

ORAL ARGUMENT NOT YET SCHEDULED**No. 19-5013**

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

GRACE, *et al.*,
Plaintiffs-Appellees,

v.

WILLIAM PELHAM BARR, ATTORNEY GENERAL OF THE UNITED
STATES, IN HIS OFFICIAL CAPACITY, *et al.*,
Defendants-Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF COLUMBIA No. 18-cv-01853
(Hon. Emmet G. Sullivan)

**BRIEF FOR THE TAHIRIH JUSTICE CENTER, *ET AL.*
AS *AMICI CURIAE* IN SUPPORT OF
APPELLEES AND AFFIRMANCE**

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), counsel for *Amici Curiae* certify as follows:

A. Parties and *Amici*

Except for the District of Columbia and United Nations High Commissioner for Refugees as *amici curiae*, all parties, intervenors, and *amici* appearing before the district court and in this court are listed in the Brief for Appellants.

B. Rulings Under Review

Reference to the ruling under review appears in the Brief for the Appellants.

C. Related Cases

This case has not previously been before this or any other court. Counsel for *Amici Curiae* are aware of two related cases within the meaning of D.C. Circuit Rule 28(a)(1)(C): *Zelda v. Sessions*, No. 1:18-cv-1966 (D.D.C.) and *Kiakombua, et al. v. McAleenan, et al.*, No. 1: 19-CV-1872 (D.D.C.).

CORPORATE DISCLOSURE STATEMENT

Pursuant to the Circuit Rules of the United States Court of Appeals for the District of Columbia Circuit 26.1 and Federal Rule of Appellate Procedure 26.1, *Amici Curiae* submit the following corporate disclosure statements with respect to those *amici* that are corporations:

Tahirih Justice Center is a private, non-profit organization. It has no parent company, and no publicly held company holds more than 10% of its stock.

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National Domestic Violence Hotline is a private, non-profit organization. It has no parent company, and no publicly held company holds more than 10% of its stock.

Catholic Legal Immigration Network, Inc. is a private, non-profit organization. It has no parent company, and no publicly held company holds more than 10% of its stock.

STATEMENT REGARDING CONSENT TO FILE

All parties consented to the filing of this brief. Tahirih Justice Center *et al.* filed their notice of intent to participate in this case as *amici curiae* on July 2, 2019.

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GLOSSARY OF ABBREVIATIONS

APA	Administrative Procedure Act
BIA	Board of Immigration Appeals
INA	Immigration and Nationality Act
PSG	Particular Social Group
USCIS Guidance or Guidance	USCIS, Guidance for Processing Reasonable Fear, Credible Fear, Asylum, and Refugee Claims in Accordance with Matter of A-B- (July 11, 2018)
USCIS	United States Citizenship and Immigration Services

STATEMENT OF IDENTITY AND INTEREST¹

Tahirih Justice Center is the largest multi-city direct services and policy advocacy organization specializing in assisting immigrant women and girls who survive gender-based violence. In five cities across the country, Tahirih offers legal and social services to women and girls fleeing all forms of gender-based violence, including human trafficking, forced labor, domestic violence, rape and sexual assault, and female genital cutting/mutilation. Since its beginning in 1997, Tahirih has provided free legal assistance to more than 20,000 individuals, many of whom have experienced the significant psychological and neurobiological effects of that trauma. Through direct legal and social services, policy advocacy, and training and education, Tahirih protects immigrant women and girls and promotes a world where they can live in safety and

¹ No counsel for a party authored this brief in whole or in part. No such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. And no person other than *amici*, their members, or their counsel made such a monetary contribution. Pursuant to D.C. Circuit Rule 29(d), a separate brief is necessary to provide the Court the unique perspective and knowledge of the *amici* who provide legal and/or social services to survivors of domestic violence. The other non-governmental *amici* are not domestic violence organizations, and in an effort to comply with Rule 29(d), domestic violence organizations have joined this brief.

dignity. Tahirih *amicus* briefs have been accepted in numerous federal courts across the country.

National Asian Pacific American Women's Forum (“**NAPAWF**”) is the leading, national, multi-issue community organizing and policy advocacy organization for Asian American and Pacific Islander (AAPI) women and girls in the U.S. NAPAWF's mission is to build collective power of all AAPI women and girls to gain full agency over our lives, our families, and our communities. NAPAWF advocates and organizes with a reproductive justice framework that acknowledges the diversity within our community and ensures that different aspects of our identity—such as ethnicity, immigration status, education, sexual orientation, gender identity, and access to health—are considered in tandem when addressing our social, economic, and health needs. Our work includes addressing sexual assault and violence against AAPI women and advocating for policies and laws that protect AAPI survivors of violence to ensure their dignity, agency, and health.

Futures Without Violence (“**FUTURES**”), is a national nonprofit organization that has worked for over thirty years to prevent and end violence against women and children around the world.

FUTURES mobilizes concerned individuals; children's, women's, and civil rights groups; allied professionals; and other social justice organizations to end violence through public education and prevention campaigns, public policy reform, training and technical assistance, and programming designed to support better outcomes for women and children experiencing or exposed to violence. FUTURES also specifically supports the rights and interests of immigrant women and children who are victims of violence, and has co-founded and co-chaired the National Network to End Violence Against Immigrant Women.

Public Counsel, based in Los Angeles, California, is the largest pro bono law firm in the nation. Its Immigrants' Rights Project provides direct representation to individuals seeking asylum before the Los Angeles Asylum Office, the Los Angeles Immigration Court, the Board of Immigration Appeals, and the U.S. Court of Appeals for the Ninth Circuit. Project attorneys co-taught a clinic representing asylum seekers at UCLA School of Law for over a decade, and they currently conduct trainings, litigate, and advocate for protections for asylum seekers.

ASISTA Immigration Assistance ("ASISTA") worked with Congress to create and expand routes to secure immigration status for

survivors of domestic violence, sexual assault, and other crimes. ASISTA serves as liaison for Department of Homeland Security personnel charged with implementing the resulting laws. ASISTA also trains and provides technical support to local law-enforcement officials, judges, domestic violence and sexual assault advocates, and attorneys working with immigrant crime survivors. ASISTA has previously filed *amicus* briefs with the Supreme Court of the United States, this Court, and four other courts of appeals.

Asian Pacific Institute on Gender-Based Violence (*formerly, Asian & Pacific Islander Institute on Domestic Violence*) is a national resource center on domestic violence, sexual violence, trafficking, and other forms of gender-based violence in Asian and Pacific Islander communities. The Institute serves a national network of advocates and community-based service programs that work with Asian and Pacific Islander and immigrant survivors, and is a leader on providing analysis on critical issues facing victims of gender-based violence in the Asian and Pacific Islander and in immigrant communities. The Institute leads by promoting culturally relevant intervention and prevention, expert

consultation, technical assistance and training; conducting and disseminating critical research; and informing public policy.

Catholic Legal Immigration Network, Inc. (“CLINIC”) is the nation’s largest network of nonprofit immigration legal services providers, with more than 370 programs in 49 states and the District of Columbia. Agencies in CLINIC’s network employ approximately 2,300 attorneys and accredited representatives who, in turn, serve hundreds of thousands of low-income immigrants each year. CLINIC’s promotion of the dignity and rights of immigrants is informed by Catholic Social Teaching and rooted in the Gospel value of welcoming the stranger.

National Domestic Violence Hotline (“NDVH”) was established in 1996 as part of the Violence Against Women Act. It operates a free, anonymous and confidential, around-the-clock hotline available via phone, internet chat, and text services to offer victims of domestic violence compassionate support, crisis intervention, safety planning, and referral services to enable them to find safety and live lives free of abuse. A substantial number of the victims NDVH serves are immigrants or those who request help related to immigration-related issues. From May 2015 through March 2017, for example, over 10,000

victims contacted NDVH identifying as immigrants, and over 6,500 of them sought help related to immigration concerns.

National Network to End Domestic Violence (“NNEDV”) is a not-for-profit organization incorporated in the District of Columbia in 1994 (www.nnedv.org) with a mission to end domestic violence. As a network of the 56 state and territorial domestic violence and dual domestic violence and sexual assault coalitions and their over 2,000 member programs, NNEDV serves as the national voice of millions women, children and men victimized by domestic violence. Our WomensLaw program provides legal information to many thousands of immigrant victims of domestic violence through our website and email hotline, and we know the critical importance of asylum for those who courageously flee their home countries in an effort to escape horrific abuse.

Amici’s interest in this litigation is to offer the Court an overview of the invalidity the Attorney General’s new general rules through the unique perspective of organizations that serve survivors of domestic violence.

INTRODUCTION

In *Matter of A-B-*, 27 I. & N. Dec. 316 (A.G. 2018), the Attorney General attempted to overturn settled law by establishing new general rules for asylum cases involving the survivors of domestic and gang-related violence. Among other things, the Attorney General said “[g]enerally, claims by aliens pertaining to domestic violence or gang violence perpetrated by non-governmental actors *will not qualify for asylum.*” *Id.* at 320 (emphasis added). And following *Matter of A-B-*, the U.S. Citizenship and Immigration Services (“USCIS”) issued guidance (“USCIS Guidance” or “Guidance”) instructing asylum officers to apply *Matter of A-B-* to all adjudications, including the credible fear determinations that take place at an early stage of the asylum application process and are intended to impose only a low screening standard. Further, as plaintiffs’ brief on appeal makes clear, Appellees’ Br. at 53–56, the new general rule directly violates settled law by precluding case-by-case adjudication of domestic-violence claims.

The government tries to salvage *Matter of A-B-* and the Guidance by arguing that they do not attempt to state new general rules, but the district court correctly rejected that argument. The plain text of both

Matter of A-B- and the Guidance—including the sole portion of the Guidance appearing in boldface—belies the government’s position.

The new general rules in *Matter of A-B-* and the Guidance also violate the Administrative Procedure Act (“APA”), because they rest on a deliberate decision to ignore critical evidence. Decades of research shows that misogynistic cultural, social, and religious norms and beliefs concerning women prevalent in certain cultures carry a high risk of domestic and other gender-based violence. Overwhelming evidence also shows that, in countries where those norms and beliefs are endemic, the government cannot or will not act to protect survivors of gender-based violence. The cultural norms in an asylum seeker’s home country are therefore critically relevant to the questions whether a survivor’s proposed “particular social group” (“PSG”) is cognizable under Board of Immigration Appeals (“BIA”) precedent and whether the government of her home country was unable or unwilling to protect her. But *Matter of A-B-* and the Guidance simply ignored this evidence in favor of the unsupported assumption that domestic violence survivors generally cannot meet the standards for asylum, even at their credible fear interviews.

Matter of A-B- and the Guidance likewise ignored evidence that goes to the heart of the question whether domestic violence is “on account of” a protected characteristic. The Attorney General assumed that domestic violence does not meet that test, because—in his view—domestic violence is a purely private or personal matter. That view cannot be reconciled with the evidence in the record in *Matter of A-B-*, which the Attorney General ignored. Furthermore, under settled legal standards, the relevant question for nexus purposes is whether a protected ground represents *one* central reason—not the *only* reason—for persecution. Many survivors of domestic violence can satisfy this standard notwithstanding the Attorney General’s musings to the contrary.

In short, the general rules enunciated by *Matter of A-B-* and the Guidance stand at odds with reality, with the record before the Attorney General, and with settled law. Those general rules, if allowed to stand, would also harm untold numbers of survivors of domestic violence and other gender-based crimes who would otherwise be eligible for asylum and for the opportunity to lead safe and productive lives in the United States. The district court’s injunction should accordingly be affirmed.

ARGUMENT

To qualify for asylum on a PSG theory², an applicant must demonstrate that (i) she has a well-founded fear of persecution; (ii) she is a member of a PSG; and (iii) her persecution is “on account of” her membership in a PSG. *E.g.*, *Mulyani v. Holder*, 771 F.3d 190, 198 (4th Cir. 2014). As to what constitutes a PSG, the BIA and several circuit courts have held that a PSG is valid if it is “(1) composed of members who share a common immutable characteristic, (2) defined with particularity, and (3) socially distinct within the society in question.” *Oliva v. Lynch*, 807 F.3d 58, 61 (4th Cir. 2015) (citations omitted).³

For decades prior to the Attorney General’s decision in *Matter of A-B-*, the BIA and numerous federal courts held that survivors of domestic violence and gender-based violence can qualify for asylum. *See, e.g.*, *Sarhan v. Holder*, 658 F.3d 649, 662 (7th Cir. 2011); *Mohammed v. Gonzales*, 400 F.3d 785, 798 (9th Cir. 2005); *In re Kasinga*, 21 I. & N. Dec.

² There are five protected grounds upon which an applicant may qualify for asylum: race, religion, nationality, membership in a PSG, or political opinion. 8 U.S.C. § 1101(a)(42).

³ While these elements are current law in a majority of circuits, the Court of Appeals for the D.C. Circuit has not decided whether these elements are valid, and *amici* do not endorse them.

357 (BIA 1996). These cases recognize that, while survival of domestic violence or gender-based violence may not itself define a freestanding PSG, survivors of domestic violence, like survivors of other gender-based violence, may nonetheless be members of cognizable PSGs. This is not to say that *every* such survivor may qualify for asylum. Such a general policy would run afoul of congressional intent and decades of settled law. *See Matter of Acosta*, 19 I. & N. Dec. 211, 233 (BIA 1985) (establishing current asylum framework) (subsequent history omitted).

But just as a policy that grants asylum to every gender-based violence survivor would be overbroad, so, too, is a policy that denies asylum to every gender-based survivor. For the reasons below and described in the district court's opinion, any policy "generally" excluding domestic violence survivors from asylum protection is overbroad and arbitrary—especially at the credible fear stage. Any such policy is also contrary to both available evidence and years of precedent.

I. THE DISTRICT COURT CORRECTLY HELD THAT *MATTER OF A-B-* AND THE SUBSEQUENT GUIDANCE CREATED A NEW GENERAL RULE DESIGNED TO IMPROPERLY ALTER THE STANDARDS FOR SHOWING CREDIBLE FEAR.

There can be little doubt that *Matter of A-B-* sought to establish a general rule. It squarely says: “Generally, claims by aliens pertaining to domestic violence or gang violence perpetrated by non-governmental actors *will not qualify* for asylum.” *Matter of A-B-*, 27 I. & N. Dec. at 320 (emphasis added). Further evidence that the decision was intended to generally limit asylum claims stemming from domestic violence is equally obvious:

- “[I]n practice such [domestic violence or gang-violence] claims are *unlikely to satisfy* the statutory grounds for proving group persecution that the government is unable or unwilling to address.” *Id.* (emphasis added).
- “Social groups defined by their vulnerability to private criminal activity *likely lack the particularity required . . .*” *Id.* at 335 (emphasis added).

The USCIS Guidance unquestionably reads *A-B-* as establishing a general rule. The Guidance makes one—and only one—point in bold-face print:

In general, in light of [*Matter of A-B*], 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 Policy Memorandum at 6 (July 11, 2018) (emphasis in original).

The Attorney General's observation that he did not decide that domestic, family, or gang violence "may never serve" as a basis for asylum does not meaningfully alter the effect of his decision. *Matter of A-B*, 27 I. & N. Dec. at 320. That observation clearly is contrary to what the Attorney General actually did. See *CBS Corp. v. FCC*, 663 F.3d 122, 145 (3d Cir. 2011) (explaining a new agency position is arbitrary and capricious where the agency fails to "provide a 'reasoned explanation' for its decision to change course"). Moreover, although a general rule will always have minor potential exceptions, the Attorney General did not discuss, suggest, or even imply the content of any potential exceptions to his rule. Nor does the Guidance. It is hard to imagine how the credible fear policies challenged here could be understood as anything other than a directive to disadvantage—and preclude—asylum claims premised on domestic violence.

The government argues that the Attorney General’s decision did nothing more than recognize that domestic violence claims have “historically foundered.” Appellants’ Br. at 56 (June 5, 2019). That is simply wrong. In fact, survivors of domestic violence have received asylum for decades. One analysis of a sample of asylum decisions rendered between December 1994 and May 2012 showed that survivors received relief in more than two-thirds of cases in which domestic violence was raised. And in the vast majority—87%—of those cases, relief was granted *because of* domestic violence. Blaine Bookey, *Domestic Violence as a Basis for Asylum: An Analysis of 206 Case Outcomes in the United States from 1994 to 2012*, 24 *Hastings Women’s L. J.* 107, 120–21 (2013). Moreover, circuit courts have routinely ruled for years that claims based on domestic and other gender-based violence can meet the statutory requirements for asylum. *See, e.g., Alvarado-Garcia v. Lynch*, 665 F. App’x 620, 621 (9th Cir. 2016) (domestic violence); *Sarhan*, 658 F.3d at 658 (threatened “honor killing” by family); *Perdomo v. Holder*, 611 F.3d 662, 669 (9th Cir. 2010) (endemic violence against women); *Nabulwala v. Gonzales*, 481 F.3d 1115, 1116–18 (8th Cir. 2007) (family-

arranged rape is persecution, not “private family mistreatment”); *Mohammed*, 400 F.3d at 798 n.19 (female genital mutilation).

In short, the Attorney General and the Guidance have enunciated a new general rule that would dramatically alter asylum law by preventing survivors of domestic violence from stating a credible fear of persecution. As the district court held, this attempt to enunciate a general rule is contrary to the law requiring individualized consideration of each claim on the record before the court. *Grace v. Whitaker*, 344 F. Supp. 3d 96, 126 (D.D.C. 2018); *see also* Appellees’ Br. 55–57. That deficiency, standing alone, provides a sufficient basis for rejecting the application of the new rules in *Matter of A-B-* and the Guidance to asylum determinations, especially credible fear.

II. THE DISTRICT COURT CORRECTLY HELD THAT THE MATTER OF A-B-’S GENERAL RULE THAT SURVIVORS OF DOMESTIC VIOLENCE CANNOT STATE A CREDIBLE FEAR OF PERSECUTION VIOLATED THE INA AND APA.

The fact that the Attorney General and USCIS have attempted to impose a categorical rule precluding individualized determinations is far from the only shortcoming of *Matter of A-B-* and the Guidance. Plaintiffs and the district court have correctly identified numerous other failings of

those policies. *See generally Grace*, 344 F. Supp. 3d at 131–40; Appellees’ Br. at 30, 39, 49.

One crucial failing is that, under the APA, agency action is arbitrary and capricious if it “entirely fail[s] to consider an important aspect of the problem” or offers “an explanation for its decision that runs counter to the evidence before the agency.” *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). It follows that “an agency cannot ignore evidence that undercuts its judgment; and it may not minimize such evidence without adequate explanation.” *Genuine Parts Co. v. EPA*, 890 F.3d 304, 312 (D.C. Cir. 2018); *see also Butte Cty., Cal. v. Hogen*, 613 F.3d 190, 194 (D.C. Cir. 2010) (“refusal to consider” relevant evidence is arbitrary). The Attorney General and USCIS have done just that by ignoring the well-settled evidence that domestic violence has cultural roots and that it is therefore not a purely personal, private matter.

A. A General Rule That Domestic Violence Claims Will Fail Ignores Ample Evidence That, in Many Places, Violence Against Women is Culturally and Socially Acceptable and Governments Do Not Protect Women Against That Violence.

Matter of A-B- and the USCIS Guidance ignored significant and wide-ranging evidence concerning the roots of gender-based violence and the response of governments to that violence. A great deal of research, much of it originating with the U.S. government, demonstrates that domestic violence and other forms of gender-based violence permeate some countries' cultural and social landscapes. The research also demonstrates that institutionalized acceptance of domestic violence prohibits survivors from obtaining protection or recourse. Thus, in many countries, violence against women is both deeply ingrained in the culture and institutionally accepted by the government.

1. Cultural, religious, and economic conditions in some countries create widespread gender-based and domestic violence.

For more than three decades, study after study has identified the cultural and social factors that increase the risk of gender-based violence. U.N. Secretary-General, *In-Depth Study on All Forms of Violence against*

*Women U.N. Doc A/61/122/Add. 1 (July 6, 2006) (“In-Depth Study”)*⁴; National Research Council, *Understanding Violence Against Women* (Nancy A. Crowell, Ann W. Burgess, eds. 1996); *see also*, Comisión Internacional Contra la Impunidad en Guatemala, *Human Trafficking for Sexual Exploitation Purposes in Guatemala* 30 (2016) (“Human Trafficking in Guatemala”)⁵; The Geneva Declaration, *Lethal Violence against Women and Girls* 93 (2015).⁶ Those factors include: an isolation and lack of social support for women; community attitudes that tolerate and legitimize male violence; and extreme social and economic disempowerment of women. In-Depth Study. Other factors include the acceptance of violence and gender stereotypes by patriarchal families and cultures. *Understanding Violence Against Women* (Nancy A. Crowell, Ann W. Burgess, eds. 1996); *see also* Human Trafficking in Guatemala 30; The Geneva Declaration, *Lethal Violence against Women and Girls* 89 (discussing “patriarchal gender relations” and intimate partner femicide). Religious beliefs and practices can also foster gender-based

⁴<https://www.refworld.org/docid/484e58702.html>.

⁵<https://www.refworld.org/docid/584aaeac4.html>.

⁶http://www.genevadeclaration.org/fileadmin/docs/GBAV3/GBAV3_Ch3_pp87-120.pdf.

violence and help keep it hidden. For example, the Afghani constitution allows courts to apply a form of sharia law to rule on matters not specifically covered by the constitution or other laws. U.S. Dep't of State, *Afghanistan 2018 Human Rights Report* 8 (2018).⁷

In many countries where these risk factors are prominent, cultural norms inculcate the belief that women are subordinate to men and are considered “objects owned by men.” Human Trafficking in Guatemala 30. In others, cultural and political authorities excuse or allow domestic violence based on their view of a married woman’s subservient role as they “attribute the abuse to a woman’s alleged disobedience of her husband.” U.N. Human Rights Council, *Report of the Special Rapporteur on Violence Against Women, Its Causes and Consequences, Mission to Afghanistan* 5, U.N. Doc. A/HRC/29/27/Add.3 (May 12, 2015).⁸

The result is that the culture in some countries is permeated by domestic violence. For example, the State Department has concluded that domestic violence is a “serious problem[]” in Guatemala. U.S. Dep’t

⁷https://af.usembassy.gov/wp-content/uploads/sites/268/HRR_Afghanistan_English.pdf.

⁸http://www.un.org/ga/search/view_doc.asp?symbol=A/HRC/29/27/Add.3.

of State, *Guatemala 2018 Human Rights Report* 16 (2018).⁹ The State Department has also recognized that in Afghanistan, “millions of women continued to suffer abuse at the hands of their husbands, fathers, brother, in-laws, armed individuals, parallel legal systems, and institutions of the state, such as the police and justice system.” *Afghanistan 2018 Human Rights Report* 30. In Saudi Arabia, domestic violence is believed to be “widespread.” U.S. Dep’t of State, *Saudi Arabia 2018 Human Rights Report* 44 (2018).¹⁰ And domestic violence is a similarly serious problem in dozens of other countries around the world, including El Salvador, Kenya, Russia, Burma, and Haiti. *See* U.S. Dep’t of State, *El Salvador 2018 Human Rights Report* 16 (2018)¹¹; U.S. Dep’t of State, *Kenya 2018 Human Rights Report* 23 (2018)¹²; U.S. Dep’t of State, *Russia 2018 Human Rights Report* 42–44 (2018)¹³; U.S. Dep’t of

⁹<https://www.state.gov/wp-content/uploads/2019/03/GUATEMALA-2018.pdf>

¹⁰<https://www.state.gov/wp-content/uploads/2019/03/SAUDI-ARABIA-2018.pdf>

¹¹<https://www.state.gov/wp-content/uploads/2019/03/EL-SALVADOR-2018.pdf>

¹²<https://www.state.gov/wp-content/uploads/2019/03/Kenya-2018.pdf>

¹³<https://www.state.gov/wp-content/uploads/2019/03/RUSSIA-2018-HUMAN-RIGHTS-REPORT.pdf>

State, *Burma 2018 Human Rights Report* 37 (2018)¹⁴; U.S. Dep't of State, *Haiti 2018 Human Rights Report* 19–20 (2018).¹⁵

2. The same cultural conditions render states unwilling or unable to protect survivors of domestic violence and other gender-based crimes.

Because of the cultural norms that lead to domestic violence, in many countries such violence is not a crime. *See, e.g., Burma 2018 Human Rights Report* 37; *Haiti 2018 Human Rights Report* 19. In 2017, for instance, Russia decriminalized domestic violence for certain first time offenders. *See Russia 2018 Human Rights Report* 43. And the laws of other countries are woefully inadequate to protect the survivors of domestic violence: Saudi Arabia, for instance, does not recognize spousal rape as a crime. *Saudi Arabia 2018 Human Rights Report* 42. Neither does Afghanistan—and judges and prosecutors in that country were surprised to learn that there is a law against some other forms of domestic violence. *Afghanistan 2018 Human Rights Report* 29.

¹⁴<https://www.state.gov/wp-content/uploads/2019/03/BURMA-2018.pdf>

¹⁵<https://www.state.gov/wp-content/uploads/2019/03/HAITI-2018.pdf>.

Even in countries where domestic violence is technically illegal, the laws against it often are not enforced. That is true in Saudi Arabia, where investigators often refuse to enter the homes of domestic violence survivors without the approval of the head of the household, who is often the abuser. *Saudi Arabia 2018 Human Rights Report* 43. It is true in Afghanistan, where police often have “sympathy toward perpetrators” or view the laws criminalizing violence against women as “un-Islamic.” *Afghanistan 2018 Human Rights Report* 30. And it is likewise true in Kenya and Guatemala, among other countries. *See Kenya 2018 Human Rights Report* 34; *Guatemala 2018 Human Rights Report* 17.

It is no surprise that, in countries where cultural norms tolerate or encourage domestic violence and the authorities cannot or will not intervene, much of that violence remains hidden. The State Department reports that, in Guatemala, there were “numerous examples of the [police’s] failure to respond to requests for assistance related to domestic violence.” *Guatemala 2018 Human Rights Report* 17. To take another example, in Saudi Arabia, rape is underreported because of “societal and familial reprisal, including diminished marriage opportunities, criminal sanctions up to imprisonment, or accusations of adultery or sexual

relations outside of marriage.” *Saudi Arabia 2018 Human Rights Report*

43. As the United Nations Report on the World’s Women in 2010 put the matter:

Violence against women throughout their life cycle is a manifestation of the historically unequal power relations between women and men. It is perpetuated by traditional and customary practices that accord women lower status in the family, workplace, community and society, and it is exacerbated by social pressures. These include the shame surrounding and hence difficulty of denouncing certain acts against women; women’s lack of access to legal information, aid or protection; a dearth of laws that effectively prohibit violence against women; [and] inadequate efforts on the part of public authorities to promote awareness of and enforce existing laws¹⁶

3. The Attorney General and USCIS violated the APA by failing to consider this evidence.

In light of this evidence, the BIA and the federal courts have long recognized that gender-based violence permeates certain countries and cultures. *See e.g., Sarhan*, 658 F.3d at 654 (“honor killings” in Jordan); *Mohammed*, 400 F.3d at 795 (female genital mutilation in Somalia);

¹⁶United Nations Secretariat Department of Economic and Social Affairs, *The World’s Women 2010*, at 127, U.N. Doc. ST/ESA/STAT/SER.K/19 (2010), https://unstats.un.org/unsd/demographic/products/worldswomen/ww_full%20report_color.pdf.

Alonzo-Rivera v. United States Atty. Gen., 649 F. App'x 983 (11th Cir. 2016) (domestic violence in Honduras). Courts and the BIA have also regularly recognized that the governments of some countries are unable or unwilling to control the actions of abusers. *See, e.g., Sarhan*, 658 F.3d at 658 (Jordan government ineffective at stopping “honor killings”); *Alonzo-Rivera*, 649 F. App'x at 991–92 (remanding to BIA where record included evidence of Honduran government’s failures to address domestic violence); *Matter of S-A-*, 22 I. & N. Dec. 1328, 1335 (BIA 2000) (Moroccan authorities unwilling or unable to control domestic violence).

The evidence concerning the cultural roots of gender-based violence and the lack of governmental response in many countries was also before the Attorney General when he decided *Matter of A-B-*. *See* Brief of *Amici Curiae* Tahirih Justice Center *et al.* at 12–18, *Matter of A-B-*, 27 I. & N. Dec. 316 (A.G. 2018). The Attorney General, however, simply ignored it. So, too, did USCIS when it issued the Guidance based on *A-B-*.

On appeal, the government suggests that this disregard was justified, because “evidence that” a given country “had a culture of ‘machismo and family violence’” is not “focused on” a specific PSG. Appellants’ Br. at 10. That unsupported statement is simply wrong.

Evidence about cultural norms surrounding gender violence is critical to an understanding of whether PSGs offered by domestic violence survivors are cognizable under *Acosta* and the BIA's requirement that PSGs be socially distinct. *See supra* at 8. For instance, the question whether a PSG defined by an inability to leave a relationship is cognizable depends, in part, on the existence of pressure to remain with an abuser based on deeply entrenched belief systems that women must be subservient to men; the prevalence of cultural and religious beliefs that women are inferior to men; and social norms under which a divorce or separation is not seen as ending an abuser's authority and right to control a survivor of domestic violence.

Evidence concerning the response of authorities to domestic violence also is critical to the question of whether governments in countries where domestic violence is tolerated are able and willing to control abusers. The failure of the Attorney General and USCIS to make any attempt to come to grips with this evidence accordingly violates the APA. *See State Farm*, 463 U.S. at 43.

B. A General Rule That Domestic Violence Claims “Will Fail” Ignores Ample Evidence That in Many Places, Gender-Based Violence is On Account Of The Survivors’ Membership in a Particular Social Group.

Just as the credible fear policies were imposed without considering the ample evidence relating to country conditions, they were also imposed without considering evidence relating to the causes of gender-based violence. In particular, the Attorney General’s decision in *Matter of A-B-* implausibly and without evidence attributed nexus in all or nearly all domestic violence cases solely to a “preexisting personal relationship.” 27 I&N Dec. at 339. And again, the Attorney General failed to consider extensive record evidence to the contrary.

Over the past thirty years, extensive research has rejected the idea that domestic violence is a simply private matter based on personal animosity. *See, e.g.,* Mary Ann Dutton & Lisa A. Goodman, *Coercion in Intimate Partner Violence: Towards a New Conceptualization*, 52 *Sex Roles* 743, 743 (2005); Rhonda Copelon, *Recognizing the Egregious in the Everyday: Domestic Violence as Torture*, 25 *Colum. Hum. Rts. L. Rev.* 291, 305 (1994); Fatma Marouf, *Becoming Unconventional: Constricting the ‘Particular Social Group’ Ground for Asylum*, 44 *N.C.J. Int’l L.* 487, 513 (2019); *see generally* Marisa Silenzi Cianciarulo, *Batterers As Agents*

of the State: Challenging the Public/Private Distinction in Intimate Partner Violence-Based Asylum Claims, 35 Harv. J. L. & Gender 117, 137 (2012). Instead, in many places in the world, domestic violence flows from gender-based norms and the need to control women. See e.g., *Focusing on Prevention to Stop the Violence*, UN Women;¹⁷ Human Trafficking in Guatemala 30.

The Attorney General's effort to treat all domestic-violence claims as arising from purely personal causes lacks legal support just as it lacks evidentiary support. As the district court recognized, "although the nexus standard forecloses cases in which purely personal disputes are the impetus for the persecution, it does not preclude a positive credible fear determination simply because there is a personal relationship between the persecutor and the victim." *Grace*, 344 F. Supp. 3d at 131 (citing *Aldana Ramos v. Holder*, 757 F.3d 9, 18–19 (1st Cir.2014)). The courts of appeals, and the BIA, have accordingly rejected any notion that "complete independence of any relationship to the persecutor" is required to satisfy the nexus criterion. *Cece v. Holder*, 733 F.3d 662, 671 (7th Cir.

¹⁷<http://www.unwomen.org/en/what-we-do/ending-violence-against-women/prevention> (last visited July 23, 2019).

2013). Contrary to the general rule espoused by the Attorney General, the mere existence of a personal relationship does not bar a positive credible-fear determination—or an ultimate grant of asylum.

Instead, to satisfy the nexus requirement, a gender-based violence survivor must, like any other asylum seeker, demonstrate that her membership in a PSG (or that some other protected ground) “was or will be at least one central reason for” her persecution. 8 U.S.C. § 1158(b)(1)(B)(i). Although *Matter of A-B-* failed to acknowledge as much, “one central reason” does not mean “the only reason.” *Qu v. Holder*, 618 F.3d 602, 608 (6th Cir. 2010). Thus, “if there is a nexus between the persecution and the membership in a particular social group, the simultaneous existence of a personal dispute does not eliminate that nexus.” *Id.*¹⁸

¹⁸ See also *Sarhan*, 658 F.3d at 655–57 (although a man’s “honor killing” of his sister “may have a personal motivation,” honor killings have “broader social significance,” and finding nexus requirement satisfied); *Aldana Ramos*, 757 F.3d at 18–19 (recognizing that “multiple motivations [for persecution] can exist, and that the presence of a non-protected motivation does not render an applicant ineligible for refugee status”); *Ndayshimiye v. U.S. Att’y Gen.*, 557 F.3d 124, 129 (3d Cir. 2009) (reversing BIA holding that would have required showing that protected ground of persecution was not subordinate to any other ground).

Specific instances of gender-based violence will often satisfy this test. As discussed above, *supra* section II.A.1, one central reason for gender-based persecution is often that the abuser believed that his wife “belonged” to him as a matter of cultural, religious, or political norms—and that he was accordingly entitled to inflict persecution with impunity. The fact that these cultural beliefs are interwoven into a personal relationship does not sever the causal connection between the beliefs and the resulting persecution. *See, e.g., Al-Ghorbani*, 585 F.3d 980, 997–98 (6th Cir. 2009). For example, an applicant whose husband regularly beats her for leaving home against his orders—but does not beat his son, brother, or sister for doing the same—may well be able to show that (1) she belongs to a PSG consisting of, say, married women of a particular nationality or married women who cannot leave a relationship, and (2) her membership in that PSG forms one central reason for the violence.

In short, the Attorney General’s opinion in *Matter of A-B-* and the USCIS Guidance have attempted to put a thumb on the scale at the credible fear stage to exclude categories of asylum claims that are not excluded by the INA. Moreover, both *Matter of A-B-* and the Guidance made this abrupt change without considering either critical evidence

concerning the roots and nature of gender-based violence or the governing law on the nexus prerequisite to asylum. The attempt by the Attorney General and USCIS to exclude survivors of gender-based violence from the protections of asylum is therefore arbitrary and capricious under the APA. *See supra* at 16; *see also Mont. Envtl. Info. Ctr. v. United States Office of Surface Mining*, 274 F. Supp. 3d 1074 (D. Mont. 2017) (agency improperly acted when it placed a thumb on the scale by “inflating the benefits of the action while minimizing its impacts”); *Rodriguez-Arias v. Whitaker*, 915 F.3d 968, 974–75 (4th Cir. 2019) (vacating denial of relief because immigration judge and BIA failed to meaningfully engage with relevant evidence).

III. THE UNLAWFUL NEW RULES IN *MATTER OF A-B-* AND THE USCIS GUIDANCE SERIOUSLY HARM BOTH SURVIVORS OF GENDER-BASED VIOLENCE AND U.S. COMMUNITIES.

The new rules set forth in *Matter of A-B-* and the USCIS Guidance would harm countless individuals and American communities. Many survivors of domestic and other gender-based violence who have been granted asylum over the past decades have gone on to live successful and productive lives that enrich their communities. The following are just a

few examples of how these survivors¹⁹ have transformed their lives and the lives of those around them:

- Monica suffered years of abuse at the hands of her family in Honduras. She lived with her grandparents and uncles, and her uncles began sexually assaulting her when she was eight. They also beat her regularly with bats, electrical cords, and whips. When Monica ran away from home, her family threatened to cut off her feet. And when she sought help from the police in her hometown, they sent her home and told her that she was too young to make a police report. In January 2012, Monica escaped alone to the United States. After she arrived, Monica—whose pro bono lawyer refers to as one of the “toughest, bravest girls I could imagine”—lived with relatives, and was able to confide in her school guidance counselor. Monica was granted asylum. Since then, Monica has excelled in her ESL classes and received an award from her high school in recognition of her achievements. She has been involved in a dance team at school and updated her

¹⁹ All names have been changed to protect the survivors.

attorneys with photos. Perhaps most importantly, Monica is optimistic about her future.

- Uwu grew up in Nigeria, where she obtained several degrees. Her husband and his family nevertheless insisted that she must be subject to his control, and he beat and raped her to teach her that she had to be “his woman.” One beating left Uwu unconscious in a pool of blood and almost caused her to suffer a miscarriage. Even then, Uwu’s husband would not allow her to access medical care. When Uwu told her church and the police about her husband’s actions, they told her to return home and submit to him. And when Uwu tried to divorce her husband—an action that is theoretically possible under Nigerian law but unheard of in reality—her lawyer withdrew after Uwu’s husband threatened him with death. Uwu went into hiding, eventually managed to escape to the United States, and received asylum. She has studied to become a nurse so that she can be economically independent and self-sufficient, and she is raising her children in peace and safety.
- When she was 15, Ana was kidnapped by a man in her Honduran village who decided she belonged to him. He beat and raped Ana

while keeping her captive. When Ana escaped and returned home, the abuser kidnapped her again and threatened to kill her family if she resisted. Ana twice became pregnant after he raped her. The abuser killed both children and shot Ana in the head. Ana miraculously survived, and, when she escaped a second time, the abuser's family pursued her and shot into her parents' house. While pregnant as a result of rape for a third time, Ana was able to escape and make her way to the United States. With the help of pro bono attorneys, she was granted asylum and is now self-sufficient and is raising her daughter.

- Mariam grew up in Mali. When she was 16, Mariam's father, acting against her will, promised to marry her to an HIV-positive man older than her father. When Mariam claimed she was no longer a virgin in order to avoid the marriage, her uncles beat her and locked her in a storage room for more than eight months. With the help of her mother, Mariam escaped. She made her way to the United States and was granted asylum. Mariam has since graduated from college with a degree in agribusiness and has a full-time job. She

plans to eventually marry and start a family, but at her own pace and with a partner of her choice.

- Didja grew up in Ivory Coast, where she was forced to undergo female genital mutilation when she was nine years old. Then, after Didja's parents died, she was given to an uncle, who decided to marry her to one of his friends—a man who already had 3 wives and over 20 children. She sought help from another family member who, acting at great risk, helped Didja escape in the middle of the night. When she arrived in the United States, Didja met a woman on a bus who gave her the phone number of a pro bono immigration organization. Didja then filed for, and was granted, asylum. Didja is now pursuing legal studies so she can one day help other women who are searching for safety and peace.

Just like these women, other survivors of gender-based violence represented and supported by *amici* seek only refuge from persecution and the chance to live with dignity. The credible-fear policies at issue here would prevent many such survivors from having any chance of receiving the relief from persecution that this country has promised by statute and treaty.

CONCLUSION

For the foregoing reasons, this Court should affirm the decision of the district court.

Respectfully submitted,

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RULE 32 CERTIFICATION

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because:

1. This brief contains 6,488 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f) and D.C. Circuit Rule 32(e).
2. The brief complies with the typeface and type-style requirements of Federal Rules of Appellate Procedure 32(a)(5) and 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point New Century Schoolbook font.

CERTIFICATE OF SERVICE

I hereby certify that on July 31, 2019, I electronically filed the foregoing Amicus Brief with the Clerk for the United States Court of Appeals for the DC Circuit by using the CM/ECF system. A true and correct copy of this brief has been served via the Court's CM/ECF system on all counsel of record.

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