

**In The United States Court of Appeals
for the Ninth Circuit**

GRICELDA NEREYDA ARELLANO RODRIGUEZ, et al.,
Petitioners,

v.

WILLIAM P. BARR,
U.S. ATTORNEY GENERAL,
Respondent.

ON A PETITION FOR REVIEW OF AN ORDER OF THE
BOARD OF IMMIGRATION APPEALS
BIA No. A206-268-456/457

**THE UNITED NATIONS HIGH COMMISSIONER FOR
REFUGEES' *AMICUS CURIAE* BRIEF
IN SUPPORT OF PETITIONERS**

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The Office of the United Nations High Commissioner for Refugees (“UNHCR”) is a non-profit entity that does not have a parent corporation. No publicly held corporation owns 10 percent or more of any stake or stock in UNHCR.

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TABLE OF CONTENTS

	Page
INTEREST OF AMICUS CURIAE	1
SUMMARY OF ARGUMENT.....	4
ARGUMENT	7
I. THE UNITED STATES IS BOUND BY THE <i>1951 CONVENTION</i> AND ITS <i>1967 PROTOCOL</i> RELATING TO THE STATUS OF REFUGEES	7
II. AS RECOGNIZED BY U.S. AND FOREIGN COURTS, UNHCR PROVIDES AUTHORITATIVE GUIDANCE IN EVALUATING CLAIMS OF PERSECUTION BY NON-STATE ACTORS	9
III. DOMESTIC VIOLENCE BY NON-STATE ACTORS CAN FORM THE BASIS FOR ASYLUM	15
A. <i>Matter of A-B-</i> Errs in Its Interpretation of the “Particular Social Group” Basis for Asylum	16
1. Protected Characteristics	19
2. Social Perception.....	22
3. Particularity.....	23
B. <i>Matter of A-B-</i> Erroneously States that Domestic Violence Claims Do Not Meet the “Unable or Unwilling” Standard	25
1. <i>Matter of A-B-</i> Is Inconsistent with the Settled Meaning of the “Unable or Unwilling” Standard.....	26
2. Domestic Violence Claims Can Meet the “Unable or Unwilling” Standard.....	31

C.	<i>Matter of A-B- Errs by Overstating the Nexus Requirement</i>	33
	CONCLUSION	37
	CERTIFICATE OF COMPLIANCE.....	38

TABLE OF AUTHORITIES

Page

CASES

<i>Aldana-Ramos v. Holder</i> , 757 F.3d 9 (1st Cir. 2014)	14
<i>Bringas-Rodriguez v. Sessions</i> , 850 F.3d 1051 (9th Cir. 2017)	9, 10
<i>Crespin-Valladares v. Holder</i> , 632 F.3d 117 (4th Cir. 2011)	14
<i>Cruz v. Sessions</i> , 853 F.3d 122 (4th Cir. 2017)	33
<i>Doe v. Holder</i> , 736 F.3d 871 (9th Cir. 2013)	15
<i>Eduard v. Ashcroft</i> , 379 F.3d 182 (5th Cir. 2004)	14
<i>Garcia v. Sessions</i> , 856 F.3d 27 (1st Cir. 2017)	2
<i>Garcia v. U.S. Att’y Gen.</i> , 665 F.3d 496 (3d Cir. 2011)	14
<i>Grace v. Whitaker</i> , 344 F. Supp. 3d 96 (D.D.C. 2018)	<i>passim</i>
<i>INS v. Aguirre-Aguirre</i> , 526 U.S. 415 (1999)	8
<i>INS v. Cardoza-Fonseca</i> , 480 U.S. 421 (1987)	3, 8, 9
<i>Kamar v. Sessions</i> , 875 F.3d 811 (6th Cir. 2017)	14
<i>Lopez v. U.S. Att’y Gen.</i> , 504 F.3d 1341 (11th Cir. 2007)	15
<i>Matter of A-B-</i> , 27 I. & N. Dec. 316 (A.G. 2018)	<i>passim</i>
<i>Matter of Acosta</i> , 19 I. & N. Dec. 211 (B.I.A. 1985)	18
<i>Matter of S-A-</i> , 22 I. & N. Dec. 1328 (B.I.A. 2000)	36
<i>Matter of S-E-G-</i> , 24 I. & N. Dec. 579 (B.I.A. 2008)	18
<i>Matter of S-P-</i> , 21 I. & N. Dec. 486 (B.I.A. 1996)	10

	Page
<i>Mohammed v. Gonzales</i> , 400 F.3d 785 (9th Cir. 2005).....	10
<i>Murray v. Schooner Charming Betsy</i> , 6 U.S. (2 Cranch) 64 (1804)	9
<i>N-A-M- v. Holder</i> , 587 F.3d 1052 (10th Cir. 2009)	3
<i>Ngengwe v. Mukasey</i> , 543 F.3d 1029 (8th Cir. 2008)	15
<i>Niang v. Gonzales</i> , 422 F.3d 1187 (10th Cir. 2005).....	15, 20
<i>Pavlova v. INS</i> , 441 F.3d 82 (2d Cir. 2006).....	14
<i>R.R.D. v. Holder</i> , 746 F.3d 807 (7th Cir. 2014)	14
<i>Rios v. Lynch</i> , 807 F.3d 1123 (9th Cir. 2015).....	25
<i>Rosales Justo v. Sessions</i> , 895 F.3d 154 (1st Cir. 2018).....	30
<i>Ruiz-Cabrera v. Holder</i> , 748 F.3d 754 (7th Cir. 2014)	25

STATUTES AND LEGISLATIVE HISTORY

8 U.S.C. § 1158(b)(1)(B)(i).....	33
H.R. Rep. No. 96-781 (1980), <i>as reprinted in</i> 1980 U.S.C.C.A.N. 160; S. Exec. Rep. No. 14, 90th Cong., 2d Sess. 4 (1968)	8
Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (1980).....	8

OTHER AUTHORITIES

<i>A v Minister for Immigration & Ethnic Affairs</i> [1997].....	21, 22
Canada (A.G.) v. Ward, [1993] 2 S.C.R. 689 (Can.).....	17, 20
<i>Convention Relating to the Status of Refugees</i> , July 28, 1951, 189 U.N.T.S. 137	1
DHS’s Position on Respt’s Eligibility for Relief, <i>Matter of R-A-</i> , No. A 73 753 922 (A.G. Feb. 19, 2004)	34, 36

	Page
Immigration and Refugee Board of Canada, <i>Chairperson’s Guideline 9: Proceedings Before the IRB Involving Sexual Orientation and Gender Identity and Expression</i> (May 1, 2017)	29
Islam (A.P.) v. Sec’y of State for the Home Dep’t, and Regina v. Immigration Appeal Tribunal & Another Ex Parte Shah (A.P.) [1999] UKHL 20, [1999] 2 AC (HL) 629 (appeal taken from Eng.)	13, 17
<i>Minister for Immigration & Multicultural Affairs v Khawar</i> [2002] HCA 14 (Austl.)	14, 23
Narvaez c. Canada (Citoyennete et de l’Immigration), [1995] 2 F.C. 55 (Can.)	13
<i>Protocol Relating to the Status of Refugees</i> , Jan. 31, 1967, 606 U.N.T.S. 267.....	2, 7
<i>Refugee Appeal No. 1312/93 Re GJ</i> [1995] 1 NLR 387 (N.Z.).....	17
<i>Refugee Appeal No. 71427/99</i> [2000] NZAR 545 (N.Z.)	14
Sec’y of State for the Home Dep’t v. K (FC), and Fornah (FC) v. Sec’y of State for the Home Dep’t [2006] UKHL 46, [2007] 1 A.C. (HL) 412 (appeal taken from Eng.)	17
Special Rapporteur on Violence Against Women, Its Causes and Consequences, <i>Further Promotion and Encouragement of Human Rights and Fundamental Freedoms, Including the Question of the Programme and Methods of Work of the Commission</i> , U.N. Doc. E/Cn.4/1996/53 (Feb. 5, 1996).....	35
Statute of the Office of the UNHCR, U.N. Doc. A/RES/428(V) (Dec. 14, 1950).....	1
U.N. Centre for Soc. Dev. & Humanitarian Affairs, <i>Violence Against Women in the Family</i> , U.N. Doc. ST/CSDHA/2 (1989)	20, 35

	Page
UNHCR <i>Handbook on Procedures and Criteria for Determining Refugee Status</i> , U.N. Doc. HCR/1P/4/ENG/REV.3 (1979, re-edited Jan. 1992; reissued Dec. 2011)	3, 11, 27
UNHCR, <i>Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations Under the 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol</i> (Jan. 2007).....	7
UNHCR, <i>Agenda for Protection</i> , U.N. Doc. A/AC.96/965/Add.1 (June 26, 2002)	10
UNHCR, <i>Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Afghanistan</i> (Aug. 30, 2018).....	13
UNHCR, <i>Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from El Salvador</i> , U.N. Doc. HCR/EG/SLV/16/01 (Mar. 15, 2016)	23, 32
UNHCR, <i>Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Honduras</i> , U.N. Doc. HCR/EG/HND/16/03 (July 27, 2016)	31
UNHCR, <i>Guidance Note on Refugee Claims Relating to Victims of Organized Gangs</i> (Mar. 2010).....	17, 25
UNHCR, <i>Guidelines on International Protection No. 1: Gender-Related Persecution Within the Context of Article 1A(2) of the 1951 Convention and/or Its 1967 Protocol Relating to the Status of Refugees</i> , U.N. Doc. HCR/GIP/02/01 (May 7, 2002)	<i>passim</i>
UNHCR, <i>Guidelines on International Protection No. 2: “Membership of a Particular Social Group” Within the Context of Article 1A(2) of the 1951 Convention and/or Its 1967 Protocol Relating to the Status of Refugees</i> , U.N. Doc. HCR/GIP/02/02 (May 7, 2002)	<i>passim</i>

	Page
UNHCR, <i>Guidelines on International Protection No. 7: The Application of Article 1A(2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees to Victims of Trafficking and Persons at Risk of Being Trafficked</i> , U.N. Doc. HCR/GIP/06/07 (Apr. 7, 2006).....	28
UNHCR, <i>Guidelines on International Protection No. 9: Claims to Refugee Status Based on Sexual Orientation and/or Gender Identity Within the Context of Article 1A(2) of the 1951 Convention and/or Its 1967 Protocol Relating to the Status of Refugees</i> , U.N. Doc. HCR/GIP/12/09 (Oct. 23, 2012).....	12, 27
UNHCR, <i>Guidelines on International Protection No. 12: Claims for Refugee Status Related to Situations of Armed Conflict and Violence Under Article 1A(2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees and the Regional Refugee Definitions</i> , U.N. Doc. HCR/GIP/16/12 (Dec. 2, 2016)	11, 25
UNHCR, <i>International Protection Considerations with Regard to People Fleeing Northeastern Nigeria (The States of Borno, Yobe and Adamawa) and Surrounding Region—Update I</i> (Oct. 2014).....	13
UNHCR, <i>Interpreting Article 1 of the 1951 Convention Relating to the Status of Refugees</i> (Apr. 2001)	26, 27, 28
UNHCR, <i>Note on International Protection</i> , U.N. Doc. A/AC.96/815 (Aug. 31, 1993)	7
UNHCR, <i>Position on Returns to Southern and Central Somalia (Update I)</i> (May 2016)	13
UNHCR, <i>Women on the Run: First-Hand Accounts of Refugees Fleeing El Salvador, Guatemala, Honduras, and Mexico</i> (Oct. 26, 2015).....	22, 32

	Page
United Kingdom Immigration Appellate Authority, <i>Asylum Gender Guidelines</i> (Nov. 1, 2000).....	29
VM (FGM-Risks-Mungiki-Kikuyu/Gikuyu) Kenya v. Sec’y of State for the Home Dep’t, CG [2008] UKAIT 00049	20

INTEREST OF AMICUS CURIAE¹

The Office of the United Nations High Commissioner for Refugees (“UNHCR”)² has a direct interest in this matter as the organization entrusted by the United Nations General Assembly with responsibility for providing international protection to refugees and others of concern and, together with national governments, for seeking permanent solutions to their problems. Statute of the Office of the UNHCR, U.N. Doc. A/RES/428(V) ¶ 1 (Dec. 14, 1950). UNHCR fulfills its mandate by, among other things, “[p]romoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto.” *Id.* ¶ 8(a). UNHCR’s supervisory responsibility is also reflected in the Preamble and Article 35 of the *Convention Relating to the Status of*

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

² Petitioners consent to this filing, and Respondent opposes this filing. No person or entity other than UNHCR and its counsel authored this brief or provided any funding related to it.

Refugees, July 28, 1951, 189 U.N.T.S. 137 (“1951 Convention”)³ and Article 2 of the *Protocol Relating to the Status of Refugees*, Jan. 31, 1967, 606 U.N.T.S. 267 (“1967 Protocol”).⁴ Those instruments obligate States to cooperate with UNHCR in the exercise of its mandate and to facilitate its supervisory role.

UNHCR, which has won two Nobel Peace Prizes for its efforts, works in some 138 countries at a time when there are 70.8 million people affected by forced displacement worldwide. The views of UNHCR are informed by its almost seven decades of experience supervising the treaty-based system of refugee protection. UNHCR’s interpretation of the provisions of the *1951 Convention* and its *1967 Protocol* are both authoritative and integral to promoting consistency in the global regime for the international protection of refugees. Accordingly, “the views of [UNHCR] . . . have been cited by the Supreme Court for interpretive guidance given that office’s expertise and responsibilities for monitoring refugee issues.” *Garcia v. Sessions*, 856 F.3d 27, 55 n.31 (1st Cir. 2017)

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

⁴ <<http://www.unhcr.org/3b66c2aa10.html>>

(Stahl, J., dissenting) (collecting cases), *cert. denied*, 138 S. Ct. 2652 (2018); *see also N-A-M- v. Holder*, 587 F.3d 1052, 1061-62 (10th Cir. 2009) (Henry, J., concurring) (per curiam) (“[The] Supreme Court has consistently turned [to UNHCR] for assistance in interpreting [U.S.] obligations under the Refugee Convention.”).

UNHCR exercises its supervisory responsibility in part by issuing interpretative guidelines on the meaning of international refugee instruments, in particular the *1951 Convention* and its *1967 Protocol*. The UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status*, U.N. Doc. HCR/1P/4/ENG/REV.3 (1979, re-edited Jan. 1992; reissued Dec. 2011) (“*Handbook*”),⁵ represents the first such comprehensive guidance. “As the Supreme Court has noted, the UNHCR Handbook provides ‘significant guidance in construing the [1967] Protocol, to which Congress sought to conform . . . [and] has been widely considered useful in giving content to the obligations that the protocol establishes.’” *Grace v. Whitaker*, 344 F. Supp. 3d 96, 124 (D.D.C. 2018) (quoting *INS v. Cardoza-Fonseca*, 480 U.S. 421, 439 n.22

⁵ <<http://www.unhcr.org/3d58e13b4.html>>

(1987)). At the request of States, including the United States, the *Handbook* has subsequently been complemented by the UNHCR *Guidelines on International Protection* and various *Guidance Notes*.

UNHCR has a specific interest in this matter because the Board rested its decision on the former Attorney General’s decision in *Matter of A-B-*, 27 I. & N. Dec. 316 (A.G. 2018), which diverges from UNHCR’s authoritative interpretation of States’ obligations under the *1951 Convention* and *1967 Protocol* in several key respects. In particular, the decision conflicts with UNHCR’s interpretations of (1) the definition of a “particular social group,” (2) the standard used to assess whether states are “unable or unwilling” to provide effective protection against non-state agents of persecution, and (3) the “nexus” requirement concerning whether persecution by non-state actors is “on account of” membership in a particular social group.

Consistent with its approach in other cases, UNHCR takes no position directly on the merits of Petitioners’ asylum claim.

SUMMARY OF ARGUMENT

It is undisputed that membership in a particular social group can form the basis for an asylum claim. Moreover, under both international

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

Under *Matter of A-B-*, however, victims of domestic violence are not generally eligible for asylum on account of membership in a particular social group. This decision interprets the refugee definition in a manner at odds with the United States' international obligations in several respects.

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

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

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

Third, Matter of A-B- misapplies the nexus requirement, creating an unnecessarily high barrier to persons fleeing domestic violence. Under the *1951 Convention* and its *1967 Protocol*, victims of domestic violence must show that their membership in a particular social group is *one* factor in their persecution.

ARGUMENT

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

The *1951 Convention* and its *1967 Protocol* are the key international instruments governing the protection of refugees. These documents address who is a refugee, his or her rights and responsibilities, and the corresponding legal obligations of States. The *1967 Protocol* binds parties to comply with the substantive provisions of Articles 2 through 34 of the *1951 Convention* with respect to “refugees” as defined in Article 1A(2) of the *1951 Convention*. *1967 Protocol* art. 1(1)-(2). The *1967 Protocol* also removes the geographic and temporal limitations from the *1951 Convention* definition, thus universalizing the refugee definition. *Id.* art. 1(2)-(3). The core of both the *1951 Convention* and its *1967 Protocol* is the principle of *non-refoulement*, which obliges States not to return a refugee to any country where he or she would face persecution or a real risk of serious harm.⁶ In 1968, the

⁶ The prohibition of *refoulement* applies to all refugees, including those who have not formally been recognized as such, and to asylum-seekers whose status has not yet been determined. UNHCR, *Note on International Protection* ¶ 11, U.N. Doc. A/AC.96/815 (Aug. 31, 1993), <http://www.unhcr.org/refworld/docid/3ae68d5d10.html>; UNHCR,

United States acceded to the *1967 Protocol*,⁷ binding itself to the international refugee protection regime and the definition of a refugee in the *1951 Convention*.

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

Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations Under the 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol ¶¶ 26-31 (Jan. 2007), <http://www.unhcr.org/refworld/docid/45f17a1a4.html>.

⁷ H.R. Rep. No. 96-781, at 19 (1980), *as reprinted in* 1980 U.S.C.C.A.N. 160, 160; S. Exec. Rep. No. 14, 90th Cong., 2d Sess. 4 (1968).

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

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

UNHCR exercises its supervisory responsibility by issuing interpretive guidance on the meaning of provisions in the *1951 Convention* and its *1967 Protocol*. Numerous courts, including the Supreme Court, have turned to UNHCR’s guidance for interpreting the *1951 Convention* and *1967 Protocol*. *Cardoza-Fonseca*, 480 U.S. at 438-39; *Bringas-Rodriguez v. Sessions*, 850 F.3d 1051, 1060-61 (9th Cir. 2017) (en banc). The most authoritative of this guidance is the UNHCR *Handbook*, which was prepared in 1979 at the request of Member States, including the United States. Although the *Handbook* is not legally binding upon U.S. officials, it provides “significant guidance” in construing the *1967 Protocol* and in giving content to the obligations established therein. *Cardoza-Fonseca*, 480 U.S. at 439 n.22; *see also Grace*, 344 F. Supp. 3d at 124 (relying on UNHCR’s definitions of the

“provisions of the Convention and Protocol in its Handbook” in construing the INA); *Matter of S-P-*, 21 I. & N. Dec. 486, 492 (B.I.A. 1996) (en banc).

In 2002, UNHCR also began issuing a number of *Guidelines*,⁸ which have been welcomed by UNHCR’s Executive Committee and the UN General Assembly. The *Guidelines* complement and update the *Handbook* by drawing upon international legal standards, judicial decisions, Executive Committee Conclusions, academic literature, and UNHCR’s views and experience. UNHCR also issues *Guidance Notes* to provide additional direction in specific areas. Courts have relied upon the *Guidelines* and *Guidance Notes* in assessing refugee claims, recognizing that UNHCR’s “analysis provides significant guidance for issues of refugee law.” *Mohammed v. Gonzales*, 400 F.3d 785, 798 (9th Cir. 2005); *Bringas-Rodriguez*, 850 F.3d at 1071.

Applied here, the *Handbook*, *Guidelines*, and *Guidance Notes* affirm the well-settled principle that persecution by non-state actors may give rise to an asylum claim. The *Handbook* recognizes that asylum

⁸ UNHCR, *Agenda for Protection*, U.N. Doc. A/AC.96/965/Add.1 (June 26, 2002), <http://www.refworld.org/docid/3d4fd0266.html>.

may be warranted by persecution “emanat[ing] from sections of the population . . . [whose] serious discriminatory or other offensive acts . . . are knowingly tolerated by the authorities, or if the authorities refuse, or prove unable, to offer effective protection.” *Handbook* ¶ 65. Non-state agents include “neighbours, family members and other individuals.” UNHCR, *Guidelines on International Protection No. 12: Claims for Refugee Status Related to Situations of Armed Conflict and Violence Under Article 1A(2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees and the Regional Refugee Definitions* ¶ 28, U.N. Doc. HCR/GIP/16/12 (Dec. 2, 2016) (“*Conflict and Violence Guidelines*”).⁹

Additionally, “rape and other forms of gender-related violence, such as dowry-related violence, female genital mutilation, domestic violence, and trafficking” may also constitute persecution “whether perpetrated by State or private actors.” UNHCR, *Guidelines on International Protection No. 1: Gender-Related Persecution Within the Context of Article 1A(2) of the 1951 Convention and/or Its 1967*

⁹ <<http://www.refworld.org/docid/583595ff4.html>>

Protocol Relating to the Status of Refugees ¶ 9, U.N. Doc. HCR/GIP/02/01 (May 7, 2002) (“*Gender Guidelines*”).¹⁰

UNHCR recognizes potential asylum claims for individuals persecuted by private actors in a wide range of circumstances. For instance, LGBTI people who are subject to persecution by “family members, neighbors, or the broader community” may have valid asylum claims.¹¹ Victims of campaigns of violence by non-state actors also may have legitimate asylum claims, including those fleeing persecution by Al

¹⁰ <<http://www.refworld.org/docid/3d36f1c64.html>>

¹¹ UNHCR, *Guidelines on International Protection No. 9: Claims to Refugee Status Based on Sexual Orientation and/or Gender Identity Within the Context of Article 1A(2) of the 1951 Convention and/or Its 1967 Protocol Relating to the Status of Refugees* ¶¶ 34-37, U.N. Doc. HCR/GIP/12/09 (Oct. 23, 2012), <http://www.refworld.org/docid/50348afc2.html> (“*Sexual Orientation Guidelines*”).

Shabaab in Somalia;¹² by Boko Haram in Nigeria;¹³ and by the Taliban in Afghanistan.¹⁴

Consistent with UNHCR's interpretation of the governing treaties, parties to the *1951 Convention* and its *1967 Protocol* have recognized valid asylum claims stemming from persecution by non-state actors, including persecution stemming from domestic violence. *See, e.g., Narvaez c. Canada (Citoyenneté et de l'Immigration)*, [1995] 2 F.C. 55 (Can.) (domestic violence);¹⁵ *Islam (A.P.) v. Sec'y of State for the Home Dep't*, and *Regina v. Immigration Appeal Tribunal & Another Ex Parte Shah (A.P.)* [1999] UKHL 20, [1999] 2 AC (HL) 629 (appeal taken

¹² UNHCR, *Position on Returns to Southern and Central Somalia (Update I)* ¶¶ 16-19, 23 (May 2016), <http://www.refworld.org/docid/573de9fe4.html>.

¹³ UNHCR, *International Protection Considerations with Regard to People Fleeing Northeastern Nigeria (the States of Borno, Yobe and Adamawa) and Surrounding Region—Update I* ¶ 11 (Oct. 2014), <http://www.refworld.org/docid/5448e0ad4.html>.

¹⁴ UNHCR, *Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Afghanistan* (Aug. 30, 2018), <http://www.refworld.org/docid/5b8900109.html>.

¹⁵ <http://www.refworld.org/cases,CAN_FC,3ae6b6e61c.html>

from Eng.) (domestic violence);¹⁶ *Minister for Immigration & Multicultural Affairs v Khawar* [2002] HCA 14 (Austl.) (domestic violence);¹⁷ *Refugee Appeal No. 71427/99* [2000] NZAR 545 (N.Z.) (domestic violence).¹⁸

Nearly every U.S. court of appeals has likewise recognized that violence by non-state actors may undergird a valid asylum claim. *See, e.g., Aldana-Ramos v. Holder*, 757 F.3d 9, 17 (1st Cir. 2014) (gang violence); *Pavlova v. INS*, 441 F.3d 82, 91 (2d Cir. 2006) (persecution by Russian Neo-Nazi group); *Garcia v. U.S. Att’y Gen.*, 665 F.3d 496, 503 (3d Cir. 2011), *as amended* Jan. 13, 2012 (gang violence); *Crespin-Valladares v. Holder*, 632 F.3d 117, 128-29 (4th Cir. 2011) (gang violence); *Eduard v. Ashcroft*, 379 F.3d 182, 190 (5th Cir. 2004) (persecution by anti-Christian Islamist groups); *Kamar v. Sessions*, 875 F.3d 811, 819 (6th Cir. 2017) (honor killing by family members); *R.R.D. v. Holder*, 746 F.3d 807, 809 (7th Cir. 2014) (persecution by drug

¹⁶ <http://www.refworld.org/cases,GBR_HL,3dec8abe4.html>

¹⁷ <http://www.refworld.org/cases,AUS_HC,3deb326b8.html>

¹⁸ <http://www.refworld.org/cases,NZL_RSAA,3ae6b7400.html>

trafficking organizations); *Ngengwe v. Mukasey*, 543 F.3d 1029, 1036 (8th Cir. 2008) (forced marriage by family members); *Doe v. Holder*, 736 F.3d 871, 878 (9th Cir. 2013) (violence toward homosexuals by classmates); *Niang v. Gonzales*, 422 F.3d 1187, 1191-92, 1201-02 (10th Cir. 2005) (female genital mutilation by tribal members); *Lopez v. U.S. Att’y Gen.*, 504 F.3d 1341, 1345 (11th Cir. 2007) (persecution by anti-government guerillas).

III. DOMESTIC VIOLENCE BY NON-STATE ACTORS CAN FORM THE BASIS FOR ASYLUM

The Board’s Order in this case is premised on the former Attorney General’s guidance in *Matter of A-B-*, which states that, “[g]enerally, claims by aliens pertaining to domestic violence . . . perpetrated by non-governmental actors will not qualify for asylum.” 27 I. & N. Dec. at 320. That directive diverges from UNHCR guidance, international case law, and U.S. case law. At least one federal court has declared that “the general rule against domestic violence” claims in the Attorney General’s directive “violates the immigration laws.” *Grace*, 344 F. Supp. 3d at 127. Departure from this well-settled and foundational legal principle is due to erroneous interpretations of (a) the “particular social group” definition, (b) the “unable or unwilling” standard, and (c) the nexus

requirement. The elevated standards that *Matter of A-B-* imposes with respect to these elements impermissibly impede asylum claims by victims of persecution. We discuss these erroneous interpretations in turn.

A. *Matter of A-B-* Errs in Its Interpretation of the “Particular Social Group” Basis for Asylum

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

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

UNHCR, *Guidelines on International Protection No. 2: “Membership of a Particular Social Group” Within the Context of Article 1A(2) of the 1951 Convention and/or Its 1967 Protocol Relating to the Status of Refugees* ¶ 11, U.N. Doc. HCR/GIP/02/02 (May 7, 2002) (“*Social Group Guidelines*”) (emphasis omitted).¹⁹ A particular social group must be identifiable through one of the approaches but need not satisfy both.

UNHCR, *Guidance Note on Refugee Claims Relating to Victims of Organized Gangs* ¶ 35 (Mar. 2010) (“*Gang Note*”). Several States have endorsed the “protected characteristics” approach without requiring an applicant further to show that society perceives the applicant’s group as distinct. See *Canada (A.G.) v. Ward*, [1993] 2 S.C.R. 689 (Can.); *Islam and Shah*, [1999] UKHL at 20; *Sec’y of State for the Home Dep’t v. K (FC)*, and *Fornah (FC) v. Sec’y of State for the Home Dep’t* [2006] UKHL 46, [2007] 1 A.C. (HL) 412 (appeal taken from Eng.);²⁰ *Refugee Appeal No. 1312/93 Re GJ* [1995] 1 NLR 387 (N.Z.).²¹

¹⁹ <<http://www.refworld.org/docid/3d36f23f4.html>>

²⁰ <http://www.refworld.org/cases,GBR_HL,4550a9502.html>

²¹ <http://www.refworld.org/cases,NZL_RSAA,3ae6b6938.html>

This either/or approach to identifying a particular social group was first delineated in *Matter of Acosta*, 19 I. & N. Dec. 211, 233 (B.I.A. 1985), *overruled in part on other grounds by Matter of Mogharrabi*, 19 I. & N. Dec. 439 (B.I.A. 1987). It guided U.S. asylum decisions for more than twenty years, until the Board diverged in 2008 by requiring asylum-seekers to prove social perception *and* particularity, in addition to protected characteristics. *Matter of S-E-G-*, 24 I. & N. Dec. 579, 582, 589 (B.I.A. 2008). As UNHCR has repeatedly remarked, imposing these additional, heightened requirements is contrary to the object and purpose of the *1951 Convention*, *1967 Protocol*, and *Social Group Guidelines*.²²

Matter of A-B- amplifies this erroneous interpretation. *See* 27 I. & N. Dec. at 319, 335, 336 (rejecting asylum for “[s]ocial groups defined by their vulnerability to private criminal activity,” including “married women . . . who are unable to leave their relationships” (internal quotation marks omitted)). It maintains the additional, heightened

²² *See, e.g.,* UNHCR *Amicus Curiae* Br. in Supp. of Petitioner, *Valdiviezo-Galdamez v. Holder* (3d Cir. Apr. 14, 2009), <http://www.refworld.org/docid/49ef25102.html>.

requirements set forth in *Matter of S-E-G-*, and it applies these requirements in a flawed manner to the facts at hand. These mistakes compound one another, resulting in a position that is even more distant from the international consensus. UNHCR maintains that the current U.S. approach—*i.e.*, requiring protected characteristics, social perception, *and* particularity—is inconsistent with international law. Even under a correct application of the heightened, conjunctive U.S. standard, however, UNHCR observes that people at risk of domestic violence by non-state actors may nonetheless constitute members of a particular social group.

1. Protected Characteristics

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

As to domestic violence, the particular social group applicable in such cases may be defined by gender alone, or by gender in combination with other characteristics related to relationship status. Both groups qualify under the “protected characteristics” approach. In UNHCR’s

view, “sex can properly be within the ambit of the social group category, with women being a clear example of a social subset defined by innate and immutable characteristics.” *Social Group Guidelines* ¶ 12; *Gender Guidelines* ¶ 30; *see also Ward*, 2 S.C.R. at 739 (contemplating a particular social group encompassing all women); VM (FGM-risks-Mungiki-Kikuyu/Gikuyu) Kenya v. Sec’y of State for the Home Dep’t, CG [2008] UKAIT 00049 (recognizing a particular social group of “women (girls) in Kenya”).²³

Alternatively, particular social groups may be defined by gender in combination with other factors. *See, e.g., Niang*, 422 F.3d at 1199. These other factors include relationship status, which may be unchangeable because of external religious, cultural, or legal constraints. *Cf. U.N. Centre for Soc. Dev. & Humanitarian Affairs, Violence Against Women in the Family* 33, U.N. Doc. ST/CSDHA/2 (1989) (“*Violence Against Women*”) (noting that men in Guatemala and El Salvador societies view “the women they live with [as] their possessions or chattels”).

²³ <<http://www.refworld.org/docid/484d4a222.html>>

Matter of A-B- erroneously holds that the proposed group in that case—“married women in Guatemala who are unable to leave their relationship”—is defined circularly by a fear of being subject to domestic violence. 27 I. & N. at 336. That is incorrect. As a federal court recently observed, “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.” *Grace*, 344 F. Supp. 3d at 133-34.

While a particular social group cannot be defined “exclusively by the persecution . . . or by a common fear of being persecuted,” “persecutory action toward a group may be a relevant factor” in determining the contours of that group. *Social Group Guidelines* ¶ 14; accord *A v Minister for Immigration & Ethnic Affairs* [1997] HCA 4 (Austl.).²⁴ Inability to leave a relationship may be caused by factors apart from the threat of harm from a domestic partner—because of cultural or religious reasons, for example. Among other things, women in domestic relationships in Central America endure the twin punishments of violence from male partners who feel “entitled to

²⁴ <<http://www.refworld.org/docid/3ae6b7180.html>>

physical and emotional power,” and “widespread impunity for [such] acts of violence” by their cultures. UNHCR, *Women on the Run: First-Hand Accounts of Refugees Fleeing El Salvador, Guatemala, Honduras, and Mexico* at 17 (Oct. 26, 2015) (“*Women on the Run*”).²⁵ *Matter of A-B-* improperly assumes that women are “unable to leave their relationship” solely on account of their fear of persecution.

2. Social Perception

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

A particular social group of domestic violence victims can satisfy the social perception requirement. See *Social Group Guidelines* ¶ 7 (“[W]omen . . . have been recognized under [the social perception] analysis as particular social groups.”). Being female “identif[ies] them as a group in society, subjecting them to different treatment and

²⁵ <<http://www.refworld.org/docid/56307e2a4.html>>

standards in some countries.” *Gender Guidelines* ¶ 30; see also *Khawar*, [2002] HCA 14, ¶ 35 (“Women in any society are a distinct and recognisable group; and their distinctive attributes and characteristics exist independently of the manner in which they are treated, either by males or by governments.”).

Moreover, in certain Central American countries, the intersection of gender and relationship status also identifies a socially distinct group. As just discussed, women in domestic relationships are subjected to high rates of domestic violence while under the “authority exercised by their” male partners. UNHCR, *Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from El Salvador* at 38, U.N. Doc. HCR/EG/SLV/16/01 (Mar. 15, 2016) (“*El Salvador Guidelines*”). Domestic violence against wives and partners leaves them “often trapped” in the relationship, due both to the threat of further violence and to broader cultural stigmas against such women. *Id.* at 37.

3. Particularity

As to “particularity,” *Matter of A-B-* asserts that “[s]ocial groups defined by their vulnerability to private criminal activity likely lack . . . particularity [because] . . . broad swaths of society may be susceptible to

victimization.” 27 I. & N. Dec. at 335. That assertion departs from UNHCR’s guidance and puts the “particular social group” ground on unequal footing as compared to the other protected grounds for asylum.

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

The other protected grounds for asylum are oftentimes shared by large segments of society. For example, broad swaths of society—“perhaps even . . . a majority of the population”—may share religious or political ideologies that are suppressed by the state. *Id.* ¶ 18. “[M]embers of a religion or holders of a political opinion” may likewise come from all segments of society. *Id.* ¶ 15. In short, there is no size or diffusiveness requirement for individuals seeking asylum on account of race, religion, nationality, or political opinion. It makes little sense to impose a set of *more* demanding requirements for asylum on account of

membership in a particular social group, particularly as international guidance and U.S. case law embrace a “flexible” approach towards this protected ground. *Id.* ¶ 3 (“[M]embership [in] a particular social group should be read in an evolutionary manner, open to the diverse and changing nature of group[] in various societies and evolving . . . human rights norms.”); *Rios v. Lynch*, 807 F.3d 1123, 1124 (9th Cir. 2015) (particular social group is an “inherently flexible term”); *Ruiz-Cabrera v. Holder*, 748 F.3d 754, 757 (7th Cir. 2014) (same).

B. *Matter of A-B- Erroneously States that Domestic Violence Claims Do Not Meet the “Unable or Unwilling” Standard*

For violence perpetrated by non-state actors to constitute persecution, an individual must demonstrate that the state is “unable or unwilling” to provide adequate protection to victims. *Gang Note* ¶ 25 (emphasis omitted);²⁶ see *Gender Guidelines* ¶ 19; *Conflict and Violence Guidelines* ¶ 30. Such a determination requires a “[h]olistic and [i]ntegrated [a]nalysis” and “judicious balancing” of several factors, including “the general state of law, order and justice in the country, and

²⁶ <<http://www.refworld.org/docid/4bb21fa02.html>>

its effectiveness, including the resources available and the ability and willingness to use them properly and effectively to protect residents.” UNHCR, *Interpreting Article 1 of the 1951 Convention Relating to the Status of Refugees* ¶¶ 7, 15 (Apr. 2001) (“*Interpreting 1951 Convention*”).²⁷

Matter of A-B- upends this holistic analysis. It requires asylum-seekers to show that “the government condoned the private actions or at least demonstrated a complete helplessness to protect the victim[.]” 27 I. & N. Dec. at 337. In other words, under that decision, occasional, piecemeal, or partial protection by a state will negate an asylum claim, even if the state is unable or unwilling to prevent violence in the vast majority of cases. As examined below, this unduly narrow construction of the “unable or unwilling” standard significantly diverges from the United States’ international obligations.

1. ***Matter of A-B-* Is Inconsistent with the Settled Meaning of the “Unable or Unwilling” Standard**

The hallmark of state protection is the state’s ability to provide *effective* protection, which requires *effective* control of non-state actors.

²⁷ <<http://www.refworld.org/docid/3b20a3914.html>>

See Handbook ¶ 65 (acts constitute persecution “if they are knowingly tolerated by the authorities, or if the authorities refuse, or prove unable, to offer effective protection”); *see also Interpreting 1951 Convention* ¶ 15 (providing that a state’s ability to offer effective protection is measured by “the general state of law, order and justice in the country, and its effectiveness, including the resources available and the ability and willingness to use them properly and effectively to protect residents”). State protection is ineffective where, for example, “the police fail to respond to requests for protection or the authorities refuse to investigate, prosecute or punish (non-State) perpetrators of violence . . . with due diligence.” *Sexual Orientation Guidelines* ¶¶ 34-37.

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

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

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

UNHCR, *Guidelines on International Protection No. 7: The Application of Article 1A(2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees to Victims of Trafficking and Persons at Risk of Being Trafficked* ¶ 22, U.N. Doc. HCR/GIP/06/07 (Apr. 7, 2006) (“*Trafficking Guidelines*”);²⁸ see also *Interpreting 1951 Convention* ¶ 15 (ability to provide effective protection requires examining “the general state of law, order and justice in the country, and its effectiveness, including the resources available and the ability and willingness to use them properly and effectively to protect residents”).

Consistent with UNHCR’s interpretation, other parties to the *1951 Convention* and *1967 Protocol* do not require complete helplessness and recognize violence by non-state parties as persecution

²⁸ <<http://www.refworld.org/docid/443679fa4.html>>

whenever state protection is ineffective. *See, e.g.*, Immigration and Refugee Board of Canada, *Chairperson’s Guideline 9: Proceedings Before the IRB Involving Sexual Orientation and Gender Identity and Expression* ¶ 8.6.5 (May 1, 2017) (instructing Canadian decision-makers to “carefully assess[] . . . the degree of actual implementation, the effectiveness, and the durability of” protection); United Kingdom Immigration Appellate Authority, *Asylum Gender Guidelines* ¶¶ 2B.2-3 (Nov. 1, 2000) (setting forth United Kingdom’s “practical standard,” requiring that protection be “meaningful, accessible, effective, and available to a woman”).²⁹

Turning the “unable or unwilling” requirement into a “condoned” or “complete helplessness” requirement significantly departs from this settled international standard. *Matter of A-B-* makes the “unable or unwilling” prong more difficult to meet, and the heightened test lacks any support in international law. A state does not have to “condone” private violence to be “unwilling” or “unable” to offer protection, nor

²⁹ <<http://www.refworld.org/docid/3ae6b3414.html>>

does a victim need to show the state’s “complete helplessness” for state protection to be unavailable or ineffective.

The First Circuit recently determined as much in *Rosales Justo v. Sessions*, 895 F.3d 154 (1st Cir. 2018), in holding that an asylum-seeker had met the “unable or unwilling” standard. Although the Mexican government had displayed a “willingness to investigate” the murder of the applicant’s family member by non-governmental actors, its “efforts to investigate” could not guarantee that the applicant could be made safer or that the state would catch the perpetrators. *Id.* at 159, 163, 164. Overruling the Board, the court determined that the specific ineffectiveness of the Mexican government in preventing violence against the applicant met the “unwilling or unable” standard. *Id.* at 163-65. “As *Rosales Justo* illustrates, a requirement that police condone or demonstrate complete helplessness is inconsistent with the current standards under immigration law.” *Grace*, 344 F. Supp. 3d at 129-30 (citing *Rosales Justo* in holding that *Matter of A-B*- “is not a permissible construction” of the Refugee Act).

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

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

UNHCR has field offices in the vast majority of originating countries for asylum-seekers, including in Central America. Relying on in-depth research from these offices, material from independent country specialists, and other sources, UNHCR has carefully compiled country-specific *Eligibility Guidelines*. The *Eligibility Guidelines* rigorously analyze factors relevant to asylum determinations, including the effectiveness of state protection.³⁰

Domestic violence victims often do not receive effective protection from the state. In some Central American societies, “[i]mpunity for violence against women and girls remain a serious problem.” UNHCR, *Eligibility Guidelines for Assessing the International Protection Needs*

³⁰ For a detailed explanation of the methodology used, see Affidavit of Janice Lyn Marshall, *Staten v/Utlendingsnemnda (Regjeringsadvokaten) v. A, B, C, D*, Oct. 26, 2015 (Nor.), <https://www.refworld.org/docid/562f546c4.html>.

of *Asylum-Seekers from Honduras* at 39, U.N. Doc. HCR/EG/HND/16/03 (July 27, 2016) (“*Honduras Guidelines*”). The high impunity rate contributes to victims’ “lack of confidence in . . . an ineffective and unsupportive justice system,” thus preventing them from even reporting domestic violence incidents to the authorities. *El Salvador Guidelines* at 25. The state’s ineffective protection against domestic violence is often exacerbated by its inability to protect against gang violence. In a study of 160 women from El Salvador, Guatemala, Honduras, and Mexico, UNHCR found that women “consistently stated that police and state law enforcement authorities were [unable] to provide sufficient protection from [] violence.” *Women on the Run* at 4. Many of the women’s partners were gang members or associates. *Id.* at 25. “[B]ecause these [criminal] groups were often [regarded as] the highest powers in the[] neighborhoods, [the women] did not believe the government could protect them.” *Id.*

The above evidence reflects that—at least in some countries and in some instances—states may be unable or unwilling to offer effective protection to persons who have been persecuted by non-state actors. *Matter of A-B-* errs by directing that domestic violence claims generally

do not meet the “unable or unwilling” standard for obtaining asylum in cases of persecution by non-state actors.

C. *Matter of A-B-* Errs by Overstating the Nexus Requirement

Under the INA, asylum-seekers must demonstrate that a protected ground “was or will be at least one central reason for” the alleged persecution—a provision commonly known as the nexus requirement. 8 U.S.C. § 1158(b)(1)(B)(i); *Cruz v. Sessions*, 853 F.3d 122, 127-28 (4th Cir. 2017). On this point, *Matter of A-B-* states that “[w]hen 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.” 27 I. & N. Dec. at 338-39. According to that decision, domestic violence victims are targeted not because of their membership in a social group, but because of their “preexisting personal relationship” with the persecutors. *Id.* at 339. These directives misapply the nexus requirement.

Under the *1951 Convention*, nexus is established when “the harm is being visited upon the victim for reasons of a Convention ground.” *Social Group Guidelines* ¶ 21. The protected ground need only be a “relevant contributing factor, [and] it need not be . . . the sole, or

dominant, cause” of the persecution. *Gender Guidelines* ¶ 20; *Trafficking Guidelines* ¶ 29. When the persecutor is a non-state actor, nexus may also be established “where the risk of being persecuted at the hands of a non-State actor is unrelated to a Convention ground, but the inability or unwillingness of the State to offer protection is for reasons of a Convention ground.” *Gender Guidelines* ¶ 21; *Social Group Guidelines* ¶ 20. UNHCR recognizes these as separate ways to establish nexus: targeting by the private actor *or* non-protection by the government.

In the context of domestic violence, “if the State is unwilling to extend protection . . . , then she may [nonetheless] be able to establish a valid claim for refugee status: the harm visited upon her by her husband is based on the State’s unwillingness to protect her for reasons of a Convention ground.” *Social Group Guidelines* ¶ 22. Moreover, perpetrators in societies that oppress women often abuse their victims precisely because they are in a domestic relationship and unable to leave, a point that the government has previously acknowledged. *See* DHS’s Position on Respt’s Eligibility for Relief at 27, *Matter of R-A-*, No. A 73 753 922 (A.G. Feb. 19, 2004) (“DHS *R-A-* Brief”) (“A group defined as

‘married women in Guatemala who are unable to leave the relationship’ . . . accurately identifies the reason why the persecutor chose his wife as his victim.”). The domestic relationship subordinates the woman, and her partner abuses her because of his corresponding belief in his right to control and abuse her, which society affirms. *See* Special Rapporteur on Violence Against Women, its Causes and Consequences, *Further Promotion and Encouragement of Human Rights and Fundamental Freedoms, Including the Question of the Programme and Methods of Work of the Commission* ¶¶ 27, 53, U.N. Doc. E/CN.4/1996/53 (Feb. 5, 1996);³¹ *Violence Against Women* at 33. Evidence of this nexus may come directly from the abuser and/or from circumstantial evidence (such as country condition information) that domestic violence against women is accepted or supported by a state. A gendered social and cultural value system may implicate the state’s inability or unwillingness to protect domestic violence victims.

Matter of A-B- asserts that domestic violence is not on account of the victims’ membership in a particular social group because the

³¹ <<http://undocs.org/E/CN.4/1996/53>>

persecutors only target their partners, and do not “b[ear] any particular animosity toward women who were intimate with abusive partners.” 27 I. & N. Dec. at 339 (internal quotation marks omitted). But whether the persecutors target female domestic partners of *other* men is irrelevant. The persecutor abuses his wife or partner specifically because she is *his* subordinate domestic partner and he can, with the approval of society (be it tacit or overt), exercise authority over her. That he does not abuse women over whom he does not perceive himself to have the same authority and control does not suggest that the abuse is not on account of the victim’s status as his subordinate domestic partner. *Cf. Matter of S-A-*, 22 I. & N. Dec. 1328, 1336 (B.I.A. 2000) (Islamic father persecuted daughter on account of her liberal beliefs, even though there was no evidence that he would persecute liberal daughters of other fathers); DHS *R-A-* Brief at 34 (analogizing to a slave owner who beats his own slave but has neither the inclination nor the opportunity to beat his neighbor’s slave, and contending that it would still be reasonable to conclude that the beating was on account of the victim’s status as a slave).

CONCLUSION

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

FEBRUARY 28, 2020

Respectfully submitted,

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IN SUPPORT OF PETITIONERS

CERTIFICATE OF COMPLIANCE

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

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s/ Ana C. Reyes _____

ANA C. REYES

DATED: FEBRUARY 28, 2020

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on February 28, 2020. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Ana C. Reyes

ANA C. REYES

DATED: FEBRUARY 28, 2020