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CENTER FOR Gender & Refugee STUDIES

PRACTICE ADVISORY: *GRACE V. WHITAKER*

March 7, 2019

I. Introduction

On December 19, 2018, the U.S. District Court for the District of Columbia issued a permanent injunction in *Grace v. Whitaker*, No. 18-cv-01853 (EGS), 2018 WL 6628081 (D.D.C. Dec. 19, 2018). *Grace* challenges the application of *Matter of A-B-*, 27 I. & N. Dec. 316 (A.G. 2018), and an accompanying USCIS policy memorandum in credible fear proceedings.[1]

The lawsuit alleged that various policies reflected in *Matter of A-B-* and the USCIS policy memorandum sought to unlawfully heighten the credible fear standard, including by singling out claims relating to domestic violence and gang violence for denial.

The Court found that several aspects of *Matter of A-B-* and the USCIS policy memorandum violate the Immigration and Nationality Act (INA) and the Administrative Procedures Act (APA). The Court vacated those portions it found unlawful and entered an order permanently enjoining the government from applying them in future credible fear processes.

This advisory provides a summary of the order and opinion, both included with this advisory as Attachments A and B, respectively. It also offers practical guidance on the impact of *Grace* for asylum seekers at the credible fear interview (CFI) stage, in front of the asylum office, and in front of EOIR.[2]

We will update this advisory as circumstances change. In the meantime, we are interested to hear how the Court's opinion in *Grace* is impacting CFIs and removal proceedings. Please contact crediblefearAB@aclu.org if you have any updates to share on the implementation and impact of *Grace*.

If you have case updates on the more general application of *Matter of A-B-* in asylum merits cases before the asylum office, immigration judges, BIA, or federal courts, please keep us apprised at CGRS-ABTracking@uchastings.edu.

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[1] *Grace* also challenges a June 13, 2018 interim guidance memorandum issued by USCIS shortly after *Matter of A-B-* was decided. This interim guidance was followed by a significantly more detailed USCIS policy memorandum on *Matter of A-B-*. As such, the Court opinion largely focuses on the USCIS policy memorandum, but the injunction applies equally to overlapping aspects of the interim guidance—namely its articulation of an unlawful state protection standard. *See, e.g.*, Order ¶1(b).

[2] This advisory is not a substitute for independent legal advice by a lawyer who is familiar with an individual's case.

***Please note that on January 17, 2019, the government filed a notice of appeal of the district court decision and order to the D.C. Circuit Court of Appeals. As of the date of this advisory, the district court injunction remains in effect. Please check the docket for the most recent status of the injunction.*

II. Background

On June 11, 2018, Attorney General Jeff Sessions issued a decision in *Matter of A-B-*, a case he certified to himself pursuant to 8 C.F.R. § 1003.1(h)(1)(i). *Matter of A-B-* is the case of a woman from El Salvador who sought asylum based on years of egregious domestic violence at the hands of her then-husband. Attorney General Sessions used Ms. A.B.'s case to vacate a previous Board decision, *Matter of A-R-C-G-*, 25 I. & N. Dec. 388 (B.I.A. 2014), and to deny Ms. A.B.'s asylum claim. The Attorney General also used the decision to issue sweeping commentary on a variety of aspects of asylum law with a particular focus on the application of the law to gang and domestic violence claims.[3]

On July 11, 2018, USCIS released a policy memorandum (USCIS PM) instructing its officers on how to apply *Matter of A-B-* in credible fear proceedings and in full asylum interviews.

On August 7, 2018, twelve asylum seekers from El Salvador, Guatemala, and Honduras who received negative credible fear determinations under *Matter of A-B-* and the subsequent USCIS PM filed a lawsuit raising a systemic challenge to multiple aspects of the *A-B-* decision and the PM as applied to credible fear proceedings.[4]

The *Grace* plaintiffs sought an injunction enjoining the challenged policies, in addition to other equitable relief. They argued that various aspects of *Matter of A-B-* and the USCIS PM violate the INA and APA. Plaintiffs also brought due process and separation of powers arguments; however, the Court did not reach the constitutional arguments, finding for the plaintiffs on their statutory claims.

III. What did the district court do?

In its decision, the Court held that the majority of the challenged policies were unlawful, as detailed below. Order ¶¶1(a)-(f). The Court entered a permanent injunction on December 19, 2018, prohibiting the government from applying the unlawful provisions in any credible fear proceedings on or after that date, including both credible fear interviews by asylum officers and credible fear review hearings by immigration judges. *Id*. ¶2. The Court also ordered the government to vacate the plaintiffs' expedited removal orders, provide them with new proceedings, and return to the United States those who had been removed. *Id.* ¶¶3-5. In addition, the Court ordered the government to provide updates to the Court on steps taken to comply with the injunction, including the issuance of revised guidance. *Id.* ¶6.

[3] For a more detailed overview of *Matter of A-B-*, please consult CGRS's *Matter of A-B-* practice advisory, available upon request at https://uchastings.edu/assistance/request.

[4] The lawsuit challenged the validity of the government's policies in expedited removal within 60 days of the issuance of *Matter of A-B-* and the USCIS PM, as provided for under 8 U.S.C. § 1252(e)(3).

The Court found the following aspects of *Matter of A-B-* and the USCIS PM unlawful as applied to credible fear proceedings:

- General rule against gang or domestic violence claims. The Court struck down portions of *Matter of A-B-* and the USCIS PM that established a general rule against gang or domestic violence asylum claims.[5] In the course of the litigation, the government took the position that *Matter of A-B-* and the USCIS PM do not actually create any rule against gang or domestic violence claims for credible fear purposes.[6] The Court disagreed, finding that *Matter of A-B-* and the guidance do create such a rule in credible fear proceedings, and held that there was no legal basis for categorically banning certain types of claims. The Court also found that the rule runs contrary to the individualized analysis of CFI claims required by the INA, noting that asylum adjudication at both the credible fear and merits stage must be case-specific.[7] Further, the Court noted the general rule runs contrary to Congress' intent to create a refugee system consistent with the 1967 Protocol Relating to the Status of Refugees; and would impermissibly heighten the credible fear standard, intended as a low screening threshold.[8] Accordingly, the Court held that the general rule against gang and domestic violence asylum claims is arbitrary and capricious, and inconsistent with the INA and APA.[9]

- Heightened state protection standard. In asylum cases involving a non-governmental persecutor the applicant must show that the government in the country of origin was unable or unwilling to offer protection.[10] *Matter of A-B-* and the USCIS PM altered this

[5] In *Matter of A-B-*, the Attorney General stated that "[g]enerally, claims by aliens pertaining to domestic violence or gang violence perpetrated by non-governmental actors will not qualify for asylum." *A-B-*, 27 I. & N. Dec. at 320. Similarly, the USCIS PM instructs (in boldface font) 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 . . . a credible or reasonable fear of persecution." USCIS PM at 6.

[6] Memorandum at 54-56, 2018 WL 6628081 at *19-20; s*ee, e.g.*, Def.'s Opp'n to Pl.'s Cross-Mot. Summ. J. and Reply in Support of its Mot. Summ. J. 26, October 10, 2018 [hereinafter Def.'s Reply Br.] ("There is no blanket rule that a specific group is or is not cognizable in all cases as long as the same factual scenario has not been previously rejected by the BIA and the group is not circularly defined."); *id.* ("[The AG] emphasized that every claim had to be rigorously analyzed *on its own merits* [..] *in each case.*"). The government's statements on this and other aspects of *Matter of A-B-* and the USCIS PM may offer helpful citations for attorneys in individual cases. As such, the government briefing in *Grace* is included with this practice advisory as Attachment E, with relevant portions highlighted.

[7] Memorandum at 56, 2018 WL 6628081 at *20.

[8] Memorandum at 56-58, 2018 WL 6628081 at *20.

[9] When assessing *Matter of A-B-*'s consistency with the INA, the Court applies the *Chevron* doctrine, wherein it first asks whether the statutory provision being interpreted is ambiguous or if Congress has directly spoken on the issue. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984). If the statutory text is unambiguous, the courts will construe it according to Congress's clearly expressed intent and will not afford deference to the agency's interpretation. If the statute is ambiguous, the courts will defer to a *reasonable* agency interpretation; however, interpretations that are arbitrary, capricious, or manifestly contrary to the statute are not reasoned and will fail at this second step of *Chevron*. Relatedly, administrative action violates the APA when it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. 5 U.S.C. § 706(2)(a). As such, there is some overlap in the Court's analysis of INA challenges, under the second step of *Chevron*, and of APA challenges. *Judulang v. Holder*, 565 U.S. 42, 52 n.7 (2011).

[10] *See Matter of Acosta*, 19 I. & N. Dec. 211, 222 (BIA 1985).

requirement, elevating it to require a showing that the government "condoned" or was "completely helpless" to protect the applicant.[11] The Court held that the "condoned" or "complete helplessness" standard is unlawful because it is inconsistent with the asylum statute. The Court reasoned that when Congress enacted the term "persecution" as part of the 1980 Refugee Act, Congress adopted the settled judicial and administrative interpretations of that term that predated the Act. The Court held that when Congress created the current asylum system in 1980, its continued use of the term "persecution" demonstrates its clear intent to adhere to the "unable or unwilling" test. The Court also noted that the UNHCR Handbook explained that the "unable or unwilling standard" asked whether "the authorities refuse, or prove unable, to offer *effective* protection."[12] The Court therefore held that "[i]t was clear at the time that the [Refugee] Act was passed by Congress that the 'unwilling or unable' standard did not require a showing that the government 'condoned' persecution or was 'completely helpless' to prevent it."[13] Accordingly, the Court found that the statutory term "persecution" is unambiguous and that under the *Chevron* doctrine, *Matter of A-B-* and the USCIS PM cannot interpret the statute to require a heightened standard for state protection.[14] The Court also held that the circuit court decisions cited by *Matter of A-B-* to support the heightened standard actually apply the proper "unable or unwilling" test.[15]

- Circularity of "unable to leave" social groups. In the past, asylum seekers fleeing domestic violence have received protection based on their membership in particular social groups formulated along the lines of "women [from a particular country] who are unable to leave their relationship."[16] This group formulation references the dynamics of abusive relationships, wherein social and cultural norms subordinate women to men and deny women the agency to end their relationships. The USCIS PM instructs that such groups are generally impermissible under asylum law, as they are circularly defined by the persecution suffered. The Court rejected the PM's circularity rule. The Court held that group cognizability is a fact-specific analysis and that the PM's imposition of a general rule is arbitrary and capricious and contrary to the INA.[17] The Court also affirmed that longstanding BIA precedent permits groups defined in part by their persecution—so long as they also contain characteristics independent from the harm—and found that the USCIS PM's instruction is an unexplained departure from this precedent.[18]

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[11] In its briefing, the government took the position that *Matter of A-B-* and the USCIS PM should *not* be read to create a heightened standard for state protection. *See* Attachment E, Def.'s Reply Br. at 38 ("[T]he 'condoned/complete helplessness' formulation is not some departure from earlier standards that makes it impossible to prove persecution by private actors.").

[12] Memorandum at 62, 2018 WL 6628081 at *22 (quoting UNHCR Handbook).

[13] Memorandum at 62, 2018 WL 6628081 at *22.

[14] Memorandum at 60-62, 2018 WL 6628081 at *21-22.

[15] Memorandum at 62-66, 2018 WL 6628081 at *22-23.

[16] The BIA accepted a similar formulation in *Matter of A-R-C-G-*, 26 I. & N. Dec. 388 (BIA 2014), which Attorney General Sessions overruled in Matter of A-B-.

[17] Memorandum at 73-74, 2018 WL 6628081 at *25.

[18] Memorandum at 74-75, 2018 WL 6628081 at *25; *see, e.g.*, *Matter of M-E-V-G-*, 26 I. & N. Dec. 227, 242 (B.I.A. 2014) (noting that groups may be cognizable if the "immutable characteristic of their shared past experience exists independent of the persecution").

- Delineation of a social group at the credible fear stage. The Court struck down the USCIS PM's directive that a particular social group must be clearly articulated by the applicant at the time of the interview. Noting the government's agreement that such a requirement is unlawful at the CFI stage,[19] the Court held that the USCIS PM's requirement that applicants clearly identify a social group in CFI proceedings is arbitrary and capricious and contrary to the INA.[20]

- Mandate to ignore contrary circuit law. The Court held unlawful the USCIS PM's instruction that asylum officers should ignore any circuit law contrary to *Matter of A-B-* when conducting CFIs.[21] The Court found that such a blanket directive violates administrative law principles.[22]

- Limitations on relevant circuit law. The Court held unlawful the USCIS PM's determination that the relevant circuit law for the purposes of a CFI is the circuit where the interview takes place. The Court analyzed the legislative history of the credible fear provisions and found that Congress specifically intended to establish a low screening standard for CFIs such that there would be no danger that asylum seekers with genuine claims would be erroneously removed, and that restricting asylum officers from relying on helpful circuit law conflicts with such intent. The Court noted that under the challenged policy, noncitizens who have a significant possibility of establishing eligibility for asylum in some circuits might nonetheless receive negative credible fear determinations, contrary to the standard Congress enacted.[23] Accordingly, the Court held that the USCIS PM's provision on the relevant circuit law is arbitrary and capricious and contrary to the INA.[24]

The Court also made clear that *Matter of A-B-* and the USCIS PM do not alter two well-established aspects of asylum law:

- Mixed-motives nexus. Asylum applicants are required to establish that their protected ground was "one central reason" for the harm that they suffered or fear.[25] This statutory standard acknowledges that there may be multiple motives for the persecution—i.e., so long as a protected ground is a central reason for harm, the existence of other motives does not disqualify the claim. Plaintiffs challenged the articulation of the nexus standard in *Matter of A-B-* and the USCIS PM, which could be read to suggest that the existence of

[19] In its initial motion for summary judgment, the government agreed that there should be no delineation requirement at the CFI stage. In its reply briefing, the government further argued that "[t]he PM does not impose a duty to articulate a particular social group on the applicants in credible fear interviews." *See* Attachment E, Def.'s Reply Br. at 48.
[20] Memorandum at 77-79, 2018 WL 6628081 at *26-27.
[21] The USCIS PM instructs that, when conducting CFIs, "[t]he asylum officer should . . . apply the case law of the relevant federal circuit court, to the extent that those cases are not inconsistent with *Matter of A-B-*." USCIS PM at 8.
[22] Memorandum at 81-87, 2018 WL 6628081 at *27-29 (relying on *Nat'l Cable & Telecomm's Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005)).
[23] Memorandum at 89-90, 2018 WL 6628081 at *30.
[24] Memorandum at 87-92, 2018 WL 6628081 at *29-31.
[25] 8 U.S.C. § 1158(b)(1)(B)(i).

a personal relationship between the persecutor and victim defeats a showing of nexus. In response, the government agreed that the controlling standard is the "one central reason" test, which requires a mixed-motives analysis, and argued that *Matter of A-B-* did not alter the mixed-motives standard.[26] The Court found that, when read properly, the documents are not inconsistent with the INA as they only discuss persecution based *solely* on personal relationships, i.e., lacking a protected characteristic. The Court thus affirmed that nexus can exist in the context of personal relationships provided that one central reason for the harm is a protected ground.[27]

- Discretion during CFI proceedings. The plaintiffs challenged the seeming imposition of a requirement during the credible fear stage that asylum adjudicators exercise adverse discretion to deny claims that otherwise satisfy the statutory credible fear standard. Noting that the government itself agreed that such a policy would be unlawful,[28] the Court found that *Matter of A-B-* and the USCIS PM do not grant asylum officers the authority to undertake discretionary analyses at the credible fear stage.[29]

IV. What does *Grace* mean for asylum seekers currently in credible fear proceedings?

The injunction issued by the District Court was effective immediately, starting on December 19, 2018. Per the terms of the injunction, the government is prohibited from applying any of the unlawful portions of *Matter of A-B-* or the USCIS PM to any individuals receiving credible fear interviews or immigration judge reviews on or after that date.

Following the District Court's order, both USCIS and EOIR released initial guidance to ensure compliance with the terms of the injunction. Both documents are appended to this practice advisory, as Attachments C and D, respectively, and are explained briefly below.

January 10, 2019 Revised USCIS Policy Memorandum

On January 10, 2019, USCIS issued a revised version of its policy memorandum that redacts the portions of the original PM enjoined by the District Court. The revised PM affirms that asylum officers conducting CFIs are **prohibited from applying**:

- A general rule against gang or domestic violence asylum claims
- A requirement that a government condone or be completely helpless to protect an applicant in cases of non-state persecution
- A rule that domestic violence-based particular social groups defined in part by inability to leave a relationship are inherently circular
- A requirement that the applicant must delineate a proposed particular social group during CFI proceedings

[26] *See* Attachment E, Def.'s Reply Br. at 41 ("Nothing in *A-B-* suggests a *per se* rule that there can be no nexus where the persecutor and victim are in a personal relationship, and to the contrary, *A-B-* is replete with instructions to abide by the statutory 'one central reason' standard.").
[27] Memorandum at 66-69, 2018 WL 6628081 at *23-24.
[28] *See* Attachment E, Def.'s Reply Br. at 49-50 ("It would be inconsistent with section 1225(b)(1)(B)(v) to consider the exercise of discretion in determining eligibility at the credible fear stage.").
[29] Memorandum at 76-77, 2018 WL 6628081 at *26. Adjudicators do, however, apply discretion at the merits stage of asylum determinations before both the asylum office and immigration courts. *See* 8 U.S.C. § 1158(a).

Under the terms of the injunction and the revised PM, asylum officers are also **prohibited from**:

- Disregarding circuit law that contradicts *Matter of A-B-*
- Disregarding circuit law from circuits other than that where the CFI takes place

Attorneys representing applicants in CFI interviews should be alert for indications that the asylum officer is applying the enjoined aspects of *Matter of A-B-* or the USCIS PM. Attorneys should note that while a few of the enjoined aspects are specific to gang and domestic violence claims—namely the general rule against domestic violence and gang claims and the circularity instruction—others are broadly relevant beyond these claims. For example, the enjoined language requiring complete helplessness impacts all claims involving non-governmental persecutors; and the delineation requirement impacts all particular social group claims. The issue of applicable circuit law reaches all individuals in credible fear proceedings. Practitioners should also keep in mind the Court's (and government's) affirmation of the validity of mixed-motives nexus claims and the prohibition against exercising discretion at the credible fear stage.

December 19, 2018 EOIR Guidance for Credible Fear Review Hearings

On December 19, 2018, EOIR issued guidance confirming that immigration judges nationwide are bound by the *Grace* injunction in credible fear review hearings. It informed immigration judges of the *Grace* injunction and instructed them not to apply any aspects of *Matter of A-B-* deemed unlawful when reviewing credible fear proceedings.

In addition, the EOIR Guidance expressly provided that, in reviewing negative credible fear determinations of asylum officers, "the immigration judge should ensure that the asylum officer's decision was not based on any enjoined parts of the USCIS Memorandum."[30] Attorneys representing applicants requesting review in front of an immigration judge should highlight any aspects of the CFI that appear to violate the *Grace* injunction and decision, arguing that the immigration judge must comply with the injunction as well as ensure the asylum officer's compliance.

***If you observe any issues with the implementation of the injunction before either the asylum officer or immigration courts, please contact credibleFearAB@aclu.org.*

V. What does *Grace* mean for asylum seekers who received a negative credible fear decision *prior* to the December 19, 2018 injunction?

For applicants who received negative credible fear determinations prior to the injunction taking effect on December 19, 2018, attorneys should consider immediately requesting reconsideration of the credible fear determination with the asylum office. Although the court did not order retroactive relief to non-plaintiffs, as *Grace* is not a class action,[31] any subsequent credible fear interview or review would fall within the scope of the injunction.

[30] Attachment D, EOIR Guidance at 3.
[31] *See supra* note 4; 8 U.S.C. § 1252(e)(3).

When making a request for reconsideration, attorneys can point to *Grace* and the updated USCIS PM as a basis for reconsideration, noting any indications that one or more of the enjoined aspects was used in the analysis. Attorneys should also advance any relevant arguments on prior factual or legal error by the credible fear adjudicator(s).

VI. What does *Grace* mean for people who received a negative credible fear decision under *Matter of A-B-* and have been removed from the country?

Individuals who were removed after receiving a negative credible fear determination under *Matter of A-B-* may request protection again if they return to the United States. Any individual who presents themselves **at a port of entry** to request protection are entitled to a credible fear interview, even if they have a prior removal order.[32] This is because only individuals who *reenter the country without inspection*[33] can be subject to reinstatement.[34] Any new CFI must be conducted in accordance with the *Grace* injunction. *See supra* Part IV.

However, attorneys should be mindful that CBP may erroneously attempt to reinstate prior orders of applicants at a port of entry, and refer them to a reasonable—instead of credible—fear interview.[35] If this occurs, the applicant and/or counsel should object and insist that they be given a CFI. CBP has no legal authority to reinstate the prior orders of, or deny credible fear interviews for, asylum-seekers at ports of entry. Attorneys should consider challenging defective reinstatement orders in a petition for review.[36]

If people with a prior removal order reenter the country without inspection—i.e., they do not present at a port of entry—they will be placed in reinstatement of removal.[37] Those in reinstatement proceedings are ineligible for asylum, but can apply for withholding of removal or

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[32] Note that while a previous expedited removal order triggers a five-year inadmissibility bar, inadmissibility is **not** a bar to seeking asylum. 8 U.S.C. § 1182(a)(9)(A)(i). If in this five-year period your client is eligible for immigration benefits other than asylum (e.g., an immigrant or nonimmigrant visa), the client may want to consider other options. First, if eligible, the client may want to file a waiver of inadmissibility on Form I-212. 8 U.S.C. § 1182(a)(9)(A)(iii); 8 C.F.R. §§ 212.2(b) (nonimmigrant visa waivers), 212.2(d) (immigrant visas). If a waiver is not a viable option, it may also be possible to vacate the ER order. *See* AM. IMMIGRATION COUNCIL, PRACTICE ADVISORY: EXPEDITED REMOVAL 6-7 (Feb. 20, 2017), *available at* https://www.americanimmigrationcouncil.org/sites/default/files/practice_advisory/final_expedited_removal_advisory-_updated_2-21-17.pdf.

[33] *See* 8 C.F.R. § 241.8(a). Someone who arrives at a port of entry has not effectuated an unlawful entry and is merely an applicant for admission. *See* 8 U.S.C. § 1225(a)(1). Thus, presenting at a port of entry cannot trigger reinstatement.

[34] People subject to reinstatement of removal have no right to a hearing before an immigration judge on the reinstatement decision, and more limited options for relief. *See* 8 U.S.C. § 1231(a)(5); 8 C.F.R. § 241.8(a).

[35] A reasonable fear interview considers whether the applicant has established a "reasonable possibility" they would face persecution or torture upon return. 8 C.F.R. § 208.31(c). This is a higher standard than the credible fear interview which asks whether an applicant has a "significant possibility" they will subsequently be able to demonstrate their eligibility for protection in a full removal proceeding. 8 C.F.R. § 208.30(e)(2).

[36] For more information about how to challenge erroneous reinstatement orders, see NAT'L IMMIGRATION PROJECT OF THE NAT'L LAWYERS GUILD, PRACTICE ADVISORY: REINSTATEMENT OF REMOVAL 10 (Apr. 29, 2013*), available at* https://www.nationalimmigrationproject.org/PDFs/practitioners/practice_advisories/gen/2013_29Apr_reinstate-removal.pdf.

[37] *See* 8 U.S.C. § 1231(a)(5).

protection under the Convention Against Torture (CAT).[38] However, it may be possible to restore asylum eligibility for such individuals by vacating either the expedited removal order or the reinstatement order.[39]

VII. What does *Grace* mean for applicants in front of the asylum office on their merits asylum claims?

Although the *Grace* injunction only applies to credible fear proceedings, the USCIS PM is directed to all asylum officers, including those adjudicating full asylum applications.

Advocates representing applicants in front of the asylum office should consider arguing that the agency's revised guidance applies to merits determinations as well as credible fear interviews. Although asylum merits adjudications were not at issue in *Grace* and thus not covered by the court's injunction, the USCIS PM expressly provides direction to asylum officers in *both* the credible fear and merits stages—and notably, the same underlying refugee definition applies at both stages. The revised version of the USCIS PM is modified through redactions only, and does not contain altered or redacted language on its scope and applicability.[40]

As discussed earlier, in its briefing the government made the following representations or concessions that may be helpful when formulating arguments before the asylum office:

- Neither *Matter of A-B-* nor the USCIS PM set out any general rule against domestic violence or gang violence-related asylum claims;
- The "condoned" or "complete helplessness" standard is the same as the "unable or unwilling" standard for proving a failure of state protection; and
- Asylum claims are subject to a "mixed motives" analysis under the "one central reason" standard.

As such, advocates should consider relying on the reasoning in *Grace* and the redacted USCIS PM, as well as the government's own litigation positions on these points, when arguing to the asylum officer that:

- DV and gang violence can be the basis of an asylum claim;
- The unable or unwilling standard is met even when the home country government has made some efforts that do not provide effective protection (and that there is no requirement to show the home government condoned the persecution or is completely helpless to prevent it)

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[38] 8 C.F.R. § 241.8(e). All courts to consider the issue to date have held that people in reinstatement of removal are *not* eligible for asylum and are only able to apply for withholding of removal or protection under the Convention Against Torture. *R-S-C- v. Sessions*, 869 F.3d 1176, 1183 n.6 (10th Cir. 2017) (collecting cases).

[39] It is possible to vacate either, or both, the earlier expedited removal order and the reinstatement order, either by (1) filing an administrative motion with the agency that issued the order and/or (2) by challenging the reinstatement order in a petition for review. Practitioners who may be considering these options are advised to obtain the assistance of attorneys with expertise in this area of the law. For more information about challenging expedited removal orders, *see* AM. IMMIGRATION COUNCIL, *supra* note 32.

[40] *See* Attachment C, Revised USCIS PM at 1 (Jan. 10, 2019) (containing redactions to July 11, 2018 version of USCIS PM). The accompanying email does, however, note that the changes are applicable to the credible fear process. *Id*.

- That a particular social group defined in part on inability to leave a relationship is cognizable so long as it contains some characteristic independent of the feared harm;
- That an applicant's personal relationship with the persecutor does not foreclose a conclusion that one of the protected grounds is "one central reason" for the persecution.

VIII. What does *Grace* mean for applicants in front of the immigration court or on appeal on their merits asylum claims?

While the *Grace* injunction is limited to the credible fear process, the opinion may still be useful for applicants in full removal proceedings. Much of the opinion analyzes key elements of the refugee definition itself, with reasoning that is equally relevant in merits proceedings. Though *Grace* is not binding with respect to INA § 240 proceedings in the immigration courts, the BIA, or the circuit courts, it is nevertheless persuasive authority. The opinion is a thoroughly reasoned decision and provides a helpful roadmap for advocates advancing similar challenges in the context of individual removal proceedings.

In particular, advocates should consider citing to *Grace* when arguing against the following aspects of *Matter of A-B-*:

- The general rule precluding gang and domestic violence claims
- The requirement that a government condone or be completely helpless to protect an applicant in cases of non-state persecution
- The presumption that groups defined in part on inability to leave a relationship are inherently circular
- The implication that nexus cannot be established when there is a preexisting personal relationship

If confronting overly-broad interpretations of *Matter of A-B-* by DHS trial attorneys, advocates should also consider countering those views with contrary assertions by the government in *Grace*. As noted, in its briefing the government has made the following representations or concessions that may be helpful to note in the context of INA § 240 proceedings:

- Neither *Matter of A-B-* nor the USCIS PM set out any general rule against domestic violence or gang violence-related asylum claims;
- The "condoned" or "complete helplessness" standard is the same as the "unable or unwilling" standard for proving a failure of state protection; and
- Asylum claims are subject to a "mixed motives" analysis under the "one central reason" standard.

Again, please email crediblefearAB@aclu.org if you have updates to share on the implementation and impact of *Grace*. If you have case updates on the more general application of *Matter of A-B-* in merits cases before the asylum office or immigration or federal courts, please email CGRS-ABTracking@uchastings.edu.

Briefing from *Grace*, including articulations of the above arguments by the plaintiffs, is available at https://www.aclu.org/cases/grace-v-whitaker.

Attachment A

D.C. District Court Order

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

ORDER

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

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

This Court hereby:

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

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

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

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

c. The Policy Memorandum's rule that domestic violence-based particular social group definitions that include "inability to leave" a relationship are impermissibly circular and therefore not cognizable in credible fear proceedings. Policy Memorandum, ECF No. 100 at 8.

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

e. The Policy Memorandum's directive that asylum officers conducting credible fear interviews should apply federal circuit court case law only "to the extent that those cases are not inconsistent with *Matter of A-B-*." Policy Memorandum, ECF No. 100 at 11.

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

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

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

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

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

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

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

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

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

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

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

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

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

SO ORDERED.

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

Attachment B

D.C. District Court Opinion

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

MEMORANDUM OPINION

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

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

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

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

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

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

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

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

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

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

I. Background

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

A. Statutory and Regulatory Background

1. The Refugee Act

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

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

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

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

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

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

2. Expedited Removal Process

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

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

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

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

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

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

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

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

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

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

3. Judicial Review

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

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

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

B. Executive Guidance on Asylum Claims

1. Precedential Decision

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

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

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

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

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

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

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

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

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

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

2. Policy Memorandum

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

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

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

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

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

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

Id. at 9 (emphasis in original).

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

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

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

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

C. Factual and Procedural Background

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

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

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

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

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

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

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

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

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

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

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

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

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

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

II. Motion to Consider Extra Record Evidence

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

A. Legal Standard

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

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

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

Plaintiffs make three arguments as to why the Court should

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

B. Analysis

1. Evidence of Prior Policies

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

The Court will consider the government training manuals,

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

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

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

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

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

2. Evidence Supporting Injunctive Relief

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

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

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

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

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

III. Motion for Summary Judgment

A. Justiciability

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

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

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

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

a. *Matter of A-B-*

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

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

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

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

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

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

8 U.S.C. § 1252(e)(3).

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

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

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

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

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

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

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

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

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

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

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

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

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

b. Policy Memorandum

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

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

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

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

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

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

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

2. Plaintiffs have Standing to Challenge the Policy Memorandum

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

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

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

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

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

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

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

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

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

B. Legal Standard for Plaintiffs' Claims

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

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

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

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

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

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

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

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

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

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

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

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

C. APA and Statutory Claims

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Plaintiffs argue that the Policy Memorandum establishes a

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The relevant section of the Policy Memorandum reads as follows:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Because the government's reading could lead to the exact

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

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

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

* * * * *

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

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

D. Relief Sought

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

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

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

1. Section 1252 Does Not Bar Equitable Relief

a. Section 1252(e)(1)

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

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

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

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

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

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

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

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

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

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

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

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

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

b. Section 1252(f)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Id. at 1028 n.12.

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

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

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

3. Permanent Injunction Factors Require Permanent Injunctive Relief

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

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

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

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

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

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

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

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

IV. Conclusion

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

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

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

SO ORDERED.

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

Attachment C

Revised USCIS Guidance

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

Asylum Division staff,

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

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

Effective immediately, with regard to credible fear processing:

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

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

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

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

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

John

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

U.S. Citizenship and Immigration Services

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

Policy Memorandum

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

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

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

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

I. Background

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

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

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

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

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

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

II. USCIS Officers' General Duties

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

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

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

[redacted]

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

A. Legal Framework for Analysis of Particular Social Group Claims

i. Immutability

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

ii. Particularity

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

[redacted]

iii. Social Distinction

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

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

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

iv. Defined Independently of the Persecution at Issue

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

[redacted]

[redacted]

B. Proving Persecution, Nexus, and Internal Relocation

i. Persecution

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

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

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

ii. Nexus

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

iii. Internal Relocation

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

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

C. Evaluating Credibility

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

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

IV. Exercising Discretion

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

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

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

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

V. Credible Fear and Reasonable Fear Interviews

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

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

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

[redacted]

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

VI. Summary

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

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

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

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

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

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

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

[redacted]

VII. Contact

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

VIII. Use

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

Attachment D

Revised EOIR Guidance

From:	Keller, Mary Beth (EOIR)
To:	[redacted]
Cc:	[redacted]
Subject:	FW: Grace v. Whitaker (Injunction Affecting Credible Fear Reviews) - on behalf of MaryBeth Keller, Chief Immigration Judge
Date:	Wednesday, December 19, 2018 4:42:54 PM
Attachments:	106 Memorandum Opinion.pdf 105 Summ Judgmnt Order.pdf OGC Grace v. Whitaker Guidance 12_19_18 Final.pdf

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[redacted]

Fyi.

Mtk

MaryBeth Keller

From: Ortiz-Ang, Susana (EOIR) <Susana.Ortiz-Ang@EOIR.USDOJ.GOV>
Sent: Wednesday, December 19, 2018 4:40 PM
To: All of Judges (EOIR) <All_of_Judges@EOIR.USDOJ.GOV>
Cc: Keller, Mary Beth (EOIR) <MaryBeth.Keller@EOIR.USDOJ.GOV>; All of Court Administrators (EOIR) <All_of_Court_Administrators@EOIR.USDOJ.GOV>; [redacted]
Subject: Grace v. Whitaker (Injunction Affecting Credible Fear Reviews) - on behalf of MaryBeth Keller, Chief Immigration Judge

Good Afternoon All,

Today, a United States District Court Judge in the District of Columbia, issued an opinion and order in connection with a lawsuit challenging certain aspects of the Attorney General's decision in *Matter of A-B-*, 27 I&N Dec. 316 (A.G. 2018) and USCIS's implementing Policy Memorandum as applied to credible fear interviews conducted by asylum officers and credible review hearings conducted by immigration judges. The case is *Grace v. Whitaker*, No. 18-cv-01853 (D.D.C., Judge Sullivan, Dec. 17, 2018). The opinion and order are attached.

The Order enjoins immigration judges from relying on certain aspects of *Matter of A-B-* when conducting negative credible fear review hearings. It also enjoins certain other USCIS interpretations of the Attorney General's decision. The injunction is effective immediately.

It is critical that all immigration judges review the attached guidance to ensure that EOIR does not violate the order and injunction when conducting negative credible fear reviews.

If you have any questions please do not hesitate to contact your ACIJ or Daniel Cicchini at EOIR's Office of General Counsel.

Thank you,

MaryBeth Keller
Chief Immigration Judge
U. S. Department of Justice

Executive Office for Immigration Review
Mary.Beth.Keller@usdoj.gov
703-305-1247

General Counsel

Issued December 19, 2018

GUIDANCE ON *GRACE V. WHITAKER* No. 18-cv-01853 (D.D.C. DEC. 19, 2018)

PURPOSE:	Establishes interim EOIR policy and procedures for compliance with court order in *Grace v. Whitaker,* No. 18-cv-01853 (D.D.C. Dec. 19, 2018, Sullivan, J.)
OWNER:	Office of the General Counsel.
AUTHORITY:	*Grace v. Whitaker,* No. 18-cv-01853 (D.D.C. Dec. 17, 2018, Sullivan, J.) (Opinion) *Grace v. Whitaker,* No. 18-cv-01853 (D.D.C. Dec. 19, 2018, Sullivan, J.) (Order)
CANCELLATION:	None.

On December 19, 2018, a United States District Court for the District of Columbia issued an opinion and order in connection with a lawsuit challenging certain aspects of the Attorney General's decision in *Matter of A-B-*, 27 I&N Dec. 316 (A.G. 2018) and USCIS's implementing Policy Memorandum as applied to credible fear interviews conducted by asylum officers and credible review hearings conducted by immigration judges. The case is *Grace v. Whitaker*, No. 18-cv-01853 (D.D.C., Judge Sullivan, Dec. 17, 2018) (herein "Opinion").

The District Court found that certain aspects of *Matter of A-B-* and the USCIS Policy Memorandum, as applied to the credible fear process, violated the Immigration and Nationality Act and the Administrative Procedure Act. As further discussed below, the Court declared those aspects of the decision and Policy Memorandum unlawful, vacated them, and enjoined the Defendants from relying on them in any credible fear proceeding. The District Court also vacated the negative credible fear determinations for the named Plaintiffs and ordered DHS to provide those individuals with new credible fear determinations (and review hearings as appropriate) consistent with the Order.

This document explains that immigration judges,[1] who are responsible for conducting credible fear review hearings, must take certain steps outlined below to comply with the order and injunction pending any judicial stay or successful further review of the District Court's decision.

For all credible fear review hearings conducted on or after today's date, immigration judges may not rely on the following aspects of *Matter of A-B-* as a basis for affirming a negative credible fear determination:

a. The general rule against credible fear claims relating to domestic and gang violence. *See Matter of A-B-*, 27 I&N Dec. at 320 & n.1. Stated differently, immigration judges may not affirm a negative credible fear determination based solely on the fact that an alien has claimed a fear of persecution based on gang-related or domestic violence.

b. The requirement that an alien whose credible fear claim involves non-governmental persecutors "show the government condoned the private actions or at least demonstrated a complete helplessness to protect the victim." *Matter of A-B-*, 27 I&N Dec. at 337. **Note**: this aspect of the injunction applies to all credible fear claims "not just claims based on membership in a "particular social group" or claims related to domestic or gang related violence." Opinion at 64, n. 16.

Grace v. Whitaker, No. 18-cv-01853, Dkt. 105 at 1-2 (D.D.C. Dec. 19, 2018, Sullivan, J.) ("Order").

Additionally, the District Court enjoined certain aspects of USCIS's Policy Memorandum to asylum officers concerning implementation of *Matter of A-B-* in the credible fear process.

Although an immigration judge applies a *de novo* standard when reviewing a negative credible fear determination rendered by an asylum officer, *see* 8 C.F.R. § 1003.42(d), the immigration judge should ensure that the asylum officer's decision was not based on any enjoined parts of the USCIS Memorandum. Similarly, the immigration judge should not adopt an interpretation of *Matter of A-B-* that is inconsistent with the District Court's Order enjoining particular provisions of the USCIS Memorandum. Specifically, the Court enjoined:

c. The USCIS Memorandum's rule that domestic violence based particular social group definitions that include "inability to leave" a relationship are impermissibly circular and therefore not cognizable in credible fear proceedings.

d. The USCIS Memorandum's requirement that, during the credible fear stage, individuals claiming credible fear must delineate or identify any particular social group in order to satisfy credible fear based on the particular social group.

e. The USCIS Memorandum's directive that asylum officers conducting credible fear interviews should apply federal circuit court case law only "to the extent that those cases are not inconsistent with *Matter of A-B-*."

[1] The Board does not have any authority to review an adverse credible fear determination made by an Immigration Judge. *See* 8 C.F.R. § 1003.43(f).

f. The USCIS Memorandum's directive that asylum officers conducting credible fear interviews should apply only the case law of "the circuit where the alien is physically located during the credible fear interview."

Order at 2-3.

Please note that the District Court's opinion and order applies nationwide to all credible fear review hearings conducted by immigration judges after the date of the order. And, to reiterate, the decision applies only to the credible fear process. It has no effect on the conduct of removal hearings.

Please contact your ACIJ if you have any questions.

Attachment E

Government Opposition to Cross-Motion for Summary Judgment and Reply

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

GRACE, *et al.* Plaintiffs, v. JEFFERSON BEAUREGARD SESSIONS III, in his official capacity as Attorney General of the United States, *et al.*, Defendants.	)	Civil Action No. 1:18-cv-01853-EGS

DEFENDANTS' OPPOSTION TO PLAINTIFFS' CROSS-MOTION FOR SUMMARY JUDGMENT AND REPLY IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

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Dated: October 10, 2018

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INTRODUCTION

In their opposition and cross-motion, Plaintiffs weave a misleading narrative, asserting that the Attorney General's decision in *Matter of A-B-* (*A-B-*), reversing a 2014 Board of Immigration Appeals (BIA) asylum decision that impermissibly relied on the parties' stipulations instead of legal analysis, somehow amounts to a revision of the credible fear process. Instead, the Attorney General's decision only restores substantive asylum law to where it was before the 2014 BIA decision created an erroneous carve-out exempting certain asylum claims from the generally applicable legal requirements for asylum eligibility. Plaintiffs fail to demonstrate, as they must, that this Court has jurisdiction to entertain their policy disputes with the Attorney General and USCIS, or that *A-B* or the USCIS Guidance (PM) implementing that decision are contrary to law.[1]

First, Plaintiffs cannot carry their burden of demonstrating that they can litigate their claims concerning *A-B-* or the PM through 8 U.S.C. § 1252(e)(3). As Plaintiffs themselves concede, *A-B-* is an *adjudication*, and under the plain text of section 1252(e)(3), is therefore not subject to review in district court. Moreover, Plaintiffs' challenge to the PM cannot succeed. Even if the Court could declare the PM unlawful—a point the Defendants dispute—that would be no more than an advisory opinion, because asylum officers, like all immigration officers, must apply the Attorney General's binding decisions. *See* 8 U.S.C. § 1103(a); 8 C.F.R. § 103.3(c). Any relief directed at the PM would not cure Plaintiffs' alleged injuries, because immigration officers and judges would still have to apply *A-B-* to all immigration proceedings, including any credible fear proceedings.

Second, even if *A-B-* or the PM, to the extent it implements *A-B-*, may be challenged through section 1252(e)(3), all that could be challenged would be new law issued within 60 days prior to the filing of their complaint. *See* 8 U.S.C. § 1252(e)(3)(B). But aside from overruling a recent BIA decision, *Matter of A-R-C-G-* (*A-R-C-G-*), *A-B-* and the PM's implementation of *A-B-* otherwise restate long-standing, preexisting law. And Plaintiffs themselves explicitly concede that they are not challenging *A-B-*'s overruling of *A-R-C-G-*. ECF 64-1 at 48 n.35.

Third, even ignoring these threshold problems, all of Plaintiffs' claims fail under well-

[1] As before, Defendants cite to legal authorities in the record, *see* USCIS001-346; ABROP0001-1716, using relevant case or statutory citation where appropriate. *See* ECF 57-1 at 8 n.2.

settled administrative law principles. *A-B-*, an adjudicative decision which restates and applies the existing standards for asylum, was issued pursuant to an express delegation of congressional authority to make such determinations, 8 U.S.C. § 1103(a), (g), and is entitled to deference in all respects. To the extent *A-B-* construed ambiguous statutory text, especially regarding the meaning of "particular social group," it is entitled to *Chevron* deference. And to the extent *A-B-* restates and applies preexisting law, construes prior precedents, or refines existing asylum standards, it is entitled to deference under the principle that courts defer to agencies' reasonable interpretation of their own precedents. Likewise, the PM, an agency interpretive document either providing guidance as to *A-B-*, or articulating reasons for interpretive policy choices, is entitled to deference in all respects. Although Plaintiffs and their amici labor to paint *A-B-* and the PM as something sinister, they are consistent with the INA and violate no constitutional right Plaintiffs may have.

The Court should grant Defendants summary judgment on all counts.

ARGUMENT

Nothing in Plaintiffs' cross-motion changes the basic path to judgment set out in Defendants' motion. The Court lacks jurisdiction to review *A-B-*, and Plaintiffs lack standing to challenge any aspect of the PM implementing *A-B-*. Even if the Court had jurisdiction, *A-B-* is entitled to deference, *Chevron* and otherwise. Indeed, Plaintiffs now concede they are not even challenging the only new aspect of *A-B-* relevant to credible fear proceedings—the reversal of *A-R-C-G-*, a four-year-old BIA decision using stipulations to resolve legal issues by adopting a carve-out for certain claims. The Attorney General explained why he reversed *A-R-C-G-*, his explanation is reasonable, and that is all the law requires. Every other aspect of *A-B-* rests on long-standing BIA and circuit precedent, and to the extent refined by the Attorney General, also is entitled to deference. The PM merely provides interpretive guidance concerning *A-B-* to USCIS employees, so it too warrants deference. Finally, Plaintiffs' sweeping requests for injunctive and declaratory relief are not cognizable in an APA action or under section 1252(e)(3). Should the Court reach the merits and find any aspect of *A-B-* or the PM unlawful, the only available relief is a remand.

I. The Court Lacks Jurisdiction Over Plaintiffs' Claims

A. *A-B-* is not a written policy directive reviewable through section 1252(e)(3).

Contrary to Plaintiffs' assertions, *A-B-* is not a written policy guidance or directive implementing section 1252(e)(3), as necessary to create jurisdiction under that provision. By its own terms and under the relevant provisions of the INA, *A-B-* is an "adjudication" concerning 8 U.S.C. § 1158 issued under the authority of the Attorney General, *see* 8 U.S.C. § 1103(a)(1), (g) not a reviewable policy, guidance, or directive concerning expedited removal, issued by the Secretary of Homeland Security under 8 U.S.C. § 1225(b). Accordingly, the Court has no jurisdiction to review *A-B-* under section 1252(e)(3).

As we have explained, section 1252(e)(3), titled "Judicial review of orders under section 1225(b)(1)," provides (emphasis added):

> Judicial review of determinations under section 1225(b) of this title and its implementation is available in an action instituted in the United States District Court for the District of Columbia, but shall be limited to determinations of . . . (ii) whether such a regulation, *or a written policy directive, written policy guideline, or written procedure issued by or under the authority of the* [*Secretary of DHS*][2] *to implement such section*, is not consistent with applicable provisions of this subchapter or is otherwise in violation of law.

First, *A-B-* is not a "policy" or "procedure" falling under this provision. Plaintiffs do not dispute that *A-B-* does not prescribe a "procedure . . . to implement" section 1225(b)(1). *See* ECF 64-1 at 16-17. Nor do they (or could they) assert that *A-B-* is a "policy" under this provision. Statements of policy differ from adjudications. An adjudication determines the rights and duties of the parties to a dispute, *see Ass'n of Nat'l Advertisers, Inc. v. F.T.C.*, 627 F.2d 1151, 1160-61 & n.17 (D.C. Cir. 1979), and can "constitute binding precedent[]" which "will have the force of law." *Pac. Gas & Elec. Co. v. Fed. Power Comm'n*, 506 F.2d 33, 38 (D.C. Cir. 1974). "A policy statement," on the other hand, "announces the agency's tentative intentions for the future." *Id.* "It is not finally determinative of the issues or rights to which it is addressed" but must still be "applied in future cases" where the policy can be challenged. *Id.* The Court "assume[s] that Congress means

[2] Pursuant to the Homeland Security Act of 2002, the former immigration functions of the Immigration and Naturalization Service (INS) were transferred from the Department of Justice to the Department of Homeland Security (DHS), *see* 6 U.S.C. § 557, as Plaintiffs concede, ECF 64-1 at 14 n.11. Therefore, as pertains to credible fear proceedings, outside of immigration judge (IJ) review of negative credible fear findings, 8 U.S.C. § 1225(b)(1)(B)(iii)(III); 8 C.F.R. § 1208.30(g)(2), the implementation of section 1225(b)(1) procedures now is entrusted to DHS.

what it says in a statute," *Anderson v. Carter*, 802 F.3d 4, 9 (D.C. Cir. 2015), and "presume[s] that Congress did not include words that have no effect, and so [it] generally avoid[s] a reading that renders some words altogether redundant." *Mercy Hosp., Inc. v. Azar*, 891 F.3d 1062, 1068 (D.C. Cir. 2018). Plaintiffs' reading of section 1252(e)(3) to include final agency *adjudications* such as *A-B-* would pervert the plain meaning of "adjudication" and also render Congress's inclusion of the word "policy" mere surplusage. Indeed, Congress knew how to specify AG determinations/rulings when it intended to do so. C*f.* 8 U.S.C. 1103(a)(1) ("determination and ruling"), 1252(a)(1) ("final order of removal"), 1252(a)(1)(B)(i) ("judgment").

Second, *A-B-* is not a "directive" or "guideline," but a determination in an administrative adjudication. *A-B-* is an administrative adjudication in a removal case certified to the Attorney General under 8 U.S.C. § 1103(a)(1), which describes the Attorney General's (and the BIA's) authority to issue "determination[s] and ruling[s]" on "questions of law" arising under the INA, in the process of "review[ing] such administrative determinations in immigration proceedings," *Id.* § 1103(g)(2);[3] *see* 8 U.S.C. § 1103; *INS v. Aguirre-Aguirre*, 526 U.S. 415, 425 (1999). *In A-B-*, the Attorney General provided an adjudicatory opinion and order. *See, e.g.*, *Matter of A-B-*, 27 I. & N. Dec. 316, 317 (A.G. 2018) ("I overrule [*A-R-C-G-*] and any other Board precedent to the extent those other decisions are inconsistent with the legal conclusions set forth in this opinion.").

Had Congress intended for Attorney General (or BIA) decisions under section 1103(a) to be subject to review under section 1252(e)(3) it could have easily added the terms "adjudications," "determinations," "rulings," "opinions," or "orders," to the list of terms triggering review under section 1252(e)(3). Congress uses these terms to provide for court review of administrative adjudications when that is its intent. *See, e.g.*, 28 U.S.C. § 2342(3)(A) (providing for exclusive jurisdiction in the court of appeals to enjoin, set aside, suspend, or determine the validity of "all

[3] Plaintiffs' nightmare scenario about the Attorney General certifying a credible fear case and eliminating eligibility, ECF 64-1 at 16, is thus unfounded, agency regulations do not authorize such a result. *See* 8 C.F.R. § 1003.1(h). Moreover, the Attorney General could not eliminate all eligibility for positive credible fear because that would require eliminating all eligibility for asylum, *see* 8 U.S.C. § 1225(b)(1)(B)(v) (defining credible fear as a substantial possibility of eligibility for asylum), which is established by Congress via statute, 8 U.S.C. § 1158(a). And, as noted, denial of asylum is reviewable by federal courts on petitions for review, *see* 8 U.S.C. § 1252(a)(5), (b)(9), ensuring review of alleged unlawful narrowing of statutory asylum eligibility.

rules, regulations, *or final orders of*—the Secretary of Transportation issued pursuant to section 50501, 50502, 56101-56104, or 57109 of title 46") (emphasis added); *id.* § 2342(5) (providing exclusive jurisdiction for the same review of "all rules, regulations, or final orders of the Surface Transportation Board made reviewable by section 2321 of this title"); *cf.* 8 U.S.C. § 1185(a)(1) (INA provision imposing travel controls on aliens "except under such reasonable rules, regulations, *and orders* . . . as the President may prescribe" (emphasis added)). Congress knew how to include a term such as "order" or "determination" in section 1252(e)(3)'s list of covered documents had it wanted to. That it did not demonstrates the lack of merit to Plaintiffs' position. *See Trump v. Hawaii*, 138 S. Ct. 2392, 2414 (2018).

Congress limited the period that plaintiffs could challenge expedited removal policies by making the 60-day requirement *jurisdictional*. *See Am. Immigration Lawyers Ass'n v. Reno*, 18 F. Supp. 2d 38, 47 (D.D.C. 1998), *aff'd*, 199 F.3d 1352, 1357 (D.C. Cir. 2000) (*AILA*); *Dugdale v. U.S. Customs & Border Prot.*, 2015 WL 2124937, at *1 (D.D.C. May 6, 2015), *aff'd sub nom. Dugdale v. Lynch*, 672 F. App'x 35 (D.C. Cir. 2016) ("the D.C. Circuit affirmed the [*AILA*] Court's determination that Section 1252(e)(3)(B)'s 60-day requirement is jurisdictional rather than a traditional limitations period"). Challenges to directives or guidelines implementing section 1225(b)(1) "must be filed no later than 60 days after the date the challenged section, regulation, directive, guideline, or procedure . . . is first implemented." 8 U.S.C. § 1252(e)(3)(B). It would be incongruent to hold that Congress, which made clear its desire to limit challenges to the expedited removal system in 8 U.S.C. § 1252(a) and (e), *see* ECF 16 at 21, would provide plaintiffs a new 60-day opportunity to challenge new interpretations of sections 1158(b)(1)(B) and 1231 every time the BIA, the Attorney General, or a federal court analyzed the meaning of "particular social group," let alone any other aspect of the asylum eligibility standard. If any agency decisions affecting the substance of asylum law restarted the limitations period under section 1252(e)(3), Congress's effort to limit this period would be entirely thwarted. Indeed, between 1998 (the effective date of section 1252(e)(3)) and the present, the agency issued at least 30 precedential decisions affecting asylum standards.[4] Congress gave no basis to believe that it intended for each of these decisions

[4] The BIA has issued at least eight decisions interpreting the term "particular social group," *see,*

to restart the 60-day clock on any challenge to the expedited removal system, and Plaintiffs do not explain why all these other substantive asylum decisions did not result in 1252(e)(3) litigation. There is no evidence in section 1252(e)(3) that Congress meant to make it the mechanism for testing all substantive developments in asylum law.

Third, *A-B-* was decided by the Attorney General, but it is the Secretary of Homeland Security, not the Attorney General, who has the responsibility for implementing virtually all of 1225(b)(1)'s provisions, as Plaintiffs themselves admit. ECF 64-1 at 14 n.11 (citing 6 U.S.C. § 557) (conceding that "Attorney General" as used in section 1252(e)(3) is "deemed to refer to the Secretary" of Homeland Security). As Plaintiffs recognize, USCIS and its asylum officers conduct credible fear screenings, indicating that this function has been "transferred" to DHS, *see* 6 U.S.C. § 557, and thus the reference in section 1252(e)(3) to the Attorney General pertains to the Secretary of Homeland Security as it relates to credible fear interviews.[5] *See Soto-Sosa v. U.S. Atty. Gen.*,

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e.g., *Matter of L-E-A-*, 27 I. & N. Dec. 40 (BIA 2017); *Matter of A-R-C-G-*, 26 I. & N. Dec. 388 (BIA 2014); *Matter of M-E-V-G-*, 26 I. & N. Dec. 227 (BIA 2014); *Matter of W-G-R-*, 26 I. & N. Dec. 208 (BIA 2014); *Matter of E-A-G-*, 24 I. & N. Dec. 591 (BIA 2008); *Matter of S-E-G-*, 24 I. & N. Dec. 579 (BIA 2008); *Matter of A-M-E- & J-G-U-*, 24 I. & N. Dec. 69 (BIA 2007); *Matter of C-A-*, 23 I. & N. Dec. 951 (BIA 2006), three precedential decisions interpreting the REAL ID Act's "one central reason" standard, *see Matter of L-E-A-*, 27 I. & N. Dec. 40; *Matter of N-M-*, 25 I. & N. Dec. 526 (BIA 2011); *Matter of J-B-N- & S-M-*, 24 I. & N. Dec. 208 (BIA 2007), and several affecting particular types of asylum claims, *see Matter of A-T-*, 24 I. & N. Dec. 296 (BIA 2007), *overruled by Matter of A-T-*, 24 I. & N. Dec. 617 (A.G. 2008); *Matter of J-S-*, 24 I. & N. Dec. 520 (A.G. 2008), *overruling Matter of S-L-L-*, 24 I. & N. Dec. 1 (BIA 2006), and *Matter of C-Y-Z-*, 21 I. & N. Dec. 915 (BIA 1997); *see also*, *Matter of L-S-*, 25 I. & N. Dec. 705 (BIA 2012); *Matter of H-L-H- & Z-Y-Z-*, 25 I. & N. Dec. 209 (BIA 2010); *Matter of A-T-*, 25 I. & N. Dec. 4 (BIA 2009); *Matter of M-F-W- & L-G-*, 24 I. & N. Dec. 633 (BIA 2008); *Matter of S-A-K- and H-A-H-*, 24 I. & N. Dec. 464 (BIA 2008); *Matter of D-I-M-*, 24 I. & N. Dec. 448 (BIA 2008); *Matter of A-K-*, 24 I. & N. Dec. 275 (BIA 2007); *Matter of J-H-S-*, 24 I. & N. Dec. 196 (BIA 2007); *Matter of J-W-S-*, 24 I. & N. Dec. 185 (BIA 2007); *Matter of T-Z-*, 24 I. & N. Dec. 163 (BIA 2007); *Matter of K-R-Y- and K-C-S-*, 24 I. & N. Dec. 133 (BIA 2007); *Matter of C-C-*, 23 I. & N. Dec. 899 (BIA 2006); *Matter of N-M-A-*, 22 I. & N. Dec. 312 (BIA 1998); *Matter of O-Z- & I-Z-*, 22 I. & N. Dec. 23 (BIA 1998). There have also been at least four decisions interpreting the requirements for protection under the United Nations Convention Against Torture (CAT). *Matter of J-F-F-*, 23 I. & N. Dec. 912 (A.G. 2006); *Matter of G-A-*, 23 I. & N. Dec. 366 (BIA 2002); *Matter of J-E-*, 23 I. & N. Dec. 291 (BIA 2002); *Matter of S-V-*, 22 I. & N. Dec. 1306 (BIA 2000).

[5] There is IJ review of an asylum officer's finding of no credible fear if requested. However, Plaintiffs have not produced any evidence that EOIR has issued any guidance regarding IJ's review of credible fear proceedings stemming from *A-B-*, and so IJ review is not at issue in this litigation.

154 F. App'x 141, 142 (11th Cir. 2005) (recognizing that, following "the transfer of the functions of the INS to the [DHS] under the Homeland Security Act of 2002," DHS took over INS's role of applying expedited removal provisions against alien in that proceeding) (citing 68 Fed. Reg. 10350 (Mar. 5, 2003)). Accordingly, given this transfer of authority over implementing the expedited removal system via the Homeland Security Act, it is the Secretary and DHS, *not* the Attorney General, that "implement[s]" section 1225(b)(1)'s credible fear procedures. The Attorney General lacks any such authority concerning those procedures, so *A-B-* cannot in any sense be "issued by or under the authority of" the currently appropriate Department head.

Plaintiffs do not directly address these points. Instead, they argue that deeming section 1252(e)(3) to encompass decisions following certification by the Attorney General "to issue written policies for implementing the credible fear process" would not mean that all agency asylum precedents would wind up susceptible to section 1252(e)(3) challenges because decisions impacting credible fear would issue "rarely," and because the BIA does not issue decisions impacting credible fear. ECF 64-1 at 18-19. As shown above, all decisions modifying asylum standards in any way affect credible fear proceedings in the same way *A-B-* does. Plaintiffs concede that if *A-B-* had not included a single footnote predicting that some credible fear claims would fail under *A-B-*, *A-B-* would not be reviewable at all, but Plaintiffs claim that the mere use of those words (which otherwise would be implicit) creates jurisdiction. *See* ECF 64-1 at 18 (asserting that section 1252(e)(3) review is available if any agency decision uses the words "credible fear"). This saving construction exalts form over substance. Had the term "credible fear" not appeared once in a footnote in *A-B-*, USCIS officers would still be required to apply *A-B-* to credible fear interviews, regardless of whether *A-B-* explicitly mentioned credible fear. *See* 8 U.S.C. § 1103(a); 8 C.F.R. § 103.3; AR002 ("Officers should continue to follow other binding precedents to the extent they are consistent with *Matter of A-B-*, including *Matter of M-E-V-G-* and *Matter of W-G-R-*")

Next, Plaintiffs contend that their theory would not sweep all BIA decisions within the ambit of section 1252(e)(3), because the BIA has no role in credible fear proceedings and it is only Attorney General's involvement that renders an asylum adjudication subject to challenge under that section. ECF 64-1 at 18. But the Attorney General certification process addresses issues taken

on review from the BIA (which indeed has no jurisdiction over issues arising from credible interviews or appeals of adverse credible fear determinations, 8 U.S.C. § 1225(b)(1)(C)). Moreover, the Attorney General is not "issu[ing] written polices for implementing the credible fear process" because authority to implement section 1225(b)(1) now rests primarily with the Secretary of DHS. Therefore, either Plaintiffs' proposed limiting principle does not cover this case, because *A-B-* is not an action by DHS, or it extends to cover all adjudicatory determinations by any governmental actor that either address asylum or mention section 1225(b)(1), because both types of adjudications would affect the credible fear process under Plaintiffs' theory. This would include countless federal court cases, including those Plaintiffs recite, *see* ECF 64-1 at 7 n.2, as well as many agency decisions, *see also Matter of A-B-*, 27 I. & N. Dec. at 318-19 (describing multiple cases in which the BIA and Attorney General have interpreted and redefined "particular social group" starting in 1985); AR016-017.

Finally, if *A-B-* could somehow be deemed not an administrative adjudication, but an "implement[ation]" of a statutory provision, it would be implementing section 1158(a). *A-B-* addresses the meaning of persecution on account of "membership in a particular social group" for purposes of qualifying for asylum under 8 U.S.C. § 1158(b)(1)(B). 27 I. & N. Dec. at 318; AR016. *A-B-* does not implement section 1225(b)(1), providing procedures for conduct of expedited removal and credible fear interviews. *Compare* 8 U.S.C. §§ 1158(a), *with* 1225(b)(1). Indeed, *A-B-* does not on its face address expedited removal at all, as review of expedited removal orders is not available before the BIA and the Attorney General cannot certify such decisions to himself. 8 U.S.C. § 1225(b)(1)(C); 8 C.F.R. § 1003.1(h) (omitting IJ review of expedited removal decisions as a decision the Attorney General may review).

Plaintiffs' entire argument thus turns on a footnote in *A-B-* observing that *A-B-*'s holdings (that few claims pertaining to domestic or gang violence as permitted by *A-R-C-G-* would pass the asylum test) have logical consequences for credible fear proceedings as well, because a credible fear requires showing a "significant possibility" that the applicant "could establish eligibility for asylum under section 1158." 27 I. & N. Dec. at 320 n.1 (citing 8 U.S.C. § 1225(b)(1)(B)(v)); AR032. This statement cannot constitute a policy or rule because it merely predicts the likelihood

of future outcomes. That footnote *descriptively* observes the small statistical likelihood that, given the asylum standard reaffirmed in *A-B-*, fear claims based on domestic or gang violence will make the threshold showing of merit in credible fear proceedings. However, it both (1) does not say that such claims are categorically barred, but implies that, as now, IJs and asylum officers will still need to determine this on an individual basis, and some may succeed; and more importantly (2) does not prescribe a standard or rule for credible fear adjudications. It is an assumption about the outcome of other cases not before the Attorney General, and cannot prescribe a rule for those cases. *See Cent. Virginia Cmty. Coll. v. Katz*, 546 U.S. 356, 363 (2006) (explaining that opinion's "assumption that the holding in that case would apply" in different circumstances not debated in the first case was dicta and nonbinding); *cf. Cohens v. Virgini*a, 6 Wheat. 264, 399-400 (1821) ("If [general expressions] go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision."). *A-B-* does not address or alter the definition of credible fear—and it does not "implement" section 1225(b).

That *A-B-* does not implement section 1225(b)(1) is further evinced by the fact that *A-B-* addresses a substantive standard whereas section 1225(b)(1) provides only procedures for determining credible fear. Section 1225(b)(1) dictates *procedures* for screening and removing aliens, but nowhere does it define the *substantive content* of the eligibility for relief from removal that the procedures screen for—that it is a function of other parts of the INA. *See* 8 U.S.C. § 1225(b)(1)(B)(v) (defining "credible fear of persecution" by reference to whether alien can show "eligibility for asylum under *section 1158*") (emphasis added). If section 1225(b)(1)'s mere reference to another statute was sufficient to invoke 1252(e)(3), several United States Code provisions materially unrelated to credible fear would suddenly be open to attack via a mechanism intended solely for systemic challenges to the expedited removal system. *See* 8 U.S.C. § 1225(b)(1)(C) (referencing 8 U.S.C. § 1157 and 28 U.S.C. § 1746); *id.* § 1225(b)(1)(D) (referencing 8 U.S.C. §§ 1325(a), 1326); *id.* § 1225(b)(1)(G) (referencing 8 U.S.C. § 1158(e)).

A-B- did not alter the procedural burden constituting "credible fear"—it still means a "significant possibility" of establishing eligibility for asylum, *see* 8 U.S.C. § 1225(b)(1)(B)(v),—but merely provided examples of factual scenarios unlikely to, not categorically incapable of,

meeting that standard. 27 I. & N. Dec. at 320 & n.1; AR018, 032. Plaintiffs mischaracterize Defendants' argument in saying that section 1252(e)(3) does not permit review of challenges to substantive policies in section 1225(b)(1) but only procedures. ECF 64-1 at 16-17. That is not Defendants' position. Rather, Defendants' position is that section 1225(b)(1) does not prescribe substantive policies, but only procedures for conducting credible fear interviews and implementing expedited removal. *See* 8 U.S.C. § 1225(b)(1)(C). Provisions of substantive immigration benefits or protections from removal are found in other parts of the INA and are not in any sense statutes implementing section 1225(b). *See, e.g.*, 8 U.S.C. §§ 1158(a), 1231(b)(3), 1255(a).

Allowing aliens to challenge BIA and Attorney General asylum and CAT decisions simply because such decisions, as most do, collaterally impact credible fear determinations or because DHS issues interpretive guidance apprising employees of significant developments in the law would be to ignore Congress's careful limitations on judicial review in 8 U.S.C. § 1252. It would be anomalous for *A-B-* to be challenged both through that petition for review process and in a district court on parallel tracks. Congress provided for review of agency determinations regarding the asylum standard exclusively through the petition-for-review process. *See* 8 U.S.C. § 1252(b)(9); *see id.* § 1252(a)(5). Plaintiffs argue that this does not provide review for persons who never show a positive credible fear and thus never make it into removal proceedings. ECF 64-1 at 19. However, they also admit that section 1252(b)(9) excepts review under other portions of section 1252(e)(9), *id.*, including section 1252(e)(2), which provides for individual habeas review over limited issues for aliens who do not show a credible fear and have final expedited removal orders. *See* 8 U.S.C. § 1252(e)(3). No clear statement is needed because section 1252 does not eliminate judicial review. *See INS v. St. Cyr*, 533 U.S. 289, 299, 314 (2001). Such aliens have an opportunity for IJ review of their negative credible fear findings, 8 U.S.C. § 1225(b)(1)(B)(iii)(III), the same IJs who are applying the section 1158(a) asylum standard in removal proceedings, subject to BIA review. And the limited review of other issues related to their expedited removal orders at 8 U.S.C. § 1252(e)(2) satisfies Suspension Clause concerns for the aliens on the threshold of admission without connections to the United States at issue in this case and expedited removal generally, as every court of appeals to address the issue for such aliens has

held. *See Castro v. DHS*, 835 F.3d 422, 450 (3d Cir. 2016), *cert. denied*, 137 S. Ct. 1581 (2017) (collecting cases from the Second, Fifth, Seventh, Ninth, Tenth, and D.C. Circuits).

B. The Court also lacks authority to review the PM under section 1252(e)(3).

The Court also lacks authority to review the PM under section 1252(e)(3). First, as with *A-B-*, the PM does not primarily address section 1225(b)(1), but section 1158(a). Second, given that the PM merely explains *A-B-*, the PM is not reviewable under section 1252(e)(3) for all the same reasons that *A-B-* is not. *See supra*. And third, the PM is at best an interpretive rule which Congress did not intend for review under section 1252(e)(3).

First, the PM primarily addresses the asylum standard. Except for a few other scattered references, only four paragraphs of one section of the extensive memorandum focus on credible fear. AR008-09. The majority of the PM describes the standard for adjudicating asylum established by *A-B-* and pre-existing precedent. *See* AR001-07, 09.

Next, the structure and content of sections 1225(b)(1) and 1252(e)(3) indicate that Congress only intended to permit court review under section 1252(e)(3) of agency directives, guidelines, or procedures creating substantive rights, not merely interpretive documents explaining the law to government officials. "An interpretative rule simply states what the administrative agency thinks the statute means, and only reminds affected parties of existing duties." *Gen. Motors Corp. v. Ruckelshaus*, 742 F.2d 1561, 1565 (D.C. Cir. 1984). "On the other hand, if by its action the agency intends to create new law, rights or duties, the rule is properly considered to be a legislative rule." *Id.* Because the latter sets standards or shapes conduct for the world outside the agency, it is subject to an external check in the way interpretive rules are not in the form of notice-and-comment APA rulemaking procedures. *See id.* (citing 5 U.S.C. § 553(b)(A)). Additional factors indicating that a rule is legislative as opposed to interpretive are

> (1) whether in the absence of the rule there would not be an adequate legislative basis for enforcement action or other agency action to confer benefits or ensure the performance of duties, (2) whether the agency has published the rule in the Code of Federal Regulations, (3) whether the agency has explicitly invoked its general legislative authority, or (4) whether the rule effectively amends a prior legislative rule.

Am. Mining Cong. v. Mine Safety & Health Admin., 995 F.2d 1106, 1112 (D.C. Cir. 1993).

First, the INA conveys significant authority on DHS to create legislative rules implementing section 1225(b)(1). "[W]e have distinguished between cases where a rule is "based on specific statutory provisions" (interpretive), and where one is instead "based on an agency's power to exercise its judgment as to how best to implement a general statutory mandate" (legislative). *Id.* at 1110 (quoting *United Techs. Corp. v. EPA*, 821 F.2d 714, 719-20 (D.C. Cir. 1987)). "[A]n agency's authority to create rights and duties will typically be relatively broad (and the agency's actual establishment of rights and duties will be legislative)." *Id.* The INA creates such broad authority in DHS to create new substantive rules and obligations under section 1225(b)(1). Most notably, the provision permits DHS to extend the scope of inadmissible aliens subject to expedited removal, provided only for such aliens at the border, to include all those who cannot establish two years consecutive presence anywhere throughout the country, and any increment in between. 8 U.S.C. § 1225(b)(1)(A)(iii)(II) (permitting now-DHS to designate for expedited removal any alien "who has not been admitted or paroled into the United States, and who has not affirmatively shown, to the satisfaction of an immigration officer, that the alien has been physically present in the United States continuously for the [prior] 2-year period"). Express delegation of authority to the agencies to create rules and rights for applying credible fear screenings is replete throughout the statute. *See, e.g.*, 8 U.S.C. § 1225(b)(1)(B)(iii)(III) ("The Attorney General shall provide by regulation and upon the alien's request for prompt review by an [IJ] of a determination under subclause (I) that the alien does not have a credible fear of persecution."); *id.* § 1225(b)(1)(B)(iv) ("An alien who is eligible for such interview may consult with a person or persons of the alien's choosing prior to the interview or any review thereof, according to regulations prescribed by the [Secretary]."). Given that Congress otherwise barred court review of the validity of such substantive rules, *see* 8 U.S.C. § 1252(a)(2)(A), and even placed some outside the confines of notice and comment rules, *see* 8 U.S.C. § 1225(b)(1)(A)(iii)(I) (providing that the designation of additional aliens for expedited removal "shall be in the sole and unreviewable discretion of [DHS] and may be modified at any time"), it makes sense that Congress would provide a mechanism for review of such agency-created rights to avoid a possible constitutional issue. *See Castro*, 835 F.3d at 433 n.13 (suggesting that the constitution may require

some review of "the case of an alien who has been living continuously for several years in the United States before being ordered removed under § 1225(b)(1)").

However, the PM "simply states what the administrative agency thinks [*A-B-*'s interpretation of] the statute means," and therefore is an interpretive rule. *See Gen. Motors Corp.*, 742 F.2d at 1565. Bolstering this conclusion is the fact that the PM is not necessary to assert or enforce any underlying rights to asylum or positive credible fear, which are established by statute; USCIS has not published it in the Code of Federal Regulations; and DHS did not specifically invoke its legislative authority in drafting it. *Am. Mining Cong.*, 995 F.2d at 1112. Such interpretive rules are not generally reviewable under the APA, indicating that Congress did not likely intend for them to fall under the even more limited review provided at section 1252(e)(3). "Like agency policy statements, 'interpretative rules' that do not establish a binding norm are not subject to judicial review under the APA." *Am. Tort Reform Ass'n v. OSHA*, 738 F.3d 387, 395 (D.C. Cir. 2013) (internal quotation omitted). "The APA only provides for judicial review of 'final agency action,' . . . and interpretative rules or statements of policy generally do not qualify because they are not finally determinative of the issues or rights to which [they are] addressed." *Id.* (internal citation and quotation marks omitted) (citing 5 U.S.C. § 704; *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 882 (1990)). The PM clearly does not represent final agency action because USCIS's understanding of *A-B-* would have to first be applied in an individual's proceeding before it would alter their rights in a way challengeable under the APA. *See id.* Because the PM merely explains what the agency thinks about *A-B-*, and does not itself create substantive rules or rights representing final *agency* action, it is not challengeable under the APA. *See, e.g.*, *See Perez v. Mort. Bankers Ass'n*, 135 S. Ct. 1199, 1204 (2015) ("[T]he critical feature of interpretive rules is that they are issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers."); *Broadgate Inc. v. USCIS.*, 730 F. Supp. 2d 240, 246 (D.D.C. 2010) ("[USCIS] Memorandum establish[ing] interpretive guidelines for the implementation of the Regulation" is "interpretive" and "does not constitute final agency action subject to judicial review"). Therefore, it is highly unlikely that Congress sought to include such interpretive guidance within the scope of review under section 1252(e)(3), given that such review is, rather,

necessary to challenge the rights-creating rules that Congress gave the agencies great latitude to create under § 1225(b)(1) and absent any other judicial review.

C. Plaintiffs lack standing to challenge the PM

Plaintiffs lack standing to challenge the PM. As we have explained, each of Plaintiffs' theories fail to satisfy the Article III standing requirements. Plaintiffs' theories of injury based on delineation and exercise of discretion do not apply to credible fear hearings at all, and their other theories fail because Plaintiffs have no legally protected interest in agency training materials that create no rights for Plaintiffs or obligations for USCIS. Even if they had plead cognizable injuries, such injuries would not be fairly traceable to the PM but rather *A-B-* itself and existing asylum precedent, which the PM merely explains to asylum officers but does not itself create substantive duties for. And such injuries would not be redressable by invalidating the PM because, even absent the PM, Plaintiffs' eligibility for credible fear or asylum would still rise or fall under the terms of section 1158(a) as clarified and reaffirmed in *A-B-*. ECF 57 at 19-24.

Plaintiffs do not directly engage with these arguments. Instead they argue that the Court must ignore them because the Court is required to assume that Plaintiffs will prevail on their claims and their arguments are not time-barred. ECF 64-1 at 25. But this turns the standing inquiry on its head. That the court may need to resolve issues overlapping with the merits as part of its standing analysis in no way means Plaintiffs have shown they have standing, nor that the Court can omit this determination before ruling on the merits. "A federal court may not rule on the merits of a case without first determining that it has subject matter jurisdiction." *Seneca Nation of Indians v. U.S. HHS*, 144 F. Supp. 3d 115, 118 (D.D.C. 2015) (citing *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 101 (1998)); *see Nat'l Mining Ass'n v. Kempthorne*, 512 F.3d 702, 706 (D.C. Cir. 2008) (court must discharge its "independent obligation to determine whether subject-matter jurisdiction exists . . . before ruling on the merits"). While a court may defer its ruling on jurisdiction at the motion to dismiss stage where jurisdictional facts are inextricably intertwined with the merits "until the merits are heard," on summary judgment, the Court must squarely address the issue. *See Herbert v. Nat'l Acad. of Sciences*, 974 F.2d 192, 198 (D.C. Cir. 1992); *Unite Here Local 25 v. Madison Ownership, LLC*, 850 F. Supp. 2d 219, 230 (D.D.C. 2012) (explaining that even "where

the jurisdictional question is closely intertwined with the merits of the case," and the court permits discovery before deciding jurisdiction, the D.C. Circuit has instructed that it is appropriate for a court . . . [nevertheless] to consider the issue of subject matter jurisdiction on a motion for summary judgment thereafter."). Here, whether Plaintiffs' claims are in whole or in part time-barred under section 1252(e)(3), is central to the standing analysis. *See AILA*, 18 F. Supp. 2d at 47 (explaining that the 60-day limitation period is jurisdictional), *aff'd*, 199 F.3d at 1357. And so the Court must address the argument even if it overlaps with the merits, before it may address any merits issues or grant relief. *See Seneca Nation of Indians*, 144 F. Supp. 3d at 118; *accord Arbaugh v. Y&H Corp.*, 546 U.S. 500, 514 (2006); *Herbert*, 974 F.2d at 198.

Apart from the time-bar issue, Plaintiffs also fail to address a number of other threshold failings to their standing. First, Plaintiffs have no legally protected interest in agency training materials or interpretive guidance that create no rights for Plaintiffs or obligations for USCIS. As explained, the PM is an interpretive document that does not create legal rights, but merely explains those already created by agency precedent. *Supra* at 13. But it is well-settled that Plaintiffs, on summary judgment, must "set forth by affidavit or other evidence specific facts" demonstrating "an invasion of a *legally protected interest* which is [] concrete and particularized." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) (emphasis added).

Plaintiffs fail to rebut Defendants' traceability argument, which they cannot establish for any aspect of the PM that implements *A-B-*. Where a party challenges government action that is itself caused by different government action, that party "needs to show that . . . invalidating [the challenged government action] will be reasonably likely to cause the [defendants] to" change the different government action. *Renal Physicians Ass'n v. US HHS*, 489 F.3d 1267, 1276 (D.C. Cir. 2007). Plaintiffs must show a causal connection such that invalidating the PM would be reasonably likely to change Plaintiffs' eligibility for positive credible fear. *See id*. But that showing is impossible, because *A-B-*, which cannot be challenged through section 1252(e)(3), would be unaffected by any order of this Court.

Plaintiffs contend that the Court can grant at least partial redress, which is constitutionally sufficient, because both *A-B-* and the PM cause their injuries. ECF 64-1 at 22. But a "plaintiff

cannot demonstrate redressability when he challenges only one of two government actions that both independently produce the same alleged harm." *Kaspersky Lab, Inc. v. DHS*, 311 F. Supp. 3d 187, 219 (D.D.C. 2018). If "the undoing of the [challenged] governmental action will not undo the harm" caused by separate government action "because the new status quo is held in place by other forces," Plaintiffs' claims are not redressable because none of the relief they request will cure their alleged injuries. *Renal Physicians Ass'n*, 489 F.3d at 1277; *see Delta Const. Co. v. EPA*, 783 F.3d 1291, 1296 (D.C. Cir. 2015). Invalidating the PM does not redress Plaintiffs' alleged injuries tied to *A-B-* because the INA and its implementing regulations—in provisions Plaintiffs do not and cannot challenge—require USCIS to apply *A-B-*. 8 U.S.C. § 1103(a)(1); 8 C.F.R. § 103.3(c).

Further, Plaintiffs' argument that their injuries are redressable by invalidating the PM would only work if *A-B-* were reviewable, which it is not, because such review is time barred and there is no jurisdiction under section 1252(e)(3). As Defendants explained, all but one of Plaintiffs' allegations against *A-B-* and the PM would be time-barred. ECF 57 at 24-25. As discussed, only one aspect of *A-B-* is in fact new: the reversal of *A-R-C-G-*. *Id.* Every other alleged change has been the state of law for far more than 60 days. ECF 57 at 25. Plaintiffs could thus challenge (at most) *A-B-*'s reversal of *A-R-C-G-* (discussed *infra*) and aspects of the PM that implement credible fear policies beyond *A-B-*, namely "instruct[ing] asylum adjudicators making credible fear determinations to disregard contrary court of appeals precedents and to apply only the case law in the circuit where the credible fear applicant is detained," ECF 3 at ¶ 51. Plaintiffs fail to rebut Defendants' time bar argument and therefore apparently concede the point. ECF 64-1 at 24-25.

Plaintiffs' argument that the PM must provide substantive rules governing credible fear if *A-B-* does not, ECF 64-1 at 22-23, is equally flawed. As explained, the PM is merely an interpretive document that does not create substantive rules—these must be contained in *A-B-* and pre-existing BIA precedent. *See* AR008 (explaining that, "[w]hen conducting a credible fear or reasonable fear interview, an asylum officer must determine what law applies to the applicant's claim," but not prescribing that law, but rather stating that "[t]he asylum officer should apply all applicable precedents of the Attorney General and the BIA," and nonconflicting circuit precedent). To the extent Plaintiffs challenge those, their injury is thus neither traceable to nor redressable by

invalidating the PM, and moreover is jurisdictionally time-barred to the extent that Plaintiffs do not challenge the narrow reversal of *A-R-C-G-* (which they concede they do not challenge). *See AILA*, 18 F. Supp. 2d at 47; *Dugdale*, 2015 WL 2124937, at *1.

Finally, Plaintiffs argue that the PM was a "detailed 10-page guidance document setting forth the new credible fear policies reaching well beyond the effect of *Matter of A-B-* as legal policy." ECF 64-1 at 23. First, this argument has no impact because the PM did not create new substantive policies, but merely explained the current law. Second, the mere fact that USCIS attempted to provide comprehensive analysis of credible fear screenings in its interpretive memorandum, stretching beyond the narrow scope of *A-B-*, does not indicate that the memorandum or *A-B-* otherwise altered the pre-existing substantive standards governing asylum. Plaintiffs provide no basis for their implicit contention that agency interpretive guidance must to be limited to a single precedential decision.

For these and the foregoing reasons, the Court should dismiss Plaintiffs' challenges to *A-B-* and the PM for lack of standing and jurisdiction under section 1252(e)(3) generally.

II. Plaintiffs' Claims Fail on the Merits

Plaintiffs' response brief misconceives textbook concepts of deference to which the Attorney General and USCIS are entitled. *A-B-* is entitled to *Chevron* deference because it reasonably interprets statutory language that Congress has instructed the Attorney General or his designees to interpret. And where *A-B-* simply restates or refines prior agency precedents, that too is entitled to deference, even if not technically called "*Chevron*" deference. And because the PM merely provides interpretive guidance to asylum officers who must apply *A-B-*, the PM is entitled to deference too, including with respect to any new interpretive guidance not directly repeating *A-B-*'s holding. Finally, even if Plaintiffs prevail on any aspect of their merits claims, the sole remedy available to them is for the Court to remand those portions of *A-B-* or the PM the Court finds unlawful to the agency under the ordinary remand rule.

A. Plaintiffs misstate how APA review works

Plaintiffs turn elementary principles of administrative law and deference to agency actions on their head. Plaintiffs fail to come to grips with Defendants' central merits arguments, and

critically misapprehend how APA review works in federal court. First, they attempt to rely on over ***1,800*** pages of extra-record material which was not before the agency and which is not properly part of review in this case. Second, Plaintiffs fail to comprehend Defendants' basic merits arguments: that the Attorney General is entitled to *Chevron* deference when he interprets ambiguous statutory terms as intended by Congress, *see* 8 U.S.C. § 1103(a), that the only *new* change to immigration law rendered by *A-B-*, the reversal of *A-R-C-G-*, is such an exercise of lawmaking authority entitled to *Chevron* deference, and that every other aspect of *A-B-* Plaintiffs challenge is not new and thus not subject to challenge in a 1252(e)(3) action. Plaintiffs and their amici also fail to acknowledge that even where an agency is not construing ambiguous statutory language, it nevertheless is entitled to deference when it construes its own prior precedents or regulations, and fail to come to grips with the settled principle that where agency documents themselves are challenged as ambiguous, as Plaintiffs allege with respect to the PM, the agency's view, as expressed in its briefs before the courts, is similarly entitled to deference.

1. Plaintiffs may not rely on extra-record evidence

The Court may not consider Plaintiffs' over 1,800 pages of extra-record evidence. As explained in greater detail in the contemporaneously filed opposition to Plaintiffs' motion to consider extra-record evidence and motion to strike, in cases challenging the substance of agency decision-making, review is limited to the administrative record as certified by the agency, *see, e.g.*, *Hill Dermaceuticals, Inc. v. FDA*, 709 F.3d 44, 47 (D.C. Cir. 2013), and the agency is entitled to a "presumption that [it] has properly designated the administrative record absent clear evidence to the contrary." *Greater Yellowstone Coal. v. Kempthorne*, No. 07-211, 2008 WL 11398908, at 1-2 (D.D.C. May 23, 2008) (Sullivan, J.). And it is equally well-settled that Plaintiffs may only rely on extra-record materials by making a showing of "bad faith or improper behavior on the part of the agency, or that, the record is so bare that it prevents effective judicial review." *Fund for Animals v. Williams*, 391 F. Supp. 2d 191, 198 (D.D.C. 2005) (collecting cases). Exceptions to the record rule involving extra-record evidence may generally only "be invoked to challenge gross procedural deficiencies—such as where the administrative record itself is so deficient as to preclude effective review," and only where "evidence [is] provided" of such deficiencies.

Children's Hosp. Ass'n of Texas v. Azar, 300 F. Supp. 3d 190, 202 (D.D.C. 2018) (Sullivan, J.).

Plaintiffs acknowledge these limitations on record review, and fail to make any showing concerning bad faith. ECF 64-1 at 12-13; ECF 66-1. Yet they contend their extrinsic evidence is needed to facilitate review of the legality of *A-B-* and the PM's implementation of *A-B-*. *Id*. Plaintiffs are simply wrong. This case involves a facial challenge to an administrative adjudication, *A-B-*, and an interpretive document, the PM, that at most requires review of a legal determination by the Attorney General and an agency's guidance instructing its employees on how to apply the Attorney General's legal conclusions. Such review is quintessentially a legal determination that can be made by reviewing the INA, agency and federal court decisions, and the administrative record. *See Marshall Cty. Health Care Auth. v. Shalala*, 988 F.2d 1221, 1226 (D.C. Cir. 1993) ("The entire case on review is a question of law, and only a question of law"); *see also Am. Bankers Ass'n v. Nat'l Credit Union Admin.*, 271 F.3d 262, 266 (D.C. Cir. 2001) (claim that agency decision violates statute it "is charged with enforcing" requires no more than "the statute and legislative history"). Indeed, any claim that *A-B-* or the PM breaks with past policies is readily ascertainable by simply reviewing the "past policies," *i.e.* legal decisions by the Attorney General, the BIA, and the Courts of Appeal on the standards governing asylum. Plaintiffs' heavy reliance on *factual* declarations submitted by *attorneys* expressing their personal views of what the law was and how they believe the Attorney General changed it is entirely improper. *See* ECF 10 at 10, 12-13, 14-15, 16, 17, 19, 20, 21-22, 28; ECF 64-1 at 13, 33-34, 41, 59.[6]

Plaintiffs also assert the Court must permit extrinsic *hearsay* evidence from third parties about the mind-state of asylum officers and IJs because they have plead a constitutional due process claim in addition to their APA claim. ECF 64-1 at 33-34; ECF 66-1 at 7-12. They are

[6] Plaintiffs' submissions from UNHCR and their suggestions that statements by the UNHCR are binding law, ECF 64-1 at 38, 46-47, are also inappropriate. Although they claim otherwise, the UNHCR Handbook "is not binding on the Attorney General, the [BIA], or United States courts." *Aguirre-Aguirre*, 526 U.S. at 426-27. Indeed, the UNHCR Handbook itself states that it does not have binding effect and that interpreting the Refugee Convention is left to each individual state that is a party to the Convention. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 439 (1987) ("the determination of refugee status under the 1951 Convention and the 1967 Protocol . . . is incumbent upon the Contracting State in whose territory the refugee finds himself").

mistaken. Plaintiffs' due process claim essentially asserts that *A-B-* and the PM as a substantive matter require asylum officers to deny credible fear claims premised on domestic or gang related violence. ECF 3 at ¶ 96. But as their summary judgment motion makes clear, that claim is redundant of their APA claim asserting the same precise injury, *i.e.* the alleged new substantive rule(s) laid out by *A-B-* are unlawful. *See* ECF 64-1 at 29-31. As Judge Boasberg recently explained, "when a constitutional challenge to agency action requires evaluating the substance of an agency's decision made on an administrative record, that challenge must be judged on the record before the agency." *Bellion Spirits, LLC v. United States*, --- F. Supp. 3d ---, 2018 WL 4637013, *7 (D.D.C. Sept. 27, 2018) (collecting cases). The reason is simple: "permitting a broader record on judicial review for a constitutional claim would 'incentivize every unsuccessful party to agency action to allege bad faith, retaliatory animus, and constitutional violations to trade in the APA's restrictive procedures for the more even-handed ones of the Federal Rules of Civil Procedure.'" *Id.* (quoting *Jarita Mesa Livestock Grazing Ass'n v. U.S. Forest Serv.*, 58 F. Supp. 3d 1191, 1237-38 (D.N.M. 2014); *accord Chiayu Chang v. USCIS*, 254 F. Supp. 3d 160, 163 (D.D.C. 2017) (Bates, J.) ("Plaintiffs cite no authority for the proposition that [their constitutional] claim is a separate cause of action that exists outside the APA and is therefore exempt from the record review rule"). Thus, Plaintiffs' due process claim, like their APA claim, must rise or fall based on the Court's review of the administrative record.

2. The Attorney General and USCIS are entitled to varying types of deference

Plaintiffs and amici fundamentally misconstrue Defendants' arguments concerning deference or how deference works in agency review cases. The Defendants do *not* contend that *A-B-* or the PM is entitled to blanket *Chevron* deference. Rather, where, as here, the Attorney General interprets any *ambiguous* statutory terms in the INA, he is entitled specifically to *Chevron* deference. ECF 57-1 at 26-27; *see Cardoza-Fonseca*, 480 U.S. at 448 ("In [the] process of filling *any gap left*, implicitly or explicitly, by Congress, the courts must respect the interpretation of the agency to which Congress has delegated the responsibility for administering the statutory program.") (emphasis added). As we have explained, *A-B-*'s primary holding was to reject the BIA's application of the term "particular social group" in the domestic violence cases of *A-R-C-*

G- and *A-B-*, because *A-R-C-G-* allowed an asylum claim that did not meet the BIA's general principles for interpreting "particular social group," as articulated in *M-E-V-G-*, 26 I. & N. Dec. at 236-37, or the requirement that the persecutor must be motivated by the victim's membership in such a group. *See Matter of A-B-*, 27 I. & N. Dec. at 334-39. Because it is beyond dispute that "particular social group" is ambiguous and *A-B-* interpreted that ambiguous phrase, *A-B-* is entitled to *Chevron* deference, as Defendants have argued. ECF 57-1 at 26-27. In their memorandum, the Plaintiffs state that they do not challenge the overruling of *A-R-C-G-* in this case. *See* ECF 64-1 at 55 n.38. Thus, importantly, the one aspect of *A-B-* that could accurately be described as a change in the law is not at issue in this case.[7]

That being said, the remainder of *A-B-* and the PM are still entitled to *Chevron* deference to the extent they state long-standing law or interpret prior agency cases or regulations through case-by-case adjudication. *See U.S. Telecom Ass'n v. F.C.C.*, 295 F.3d 1326, 1332 (D.C. Cir. 2002) ("We [] defer to an agency's reasonable interpretation of its own rules and precedents"). It is well-settled that deference is appropriate not just to an agency's construction of statutory language, but also policy objectives reached through case-by-case adjudication. *See, e.g.*, *Health Ins. Ass'n of Am., Inc. v. Shalala*, 23 F.3d 412, 416 (D.C. Cir. 1994) ("Resolution of an ambiguity in a statute, if it has consequences, inevitably requires the agency to consider competing policy objectives, and it is the reconciliation of such conflicts that is entitled to judicial deference."). Agency refinement of statutory concepts and agency precedents does not always involve construction of ambiguous terms, but nevertheless is accorded deference given the agency's expertise and authority. *See, e.g.*, *S.E.R.L. v. U.S. Att'y Gen.*, 894 F.3d 535, 554, 557 (3d Cir. 2018) (according *Chevron* deference to the BIA's establishment of additional requirements for particular social groups—"social distinction and particularity"—not explicitly in the INA because of "the BIA's experience

[7] Although the Plaintiffs do not challenge the *M-E-V-G-* interpretation of "particular social group" or the Attorney General's adoption of the *M-E-V-G-* standard as described at ECF 57-1 at 6, UNHCR does. UNHCR participated as amicus before the BIA in *M-E-V-G-*, opposing the adoption of the social distinction and particularity criteria. *Matter of M-E-V-G-*, 26 I. & N. Dec. at 233 & n.8. The BIA addressed and rejected UNHCR's arguments in *M-E-V-G-*. 26 I. & N. Dec. at 248-49. UNHCR renews the same arguments before this Court. *See* ECF 84 at 13-20. Not only is a challenge to *M-E-V-G-* time-barred, but the BIA's interpretation has been accorded *Chevron* deference by every court that has addressed it. *See* ECF 57-1 at 27 n.9.

adjudicating prior cases and its desire to give further guidance"); *Paloka v. Holder*, 762 F.3d 191, 195 (2d Cir. 2014) ("[w]e give BIA interpretations *Chevron* deference," including where "BIA has interpreted [] phrase through a series of precedential opinions").[8]

Regardless, even if statutory terms may not be ambiguous, where the Attorney General is simply repeating or refining pre-existing law as construed by the BIA—as is the case with respect to each of Plaintiffs' claims concerning *A-B-* that is not interpreting ambiguous statutory language, *see infra*—such repetition of legal principles, even if it is not subject to *Chevron* deference, is still entitled to deference so long as it is reasonable. *See, e.g.*, *Boca Airport, Inc. v. FAA*, 389 F.3d 185, 190 (D.C. Cir. 2004) ("we have repeatedly held[] [that] an agency's interpretation of its own precedent is entitled to deference"); *accord Columbia Gas Transmission Corp. v. FERC*, 477 F.3d 739, 742-44 (D.C. Cir. 2007) (similar); *Cassell v. FCC*, 154 F.3d 478, 483 (D.C. Cir. 1998) (similar). Deference is appropriate where Congress has authorized rulemaking *and adjudications*. *See United States v. Mead Corp.*, 533 U.S. 218, 219 (2001). Even where an agency is not interpreting ambiguous language through adjudications, if it is simply articulating a view of its prior precedents, that articulation is entitled to deference. *See Boca*, 389 F.3d at 190; *Cassell*, 154 F.3d at 162; *accord Paloka*, 762 F.3d at 196 (explaining that BIA decisions "reformulat[ing]

[8] Plaintiffs and their amici apparently assert that none of the statutory terms the Attorney General has interpreted or the interpretation of which he reaffirmed in *A-B-* are ambiguous as a statutory matter. The Court need not address the issue, given the Government's legal position, but the assertion is wrong in many instances and debatable in others, given the many cases according deference to the Attorney General or the BIA on each aspect of the legal standards governing claims for asylum that are not expressly defined by statute. *See, e.g.*, *Fatin v. INS*, 12 F.3d 1233, 1238 (3d Cir. 1993) (Alito, J.) ("well-founded fear"); *Rivera-Barrientos v. Holder*, 666 F.3d 641, 648 (10th Cir. 2012) ("particular social group"); *Mei Fun Wong v. Holder*, 633 F.3d 64, 71-72 (2d Cir. 2011) ("social distinction"); *Martinez-Perez v. Sessions*, 897 F.3d 33, 41 (1st Cir. 2018) ("nexus"); *Castillo-Arias v. U.S. Att'y Gen.*, 446 F.3d 1190, 1196 (11th Cir. 2006) ("social visibility"); *S.E.R.L.*, 894 F.3d at 551 ("particularity"); *Lopez v. Sessions*, No. 17-9517, 2018 WL 3730137, at *3 (10th Cir. Aug. 6, 2018) ("circularity"); *cf. Chen v. Holder*, 607 F.3d 511, 512 (7th Cir. 2010) ("The alien must establish that 'race, religion, nationality, membership in a particular social group, or political opinion was or will be at least one central reason for persecuting the applicant.' 8 U.S.C. § 1158(b)(1)(B)(i). These are not self-defining terms, so administrative officials have considerable leeway."). To the extent the Attorney General construed such terms, Plaintiffs must show that the Attorney General's construction of relevant ambiguous statutory provisions is "unambiguously foreclosed." *Lindeen v. SEC*, 825 F.3d 646, 653 (D.C. Cir. 2016).

[particular social group] test and accompanying analysis clarify[ing] several issues" entitled to deference). And where the agency is applying such law to facts, review is equally deferential: "To reverse the BIA finding we must find that the evidence not only supports that conclusion, but *compels* it[.]" *INS v. Elias-Zacarias*, 502 U.S. 478, 481 n.1 (1992) (emphasis in original).

Plaintiffs and their amici attempt an end-run around these long-standing principles by asserting that *A-B-* violates a principle that Congress is presumed to have incorporated prior administrative and judicial interpretations or "common sense" or "well-established" definitions of terms when in legislates. *See, e.g.*, ECF 81 at 5-9. As explained below, that argument misses the mark because each of the asylum criteria considered and clarified by the Attorney General are long-standing and entitled to deference even if not time-barred. *Supra*. Even were that not so, this argument ignores the well-settled principle that where "Congress explicitly authorize[s]" an agency to "define [a] term," it "necessarily suggests that Congress did not intend the word to be applied in its plain meaning sense." *Women Involved in Farm Econ. v. USDA*, 876 F.2d 994, 1000 (D.C. Cir. 1989) (emphasis in original). Congress delegated the authority to define legal terms to the Attorney General, and thus it did not incorporate preexisting definitions of statutory terms, whatever they may be, into the INA. *See id.* Were it otherwise, section 1103(a) would be a nullity.

Finally, it is beyond dispute that at *Chevron* step two and when agencies interpret their prior precedents, all that is required is that the agency's construction of ambiguous statutory terms be reasonable, *i.e.*, "based on a permissible construction of the statute." *Chevron, U.S.A. v. Nat. Res. Def. Counsel*, 467 U.S. 837, 842-43 (1984). That is a permissive standard, with the agency's view deemed to be reasonable so long as it is not "flatly contradicted" by plain language. *Dep't of the Treasury v. Fed. Labor Relations Auth.*, 494 U.S. 922, 928 (1990). And that standard is equally applicable to agency interpretations of their own regulations or other guidance materials. *See, e.g.*, *Auer v. Robbins*, 519 U.S. 452 (1997); *Drake v. FAA*, 291 F.3d 59, 67 (D.C. Cir. 2002).

What Plaintiffs and their amici ignore, however, is that where Congress has explicitly delegated to an agency the authority to issue binding rules, the agency's "judgement [is owed] more than mere deference or weight." *Lindeen*, 825 F.3d at 655-56. Thus, where, as here, "there is an express delegation of authority [through 8 U.S.C. § 1103(a)] to the agency to elucidate a

specific provision of the statute by regulation," courts give the agency interpretation "controlling weight unless [it is] arbitrary, capricious, or manifestly contrary to the statute." *Id.* at 656; *see Atrium Med. Ctr. v. US HHS.*, 766 F.3d 560, 566 (6th Cir. 2014) (comparing standard when delegation is explicit versus implicit, and noting that, in the latter scenario, "the court's review is somewhat less deferential"); *see also AILA*, 18 F. Supp. 2d at 53 (Sullivan, J.), *aff'd*, 199 F.3d 1352 (D.C. Cir. 2000) ("an agency is entitled to the highest degree of deference where Congress has delegated to the agency the authority to promulgate standards or classifications. Such standards or classifications are entitled to 'legislative effect' and are to be given "controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.") (internal quotations omitted). Simply put, the deference owed an agency is at its apex where, as here, Congress has directed the agency to define legal terms relevant to the statute at issue. *See Lindeen*, 825 F.3d at 653 (grant of definitional authority "manifests that the Congress intended the [agency] to enjoy broad discretion to decide" what the statute means by the terms to be defined); *Henry Ford Health Sys. v. Dep't of Health and Human Servs.*, 654 F.3d 660, 665 (6th Cir. 2011) ("An agency is at the apex of its administrative authority when Congress not only gives the agency general authority to implement a statute but also expressly asks the agency to define a specific phrase."). No more than a "reasoned explanation for why [the agency] chose that interpretation" is required, *Lindeen*, 825 F.3d at 656, and Plaintiffs bear the heavy burden of demonstrating the interpretation challenged is not reasonable. *See San Luis Obispo Mothers for Peace v. U.S. Nuclear Regulatory Comm'n*, 789 F.2d 26, 37 (D.C. Cir. 1986); *accord FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 514 (2009) (same, where Plaintiffs allege agency changed its prior policies).

With these administrative law and evidentiary standards in mind, Plaintiffs cannot demonstrate that the Attorney General's decision, and thus the PM's informing line officers of aspects of that decision, are unreasonable, and summary judgment must be granted to Defendants.

B. *A-B-* is a lawful interpretation and re-statement of the asylum laws and is entitled to some form of deference in all respects, and because the PM merely implements *A-B-*, it too is entitled to deference

As we have explained, the only arguably "new" law established by *A-B-* was overruling *A-R-C-G-*. ECF 57-1 at 24. Plaintiffs concede they do not challenge that decision. ECF 64-1 at 48

n.35. Accordingly, Plaintiffs' challenges to those aspects of *A-B-* applying settled law and the PM's reiterations of *A-B-*'s various statements are time-barred under 8 U.S.C. § 1252(e)(3)(B).

Assuming it is appropriate to reach the merits, Plaintiffs' opposition—indeed, their entire case—rests on the suggestion that asylum claims based on domestic violence and gang violence were uncontroversial and well-settled until *A-B-*. *See* ECF 64-1 at 28. Nothing could be further from the truth. Asylum claims based on domestic and gang violence have been at the center of the decades-old controversy over the circumstances under which private crime may be inflicted on account of a protected ground such that is may form a basis for asylum. In brief, Congress designed the asylum statute to offer a limited form of relief, not to "provide redress for all misfortune." *Matter of A-B-*, 27 I. & N. Dec. at 318.. This fundamental limitation is hard-coded into the INA's definition of a refugee, which makes asylum available only for victims of persecution, and moreover, only persecution motivated by a specific list of protected grounds: race, religion, nationality, political opinion, and membership in a particular social group. 8 U.S.C. § 1101(a)(42)(A). Harm resulting solely from ordinary crime and personal conflicts that do not involve a protected ground, even grievous harm, is not, and has never been, a basis for asylum.[9] *See generally Matter of M-E-V-G-*, 26 I. & N. Dec. at 234-35 (*MEVG*). Despite the evident statutory intent to create a limited form of relief, for years the "refugee" definition has been heavily tested in litigation, *see id.* at 232, as asylum applicants attempted to stretch the statutory terms—especially the ambiguous phrase "membership in a particular social group—to create a catch-all covering harm from personal disputes and crime. *See infra*. Over the last thirty-some years, the BIA, and now the Attorney General, have struggled to develop principled interpretations of the key statutory terms "persecution," "on account of," and especially "particular social group," that engage with novel claims, yet preserve the integrity of the refugee definition. *A-B-* is simply an installment in that story, and as with prior agency decisions addressing, refining, or repeating the definition of a refugee, entitled to deference.

1. *A-B-* and the implementing PM did not create a "rule" against asylum claims resulting from domestic or gang violence

[9] Cases are collected at ECF 57-1 at 30 nn.14 & 15.

Plaintiffs premise much of their case on their allegation that *A-B-* and the PM establish a *de facto* "rule" or "bar" against any asylum applications premised on domestic or gang violence that deprives Plaintiffs of an "individualized analysis" of their credible fear claims. ECF 64-1 at 27, 28, 30, 31. Plaintiffs misread *A-B-* and the PM. To be sure, *A-B-* and the PM do state that asylum claims based on domestic or gang violence "generally" will not satisfy the asylum (or credible fear) standard. But the Attorney General unambiguously disclaimed any purpose of deciding that asylum claims involving domestic or gang violence could never succeed. 27 I. & N. Dec. at 320. To the contrary, he emphasized that every claim had to be rigorously analyzed *on its own merits* "in the context of the evidence presented regarding the particular circumstances in the country in question" in *each case*. *Id.* at 339. Moreover, the Attorney General explained, consistent with long-standing law, that

> [a]n asylum applicant has the burden of showing her eligibility for asylum, [] which includes identifying a cognizable social group and establishing group membership, persecution based on that membership, and that the government was unwilling or unable to protect the respondent. The respondent must present facts that undergird each of these elements, and the asylum officer, immigration judge, or the Board has the duty to determine whether those facts *satisfy all of the legal requirements* for asylum.

Id. at 340. By requiring the BIA to assess each element, rather than accept a party's concession that an element is satisfied, the Attorney General has denied no one an individualized assessment of their claims—he has only eliminated a loophole created by *A-R-C-G-* exempting certain aliens from the requirement to demonstrate all elements of their claim, consistent with BIA decisions like *M-E-V-G-* and *W-G-R-*. *See, e.g.*, *S.E.R.L.*, 894 F.3d at 554 (noting "wide acceptance of the BIA's revised test from *M-E-V-G-*, and, in particular, the Ninth Circuit's analysis of the companion case, *W-G-R-*"). Accordingly, both Plaintiffs' APA and due process claims to the contrary fail.

a. Plaintiffs lack any cognizable APA claim premised on any alleged "general rule" against domestic or gang violence claims

Whether a particular social group is cognizable under the INA is a fact-intensive, case-by-case inquiry. *Matter of M-E-V-G-*, 26 I. & N. Dec. at 251. There is no blanket rule that a specific group is or is not cognizable in all cases as long the same factual scenario has not been previously rejected by the BIA and the group is not circularly defined. And, contrary to Plaintiffs' assertions,

neither *A-B-* nor the PM create such a blanket rule against domestic violence- or gang-related claims. ECF 64-1 at 28-37. Both reinforce the long-standing requirement that the BIA and IJs analyze particular social groups under the *M-E-V-G-* framework. *A-B-* and the PM merely recognize that, in practice, claims based on gang or domestic violence generally do not prevail. Those conclusions are borne out by BIA and circuit court decisions. While victims of gang or domestic violence may be able to make an asylum claim if they can satisfy the requirements of the refugee definition, merely being a victim of crime or a personal dispute that is not related to a protected ground will not substitute for those requirements.

The Attorney General in *A-B-* accurately commented on problems typical of gang- and domestic violence-related claims: they often fall short of the requirements for particular social group and nexus. He said that groups defined to consist of persons who are victims of abuse would violate the rule that the group must exist independently of the persecution. 27 I. & N. Dec. at 334-35. They also likely fail to meet the particularity requirement, because "broad swaths of society may be susceptible to victimization." *Id.* at 335. Further, he said, artificial groups consisting of victims of violence often lack any characteristic that makes others consider them a group in society, "rather than each as a victim of a particular abuser in highly individualized circumstances." *Id.* at 336. He added that where the wrongdoer's ill treatment was motivated only by personal conflict or by the desire for money, there would not be the necessary nexus to membership in the particular social group. *Id.* at 338-39. The Attorney General made it clear that it would be these failings, not a rule against domestic or gang violence claims, that would likely prevent applicants from succeeding on their claims. *Id.* at 320.

Despite those failings, where the actor in a gang or domestic violence case is motivated by a protected ground and the violence meets the definition of persecution, the BIA and the Attorney General have been careful to recognize that asylum claims would not be precluded merely because they involve domestic or gang violence. They expressly stated that there is no rule that asylum claims resulting from domestic or gang violence are not viable, only a rule that they must satisfy the same standards as other claims. *Id.* at 317, 320, 340; *Matter of M-E-V-G-*, 26 I. & N. Dec. at 251 (BIA does not advocate "blanket rejection" of all claims involving gangs). Indeed, Plaintiffs

admit that the Attorney General did not make a new legal rule or alter the governing legal standards. *See* ECF 64-1 at 10 ("Attorney General did not purport to conclude that, as a matter of law, domestic violence cannot form the basis of a viable asylum claim. . . . [or] alter the long-standing legal standards."). Therefore, Plaintiffs' contention that *A-B-* impermissibly adopted a rule against asylum based on domestic or gang violence is not an accurate reading of *A-B-*.

Importantly, although Plaintiffs suggest that asylum was freely available for domestic violence and gang cases before *A-B-*, that is not true. As explained below, domestic and gang violence have been two arenas where the BIA and Attorney General have struggled to work out principled interpretations of the key statutory terms that would enable adjudicators to distinguish between persecution on account of a protected ground and violence arising out of ordinary crime or personal conflicts. Hence the emphasis on those kinds of scenarios in *A-B-*.

First, contrary to Plaintiffs' suggestions, s*ee* ECF 64-1 at 7-10, domestic violence-related claims have vexed the BIA, multiple Attorneys General, and the courts for decades, in particular, because of the difficulty of establishing an applicable protected ground or nexus to such a protected ground, and because the claims relied on the fact of violence to manufacture both a protected ground and nexus.[10] As explained previously, ECF 57-1 at 27-28, in 2014 after decades of uncertainty over the how to resolve these two elements in the context of domestic violence, in *A-R-C-G-* the BIA accepted party concessions that a group based on being "unable to leave a relationship" was a protected "particular social group," and that there was a nexus between

[10] The history of *Matter of R-A-*, 22 I. & N. Dec. 906 (BIA 1999) (en banc)*,* exemplifies the struggle. Initially, the BIA denied R-A-'s asylum claim based on domestic violence for failing to establish a cognizable particular social group or nexus to any protected ground. In January 2001, Attorney General Reno vacated the BIA's decision and directed the BIA to stay consideration of the case pending publication of a final version of a regulation ("2000 draft rule") that addressed various issues in *R-A-*. In February 2003, Attorney General Ashcroft certified *R-A-* to himself and subsequently ordered briefing on R-A-'s eligibility for relief under the INA. Att'y Gen. Order No. 2696-2003 (unpublished). Attorney General Ashcroft declined to issue a decision on the merits and directed the BIA to reconsider the case following publication of the 2000 draft rule in final form. 23 I. & N. Dec. 694 (A.G. 2005). Attorney General Mukasey certified *R-A-* to himself in September 2008 and remanded the case to the BIA for reconsideration in light of significant developments in asylum law and the fact that the 2000 draft rule had not been promulgated. *See* 24 I. & N. Dec. 629, 630 (A.G. 2008). Ultimately, DHS agreed to a grant of asylum before an IJ.

domestic violence and such a group. This provisionally resolved the two problematic issues by creating a carve-out for claims based on domestic violence,[11] but with no guidance on how far this carve-out would extend into the heart of asylum law. Instead of reckoning with the difficult claims relating to domestic violence encountered over the past twenty years, Plaintiffs cite distinguishable cases where the Board found a protected ground and nexus, independent of the mere fact of violence. ECF 64-1 at 7-10. *Matter of Kasinga* granted asylum to a woman who feared female genital mutilation, a ubiquitous traditional practice, if returned to Togo, where the opposition to the traditional practice was held to constitute a particular social group. 21 I. & N. Dec. 357, 358, 368 (BIA 1996). *Matter of S-A-* granted asylum to a woman fleeing abuse by her father on religious grounds, because her liberal Muslim views conflicted with her father's conservative Muslim views. 22 I. & N. Dec. 1328 (BIA 2000). In both cases, the applicants established more than the mere fact of violence by persons with whom they had a personal relationship; instead, each was able to show that their persecutors were motivated by a protected ground, whether religion or a cognizable particular social group. Those are the missing elements which the Attorney General said in *A-B-* must be satisfied in each case.

Similarly, claims based on gang violence have been at the forefront of the BIA's struggle to distinguish persecution on account of a protected ground from crime. In a multitude of cases, applicants have failed to satisfy the tests for particular social group and nexus in gang violence cases.[12] Four of the key BIA precedents developing the current framework for "particular social

[11] Unlike in the gang context, as discussed below, prior to 2014 there were not many circuit court decisions regarding claims relating to domestic violence, because ICE generally conceded that groups such as the one in *A-R-C-G-* were cognizable. Because only aliens can petition for review in the courts of appeals, and aliens generally won on the issue of cognizability of such groups by virtue of ICE's concession, such cases did not make it to the courts. This policy of conceding the cognizability of the group is demonstrated in the ICE brief Plaintiffs seek to submit from *Matter of R-A-*. *See* ECF 64-4 at 73, Exhibit 3, DHS Brief, *Matter of R-A-* (Feb. 19, 2004) (arguing that the social group in *R-A-* would more accurately be defined as "married women in Guatemala who are unable to leave the relationship"). To the extent ICE may have conceded the cognizability of the group in the past, it is not binding on the BIA, the Attorney General, or the courts, as *A-B-* held. *See* ECF 57-1 at 28 (discussing precedent regarding the impropriety of accepting party concessions regarding legal issues).

[12] *E.g.*, *Larios v. Holder*, 608 F.3d 105, 109 (1st Cir. 2010); *Zelaya v. Holder*, 668 F.3d 159, 166-67 (4th Cir. 2012); *Orellana-Monson v. Holder*, 685 F.3d 511, 519-22 (5th Cir. 2012); *Umana-*

group" arose out of claims that victims of gang violence constituted a particular social group, and while those cases do not preclude all asylum claims involving gang violence, they do explain why the mere fact of vulnerability to gang violence has fallen short of satisfying the criteria for membership in a particular social group.[13] And as explained, ECF 57-1 at 27 n.9, all circuits to have addressed the framework established by those cases have deferred to it. Although applicants still raise particular social groups based simply on being the victim of gang violence, the courts routinely reject those claims, after considering them under *M-E-V-G-*, the motive requirement, and the requirement that the government must be unwilling or unable to control private actors.[14]

The cases Plaintiffs cite in which gangs or domestic partners attacked a victim on account of a protected ground, such as religion, and the applicant was therefore eligible for asylum, do not disprove *A-B-*'s assertion that gang and domestic violence cases will often fail for lack of crucial elements. *See W.G.A. v. Sessions*, 900 F.3d 957, 965-67 (7th Cir. 2018) (threatening gang held to be motivated by applicant's membership in a "particular social group" consisting of the applicant's family, which was deemed a cognizable particular social group); *Salgado-Sosa v. Sessions*, 882 F.3d 451, 457-590 (4th Cir. 2018) (same); *Aldana-Ramos v. Holder*, 757 F.3d 9, 17-19 (1st Cir. 2014) (remanding for BIA to consider nexus to family particular social group); *Ivanov v. Holder*, 736 F.3d 5, 14-15 (1st Cir. 2013) (religious persecution by skinheads); *Haoua v. Gonzales*, 472 F.3d 227 (4th Cir. 2007) (female genital mutilation claim brought under theory recognized in *Kasinga*). Instead, they prove that applicants who satisfy the requirements for "persecution on

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Ramos v. Holder, 724 F.3d 667, 671-74 (6th Cir. 2013); *Gaitan v. Holder*, 671 F.3d 678, 680-82 (8th Cir. 2012); *Barrios v. Holder*, 581 F.3d 849, 855-56 (9th Cir. 2009); *Rivera-Barrientos*, 666 F.3d at 647-54; *Velasquez-Otero v. U.S. Atty. Gen.*, 456 F. App'x 822, 825-26 (11th Cir. 2012) (per curiam).

[13] *See Matter of M-E-V-G-*, 26 I. & N. Dec. 227;*Matter of W-G-R-*, 26 I. & N. Dec. 208; *Matter of E-A-G-*, 24 I. & N. Dec. 591; *Matter of S-E-G-*, 24 I. & N. Dec. 579.

[14] *Paiz-Morales v. Lynch*, 795 F.3d 238, 243-45 (1st Cir. 2015); *Morquecho-Saico v. Sessions*, 696 F. App'x 34, (2d Cir. 2017); *Roblero-Morales v. Boente*, 677 F. App'x 849 (4th Cir. 2017) (per curiam); *Diaz-Villaneuva v. Sessions*, 682 F. App'x 307, 308 (5th Cir. 2017); *Zaldana Menijar v. Lynch*, 812 F.3d 491, 498-99 (6th Cir. 2015); *Mayorga-Rosa v. Sessions*, 888 F.3d 379, 385-85 (8th Cir. 2018) (; *Lopez-Velasquez v. Sessions*, --- F. App'x ---, 2018 WL 3423900, at *2 (9th Cir. July 16, 2018); *Rodas Orellana v. Holder*, 780 F.3d 982, 992-93 (10th Cir. 2015); *Tum-Lux v. U.S. Att'y Gen.*, --- F. App'x ---, 2018 WL 3342699, at * 3 (11th Cir. July 9, 2018).

account of a protected ground" could establish an asylum claim no matter what the identity of their persecutors, as they still can after *A-B-*.

Similarly, Plaintiffs treat the PM's quotation from *A-B-* as a separate "rule" against asylum claims resulting from domestic or gang violence, ECF 64-1 at 27, but the PM specifically qualifies its general statement about gang and domestic violence claims to a particular legal failing: defining the group by members' vulnerability to harm. AR006. Plaintiffs omit this key language from their quotation of the PM, ECF 64-1 at 31, and they change the meaning by this omission. After reiterating the Attorney General's legal framework discussing the requirements for particular social groups and persecution, the full language from the PM states: "In general, in light of the above standards, claims based on membership in a putative particular social group *defined by the members' vulnerability to harm* . . . will not establish the basis for asylum, refugee status, or a credible or reasonable fear of persecution." AR006 (emphasis added); AR010 ("few gang-based or domestic violence claims involving particular social groups defined by the members' vulnerability to harm may merit a grant"). These statements in the PM reiterate black letter law: particular social groups cannot be based on the persecution or vulnerability to persecution, or as commonly phrased, they must be defined independently of the persecution. *See infra* 42-48. Plaintiffs' contention that the PM includes a per se rule against cases involving gang or domestic violence is wrong, as shown by examining the PM itself instead of Plaintiffs' truncated quotation from it. In sum, Plaintiffs' contention that either *A-B-* or the PM denies applicants an individual consideration of their claim is unfounded. *A-B-* and the PM are not contrary to existing law and are not arbitrary or capricious.

b. Plaintiffs' due process "bias" claim is meritless

Plaintiffs also repackage their claims concerning a presumption against asylum claims premised on domestic or gang violence into a due process claim by arguing that the alleged "presumption" violates due process by "depriv[ing] applicants of their right to an adjudicator who is, and is reasonably perceived to be, impartial" through "institutional pressure" to deny asylum claims. ECF 64-1 at 32-33. This is a serious allegation, but it does not make it any less meritless.

To start, Plaintiffs have dramatically narrowed their due process claims, by arguing only

that the "new" credible fear proceedings create the appearance of bias. *Id.* They have thus waived their other due process claims. *See* ECF 3 at ¶ 96. Second, the claim is entirely redundant of their APA claim. Both claims assert that *A-B-* and the PM prevent aliens from receiving an individualized hearing on their claims that is not pre-judged as unlawful because its premised on domestic or gang violence. *Compare id.*, ¶ 89 *with* ¶ 96; ECF 64-1 at 28-32, *with* 32-38. The claim is thus duplicative and cannot exist separate and apart from the APA claim. *See Ursack v. Sierra Interagency Black Bear Grp.,* 639 F.3d 949, 955 (9th Cir. 2011) ("Although Ursack separately argues that the decision also violated equal protection principles, the equal protection argument can be folded into the APA argument, since no suspect class is involved and the only question is whether the defendants' treatment of Ursack was rational (i.e., not arbitrary and capricious).")

Moreover, even assuming the "bias" claim may proceed independent of the APA claim, Plaintiffs cannot circumvent the record rule by simply labeling the same claim a constitutional claim. "[W]hen a constitutional challenge to agency action requires evaluating the substance of an agency's decision made on an administrative record, that challenge must be judged on the record before the agency." *Bellion*, 2018 WL 4637013, *7 (collecting cases); *Chiayu Chang*, 254 F. Supp. 3d at 162; *see* cases cited *supra* Part II.A1. And because Plaintiffs' due process bias claim rests exclusively on their proffered extra-record evidence, its exclusion means they fail to provide sufficient evidence on this claim to survive summary judgment. *See* Fed. R. Civ. P. 56(a).[15]

Regardless, Plaintiffs' bias claim fails even on its own merits. The decisions of IJs and asylum adjudicators are entitled to a presumption of regularity, and a party alleging bias bears the heavy burden of proving it. *See, e.g.*, *Citizens of Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971); *McLeod v. INS*, 802 F.2d 89, 95 n. 8 (3d Cir. 1986). Consequently, "in order to warrant a hearing on their claim of political interference and ex parte communications, Petitioners must make a

[15] And even assuming that their bias claim exists independently of their APA claim, Plaintiffs would still have to show that this claim is cognizable under 8 U.S.C. § 1252(e)(3). Plaintiffs allegations concerning the Attorney General's role as a supervisor of immigration judges, his statements in the media and in speeches, and performance measures for IJs are clearly not claims cognizable under § 1252(e)(3) since they do not "implementat[]"8 U.S.C. § 1225(b).

'strong showing' of impropriety by administrative officials." *Yang v. Reno*, 925 F. Supp. 320, 331 (M.D. Pa. 1996). That is, Plaintiffs must establish that agency adjudicators failed to exercise their own discretion and instead allowed the Administration to dictate the outcome of their cases. *See United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 267 (1954); *Shaughnessy v. United States ex rel. Accardi*, 349 U.S. 280 (1955). As other courts have explained, the Supreme Court has "ma[de] clear that a finding of political interference may not be based upon speculation that [agency] adjudicators were unconsciously influenced by the [] Administration's alleged desire that Petitioners be deported." *Yan*g, 925 F. Supp. at 320 (citing *Accardi*, 349 U.S. at 282).

Under these standards, even assuming the Court may consider Plaintiffs' extra-record evidence, they fail to make any "strong showing" of bias. Indeed, Plaintiffs' primary sources of evidence are two *hearsay* declarations from third-party attorneys and a *newspaper* article. *See* ECF 64-1 at 33-34. Plaintiffs rely on these sources to assert that *A-B-* is "a clear signal to deny domestic violence claims, and claims related to gang violence," *id.* (quoting Jamil Decl, ¶ 11), that an asylum officer "reading [the PM] would feel strong pressure to not grant a positive credible fear determination for an applicant in a domestic violence or gang violence situation," *id.* (quoting Nasr Decl., ¶ 5), and that *A-B-* is "an attempt to turn judges from neutral arbiters into law enforcement agents enacting Trump administration policies." *Id.* (quoting opinion of source in newspaper article). Plaintiffs cite zero authority for the proposition that vague bias claims in an APA case may be proven by citing hearsay declarations and newspaper articles, and that such allegations may circumvent the record rule. Moreover, even were this a normal Rule 56 motion not subject to the record rule, Plaintiffs' hearsay evidence would not be admissible in any event. *See, e.g.*, *Biolchini v. Gen. Elec. Co*., No. 97-C-1704, 1998 WL 155930, at *7 (N.D. Ill. Mar. 28, 1998), *aff'd*, 167 F.3d 1151 (7th Cir. 1999) ("Biolchini's purported evidence of bias is infirm because he cites speculative and inadmissible hearsay statements").

Plaintiffs nevertheless contend that the Attorney General's role as supervisor of IJs creates the potential for unconstitutional bias. ECF 64-1 at 33. This claim has been rejected repeatedly as frivolous. Since the first INA, Congress has vested the Attorney General with supervisory authority over the immigration courts and the BIA. *See Marcello v. Bonds*, 349 U.S. 302 (1955) (discussing

history); 8 U.S.C. § 1103(g). And the Supreme Court has clearly rejected any argument that this relationship *per se* violates due process. *See id*. at 311 ("Petitioner would have us hold that the presence of this relationship so strips the hearing of fairness and impartiality as to make the procedure violative of due process. The contention is without substance[.]").

Plaintiffs' contention that statements made by the Attorney General in the media and in speeches to IJs creates a risk of potential for unfairness or bias is similarly unavailing. ECF 64-1 at 33-34 & n.24. Plaintiffs take issue with the Attorney General's statements to IJs that it is "their duty to carry out *Matter of A-B*." *Id.* at 34. But that statement simply reiterates the statutory and regulatory requirement that the Attorney General's legal decisions must be followed by immigration officers, judges, and the BIA. *See* 8 U.S.C. § 1103(a)(1); 8 C.F.R. § 1003.1(g). Moreover, case law makes clear that a finding of political interference may not be based upon speculation that agency adjudicators were unconsciously influenced by statements made by the Attorney General absent a showing of actual pressure. *See Accardi*, 349 U.S. at 284; *Yang*, 925 F. Supp. at 320. Plaintiffs do not come close to making this showing.[16]

Finally, Plaintiffs have not pointed to any evidence that these factors combined with *A-B*-prejudiced the outcome of their cases. Nothing Plaintiffs allege shows that receiving asylum adjudications by agency adjudicators governed by standards established by the Attorney General is inherently prejudicial, and even if they had shown actual prejudice in the circumstances surrounding *A-B*-, which they have not, they still must show prejudice to their underlying claims to succeed on their due process claim. *United States v. Decoster*, 624 F.2d 196, 336 (D.C. Cir. 1976). Showing prejudice requires showing "there is a reasonable probability that, but for [the constitutional violation], the result of the proceeding would have been different." *See, e.g.*, *Lafler v. Cooper*, 566 U.S. 156, 163 (2012). The record contains no evidence that Plaintiffs were found

[16] Plaintiffs also contend that the "pressure to deny cases is heightened by case completion quotas that discourage thorough decision making." ECF 64-1 at 34. Plaintiffs point to no evidence making this connection: court performance metrics are used by many different courts, and EOIR has made clear that the courts must still ensure due process in meeting these goals. *See* Case Priorities and Immigration Court Performance Measures, EOIR, (Jan. 17, 2018), at 2, available at https://www.justice.gov/eoir/page/file/1026721/download; *cf.* 28 U.S.C. § 476 (encouraging federal judges to resolve pending cases, motions, and trials within certain timeframes).

to have no credible fear for reasons other than because adjudicators of both USCIS (with supervisory review) and EOIR found that they did not establish the requisite likelihood that they could meet the standard for asylum under section 1158(a) as clarified by *A-B-* and other precedent.

Regardless, as we argued in our opening motion, Plaintiffs lack due process rights regarding their admission to any procedures or protections other than those prescribed by Congress via statute, which they have received. Plaintiffs are aliens with no prior ties or connections to this country who were apprehended at a port of entry or shortly after crossing the border illegally and who have requested asylum. ECF 3 at ¶¶ 2-3, 15-24. "[A]n alien seeking initial admission to the United States," such as Plaintiffs in their requests for asylum, "requests a privilege and has no constitutional rights regarding his application, for the power to admit or exclude aliens is a sovereign prerogative." *Landon v. Plasencia*, 459 U.S. 21, 32 (1982). Alien applicants for admission at the border, which Plaintiffs are, *see Castro*, 835 F.3d at 445-46, lack any constitutional due process rights with respect to admission: "[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned." *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953). Plaintiffs do not address this argument and do not deny that they received credible fear reviews in accordance with statutory procedure; the Due Process Clause does not provide them with any additional protection respecting their bid to establish credible fear and eventually obtain admission. ECF 57 at 36-38.

At bottom, what Plaintiffs' "bias" argument demonstrates is that they believe they established the requisite likelihood of making an asylum claim which entitled them to a positive credible fear determination and therefore the fact they did not receive it must mean bias permeated the relevant immigration officers' decisions. But given that Plaintiffs received the process they were due under the statute with respect to their credible fear interviews, their claim is baseless. While arriving aliens like Plaintiffs may be entitled to fair proceedings when Congress provides them, they lack a constitutional right, whether dressed up as "bias" or otherwise, to any particular *outcome* in their efforts to gain admission or relief from removal. *See Landon*, 459 U.S. at 32. They are aliens seeking initial admission and are properly treated as at the threshold of initial entry. *See Kwai Fun Wong v. United States*, 373 F.3d 952, 971 (9th Cir. 2004) ("[A]n alien seeking

admission has not 'entered' the United States, even if [he] is in fact physically present."). They thus lack any constitutional rights regarding their attempts to gain admission (including asylum) to the country, *see Ukrainian-Am. Bar Ass'n v. Baker*, 893 F.2d 1374, 1382 (D.C. Cir. 1990), including receiving greater *procedures* which they contend would have achieved a different result. *See, e.g.*, *Castro*, 835 F.3d at 445-46 (collecting cases) (Plaintiffs "cannot invoke the Constitution . . . in an effort to force judicial review beyond what Congress has already granted them").

For these reasons, Plaintiffs' Due Process bias claim cannot survive summary judgment

2. *A-B-* did not change the existing standard for showing the government is unwilling or unable to protect the applicant from private actors

Plaintiffs persist in asserting that the "condoned/complete helplessness" language in *A-B-*, 27 I. & N. Dec. at 337, as incorporated in the PM, is new and imposes a heightened legal requirement that is contrary to the INA and prior BIA and judicial precedents. ECF 64-1 at 38-43. They are wrong. The standard is well-established, and Plaintiffs' arguments that the INA and court precedent expressly foreclose the Government's reading is meritless.

As Defendants' motion for summary judgment points out, several courts have applied the "condoned/complete helplessness" formulation, beginning with *Galina v. INS*, 213 F.3d 955, 958 (7th Cir. 2000), and thus this standard is hardly new. ECF 57-1 at 29 n.3 (listing cases). To the contrary, the "condoned/complete helplessness" standard articulates the required governmental role. Indeed, the word "persecution" in the INA does not, on its face, supply an answer to the complex questions that arise under the refugee definition. Therefore, the BIA is charged with interpreting the term. *See, e.g.*, *Corado v. Ashcroft*, 384 F.3d 945, 947 (8th Cir. 2004) ("The BIA is entitled to deference in interpreting ambiguous statutory terms such as 'persecution.'"); *cf. Singh v. INS*, 134 F.3d 962, 967 (9th Cir. 1998) (noting that the INA "does not define 'persecution' or specify what acts constitute persecution"). When an applicant seeks asylum based on private violence, whether the applicant's home government is willing and able to control the alleged persecutors is part of the larger persecution inquiry. *Matter of Acosta*, 19 I. & N. Dec. 211, 222 (BIA 1985); *accord Matter of Kasinga*, 21 I. & N. Dec. at 365 (revising *Acosta* standard).

Plaintiffs and the administrative law professor amici argue that the "unwilling or unable to control private actors" element of persecution, as set out in *Acosta*, 19 I. & N. Dec. at 222-23, was

drawn from pre-Refugee Act understandings of "persecution," and so should be considered unambiguous for purposes of *Chevron* analysis.[17] ECF 64-1 at 38-39, ECF 75 at 8-9. But the agency has not hitherto regarded the *Acosta* definition of "persecution" to be beyond its authority to modify, as shown in *Matter of Kasinga*, 21 I. & N. Dec. at 365. *Kasinga* modified the *Acosta* definition of persecution, thus indicating that the BIA has viewed "persecution" as ambiguous, despite its roots in pre-Refugee Act authority. Whereas *Acosta* had held that persecution was harm inflicted upon a person "in order to punish him for possessing a belief or characteristic a persecutor sought to overcome," 19 I. & N. Dec. at 222 (relying on pre-Refugee Act authority), *Kasinga* eliminated the need for "punitive" intent, 21 I. & N. Dec. at 365. If, as Plaintiffs argue, the definition of "persecution" was set in stone by the adoption of "persecution" with its pre-Refugee Act meaning, *Kasinga*'s holding, on which Plaintiffs rely, would be *ultra vires*. *Kasinga* and the Attorney General's citation of *Kasinga* in *A-B-*, 27 I. & N. Dec. at 337, show that persecution has been thought to be ambiguous and thus subject to administrative interpretation. *See, e.g.*, *Shalala*, 23 F.3d at 416. Plaintiffs' contrary theory would upset *Kasinga*, settled law going back to 1996.

In any event, the case law using the "condoned" or "complete helplessness" language shows that the language did not change the unwilling/unable standard. *See Galina*, 213 F.3d at 958 (using "condoned" or "complete helplessness" and also remanding, based in part on conclusion that if applicant were subjected to the feared future mistreatment, "it would still be persecution, even if the police might take some action against telephone threats"); *Hor v. Gonzales*, 421 F.3d 497, 502 (7th Cir. 2005) (using "condones" or "helpless" language and nevertheless concluding that evidence warranted a remand to the agency to find whether applicant proved a well-founded fear of future persecution).[18] Plaintiffs contend that even though the cases articulated the

[17] Plaintiffs also argue that because the UNHCR Handbook was in existence at the time of the Refugee Act, and the Handbook's standard was "effective protection," this means that the Refugee Act must have enshrined "effective protection" as the meaning of persecution. ECF 64-1 at 38-39 (citing *Acosta*, 19 I. & N. Dec. at 222-23). To the contrary, when *Acosta* described the pre-Refugee Act meaning of "persecution," it relied on the meaning of that term under *domestic* law prior to the Refugee Act, not on the interpretations of UNHCR. 19 I. & N. Dec. at 220-24. *Acosta* specifically rejected the notion that UNHCR's interpretations were binding on the BIA. *Id.* at 220.

[18] *See, e.g.*, *Guillen-Hernandez v. Holder*, 592 F.3d 883, 887 (8th Cir. 2010); *Elias v. Gonzales*, 490 F.3d 444, 454 (6th Cir. 2007); *Shehu v. Gonzales*, 443 F.3d 435, 437 (5th Cir. 2006).

"condoned/complete helplessness" language, the courts failed to apply the standard they articulated. ECF 64-1 at 42 & n.29. But results matter, and these cases show that the "condoned/complete helplessness" formulation is not some departure from earlier standards that makes it impossible to prove persecution by private actors.

Neither the Attorney General in *A-B-* nor the PM suggest that the "condoned/complete helplessness" language is a new standard. The Attorney General uses the "condoned/complete helplessness" and "unwilling or unable" language interchangeably on the same page, and even within the same paragraph of *A-B-*, ECF 57-1 at 30 n.13 (citing 27 I. & N. Dec. at 337), without indicating that he thinks there is any difference between them. Plaintiffs' assertion that the PM "specifically and repeatedly highlights" the "condoned/complete helplessness" language as a "key change" is simply untrue. ECF 64-1 at 43. The "condoned/complete helplessness" language does not appear with any particular emphasis in the PM. Indeed, the number of times "condoned/complete helplessness" is used in the PM (three times) pales in comparison to the number of times the more familiar "unable/unwilling" standard appears within the same document (eleven times). The "condoned/complete helplessness" standard, to the extent that it has not been explicitly articulated by the agency previously, is an example of permissible synthesis or reaffirming of law on a case-by-case basis, which is entitled to deference. *See Paloka*, 762 F.3d at 196 (explaining that BIA decisions "reformulat[ing] [particular social group] test and accompanying analysis clarify[ing] several issues" entitled to deference).

Plaintiffs are also incorrect that asylum applicants, via the PM, are newly being required to demonstrate with "absolute certainty that the government will not protect them from feared harm." ECF 64-1 at 39. Nowhere in the PM or *A-B-* is "absolute certainty" recited as the standard.

Plaintiffs argue that this Court should fashion an interpretation of persecution that would make the "unwilling or unable to control" element synonymous with (and therefore duplicative of) the separate standard that the applicant must have a well-founded fear of persecution. ECF 64-1 at 39. The overall burden to be applied in an asylum determination—"a well-founded fear of persecution," 8 C.F.R. § 208.13(b)(2)—is separate from the requirement of government action/inaction. The BIA has never equated these two standards. The BIA and the Courts use the

"unwilling or unable to control" private actors standard to gauge the governmental role in persecution, even in the context of past persecution, where the existence of a well-founded fear is a moot point. In *Acosta*, the BIA held the accepted definition of persecution referred to suffering or harm "inflicted either by the government of a country or by persons or an organization that the government was unable or unwilling to control." 19 I. & N. Dec. at 222. The past tense ("was") shows the BIA was not talking solely about likelihood of future persecution, but about the government's responsibility for harm that has already happened. That is how courts have applied the test. *See, e.g.*, *Harutunyan v. Gonzales*, 421 F.3d 64, 68-69 (1st Cir. 2005); *Mulyani v. Holder*, 771 F.3d 190, 198-99 (4th Cir. 2014); *Yasinskyy v. Holder*, 724 F.3d 983, 984, 989 (7th Cir. 2013); *Saldana v. Lynch*, 820 F.3d 970, 976-77 (8th Cir. 2016); *Nahrvani v. Gonzales*, 399 F.3d 1148, 1154 & n.4 (9th Cir. 2005); *Ritonga v. Holder*, 633 F.3d 971, 976-78 (10th Cir. 2011). Thus, Plaintiffs are urging the Court to adopt novel reasoning that is not part of the existing framework.

Finally, Defendants do not agree that the PM instructs officers to "*ignore* whether state protection is effective." ECF 64-1 at 41. Plaintiffs argue that the PM "explicitly dismisses the significance" of whether a country "'has problems effectively policing certain crimes, like domestic violence or gang-related activities.'" ECF 64-1 at 41 (quoting AR006). Plaintiffs, however, take this quoted language out of context. The sentence from which Plaintiffs excerpt this language explains that the effectiveness of combatting such crimes "cannot, *by itself*, establish eligibility for asylum or refugee status." AR006 (emphasis added). There is nothing incorrect about this statement when considered in its entirety. Merely being at risk of harm is not enough to establish eligibility for relief or protection. Critically and undisputedly, an applicant must establish a nexus to a protected ground to be granted asylum. The PM contains no instruction to "ignore" the effectiveness of a government's efforts to combat certain crimes; rather, the instruction is not to consider a country's difficulty effectively policing certain crimes, alone, as establishing eligibility for relief. This is consistent with existing law and is not new.

3. *A-B-* did not create a new nexus standard, but simply requires adjudicators to apply the old one

Defendants explained in their summary judgment memorandum that *A-B-* did not create a new motive standard, but rather, held that adjudicators needed to apply the existing standard,

instead of accepting a stipulation in lieu of proof, as the BIA did in *A-R-C-G-*. ECF 57-1 at 30. Plaintiffs do not dispute that the Attorney General and the PM stated the correct legal standards for nexus.[19] ECF 64-1 at 44. Nor do they (or could they) dispute that under pre-existing law, "nexus is foreclosed in the case of purely personal disputes," ECF 64-1at 44 (internal punctuation omitted), as Defendants have shown, ECF 57-1 at 30 nn.14 & 15 (collecting cases). And Plaintiffs do not dispute that the Attorney General correctly applied the nexus standard in *A-B-*, where he held that the BIA pointed to no record evidence that *A-B-*'s husband mistreated her "in any part" on account of her membership in the particular social group of "El Salvadoran women who are unable to leave their domestic relationship where they have children in common," since there was no evidence the husband knew any such group existed. 27 I. & N. Dec. at 343; *see* ECF 64-1 at 45. These concessions establish that the actual nexus holding of *A-B-* is not at issue here.

Instead, Plaintiffs argue that, even if the Attorney General correctly concluded that the domestic violence asylum claims in *A-B-* and *A-R-C-G-* failed for lack of nexus, "that does not mean that other applicants will be unable to provide proof of motive." ECF 64-1 at 45. That is true. Indeed, the Attorney General did not purport to foreclose cases in which, unlike *A-R-C-G-* and *A-B-*, the applicant could prove a protected-ground motive was a central reason for persecution. Nor did he suggest that cases where there was a nexus to a protected ground would fail because there is also a personal relationship between the persecutor and victim. *See* 27 I. & N. Dec. at 338-39. What the Attorney General did in fact rule, when quoted accurately rather than selectively, is that the personal conflict could not substitute for a protected-ground motive: "When private actors inflict violence based on a personal relationship with a victim, then the victim's membership in a larger group may well not be 'one central reason' for the abuse." *Id.*

To be sure, it is true, as Plaintiffs argue, *see* ECF 64-1 at 8-10, 44, that there are many cases in which persecutor and applicant have a relationship, yet the applicant is also able to show that the persecutor was motivated by a protected ground, rather than a purely personal dispute. For

[19] Unlike Plaintiffs, UNHCR takes issue with the U.S. law of nexus. The Court may not adopt UNHCR's interpretation of the Refugee Convention in lieu of Congress's implementation of the standard in the INA, or the Supreme Court's interpretation of the INA. *See Aguirre-Aguirre*, 526 U.S. at 427-28 (UNHCR's position not binding on Attorney General, the BIA, or U.S. courts).

instance, in one of the cases Plaintiffs cite, *Matter of S-A-*, 22 I. & N. Dec. at 1336, the applicant showed that she had suffered past persecution at the hands of her father on account of her religious beliefs, which differed from her father's orthodox Muslim views concerning the proper role of women in society, and the BIA held she was eligible for asylum. *Accord Matter of Kasinga*, 21 I. & N. Dec. at 368 (finding nexus between persecution and cognizable particular social group based on resistance to traditional practice of female genital mutilation in Togo). In the cases Plaintiffs cite, in addition to a personal relationship, there was thus a nexus between the harm and a cognizable particular social group or one of the other protected grounds. *A-B-* did not question or overrule such cases. 27 I. & N. Dec. at 338-39. *A-B-* simply held that there must be a nexus to a protected ground in addition to the non-protected motivation of personal conflict. *Id.* Nothing in *A-B-* suggests a *per se* rule that there can be no nexus where the persecutor and victim are in a personal relationship, and to the contrary, *A-B-* is replete with instructions to abide by the statutory "one central reason" standard.[20]

The PM also does not establish a *per se* rule against nexus in the context of personal relationships. Plaintiffs inaccurately claim that the PM says a personal relationship between persecutor and victim "forecloses" a nexus to a protected ground. ECF 64-1 at 44 (citing AR006). The PM does not say that. When read in context without selective citation, the PM states that if the evidence shows the victim was attacked "based solely" on a pre-existing personal relationship, nexus will not be established. AR006 (section III.B.ii). The PM also says that the victims' membership in a larger group will "often" not be one central reason for abuse when the violence is based on a personal relationship. AR006. The word "often" indicates that the PM was making an observation, not a rule. And both of these statements in the PM mirror those of the attorney General in *A-B-* in which the Attorney General cited the statutory "one central reason" mixed-motive standard. 27 I. & N. Dec. at 317, 319, 320, 321, 323 330, 332, 338, 339, 343.

Accordingly, neither *A-B-* nor the PM implementing *A-B-* is contrary to the existing law of nexus, including the basic motive and mixed-motive inquiries. Therefore, neither can be viewed

[20] To the extent Plaintiffs claim otherwise, the Government's position is that *A-B-* does not establish a *per se* rule, and that position is entitled to deference. *See Drake*, 291 F.3d at 67.

as arbitrary and capricious, and Plaintiffs' arguments to the contrary lack merit.

4. *A-B-*'s disapproval of particular social groups based on a term used to describe domestic violence is an application of existing law that a "particular social group" must exist independently of the persecution.

As we have explained, one of the errors in *A-R-C-G-* that *A-B-* pointed out and overruled was that *A-R-C-G-* countenanced a circularly defined particular social group that was based in part on the persecution. *See A-B-*, 27 I. & N. Dec. at 334-35 (disapproving A-R-C-G-'s particular social group because including "unable to leave their relationship" rendered the group "effectively defined to consist of women in Guatemala who are victims of domestic abuse because the inability to leave was created by harm or threatened harm). *A-B-*'s holding was not a new rule but merely a reasonable application of the existing rule that a particular social group must be defined "independently" of the persecution.

In their Complaint, Plaintiffs objected to the anti-circularity holding of *A-B-* on the ground that *A-R-C-G-* might have been "unable to leave" for reasons unrelated to her spouse's abuse. ECF 3 at 24. This argument assumes that it would be improper to include the fact of abuse in the particular social group, but argues that not all groups based on "unable to leave" would necessarily rely on abuse. Now, on Summary Judgment, Plaintiffs for the first time raise a contrary argument: they contend that it is permissible to base a particular social group on the persecution as long as some other term is also added. ECF 64-1 at 46-47. Plaintiffs cannot amend their complaint through a summary judgment motion, and so the Court should disregard this argument and deem it forfeited. *See, e.g.*, *Mazloum v. Dist. of Columbia*, 442 F. Supp. 2d 1, 12 n.7 (D.D.C. 2006) (Bates, J.) (noting plaintiff cannot amend complaint through an opposition brief); *Arbitraje Casa de Cambio, S.A. de C.V. v. U.S. Postal Serv.*, 297 F. Supp. 2d 165, 170 (D.D.C. 2003) (Collyer, J.) (same). Even if they could raise this claim for the first time in a responsive pleading, their arguments about the meaning of "particular social group" fail, because *A-B-* is based on an interpretation of "particular social group" that has been agency law since at least 2014, and is, in any case, a reasonable interpretation of the ambiguous term "particular social group."

The rule against circularly defined particular social groups is required to prevent "particular social group" from becoming a catch-all that swallows the rest of the refugee definition. *See Matter*

of M-E-V-G-, 26 I. & N. Dec. at 231. The BIA and courts have recognized that if "particular social group" is allowed to serve as a catch-all for anyone who is harmed by others, the "persecution on account of" clause will lose its limiting function. *Orellana-Monson*, 685 F.3d at 518-19; *Castillo-Arias*, 446 F.3d at 1197-98; *Matter of M-E-V-G-*, 26 I. & N. Dec. at 235, 242. The simplest way to make "particular social group" a catch-all is to take the fact of persecution itself and fashion it into a putative particular social group. But this is circular reasoning, as "persecution on account of . . . membership in a particular social group" requires that the membership causes the persecution, not vice versa. *Lukwago v. Ashcroft*, 329 F.3d 157, 172 (3d Cir. 2003); *Sarkisian v. Att'y Gen. of U.S.*, 322 F. App'x 136, 141 (3d Cir. 2009) ("This is a matter of logic: motivation must precede action; and the social group must exist prior to the persecution if membership in the group is to motivate the persecution."); *see Perez-Rabanales v. Sessions*, 881 F.3d 61, 67 (1st Cir. 2018). As early as 2006, in *Matter of C-A-*, the BIA held that "particular social group" should not be interpreted as a catch-all, and, the BIA continued, as part of this principle, the social group cannot be defined by the fact that it is targeted for persecution. 23 I. & N. Dec. at 960; *accord Matter of M-E-V-G-*, 26 I. & N. Dec. at 235. The BIA repeated this anti-circularity rule in subsequent cases. *Matter of S-E-G-*, 24 I. & N. Dec. at 584; *Matter of M-E-V-G-*, 26 I & N. Dec. at 236-37 n. 11 (particular social group must be defined "independently" of the persecution); *Matter of W-G-R-*, 26 I. & N. Dec. at 215. Courts have routinely reiterated and affirmed this compelling logic. *E.g.*, *Gonzalez Cano v. Lynch*, 809 F.3d 1056, 1059 (8th Cir. 2016) ("Among other causation problems, the most severe harm Gonzalez Cano suffered—abduction and forced labor—are the characteristics that define his proposed social group. As such, his membership in that group could not have been the motive, at least initially, for the persecution."); *Perez-Rabanales*, 881 F.3d at 67 ("[T]he petitioner's proffered social group is defined by the persecution of its members. The distinction has decretory significance."). In *A-B-*, the Attorney General simply reiterated and applied the anti-circularity rule as stated in *M-E-V-G-*, and neither Plaintiffs' argument in their Complaint, nor their different argument in their summary judgment motion, shows anything arbitrary or capricious in the Attorney General's reasoning.

First, Plaintiffs' Complaint alleges that "inability to leave" may result from other factors

than a spouse's use of force to prevent the applicant from leaving. ECF 3 at 24. This is true, and the Attorney General did not say anything to the contrary. *Matter of A-B-*, 27 I. & N. Dec. at 334-35. However, the Attorney General reasonably disapproved of a particular social group including "unable to leave," because that term is so ambiguous that it could (and did) serve as a placeholder to obscure the fact that the particular social group was circularly defined. *Id.* In fact, that is how *A-R-C-G-* was interpreted during the time it was in effect: applicants making claims in reliance on *A-R-C-G-* relied on the fact of their partner's violence as a way of establishing that they were "unable to leave." In fact, in concluding that A-B- was unable to leave her relationship, the Board in *A-B-* relied entirely on threats and violence against A-B- by her ex-husband and his associates after her divorce. *See* ABROP0029-30; *see, e.g.*, *Alvarado-Garcia v. Lynch*, 665 F. App'x 620, 621 (9th Cir. 2016) (record compelled conclusion applicant was "unable to leave" where partner beat applicant when he discovered she had reported his abuse to the police, stalked her trying to convince her to reconcile, and threatened her that if she did not return to the relationship, she would be forced out of town). After all, if being a "married woman" or "woman in a domestic relationship" are immutable in the relevant societies without regard to the partner's abuse, then it is redundant to add "unable to leave" to a group defined by the marriage or domestic relationship. And if there is some non-persecutory reason other than being married that causes the group members to be unable to leave, that reason can be identified with sufficient specificity that it cannot be used to hide the existence of persecution in the group definition. Thus, the Attorney General's holding that *A-R-C-G-* erred in approving a group with language so vague it permitted an end-run around the rule against defining groups by persecution was a reasonable application of the BIA's existing rule against circularly defined particular social groups. "[An] agency's interpretation of its own precedent is entitled to deference." *Cassell*, 154 F.3d at 483. In any case, Plaintiffs' argument about whether the phrase "unable to leave" can be included in a particular social group definition is irrelevant at the credible fear stage, since USCIS does not require applicants to precisely articulate their "particular social group" in non-adversarial proceedings. *Infra* Part II.B.5.

In contrast to Plaintiffs' protestations in their Complaint that the particular social group in *A-R-C-G-* was not necessarily defined by the persecution, in their summary judgment motion,

Plaintiffs now say that the Attorney General has to allow groups to be defined by persecution, as long as something else is thrown into the definition. ECF 64-1 at 46-48. Although this claim is forfeited, *see supra*, it is also time-barred, as well as being meritless. Hybrid groups consisting of the persecution plus something else are not defined "independently" of the persecution, as required by BIA authority existing before *A-B-*, *see Matter of M-E-V-G-*, 26 I. & N. Dec. at 236-37 n.11; *Matter of W-G-R-*, 26 I. & N. Dec. at 215, as explained below.

Plaintiffs rely on the BIA's statements such as that in *C-A-*, where the BIA suggested that the particular social group cannot be defined "exclusively" by the persecution. 23 I. & N. Dec. at 960; *accord Matter of A-M-E- & J-G-U-*, 24 I. & N. Dec. at 74. The Plaintiffs infer from the word "exclusively" that it would be permissible to define a social group partly by the persecution. ECF 64-1 at 47 (claiming that it is "well-established" that a group can be defined by persecution plus something else). But that inference is not mandatory, and the BIA has never drawn it. Even before the BIA explicitly stated that the group had to be defined "independently" of the persecution, *Matter of M-E-V-G-*, 26 I. & N. Dec. at 236-37 n.11, the BIA and courts alike applied the rule against defining a particular social group by its persecution where the groups in question were hybrids consisting of the persecution plus other terms.[21] This shows that the BIA and at least some courts did not infer that "not exclusively" meant that hybrid groups would be cognizable.

To be sure, some courts, notably the Seventh Circuit, have reasoned that a hybrid particular social group could be cognizable. *See Cece v. Holder*, 733 F.3d 662, 671 (7th Cir. 2013) (en banc); *see also Cordoba v. Holder*, 726 F.3d 1106, 1113 n.1 (9th Cir. 2013).[22] But *Cece* specifically

[21] *E.g.*, *Matter of S-E-G-*, 24 I. & N. Dec. at 584; *Perez-Rabanales*, 881 F.3d at 66-67; *Rodriguez v. U.S. Att'y Gen.*, 735 F.3d 1302, 1310 (11th Cir. 2013); *Rreshpja v. Gonzales*, 420 F.3d 551, 556 (6th Cir. 2005).

[22] Plaintiffs argue that the Third Circuit has also recognized hybrid particular social groups, consisting in part of the persecution, ironically citing *Lukwago*, the decision that first encapsulated the principle that the particular social group must be defined "independently" of the persecution. ECF 64-1 at 47. Plaintiffs cite a different part of *Lukwago* than that relied on in *M-E-V-G-*, 26 I & N. Dec. at 236-37 n.11, and *A-B-*, 27 I. & N. Dec. at 334-35. In the first part of *Lukwago*, the court correctly rejected the applicant's past persecution claim as circular because based on the persecution of being forced to be a child soldier. 329 F.3d at 172. But in the second part of *Lukwago*, the Court illogically held that there could be a well-founded fear of future persecution based on the applicant's escape and his membership in a particular social group of escapees. *Id.* at

based its holding on its assertion that the BIA had never required the particular social group to be independent of the persecution. 733 F.3d at 671. *Cece* failed to distinguish between a group being defined by persecution, which the Board had never held permissible, and the group having a history of being subject to mistreatment, which as explained below, is indeed relevant to the group's social distinction, but should be proved by evidence, not assumed by being included in the group definition. At any rate, *Cece*'s assertion that the BIA had never disapproved of hybrid groups was superseded by the BIA's 2014 decisions in *M-E-V-G-* and *W-G-R.*

In *M-E-V-G-* and *W-G-R-*, the BIA resolved any ambiguity about whether hybrid groups could be allowed when it said it was well-established that the group must be defined "independently of the fact of persecution." *Matter of M-E-V-G-*, 26 I. & N. Dec. at 236-37 n.11; *accord Matter of W-G-R-*, 26 I. & N. Dec. at 215. At the same time *M-E-V-G-* clarified that the particular social group must be defined independently of the persecution, *M-E-V-G-* also stated that past mistreatment of a group (not an individual) by society (not an individual persecutor) is relevant to the criterion of social distinction. 26 I. & N. Dec. at 244. Plaintiffs argue that since a history of discrimination is relevant to social distinction, applicants ought to be able to put persecution in their group definition. ECF 64-1 at 47; *see also Cece*, 733 F.3d at 671-72 (stating that a group's history of persecution does "not disqualify" the group). Actually, the truth is just the opposite. The relevance of past discrimination to social distinction cuts *against* letting applicants insert persecution into a hybrid group definition. Social distinction needs to be proved by evidence, not assumed by sticking "distinction" words in the group definition. If applicants could manipulate the underlying group by separating out the members of the group who have been mistreated and positing an artificial sub-group consisting only of those members, any non-persecution characteristic could be made to seem socially distinct. By this method, the group of "alumnae of

178. But this ignores the fact that the escape (and the particular social group based on it) is just part of one continuing course of persecution. If applicants could defeat the rule against circularity by dividing up the same persecution into tranches, and predicating their particular social group on the second minute, rather than the first, the catch-all problem would re-emerge. In citing *Lukwago*'s statement that the particular social group must be defined "independently" of the persecution, neither the BIA in *M-E-V-G* nor the Attorney General in *A-B-* espoused the second, illogical part of *Lukwago*.

prestigious universities *subject to unfair discrimination*" would be recognized as a marginalized particular social group in United States society, despite the fact that the broader group without the adverse treatment qualifier would not. It follows that for evidence of discrimination or other adverse treatment to be useful as a way to evaluate the group's role in its society, the adverse treatment cannot be added in to create an artificial subgroup that is persecuted by definition. Instead, the experiences of all those with the non-persecution characteristic should be taken into account to ascertain whether people with that non-persecution characteristic are truly socially distinct in their society. And if they are, adding in the fact of persecution to the group definition is unnecessary. In fact, whether an applicant can include the persecution in her social group will likely only be a fighting point in cases where the group is not otherwise distinct.

Because the BIA adopted the "must be defined independently of the persecution" clarification in 2014, the Plaintiffs' attack on the rule against including the persecution in the particular social group, is time-barred under 8 USC § 1252(e)(3)(B).

Even if Plaintiffs' challenge to the rule were not time-barred, the rule requiring a particular social group to be defined independently of the persecution at issue is reasonable and the Court should defer to it. As all agree, "membership in a particular social group" is ambiguous and the Attorney General's interpretation is analyzed under *Chevron* step two. ECF 57-1 at 27 n.8. *M-E-V-G-*'s more precise formulation of the anti-circularity rule excludes the possibility of hybrid particular social groups consisting partly of the persecution and partly of something else, and thus is a reasonable measure to prevent "particular social group" from becoming a catch-all. This aspect of *M-E-V-G-* should receive *Chevron* deference, as has been accorded to *M-E-V-G-* generally. *See* ECF 57-1 at 27 n.9. Moreover, the holding in *Cece* approving hybrid particular social groups must be regarded as superseded under *Brand X* by the BIA's decision in *M-E-V-G.*

In sum, both Plaintiffs' attacks on *A-B-*'s overruling of *A-R-C-G-* on circularity grounds—Plaintiffs' argument that the group was not necessarily defined by persecution and their argument that it was permissible to define it by persecution—fail to show that the Attorney General's decision or the PM implementing it were arbitrary or capricious.

5. The PM does not require exact delineation of particular social groups in

credible fear interviews

Plaintiffs assert that the PM requires the "exact delineation" of a particular social group at the credible fear stage. ECF 64-1 at 49-51. That is wrong. The PM follows existing law and practice by instructing asylum officers on two principles: (1) an applicant bears the burden of showing he or she has a significant possibility of prevailing on an asylum claim by presenting facts that "clearly identify the proposed particular social group," AR003 (Section III), but (2) the officer is to conduct the interview in a non-adversarial manner, with the purpose of eliciting all relevant information bearing on eligibility, AR004 n.2 (citing 8 C.F.R. § 208.9(b)). This guidance is consistent with the regulation, which describes that the purpose of the credible fear interview is to determine whether "the alien has established a credible fear of persecution or torture." 8 C.F.R. § 208.30(e)(1) & (2). The PM is thus consistent with the law and does not establish any new standard.[23]

The PM does not impose a duty to articulate a particular social group on the applicants in credible fear interviews. Nor does the PM disregard the asylum officer's role in developing evidence in a non-adversarial manner, which the PM specifically acknowledges. AR004 n.2. While the PM cites *A-B-*, it does not instruct officers to require that applicants precisely articulate a particular social group. Instead, the PM phrases its instructions to asylum officers in terms of the applicant's responsibility to present facts, rather than to articulate claims: "[A]n applicant seeking asylum . . . must present facts that clearly identify the proposed particular social group." AR003. The PM thus accommodates the non-adversarial context of the asylum or credible fear interview by referring to the applicant's burden of proving facts that could support a claim, and reminding officers of their duty to elicit all relevant information. The PM does not instruct asylum officers that the applicant has to articulate the "exact delineation" of his or her particular social group before the officer, either at an affirmative interview or a credible fear interview. As in all aspects of a credible fear interview, the officer has a duty to elicit relevant testimony in order to determine whether the applicant may be eligible for relief or protection, which would include whether the applicant is a member of a cognizable particular social group. *See* 8 C.F.R. § 208.30(d).

Significantly, the duty to present facts that establish a particular social group in the non-

[23] If Plaintiffs complain about the regulation, that claim is time-barred. 8 U.S.C. § 1252(e)(3).

adversarial credible fear process is different from the duty described in *A-B-* to articulate the exact delineation of a proposed particular social group in the adversarial defensive context of removal proceedings. The PM makes clear that the "exact delineation" requirement applies in adversarial proceedings. AR003 (quoting *Matter of A-B-*, 27 I. & N. Dec. at 344 ("an applicant seeking asylum or withholding of removal based on membership in a particular social group must clearly indicate, on the record and before the IJ, the exact delineation of any proposed particular social group.")). There should be no confusion that an applicant's obligation to articulate a particular social group as stated in *A-B-* relates to defensive applications in proceedings before an IJ, which accords with the nature of adversarial removal proceedings versus non-adversarial USCIS adjudications and screenings. Thus, Plaintiffs' contention that the PM demands that applicants at the credible fear stage must provide an "exact delineation" of a particular social group is unfounded. And even were the issue ambiguous, which it is not, the Court owes deference to the agency's statement that the "exact delineation" requirement is inapplicable at the credible fear stage. *See, e.g.*, *Drake*, 291 F.3d at 67 (explaining that deference is owed "to an agency's interpretation advanced during litigation regarding the meaning of an ambiguous regulation, if the position is not inconsistent with the agency's prior statements and actions regarding the disputed regulation").

6. The PM does not instruct asylum officers to exercise discretion in credible fear interviews

Plaintiffs persist in misstating that the PM requires asylum officers to consider denying credible fear applications based on discretionary factors. *See* ECF 64-1 at 51-53. This claim is baseless, and nothing in the PM supports it. Nowhere does the PM state that discretion should be evaluated in the credible fear context. The PM applies to all situations in which USCIS is making a determination under 8 U.S.C. § 1101(a)(42), as reflected by the title of the memo: "Guidance for Processing Reasonable Fear, Credible Fear, Asylum, and Refugee Claims in Accordance with *Matter of A-B-*." The applicable statute defines credible fear as a "significant possibility" of establishing eligibility for asylum, 8 U.S.C. § 1225(b)(1)(B)(v), and does not provide for denial of that standard on the basis of discretionary factors applicable in an asylum application under 8 U.S.C. § 1158. It would be inconsistent with section 1225(b)(1)(B)(v) to consider the exercise of

discretion in determining eligibility at the credible fear stage. Although the PM includes information about exercising discretion, the memo does not direct officers to apply the exercise of discretion in the credible fear context. To the extent this may be ambiguous, again, the Court owes deference to the agency's interpretation advanced here that discretion is inapplicable at the credible fear stage. *See, e.g.*, *Drake*, 291 F.3d at 67.

C. The PM, to the extent it does not simply repeat *A-B-*, is entitled to deference

Plaintiffs also assert that the PM "establishes two new unlawful credible fear policies with regard to circuit precedent," namely: "instructing asylum officers" to apply circuit precedents "to the extent that those cases are not inconsistent with *Matter of A-B-*," and to apply the law of the "relevant circuit" to credible fear proceedings, defined as "the circuit where the alien is physically located during the credible fear interview." ECF 64-1 at 53. Plaintiffs assert these instructions to line officers in the PM violate the separation of powers, the INA, and the APA. *Id.*

First, Plaintiffs do not address Defendants' argument that their separation of powers claim is redundant of their APA claim, and thus cannot proceed outside the confines of APA review. *See* ECF 57-1 at 34 n.16. They have thus waived any argument that Count II of their complaint can proceed separate and independent of Count I. *See, e.g.*, *Hopkins v. Women's Div., Gen. Bd. of Glob. Ministries*, 284 F. Supp. 2d 15, 25 (D.D.C. 2003) (Walton, J.) ("It is well understood in this Circuit that when a plaintiff files an opposition to a dispositive motion and addresses only certain arguments raised by the defendant, a court may treat those arguments that the plaintiff failed to address as conceded"), *aff'd*, 98 F. App'x 8 (D.C. Cir. 2004). In any event, Plaintiffs' assertions lack any factual support in the record, ignore basic principles of deference accorded to agency guidance, and are without merit. As we have explained, the PM's instruction to follow circuit precedent to the extent not inconsistent with *A-B-* is simply an instruction that line officers follow *A-B-* unless and until a competent court of appeals issues a decision that some aspect of *A-B-* is not entitled to deference or does not follow from the plain text of the INA. ECF 57-1 at 34-36.

The plain text of the PM provides that:

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

> *of E-L-H-*, 23 I&N Dec. 814, 819 (BIA 2005), which are binding on all immigration judges and asylum officers nationwide. The asylum officer should also apply the case law of the relevant federal circuit court, to the extent that those cases are not inconsistent with *Matter of A-B-*. *See, e.g.*, *Matter of Fajardo Espinoza*, 26 I&N Dec. 603, 606 (BIA 2015).

AR008. The requirement that asylum officers "apply all applicable precedents of the Attorney General and the BIA" simply states the truism that the INA *requires* all line officers to follow the binding decisions of the Attorney General and the BIA. *See* 8 U.S.C. § 1103(a) ("determination and ruling by the Attorney General with respect to all questions of law shall be controlling"); 8 C.F.R. § 103.3(c) ("Except as these decisions may be modified or overruled by later precedent decisions, they are binding on all Service employees in the administration of the Act."); 8 C.F.R. § 1003.1(g) ("Except as Board decisions may be modified or overruled by the Board or the Attorney General, decisions of the Board, and decisions of the Attorney General, shall be binding on all officers and employees of the Department of Homeland Security or immigration judges in the administration of the immigration laws of the United States."). Plaintiffs do not and cannot dispute that asylum officers must follow Attorney General and BIA decisions.

Plaintiffs do however assert that the instruction that asylum officers "apply the case law of the relevant circuit court, to the extent that those cases are not inconsistent with *Matter of A-B-*" violates the separation of powers because it requires line officers to assume that "every aspect of *Matter of A-B-* is entitled to deference." ECF 64-1 at 55. The PM does no such thing. Indeed, the PM is far more modest: it reminds asylum officers that the INA requires them to follow *A-B-* and other binding BIA and Attorney General precedents, and further reminds them the Attorney General's decision is the law of the land unless and until a Circuit Court rules otherwise. Put another way, under textbook administrative law principles, when an agency—here the Attorney General—is delegated *express* authority to make rules with binding legislative effect, when that agency does so, that decision is binding law until a federal court of competent jurisdiction declares otherwise. *See, e.g.*, *Petit v. U.S. Dep't of Educ.*, 675 F.3d 769, 791 (D.C. Cir. 2012). As Defendants explained in their prior brief, this is nothing but a straightforward application of the Supreme Court's *Brand X* decision. ECF 57-1 at 35.

As that decision explains, "[a] court's prior judicial construction of a statute trumps an

agency construction otherwise entitled to *Chevron* deference *only if* the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion." *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982 (2005). But Plaintiffs (and their amici) point to no decisions published otherwise taking issue with *A-B-*, and so they cannot plausibly allege, let alone demonstrate with facts, that it would be wrong under *Brand X* for an asylum officer to follow *Matter of A-B-* as instructed. In order for *Brand X* not to apply, Plaintiffs must point to binding circuit precedent concluding that some aspect of *A-B-* is inconsistent with the plain text of the INA or prior judicial precedent finding terms the Attorney General may have viewed as ambiguous were not in fact ambiguous. *Brand X*, 545 U.S. at 982; *Petit*, 675 F.3d at 791. But the contrary is true: every Court to date to discuss *Matter of A-B-* in any meaningful sense has approved of it or at the least not criticized any aspect of it. *See, e.g.*, *Saravia v. Att'y Gen. of U.S.*, --- F.3d---, 2018 WL 4688710, at *8 (3d Cir. Oct. 1, 2018) (noting *A-B-*'s impact on domestic and gang violence based claims for asylum); *Martinez-Perez*, 897 F.3d at 41 (rejecting petitioner's construction of "nexus" in part because inconsistent with *A-B-*); *Rosales Justo*, 895 F.3d at 162-64 (agreeing with *A-B-*'s statement that "[t]he mere fact that a country may have problems effectively policing certain crimes cannot itself establish an asylum claim"); *S.E.R.L.*, 894 F.3d at 551 (deferring to interpretations concerning "particular social group" as "well within the bounds of reasonableness" and consistent with *A-B-* noting without disapproval *A-B-* abrogation of *A-R-C-G-* because it "caused confusion because it recognized an expansive new category of particular social groups based on private violence"); *Lopez*, No. 17-9517, 2018 WL 3730137, at *3 (relying on *A-B-*'s articulation of particular social group and circularity).[24]

At its crux, then, Plaintiffs' claim is that an agency that instructs its line officers to follow

[24] Amici, Administrative Law Professors, suggest that "[t]o the extent that the Guidance directs officers to apply *Matter of A-B-*, notwithstanding any potential judicial opinion to the contrary, such policies have been "roundly 'condemned' by every circuit that has addressed the issue," citing *Grant Med. Ctr. v. Burwell*, 204 F. Supp. 3d 68, 79 (D.D.C. 2016). ECF 81 at 12-13, n.5. But in *Grant Med.* a court of appeals had *already* explicitly rejected the proposed agency approach as contrary to plain statutory text, and the issue of "intracircuit nonacquiescence," 204 F. Supp. 3d at 79-80. Those key facts are not presented here. *Grant Med.* does not—and could not—hold that an agency cannot instruct its line officers to follow binding agency decisions unless and until a court of competent jurisdiction tells it otherwise.

the law somehow violates the separation of powers because it is possible that some court in the future *might* declare some aspect of *A-B-* unlawful or contrary to the INA. ECF 64-1 at 57-58. Indeed, Plaintiffs, conflating the standard for credible fear with relevant administrative law principles, argue, without any record support, that there is "a significant possibility that a circuit court examining *Matter of A-B-*" in the future might "refuse to defer" to it, and therefore a credible fear applicant "must pass credible fear." *Id.* at 57-58. The argument is absurd. Predicting the likelihood of a court rejecting a legal opinion is not the kind of factual inquiry the "significant possibility" standard refers to. Moreover, this prospective, predictive interpretation of *Brand X* has no support in the law, and would severely limit an agency's ability to tell its employees to follow binding agency authority. No authority requires an agency to guess what aspect of binding agency decisions *might* at some point in the future be invalidated by a court. No conception of *Brand X* requires agency administrators and officers to learn the arts of clairvoyance and gaze into crystal balls pondering what courts of the future might decide. Indeed, as Defendants have already made clear in prior briefing: USCIS reads its own guidance on this score to simply require line officers to follow *A-B-* unless and until a circuit court of appeals declares some aspect of it contrary to the plain text of the INA. Then, line officers would by necessity, under *Brand X* have to follow the contrary circuit law. Thus, even were there any ambiguity in the PM, the agency's interpretation of its own guidance is entitled to deference, and Plaintiffs claims to the contrary lack any merit. *See Drake*, 291 F.3d at 67 ("[W]e owe deference to an agency's interpretation advanced during litigation regarding the meaning of an ambiguous regulation, if the position is not inconsistent with the agency's prior statements and actions regarding the disputed regulation.").[25]

Plaintiffs' response to Defendants' argument concerning their claim that instructing line officers to apply the law of the jurisdiction in which the credible fear interview occurs are equally

[25] Plaintiffs half-heartedly in one undeveloped sentence suggest that the PM violates the APA because it does not explain a departure from long-standing practice of following circuit law. ECF 64-1 at 58 n.39. Plaintiffs cite no record evidence for this alleged long-standing policy, and there is no such policy. Rather, there is statutory authority which requires line officers to follow binding decisions of the Attorney General and the BIA. 8 U.S.C. § 1103(a). The regulations instructing line officers to follow such decisions are long-standing, and well outside the 60-day window for challenge. *See* 8 C.F.R. § 1003.1(g) (last amended on Feb. 27, 2018, on issues unrelated to this case; 8 C.F.R. § 103.3(c) (last amended August 29, 2011 on issues unrelated to this case).

nonsensical. Defendants argued that there is no constitutional, statutory, or regulatory right to have an agency decide a benefit application based on the law most favorable to the alien from *any* jurisdiction in the country. ECF 57-1 at 35-36. Plaintiffs have no response to this argument, and cite no authority to the contrary. Instead, they again pervert the statutory definition of "significant possibility" by reading the phrase "could establish eligibility for asylum" in 8 U.S.C. § 1225(b)(1)(B)(ii) to read: "could establish eligibility for asylum if they applied for asylum in the jurisdiction that has the law most favorable to their legal position." The statute, of course, says no such thing, and that Plaintiffs must invent an entirely different statute to make their argument should be the beginning and the end of this argument. *See, e.g.*, *Anderson*, 802 F.3d at 9.

Plaintiffs also argue that even without the invisible statutory text that requires USCIS to apply the law most favorable to plaintiffs, USCIS used to recognize such a "right," and so any change violates the APA. *See* ECF 64-1 at 59-60. But this claim is readily refuted by the very alleged "policies," contained in training materials, that Plaintiffs rely on. As Defendants already noted, and Plaintiffs appear to concede, the very training material Plaintiffs cite provides that

> [W]here there is:
> a. disagreement among the United States Circuit Courts of Appeal as to the proper interpretation of a legal issue; ***or***,
> b. the claim otherwise raises an unresolved issue of law; ***and***,
> c. there is no DHS or Asylum Division policy or guidance on the issue, then generally the interpretation most favorable to the applicant is used when determining whether the applicant meets the credible fear standard.

ECF 57-1 at 34-35; ECF 64-1 at 59 n.40 (emphasis added). The PM is precisely such "policy or guidance on the issue."

Nevertheless, Plaintiffs suggest that the disjunctive "or" after "disagreement among the United States Circuit Courts of Appeal as to the proper interpretation of a legal issue" and the conjunctive "and" after "the claim otherwise raises an unresolved issue of law" means that the exception for DHS policies applies only if "the claim otherwise raises an unresolved issue of law" and not if there is "disagreement among the United States Circuit Courts of Appeal." ECF 64-1 at 59 n.40. That strained reading is belied by the text, which provides that "disagreement among the United States Circuit Courts of Appeal" *or* that the "claim otherwise raises an unresolved issue of

law" are both *necessary* conditions to apply the most favorable law to the applicant, but neither is sufficient unless there is *no* "DHS or Asylum Division policy or guidance." Plaintiffs then suggest that "[a]t a minimum, the former policy is ambiguous," *id.*, but as already explained, where there is such ambiguity, the agency's interpretation is entitled to deference. *See Drake*, 291 F.3d at 67.

Plaintiffs' response is to assert that Defendants are wrong to suggest the PM is accorded blanket "*Chevron* deference." ECF 64-1 at 60. But Defendants never asserted the PM's "relevant circuit" guidance is subject to *Chevron* in every instance. *See* ECF 57-1 at 32-35. Indeed, the PM is interpretive guidance, and thus not subject to notice-and-comment requirements that accompany rulemaking. *See* 5 U.S.C. § 553(b)(A). Rather, Defendants argued, consistent with binding Circuit authority that agency interpretive guidance is entitled to deference independent of *Chevron*. *Id.*; *see, e.g.*, *Tex. Children's Hosp. v. Azar*, 315 F. Supp. 3d 322, 338 (D.D.C. 2018) (Sullivan, J.) ("an agency's [informal] interpretation may merit some deference in view of the agency's specialized experience and to support uniformity in agency administration of laws"); *Pharm. Research & Mfrs. of Am. v. US HHS*, 43 F. Supp. 3d 28, 36-37 (D.D.C. 2014) (courts "afford some deference to a non-binding agency interpretation of its guiding statute to the extent the interpretation has the power to persuade"); *but see Health Ins. Ass'n of Am., Inc.*, 23 F.3d at 424 ("We have often applied *Chevron* deference to interpretive rules"). And separate and apart from either *Chevron* deference or "power to persuade" deference, the agency is indisputably entitled to deference when it interprets its own prior guidance or decisions, *U.S. Telecom Ass'n*, 295 F.3d at 1332, including when it does so in a legal brief. *Drake*, 291 F.3d at 67. Regardless, contrary to Plaintiffs' arguments, the PM *is* entitled to deference, even if not *Chevron* deference. *See supra* Part II.A.2.

Plaintiffs' final argument is that the "relevant circuit" guidance is unreasonable because it is illogical. ECF 64-1 at 60-61. But asserting that something is illogical comes nowhere close to satisfying their heavy burden of *showing* the agency acted unreasonably. It is well-settled that "a court is not to substitute its judgment for that of the agency, and should uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned," *Fox Television Stations, Inc*., 556 U.S. at 513-14, and that agency's decision is entitled to a "presumption of procedural regularity and substantive rationality." *Pharm. Research & Mfrs. of Am. v. FTC*, 790 F.3d 198,

212 (D.C. Cir. 2015). The PM explains the basis for its decision quite clearly: "an asylum officer cannot predict with certainty where DHS will file a Notice to Appear or Notice of Referral to Immigration Judge, and [] there may not be removal proceedings if the officer concludes the alien does not have a credible fear or reasonable fear and the alien does not seek review from an immigration judge." AR009. Plaintiffs disagree, and would prefer a statutory right to have their credible fear proceedings adjudicated in a jurisdiction where they are guaranteed to pass their interview, but "policy disagreement" does not make agency action unreasonable. *See, e.g.*, *Pub. Citizen, Inc. v. Nat'l Highway Traffic Safety Admin*., 374 F.3d 1251, 1263 (D.C. Cir. 2004).

III. Plaintiffs are not entitled to declaratory or injunctive relief

Plaintiffs assert that they are entitled to an injunction enjoining operation of and vacating *A-B-* and the PM, ECF 64-1 at 13, 61-64; ECF 3, Prayer for Relief, a-c, e, and an order requiring Defendants to allow Plaintiffs who have already been removed to enter the United States. ECF 64-1 at 61-62; ECF 3, Prayer for Relief, d. Both claims are without merit because the Court lacks authority under the INA or the APA to enter either form of relief.

A. Section 1252(e)(3) does not permit the Court to grant equitable relief

Declaratory or injunctive relief is not permissible in a section 1252(e)(3) challenge. *See* ECF 16 at 9-14. Section 1252(e)(1) unambiguously provides that "[w]ithout regard to the nature of the action or claim and without regard to the identity of the party or parties bringing the action, no court may . . . enter *declaratory, injunctive, or other equitable relief* in any action pertaining to an order to exclude an alien in accordance with section 1225(b)(1) of this title *except as specifically authorized in a subsequent paragraph of this subsection*." 8 U.S.C. § 1252(e)(1) (emphasis added). The sole, specifically authorized remedy in a "subsequent paragraph" is a "determination[]" whether any alleged new written policy "is not consistent with applicable provisions of this subchapter or is otherwise in violation of law," 8 U.S.C. § 1252(e)(3)(A)(ii), and to issue an "order" to that effect, *id.* § 1252(e)(3)(C). Where Congress intended for an equitable remedy in section 1252(e), it said so explicitly. *See id*. § 1252(e)(4)(B) (specifically authorizing delimited habeas relief); *see Am. Immigration Lawyers Ass'n v. Reno*, No. 97-0597, 1997 WL 161944, at *2 (D.D.C. Mar. 31, 1997) (Sullivan, J.) ("the Court does not have any authority" under section 1252(e) to

issue an order "restrain[ing] the effective date of [expedited removal] legislation"). Accordingly, under section 1252(e)(3), the court may only issue a legal determination that the alleged credible fear policies are inconsistent with section 1225(b), and no more.

B. Under the APA, the Court cannot grant relief beyond a remand to the agency

Because section 1252(e)(3) provides no basis to enter declaratory or injunctive relief, the sole basis for relief in under the APA. As this Court has recently explained, where Plaintiffs allege agency action is arbitrary and capricious or exceeds or is contrary to statutory authority, the only appropriate remedy to "set aside [the] challenged agency action." *Children's Hosp. Ass'n of Texas*, 300 F. Supp. 3d at 202; *see* 5 U.S.C. § 706 (authorizing a Court to "hold unlawful and set aside" agency action that violates the APA). In the immigration context, when agency action is "set aside" the "ordinary remand rule" applies. *See Fogo De Chao (Holdings) Inc. v. DHS*, 769 F.3d 1127, 1139 (D.C. Cir. 2014) ("consistent with our limited role in reviewing agency action, we reverse the district court's judgment and remand with instructions to vacate the Appeals Office's order and remand for further proceedings consistent with this opinion"). "Within broad limits the law entrusts the agency to make the basic asylum eligibility decision here in question." *INS v. Ventura*, 537 U.S. 12, 17 (2002). "In such circumstances a judicial judgment cannot be made to do service for an administrative judgment." *Id.* Nor can a "court intrude upon the domain which Congress has exclusively entrusted to an administrative agency." *Id.* A federal court "is not generally empowered to conduct a de novo inquiry into the matter being reviewed and to reach its own conclusions based on such an inquiry." *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985). "Rather, the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation." *Ventura*, 537 U.S. at 17. Remand is appropriate because "[t]he agency can bring its expertise to bear upon the matter; it can evaluate the evidence; it can make an initial determination; and, in doing so, it can, through informed discussion and analysis, help a court later determine whether its decision exceeds the leeway that the law provides. *Id.* Thus, even if some aspect of *A-B-* or the PM is unlawful, the only proper remedy is remand. *Cf. Am. Wild Horse Pres. Campaign v. Perdue*, 873 F.3d 914, 932 (D.C. Cir. 2017) ("direct[ing] the district court to remand to the Service for further consideration consistent with this decision").

Even assuming the ordinary remand rule does not apply, it is settled law in this Circuit that where agency action is "set aside" under the APA, only one of two remedies is available: either the Court vacates the agency action outright, or the court declares the action unlawful and remands the agency decision back to the agency to "justify its decision on remand." *Children's Hosp. Ass'n of Texas*, 300 F. Supp. 3d at 202 (citing and quoting *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n*, 988 F.2d 146, 150-51 (D.C. Cir. 1993) and *Humane Soc'y of the U.S. v. Jewell*, 76 F. Supp. 3d 69, 136 (D.D.C. 2014)). "An inadequately supported rule . . . need not necessarily be vacated." *Allied-Signal*, 988 F.2d at 150-51. What remedy should apply depends on two factors: "(1) the seriousness of the deficiencies of the action, that is, how likely it is the agency will be able to justify its decision on remand; and (2) the disruptive consequences of vacatur." *Heartland Reg'l Med. Ctr. v. Sebelius*, 566 F.3d 193, 197 (D.C. Cir. 2009) (internal quotation marks omitted).

Here, assuming the remand rule applicable to immigration cases does not apply and any aspect of *A-B-* or the PM is unlawful, remand without vacatur is the appropriate remedy. First, it is beyond dispute that the Attorney General had authority to issue *A-B-*, and that USCIS had authority to issue its PM. *See* 8 U.S.C. § 1103(a). Accordingly, the agencies can "arrive at the same conclusions reached" in *A-B-* or the PM, and this is not a case where "the actions taken were not statutorily authorized." *See Children's Hosp.*, 300 F. Supp. 3d at 211. Indeed, Plaintiffs' primary grievance is that Defendants did not adequately explain any change in policy. ECF 64-1 at 3-4. That claim is meritless, but if the Court disagrees, because the Attorney General can "readily [] cure a defect in its explanation of a decision, the first factor in *Allied–Signal* counsels remand without vacatur." *Heartland*, 566 F.3d at 198. Second, vacating *A-B-* and the guidance would have seriously disruptive consequences. Without *A-B-*, immigration officers examining asylum claims in any context would lack necessary guidance on how to apply the immigration laws now that *A-R-C-G-* is no longer good law. That would seriously disrupt the efficient handling of asylum claims, not just in credible fear intereviews, but in removal proceedings and affirmative cases before USCIS. Moreover, because *A-R-C-G-* is no longer good law—an issue Plaintiffs do not contest—"there is no apparent way to restore the status quo ante," also warranting remand without

vacatur. *Sugar Cane Growers Coop. v. Veneman*, 289 F.3d 89, 97-98 (D.C. Cir. 2002)).[26]

C. The Court may not order that Plaintiffs already removed be returned to the country

Longstanding precedent prohibits a court from ordering the United States to allow an alien to enter the country. *See, e.g.*, *Yamataya v. Fisher*, 189 U.S. 86, 98 (1903) ("It is not within the province of the judiciary to order that foreigners who have never been naturalized, nor acquired any domicile or residence within the United States, nor even been admitted into the country pursuant to law, shall be permitted to enter, in opposition to the constitutional and lawful measures of the legislative and executive branches of the national government."); *Sevilla v. Elizalde*, 112 F.2d 29, 38 (D.C. Cir. 1940) (same). Plaintiffs do not grapple with these precedents. Instead, selectively quoting the TRO transcript, they claim that the Government conceded that the court could order it to return removed aliens to the United States. ECF 64-1 at 62. Not so. In response to a question as to whether the Government would return removed aliens to the United States, Government counsel did not concede the Court had such authority. *See* Tr. 13-14. Rather counsel sated "I'm not in a position to say . . . yes," while indicating that in a prior Supreme Court case, based on the facts in *that* case, the Department of Justice had informed the court it would return that alien if the government lost that case. Tr. 13:20-14:10. Regardless, the Government did not, and could not, concede a position contrary to long-standing, binding Supreme Court precedent.

Plaintiffs also perplexingly assert that *Kiyemba v. Obama*, 555 F.3d 1022 (D.C. Cir. 2009)

[26] Plaintiffs assert these rules do not apply because they filed a for preliminary injunction that they believe the Court combined with merits briefing under Rule 65(a)(2). ECF 64-1 at 13 n.10. The Court has not issued any such order, but even if it had, it is well-settled that "consolidation of [] motions for preliminary-injunctive relief and summary judgment under Federal Rule of Civil Procedure 65 effectively moots the Court's consideration of the preliminary injunctive factors because the court will enter judgment on the merits." *Children's Hosp. Ass'n of Texas*, 300 F. Supp. 3d at 202 (Sullivan, J.). In other words, if the preliminary injunction is combined with "a full hearing" on plaintiff's claim, "considerations of irreparable harm are out the window." *Cronin v. USDA*, 919 F.2d 439, 445 (7th Cir. 1990). Plaintiffs' attempts to invoke injunction concepts like irreparable harm and balance of the equities are irrelevant. *See Herman v. Assoc. Elec. Coop., Inc.*, 994 F. Supp. 1147, 1153 (E.D. Mo. 1998), *rev'd on other grounds*, 172 F.3d 1078 (8th Cir. 1999) ("Court need not and does not further address the factors ordinarily considered in the preliminary injunction context"); *Dangler v. Yorktown Cent. Sch.*, 771 F. Supp. 625, 632 (S.D.N.Y. 1991) ("If the trial of the merits is accelerated and consolidated with the preliminary injunction hearing, then no determination of irreparable harm need be made by this court."). Plaintiffs' preference to proceed under Rule 65(a)(2) in no way authorizes injunctive relief. *See infra*.

somehow supports their position. ECF 64-1 at 62. But that case quite clearly says that Courts lack any authority to order the government to allow an alien to enter the county. *See id.* at 1026 (such matters are "wholly outside the concern and competence of the Judiciary" and "is not within the province of any court, unless expressly authorized by law, to review the determination of the political branch of the Government to exclude a given alien").[27]

Finally, Plaintiffs concede the statutory framework that governs parole, but then suggest the Court may exercise its equitable powers to remedy an alleged violation of their rights. ECF 64-1 at 62. As noted, Plaintiffs lack any due process claim to this remedy, but even if they did, it is "well established that courts of equity can no more disregard statutory and constitutional requirements and provisions than can courts of law." *INS v. Pangilinan*, 486 U.S. 875, 883 (1988); *accord Rees v. Watertown*, 86 U.S. [19 Wall.] 107, 122 (1873) ("A Court of equity cannot, by avowing that there is a right but no remedy known to the law, create a remedy in violation of law."). Thus, the court lacks any authority to "compel[] the Executive to release [aliens] into the United States outside the framework of the immigration laws." *Kiyemba*, 555 F.3d at 1028; *accord Giammarco v. Kerlikowske*, 665 F. App'x 24, 26 (2d Cir. 2016) (court lacks jurisdiction to order alien be permitted to "temporar[ily] reent[er] so as to allow him to provide testimony").

CONCLUSION

For these reasons, the Court should grant summary judgment to Defendants on all counts.

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[27] Plaintiffs suggest *Walters v. Reno*, 145 F.3d 1032 (9th Cir. 1998) provides for such relief. ECF 64-1 at 63. But *Walters* is out-of-circuit authority in conflict with *Kiyemba*, and in any event is entirely inapt. *Walters* involved an injunction ordering the government to parole certain individuals as part of a non-APA remedy in a constitutional class action. However, *Walters* addressed a version of the parole statute that no longer exists. The INA has since been amended to make clear that parole is a discretionary decision not subject to judicial review. *See* REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 231. Under the current statute, 8 U.S.C. § 1182(d)(5)(A), the authority to parole aliens into the country "is granted in the exclusive discretion of the Secretary of Homeland Security," *Kiyemba*, 555 F.3d at 1031, and any decision to parole or not parole an alien in any circumstances is not subject to judicial review by any Court. *See* 8 U.S.C. § 1252(a)(2)(B)(ii); *Kucana v. Holder*, 558 U.S. 233, 237 (2010) ("§ 1252(a)(2)(B) applies . . . to . . . determinations made discretionary by statute"); *Bolante v. Keisler*, 506 F.3d 618, 621 (7th Cir. 2007) (§ 1252(a)(2)(B)(ii) precludes judicial review of DHS parole determinations).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 10, 2018, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of for the District of Columbia by using the appellate CM/ECF system. Counsel in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

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