IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

GRACE, ET AL.,

Plaintiffs-Appellees,

—v.—

WILLIAM BARR, ATTORNEY GENERAL OF THE UNITED STATES, ET AL.,

NO. 19-5013

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR AMICUS CURIAE IMMIGRATION REFORM LAW INSTITUTE IN SUPPORT OF DEFENDANTS-APPELLANTS

Michael M. Hethmon
(DC Circuit Bar No. 56265)
Christopher J. Hajec (DC Bar No. 492551)
Immigration Reform Law Institute
25 Massachusetts Ave. NW, Suite 335
Washington, DC 20001
(202) 232-5590
mhethmon@irli.org
chajec@irli.org
Attorneys for *Amicus Curiae*
Immigration Reform Law Institute

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici

Twelve anonymous aliens were plaintiffs in the underlying district court case, and are Appellees in this Court. Six of those plaintiffs were minors accompanying a parent-plaintiff. Matthew G. Whitaker, Acting Attorney General of the United States, in his Official Capacity; Kirstjen M. Nielsen, Secretary of the Department of Homeland Security, in her Official Capacity; L. Francis Cissna, Director of United States Citizenship and Immigration Services, in his Official Capacity; and James McHenry, Director of the Executive Office for Immigration Review, in his Official Capacity, were defendants in the district court and are Appellants in this Court, with William P. Barr, Attorney General, substituted automatically under Fed. R. App. P. 43(c) as Appellant.

Amici curiae in the district court were the UNCHR, Immigration Law Professors, Tahrih Justice Center, the states of Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont, Virginia, and Washington, and the District of Columbia.

B. Rulings Under Review

Defendants seek review of the district court's December 19, 2018, Judge Emmet G. Sullivan, Order and Opinion, Docket No. 105 and 106, *Grace, et al. v. Whitaker, et al.*, 1:18-cv-01853-EGS.

C. Related Cases

This case has not previously been before this Court.

DISCLOSURE STATEMENT

The Immigration Reform Law Institute is a 501(c)(3) nonprofit corporation. It does not have a parent corporation and does not issue stock.

All parties have consented to the filing of this *amicus curiae* brief. No party or party's counsel authored any part of this brief. No person or entity, other than *amicus*, its members, or its counsel, has made a monetary contribution to its preparation or submission.

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GLOSSARY OF ABBREVIATIONS

APA	Administrative Procedure Act
BIA	Board of Immigration Appeals
ECF	Docket Entry for District Court
INA	Immigration and Nationality Act
IRLI	Immigration Reform Law Institute
Op'n	District Court's Opinion on Summary Judgment, ECF No. 106
Order	District Court's Order Granting in Part and Denying in Part Cross-Motions for Summary Judgment, ECF No. 105
UNHCR	United Nations High Commission on Refugees

IDENTITY OF *AMICUS CURIAE*

The Immigration Reform Law Institute is a nonprofit 501(c)(3) public interest law firm dedicated to litigating immigration-related cases in the interests of United States citizens, and assisting courts in understanding federal immigration law. IRLI has litigated or filed *amicus curiae* briefs in a wide variety of cases and federal venues. For more than twenty years, the Board of Immigration Appeals has solicited supplementary briefing prepared by IRLI staff.

SUMMARY OF THE ARGUMENT

The district court below ruled that

> 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; [and] (3) the circularity standard as reflected in the Policy Memorandum[.]

Appellants' Appendix, Op'n at 92 (ECF No. 106).

These rulings are erroneous for at least two reasons. First, the district court treated the Attorney General as having propounded a general rule pertaining to particular social groups, when in fact he had not done so, but only recognized a strong presumption. Because the relevant statute does not limit the Attorney General's discretion to recognize such presumptions in an adjudication such as

Matter of A- B-, 27 I. & N. Dec. 316 (A.G. 2018) ("*Matter of A- B-*") the district court should have deferred to this presumption.

Second, even if the district court was correct that the Attorney General propounded a general rule pertaining to particular social groups, the district court relied on its own impermissible treatment of the United Nations' guidance on implementation of the Protocol, as "codified" by the UNHCR in its Handbook on Procedures and Criteria for Determining Refugee Status (Geneva 1992) ("Handbook") as binding in reaching all three of the rulings above. The Handbook is no more than persuasive authority. It is not U.S. law, and is binding on no agency or court in this country. It thus cannot be used, as the district court used it, to find agency action either "contrary to law" or "arbitrary and capricious."

ARGUMENT

I. *Matter of A-B-* was an adjudication by the Attorney General recognizing a strong presumption—not a general rule—against finding that domestic and gang-related criminal violence constitutes persecution.

The district court mischaracterized the adjudication of *Matter of A-B-* as unlawful rulemaking. *Matter of A-B-* explicitly clarified that it applied only a strong presumption to guide future adjudications, and did not create a regulatory rule:

> While I do not decide that violence inflicted by non-governmental actors may never serve as the basis for an asylum or withholding application based on membership in a particular social group, *in practice such claims are unlikely to satisfy the statutory grounds for*

> *proving group persecution* that the government is unable or unwilling to address.

27 I. & N. Dec. at 320 (emphasis added). The district court arbitrarily rejected this determination, holding that "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." Op'n at 116 (ECF No. 106).

Generally, an agency "is free to change its mind so long as it supplies a reasoned analysis," *Nat'l Cable & Telecomms. Ass'n v. FCC*, 567 F.3d 659, 667 (D.C. Cir. 2009), and "is not precluded from announcing new principles in an adjudicative proceeding," *Miguel-Miguel v. Gonzales*, 500 F.3d 941, 950 (9th Cir. 2011), as "the choice between rulemaking and adjudication lies in the first instance within the [agency's] discretion." *Id.* (citing *NLRB v. Bell Aero. Co.*, 416 U.S. 267, 294 (1974)). In immigration cases like *Matter of A-B-*, this principle operates through statutorily delegated authority that permits the Attorney General to overrule the BIA by issuing a published opinion. 8 U.S.C. § 103(g); 8 C.F.R. § 1003.1(g)-(h).

Ignoring both doctrine and statute, the district court dismissed the Attorney General's statement that *Matter of A-B-* "was a decision about petitions for asylum under section 1158," and "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."

Op'n at 115-16 (ECF No. 106). According to the district court, *Matter of A-B-* (1) impermissibly "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,'" *Grace* at 125 (quoting 27 I. & N. Dec. at 319); (2) "was a 'precedential decision' that 'generally, claims by aliens pertaining to domestic violence or gang violence perpetrated by non-governmental actors will not qualify for asylum,'" *id*. at 126; and (3) was implemented by a "Policy Memorandum [that] also makes clear that the sweeping statements in *Matter of A-B-* must be applied to credible fear determinations … based on membership in a particular social group," where "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.* (citing Policy Memorandum, ECF No. 100 at 12).

The district court's analysis repeats an error that was rejected by the Ninth Circuit when it considered particularly serious crimes that disqualify an alien from eligibility for withholding of removal. *Miguel-Miguel*, 500 F.3d at 949. In 2002, the Attorney General had instructed the BIA presumptively to treat all drug trafficking offenses as particularly serious crimes under 8 U.S.C § 1231(b)(3)(B). *In re Y-L-*, 23 I. & N. Dec. 270 (B.I.A. 2002). The Attorney General stated that his decision did not create a *per se* rule:

> I do not consider it necessary . . . to exclude entirely the possibility of the very rare case where an alien may be able to demonstrate extraordinary and compelling circumstances that justify treating a particular drug trafficking crime as falling short of [being a particularly serious crime].

Id. at 276. The Ninth Circuit agreed, presuming that "*Y-L-* will be interpreted consistent with this statement and there will be some cases in which its exception applies. . . . Thus, *Y-L- creates a strong presumption, not a per se rule*." *Miguel-Miguel*, 500 F.3d at 947 (emphasis added). Citing *INS v. Aguirre-Aguirre*, 526 U.S. 415, 424 (1999), the Ninth Circuit "afford[ed] the Attorney General's interpretation deference," because it determined that the "statute is silent or ambiguous with respect to the Attorney General's authority to create strong presumptions with regard to it," and that the Attorney General's presumption was a permissible construction of the statute. *Id.*at 947-48.

The Ninth Circuit's holding—that adjudicatory creation of a strong presumption was permissible—is directly relevant here. Every asylum applicant bears the burden to "satisfy the trier of fact that the applicant's testimony is credible, is persuasive and refers to specific facts sufficient to demonstrate that the applicant is a refugee." 8 U.S.C. § 1158(B)(1), *see* 8 C.F.R § 208.13(a). Even under the expedited removal statute, the alien in a credible fear interview must still convince the asylum officer that "there is a significant possibility, taking into account the credibility of the statements made by the alien . . . and other facts known to the

officer, that the alien could establish eligibility for asylum . . . .” 8 U.S.C. § 1225(b)(1)(B)(v); *see also* 8 C.F.R. § 208.30(e)(3).

The scope of “significant possibility,” the undefined statutory standard for a finding of credible fear, is fully amenable to presumptions created by the Attorney General for individualized adjudications. The guidance in *A-B-* merely instructs the asylum officer to “analyze the requirements” for membership in a particular social group and “factor the standards explained in *Matter of A-B-* into their [credible fear] determination.” *Grace*, 344 F. Supp. at 125 (citing 27 I. & N. Dec. at 319). “Although there may be exceptional circumstances when victims of private criminal activity could meet these requirements,” the Attorney General clarified, “they must satisfy established standards when seeking asylum.” *Id*. at 317.

These formulations are redolent of a rebuttable presumption—not a *bona fide* per se rule. They do not foreclose eligibility, but only clarify that the burden of persuasion is on the applicant. Nowhere in the texts of the asylum and expedited removal statutes and their associated regulations is there any indication that the Attorney General may not create a strong presumption that claims of membership in a particular social group based on domestic or gang-related violence do not persuasively demonstrate that the applicant is a refugee—to include situations where the applicant is “unable to leave” the perpetrator of criminal domestic violence. And, for the reasons stated below, this construction of the statute is permissible.

II. Thirty-five years of Supreme Court review make clear that the United States is not bound by the text of the U.N. Protocol nor its "codification" in the UNHCR Handbook.

In a striking parallel to the instant case, the appellant in *Miguel-Miguel* argued that the Attorney General's adjudicatory statement of policy in *In re Y-L-* (that drug offenses bar eligibility for asylum because they are particularly serious crimes)

> *conflicts with* [the Handbook]. The Handbook states that refugees may be returned to countries in which they face persecution only in "extreme cases," and suggests that a "serious" crime must be "a capital crime or a very grave punishable act."

Miguel-Miguel, 500 F.3d at 948 (quoting the Handbook at 154-55) (emphasis added).

The Ninth Circuit disagreed. "Admittedly, the creation of a strong presumption . . . is in tension with the Handbook's definition." *Id.* at 949 (citing *INS v. Cardoza-Fonseca*, 480 U.S. 421, 439 n.22 (1987) (stating that the Handbook provides significant guidance in construing the Protocol, to which Congress sought to conform)). Unlike the district court below, the Ninth Circuit correctly followed strong and still controlling precedent to hold that the Handbook—even as "persuasive authority"—"is *not binding on the Attorney General, the BIA, or United States courts*." *Id.* (citing *Aguirre-Aguirre,* 526 U.S. at 427) (emphasis added). The Ninth Circuit concluded:

> If the Attorney General's interpretation is permissible in light of the statute's text, structure and purpose, we must defer under *Chevron* to

> the Attorney General's interpretation *even if it is in tension with the UNHCR Handbook*."

Miguel-Miguel, 500 F.3d at 949 (emphasis added).

Similarly, even if it were true that *Matter of A-B-* construed these three policies so that they are "in tension" or "in conflict" with UNHCR doctrine, that conclusion cannot render agency action "arbitrary, capricious, . . . or otherwise not in accordance with law" under 5 U.S.C. § 706 (2)(A).

This Court should adopt the reasoning in *Miguel-Miguel* and overrule the district court's extreme deference to the highly relaxed United Nations standards for classification as a refugee. The district court ignored decades of Supreme Court deference to the generally more restrictive views of the Attorney General. Since enactment of the United States Refugee Act of 1980, P.L. 96-212, 94 Stat. 102 ("Refugee Act"), the Supreme Court has reviewed at least six cases where UNHCR has submitted *amicus* briefs arguing that its interpretations of the Convention and Protocol in the UNHCR Handbook were controlling because Congress had incorporated them into U.S. law. These decisions affirm that UNHCR standards are never binding on federal courts and agencies, and are due no deference beyond any inherent persuasiveness. The district court memorandum arbitrarily considered only the second of these cases, *Cardoza–Fonseca*, a doctrinal outlier.

Shortly after passage of the Refugee Act, *INS v. Stevic* reviewed whether Congress had intended, in 1980, to alter the evidentiary standard required of asylum

applicants in the absence of express language in that Act. 467 U.S. 407, 421 (1984). Relying in part on the UNHCR Handbook, the Second Circuit had found that the "well-founded fear of persecution" standard in the Protocol was a less stringent standard than "clear probability," the U.S. statutory standard prior to passage of the Act. *Stevic v. Sava*, 678 F.2d 401, 405 (2d Cir. 1982). As a Supreme Court *amicus*, UNHCR argued that Congress intended to adopt the Convention's definition, that is, that "well-founded fear" required only a subjective fear that is reasonable. *Stevic*, *Amicus* Brief of UNHCR at 8, 12.

The Supreme Court found that "President [Johnson] and the Senate believed that the Protocol was largely consistent with existing law. There are many statements to that effect in the legislative history of the accession to the Protocol." 467 U.S. at 417-18 (citations omitted). Requesting Congressional accession to the Protocol, President Johnson explained that the primary goal was "acceptance of humane standards *in other states* whose treatment of refugees is less liberal . . . [e]ven though the United States *already meets the standards of the Protocol*…." *Ming v. Marks*, 367 F. Supp. 673, 678 (S.D.N.Y. 1973) (citing S. Exec. Rep. No. 14, 90th Cong., 2d Sess. at 6, 7, VII (1967)) (emphasis added).

Congress "believed that apparent differences between the Protocol and existing statutory law *could be reconciled by the Attorney General in administration and did not require any modification of statutory language*." 467 U.S. at 418

(emphasis added). The Refugee Act had only "regularized and formalized the policies and practices that have been followed in recent years." *Id.* at 426 (quoting H.R. Rep. No. 96-608, at 10 (1979)). This legislative history helped persuade the Court to overrule the Second Circuit and apply the higher standard from U.S. law to withholding of deportation adjudications, UNHCR's contrary views notwithstanding.

This doctrine of no mandatory deference has only become more established over the past forty years. In *Cardoza–Fonseca*, 480 U.S. 421 (1987), the Court reviewed the standard of proof for asylum. As in *Stevic*, UNHCR submitted an *amicus* brief, arguing that Congress had adopted the Convention's definition and that UNHCR guidelines are the international standard for interpreting the definition of "well-founded fear of persecution," which UNHCR interprets as meaning a reasonably held subjective fear. While the Supreme Court's holding in this one case was consistent with the UNHCR recommendation—the Court distinguished *Stevic* and cited the UNHCR Handbook as an analytical guide—the Court did not hold that the UNHCR position was controlling. 480 U.S. at 436-440. After stating that the Handbook was not legally binding on U.S. agencies or courts, the Court in *dicta* equivocated that it still "provides significant guidance in construing the Protocol, to which Congress sought to conform," noting that the Handbook was "widely

considered useful in giving content to the obligations that the Protocol establishes." *Id.* at 439 n. 22.

Since 1987, the Court has clarified that where the UNHCR's "significant guidance" conflicted with precedential determinations of the Attorney General, the latter controls. *INS v. Elias-Zacarias*, 502 U.S. 478 (1992), addressed the core definition of persecution, as it applies to the motive that a persecutor of an applicant for refugee status must possess. UNHCR argued that resistance to forced recruitment by a persecutor amounted to the manifestation of a political opinion. *Amicus* Brief of UNHCR at 11-19. But in denying the asylum claim, the Court did not consider, or even mention, the UNHCR or mandates of international law. 502 U.S. at 479-484.

That same year, UNHCR argued that the U.S. exercise of discretion to *refouler* an illegally present convicted IRA terrorist back to prison in the United Kingdom without an asylum hearing conflicted with Convention protections. *INS v. Doherty*, 502 U.S. 314 (1992). INS appealed a Second Circuit decision holding that when enacting the Refugee Act "Congress intended foreign policy interests to play no role in asylum determinations." *Id.* at 321. The Supreme Court ignored the UNHCR interpretation of the political crime exception to deportation, which had supported the Second Circuit's analysis, and upheld the Attorney General's action as an exercise of his "broad discretion" as "the final administrative authority in construing the regulations, and in deciding questions under them." *Id.* at 327.

The Court next reviewed the extraterritorial scope of U.S. asylum obligations under the Convention. *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155 (1993). Convention Article 33.1 states may not "expel or return (*refouler*) a refugee," while under U.S. immigration law, the "Attorney General shall not deport or return any alien"; *see* former 8 U.S.C. § 1253(h)(i) (repealed 1996). *Amicus* UNHCR argued that the Convention's text prohibited the interception and repatriation of asylum seekers without a hearing, even from outside the borders of a signatory state. Nonetheless, after a detailed analysis of the Convention, the Court agreed with the government that the prohibition on *refoulement* did not apply to refugees located on the high seas. *Id.* at 187-188.

The two most recent of these Supreme Court decisions have moved beyond ignoring UNHCR policy and articulated explicit cautions against presumptive deference to UNHCR interpretations of the Convention. *Aguirre-Aguirre* reviewed the scope of the "serious nonpolitical crime" bar to U.S. asylum law. 526 U.S. 414 (1999). The Ninth Circuit had adopted the UNHCR's narrow construction of the bar, relying on the Handbook as "an authoritative commentary on the Convention and Protocol." *Aguirre-Aguirre v. INS*, 121 F.3d 521, 523 (9th Cir. 1997). *Amicus* UNHCR argued in the Supreme Court that the UNHCR Handbook treats a crime with political objectives as nonpolitical only if the seriousness of the crime was

disproportionate to the political objectives, and requires a balancing test. *Amicus* Brief of UNHCR at 16, 25, 27-28 (citing UNHCR Handbook ¶¶ 152, 156, 161).

The Supreme Court reversed, finding that the Ninth Circuit erred as a matter of statutory construction in requiring the BIA to engage in balancing a serious crime against possible future persecution. *Aguirre-Aguirre*, 526 U.S. at 425. The "significant guidance" mantra—found only in *Cardoza-Fonseca* and invoked by the district court in this case—is replaced with much less deferential language: "We agree that the Handbook provides *some* guidance in construing the provisions added to the INA by the Refugee Act." *Id.* at 427 (emphasis added). "The [UNHCR] Handbook may be *a useful interpretative aid*, but it is *not binding* on the Attorney General, the BIA, or United States courts." *Id.* at 427-428 (emphases added).

> We do not suggest, of course, that the explanation in the U.N. Handbook *has the force of law* or in any way *binds the INS* . . . Indeed, the Handbook itself disclaims such force, explaining that "the determination of refugee status under the 1951 Convention and the 1967 Protocol . . . *is incumbent upon the Contracting State* in whose territory the refugee finds himself."

Id. at 428 (citing *Cardoza-Fonseca*, 480 U.S. at 439, n. 22 (quoting UNHCR Handbook, at 1, P(ii)(1987)) (emphases added).

Most recently, *Negusie v. Holder*, 555 U.S. 511 (2009), reviewed the so-called "persecutor bar" in the Refugee Act, as codified at 8 U.S.C. § 1101(a)(42). *Amicus* UNHCR argued that this INA provision was to be interpreted using the Convention's Article I(F)(a) exclusion from protection of aliens who have "committed a crime

against peace, a war crime, or a crime against humanity." *Amicus* Brief UNHCR at 11. The Supreme Court found the Refugee Act ambiguous as to the role of duress and thus, as in *Aguirre-Aguirre*, gave deference to the BIA's construction, not UNHCR doctrine: "courts are neither policy-makers nor diplomats" and "are ill-suited for those roles . . . . Immigration policy properly resides with the elected branches of government." *Negusie*, 555 U.S. at 516-17.

If the Handbook is merely "a useful interpretive aid" and "not binding" on the Attorney General or the courts, it follows that it is also not the "law" for purposes of an APA injunction. *See* 5 U.S.C. § 706(2)(A) ("setting aside agency action … not in accordance with law").

The same is true for the Protocol. It is well-settled that the Protocol does not "confer any rights beyond those granted by implementing domestic legislation." *Jaadan v. Gonzales*, 211 Fed. Appx. 422, 431-32 (6th Cir. 2006); *see also United States v. Velasquez-Luna*, 2019 U.S. Dist. LEXIS 15647,*2-3 (S.D. Cal. 2019) ("However, the Protocol is not self-executing.") citing *Khan v. Holder*, 584 F.3d 773, 783 (9th Cir. 2009); *Reyes-Sanchez v. Ashcroft*, 261 F. Supp. 2d 276, 288-89 (S.D.N.Y. 2003) (same).

Appellees have not even attempted to plead the dubious proposition that Protocol protections would ever apply to their illegal entries from Mexico as non-Mexican applicants. *See United States v. Guevara-Medina*, 2018 U.S. Dist. LEXIS

143587, *4-5 (S.D. Cal. 2018) (Article 31 applies only when a bona fide refugee arrives directly from the territory from which he fled, presents without delay to the authorities; and otherwise has good cause for unlawful entry) (citations omitted); *Ming v. Marks*, 367 F. Supp. at 676 (Article 32 *nonrefoulement* only protects refugees lawfully present in U.S); *Haitian Refugee Ctr., Inc. v. Baker*, 949 F.2d 1109, 1110 (11th Cir. 1991) (applicants brought by sea lacked "enforceable rights" to claim asylum under Article 33 (definition of a refugee) notwithstanding nearly identical language in the INA.).

III. Absent the district court's impermissible reliance on the Handbook, its arbitrary and capricious rulings were without basis.

Again and again, the district court's treatment of the Handbook as binding fatally infected its arbitrary and capricious analyses. Without the Handbook, the district court's rulings that *Matter of A- B-* was not a demonstrable product of reasoned decision-making become untenable.

A. *Matter of A-B-*'s criteria for persecution by non-governmental actors are the products of reasoned decision-making.

The district court erred in treating the UNHCR's evolving interpretation of "persecution" in its Handbook as an instance of *Chevron* step one unambiguity. The district court's justification for its permanent injunction of "the government's new interpretation" of fear of persecution by private actors as "inconsistent with the INA…" wrongly states that the definitions of "persecution" and "well-founded fear

of persecution," are unambiguous for *Chevron* step one purposes and "… must fail at *Chevron* step one." Op'n. at 128 ("Congress adopted the 'unable or unwilling' standard [for particular social group persecution by private actors] when it used the word 'persecution' in the Refugee Act.") (citing *Matter of Acosta*, 19 I. & N. Dec. 211, 222 (B.I.A. 1985)).

That justification directly conflicts with Supreme Court doctrine. In *Stevic*, a pre-*Acosta* decision, the Supreme Court "observe[d] that the Refugee Act itself *does not contain any definition* of the "well-founded fear of persecution language contained in [INA] § 101(a)(42)(A)." (emphasis added). After *Matter of Acosta*, the Supreme Court again rejected the claim that the definition was ever so unambiguous under U.S. law as to strip the agency of primary responsibility for its construction:

> There is obviously some ambiguity in a term like "well-founded fear" which can only be given concrete meaning through a process of case-by-case adjudication. In that process of filling any gap left, implicitly or explicitly, by Congress, the courts must respect the interpretation of the agency to which Congress has delegated the responsibility for administering the statutory program.

Cardoza-Fonseca, 480 U.S. at 448 (internal quotation marks omitted).

That error tainted the district court's decree that UNHCR criteria control in credible fear determinations, by circumventing the significantly different standard actually adopted by Congress. *See* Appellants' Appendix, Order at 2 (ECF No. 105) (enjoining "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 . . .").

The asserted 5 U.S.C. § 706(2)(A) APA violation was that this determination was "inconsistent with Congress' intent to bring United States refugee law into conformance with the [Protocol]," Op'n. at 127, "fundamentally inconsistent with the low screening standard that Congress established," *id*. at 127, and thus "impermissibly heightens the standard at the credible fear stage…." *Id*.

In reality, Congress intentionally enacted a higher and more restrictive evidentiary standard for credible fear interviews than that promulgated by UNHCR. Whatever the legislative intent may have been in 1980, it changed after 1996 when Congress revisited problems with the asylum system. *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996, P. L. No. 104-208, § 604, 110 Stat. 3009 (1996) ("IIRIRA"), as codified at 8 U.S.C. §§ 1101, 1221, 1324, (1996). New IIRIRA provisions included expedited removal, in particular the credible fear screening provisions thereof. As amended, the INA adopted the more demanding "significant possibility" standard, not the UNHCR alternative of a "not manifestly unfounded" claim of credible fear. *See* 142 Cong. Rec. S11491 (Sept. 27, 1996) (statement of Sen. Hatch).

The differences between the UNHCR and U.S. standards are important. The UNHCR's credibility requirement is a "claim which is not clearly fraudulent." Mark

Hatfield, U.S. Comm'n on Int'l Religious Freedom, *Study on Asylum Seekers in Expedited Removal: Report on Credible Fear Determinations*, 170 (vol. 2 2005) ("USCIRF Report Vol. 2"). To meet the UNHCR "not manifestly unfounded" standard, an applicant in a contracting state that has adopted the U.N. standard would only need to prove that his or her claim is not clearly a lie. *Id.*

By contrast, the U.S. statute requires

> 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 [INA] Section 208.

8 U.S.C. § 1225(b)(1(B)(v). The U.S. standard requires applicants to prove both that they were not lying and that they have a substantial and realistic possibility of prevailing on an asylum claim. USCIS - Refugee, Asylum and Int'l Operations Directorate Officer Training, Asylum Division Officer Training Course: Reasonable Fear of Persecution and Torture Determinations 17 (Feb. 13, 2017), https://www.uscis.gov/sites/default/files/files/nativedocuments/Reasonable_Fear_Asylum_Lesson_Plan.pdf ("Credible Fear training").

A credible fear claim under the UNHCR Handbook must merely "be related to criteria for refugee status," while, by contrast, the U.S. standard requires a "significant possibility the applicant can establish a nexus to a protected ground or . . . to torture." USCIRF Report Vol. 2 170.

In the REAL ID Act of 2005, Congress again moved beyond the 1980 formulations to clarify that credible fear claims must be primarily and directly related to one of the protected Convention grounds. 8 U.S.C. § 1158(b)(1)(B)(iii) (providing that such a ground must be a "central reason"). Congress intended, *inter alia*, to "tighten the asylum process," which the sponsors believed had been "abused by terrorists" like those in the 9/11 attacks. 151 Cong. Rec. H454 (Feb. 9, 2005) (statement of Rep. Sensenbrenner). These more demanding standards, absent from the U.N.'s formulation, were overlooked by the district court.

After overlooking these standards, the district court felt free to enjoin *A-B-* on the mistaken theory that it would completely exclude victims of private actor persecution from eligibility where the government had provided any assistance, "no matter how ineffective." Op'n at 129. But *Matter of A-B-* never disagrees with federal precedent that application of the credible fear standards is "a factual question that must be resolved based on the record in each case." *Menjivar v. Gonzales*, 416 F.3d 918, 921 (8th Cir. 2005). To make that record is however the responsibility of the applicant. *See, e.g., Ago v. Ashcroft*, 100 Fed. App'x 550, 552 (7th Cir. 2004).

B. *A-B-*'s criteria for recognition of particular social groups defined by domestic or gang-related criminal violence are the products of reasoned decision-making.

The district court enjoined the use of the Attorney General's other key construction—of the term "particular social group"—deeming it "inconsistent with

Congress' intent to bring United States refugee law into conformance with the Protocol." Op'n. at 126. While *Matter of A-B-* "effectively bars [membership in a particular social group] claims based on certain categories of persecutors (i.e. domestic abusers or gang members) or claims related to certain kinds of violence," *id.*, the "UNHCR Handbook *codified* the United Nation's interpretation of the term 'particular social group' *at that time*, construing the term expansively," *id*. at 124 (emphases added). "[T]he UNHCR's classification of 'social 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." *Id*. Since 1980, "Congress *has not expressed any intention to rescind its [unambiguous] international obligations* assumed through accession to the 1967 Protocol via the Refugee Act of 1980." *Id*. at 126 n. 14 (emphasis added). Thus, "there is no legal basis for an effective categorical ban on domestic violence and gang-related claims." *Id*. at 126.

This reasoning could only be colorable if, as the district court mistakenly believed, the United Nation's formulation of membership in a particular social group controlled over the United States's very different formulation. The U.N. now defines membership in a particular social group as a

> group of persons who share a common characteristic other than their risk of being persecuted, or who are perceived as a group by society. The characteristic will often be one that is innate, unchangeable, or

> which is otherwise fundamental to identity, conscience, or the exercise of one's human rights.

UNHCR, U.N.R.A., Guidelines on International Protection: "Membership of a particular social group" within the context of Article 1A(s) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees,¶ 11 (U.N. Doc. HCR/GIP/02/02, May 7, 2002).

By contrast, under BIA and federal judicial precedent a cognizable particular social group must be:

> (1) composed of members who share a common immutable characteristic; (2) defined with particularity, and (3) socially distinct within the society in question.

S.E.R.L. v. AG United States, 894 F.3d 535, 539-540 (3d Cir. 2018) (citing *Matter of M-E-V-G-*, 26 I. & N. Dec. 227, 237 (B.I.A. 2014)) ("*M-E-V-G-* is based on a reasonable construction of the statute, whether or not it is the only possible interpretation or . . . the one [a federal court] might think best.") The Third Circuit has explained that over time,

> the BIA determined that the *Acosta* test *had proven to be over-inclusive and unworkable*, in part because it encompassed virtually any past acts or experiences, since the past cannot be changed and is, by definition, immutable. Thus, in 1999, the BIA began supplementing the *Acosta* test *with additional requirements*.

Valdiviezo-Galdamez v. Attorney General, 663 F.3d 582, 596-97 (3d Cir. 2011) (emphases added).

In *Matter of A-B-*, the Attorney General described at length and sought to resolve a decades-long conflict over recognition of particular social groups based on criminal acts of domestic violence and gang activity, methodically identifying agency and judicial precedent that rejects domestic and gang-based criminal violence as qualifying particular social group formulations. For example, *A-B-* noted the BIA's previous questioning of particular social groups that were "defined principally, if not exclusively, for the purposes of [litigation] . . . without regard to the question of whether anyone in [a given country] perceives [those] group[s] to exist in any form whatsoever." 27 I. & N. Dec. at 318 (citing *In re R-A-*, 22 I. & N. Dec. 906, 918 (B.I.A. 1999; A.G. 2001), *remanded for reconsideration in Matter of R-A-*, 24 I. & N. Dec. 629 (A.G. 2008)). Although the BIA in *R-A-* accepted that the *Acosta* test was the starting point for assessing particular social groups, it held that the test would no longer be the ending point. *R-A-* at 919. Additional requirements were also recognized in cases rejecting criminal gang-related violence as cognizable persecution for membership in a particular social group, as Central American criminal gangs may target individuals for various non-Convention reasons. *See, e.g.*, *Matter of E-A-G-*, 24 I. & N. Dec. 591, 595 (B.I.A. 2008) (finding that "persons resistant to gang membership" was not a particular social group); *Alvizures-Gomes v. Lunch*, 830 F.3d 49, 53 (1st Cir. 2016) (listing various non-persecutorial motivations a gang may have for targeting an individual).

The policies articulated in *A-B-* will likely make qualification as a particular social group more difficult. But extensive precedent in other circuits contrary to the district court's rationale undermines the district court's mistaken belief that *A-B-* has arbitrarily imposed an unexplained "categorical ban" on these long-contested particular social group formulations. *See, e.g.*, *Perez-Rabanales v. Sessions*, 881 F.3d 61, 66 (1st Cir. 2018) (applying the BIA's interpretation in *M-E-V-G-* and rejecting proffered social group of "Guatemalan women who try to escape systemic and severe violence but who are unable to receive official protection"); *Paloka v. Holder*, 762 F.3d 191, 195 (2d Cir. 2014) (applying *M-E-V-G-* deference); *S.E.R.L. v. AG United States*, 894 F.3d at 545-49 (3d Cir. 2018) (persecutory conduct alone cannot define a particular social group); *Pacas-Renderos v. Sessions*, 691 F. App'x 796, 804 (4th Cir. 2017) (applying criteria from *M-E-V-G-*); *Hernandez-De La Cruz v. Lynch*, 819 F.3d 784, 786-87 & n.1 (5th Cir. 2016) (endorsing the BIA's interpretation); *Zaldana Menijar v. Lynch*, 812 F.3d 491, 498-99 (6th Cir. 2015) (same); *Juarez Chilel v. Holder*, 779 F.3d 850, 855 (8th Cir. 2015) (same); *Reyes v. Lynch*, 842 F.3d 1125, 1136 (9th Cir. 2016), *cert. denied*, 138 S. Ct. 736 (2018) (proposed particular social group "former members of the Mara 18 gang in El Salvador who have renounced their gang membership" lacked particularity and social distinctiveness); *Rodas-Orellana v. Holder*, 780 F.3d 982, 992 (10th Cir. 2015) (*M-E-V-G-* is consistent with the circuit's past interpretation of social

visibility); *Chavez v. Att'y Gen.*, 571 F. App'x 861, 864-65 (11th Cir. 2014) (applying *M-E-V-G-* criteria).

C. The Policy Memorandum's application of the anti-circularity doctrine was amply reasoned.

The district court nullified the "policy" in *A-B-* of applying the rule against circularity to credible fear determinations, holding that its application in the Policy Memorandum to formulations where particular social group members are unable to "leave a relationship" . . . "ensures that women unable to leave their relationship will always be circular." Op'n. at 133; *see* also Order at 2 (enjoining "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.").

The Supreme Court's APA reasonableness test does not permit a court to nullify a changed policy made in an agency adjudication, based on no more than a hypothetical additional element that does not appear in the factual record. The Attorney General

> need not demonstrate to a court's satisfaction that the reasons for the new policy are *better* than the reasons for the old one; it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency believes it to be better. . . .

FCC v. Fox TV Stations, Inc., 556 U.S. 502, 515 (2009) (emphasis in original).

The district court agreed that *A-B-* itself correctly articulated the anti-circularity rule. Op'n. at 133. The Policy Memorandum held only that "married women . . . who are unable to leave their relationship" would not meet the agency's particularity and circularity standards. Op'n. at 134. Manifestly, it does not meet those standards. And this holding does not ensure that all women with this characteristic will be denied asylum. No party disputes that if an asylum officer became aware of an additional characteristic "independent from the feared persecution" during a credible fear interview, the officer would be obliged to consider whether a "significant possibility" exists that the characteristic could form the basis of a successful asylum claim. 8 U.S.C. § 1225(b)(1(B)(v). "[M]arried women . . . who are unable to leave their relationship" might always be circular, but will not always be fatally so.

CONCLUSION

For the foregoing reasons, the judgment of the court below should be reversed.

Dated: June 11, 2019.

Respectfully submitted,

/s/ Michael M. Hethmon

Michael M. Hethmon (DC Circuit Bar No. 56265)
Christopher J. Hajec (DC Bar No. 492551)
IMMIGRATION REFORM LAW INSTITUTE
25 Massachusetts Avenue, NW
Suite 335
Washington, DC 20001
(202) 232-5590
mhethmon@irli.org
chajec@irli.org

Attorneys for *Amicus Curiae* Immigration Reform Law Institute

RULE 32 CERTIFICATION

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(B), I certify that the foregoing brief is proportionately spaced, has a typeface of Times New Roman, 14 points, and contains 5,939 words, including footnotes, but excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f) and D.C. Circuit Rule 32(e)(1).

CERTIFICATE OF SERVICE

I hereby certify, pursuant to Fed. R. App. P. 25(d) and Cir. R. 25, that on June 11, 2019, the foregoing was electronically filed with the Clerk of the Court using the CM/ECF system, which will send a notification to the attorneys of record in this matter who are registered with the Court's CM/ECF system.

/s/ Michael M. Hethmon
Michael M. Hethmon