

NOT YET SCHEDULED FOR ORAL ARGUMENT

No. 19-5013

**In the United States Court of Appeals
for the District of Columbia Circuit**

GRACE, et al.,
Plaintiffs-Appellees,

v.

WILLIAM P. BARR, ATTORNEY GENERAL, et al.,
Defendants-Appellants.

*ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA (CIV. NO. 18-1853)
(THE HON. EMMET G. SULLIVAN, J.)*

**BRIEF OF AMICUS CURIAE UNITED NATIONS
HIGH COMMISSIONER FOR REFUGEES IN SUPPORT OF
PLAINTIFFS-APPELLEES**

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), amicus curiae makes the following certification:

(A) Parties, Intervenors, and Amici. Except for the following, all parties, intervenors, and amici appearing before the district court and in this court are listed in the Brief for Appellants.

Amicus in support of Appellees is the United Nations High Commissioner for Refugees. Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, and Circuit Rule 26.1, amicus United Nations High Commissioner for Refugees certifies that it is not a corporation, it has no parent corporation, and no publicly held corporation owns ten percent or more of its stock.

(B) Rulings Under Review. References to the rulings at issue appear in the Brief for Appellants.

(C) Related Cases. This case has not previously been before this Court or any other court for appellate review. To the best of the knowledge of amicus curiae and its counsel, all references to related cases appear in Brief for Appellees.

/s/ Alexander J. Kasner
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STATEMENT REGARDING CONSENT TO FILE AND AUTHORSHIP

All parties to this appeal have consented to the filing of this brief.

No person or entity other than amicus United Nations High Commissioner for Refugees and its counsel authored this brief or provided any funding related to it.

CERTIFICATE OF COUNSEL AS TO SEPARATE BRIEFING

Pursuant to Circuit Rule 29(d), counsel certifies that a separate amicus brief is necessary to provide the perspective of the United Nations High Commissioner for Refugees (“UNHCR”). As recognized by the U.S. Supreme Court, UNHCR provides significant guidance on the United States’ obligations under international refugee conventions. This guidance was central to the district court’s opinion on appeal in this case, as well the respective Briefs of Appellants and Appellees.

/s/ Alexander J. Kasner
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GLOSSARY OF ABBREVIATIONS

- UNHCRUnited Nations High Commissioner for Refugees
- 1951 Convention..... *Convention Relating to the Status of Refugees*,
July 28, 1951, 189 U.N.T.S. 137
- 1967 Protocol*Protocol Relating to the Status of Refugees*,
Jan. 31, 1967, 606 U.N.T.S. 267

INTEREST OF *AMICUS CURIAE*¹

The Office of the United Nations High Commissioner for Refugees (“UNHCR”) has a direct interest in this matter as the organization entrusted by the United Nations General Assembly with responsibility for providing international protection to refugees and others of concern and, together with national governments, for seeking permanent solutions to their problems. Statute of the Office of the UNHCR, U.N. Doc. A/RES/428(V) ¶ 1 (Dec. 14, 1950). UNHCR fulfills its mandate by, among other things, “[p]romoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto.” *Id.* ¶ 8(a). UNHCR’s supervisory responsibility is also reflected in the Preamble and Article 35 of the *Convention Relating to the Status of Refugees*, July 28, 1951, 189 U.N.T.S. 137 (“1951 Convention”)² and Article 2 of the *Protocol*

¹ This amicus brief does not constitute a waiver, express or implied, of any privilege or immunity that UNHCR and its staff enjoy under applicable international legal instruments and recognized principles of international law. *See* U.N. General Assembly, *Convention on the Privileges and Immunities of the United Nations*, Feb. 13, 1946, 1 U.N.T.S. 15, <http://www.refworld.org/docid/3ae6b3902.html>.

² <<http://www.unhcr.org/3b66c2aa10.html>>

Relating to the Status of Refugees, Jan. 31, 1967, 606 U.N.T.S. 267 (“1967 Protocol”).³ Those instruments obligate States to cooperate with UNHCR in the exercise of its mandate and to facilitate its supervisory role.

UNHCR, which has won two Nobel Peace Prizes for its efforts, works in some 130 countries, at a time when there are 70.8 million people affected by forced displacement worldwide. The views of UNHCR are informed by its close to seven decades of experience supervising the treaty-based system of refugee protection. UNHCR’s interpretation of the provisions of the *1951 Convention* and its *1967 Protocol* are both authoritative and integral to promoting consistency in the global regime for the international protection of refugees. Accordingly, the “Supreme Court has consistently turned [to UNHCR] for assistance in interpreting [U.S.] obligations under the Refugee Convention.” *N-A-M- v. Holder*, 587 F.3d 1052, 1061-62 (10th Cir. 2009) (Henry, J., concurring) (per curiam); *see, e.g., Negusie v. Holder*, 555 U.S. 511, 536-37 (2009); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 439 (1987).

UNHCR exercises its supervisory responsibility in part by issuing interpretative guidelines on the meaning of international refugee instruments,

³ <<http://www.unhcr.org/3b66c2aa10.html>>

in particular the *1951 Convention* and its *1967 Protocol*. The UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status*, U.N. Doc. HCR/1P/4/ENG/REV.3 (1979, re-edited Jan. 1992; reissued Dec. 2011, re-issued Feb. 2019) (“*Handbook*”),⁴ represents the first such comprehensive guidance. The Supreme Court has noted that the *Handbook* provides “significant guidance in construing the [1967] Protocol, to which Congress sought to conform . . . [and] has been widely considered useful in giving content to the obligations that the protocol establishes.” *Cardoza-Fonseca*, 480 U.S. at 439 n.22. At the request of States, including the United States, and in the exercise of the Office’s supervisory responsibility, the *Handbook* has subsequently been complemented by the UNHCR *Guidelines on International Protection* and various *Guidance Notes*.

UNHCR has a specific interest in this matter because the Attorney General’s decision in *Matter of A-B-*, 27 I. & N. Dec. 316 (A.G. 2018), and the USCIS Policy Memorandum (“new policies”), which rely on *Matter of A-B-*, are at variance with UNHCR’s authoritative interpretation of States’ obligations under the *1951 Convention* and *1967 Protocol* in several key respects. In

⁴ <<http://www.unhcr.org/3d58e13b4.html>>

particular, the new policies, and *Matter of A-B-* decision, diverge from UNHCR's interpretations of (1) the standard used to assess whether states are "unable or unwilling" to provide effective protection against non-state agents of persecution, and (2) the definition of a "particular social group."

Consistent with its approach in other cases, UNHCR takes no position directly on the merits of Appellees' asylum claims.

STATUTES AND REGULATIONS

All applicable statutes and regulations are contained in the Briefs for Appellants and Appellees, respectively.

SUMMARY OF ARGUMENT

It is undisputed that persecution on account of one's membership in a particular social group can form the basis for an asylum claim. Moreover, under both international and domestic law, persecution forming the basis for an asylum claim may be perpetrated by non-state actors. Applying these principles, other States with significant jurisprudence on refugee status determination, such as Canada, the United Kingdom, Australia, and New Zealand, have concluded that victims of domestic and gang violence may qualify for asylum on account of their membership in a particular social group.

Under the new policies at issue and *Matter of A-B-*, however, victims of violence by non-state actors, including victims of domestic and gang violence, are not generally eligible for asylum. This decision interprets the refugee definition in a manner at odds with the United States' international obligations in several respects.

First, Matter of A-B- recasts the “unable or unwilling” standard for non-state actors into one requiring “complete helplessness” or “condoned” action. The proper inquiry under international standards is whether the state is ineffective in combatting the persecutory practices or otherwise tolerates such persecution. Victims of domestic and gang violence, particularly in Central America, as documented by country conditions, may be able to meet this correct articulation of the standard.

Second, Matter of A-B- misconstrues the requirement for defining a particular social group. As an initial matter, under international law, members of a particular social group must show *either* that they share common characteristics beyond their persecution, *or* that they are perceived as a discrete group by society. U.S. law impermissibly requires both, and *Matter of A-B-* departs even further from international legal standards by misapplying each of those requirements to victims of domestic violence. Contrary to *Matter of A-B-* and

the new policies, women in domestic relationships share common characteristics beyond their persecution, and are often perceived as discrete, subordinate groups by their societies. And in further contrast to *Matter of A-B-*, the size of a particular social group is irrelevant under international law.

ARGUMENT

I. THE UNITED STATES IS BOUND BY THE *1951 CONVENTION* AND ITS *1967 PROTOCOL* RELATING TO THE STATUS OF REFUGEES

The *1951 Convention* and its *1967 Protocol* are the key international instruments governing the protection of refugees. These documents address who is a refugee, his or her rights and responsibilities, and the corresponding legal obligations of States. The *1967 Protocol* binds parties to comply with the substantive provisions of Articles 2 through 34 of the *1951 Convention* with respect to “refugees” as defined in Article 1A(2) of the *1951 Convention*. *1967 Protocol* art. 1(1)-(2). The *1967 Protocol* also removes the geographic and temporal limitations from the *1951 Convention* definition, thus universalizing the refugee definition. *Id.* art. 1(2)-(3). The core of both the *1951 Convention* and its *1967 Protocol* is the principle of *non-refoulement*, which obliges States not to return a refugee to any country where he or she would face persecution or

a real risk of serious harm.⁵ In 1968, the United States acceded to the *1967 Protocol*,⁶ binding itself to the international refugee protection regime and the definition of a refugee in the *1951 Convention*.

Congress enacted the Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (1980), to “bring United States refugee law into conformance with the 1967 United Nations Protocol Relating to the Status of Refugees,” *Cardoza-Fonseca*, 480 U.S. at 436-37 & n.19 (citing H.R. Rep. No. 96-781, at 19); *see also INS v. Aguirre-Aguirre*, 526 U.S. 415, 427 (1999). The Refugee Act brings the United States into compliance with its international obligations under the *1967 Protocol* and, by extension, the *1951 Convention*. It should be interpreted and applied in a manner consistent with those instruments. *See Cardoza-Fonseca*, 480 U.S. at 437 (by enacting Refugee Act, Congress intended “that the new

⁵ The prohibition of *refoulement* applies to all refugees, including those who have not formally been recognized as such, and to asylum-seekers whose status has not yet been determined. UNHCR, *Note on International Protection* ¶ 11, U.N. Doc. A/AC.96/815 (Aug. 31, 1993), <http://www.unhcr.org/refworld/docid/3ae68d5d10.html>; UNHCR, *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations Under the 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol* ¶¶ 26-31 (Jan. 2007), <http://www.unhcr.org/refworld/docid/45f17a1a4.html>.

⁶ H.R. Rep. No. 96-781, at 19 (1980), *as reprinted in* 1980 U.S.C.C.A.N. 160, 160; S. Exec. Rep. No. 14, 90th Cong., 2d Sess. 4 (1968).

statutory definition of ‘refugee’ be interpreted in conformance with the *Protocol’s* definition”); cf. *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) (“[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains.”).

II. AS RECOGNIZED BY U.S. AND FOREIGN COURTS, UNHCR PROVIDES AUTHORITATIVE GUIDANCE IN EVALUATING CLAIMS OF PERSECUTION BY NON-STATE ACTORS

UNHCR exercises its supervisory responsibility by issuing interpretive guidance on the meaning of provisions in the *1951 Convention* and its *1967 Protocol*. Numerous courts, including the Supreme Court, have turned to UNHCR’s guidance for interpreting the *1951 Convention* and *1967 Protocol*. *Cardoza-Fonseca*, 480 U.S. at 438-39; *Bringas-Rodriguez v. Sessions*, 850 F.3d 1051, 1060-61 (9th Cir. 2017) (en banc). The most authoritative of this guidance is the UNHCR *Handbook*, which was prepared in 1979 at the request of Member States, including the United States. Although the *Handbook* is not legally binding upon U.S. officials, it provides “significant guidance” in construing the *1967 Protocol* and in giving content to the obligations established therein. *Cardoza-Fonseca*, 480 U.S. at 439 n.22; see also *Garcia v. Sessions*, 856 F.3d 27, 55 n.31 (1st Cir. 2017).

In 2002, UNHCR also began issuing a number of *Guidelines*,⁷ which have been welcomed by UNHCR’s Executive Committee and the UN General Assembly. The *Guidelines* complement and update the *Handbook* by drawing upon international legal standards, judicial decisions, Executive Committee Conclusions, academic literature, and UNHCR’s views and experience. UNHCR also issues *Guidance Notes* to provide additional direction in specific areas. Courts have relied upon the *Guidelines* and *Guidance Notes* in assessing refugee claims, recognizing that UNHCR’s “analysis provides significant guidance for issues of refugee law.” *Mohammed v. Gonzales*, 400 F.3d 785, 798 (9th Cir. 2005); *Bringas-Rodriguez*, 850 F.3d at 1071.

Applied here, the *Handbook*, *Guidelines*, and *Guidance Notes* affirm the well-settled principle that persecution by non-state actors may give rise to an asylum claim. The *Handbook* recognizes that asylum may be warranted by persecution “emanat[ing] from sections of the population . . . [whose] serious discriminatory or other offensive acts . . . are knowingly tolerated by the authorities, or if the authorities refuse, or prove unable, to offer effective protection.” *Handbook* ¶ 65. Non-state actors of persecution include “paramilitary

⁷ UNHCR, *Agenda for Protection*, U.N. Doc. A/AC.96/965/Add.1 (June 26, 2002), <http://www.refworld.org/docid/3d4fd0266.html>.

groups, militias, insurgents, bandits, pirates, criminal gangs or organizations,” in addition to “neighbours, family members and other individuals.” UNHCR, *Guidelines on International Protection No. 12: Claims for Refugee Status Related to Situations of Armed Conflict and Violence Under Article 1A(2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees and the Regional Refugee Definitions* ¶ 28, U.N. Doc. HCR/GIP/16/12 (Dec. 2, 2016) (“*Conflict and Violence Guidelines*”).⁸

Additionally, “rape and other forms of gender-related violence, such as dowry-related violence, female genital mutilation, domestic violence, and trafficking” may also constitute persecution “whether perpetrated by State or private actors.” UNHCR, *Guidelines on International Protection No. 1: Gender-Related Persecution Within the Context of Article 1A(2) of the 1951 Convention and/or Its 1967 Protocol Relating to the Status of Refugees* ¶ 9, U.N. Doc. HCR/GIP/02/01 (May 7, 2002) (“*Gender Guidelines*”).⁹

UNHCR recognizes potential asylum claims for individuals persecuted by non-state actors in a wide range of circumstances. For instance, LGBTI

⁸ <<http://www.refworld.org/docid/583595ff4.html>>

⁹ <<http://www.refworld.org/docid/3d36f1c64.html>>

people who are subject to persecution by “family members, neighbors, or the broader community” may have valid asylum claims.¹⁰ Victims of campaigns of violence by non-state actors also may have legitimate asylum claims, including those fleeing persecution by Al Shabaab in Somalia;¹¹ by Boko Haram in Nigeria;¹² and by the Taliban in Afghanistan.¹³

Consistent with UNHCR’s interpretation of the governing treaties, parties to the *1951 Convention* and its *1967 Protocol* have recognized valid asylum claims stemming from persecution by non-state actors, including persecution

¹⁰ UNHCR, *Guidelines on International Protection No. 9: Claims to Refugee Status Based on Sexual Orientation and/or Gender Identity Within the Context of Article 1A(2) of the 1951 Convention and/or Its 1967 Protocol Relating to the Status of Refugees* ¶¶ 34-37, U.N. Doc. HCR/GIP/12/09 (Oct. 23, 2012), <http://www.refworld.org/docid/50348afc2.html> (“*Sexual Orientation Guidelines*”).

¹¹ UNHCR, *Position on Returns to Southern and Central Somalia (Update I)* ¶¶ 16-19, 23 (May 2016), <http://www.refworld.org/docid/573de9fe4.html>.

¹² UNHCR, *International Protection Considerations with Regard to People Fleeing Northeastern Nigeria (the States of Borno, Yobe and Adamawa) and Surrounding Region—Update I* ¶ 11 (Oct. 2014), <http://www.refworld.org/docid/5448e0ad4.html>.

¹³ UNHCR, *Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Afghanistan* (Aug. 30, 2018), <http://www.refworld.org/docid/5b8900109.html>.

stemming from domestic and gang violence. *See, e.g.*, Canada (Attorney General) v. Ward, [1993] 2 S.C.R. 689 (Can.) (prosecution by non-state paramilitary group);¹⁴ Tobias Gomez v. Canada (Citizenship and Immigration), 2011 F.C. 1093 (Can.) (gang violence);¹⁵ Narvaez c. Canada (Citoyenneté et de l'Immigration), [1995] 2 F.C. 55 (Can.) (domestic violence);¹⁶ Islam (A.P.) v. Sec'y of State for the Home Dep't, and Regina v. Immigration Appeal Tribunal & Another Ex Parte Shah (A.P.) [1999] UKHL 20, [1999] 2 AC (HL) 629 (appeal taken from Eng.) (domestic violence);¹⁷ AZ (Trafficked Women) Thailand v. Sec'y of State for the Home Dep't [2010] UKUT 118 (IAC) (human trafficking by criminal gangs);¹⁸ *Minister for Immigration & Multicultural Affairs v Khawar* [2002] HCA 14 (Austl.) (domestic violence);¹⁹ *AB (Slovakia), AF*

¹⁴ <http://www.refworld.org/cases,CAN_SC,3ae66b673c.html>

¹⁵ <http://www.refworld.org/cases,CAN_FC,56e6e5e14.html>

¹⁶ <http://www.refworld.org/cases,CAN_FC,3ae6b6e61c.html>

¹⁷ <http://www.refworld.org/cases,GBR_HL,3dec8abe4.html>

¹⁸ <http://www.refworld.org/cases,GBR_UTIAC,4bd58d912.html>

¹⁹ <http://www.refworld.org/cases,AUS_HC,3deb326b8.html>

(Czech Republic) [2015] NZIPT 800734-738 (N.Z.) (skinhead group violence);²⁰
Refugee Appeal No. 71427/99 [2000] NZAR 545 (N.Z.) (domestic violence).²¹

Nearly every U.S. court of appeals has likewise recognized that violence by non-state actors may undergird a valid asylum claim. *See, e.g., Aldana-Ramos v. Holder*, 757 F.3d 9, 17 (1st Cir. 2014) (gang violence); *Pavlova v. INS*, 441 F.3d 82, 91 (2d Cir. 2006) (persecution by Russian Neo-Nazi group); *Garcia v. U.S. Att’y Gen.*, 665 F.3d 496, 503 (3d Cir. 2011), *as amended* Jan. 13, 2012 (gang violence); *Crespin-Valladares v. Holder*, 632 F.3d 117, 128-29 (4th Cir. 2011) (gang violence); *Eduard v. Ashcroft*, 379 F.3d 182, 190 (5th Cir. 2004) (persecution by anti-Christian Islamist groups); *Kamar v. Sessions*, 875 F.3d 811, 819 (6th Cir. 2017) (honor killing by family members); *R.R.D. v. Holder*, 746 F.3d 807, 809 (7th Cir. 2014) (persecution by drug trafficking organizations); *Ngengwe v. Mukasey*, 543 F.3d 1029, 1036 (8th Cir. 2008) (forced marriage by family members); *Doe v. Holder*, 736 F.3d 871, 878 (9th Cir. 2013) (violence toward homosexuals by classmates); *Niang v. Gonzales*, 422 F.3d 1187, 1191-92, 1201-02 (10th Cir. 2005) (female genital mutilation by tribal

²⁰ <http://www.refworld.org/cases,NZ_IPT,55e868b54.html>

²¹ <http://www.refworld.org/cases,NZL_RSAA,3ae6b7400.html>

members); *Lopez v. U.S. Att’y Gen.*, 504 F.3d 1341, 1345 (11th Cir. 2007) (persecution by anti-government guerillas).

III. VIOLENCE BY NON-STATE ACTORS, AND IN PARTICULAR, DOMESTIC AND GANG VIOLENCE, CAN FORM THE BASIS FOR ASYLUM

The new policies direct 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 [or] refugee status.” USCIS Guidance at 6. This directive is premised on the former Attorney General’s guidance in *Matter of A-B-*, which states that, “[g]enerally, claims by aliens pertaining to domestic violence or gang violence perpetrated by non-governmental actors will not qualify for asylum.” 27 I. & N. Dec. at 320. That guidance diverges from UNHCR guidance, international case law, and U.S. case law. Departure from this well-settled and foundational legal principle is due to erroneous interpretations of (a) the “unable or unwilling” standard, and (b) the “particular social group” definition. The elevated standards that *Matter of A-B-* imposes with respect to these elements impermissibly impede asylum claims by victims of persecution.

A. *Matter of A-B-* and the New Policies Erroneously State that Domestic and Gang Violence Claims Do Not Meet the “Unable or Unwilling” Standard

For violence perpetrated by non-state actors to constitute persecution, an individual must demonstrate that the state is “unable or unwilling” to provide adequate protection to victims. UNHCR, *Guidance Note on Refugee Claims Relating to Victims of Organized Gangs* ¶ 25 (Mar. 2010) (“*Gang Note*”) (emphasis omitted);²² see *Gender Guidelines* ¶ 19; *Conflict and Violence Guidelines* ¶ 30. Such a determination requires a “[h]olistic and [i]ntegrated [a]nalysis” and “judicious balancing” of several factors, including “the general state of law, order and justice in the country, and its effectiveness, including the resources available and the ability and willingness to use them properly and effectively to protect residents.” UNHCR, *Interpreting Article 1 of the 1951 Convention Relating to the Status of Refugees* ¶¶ 7, 15 (Apr. 2001) (“*Interpreting 1951 Convention*”).²³

The new policies upend this holistic analysis. They require asylum-seekers to show that “the government condoned the private actions or at least

²² <<http://www.refworld.org/docid/4bb21fa02.html>>

²³ <<http://www.refworld.org/docid/3b20a3914.html>>

demonstrated a complete helplessness to protect the victim[.]” USCIS Guidance at 6; *Matter of A-B-*, 27 I. & N. Dec. at 337. “The mere fact that a country . . . has problems effectively policing certain crimes, like domestic violence or gang-related activities . . . cannot, by itself, establish eligibility for asylum.” USCIS Guidance at 6. In other words, under that decision, occasional, piecemeal, or partial protection by a state will negate an asylum claim, even if the state is unable or unwilling to prevent violence in the vast majority of cases. This unduly narrow construction of the “unable or unwilling” standard significantly diverges from the United States’ international obligations.

1. The New Policies and *Matter of A-B-* Are Inconsistent with the Settled Meaning of the “Unable or Unwilling” Standard

The hallmark of state protection is the state’s ability to provide *effective* protection, which requires *effective* control of non-state actors. *See Handbook* ¶ 65 (acts constitute persecution “if they are knowingly tolerated by the authorities, or if the authorities refuse, or prove unable, to offer effective protection”); *see also Interpreting 1951 Convention* ¶ 15 (providing that a state’s ability to offer effective protection measured by “the general state of law, order and justice in the country, and its effectiveness, including the resources available and the ability and willingness to use them properly and effectively

to protect residents”). State protection is ineffective where, for example, “the police fail to respond to requests for protection or the authorities refuse to investigate, prosecute or punish (non-State) perpetrators of violence . . . with due diligence.” *Sexual Orientation Guidelines* ¶¶ 34-37.

Merely enacting a law prohibiting persecutory practices is not enough: “Even though a particular State may have prohibited a persecutory practice . . . , the State may nevertheless . . . not be able to stop the practice effectively.” *Gender Guidelines* ¶ 11 (emphasis omitted). Despite best intentions and efforts, there may be an incongruity between avowed commitments and reality on the ground. Effective protection depends on both de jure and de facto capability by the authorities.

For example, in determining whether a state offers effective protection from human trafficking, UNHCR notes:

Whether the authorities in the country of origin are able to protect victims or potential victims of trafficking will depend on whether legislative and administrative mechanisms have been put in place to prevent and combat trafficking, as well as to protect and assist the victims and on whether these mechanisms are effectively implemented in practice.

UNHCR, *Guidelines on International Protection No. 7: The Application of Article 1A(2) of the 1951 Convention and/or 1967 Protocol Relating to the Sta-*

tus of Refugees to Victims of Trafficking and Persons at Risk of Being Trafficked ¶ 22, U.N. Doc. HCR/GIP/06/07 (Apr. 7, 2006);²⁴ see also *Interpreting 1951 Convention* ¶ 15 (ability to provide effective protection requires examining “the general state of law, order and justice in the country, and its effectiveness, including the resources available and the ability and willingness to use them properly and effectively to protect residents”).

Consistent with UNHCR’s interpretation, other parties to the *1951 Convention* and *1967 Protocol* do not require complete helplessness and recognize violence by non-state actors as persecution whenever state protection is ineffective. See, e.g., Immigration and Refugee Board of Canada, *Chairperson’s Guideline 9: Proceedings Before the IRB Involving Sexual Orientation and Gender Identity and Expression* ¶ 8.6.5 (May 1, 2017) (instructing Canadian decision-makers to “carefully assess[] . . . the degree of actual implementation, the effectiveness, and the durability of” protection); United Kingdom Immigration Appellate Authority, *Asylum Gender Guidelines* ¶¶ 2B.2-3 (Nov. 1,

²⁴ <<http://www.refworld.org/docid/443679fa4.html>>

2000) (setting forth United Kingdom’s “practical standard,” that protection be “meaningful, accessible, effective, and available to a woman”).²⁵

Turning the “unable or unwilling” requirement into a “condoned” or “complete helplessness” requirement significantly departs from this settled international standard. The new policies make the “unable or unwilling” prong more difficult to meet, and the heightened test lacks any support in international law. A state does not have to “condone” private violence to be “unwilling” or “unable” to offer protection, nor does a victim need to show the state’s “complete helplessness” for state protection to be unavailable or ineffective.

The First Circuit recently determined as much in *Rosales Justo v. Sessions*, 895 F.3d 154 (1st Cir. 2018). Although the Mexican government had displayed a “willingness to investigate” the murder of the applicant’s family member by non-governmental actors, its “efforts to investigate” could not guarantee that the applicant could be made safer or that the state would catch the perpetrators. *Id.* at 159, 163, 164. Overruling the Board, the Court deter-

²⁵ <<http://www.refworld.org/docid/3ae6b3414.html>>

mined that the specific ineffectiveness of the Mexican government in preventing violence against the applicant met the “unwilling or unable” standard. *Id.* at 163-65.

2. Domestic and Gang Violence Claims Can Meet the “Unable or Unwilling” Standard

Matter of A-B- and the new policies’ erroneous approach to the “unable or unwilling” standard is all the more pronounced in the domestic and gang violence contexts and runs counter to UNHCR’s on-the-ground experience.

UNHCR has field offices in the vast majority of originating countries for asylum-seekers. Relying on in-depth research from these offices, material from independent country specialists, and other sources, UNHCR has carefully compiled country-specific *Eligibility Guidelines*. The *Eligibility Guidelines* rigorously analyze factors relevant to asylum determinations, including the effectiveness of state protection.²⁶

Based on its decades-long presence in countries affected by gang violence, UNHCR encourages decision-makers to examine “efforts to reform and

²⁶ See Affidavit of Janice Lyn Marshall, *Staten v/Utlendingsnemnda (Regjeringsadvokaten) v. A, B, C, D*, Oct. 26, 2015 (Nor.), <https://www.refworld.org/docid/562f546c4.html> (detailing methodology).

expand the criminal justice system[,] establish[] witness protection programmes,” and—conversely—the “lack of measures to ensure security to individuals at risk of harm by gangs.” *Gang Note* ¶ 28. “The [s]tate [may] prove unable to provide effective protection,” especially when gangs “yield considerable power and capacity to evade law enforcement or when the corruption is pervasive.” *Id.* ¶ 25. Likewise, the state “may be unwilling to protect a particular individual, for instance, because of their own financial interest in the gang activities or because they consider the person associated with or targeted by the gangs unworthy of protection.” *Id.*

In El Salvador, for example, gangs “exercise extraordinary levels of social control over the population of their territories.” UNHCR, *Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from El Salvador* at 12, U.N. Doc. HCR/EG/SLV/16/01 (Mar. 15, 2016) (“*El Salvador Guidelines*”).²⁷ Despite the formal existence of an anti-gang legal framework, “weakness and corruption” in the police and judiciary “contribute to creating a high level of impunity for crimes in El Salvador.” *Id.* at 23; see also U.S. State Dep’t, *El Salvador 2017 Human Rights Report* at 15 (“U.S.

²⁷ <<http://www.refworld.org/docid/56e706e94.html>>

State Dep't, *El Salvador Report*"). In gang-controlled territories, "the police—even the elite Anti-Gang Unit in high-profile cases—are usually not seen as offering a sufficient form of protection . . . , since their presence is only temporary and gangs will return once the police move on after a few hours or days." *El Salvador Guidelines* at 24; see U.S. State Dep't, *El Salvador Report* at 19 ("The major gangs controlled their own territory. Gang members did not allow persons living in another gang's controlled area to enter their territory."). Gangs have their own infiltrators in the police and military, who warn about anti-gang operations and have access to weapons and uniforms. *El Salvador Guidelines* at 23.

Gangs' "extraordinary levels of social control" and the state's corresponding ineffectiveness in combating gang-related crimes are also pervasive in other Central American countries. See UNHCR, *Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Honduras* at 18-19, 38-39, U.N. Doc. HCR/EG/HND/16/03 (July 27, 2016) ("*Honduras Guidelines*") (police are "not usually seen as offering a sufficient form of protection for residents who are threatened by gangs" and are "reported to acknowledge their fear at the inability of the State to protect them from assas-

sination when they are off duty”);²⁸ UNHCR, *Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Guatemala* at 34, U.N. Doc. HCR/EG/GTM/18/01 (Jan. 2018)²⁹ (“[I]n certain parts of the country the Government has lost effective control to gangs and other organized criminal groups and is unable to provide protection to inhabitants.”).

Equally, domestic violence victims often do not receive effective protection from the state. In some Central American societies, “[i]mpunity for violence against women and girls remain a serious problem.” *Honduras Guidelines* at 39. The high impunity rate contributes to victims’ “lack of confidence in . . . an ineffective and unsupportive justice system,” thus preventing them from even reporting domestic violence incidents to the authorities. *El Salvador Guidelines* at 25. The state’s ineffective protection against domestic violence is often exacerbated by its inability to protect against gang violence. In a study of 160 women from El Salvador, Guatemala, Honduras, and Mexico, UNHCR found that women “consistently stated that police and state law enforcement authorities were [unable] to provide sufficient protection from [] violence.” UNHCR, *Women on the Run: First-Hand Accounts of Refugees*

²⁸ <<http://www.refworld.org/docid/579767434.html>>

²⁹ <<http://www.refworld.org/docid/5a5e03e96.html>>

Fleeing El Salvador, Guatemala, Honduras, and Mexico at 25 (Oct. 26, 2015) (“*Women on the Run*”). Many of the women’s partners were gang members or associates. *Id.* at 25. “[B]ecause these [criminal] groups were often [re-garded as] the highest powers in the[] neighborhoods, [the women] did not believe the government could protect them.” *Id.*

The above evidence reflects that—at least in some countries and in some instances—states may be unable or unwilling to offer effective protection to persons who have been persecuted by non-state actors. *Matter of A-B-* and the new policies err by directing that domestic and gang violence claims generally do not meet the “unable or unwilling” standard for obtaining asylum in cases of persecution by non-state actors.

B. *Matter of A-B-* and the New Policies Err in Their Interpretation of the “Particular Social Group” Basis for Asylum

Matter of A-B- and the new policies change the approach to asylum claims based upon “membership in a particular social group,” elevating the rule far beyond the international threshold. Although “membership in a particular social group” is on its face an ambiguous term, *Matter of A-B-*, 27 I. & N. Dec. at 326, jurisprudence and commentary have over time helped clarify its meaning. Based on international legal norms and State practice, UNHCR’s

Social Group Guidelines adopt two alternative approaches to defining a particular social group:

[A] particular social group is a group of persons who share a common characteristic other than their risk of being persecuted [the “protected characteristics” approach], *or* who are perceived as a group by society [the “social perception” approach]. The characteristic will often be one which is innate, unchangeable, or which is otherwise fundamental to identity, conscience or the exercise of one’s human rights.

UNHCR, *Guidelines on International Protection No. 2: “Membership of a Particular Social Group” Within the Context of Article 1A(2) of the 1951 Convention and/or Its 1967 Protocol Relating to the Status of Refugees* ¶ 11, U.N. Doc. HCR/GIP/02/02 (May 7, 2002) (“*Social Group Guidelines*”) (emphasis omitted).³⁰ A particular social group must be identifiable through one of the approaches but need not satisfy both. *Gang Note* ¶ 35. Several States have endorsed the “protected characteristics” approach without requiring an applicant further to show that society perceives the applicant’s group as distinct. *See* Canada (A.G.) v. Ward, [1993] 2 S.C.R. 689 (Can.); *Islam and Shah*, [1999] UKHL at 20; Sec’y of State for the Home Dep’t v. K (FC), and Fornah (FC) v. Sec’y of State for the Home Dep’t [2006] UKHL 46, [2007] 1 A.C. (HL) 412

³⁰ <<http://www.refworld.org/docid/3d36f23f4.html>>

(appeal taken from Eng.);³¹ *Refugee Appeal No. 1312/93 Re GJ* [1995] 1 NLR 387 (N.Z.).³²

This either/or approach to identifying a particular social group was first delineated in *Matter of Acosta*, 19 I. & N. Dec. 211, 233 (B.I.A. 1985), *overruled in part on other grounds by Matter of Mogharrabi*, 19 I. & N. Dec. 439 (B.I.A. 1987). It guided U.S. asylum decisions for more than twenty years, until the Board diverged in 2008 by requiring asylum-seekers to prove social perception *and* particularity, in addition to protected characteristics. *Matter of S-E-G-*, 24 I. & N. Dec. 579, 582, 589 (B.I.A. 2008). As UNHCR has repeatedly remarked, imposing these additional, heightened requirements is contrary to the object and purpose of the *1951 Convention*, *1967 Protocol*, and *Social Group Guidelines*.³³

Matter of A-B- amplifies this erroneous interpretation. See 27 I. & N. Dec. at 319, 335, 336 (rejecting asylum for “[s]ocial groups defined by their vulnerability to private criminal activity,” including “married women . . . who

³¹ <http://www.refworld.org/cases,GBR_HL,4550a9502.html>

³² <http://www.refworld.org/cases,NZL_RSAA,3ae6b6938.html>

³³ See, e.g., UNHCR *Amicus Curiae* Br. in Supp. of Petitioner, *Valdiviezo-Galdamez v. Holder* (3d Cir. Apr. 14, 2009), <http://www.refworld.org/docid/49ef25102.html>.

are unable to leave their relationships” (internal quotation marks omitted)). It maintains the additional, heightened requirements set forth in *Matter of S-E-G-*, and, alongside the new policies, it applies these requirements in a flawed manner to the facts at hand. UNHCR maintains that the current U.S. approach—*i.e.*, requiring protected characteristics, social perception, *and* particularity—is inconsistent with international law. Even under a correct application of the heightened, conjunctive U.S. standard, however, UNHCR observes that people at risk of domestic and gang violence by non-state actors may nonetheless constitute members of particular social groups.

1. Protected Characteristics

The “protected characteristics” approach examines “whether a group is united by an immutable characteristic or by a characteristic that is so fundamental to human dignity that a person should not be compelled to forsake it.” *Social Group Guidelines* ¶ 6.

As to gang violence, victims resisting forced recruitment may share innate or immutable characteristics, such as age, gender, and social status. *Gang Note* ¶ 36. To this point, a USAID study on Central American gangs found that youth between the ages of 8 and 18 were particularly vulnerable to recruitment. USAID, *Central America and Mexico Gang Assessment Report*

15 (Aug. 2006).⁴² UNHCR likewise notes that young people are more susceptible to recruitment because of their “age, impressionability, dependency, poverty and lack of parental guidance.” *Gang Note* ¶ 36; *Honduras Guidelines* at 15, 16. Additionally, “[p]ast actions or experiences, such as refusal to join a gang, may be considered irreversible and thus immutable.” *Id.* ¶ 37; *Social Group Guidelines* ¶ 6; *Matter of S-E-G-*, 24 I. & N. Dec. at 584.

Consistent with this interpretation, parties to the *1951 Convention* and its *1967 Protocol*—including the United States—have held that gang violence victims or resisters to gang recruitment may form particular social groups under the protected characteristics approach. *See Tobias Gomez*, 2011 F.C. at 1093 (innate characteristics and shared past experience); *AZ*, [2010] UKUT at 118 (shared past experience); *Valdiviezo-Galdamez v. U.S. Att’y Gen.*, 502 F.3d 285, 291 (3d Cir. 2007) (remanding to BIA to consider whether “young Honduran men who have been actively recruited by gangs and who have refused to join the gangs” constitute a particular social group; noting that group “shares the characteristics of other groups that the BIA has found to constitute a ‘particular social group’”).

⁴² <https://pdf.usaid.gov/pdf_docs/PNADG834.pdf>

As to domestic violence, the particular social group applicable in such cases may be defined by sex alone or in combination with other characteristics related to relationship status. Both groups qualify under the “protected characteristics” approach. In UNHCR’s view, “sex can properly be within the ambit of the social group category, with women being a clear example of a social subset defined by innate and immutable characteristics.” *Social Group Guidelines* ¶ 12; *Gender Guidelines* ¶ 30; see also *Ward*, 2 S.C.R. at 739 (contemplating a particular social group encompassing all women); VM (FGM-risks-Mungiki-Kikuyu/Gikuyu) Kenya v. Sec’y of State for the Home Dep’t, CG [2008] UKAIT 00049 (recognizing a particular social group of “women (girls) in Kenya”).³⁴

Alternatively, particular social groups may be defined by sex in combination with other factors. See, e.g., *Niang*, 422 F.3d at 1199. These other factors include relationship status, which may be unchangeable because of external religious, cultural, or legal constraints. Cf. U.N. Centre for Soc. Dev. & Humanitarian Affairs, *Violence Against Women in the Family* 33, U.N. Doc.

³⁴ <<http://www.refworld.org/docid/484d4a222.html>>

ST/CSDHA/2 (1989) (noting that men in Guatemala and El Salvador view “the women they live with [as] their possessions”).

Matter of A-B- erroneously holds that the proposed group in that case— “married women in Guatemala who are unable to leave their relationship”—is defined circularly by a fear of being subject to domestic violence. 27 I. & N. at 336. That is incorrect.

While a particular social group cannot be defined “exclusively by the persecution . . . or by a common fear of being persecuted,” “persecutory action toward a group may be a relevant factor” in determining the contours of that group. *Social Group Guidelines* ¶ 14; accord *A v Minister for Immigration & Ethnic Affairs* [1997] HCA 4 (Austl.).³⁵ Inability to leave a relationship may be caused by factors apart from the threat of harm from a domestic partner— because of cultural or religious reasons, for example. Among other things, women in domestic relationships in Guatemala and El Salvador endure the twin punishments of violence from male partners who feel “entitled to physical and emotional power,” and “widespread impunity for [such] acts of violence”

³⁵ <<http://www.refworld.org/docid/3ae6b7180.html>>

by their cultures. *Women on the Run* at 17.³⁶ *Matter of A-B-* improperly assumes that women are “unable to leave their relationship” solely on account of their fear of persecution.

2. Social Perception

The social perception approach examines whether group members share a common characteristic that makes them a cognizable group or sets them apart from society at large. *Social Group Guidelines* ¶ 7; see also *A v Minister* [1997] HCA at 4.

Gang violence victims may constitute a particular social group under such an approach. In a society “where it is risky for people to oppose gangs, often in closely knitted neighborhoods that are effectively controlled by gangs, gang resisters may be set apart in society.” *Gang Note* ¶ 41. This situation is common in Central America, where gangs exert extraordinary social control. *El Salvador Guidelines* at 12; *Honduras Guidelines* at 18, 38. For example, in El Salvador, “[p]ersons who resist the authority of the local gang . . . are reportedly subject to swift and brutal retaliation from the gang.” *El Salvador*

³⁶ <<http://www.refworld.org/docid/56307e2a4.html>>

Guidelines at 13. Similar circumstances affect Hondurans. *Honduras Guidelines* at 18 (“Many gangs are reported to forbid inhabitants to show ‘disrespect’ for the gang . . .”).

A particular social group defined by gender and relationship status can also satisfy the social perception requirement. *See Social Group Guidelines* ¶ 7 (“[W]omen . . . have been recognized under [the social perception] analysis as particular social groups.”). Being female “identif[ies] them as a group in society, subjecting them to different treatment and standards in some countries.” *Gender Guidelines* ¶ 30; *see also Khawar*, [2002] HCA 14, ¶ 35 (“Women in any society are a distinct and recognisable group; and their distinctive attributes and characteristics exist independently of the manner in which they are treated, either by males or by governments.”).

Moreover, in certain Central American countries, the intersection of gender and relationship status also identifies a socially distinct group. Women in domestic relationships are subjected to high rates of domestic violence while under the “authority exercised by their” male partners. *El Salvador Guidelines* at 38. Domestic violence against wives and partners leaves them “often trapped” in the relationship, due both to the threat of further violence and to broader cultural stigmas against such women. *Id.* at 37.

3. Particularity

As to “particularity,” *Matter of A-B-* asserts, and the new policies reiterate, that “[s]ocial groups defined by their vulnerability to private criminal activity likely lack . . . particularity [because] . . . broad swaths of society may be susceptible to victimization.” 27 I. & N. Dec. at 335.; *see also id.* (gang violence victims “are too diffuse” to form particular social group). That assertion departs from UNHCR’s guidance and puts the “particular social group” ground on unequal footing as compared to the other protected grounds for asylum.

Under prevailing international standards, the size and diffusiveness of a proposed group are irrelevant. As UNHCR has explained, “The size of the purported social group is not a relevant criterion in determining whether a particular social group exists within the meaning of Article 1A(2).” *Social Group Guidelines* ¶ 18; *see also id.* ¶ 15 (“It is widely accepted in State practice that . . . there is no requirement that the group be ‘cohesive.’”).

The other protected grounds for asylum are oftentimes shared by large segments of society. For example, broad swaths of society—“perhaps even . . . a majority of the population”—may share religious or political ideologies that are suppressed by the state. *Id.* ¶ 18. “[M]embers of a religion or holders of a

political opinion” may likewise come from all segments of society. *Id.* ¶ 15. In short, there is no size or diffusiveness requirement for individuals seeking asylum on account of race, religion, nationality, or political opinion. It makes little sense to impose a set of *more* demanding requirements for asylum on account of membership in a particular social group, particularly as international guidance and U.S. case law embrace a “flexible” approach towards this protected ground. *Id.* ¶ 3 (“[M]embership [in] a particular social group should be read in an evolutionary manner, open to the diverse and changing nature of group[] in various societies and evolving . . . human rights norms.”); *Rios v. Lynch*, 807 F.3d 1123, 1124 (9th Cir. 2015) (particular social group is an “inherently flexible term”).

CONCLUSION

For the foregoing reasons, UNHCR submits that the new policies and *Matter of A-B-* are at variance with the United States’ obligations under the *1951 Convention* and *1967 Protocol*.

JULY 31, 2019

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the typeface and type style requirements of Fed. R. App. P. 32(a)(5)(A) and Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in Century Expanded BT 14-point font.

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/s/ Alexander J. Kasner
ALEXANDER J. KASNER

DATED: JULY 31, 2019

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system on July 31, 2019. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Alexander J. Kasner
ALEXANDER J. KASNER

DATED: JULY 31, 2019