in the past. Specifically, he states that “a favorable exercise of discretion . . . should not be presumed or glossed over” and proceeds to list only negative discretionary factors such as “the circumvention of orderly refugee procedures.”<sup>72</sup> Though citing to a seminal Board decision as support for this proposition, it is the attorney general who glosses over the crux of the Board’s precedential ruling—that adjudicators must balance any negative factors against positive factors under a “totality of the circumstances” analysis.<sup>73</sup> In fact, the Board explicitly held that “circumvention of orderly refugee procedures should not be considered in such a way that the practical effect is to deny relief in virtually all cases.”<sup>74</sup> Moreover, the Board instructed adjudicators that “the danger of persecution should generally outweigh all but the most egregious of adverse factors.”<sup>75</sup>

The attorney general's preoccupation with asylum seekers' manner of entry is not an attempt to bring adjudication of asylum claims in line with precedent (indeed, it contradicts existing case law), but rather a reflection of his prejudicial views of the majority of asylum seekers as liars and criminals trying to "game" the system. In the penultimate section of his decision, the attorney general states "there are proper and legal channels for seeking admission to the United States other than entering the country illegally and applying for asylum in a removal proceeding,"<sup>76</sup> implying that asylum seekers such as Ms A.B. who ask for protection at the border are not genuinely fearful of persecution. It is telling that on the same day he issued his decision in *Matter of A-B*, the attorney general delivered remarks to immigration judges, claiming that "the vast majority of the current asylum claims are not valid" and that moving forward, "[t]he number of illegal aliens and the number of baseless claims will fall."<sup>77</sup> However, while the attorney general suggests that lacking status in the United States and having a meritorious claim for protection are mutually exclusive, the Immigration and Nationality Act provides very clearly that "[a]ny alien who is physically present in the United States or who arrives in the United States (*whether or not at a designated port of arrival*) . . . *irrespective of such alien's status*, may apply for asylum."<sup>78</sup> The fact that an asylum seeker who flees her country of origin makes the dangerous journey to the United States for the mere possibility of a safe haven "does not detract from but supports [her] claim of fear of persecution."<sup>79</sup>

## Subsequent Agency Treatment Confuses Dicta with the Holding

The single most impactful part of *Matter of A-B* is how the DHS, specifically the U.S. Citizenship and Immigration Services (USCIS), has interpreted the decision, treating dicta as if they were legally binding precedent. Although interim guidance leaked to the media initially instructed asylum officers to continue assessing claims on a case-by-case basis and focused on the narrow holding of *A-B* by asking officers to no longer rely on *Matter of A-R-C-G*,<sup>80</sup> a policy memo issued on July 11, 2018, wildly departed from that approach and zealously treated dicta as though they were the holding.<sup>81</sup> Particularly troubling is the memo's treatment of *Matter of A-B* in the context of credible fear interviews, which are only preliminary screenings to determine whether "there is a significant possibility . . . that

the alien could establish eligibility for asylum” later in a full merits hearing before an immigration judge.<sup>82</sup> That has become the basis for a legal challenge currently pending in the U.S. District Court for the District of Columbia.<sup>83</sup>

That lawsuit argues that the new USCIS policies are harmful in primarily three ways. First, they instruct asylum officers to apply federal circuit law only to the extent that it is not inconsistent with the attorney general’s decision in *A-B*, which effectively strips the Judiciary of its constitutional authority to interpret the law. Second, they instruct asylum officers to generally deny domestic violence and gang-related claims and to apply erroneous legal standards, such as with respect to the nexus and government protection elements (as discussed above).<sup>84</sup> Third, they remove without adequate explanation years of practice in which the asylum officers were instructed to apply the most favorable circuit law during credible fear assessments.<sup>85</sup> These changes to the “credible fear” standards are designed to ensure that asylum seekers fleeing domestic and gang-based violence *never* make it into full immigration court proceedings. In so doing, the United States will be in clear violation of our *nonrefoulement* obligations under the 1951 Refugee Convention, and asylum seekers’ lives will be in danger upon return.<sup>86</sup>

For all of the above reasons, adjudicators must be careful to distinguish dicta from the holding regardless of USCIS’s inability to do so in its guidance.

### **Some Adjudicators and Courts of Appeals Have Continued to Analyze Domestic Violence Claims on a Case-by-Case Basis**

Although USCIS guidance attempts to transform the attorney general’s dicta into policy, several adjudicators and U.S. courts of appeals remain cognizant of longstanding case precedent and have properly read *Matter of A-B* narrowly. The Center for Gender & Refugee Studies (CGRS) has set up a tracking system to collect information on how adjudicators have responded to *Matter of A-B*.<sup>87</sup> Outcomes reported to CGRS since June 12, 2018, have been mixed at the immigration court level. Several judges have found domestic violence–based asylum claims foreclosed by *A-B*, regardless of the evidentiary record or legal arguments presented by the asylum applicant. Nonetheless, other judges have continued to analyze such claims on a case-by-case basis. Among these judges, some have granted asylum in individual cases based on the asylum seeker’s membership in a social group defined by gender, nationality, and/or other characteristics (but excluding

“inability to leave”).<sup>88</sup> Others have acknowledged that social group arguments may be viable in domestic violence claims, but have preferred to grant individual applications on a different protected ground, such as political opinion, where applicable, to avoid untangling the contentious weeds of *A-B*.

At the appellate level, some U.S. courts of appeals have cited to *Matter of A-B* in passing, such as to note that the asylum applicant’s reliance on *Matter of A-R-C-G* is no longer favorable.<sup>89</sup> However, as of the time of writing, a court of appeals has yet to apply the attorney general’s decision to find an asylum seeker’s claim foreclosed. While the courts of appeals have not explicitly countered the dicta in *Matter of A-B* by name, several have distinguished the cases before them from *A-R-C-G*, reflecting a narrow interpretation of *A-B* that does not disrupt existing standards in U.S. asylum law. For example, the Ninth Circuit held in an unpublished case that the Board erred by not considering the social group “Guatemalan women” as it was the “gravamen” of her claim based on domestic violence, even though the asylum seeker herself had not proposed that group formulation.<sup>90</sup> As such, the court did not read *A-B* as a categorical foreclosure of gender-defined social groups as a matter of law and instead left it to the Board to consider whether *A-B* “has *any* bearing on the question remanded here.”<sup>91</sup>

Most notably, in an unpublished case involving a domestic violence survivor from El Salvador, the Third Circuit explicitly stated that, “[w]hile the overruling of *A-R-C-G* weakens [the petitioner’s] case, it does not automatically defeat her claim that she is a member of a cognizable particular social group . . . of ‘Salvadoran women in domestic relationships who are unable to leave’” and remanded for the immigration judge to consider whether the group is cognizable post *A-B*.<sup>92</sup> The court’s decision should serve as a reminder to adjudicators that similar, and even near-identical, social group formulations must be analyzed on a case-by-case basis, notwithstanding the attorney general’s sweeping statements; thus, *A-B* should not be read to rule out claims where the social group is defined in part by inability to leave.

In another unpublished case, the Sixth Circuit found that an indigenous Guatemalan woman had established nexus between the rape she suffered at the hands of gang members and her ethnicity, noting that the gang had not targeted her merely because of a “personal vendetta.”<sup>93</sup> Similarly, in a published gang-related case, the Seventh Circuit held that the immigration judge erred by “rely[ing] on a lack of harm to other [group] members, without more” to find the persecutor

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was motivated by a “personal vendetta” rather than a protected ground.<sup>94</sup> Although the Sixth and Seventh Circuits did not explicitly reject the attorney general’s nexus analysis in *A-B*-, their rulings counter his attempt to relegate gender-based violence and persecution by other non-state actors to the private sphere.

Finally, with respect to government inability or unwillingness to protect, in a published fear-of-gang case, the First Circuit acknowledged the attorney general’s statement that “[t]he mere fact that a country may have problems effectively policing certain crimes. . . cannot itself establish an asylum claim.”<sup>95</sup> However, it ultimately found that the police would have been unable to protect the asylum seeker from organized crime in spite of the government’s enactment of laws to address gang activity. Therefore, even though the court made a brief note of the attorney general’s state-protection analysis, it ultimately did not appear to apply a heightened standard that would depart from case precedent.

## **Adjudicators should construe the attorney general’s decision in *A-B*- narrowly and treat the sweeping conclusions he states in dicta as opinions that do not bind.**

While courts of appeals should more explicitly counteract the sweeping conjectures made by the attorney general in *Matter of A-B*-, the fact that favorable decisions continue to come out of both the immigration courts and the U.S. courts of appeals in cases involving domestic violence– or gang-related persecution is a testament to the continued viability of such claims. Moreover, the nuanced approach adopted in some of these decisions and the limited attention given to *Matter of A-B*- indicate that at least some adjudicators agree the attorney general’s decision does not, under a proper reading, ultimately change the existing legal standards for asylum law and much of his speculation should be construed merely as dicta.

## Conclusion

The attorney general's decision in *Matter of A-B* is an attempt to turn back decades of hard-won victories in the recognition of women's rights as human rights and domestic violence as a horrific social evil that states must take responsibility for. His broad, sweeping language regarding the viability of asylum claims based on domestic violence reflects an antiquated perception of women's rights issues as a "personal matter" or "private affair" that does not merit discussion in the public sphere. Nonetheless, despite the attorney general's intent to deny a safe haven in the United States to most, if not all, domestic violence survivors, his statements are mere speculation, removed from either the dangerous conditions these women are fleeing from or longstanding principles of asylum law. Therefore, adjudicators at all levels of decision making must construe the attorney general's decision narrowly, not give credence to politically motivated statements that properly read are mere dicta, and afford women the opportunity to have their claims heard on their own merits under a fair and just interpretation of the law.

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## NOTES

1. Mireille Widmer & Irene Pavesi, *A Gendered Analysis of Violent Death*, SMALL ARMS SURVEY: RESEARCH NOTES, No. 63 at 2 (Nov. 2016), [www.smallarmssurvey.org/fileadmin/docs/H-Research\\_Notes/SAS-Research-Note-63.pdf](http://www.smallarmssurvey.org/fileadmin/docs/H-Research_Notes/SAS-Research-Note-63.pdf) (finding that El Salvador had the third-highest death rate for women and girls, after Syria and Lesotho).
2. Matter of A-B-, 27 I. & N. Dec. 316 (Att’y Gen. 2018).
3. United Nations Protocol Relating to the Status of Refugees, Oct. 4, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 [hereinafter 1967 Protocol].
4. The Refugee Act of 1980 (Act of March 17, 1980, Pub. L. No. 96-212, 94 Stat. 107 (1980)) was specifically drafted to bring the United States into compliance with its treaty obligations under the 1967 Protocol. *See* S. REP. NO. 96-256, 96th Cong., 1st Sess. (1979), Report on the Refugee Act of 1979 at 1, 4.
5. Immigration and Nationality Act (INA) § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A).
6. *Id.*; Matter of McMullen, 17 I. & N. Dec. 542, 544 (BIA 1980); Matter of Pierre, 15 I. & N. Dec. 461, 462 (BIA 1975).
7. U.N. Comm. on Elimination of Discrimination Against Women, General Recommendation No. 19, ¶¶ 1, 9 (1992), [www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm](http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm) (“It is emphasized . . . that discrimination under the Convention [on the Elimination of Discrimination against Women] is not restricted to action by or on behalf of Governments . . . . Under general international law and specific human rights covenants, States may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation.”); U.N. High Comm’r for Refugees, Guidelines on International Protection: Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, HCR/GIP/02/01 (May 7, 2002), [www.unhcr.org/3d58ddef4.pdf](http://www.unhcr.org/3d58ddef4.pdf).
8. Matter of Acosta, 19 I. & N. Dec. 211, 233 (BIA 1985).
9. *Fatin v. INS*, 12 F.3d 1233, 1240 (3d Cir. 1993); *Lazo-Majano*, 813 F.2d 1432 (9th Cir. 1987), *overruled on other grounds by Fisher v. INS*, 79 F.3d 955 (9th Cir. 1996); Matter of S-A-, 22 I. & N. Dec. 1328 (BIA 2000).
10. Matter of Kasinga, 21 I. & N. Dec. 357 (BIA 1996).
11. *See, e.g.*, *Cece v. Holder*, 733 F.3d 662 (7th Cir. 2013) (en banc); *Sarhan v. Holder*, 658 F.3d 649 (7th Cir. 2011); *Ngengwe v. Mukasey*, 543 F.3d 1029 (8th Cir. 2009); *Bi Xia Qu v. Holder*, 618 F.3d 602 (6th Cir. 2010); *Perdomo v. Holder*, 611 F.3d 662 (9th Cir. 2010); *Yadegar-Sargis v. INS*, 297 F.3d 596 (7th Cir. 2002).
12. *See* Karen Musalo, *Protecting Victims of Gendered Persecution: Fear of Floodgates or Call to (Principled) Action*, 14 VA. J. SOC. POL’Y & L. 119, 120 (2007), [https://cgrrs.uchastings.edu/sites/default/files/protecting\\_victims\\_of\\_gendered\\_persecution\\_Musalo\\_2007.pdf](https://cgrrs.uchastings.edu/sites/default/files/protecting_victims_of_gendered_persecution_Musalo_2007.pdf) (discussing why “the acceptance of gender asylum does not give rise to a skyrocketing of claims”); Karen Musalo, *Personal Violence, Public Matter: Evolving Standards in*

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- Gender-Based Asylum Law*, HARVARD INT'L REV. 45 (Fall 2014/Winter 2015), [https://cgrs.uchastings.edu/sites/default/files/Personal\\_Violence%2C\\_Public%20Matter.pdf](https://cgrs.uchastings.edu/sites/default/files/Personal_Violence%2C_Public%20Matter.pdf) (addressing factors contributing to the controversy surrounding recognition of domestic violence asylum claims). For a more comprehensive overview of the history of gender-based asylum, see Karen Musalo, *A Short History of Gender Asylum in the United States: Resistance and Ambivalence May Very Slowly Be Inching Towards Recognition of Women's Claims*, 29 REFUGEE SURVEY Q. 2, 46 (2010), [https://cgrs.uchastings.edu/sites/default/files/short\\_history\\_of\\_gender\\_asylum\\_Musalo\\_2010\\_0.pdf](https://cgrs.uchastings.edu/sites/default/files/short_history_of_gender_asylum_Musalo_2010_0.pdf).
13. DHS filed briefs in *Matter of R-A-* in 2004 and *Matter of L-R-* in 2009 acknowledging that domestic violence can be the basis of an asylum claim. Department of Homeland Security's Position on Respondents Eligibility for Relief, *Matter of R-A-*, 23 I. & N. 694 (Att'y Gen. 2005), <https://cgrs.uchastings.edu/sites/default/files/Matter%20of%20R-A-%20DHS%20brief.pdf>; Department of Homeland Security's Supplemental Brief, *Matter of L-R-* (BIA 2010), [https://cgrs.uchastings.edu/sites/default/files/Matter\\_of\\_LR\\_DHS\\_Brief\\_4\\_13\\_2009.pdf](https://cgrs.uchastings.edu/sites/default/files/Matter_of_LR_DHS_Brief_4_13_2009.pdf). DHS eventually stipulated to a grant of asylum in both cases.
  14. *Matter of A-R-C-G-*, 26 I. & N. Dec. 338 (BIA 2014).
  15. *Id.* at 395.
  16. *A-B-*, 27 I. & N. Dec. at 319 (emphasis added).
  17. *Id.* at 320. It is worth noting that, although the attorney general (randomly) raises the issue of gang-based claims several times in his decision, this article focuses exclusively on domestic violence, as that was the type of claim at issue in *Matter of A-B-* and the case it overturned, *Matter of A-R-C-G-*.
  18. *A-B-*, 27 I. & N. Dec. at 317.
  19. See, e.g., Karen Musalo, *Personal Violence, Public Matter: Evolving Standards in Gender-Based Asylum Law*, HARV. INT'L REV. (2014); Nat'l Immigrant Justice Ctr., Particular Social Group Practice Advisory: Applying for Asylum After *Matter of M-E-V-G-* and *Matter of W-G-R-* (Jan. 2016), [www.immigrantjustice.org/sites/default/files/PSG%2520Practice%2520Advisory%2520and%2520Appendices-Final-1.22.16.pdf](http://www.immigrantjustice.org/sites/default/files/PSG%2520Practice%2520Advisory%2520and%2520Appendices-Final-1.22.16.pdf).
  20. The attorney general acknowledges the concerns of numerous amici and Ms A.B. related to the bias that his "policy views" bring to this case, but ultimately concludes that "[i]f policy statements about immigration-related issues were a basis for disqualification, then no Attorney General could fulfill his or her statutory obligations to review the decisions of the Board." *A-B-*, 27 I. & N. Dec. at 325. It is, he says, as if others have been political in the past, and thus he will be as political as he chooses in this decision.
  21. Courts have defined the terms "obiter dicta" and "dicta" as "language unnecessary to a decision," "ruling on an issue not raised," or "opinion of a judge which does not embody the resolution or determination of the court, and made without argument or full consideration of the point." *Lawson v. United States*, 176 F.2d 49, 51 (D.C. Cir. 1949) (internal citations omitted); see also *Kirtsang v. John Wiley & Sons, Inc.*, 658 U.S. 519, 548 (2013) ("Is the Court having once written dicta calling a tomato a vegetable bound to deny that it is a fruit forever after? To the contrary, we have written that we are not necessarily bound by dicta should more complete argument demonstrate that the dicta is not correct.").
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22. “Generally, claims by aliens 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. If indeed he intended to tell adjudicators what to do, then he’s done “precisely what the regulations forbid him to do: dictating the Board’s decision.” U.S. *ex rel.* *Accardi v. Shaughnessy*, 347 U.S. 260, 267 (1954). For a more detailed discussion of the *Accardi* principle see Nat’l Immigrant Justice Ctr., *Asylum Practice Advisory: Applying for Asylum After Matter of A-B*, at 9 n.8 (June 2018), [www.immigrantjustice.org/sites/default/files/content-type/resource/documents/2018-06/Matter%20of%20A-B-%20Practice%20Advisory%20-%20Final%20-%206.21.18.pdf](http://www.immigrantjustice.org/sites/default/files/content-type/resource/documents/2018-06/Matter%20of%20A-B-%20Practice%20Advisory%20-%20Final%20-%206.21.18.pdf).
23. *A-B*, 27 I. & N. Dec. at 316, 337.
24. Persecution refers only to the severity of the harm. *See, e.g.*, *Pitcherskaia v. INS*, 118 F.3d 641, 647 (9th Cir. 1997) (“We have defined ‘persecution’ as ‘the infliction of suffering or harm upon those who differ . . . in a way regarded as offensive.’”). Whether that harm is linked to a protected ground (nexus) or whether the government is unable or unwilling to protect the asylum seeker are separate questions.
25. In other parts of the decision, the attorney general discusses each of these elements separately. However, his inaccurate articulation of the term “persecution,” conflating the elements, bolsters the potential for immigration judges to issue decisions that are incomplete or not well-reasoned, which would make it challenging for the asylum applicant’s opposing counsel at DHS to stipulate to certain issues and for the asylum applicant herself to discern for purposes of appeal why exactly the judge denied her claim.
26. *Acosta*, 19 I. & N. Dec. at 233–34.
27. *Id.* at 233.
28. *See* *Matter of M-E-V-G-*, 26 I. & N. Dec. 227, 237–43 (BIA 2014); *Matter of W-G-R-*, 26 I. & N. Dec. 208, 210–18 (BIA 2014). The Board’s two additional requirements for particular social groups have often confounded advocates and adjudicators alike, resulting in case outcomes inconsistent with prior U.S. precedent and receiving criticism from the U.N. High Commissioner for Refugees (UNHCR) as misconstruing the refugee definition. *See, e.g.*, Brief of the UNHCR as Amicus Curiae in Support of the Petitioner, *Valdiviezo-Galdamez v. Holder*, 663 F.3d 582 (3d Cir. 2011), [www.refworld.org/docid/49ef25102.html](http://www.refworld.org/docid/49ef25102.html). Moreover, the Board’s fixation on the exact language used to delineate a social group significantly disadvantages *pro se* asylum seekers. For an in-depth discussion of common challenges to the Board’s three-part test, see National Immigrant Justice Center, *Particular Social Group Practice Advisory: Applying for Asylum After Matter of M-E-V-G- and Matter of W-G-R-* (Jan. 2016), [www.immigrantjustice.org/resources/resourcesasylum-claims-based-membership-particular-social-group](http://www.immigrantjustice.org/resources/resourcesasylum-claims-based-membership-particular-social-group); Benjamin Casper et al., *Matter of M-E-V-G- and the BIA’s Confounding Legal Standard for “Membership in a Particular Social Group”*, 14-06 IMMIGRATION BRIEFINGS I (June 2014).
29. It is notable that the Board issued its decision in *Matter of A-R-C-G-* soon after its attempt to “clarify” the meaning of the “social distinction” and “particularity” requirements in its two companion decisions in 2014, *M-E-V-G-*, 26 I. & N. Dec. 227; *W-G-R-*, 26 I. & N. Dec. 208. Indeed, in *A-R-C-G-*, the Board found a social group cognizable for the first time since its 2014 revamped articulation of its test. As such, in addition to settling

- a debate on whether domestic violence asylum claims are viable, the Board's decision in *Matter of A-R-C-G* provided at least one concrete example of a social group that could satisfy its otherwise obscure three-part test and, thereby, some tangible guidance to attorneys and adjudicators.
30. *A-B-*, 27 I. & N. Dec. at 334–35 (“[M]arried women in Guatemala who are unable to leave their relationship’ was effectively defined to consist of women in Guatemala who are victims of domestic abuse.”).
  31. *See, e.g.*, *Matter of W-G-R-*, 26 I. & N. Dec. 208, 215 (BIA 2014). Note, however, that a social group defined by past harm may be permissible for purposes of asylum if it is a central reason why the asylum seeker would be further harmed in *the future*. For example, a woman who has been raped in the past may suffer ostracism and violence at the hands of a different persecutor in the future because of the stigma associated with rape in her society. *See, e.g.*, *Lukwago v. Ashcroft*, 329 F.3d 157, 172 (3d Cir. 2003) (noting that “the shared experience of enduring past persecution may, under some circumstances, support defining a ‘particular social group’ for purposes of fear of future persecution,” though not for the past persecution itself).
  32. Indeed, earlier this year, the First Circuit expressly upheld the social group in *A-R-C-G* as permissible and distinguishable from a social group defined as “Guatemalan women who try to escape systemic and severe violence but who are unable to receive official protection.” *Perez-Rabanales v. Sessions*, 881 F.3d 61, 67 (1st Cir. 2018).
  33. The Center for Gender & Refugee Studies (CGRS) has an expert declaration on file by Professor Nancy K.D. Lemon, Lecturer at the University of California Berkeley School of Law and a leading authority on domestic violence, that describes domestic dynamics of domestic violence situations and the myriad reasons why women are unable to leave abusive relationships. The declaration is available upon request through CGRS’s Technical Assistance Program. *Request Expert Consultation for Asylum Case*, CTR. FOR GENDER & REFUGEE STUDIES, <https://cgrs.uchastings.edu/assistance/> (last visited Oct. 5, 2018).
  34. *See, e.g.*, *W-G-R-*, 26 I. & N. Dec. at 215 (“Persecutory conduct aimed at a social group cannot *alone* define the group, which must exist independently of the persecution. Circuit courts have long recognized that a social group must have ‘defined boundaries’ or a ‘limiting characteristic,’ other than the risk of being persecuted, in order to be recognized.” (emphasis added) (citations omitted)); *Matter of A-M-E- & J-G-U-*, 24 I. & N. Dec. 69, 74 (BIA 2007) (“Although a social group cannot be defined *exclusively* by the fact that its members have been subjected to harm, we noted that this may be a relevant factor in considering the group’s visibility in society.” (emphasis added)); *Jonaitiene v. Holder*, 660 F.3d 267, 271 (7th Cir. 2011) (“The social group, however, cannot be defined *merely* by the fact of persecution.” (emphasis added)); *Castillo-Arias v. U.S. Attorney Gen.*, 446 F.3d 1190, 1198 (11th Cir. 2006) (“The risk of persecution *alone* does not create a particular social group.” (emphasis added)).
  35. *A-M-E- & J-G-U-*, 24 I. & N. Dec. at 74.
  36. *Cece v. Holder*, 733 F.3d 662, 672 (7th Cir. 2013) (noting that “it is not fair to conclude that the group is defined by the harm or potential harm inflicted merely by the language used” and finding that members of the asylum seeker’s proposed social group of “young

- women who are targeted for prostitution by traffickers in Albania” are linked not only by the persecution suffered (*i.e.*, forced prostitution), but also by “the common and immutable characteristics of being (1) young, (2) Albanian, (3) women, (4) living alone”); *see also* Escobar v. Holder, 657 F.3d 537, 545–46 (7th Cir. 2011) (“[J]ust because all members of a group do experience persecution, that does not mean that this is the only thing that links them.”).
37. *A-B*, 27 I. & N. Dec. at 336 (quoting *A-R-C-G*, 26 I. & N. Dec. at 394).
  38. *Id.* at 335–36 (asserting that “[s]ocial groups defined by their vulnerability to private criminal activity likely lack the particularity required . . . given that broad swaths of society may be susceptible to victimization” and that “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”).
  39. *Id.* at 340.
  40. *M-E-V-G*, 26 I. & N. Dec. at 251 (“Social group determinations are made on a case-by-case basis”); *Acosta*, 19 I. & N. Dec. at 233 (stating “[t]he particular kind of group characteristic that will qualify under this construction remains to be determined on a case-by-case basis”); *see also* Paiz-Morales v. Lynch, 795 F.3d 238, 245 (1st Cir. 2015) (“We do not mean to suggest a blanket rejection of all factual scenarios involving gangs.” (internal quotation marks omitted)); *Pirir-Boc v. Holder*, 750 F.3d 1077, 1084 (9th Cir. 2014) (“[T]he BIA may not reject a group solely because it had previously found a similar group in a different society to lack social distinction or particularity.”).
  41. *A-B*, 27 I. & N. Dec. at 317.
  42. This is not the first time the concept of “personal” or “private” motivation has been used to attempt to dismiss legally viable claims for asylum. In *Sarhan v. Holder*, 658 F.3d 649 (7th Cir. 2011), the circuit court rejected the immigration judge’s contention that a threatened honor killing was due to a “personal dispute” rather than a “widely-held social norm in Jordan” that allowed honor killings to exist within society.
  43. *See* Lazo-Majano v. INS, 813 F.2d 1432, 1435 (9th Cir. 1987), *overruled on other grounds by Fisher*, 79 F.3d 955; *cf. Ali*, 394 F.3d at 787 (“The [immigration judge]’s notion that the rapes were motivated merely to sexually ‘gratify’ the attackers impermissibly relied on the myth that rape is about sex instead of domination and control.”); *see also* Ndonyi v. Mukasey, 541 F.3d 702, 711 (7th Cir. 2008) (vacating a removal order upon finding that the immigration judge and Board “utterly fai[ed] to consider the context of [the applicants’] arrest”); *Osorio v. INS*, 18 F.3d 1017, 1029 (2d Cir. 1994).
  44. *A-B*, 27 I. & N. Dec. at 339 (quoting *Matter of R-A*, 22 I. & N. Dec. 906 (BIA 1999), *vacated and remanded*, 22 I. & N. Dec. 906 (Att’y Gen. 2001)).
  45. “There is no exception to the asylum statute for violence from family members; if the government is unable or unwilling to control persecution, it matters not who inflicts it.” *Faruk v. Ashcroft*, 378 F.3d 940, 943 (9th Cir. 2004).
  46. In footnote 10 of his decision, the attorney general refers to *Matter of Pierre*, 15 I. & N. Dec. 461 (BIA 1975), a case in which a Haitian husband’s threats against his wife were deemed “strictly personal” despite the fact that he was a Haitian government official.
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Since 1975, fortunately, our understanding of domestic violence has advanced and we now recognize the social, legal, and cultural contexts within which male dominance of women is allowed to thrive. Scholars and courts now recognize domestic violence as a communal ail (motivated by power and control) rather than a personal problem (based on a persecutor's physical desire or attraction). *See* *Angoucheva v. INS*, 106 F.3d 781, 793 n.2 (7th Cir. 1997) (Rovner, J., concurring) (“Rape and sexual assault are generally understood today. . . as acts of violent aggression that stem from the perpetrator’s power over and desire to harm his victim.”) You may request a copy of an expert declaration by Professor Lemon on file with CGRS for a far more detailed description of this issue (*see supra* note 33).

47. *A-B-*, 27 I. & N. Dec. at 339.
48. *R.R.D. v. Holder*, 746 F.3d 807, 809 (7th Cir. 2014) (“[T]he statute makes eligible a person persecuted because of his membership in a protected category; it does not require that all members of that category suffer the same fate.”)
49. *Sarban*, 658 F.3d at 657.
50. The attorney general states there was “no evidence that [the persecutor] attacked her because he was aware of and hostile to ‘married women in Guatemala who are unable to leave their relationship.’” *A-B-*, 27 I. & N. Dec. at 339.
51. The Ninth Circuit has noted that “persecutors are hardly ‘likely to submit declarations explaining exactly what motivated them to act.’” *Parussimova v. Mukasey*, 555 F.3d 734, 742 (9th Cir. 2009) (quoting *Gafoor v. INS*, 231 F.3d 645, 654 (9th Cir. 2000)); *see also* *INS v. Elias-Zacarias*, 502 U.S. 478, 483 (1992).
52. The attorney general cites to *Zoarab v. Mukasey*, for the conclusion that “[c]ourts have routinely rejected asylum applications grounded in personal disputes.” *A-B-*, 27 I. & N. Dec. at 339 (quoting *Zoarab v. Mukasey*, 524 F.3d 777, 781 (6th Cir. 2008)). The *Zoarab* court however, clearly misstates the nexus requirement in articulating “[i]f the ill-treatment was motivated by something other than one of these five circumstances, then the applicant cannot be considered a refugee for purpose of asylum.” *Id.* at 780.
53. INA § 208(b)(1)(B)(i), 8 U.S.C. § 1158(b)(1)(B)(i).
54. Mixed motives, before and after the REAL ID Act, have been recognized by the courts. *See* *Shaikh v. Holder*, 702 F.3d 897, 902 (7th Cir. 2012) (“Thus, the REAL ID Act modifies our earlier mixed motives cases only to require among that mix of motives a protected ground qualifying as a central reason. Indeed, that ground may be a secondary (or tertiary, etc.) reason and still justify asylum.”); *see also* *Archarya v. Holder*, 761 F.3d 289, 296 (2d Cir. 2014) (noting that in passing the REAL ID Act “Congress evinced an understanding that this language would explicitly guarantee the continued viability of mixed motive claims”); *Madrigal v. Holder*, 716 F.3d 499, 505–06 (9th Cir. 2013) (recognizing that if a “retributory motive exists alongside a protected motive, an applicant need only show that a protected ground is ‘one central reason’”); *Hoque v. Ashcroft*, 367 F.3d 1190, 1198 (9th Cir. 2014) (considering both “political jealousy” and “political opinion” as motives); *Bi Xia Qu v. Holder*, 618 F.3d 602, 608 (6th Cir. 2010) (recognizing that although the applicant was targeted for forced marriage and involuntary servitude in part for financial reasons to repay the girl’s father, her gender within the societal context was nonetheless one central reason for her persecution); *Ndayshimiye v. Attorney Gen. of U.S.*, 557 F.3d 124,



- 129–31 (3d Cir. 2009) (recognizing “Section 208’s use of the phrase ‘one central reason’ rather than ‘the central reason,’ which, . . . was a deliberate change in the drafting of this provision, demonstrates that the mixed-motives analysis should not depend on a hierarchy of motivations in which one is dominant and the rest are subordinate.”); Matter of N-M-, 25 I. & N. Dec. 526, 533 (BIA 2011); Matter of J-B-N- & S-M, 24 I. & N. Dec. 208, 212–13 (BIA 2007).
55. *A-B-*, 27 I. & N. Dec. at 317 (emphasis added).
56. *Id.* at 337 (quoting *Galina v. INS*, 213 F.3d 955, 958 (7th Cir. 2000)).
57. United Nations Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137 [hereinafter 1951 Refugee Convention].
58. The UNHCR addresses the intent of the 1951 Refugee Convention’s drafters to include non-state actors as persecutors in stating: “The *travaux préparatoires* of the Convention also do not indicate that the authors of that instrument intended to require that a well-founded fear of persecution must emanate from the government or those perceived to be acting in its interest. Clearly, the spirit and purposes of the Convention would be contravened and the system for the international protection of refugees would be rendered ineffective if it were to be held that an asylum seeker should be denied needed protection unless a Sta[t]e could be held accountable for the violation of his/her fundamental human rights by a non-governmental actor.” U.N. High Comm’r for Refugees [UNHCR], Agents of Persecution—UNHCR Position (Mar. 14, 1995), [www.refworld.org/docid/3ae6b31da3.html](http://www.refworld.org/docid/3ae6b31da3.html); see also *McMullen*, 17 I. & N. Dec. at 545 (recognizing “unable and unwilling” as the standard before and after the enactment of the 1980 Refugee Act, in stating that “[w]e will therefore require under the new Act, as we did under the old law, that an alien must show either persecution by the government in the country to which he is returnable, or persecution at the hands of an organization or person from which the government cannot or will not protect the alien”); *Matter of S-A-*, 22 I. & N. Dec. 1328, 1335 (BIA 2000) (where the persecutor is a non-government actor, the applicant bears the burden of demonstrating that the government is either unwilling or unable to protect her); *Burbiene v. Holder*, 568 F.3d 251, 255 (1st Cir. 2009); *Paloka v. Holder*, 762 F.3d 191, 195 (2d Cir. 2014); *Garcia v. Attorney Gen. of U.S.*, 665 F.3d 496, 503 (3d Cir. 2011); *Crespin-Valladares v. Holder*, 632 F.3d 117, 128 (4th Cir. 2011); *Tesfamichael v. Gonzales*, 469 F.3d 109, 113 (5th Cir. 2006); *Khalili v. Holder*, 557 F.3d 429, 436 (6th Cir. 2009); *R.R.D. v. Holder*, 746 F.3d 807, 809 (7th Cir. 2014); *Constanza-Martinez v. Holder*, 739 F.3d 1100, 1102 (8th Cir. 2014); *Doe v. Holder*, 736 F.3d 871, 877–78 (9th Cir. 2013); *Karki v. Holder*, 715 F.3d 792, 801 (10th Cir. 2013); *Lopez v. U.S. Attorney Gen.*, 504 F.3d 1341, 1345 (11th Cir. 2007).
59. Under *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944), deference to the agency varies “depend[ing] upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.” Additionally, the Supreme Court has required an agency to provide an adequately reasoned explanation for a departure from previous reasoning in stating, “[s]udden and unexplained change, or change that does not take account of legitimate reliance on prior interpretation, may be arbitrary, capricious [or]
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- an abuse of discretion,” and therefore unworthy of deference. *Smiley v. Citibank* (S.D., N.A.), 517 U.S. 735, 742 (1996) (internal quotation marks and citations omitted); *see also* *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 1000 (2005) (“[T]he Commission is free within the limits of reasoned interpretation to change course if it adequately justifies the change.”). Therefore, the attorney general needed to provide not only a reasoned explanation for his new position, but also a reasoned explanation for why the change was warranted or why the new position he proffers is preferable. He did no such thing in *Matter of A-B* and therefore, very little if any deference should be afforded to his change of mind.
60. *See, e.g.*, *INS v. Cardoza-Fonseca*, 480 U.S. 421, 440 (1987); *Canales-Vargas v. Gonzales*, 441 F.3d 739, 743 (9th Cir. 2006) (“While a well-founded fear must be objectively reasonable, it ‘does not require certainty of persecution.’”).
  61. *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Dec. 10, 1984, G.A. Res. 39/46, Annex, 39 U.N. GAOR Supp. No. 51, U.N. Doc. A/39/51 [hereinafter CAT].
  62. The attorney general’s dicta would raise the standard beyond the “acquiescence” required by the CAT, which clearly articulates a higher standard of government failure to intervene than the INA’s asylum provisions or the 1951 Refugee Convention and related protocols. 8 C.F.R. § 208.18(a)(1); *see also* *Fuentes-Erazo v. Sessions*, 848 F.3d 847, 852 (8th Cir. 2017) (describing the “more onerous” CAT standard for government protection); *Khan v. Holder*, 766 F.3d 689, 698 (7th Cir. 2014) (noting that “unable or unwilling” is “not enough to establish that Khan is likely to be tortured by or with the acquiescence of the Pakistani government”); *Garcia v. Holder*, 746 F.3d 869, 874 (8th Cir. 2014) (“Without more, the inability of Guatemalan police to curtail MS-13 violence does not entitle Somoza to CAT relief.”); *Azanor v. Ashcroft*, 364 F.3d 1013, 1019 (9th Cir. 2004) (noting that while withholding of removal only requires “showing that public officials would be merely unable or unwilling to prevent torture by private parties, INS regulations unequivocally dictate that an alien has no right to withholding of removal under [CAT] absent evidence of public officials’ ‘consent or acquiescence’” (internal citation omitted)); *see also* *Mouawad v. Gonzales*, 485 F.3d 405, 413 (8th Cir. 2007) (noting that CAT imposes a higher standard than “powerlessness” for government protection). In fact, even the heightened CAT standard does not require a government to “condone” a non-state actor’s persecution. *See, e.g.*, *Madrigal v. Holder*, 716 F.3d 499, 509 (9th Cir. 2013) (“Acquiescence . . . does not require that the public official approve of the torture, even implicitly. It is sufficient that the public official be aware that torture of the sort feared by the applicant occurs and remain willfully blind to it.”); *see also* *Ramirez-Mejia v. Lynch*, 794 F.3d 485 (5th Cir. 2015); *Karki v. Holder*, 715 F.3d 792 (10th Cir. 2013); *Suarez-Valenzeula v. Holder*, 714 F.3d 241 (4th Cir. 2013); *Khrystodorov v. Mukasey*, 551 F.3d 775 (8th Cir. 2008); *Silva-Rengifo v. U.S. Attorney Gen.*, 473 F.3d 58 (3d Cir. 2007); *Amir v. Gonzales*, 467 F.3d 921 (6th Cir. 2006); *Khouzam v. Ashcroft*, 351 F.3d 161 (2d Cir. 2004.).
  63. *See, e.g.*, *Galina v. INS*, 213 F.3d 955, 958 (7th Cir. 2000); *Hor v. Gonzales*, 400 F.3d 482, 502 (7th Cir. 2005).

64. See, e.g., *Sarban*, 658 F.3d at 657–60; *Fiadjoe v. Attorney Gen. of U.S.*, 411 F.3d 135, 160–61 (3d Cir. 2005).
  65. *A-B*, 27 I. & N. Dec. at 337.
  66. *Afriyie v. Holder*, 613 F.3d 924, 931 (9th Cir. 2010).
  67. *A-B*, 27 I. & N. Dec. at 344.
  68. 8 C.F.R. § 1208.13(b)(1)(i)(B) (“The applicant could avoid future persecution by relocating to another part of the applicant’s country of nationality . . . and under all the circumstances, it would be reasonable to expect the applicant to do so.” (emphasis added)).
  69. *A-B*, 27 I. & N. Dec. at 345.
  70. 8 C.F.R. § 1208.13(b)(3) (emphasis added).
  71. For example, it has been noted that in El Salvador, Honduras, and Guatemala, the Northern Triangle countries of Central America: “[U]nless women have an intact family network in their new community that is able and willing to provide physical security, economic support, and housing, relocating to another area to escape threats and violence cannot generally be considered a viable alternative.” Thomas Boerman & Jennifer Knapp, *Gang Culture and Violence Against Women in El Salvador, Honduras, Guatemala*, 17-03 IMMIGRATION BRIEFINGS 1, 13 (Mar. 2017). Boerman and Knapp further state women living on their own in a new part of the country may be “at best, trading the risk in the home community for similar risks in the new area as they are immediately recognized as ‘unprotected’ females and at risk from gangs, sexual predators, abusive police, and, potentially, labor market abusers.” *Id.* at 14.
  72. *A-B*, 27 I. & N. Dec. at 345 n.12.
  73. *Matter of Pula*, 19 I. & N. Dec. 467, 473 (BIA 1987).
  74. *Id.*
  75. *Id.* at 474; see also *Gulla v. Gonzales*, 498 F.3d 911, 916 (9th Cir. 2007) (“It is rare to find a case where an [immigration judge] finds a petitioner statutorily eligible for asylum and credible, yet exercises his discretion to deny relief.”).
  76. *A-B*, 27 I. & N. Dec. at 345.
  77. News Release, U.S. Dep’t of Justice, Attorney General Sessions Delivers Remarks to the Executive Office for Immigration Review Legal Training Program (June 11, 2018) (prepared text of remarks by Attorney General Jeff Sessions), [www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-executive-office-immigration-review-legal](http://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-executive-office-immigration-review-legal).
  78. INA § 208(a), 8 U.S.C. § 1158(a).
  79. *Mamouzian v. Ashcroft*, 390 F.3d 1129, 1138 (9th Cir. 2004) (“When a petitioner who fears deportation to his country of origin uses false documentation or makes false statements in order to gain entry to a safe haven, that deception does not detract from but supports his claim of fear of persecution.” (internal quotation marks omitted)).
  80. Dara Lind, *Exclusive: How Asylum Officers Are Being Told to Implement Sessions’s New Rules*, Vox (June 19, 2018), [www.vox.com/platform/amp/policy-and-politics/2018/6/19/17476662/asylum-border-sessions?](http://www.vox.com/platform/amp/policy-and-politics/2018/6/19/17476662/asylum-border-sessions?)
  81. U.S. Dep’t of Homeland Sec., USCIS Policy Memo. No. PM-602-0162, Guidance for Processing Reasonable Fear, Credible Fear, Asylum and Refugee Claims in Accordance with *Matter of A-B* (July 11, 2018) [hereinafter USCIS Guidance] [www.uscis.gov/sites/](http://www.uscis.gov/sites/)
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- default/files/USCIS/Laws/Memoranda/2018/2018-06-18-PM-602-0162-USCIS-Memorandum-Matter-of-A-B.pdf. Typically, USCIS Asylum Division guidance is drafted within that office and approved by the Chief of the Asylum Division. Curiously however, this guidance has no “FROM” field or signature, and identifies no author.
82. *Zhang v. Holder*, 585 F.3d 715, 724 (2d Cir. 2009) (internal quotation marks omitted) (“[C]redible fear interviews are not designed to elicit all the details of an alien’s claim . . .”); *see also, e.g.*, *Ferreira v. Lynch*, 831 F.3d 803, 809 (7th Cir. 2016) (per curiam) (“There may be areas of the individual’s claim that were not explored or documented for purposes of this threshold screening.”).
83. *See* Complaint for Declaratory and Injunctive Relief, *Grace v. Sessions*, No. 18-cv-01853 (D.D.C.) (filed Aug. 7, 2018, by the ACLU and CGRS), [www.aclu.org/legal-document/grace-v-sessions-complaint](http://www.aclu.org/legal-document/grace-v-sessions-complaint). The Tahirih Justice Center filed an amicus brief in this case. *See* Brief of Tahirih Justice Ctr. et al. as Amici Curiae in Support of Plaintiffs’ Opposition and Motion for Summary Judgment, *Grace v. Sessions*, No. 18-cv-01853 (D.D.C.) (filed Sept. 28, 2018), [www.tahirih.org/pubs/amicus-brief-filed-in-u-s-district-court-for-the-district-of-columbia-case-grace-v-sessions/](http://www.tahirih.org/pubs/amicus-brief-filed-in-u-s-district-court-for-the-district-of-columbia-case-grace-v-sessions/).
84. USCIS Guidance stated that “[i]n general . . . 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.” USCIS Guidance, *supra*, note 81, at 6. It further instructed asylum officers 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” and that “[t]he applicant must show that the government condoned the behavior or demonstrated a complete helplessness to protect the victim.” *Id.*
85. The new policy asserts that for any statement contained within the *Matter of A-B* decision, the attorney general’s opinion is controlling regardless of any other federal court decision. Such a contention, runs contrary to our entire constitutional scheme, which gives the Judiciary (and not the attorney general) the authority to interpret the law. Furthermore, the credible fear interview is meant to function as a threshold screening and not as a final determination of an applicant’s eligibility for asylum. Because asylum seekers will ultimately present their asylum claims before the immigration court with jurisdiction over their place of residence, as opposed to at the border, it is impossible to know at the point of the credible fear interview, which circuit court’s precedence will ultimately apply to that individual’s claim. It therefore makes sense to apply the “interpretation most favorable to the applicant” when determining whether she meets the “credible fear” standard. Readers should refer to Refugee, Asylum, and International Operations Directorate Officer Training Asylum Division Officer Training Course [hereinafter RAO Training Course] lesson plan overviews. *See* AILA Doc. No. 17022435, RAO Training Course, Lesson Plan Overview: Credible Fear of Persecution and Torture Determinations, at 17 (Feb. 13, 2017), [www.aila.org/infonet/raio-and-asylum-division-officer-training-course](http://www.aila.org/infonet/raio-and-asylum-division-officer-training-course); RAO Training Course, Lesson Plan Overview: Credible Fear, at 16 (Feb. 28, 2014), <http://cmsny.org/wp-content/uploads/credible-fear-of-persecution-and-torture.pdf>; RAO Training Course, Lesson Plan

- Overview: Credible Fear, at 14 (Apr. 14, 2006), [www.virginiaraymond.com/wp-content/uploads/2014/11/Credible-Fear-31augu2006-USCIS.pdf](http://www.virginiaraymond.com/wp-content/uploads/2014/11/Credible-Fear-31augu2006-USCIS.pdf) (same).
86. Article 33(1) of the 1951 Refugee Convention provides: “No Contracting State shall expel or return (‘refouler’) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.” The United Nations High Commissioner for Refugees, the U.N. body tasked with upholding the convention, has stated: “This provision constitutes one of the basic Articles of the 1951 [Refugee] Convention, to which no reservations are permitted. It is also an obligation under the 1967 Protocol by virtue of Article I(1) of that instrument. Unlike various other provisions in the Convention, its application is not dependent on the lawful residence of a refugee in the territory of a Contracting State.” UNHCR, Note on Non-Refoulement (Submitted by the High Commissioner) EC/SCP/2, at 4 (Aug. 23, 1977), [www.unhcr.org/afr/excom/scip/3ae68ccd10/note-non-refoulement-submitted-high-commissioner.html](http://www.unhcr.org/afr/excom/scip/3ae68ccd10/note-non-refoulement-submitted-high-commissioner.html).
  87. To report outcomes or adjudication trends in cases impacted by *Matter of A-B* at the asylum office, immigration court, or BIA level, or to flag cases pending in the U.S. courts of appeals that may raise challenges to *A-B*, please follow the instructions on CGRS’s website. *See A-B Tracking*, CTR. FOR GENDER & REFUGEE STUDIES, <https://cgrs.uchastings.edu/A-B-Tracking> (last visited Oct. 5, 2018).
  88. Note that a July 2018 guidance memo by the Immigration and Customs Enforcement (ICE) Office of Principal Legal Advisory (OPLA) directs DHS trial attorneys that they should not take a position on the cognizability of social groups defined by gender plus nationality alone (“gender alone,” or “women of [country]”) without consulting headquarters or absent further guidance, despite courts of appeals decisions suggesting that such social groups may be cognizable (*see, e.g.*, *Perdomo v. Holder*, 611 F.3d 662 (2010); *Hassan v. Gonzales*, 484 F.3d 513 (8th Cir. 2007)). ICE Memo. from Tracy Short, Principal Legal Advisor, to all OPLA Attorneys, Litigating Domestic Violence-Based Persecution Claims Following *Matter of A-B* (July 11, 2018) (AILA Doc. No. 18071232 (July 11, 2018), [www.aila.org/infonet/ice-guidance-on-litigating-domestic-violence](http://www.aila.org/infonet/ice-guidance-on-litigating-domestic-violence)).
  89. *See, e.g.*, *Martinez-Perez v. Sessions*, 897 F.3d 33, 40 n.6 (1st Cir. 2018); *S.E.R.L. v. Sessions*, 894 F.3d 535 (3d Cir. 2018).
  90. *Silvestre-Mendoza v. Sessions*, 729 F. App’x 597, 598 (9th Cir. 2018).
  91. *Id.* at 598 n.4 (emphasis added).
  92. *Padilla-Maldonado v. U.S. Attorney Gen.*, \_\_\_ F. App’x \_\_\_, 2018 WL 4896385, at \*5 (3d Cir. Oct. 9, 2018).
  93. *Juan-Pedro v. Sessions*, \_\_\_ F. App’x \_\_\_, 2018 WL 3202953, at \*3–5 (6th Cir. June 29, 2018).
  94. *W.G.A. v. Sessions*, 900 F.3d 957, 967 (7th Cir. 2018).
  95. *Rosales Justo v. Sessions*, 895 F.3d 154, 166 n.9 (1st Cir. 2018).
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