

FALL 2019 UPDATE

FORCED MIGRATION: LAW AND POLICY (2d Edition)

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This Update includes materials on major developments that have occurred since *Forced Migration: Law and Policy* went to press in summer 2013. We have limited ourselves to developments that may affect teaching from the casebook, and not included the sort of detailed updates that might be more appropriate for a treatise or practitioner's guide.

We have provided these materials in Word format, so that individual instructors, if they wish, can select or further edit what will be useful, given the coverage in their courses. Users of the casebook have permission to reproduce these materials for instructional purposes in their own classes.

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CHAPTER ONE

FORCED MIGRATION: CONCEPT, HISTORY, AND INSTITUTIONS

p. 21, after Figure 1.3, add:

UNHCR reported that 10.4 million individuals were newly displaced based on persecution and conflict in 2016. This included 6.9 million new internally displaced persons, and 3.4 million new refugees and asylum seekers.

According to UNHCR the total number of forced migrants worldwide in 2016 was 65.6 million. The magnitude of the scope can be seen in each category of forced displacement: 22.5 million refugees, 40.3 million internally displaced persons, and 2.8 million asylum seekers. UNHCR, *Global Trends: Forced Displacement in 2016* (June 2017) at 2.

p. 61, after carryover paragraph, add:

Spurred by the ongoing civil war in Syria, the lack of a functioning government in Libya, and strife in many parts of Africa and Asia, the number of asylum seekers in Europe has increased dramatically in recent years. The number of individuals who filed asylum applications in the European Union was 302,000 in 2011, 332,000 in 2012, 431,000 in 2013, and 627,000 in 2014. In 2015 Europe faced its largest refugee crisis since World War II. Frontex, the European Union (EU) border management agency, counted 1.8 million asylum seekers crossing the EU frontiers. Eurostat, *Statistics Explained/Asylum Statistics*, http://ec.europa.eu/eurostat/statistics-explained/index.php/Asylum_statistics#Asylum_applicants.

EU governments reported that 1.3 million individuals registered as asylum seekers in 2015, with 1.1 million registering in Germany alone. *Id.* UNHCR data showed that most of the 1.1 million asylum seekers registered in Europe in 2015 came from countries experiencing war and persecution, suggesting that a high proportion have valid claims to asylum. UNHCR, *Refugees/Migrants Emergency Response - Mediterranean*, <http://data.unhcr.org/mediterranean/regional.php>. The largest number came from Syria. More than 10 million Syrians have fled their homes during the civil war, with more than 5 million crossing borders to neighboring countries and registering as refugees. UNHCR, *Syria Regional Response*, <http://data.unhcr.org/syrianrefugees/regional.php> (July 4, 2017). Turkey hosts over 3 million registered Syrians, *id.*, and many more may be unregistered. Lebanon, a country of 4 million, hosts 1.1 million Syrian refugees, while Jordan hosts 660,000. *Id.* Many of the countries of refuge have not granted Syrians permission to work, leading refugees to deplete their savings, and then seek work in the informal labor market where they are underpaid and vulnerable. Patrick Kingsley, *Fewer Than 0.1% of Syrians in Turkey In Line for Work Permits*, *The Guardian*, Apr. 11, 2016.

Refuge in the Middle East became more untenable in September 2015 when a lack of resources led the World Food Program to eliminate food vouchers for one-third of the Syrian refugees in the region. Associated Press, *Lack of Funds: World Food Programme Drops Aid to One-third of Syrian Refugees*, *The Guardian*, Sept. 4, 2015. Multiple factors – the

seemingly endless duration of the civil war, the lack of employment opportunities, the depletion of savings, and the food cuts – contributed to the decisions of many Syrian refugees to seek safety in Europe. By the end of 2015, more than 856,000 individuals had arrived in Greece by sea. UNHCR, *Global Trends: Forced Displacement in 2015*, at 33. More than 153,000 had arrived by sea in Italy. *Id.* There were many incidents of disasters at sea; roughly 4,000 people were reported dead or missing in the Mediterranean Sea in 2015. *Id.*, at 32.

In response to the 2015 surge in refugees, the European Union entered into negotiations with Turkey. In March 2016 Turkey agreed that all refugees crossing from Turkey to the Greece as of March 20, 2016 would be returned to Turkey, and in exchange, the European Union agreed to allow refugees from camps in Turkey to resettle in the European Union. European Commission Press Release, Implementing the EU-Turkey Agreement, Apr. 4, 2016, http://europa.eu/rapid/press-release_MEMO-16-1221_en.htm. After the agreement went into effect, the numbers of arrivals in Greece plummeted from 6,800 per day in October 2015 to 50 per day in May 2016. Nektaria Stamouli, *Greece Struggles to Return Migrants Under EU-Turkey Deal*, Wall St. J., May 19, 2016. The drop in the number of new arrivals has not been coupled with an increase in the number of those being returned to Turkey, however. By the end of 2016, Greece had returned only 865 migrants to Turkey pursuant to the agreement. Apostolis Fotiadis, *Greece Plans to Fast Track Asylum Claims to Save EU-Turkey Deal*, News Deeply, Jan. 30, 2017, <https://www.newsdeeply.com/refugees/articles/2017/01/30/greece-plans-to-fast-track-asylum-claims-to-save-e-u-turkey-deal>. Furthermore, many asylum seekers in Greece have charged that it would be unsafe to return them to Turkey. By the end of 2016 Greece had received 51,000 asylum applications, and had only decided 9,000; 2,500 were granted protection and 6,500 were rejected. European Council of Refugees and Exiles, Asylum Information Database, *Country Report: Greece, 2016 Update*, http://www.asylumineurope.org/sites/default/files/report-download/aida_gr_2016update.pdf. The combination of slow processing times and court rulings that Turkey is not be a safe country to which the claimants can be returned is worrisome for those who thought the EU-Turkey deal would reverse the refugee flows to Europe.

In 2016 the migration routes to Europe shifted away from the Aegean. More than 180,000 asylum seekers traveled from Africa to Italy, setting a new record. Anna Momigliano, *Italy May Require Asylum Seekers to Do Community Service*, Washington Post, Jan. 25, 2017. The Mediterranean route is far more dangerous, and the number of drownings rose to more than 5,000 in 2016. *Mediterranean Migrant Deaths in 2016 Pass 5,000: UN*, Al Jazeera, Dec. 23, 2016. The first six months of 2017 appear similar to 2016; 112,00 migrants and refugees have entered Europe by sea, with 85 percent arriving in Italy, and the rest reaching Greece, Cyprus, and Spain. More than 2,300 have died in the Mediterranean. *Refugees/Migrants Emergency—Europe*, Relief Web, July 25, 2017, <http://reliefweb.int/topics/refugeesmigrants-emergency-europe>.

Attacks by terrorists and mentally unstable individuals in France, see, e.g., *Truck Attack in Nice, France: What We Know, and What We Don't*, N.Y. Times, July 15, 2015; Liz

Alderman & Jim Yardley, *Paris Terror Attacks Leave Awful Realization: Another Massacre*, N.Y. Times, Nov. 13, 2015, Belgium, e.g., Alissa J. Rubin, Aurelien Breeden & Anita Raghavan, *Strikes Claimed by ISIS Shut Brussels and Shake European Security*, N.Y. Times, Mar. 22, 2016, and Germany, e.g., Rukmini Callimachi & Melissa Eddy, *Munich Killer Was Troubled, But Had No Terrorist Ties, Germany Says*, N.Y. Times, July 23, 2016; Melissa Eddy & Boryana Dzhambazova, *Refugee or Jihadist? Leaders Can't Always Say*, N.Y. Times, Aug. 5, 2016, have heightened fears across the continent, and stories that some of the assailants mingled with the throng of asylum seekers who entered Europe in 2015 have inspired xenophobia and anti-refugee sentiments. See, e.g., Rick Lyman, *Regulating Flow of Refugees Gains Urgency in Greece and Rest of Europe*, N.Y. Times, Nov. 25, 2015; Aurelien Breeden & Kimiko De Freytas-Tamura, *Third Body Is Found In Rubble of Police Raid Near Paris*, N.Y. Times, Nov. 20, 2015; Adam Nossiter & Liz Alderman, *After Paris Attacks, a Darker Mood Toward Islam Emerges in France*, N.Y. Times, Nov. 16, 2015. Although many Europeans have welcomed refugees and EU countries have managed to find temporary quarters for more than one million new arrivals, the mood is dark. Many attribute the United Kingdom's referendum vote to leave the European Union to fear of refugees, Will Somerville, *When the Dust Settles: Migration Policy after Brexit*, Migration Policy Institute (June 2016), an ironic result since the U.K. government had already negotiated an opt-out provision from EU refugee relocation decisions.

p. 67, immediately before notes and questions, add new subsection:

e. United Nations Summit for Refugees and Migrants

During the fall of 2015, with full-blown refugee crises in the Middle East, Europe, Central America, and elsewhere around the globe, the U.N. Secretary General organized meetings to strengthen cooperation on refugee and migration movements. The U.N. General Assembly convened additional meetings to consider comprehensive responses to the global refugee and humanitarian emergencies, and ultimately decided to devote an entire day to plenary discussion of the large movements of refugees and migrants during the 2016 General Assembly session in New York. Scheduled for September 19, 2016, the U.N. Summit for Refugees and Migrants resulted in U.N. declarations concerning state responsibilities in response to mass movements of forced and voluntary migrants.

In preparation for the Summit, Secretary General Ban Ki-moon commissioned Special Advisor Karen AbuZayd to prepare a report, *In Safety and Dignity: Addressing Large Movements of Refugees and Migrants* (May 2016). AbuZayd spotlighted the large number – 244 million in 2015 – of international migrants and the great impact that remittances from migrants have on the economies of developing societies. She emphasized the perilous journeys many migrants make, the discrimination they often face in the receiving countries, and the lack of comprehensive immigration policies in many societies.

Meanwhile, the President of the General Assembly appointed Dina Kavar, Permanent Representative of Jordan, and David Donoghue, Permanent Representative of Ireland, to jointly lead consultations with U.N. Member States to develop possible action

plans and other outcomes. After hearings and discussions involving government officials, civil society organizations, members of the private sector, and others, intergovernmental negotiations in August 2016 led to a document to guide the discussion during the Summit. Annex I of the document contains a Comprehensive Refugee Response Framework, to be spearheaded by UNHCR in situations involving large-scale refugee movements. Annex I concludes with the call for a Global Refugee Compact to be adopted in 2018. Annex II calls for a separate Global Compact for Safe, Orderly, and Regular Migration. It envisions adoption of the Global Compact at an intergovernmental conference on global migration in 2018. Further information on the U.N. Summit for Refugees and Migrants, including background reports and documents, can be found at <https://refugeesmigrants.un.org/summit-refugees-and-migrants-19-september-2016>.

On September 20, 2016, the day following the U.N. Summit, President Obama hosted a Leaders' Summit on the Global Refugee Crisis. Scheduled to take advantage of the world leaders who will gather for the annual opening of the U.N. General Assembly and for the Summit on Refugees and Migrants, the Obama Administration worked to obtain new commitments to refugees from governments around the world. High priorities included 1) a 30% increase in funding for humanitarian appeals and international organizations, 2) a 100% increase in the resettlement of refugees, and 3) to authorize 1,000,000 more refugees to work legally and to place 1,000,000 more refugees in school. Statement by National Security Advisor Susan Rice on Co-Hosts for President Obama's Leaders' Summit on Refugees, June 3, 2016. <https://www.whitehouse.gov/the-press-office/2016/06/03/statement-national-security-advisor-susan-rice-co-hosts-president-obamas>. Many countries pledged to increase humanitarian aid to refugees and to accept refugees for resettlement. *See Summary Overview Document, Leaders Summit on Refugees*, Nov. 10, 2016, https://refugeesmigrants.un.org/sites/default/files/public_summary_document_refugee_summit_final_11-11-2016.pdf.

CHAPTER TWO

PROTECTION IN THE UNITED STATES: *NONREFOULEMENT* AND ASYLUM

p. 101, after first full paragraph, add:

The treatment of asylum seekers in credible fear interviews, and afterwards if they are found to have credible fear, has been the focus of two Attorney General decisions followed by federal court litigation.

In 2018, then-Attorney General Sessions decided *Matter of A-B-*, 27 I & N Dec. 316 (AG 2018), which narrowed the definition of persecution on account of membership in a particular social group (required to qualify an applicant for a grant of asylum). is a principal case in the materials to this Update for casebook page 375. *Matter of A-B-* adopted the view that in general, asylum claims “pertaining to domestic violence or gang violence perpetrated by non-government actors will not qualify for asylum.” The Attorney General found that “[a]ccordingly, few such claims would satisfy the legal standard” for “credible fear.” Soon thereafter, USCIS issued a Policy Memorandum applying the new standards to credible fear interviews. See USCIS Policy Mem., *Guidance for Processing Reasonable Fear, Credible Fear, Asylum, and Refugee Claims in Accordance with Matter of A-B-*, July 11, 2018.

In December 2018, the federal district court for the District of Columbia issued a permanent injunction blocking the application of the new asylum standards set forth in *Matter of A-B-* and the subsequent Policy Memorandum to credible fear interviews. See *Grace v. Whitaker*, 344 F. Supp. 3d 96 (D.D.C. 2018). The court found that applying these more restrictive standards to credible fear interviews would violate the Immigration and Nationality Act and the Administrative Procedure Act. The injunction does not directly affect the application of *Matter of A-B-* to the ultimate decisions in asylum cases. An edited version of *Matter of A-B-*, with Notes and Questions, is in the material in this Update for casebook page 375.

In the second case, *Matter of M-S-*, 27 I & N Dec. 509 (AG 2019), Attorney General William Barr overruled *Matter of X-K-*, 23 I & N Dec. 731 (BIA 2005) and held that immigration judges lack the authority to hold bond hearings for arriving asylum seekers. This decision, to the extent it is implemented, would mean that asylum seekers who pass credible fear screening would be detained for the duration of immigration proceedings to decide their cases. The only exception is for persons granted parole — a decision within the authority of DHS, not an immigration judge. The Attorney General Barr granted a 90-day delay in implementing the decision, “so that DHS may conduct the necessary operational planning for additional detention and parole decisions.”

In July 2019, the federal district court for the Western District of Washington issued a preliminary injunction blocking implementation of *Matter of M-S-*. The lawsuit was a class action by a nationwide class of noncitizens who entered the United States without inspection, requested asylum, and whom the government has found to have a credible fear of persecution if returned home. Judge Pechman found that class members are likely to succeed on their

claim that it violates their due process rights under the U.S. Constitution to deny them any hearings for release on bond while their cases are pending. *See Padilla v. US ICE*, 2019 WL 2766720 (W.D. Wash. July 2, 2019).

Initially, a panel of the Ninth Circuit Court of Appeals temporarily stayed the district court's order pending appeal, but soon thereafter, another Ninth Circuit panel lifted the temporary stay and reinstated the crucial part of the district court's injunction, pending a full appeal on the merits. *See Padilla v. ICE*, No. 19-35565 (9th Cir. July 22, 2019) (declining to stay district court's ruling that plaintiffs were constitutionally entitled to bond hearing while awaiting resolution of asylum claims). *See Padilla v. ICE*, No. 19-35565 (9th Cir. July 12, 2019).

p. 101, after second full paragraph, before section 2, add:

The Trump administration has directed substantial enforcement resources to the southern border with Mexico, and much of that effort has targeted asylum seekers arriving there, deploying several principal strategies.

Border Wall. One of President's Trump's signature campaign promises was the construction of a wall at the Mexican-U.S. border. The cost of construction was estimated at \$21.6 billion over 3½ years. Julia Edwards Ainsley, *Trump border 'wall' to cost \$21.6 billion, take 3.5 years to build: internal report*, Reuters (Feb. 9, 2017). Throughout 2017 and 2018, Congress consistently denied the President's request to fund border wall construction, although it did approve a \$1.6 billion measure for border fencing, design, and technology.

Unhappy with Congress' refusals, President Trump shut down the federal government in late December 2018 as a bargaining measure intended to pressure Congress to accede to his demand for funding. After a 35-day government shutdown, however, he was unable to secure funding and on February 14, 2019, Trump finally signed a measure to reopen the government. In that measure, Congress appropriated only \$1.375 billion to border funding, specifying that the appropriation was for pedestrian fencing in the Rio Grande Valley, and disallowing construction in some wildlife refuges.

The day after signing the funding bill, President Trump declared a national emergency under the National Emergencies Act. *See Proclamation No. 9844*, 84 Fed. Reg. 4949 (2019); *National Emergencies Act*, 50 U.S.C. §§ 1601-1651. Based on that declaration, the President identified \$8.1 billion dollars appropriated to the Departments of Defense and Homeland Security that he intended to divert to border wall construction. The House and the Senate responding by passing a joint resolution terminating the President's national emergency declaration. The President vetoed the resolution and began to use funds for border wall construction.

On February 19, 2019 the Sierra Club and a group of states, in separate lawsuits, sued the President in the Northern District of California. In May and June, 2019, Judge Hayward Gilliam, presiding over both the states' and the Sierra Club's challenges, enjoined the President's diversion of a significant portion of the targeted funds to build border barriers

in the El Paso, Yuma, El Centro, and Tucson border sectors. Shortly thereafter, a divided panel of the Ninth Circuit Court of Appeals affirmed the district court's rulings, finding that the President violated constitutional limits on presidential authority in diverting funds for border wall construction when the underlying statutes did not authorize such a diversion, and after Congress had expressly rejected appropriations for that purpose.

The Ninth Circuit majority noted Congress' repeated denial of border funding requests, quoting extensively from the Supreme Court's 1952 steel seizure case in holding the President's actions unlawful. *Sierra Club v. Trump*, 929 F.3d 670 (9th Cir. 2019) (quoting *Youngstown Sheet & Tube v. Sawyer*, 343 U.S. 579 (1952) (Jackson and Frankfurter, JJ. concurring opinions, finding President Truman's plan to seize domestic steel mills under a claim of military exigency to exceed the President's constitutional authority because Congress had expressly declined to provide the President that authority)). Then, on July 26, 2019, the U.S. Supreme Court, by a 5-4 vote, lifted the district court's injunction, finding that "the Government has made a sufficient showing . . . that the plaintiffs have no cause of action to obtain review" Without the injunction in place, the administration can proceed with planning and construction until the litigation reaches a decision on the merits.

Port-of-entry requirement. In November 2018, the federal government published an interim rule to make noncitizens ineligible for asylum if they enter the United States in violation of a presidential proclamation barring their entry. *See Aliens Subject to a Bar on Entry Under Certain Presidential Proclamations; Procedures for Protection Claims*, 83 Fed. Reg. 55934 (Nov. 9, 2018). The same day, the President issued a proclamation — initially for 90 days, then renewed in February 2019 — barring the entry of anyone crossing the southern border unlawfully, that is, between ports of entry. White House, Presidential Proclamation 9822 of Nov. 9, 2018: *Addressing Mass Migration through the Southern Border of the United States*, 83 Fed. Reg. 57661 (Nov. 15, 2018); Presidential Proclamation 9842 of Feb. 7, 2018: *Addressing Mass Migration through the Southern Border of the United States*, 84 Fed. Reg. 3665 (Feb. 12, 2019). The result was to make anyone ineligible for asylum except at a port of entry. In December 2018, the federal district court for the Northern District of California issued a preliminary injunction blocking implementation of this regulation as inconsistent with the statutory asylum scheme enacted by Congress, which expressly allows asylum applications "whether or not at a designated port of arrival." *See East Bay Sanctuary Covenant v. Trump*, 354 F. Supp. 3d 1094 (2018) (citing INA § 208(a)(1)). In December 2018, the U.S. Supreme Court, by a 5-4 vote, denied the government's application for a stay of the preliminary injunction. As of early August 2019, this injunction remains in effect.

"Metering." The administration has been limiting the number of asylum seekers whom it allows to enter the United States at ports of entry. This practice, known informally as "metering," requires asylum seekers to wait for long periods of time, even months, to present their asylum claims. *See* Kirk Semple, *What Is "La Lista," Which Controls Migrants' Fates in Tijuana?*, N.Y. Times (Nov. 30, 2018); Miriam Jordan, Kirk Semple & Caitlin Dickerson, *For Migrants on Both Sides of the Border, the One Constant Is a Long Wait*, N.Y. Times (Nov. 27, 2018); Dara Lind, *The US Has Made Migrants at the Border Wait Months to Apply for*

Asylum. Now the Dam is Breaking, Vox (Nov. 28, 2018). A court challenge to “metering” is pending in the federal district court for the Southern District of California, *see Al Otro Lado v. McAleenan*, 2019 WL 3413406 (July 29, 2019).

Migrant Protection Protocols (Remain in Mexico Policy). In December 2018, DHS implemented the Migrant Protection Protocols (MPP), popularly known as the Remain in Mexico policy. Reflecting the administration’s perception that many asylum seekers make groundless claims and then abscond into the United States while their cases are pending, the MPP policy allows immigration officers to return certain asylum seekers to Mexico to await the resolution of their proceedings. DHS, *Announcement of Migration Protection Protocols*, Dec. 20, 2018, <https://www.dhs.gov/news/2018/12/20/secretary-nielsen-announces-historic-action-confront-illegal-immigration>.

As authority for the MPP, the administration cites INA § 235(b)(2)(C), which gives immigration officials discretion to return individuals arriving by land from a contiguous foreign country to the territory from which they arrived pending their removal proceedings. The MPP was first instituted at the San Ysidro, California port of entry, which covers migration from the Tijuana, Mexico area, but has since been expanded to other sites along the border. A federal court preliminarily enjoined the MPP as a violation of the Administrative Procedure Act, *Innovation Law Lab v. Nielsen*, 366 F. Supp. 3d 1110 (N.D. Cal. 2019), but the Ninth Circuit Court of Appeals, in a per curiam opinion, stayed the injunction pending appeal. *Innovation Law Lab v. McAleenan*, 924 F.3d 503 (9th Cir. 2019). Notably, Judge William Fletcher concurred only in the result and forcefully criticized the per curiam reasoning and the government’s argument, flatly stating, “The Government is wrong. Not just arguably wrong, but clearly and flagrantly wrong. [INA § 235(b)(2)(C)] does not provide authority for the MPP.” *Id.* (Fletcher, J. concurring only in result).

Third-Country Asylum Provisions. On July 16, 2019, the Administration announced an interim final rule that would bar individuals from seeking asylum as they arrive at the southern border of the United States if they did not seek such protection from another country on their way to the United States. *See* 84 Fed. Reg. 33,829 (2019). The rule would especially affect asylum seekers from the so-called “Northern Triangle” countries of Guatemala, El Salvador, and Honduras, forcing migrants from El Salvador or Honduras to apply for asylum in Guatemala or Mexico, or migrants from Guatemala to apply in Mexico. As authority for the rule, the administration cited INA §§ 208(b)(2)(C) and (d)(5)(B), which provide general authority for conditions and limitations on asylum eligibility. Such individuals would still be able to seek withholding of removal and relief under the Convention Against Torture upon arrival in the United States.

Two separate lawsuits immediately challenged this interim final rule, alleging that the rule violates the INA’s provisions on asylum eligibility, the Administrative Procedure Act, and the Trafficking Victims Protection Reauthorization Act. On the statutory claim, the challengers argue that the INA only authorizes denial of asylum based on passing through a third country in transit in limited and narrow circumstances: if the individual firmly settled in a third country, or the United States has a “safe third country” agreement in place with

that country. See INA §§ 208(a)(2)(A) and (b)(2)(A)(vi). Currently, the United States does not have a bilateral or multilateral agreement with Mexico or any Central American countries, as required to satisfy the second of these exceptions. The U.S. currently has only one such bilateral agreement in place, with Canada. See Agreement between the Government of Canada and the Government of the United States for Cooperation in the Examination of Refugee Status Claim from Nationals of Third Countries (Dec. 5, 2002), <https://2009-2017.state.gov/s/l/38616.htm>.

On July 24, 2019, the district courts hearing these challenges issued preliminary rulings. The district court for the District of Columbia declined to enjoin it, but hours later the district court for the Northern District of California issued a nationwide preliminary injunction blocking the rule. See *East Bay Sanctuary Covenant, et al., v. Barr*, No. 3:19-CV-04073 (N.D. Cal July 24, 2019) and *Capital Area Immigrants' Rights Coalition, et al., v. Trump*, No. 1:19-CV-02117 (D.D.C. July 24, 2019).

Then, on July 26, 2019, the administration announced an agreement with Guatemala that Acting DHS Secretary Kevin McAleenan called a “safe third country” agreement. However, the Guatemalan government appeared to reject that characterization. One reason may be that Guatemala’s constitutional court ruled in early July that Guatemala cannot enter into any such agreement without legislative approval. Moreover, as of early August 2019, significant uncertainty remains about the agreement’s terms or intended effect. No U.S. government agency has released an official copy of the text. Unofficial texts suggest that the agreement is not a traditional safe third country agreement that would require any migrants who travel through Guatemala to apply for asylum there, rather than come to the United States to apply. Instead, the agreement appears to apply to anyone who applies for asylum at the U.S. border whether or not that asylum seeker has traveled through Guatemala. The agreement also appears to allow the U.S. government to “transfer” asylum seekers to Guatemala, which would decide their asylum claims. See Susan Gzesh, *Questions Surround Secretive US-Guatemala Agreement*, Just Security, July 30, 2019; Michael D. Shear, Zolan Kanno-Youngs & Elisabeth Malkin, *After Tariff Threat, Trump Says Guatemala Has Agreed to New Asylum Rules*, N.Y. Times, July 26, 2019; Adolfo Flores & Hamed Aleaziz, *Trump Says the US and Guatemala Have Signed a “Safe Third Country” Agreement to Restrict Asylum Seekers*, BuzzFeed News, July 26, 2019.

p. 111, after first full paragraph, add:

In 2014, the Supreme Court again considered a *Chevron* challenge in an immigration case, this time concerning when the offspring of intending immigrants “age out” of their status as children and thus are no longer able to immigrate as part of their parents’ approved visa. Courts disagreed as to whether the BIA’s ruling was inconsistent with the plain language of the statute. The Supreme Court granted certiorari to resolve the circuit conflict, and ultimately ruled 5-4 in favor of the BIA’s interpretation of INA § 203(h)(3). *Scialabba v. Cuellar de Osorio*, 573 U.S. ___, 134 S.Ct. 2191 (2014). The plurality, in an opinion by Justice Kagan, found that section of the statute “through and through perplexing,” *id.* at 2200, and held that *Chevron* deference to the BIA was appropriate:

The argument [against the BIA's interpretation] assumes that the respondents' sons and daughters should "receive credit" for all the time the respondents themselves stood in line. * * * But if the parent had died while waiting for a visa, or had been found ineligible, or had decided not to immigrate after all, the derivative would have gotten nothing for the time spent in line. Similarly, the Board could reasonably conclude, he should not receive credit for his parent's wait when he has become old enough to live independently. In the unavoidably zero-sum world of allocating a limited number of visas, the Board could decide that he belongs behind any alien who has had a lengthier stand-alone entitlement to immigrate. * * *

This is the kind of case *Chevron* was built for. Whatever Congress might have meant in enacting § 203(h)(3), it failed to speak clearly. Confronted with a self-contradictory, ambiguous provision in a complex statutory scheme, the Board chose a textually reasonable construction consonant with its view of the purposes and policies underlying immigration law. Were we to overturn the Board in that circumstance, we would assume as our own the responsible and expert agency's role. We decline that path, and defer to the Board.

Id. at 2213.

Justices Roberts and Scalia concurred in the judgment, objecting to the plurality's view that a self-contradictory statute would justify *Chevron* deference, but still finding the statute sufficiently ambiguous to reach the same result. Justice Alito and Justice Sotomayor dissented, the latter joined by Justice Breyer and (except for one footnote) Justice Thomas. The dissenters argued that Congress's clear or dominant intent was to preserve the earlier priority date for the child, no matter when or how an "appropriate category" becomes available. Justice Sotomayor wrote that, before finding ambiguity, courts are called upon to interpret statutes as a "coherent regulatory scheme," fitting, if possible, all parts into a "harmonious whole." *Id.* at 2217.

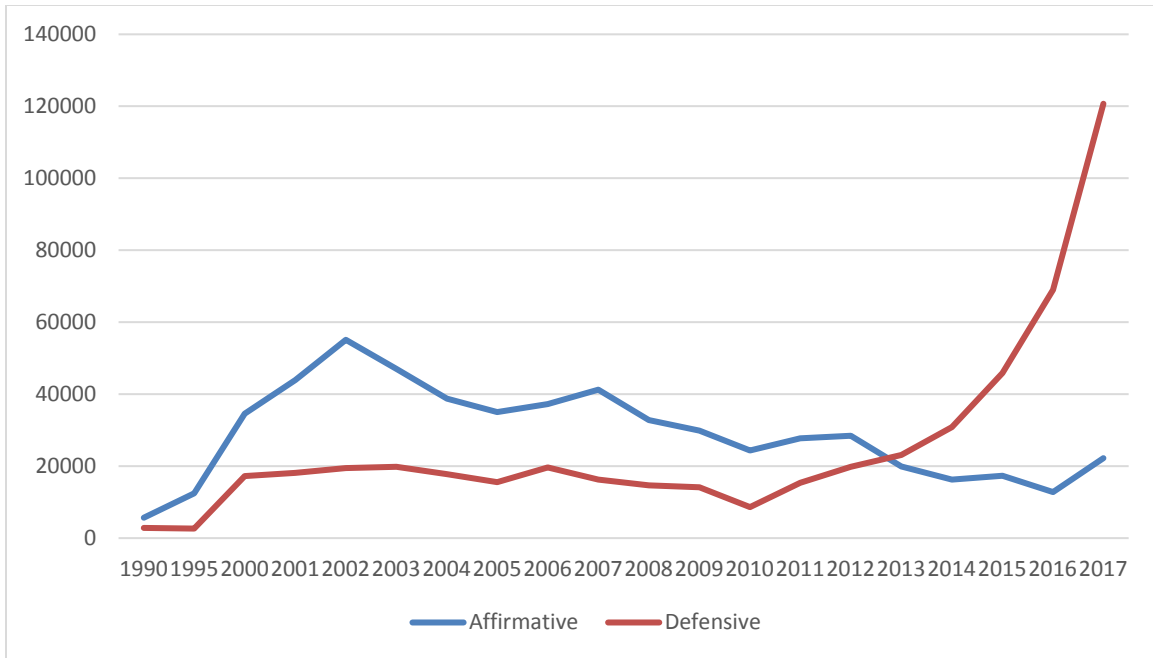
p. 111, in the second full paragraph, replace the first four words with:

Neither *Cuellar de Osorio* nor *Judulang* involved

pp. 112-130, replace the text of D. TRENDS AND STATISTICS, with the following:

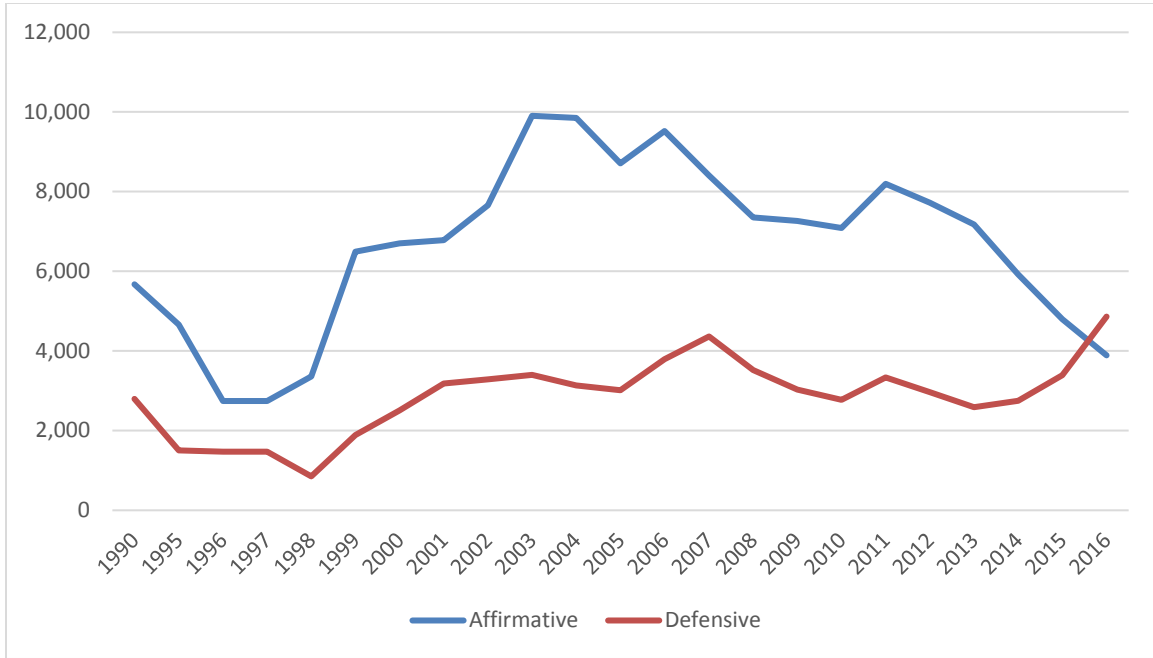
The graphs and charts in this section report data according to fiscal year, which the federal government defines as the 12 months ending on September 30. The first two graphs contain data collected by DHS and EOIR. They plot both affirmative asylum claims filed with INS/USCIS and asylum claims filed with immigration judges. Figure 2.1 shows the number of asylum cases filed affirmatively and defensively and shows the number of asylum cases granted in each setting. Note that many of the claims filed with immigration judges had been preceded by affirmative asylum applications. Thus, some asylum applications appear in both portions of the asylum adjudication caseload; the sum of the two portions exceeds the total number of asylum applicants.

Figure 2.1
Asylum Cases Filed with
Immigration Judges, 1990-2017



Source: USCIS Refugees, Asylum and Parole System.
Asylum Office Workload by Fiscal Year, FY 1991-2016; 2005-2017 EOIR Statistics Yearbooks.

Figure 2.2.
Asylum Cases Granted by
Immigration Judges, 1990-2017¹

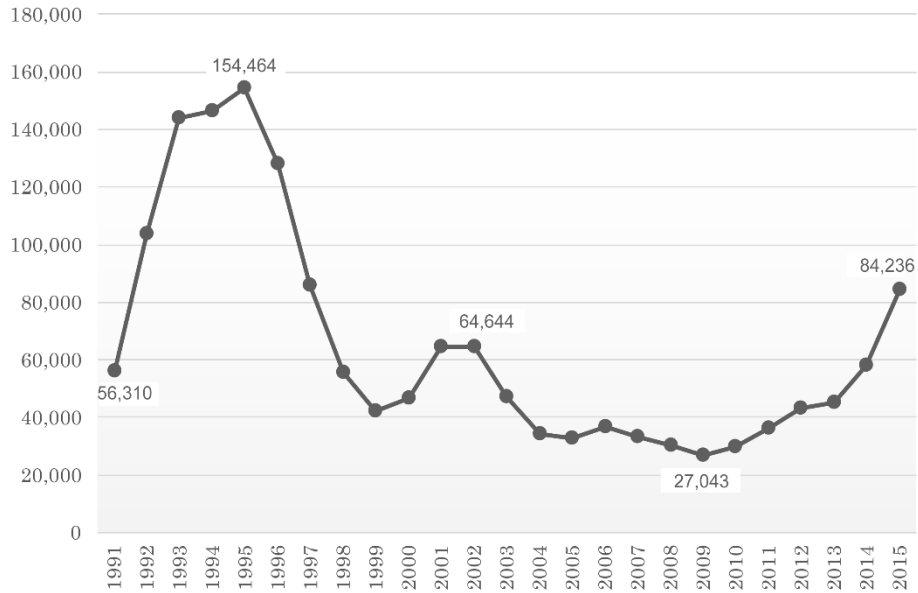


Source: USCIS Refugees, Asylum and Parole System. Asylum Office Workload by Fiscal Year, FY 1991-2016; 2005-2017 EOIR Statistics Yearbooks; Asylum: Variation Exists in Outcomes of Applications Across Immigration Courts and Judges, GAO Report 2016, <http://www.gao.gov/assets/690/682965.pdf>.

¹ The 2017 EOIR Statistics Yearbook broke from earlier Yearbooks in no longer reporting asylum grant rates by affirmative and defensive claims. The total grant rate that EOIR reported in 2017 was 10,654, compared to 9,753 in 2013. The denial rate in 2017 was 17,677 compared to 8,665 in 2013. See 2017 EOIR Statistics Yearbook, Fig. 19.

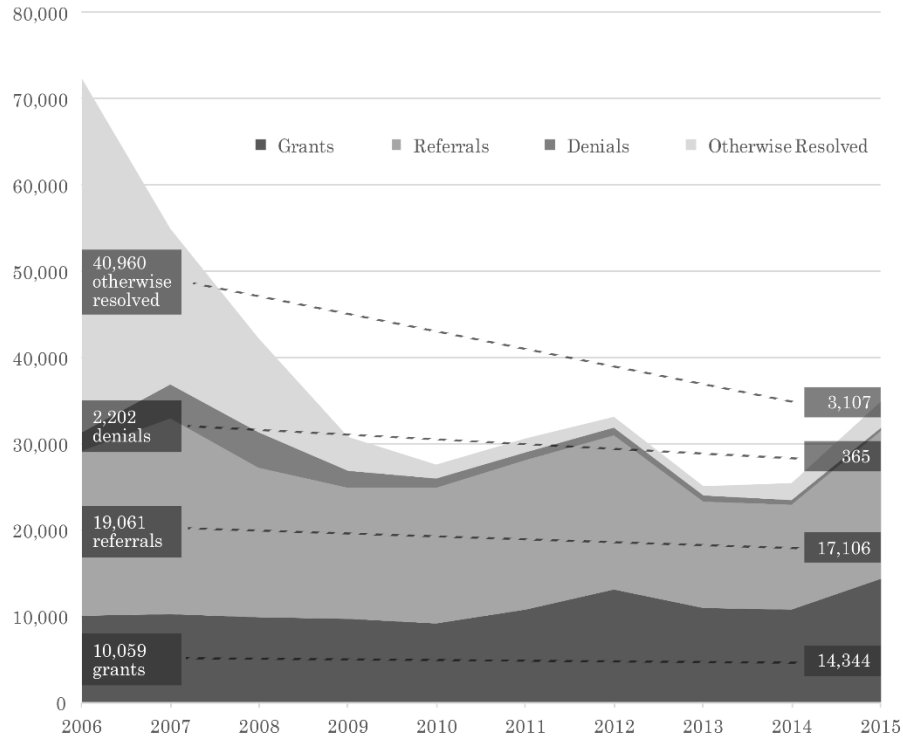
Figures 2.3 and 2.4 rely solely on DHS data; they refer to affirmative asylum claims filed with DHS and do not take into account asylum decisions by immigration judges. Figure 2.3 reports the number of affirmative asylum cases filed over the past 25 years. Figure 2.4 shows the number of affirmative asylum cases filed with and approved by DHS during the past ten years.

Figure 2.3
Affirmative Asylum Applications Filed with INS/USCIS, 1991–2015



Source: USCIS Refugees, Asylum and Parole System, Asylum Office Workload by Fiscal Year, FY 1991–2015.

Figure 2.4
Results in Affirmative Asylum Cases Filed with USCIS, 2006–2015



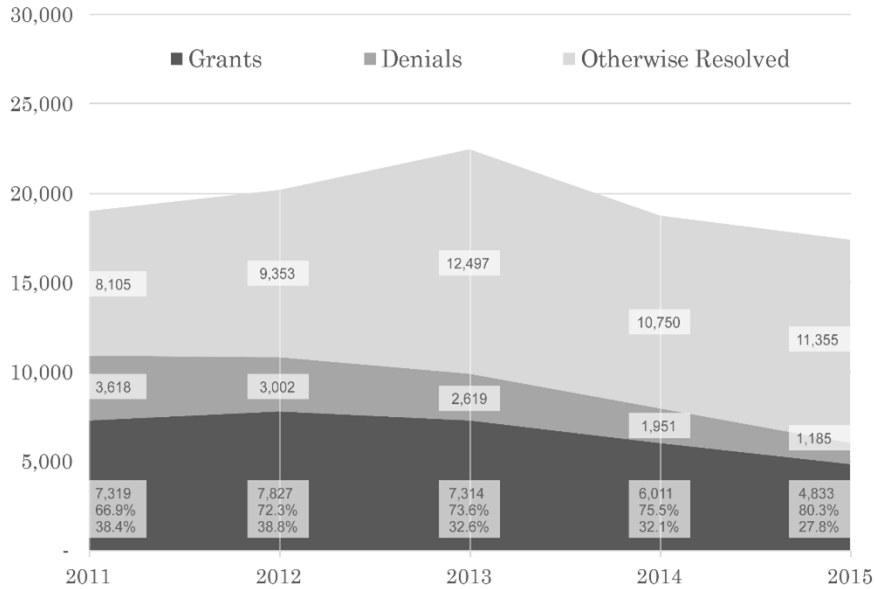
	2006	2008	2010	2012	2014
Grants	10,059	9,796	9,174	12,991	10,811
Referrals	19,061	17,374	15,784	17,948	12,034
Denials	2,202	4,188	958	922	582
Otherwise Resolved	40,960	10,780	1,677	1,318	2,008

Source: USCIS Refugees, Asylum and Parole System, Asylum Office Workload by Fiscal Year, FY 1991–2015.

The next set of figures reports on asylum claims decided by immigration judges. Figure 2.5 shows the outcomes in cases that started with an affirmative application and then, after the Asylum Office did not grant asylum, were referred to immigration court. For 2015, for example, immigration judges granted 4,833 asylum claims and denied 1,185 claims. Looking only at the cases that were resolved by a decision to grant or to deny yields an apparent grant rate of 80 percent, but note this percentage exaggerates the rate at which the immigration court differed from the USCIS asylum officer’s prior decision on the same individual’s affirmative application. Figure 2.5 also shows that an additional 11,355 cases were otherwise resolved in 2015, such as by withdrawal, abandonment, the grant of some

other type of relief, or change of venue. Of all asylum cases that reached a decision in 2015, 27.8 percent were grants. Over half of affirmative asylum claims referred to immigration court by asylum officers were not resolved on the merits.

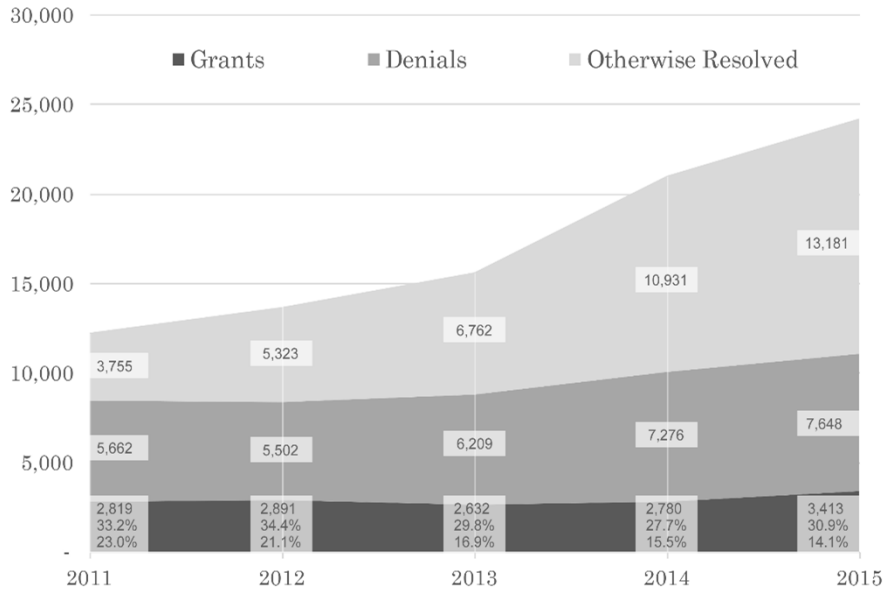
Figure 2.5
Immigration Court Grants and Denials of Affirmative Asylum Claims
Referred by Asylum Officers, 2011–2015



Source: Executive Office for Immigration Review,
 Office of Planning, Analysis, and Statistics,
 Asylum Completions by Asylum Type and Disposition, FY 2011-2015.

Figure 2.6 shows the outcomes in cases that started defensively in immigration court without a prior affirmative application to USCIS. In 2015, asylum grants in these cases numbered 3,413 and denials numbered 7,648. The grant rate was 30.9 percent of the cases that resulted in grants or denials, but an additional 13,181 cases were otherwise resolved, such as by withdrawal, abandonment, the grant of some other type of relief, or change of venue. The grant rate was 14.1 percent of all the defensive asylum claims that reached a decision in 2015.

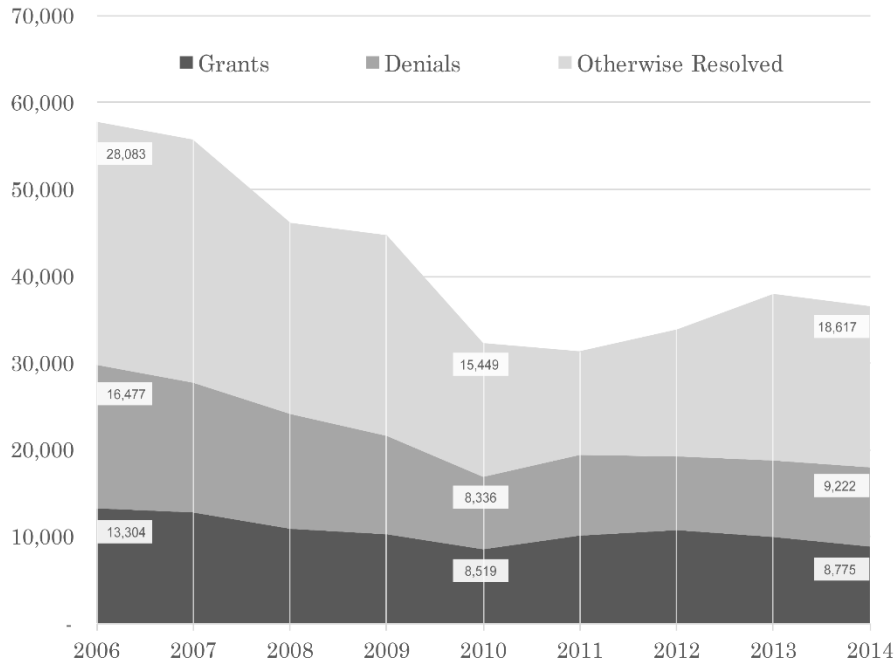
Figure 2.6
Immigration Court Grants and Denials of Defensive Claims First Filed in
Immigration Court, 2011–2015



Source: Executive Office for Immigration Review,
 Office of Planning, Analysis, and Statistics,
 Asylum Completions by Asylum Type and Disposition, FY 2011-2015.

Figure 2.7 shows outcomes in asylum applications in immigration court. These applications include both cases referred to immigration court by USCIS asylum officers and cases filed initially in immigration court. Not included are cases in which USCIS asylum officers already granted asylum on the basis of an affirmative application.

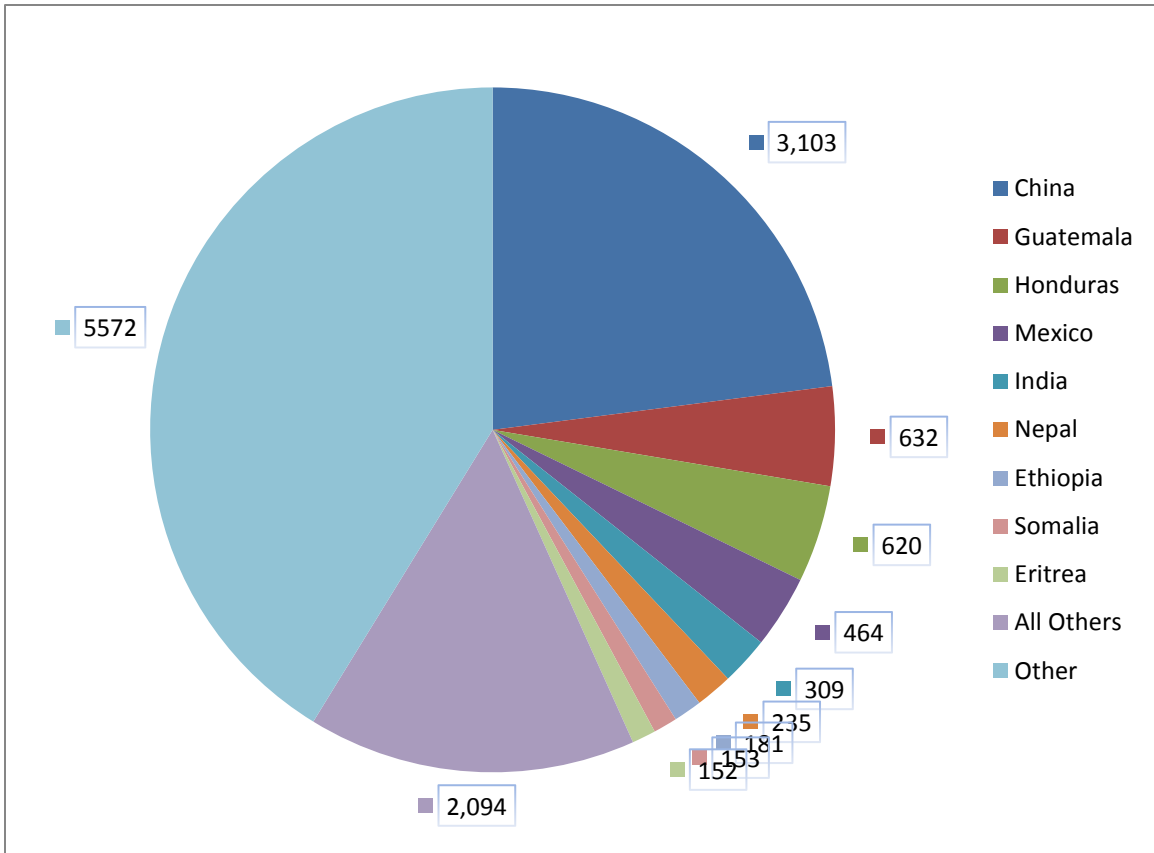
Figure 2.7
Results in All Asylum Cases Filed with
Immigration Courts, 2006–2014



Source: EOIR FY 2014 Statistics Yearbook, Figure 19;
 EOIR FY 2010 Statistical Year Book, Figure 19.

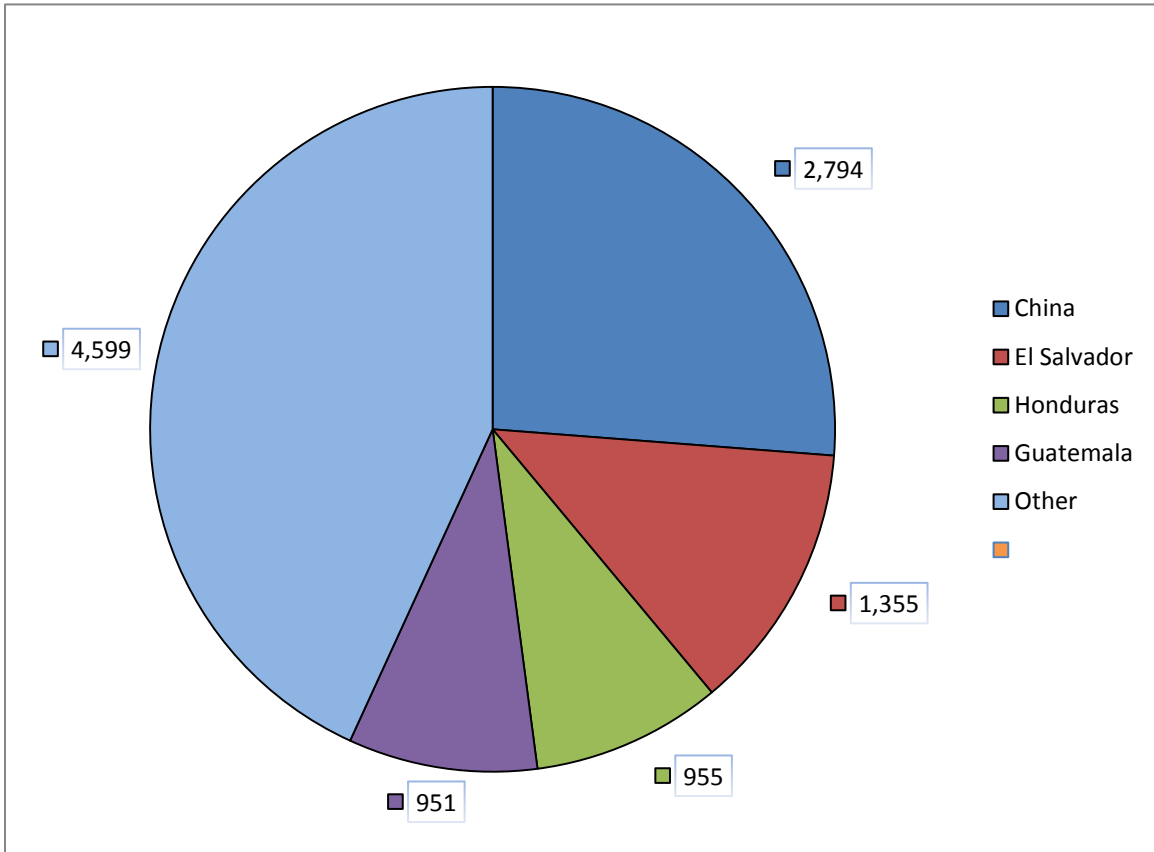
Figures 2.8 and 2.9 show the ten countries most represented among those granted asylum in the United States in recent years. Figure 2.8 shows the top ten nationalities for affirmative applications granted by USCIS in 2015. Figure 2.9 shows the top nationalities for asylum claims granted by immigration judges in 2017. Chinese applicants comprised roughly 15 percent of all asylum cases approved by USCIS, but were granted almost 35 percent of all approvals in immigration court. The second largest group of successful applicants at both USCIS and Immigration Court came from El Salvador. Egyptians formed the third largest group at USCIS, while Guatemalans were the third largest group of approvals in immigration court. Do any of the listed countries or any omissions surprise you? Is it significant that the USCIS data is from 2015 and the Immigration Court data is from 2016?

Figure 2.8
Asylum Cases Approved by USCIS, FY 2016



Source: 2016 EIOR Yearbook (2017), Figure 22.

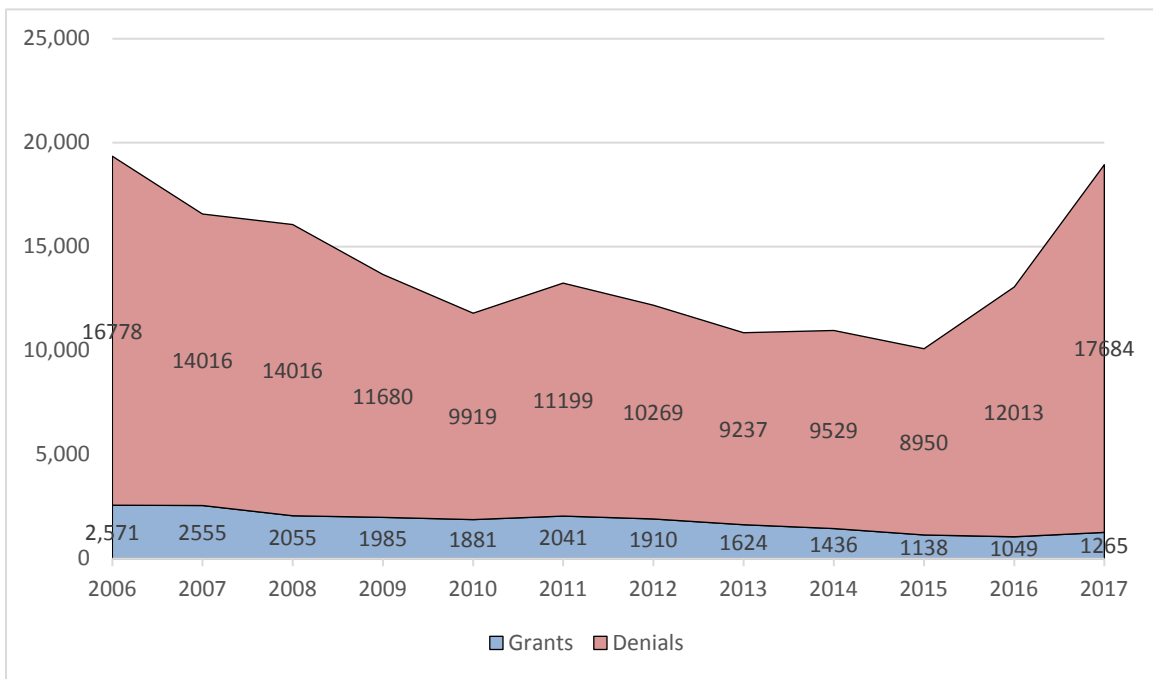
Figure 2.9
Asylum Cases Approved by Immigration Judges by Nationality, FY 2017



Source: 2017 EOIR Yearbook, Figure 24.

Figure 2.10 focuses on withholding of removal. Individuals seeking protection in the United States file Form I-589 to apply for asylum and withholding of removal. If an immigration judge rules against asylum, the next issue is withholding. (Immigration judges, not USCIS asylum officers, evaluate all withholding applications.) Figure 2.10 shows how many of these withholding applications—reached only after it has been established that asylum is unavailable—are granted and denied. In 2006, immigration judges granted withholding in 2,571 cases and denied in 16,778 cases. The percentage of grants was 13 percent. How had withholding decisions changed in 2017?

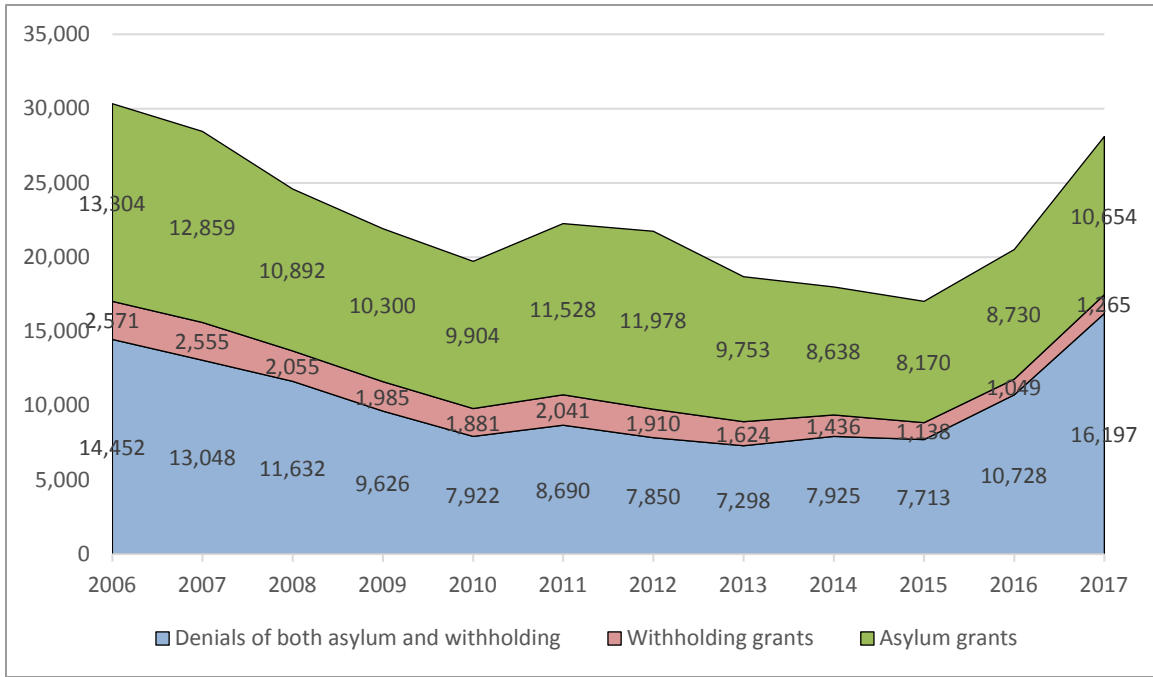
Figure 2.10
Immigration Courts Grants and Denials in
Withholding of Removal Cases, 2006–2017



Source: 2006 – 2017 EOIR Statistics Yearbooks, Figure 23.

Figure 2.11 shows the outcomes when immigration courts decide to grant or deny a claim for protection from persecution. Counting both asylum and withholding applications together, Figure 2.11 does not reflect the substantial number of asylum grants by USCIS asylum officers based on affirmative applications without involving an immigration court. Moreover, Figure 2.11 depicts only a portion of the asylum claims raised in immigration court. Roughly one-half of asylum and withholding cases in immigration court do not reach a substantive decision to grant or deny; they are withdrawn or abandoned, or they result in another disposition, as shown earlier in this section.

Figure 2.11
Immigration Court Grants and Denials in
Asylum and Withholding Cases, 2006–2017



	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017
denials of both asylum & withholding	14452	13048	11632	9626	7922	8690	7850	7,298	7,925	7,713	10,728	16,197
withholding grants	2571 8%	2555 9%	2055 9%	1985 9%	1881 10%	2041 9%	1910 9%	1624 8%	1436 8%	1138 7%	1049 5%	1265 4%
asylum grants	13304 44%	12859 45%	10892 44%	10300 47%	9904 50%	11528 52%	11978 55%	9,753 61%	8,638 56%	8,170 55%	8,730 48%	10,654 38%
total	30327	28462	24579	21911	19707	22259	21738	18675	17999	17021	20507	28116

Source: EOIR Statistical Year Books 2006-2017, Figure 22.

CHAPTER THREE
PERSECUTION

p. 176, at end of carryover paragraph, add new Note 3:

3. In December 2013, UNHCR issued a new set of guidelines concerning refugee claims by individuals seeking to avoid recruitment by and service in military forces, including forced recruitment by non-government armed militias. UNHCR, Guidelines on International Protection No. 10: Claims to Refugee Status related to Military Service within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, <http://unhcr.org/trends2013/>.

p. 185, at end of current Notes, add new Note 3:

3. In July 2014 the First Circuit had occasion to examine the intersection of past persecution and humanitarian asylum in a case that arose out of the decades-long civil war in Guatemala, *Ordonez-Quino v. Holder*, 760 F.3d 80 (1st Cir. 2014). Relying heavily on the report issued by the Guatemala Truth Commission, Commission of Historical Clarification, Guatemala Memory of Silence: Report Conclusions and Recommendations, Conclusions, ¶¶38—41 (1999), <http://www.aaas.org/sites/default/files/migrate/uploads/mosen.pdf>, the court overturned the Immigration Judge's and the BIA's conclusion that the applicant had not been a target of persecution in the past, but had rather been an unfortunate bystander in a war zone. The First Circuit emphasized the Truth Commission's finding that the Guatemalan army had committed genocide against Mayan people in the region where Ordonez-Quino lived. On remand, the court ordered the agency to evaluate whether the harm experienced by Ordonez-Quino, viewed from his perspective as a small child at the time it occurred, constituted past persecution on account of his Mayan ancestry. In addition, the court rejected the argument that Ordonez-Quino had waived his claim to humanitarian asylum because he had not explicitly raised it before the Immigration Judge and ordered this claim to be carefully evaluated on remand.

p. 246, at end of current Notes, add new Note 5:

5. The Attorney General's 2018 decision in *Matter of A-B-*, 27 I. & N. Dec. 316 (A.G. 2018), set out below at the material in this Update for casebook page 375, may signal more immigration judge latitude to deny asylum in the exercise of discretion. Footnote 12 of the decision states:

Neither the immigration judge nor the Board addressed the issue of discretion regarding the respondent's asylum application, and I decline to do so in the first instance. Nevertheless, I remind all asylum adjudicators that 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. Relevant discretionary factors include, *inter alia*, 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 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 her living conditions, safety, and potential for long-term residency there. *See Matter of Pula*, 19 I&N Dec. 467, 473-74 (BIA 1987).

CHAPTER FOUR
GROUND OF PERSECUTION

D. Membership in a Particular Social Group

**3. Applying the Criteria: Specific Settings and the Controversy over
“Social Visibility” and Particularity”**

b. Threats to Persons Who Resist Gang Recruitment

pp. 359-64, replace text with the following:

Recent cases have explored whether individuals connected in some way with gangs (sometimes as recruits, sometimes as former gang members, sometimes as opponents of gangs) should be viewed as particular social groups. In 2014 the BIA issued two precedent decisions that attempted to harmonize the case law and clarify the factors of “particularity” and “social visibility” or “social distinction” that had become prominent in asylum litigation.

MATTER OF M–E–V–G–

Board of Immigration Appeals, 2014
26 I. & N. Dec. 227

GUENDELSBERGER, BOARD MEMBER:

This case is before us on remand from the United States Court of Appeals for the Third Circuit for further consideration of the respondent’s applications for asylum and withholding of removal. The court declined to afford deference to our conclusion that a grant of asylum or withholding of removal under the “particular social group” ground of persecution requires the applicant to establish the elements of “particularity” and “social visibility.” Upon further consideration of the record and the arguments presented by the parties and amici curiae, we will clarify our interpretation of the phrase “particular social group.” We adhere to our prior interpretations of the phrase but emphasize that literal or “ocular” visibility is not required, and we rename the “social visibility” element as “social distinction.” * * *

* * * [T]he respondent claims that he suffered past persecution and has a well-founded fear of future persecution in his native Honduras because members of the Mara Salvatrucha gang beat him, kidnaped and assaulted him and his family while they were traveling in Guatemala, and threatened to kill him if he did not join the gang. In addition, the respondent testified that the gang members would shoot at him and throw rocks and spears at him about two to three times per week. The respondent asserts that he was persecuted “on account of his 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.”

* * * [The immigration judge denied asylum and withholding of removal. The BIA affirmed.] The case is now before us following a second remand from the Third Circuit. *Valdiviezo-Galdamez v. Att’y Gen. of U.S.*, 663 F.3d 582 (3d Cir. 2011). The court found that our requirement that a particular social group must possess the elements of “particularity” and “social visibility” is inconsistent with prior Board decisions, that we have not announced a “principled reason” for our adoption of that inconsistent requirement, and that our interpretation is not entitled to deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Nevertheless, the court advised that “an agency can change or adopt its policies” and recognized that the Board may add new requirements to, or even change, its definition of a “particular social group.”

* * *

III. PARTICULAR SOCIAL GROUP

* * *

The phrase “membership in a particular social group,” which is not defined in the Act, the Convention, or the Protocol, is ambiguous and difficult to define. * * * Congress has assigned the Attorney General the primary responsibility of construing ambiguous provisions in the immigration laws, and this responsibility has been delegated to the Board. The Board’s reasonable construction of an ambiguous term in the Act, such as “membership in a particular social group,” is entitled to deference. *See Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005); *Chevron*.

We first interpreted the phrase “membership in a particular social group” in *Matter of Acosta* [19 I&N Dec. 211 (BIA 1985)]. We found the doctrine of “ejusdem generis” helpful in defining the phrase, which we held should be interpreted on the same order as the other grounds of persecution in the Act. The phrase “persecution on account of membership in a particular social group” was interpreted to mean “persecution that is directed toward an individual who is a member of a group of persons all of whom share a common, immutable characteristic.” The common characteristic that defines the group must be one “that the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences.”

Matter of Acosta * * * rejected the applicant’s claim that a Salvadoran cooperative organization of taxi drivers was a particular social group, because members could change jobs and working in their job of choice was not a “fundamental” characteristic. *Id.* at 234. * * *

* * *

Now, close to three decades after *Acosta*, claims based on social group membership are numerous and varied. The generality permitted by the *Acosta* standard provided flexibility in the adjudication of asylum claims. However, it also led to confusion and a lack of consistency as adjudicators struggled with various possible social groups, some of which appeared to be created exclusively for asylum purposes. * * * [We have also] cautioned that “the social group concept would virtually swallow the entire refugee definition if common characteristics, coupled with a meaningful level of harm, were all that need be shown.”

* * *

In a series of cases, we applied the concepts of “social visibility” and “particularity” as important considerations in the particular social group analysis, and we ultimately deemed them to be requirements. *See Orellana-Monson v. Holder*, 685 F.3d 511, 521 (5th Cir. 2012).
* * *

In *Matter of C-A-*, we recognized “particularity” as a requirement in the particular social group analysis and held that the “social visibility” of the members of a claimed social group is “an important element in identifying the existence of a particular social group.” *Matter of C-A-*, 23 I&N Dec. 951, 957, 959–61 (BIA 2006) (holding that “noncriminal informants working against the Cali drug cartel” in Colombia were not a particular social group), *aff’d* 446 F.3d 1190 (11th Cir. 2006), *cert. denied*, 549 U.S. 1115 (2007). We subsequently determined that a “particular social group” cannot be defined exclusively by the claimed persecution, that it must be “recognizable” as a discrete group by others in the society, and that it must have well-defined boundaries. *Matter of A-M-E- & J-G-U-*, 24 I&N Dec. 69, 74–76 (BIA 2007) (holding that “wealthy” Guatemalans were not shown to be a particular social group within the meaning of the “refugee” description), *aff’d* 509 F.3d 70 (2d Cir. 2007).

Finally, in 2008, we issued *Matter of S-E-G-*, [24 I&N Dec. 579 (BIA 2008),] and *Matter of E-A-G-*, [24 I&N Dec. 591 (BIA 2008),] in which we held that – in addition to the common immutable characteristic requirement set forth in *Acosta* – the previously introduced concepts of “particularity” and “social visibility” were distinct requirements for the “membership in a particular social group” ground of persecution. * * *

Our articulation of these requirements has been met with approval in the clear majority of the Federal courts of appeals [citing cases from the 1st, 2d, 4th, 6th, 8th, 10th, and 11th Circuits]. However, it has not been universally accepted [citing cases from the 3d and 7th Circuits].

* * * [T]he respondent and amici curiae [including UNHCR] argue that the Board should disavow the requirements of “social visibility” and “particularity” and should restore *Matter of Acosta* as the sole standard for determining a particular social group. The Department of Homeland Security (“DHS”) argues that “social visibility” and “particularity” are valid refinements to the particular social group interpretation but that the two concepts should be clarified and streamlined into a single requirement.

IV. ANALYSIS

We take this opportunity to clarify our interpretation of the phrase “membership in a particular social group.” In doing so, we adhere to the social group requirements announced in *Matter of S-E-G-* and *Matter of E-A-G-*, as further explained here and in *Matter of W-G-R-*, 26 I&N Dec. 208 (BIA 2014), a decision published as a companion to this case.⁹ * * *

⁹ The Supreme Court has stated that administrative agencies may adopt a new or changed interpretation as long as it is based on a “reasoned explanation.” *FCC v. Fox Television Stations, Inc.*,

A. Protection Within the Refugee Context

The interpretation of the phrase “membership in a particular social group” does not occur in a contextual vacuum. * * *

The Act and the Protocol * * * identify “refugees” as only those who face persecution on account of “race, religion, nationality, membership in a particular social group, or political opinion.”

The limited nature of the protection offered by refugee law is highlighted by the fact that it does not cover those fleeing from natural or economic disaster, civil strife, or war. *See Matter of Sosa Ventura*, 25 I&N Dec. 391, 394 (BIA 2010) (explaining that Congress created the alternative relief of Temporary Protected Status because individuals fleeing from life-threatening natural disasters or a generalized state of violence within a country are not entitled to asylum). Similarly, asylum and refugee laws do not protect people from general conditions of strife, such as crime and other societal afflictions.

Unless an applicant has been targeted on a protected basis, he or she cannot establish a claim for asylum. * * *

The “membership in a particular social group” ground of persecution was not initially included in the refugee definition proposed by the committee that drafted the U.N. Convention; it was added later without discussion. The guidelines to the Protocol issued by the United Nations High Commissioner for Refugees (“UNHCR”) clearly state that the particular social group category was not meant to be “a ‘catch all’ that applies to all persons fearing persecution.”

Societies use a variety of means to distinguish individuals based on race, religion, nationality, and political opinion. The distinctions may be based on characteristics that are overt and visible to the naked eye or on those that are subtle and only discernible by people familiar with the particular culture. The characteristics are sometimes not literally visible. Some distinctions are based on beliefs and characteristics that are largely internal, such as religious or political beliefs. Individuals with certain religious or political beliefs may only be treated differently within society if their beliefs were made known or acted upon by the individual. The members of these factions generally understand their own affiliation with the grouping, and other people in the particular society understand that such a distinct group exists.

Therefore these enumerated grounds of persecution have more in common than simply describing persecution aimed at an immutable characteristic. They have an external perception component within a given society, which need not involve literal or “ocular” visibility. Considering the refugee context in which they arise, we find that the enumerated

556 U.S. 502, 515-16 (2009). Our decision in this case is not a new interpretation, but it further explains the importance of particularity and social distinction as part of the statutory definition of the phrase “particular social group.”

grounds all describe persecution aimed at an immutable characteristic that separates various factions within a particular society.

B. Particular Social Group

Given the suggestions [in federal court opinions] that further explanation of our interpretation of the phrase “particular social group” is warranted, we now provide such clarification based on the analysis set forth above.

The primary source of disagreement with, or confusion about, our prior interpretation of the term “particular social group” relates to the social visibility requirement. Contrary to our intent, the term “social visibility” has led some to believe that literal, that is, “ocular” or “on-sight,” visibility is required to make a particular social group cognizable under the Act. Because of that misconception, we now rename the “social visibility” requirement as “social distinction.” This new name more accurately describes the function of the requirement.

Thus, we clarify that an applicant for asylum or withholding of removal seeking relief based on “membership in a particular social group” must establish that the group is

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

1. Overview of Criteria

The criteria of particularity and social distinction are consistent with both the language of the Act and our earlier precedents. By defining these concepts in *Matter of C-A-* and the cases that followed it, we did not depart from or abrogate the definition of a particular social group that was set forth in *Matter of Acosta*; nor did we adopt a new approach to defining particular social groups under the Act.

Our interpretation of the phrase “membership in a particular social group” incorporates the common immutable characteristic standard set forth in *Matter of Acosta*[.]
* * *

The “particularity” requirement relates to the group’s boundaries or, as earlier court decisions described it, the need to put “outer limits” on the definition of a “particular social group.” See *Castellano-Chacon v. INS*, 341 F.3d 533, 549 (6th Cir. 2003); *Sanchez-Trujillo v. INS*, 801 F.2d at 1576. The particular social group analysis does not occur in isolation, but rather in the context of the society out of which the claim for asylum arises. Thus, the “social distinction” requirement considers whether those with a common immutable characteristic are set apart, or distinct, from other persons within the society in some significant way. In other words, if 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. A viable particular social group should be perceived within the given society as a sufficiently distinct group. The members of a particular social group will generally

understand their own affiliation with the grouping, as will other people in the particular society.¹²

* * * Our precedents have collectively focused on the extent to which the group is understood to exist as a recognized component of the society in question.

2. “Particularity”

While we addressed the immutability requirement in *Acosta*, the term “particularity” is included in the plain language of the Act and is consistent with the specificity by which race, religion, nationality, and political opinion are commonly defined.¹³ The Tenth Circuit recently noted that “the particularity requirement flows quite naturally from the language of the statute, which, of course, specifically refers to membership in a ‘*particular* social group.’”

A particular social group must be defined by characteristics that provide a clear benchmark for determining who falls within the group. *Matter of A–M–E– & J–G–U–*, 24 I&N Dec. at 76 (holding that wealthy Guatemalans lack the requisite particularity to be a particular social group). It is critical that the terms used to describe the group have commonly accepted definitions in the society of which the group is a part. *Id.* (observing that the concept of wealth is too subjective to provide an adequate benchmark for defining a particular social group).

The group must also be discrete and have definable boundaries – it must not be amorphous, overbroad, diffuse, or subjective. The particularity requirement clarifies the point, at least implicit in earlier case law, that not every “immutable characteristic” is sufficiently precise to define a particular social group. *See, e.g., Escobar v. Gonzales*, 417 F.3d 363, 368 (3d Cir. 2005) (finding the characteristics of poverty, homelessness, and youth to be “too vague and all encompassing” to set perimeters for a protected group within the scope of the Act).

3. “Social Distinction”

Our definition of “social visibility” has emphasized the importance of “perception” or “recognition” in the concept of “particular social group.” *See Matter of H–*, 21 I&N Dec. 337, 342 (BIA 1996) (in Somali society, clan membership is a “highly recognizable” characteristic that is “inextricably linked to family ties”). The term was never meant to be read literally. The renamed requirement “social distinction” clarifies that social visibility does not mean “ocular” visibility – either of the group as a whole or of individuals within the group – any

¹² Although members of a particular social group will generally understand their own affiliation with the group, such self-awareness is not a requirement for the group’s existence. Nevertheless, as a practical matter, this point is of little import because the applicants in removal proceedings are generally professing their membership in these groups in the process of seeking asylum.

¹³ However, there is a critical difference between a political opinion or religious belief, which may in theory be entirely personal and idiosyncratic, and membership in a particular social group, which requires that others in the society share the characteristics that define the group.

more than a person holding a protected religious or political belief must be “ocularly” visible to others in society. Social distinction refers to social recognition, taking as its basis the plain language of the Act – in this case, the word “social.” To be socially distinct, a group need not be seen by society; rather, it must be perceived as a group by society. Society can consider persons to comprise a group without being able to identify the group’s members on sight.

* * * For this reason, the fact that members of a particular social group may make efforts to hide their membership in the group to avoid persecution does not deprive the group of its protected status as a particular social group.

* * * [T]here is considerable overlap between the “social distinction” and “particularity” requirements, which has resulted in confusion. * * *

The “social distinction” and “particularity” requirements each emphasize a different aspect of a particular social group. * * * While “particularity” chiefly addresses the “outer limits” of a group’s boundaries and is definitional in nature, this question necessarily occurs in the context of the society in which the claim for asylum arises. Societal considerations have a significant impact on whether a proposed group describes a collection of people with appropriately defined boundaries and is sufficiently “particular.” Similarly, societal considerations influence whether the people of a given society would perceive a proposed group as sufficiently separate or distinct to meet the “social distinction” test.

For example, in an underdeveloped, oligarchical society, “landowners” may be a sufficiently discrete class to meet the criterion of particularity, and the society may view landowners as a discrete group, sufficient to meet the social distinction test. However, such a group would likely be far too amorphous to meet the particularity requirement in Canada, and Canadian society may not view landowners as sufficiently distinct from the rest of society to satisfy the social distinction test. In analyzing whether either of these hypothetical claims would establish a particular social group under the Act, an Immigration Judge should make findings whether “landowners” share a common immutable characteristic, whether the group is discrete or amorphous, and whether the society in question considers “landowners” as a significantly distinct group within the society. Thus, the concepts may overlap in application, but each serves a separate purpose.

4. Society’s Perception

The Ninth Circuit has recently observed that neither it nor the Board “has clearly specified whose perspectives are most indicative of society’s perception of a particular social group.” *Henriquez-Rivas v. Holder*, 707 F.3d at 1089). Interpreting “membership in a particular social group” consistently with the other statutory grounds within the context of refugee protection, we clarify that a group’s recognition for asylum purposes is determined by the perception of the society in question, rather than by the perception of the persecutor.

Defining a social group based on the perception of the persecutor is problematic for two significant reasons. First, it is important to distinguish between the inquiry into whether a group is a “particular social group” and the question whether a person is persecuted “on

account of” membership in a particular social group. In other words, we must separate the assessment whether the applicant has established the existence of one of the enumerated grounds (religion, political opinion, race, ethnicity, and particular social group) from the issue of nexus. The structure of the Act supports preserving this distinction, which should not be blurred by defining a social group based solely on the perception of the persecutor.

Second, defining a particular social group from the perspective of the persecutor is in conflict with our prior holding that “a social group cannot be defined exclusively by the fact that its members have been subjected to harm.” *Matter of A-M-E- & J-G-U-*, 24 I&N Dec. at 74. The perception of the applicant’s persecutors may be relevant, because it can be indicative of whether society views the group as distinct. However, the persecutors’ perception is not itself enough to make a group socially distinct, and persecutory conduct alone cannot define the group.

For example, a proposed social group composed of former employees of a country’s attorney general may not be valid for asylum purposes. Although such a shared past experience is immutable and the group is sufficiently discrete, the employees may not consider themselves a separate group within the society, and the society may not consider these employees to be meaningfully distinct within society in general. * * *

[If the government begins persecuting the former employees,] it is possible that 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. The act of persecution by the government may be the catalyst that causes the society to distinguish the former employees in a meaningful way and consider them a distinct group, but the immutable characteristic of their shared past experience exists independent of the persecution.

The persecutor’s actions or perceptions may also be relevant in cases involving persecution on account of “imputed” grounds * * *. For example, an individual may present a valid asylum claim if he is incorrectly identified as a homosexual by a government that registers and maintains files on homosexuals—in a society that considers homosexuals a distinct group united by a common immutable characteristic. In such a case, the social group exists independent of the persecution, and the perception of the persecutor is relevant to the issue of nexus (whether the persecution was or would be on account of the applicant’s imputed homosexuality).

Persecution limited to a remote region of a country may invite an inquiry into a more limited subset of the country’s society * * *. However, the refugee analysis must still consider whether government protection is available, internal relocation is possible, and persecution extends countrywide. * * *

C. Evidentiary Burdens

* * *

[T]he applicant has the burden to establish a claim based on membership in a particular social group and will be required to present evidence that the proposed group

exists in the society in question. * * * [A] successful case will require evidence that members of the proposed particular social group share a common immutable characteristic, that the group is sufficiently particular, and that it is set apart within the society in some significant way. Evidence such as country conditions reports, expert witness testimony, and press accounts of discriminatory laws and policies, historical animosities, and the like may establish that a group exists and is perceived as “distinct” or “other” in a particular society. * * *

D. Consistency with Prior Board Precedent

In its decision, the Third Circuit declined to afford *Chevron* deference to our prior interpretation of the requirements for a particular social group because it perceived them to be inconsistent with our past decisions, in particular *Matter of Kasinga*, *Matter of Toboso-Alfonso*, and *Matter of Fuentes*. * * *

* * *

[In *Matter of Toboso-Alfonso*, 20 I & N Dec. 819 (BIA 1990) the proposed group,] homosexuals in Cuba, was sufficiently particular because it was a discrete group with well-defined boundaries. The group was based on an immutable characteristic that provided an adequate benchmark for defining the members of the group, and it did not rely on a vague or subjective characteristic. The record established the existence of a Cuban governmental office that registered and maintained files on homosexuals. The applicant testified that residents threw eggs and tomatoes at him when he was being forced to leave the country because of his status as a homosexual, and he submitted evidence that suspected homosexuals were subjected to physical examinations, interrogations, and beatings. On those facts, it was clear that people in Cuban society considered homosexuals to be a discrete and distinct group within the society and that a homosexual in Cuba would have generally understood his or her affiliation with the grouping. The group was therefore particular and socially distinct within the society in question.

In *Matter of Kasinga*, [21 I & N Dec. 357 (BIA 1996), the] proposed group of young women of a certain tribe who had not been subjected to FGM and opposed the practice was sufficiently particular because it presented a group that had clear and definable boundaries. The record contained objective evidence regarding the prevalence of FGM in the society in question and the expectation that women of the tribe would undergo FGM. Based on these facts, we found that people in the Tchamba-Kunsuntu Tribe would generally consider women who had not undergone FGM and opposed the practice to be a discrete and distinct group that was set apart in a significant way from the rest of the society. Such women would clearly understand their affiliation with this grouping. Thus, the proposed group was particular and was perceived as socially distinct within the society in question.

In *Matter of Fuentes*, [19 I & N Dec. 658 (BIA 1988),] the fundamental characteristic at issue was also not visible. However, we did not hold that “former member[s] of the national police of El Salvador” necessarily constituted a viable particular social group. Rather, we merely recognized that the applicant’s status as a former policeman was an immutable

characteristic because it was beyond his capacity to change, and we noted that it is “*possible* that mistreatment occurring because of such a status in appropriate circumstances *could* be found to be persecution on account of political opinion or membership in a particular social group.” The applicant in *Fuentes* presented some evidence of social distinction, because the national police played a high-profile role in combating guerrilla violence, and a witness testified that “guerrillas had the names of the people who had been in the service” and targeted and killed former service members. However, because we held that the applicant did not show that the harm he feared bore a nexus to his status as a former member of the national police, we did not fully assess the factors that underlie particularity and social distinction.

In *Matter of C-A-*, we found that “noncriminal drug informants working against the Cali drug cartel” in Colombia were not a particular social group, and we emphasized that “[s]ocial groups based on innate characteristics such as sex or family relationship are generally easily recognizable and understood by others to constitute social groups.” *Matter of C-A-*, 23 I & N Dec. at 957, 959–60 . * * * To the extent that *Matter of C-A-* has been interpreted as requiring literal or “ocular” visibility, we now clarify that it does not.

* * *

E. International Interpretations

Although the statutory terms “refugee” and “particular social group” occur against the backdrop of the Protocol and the Convention, international interpretations of those terms are not controlling here.

We recognize that our interpretation of the ambiguous phrase “particular social group” differs from the approach set forth in the UNHCR’s social group guidelines, which sought to reconcile two international interpretations that had developed over the years. The UNHCR advocates an alternative approach, which permits an individual to establish a particular social group based on “protected characteristics” or “social perception” but does not require both. However, the European Union adopted a “particular social group” definition that departs from the UNHCR Guidelines by requiring a social group to have both an immutable/fundamental characteristic and social perception.²

² Article 10.1(d) of the European Union’s guidelines states:
[A] group shall be considered to form a particular social group where in particular:
—members of that group share an innate characteristic, or a common background that cannot be changed, or share a characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it, *and*
—that group has a distinct identity in the relevant country, because it is perceived as being different by the surrounding society.
Directive 2011/95/EU, of the European Parliament and of the Council of 13 December 2011 on Standards for the Qualification of Third-Country Nationals or Stateless Persons as Beneficiaries of International Protection * * * .

While the views of the UNHCR are a useful interpretative aid, they are “not binding on the Attorney General, the BIA, or United States courts.” *INS v. Aguirre-Aguirre*, 526 U.S. at 427. * * *

We believe that our interpretation in *Matter of S-E-G-* and *Matter of E-A-G-*, as clarified, more accurately captures the concepts underlying the United States’ obligations under the Protocol and will ensure greater consistency in the adjudication of asylum claims under the Act. See *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967; *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837. Unlike the UNHCR’s alternative approach, we conclude that a particular social group must satisfy both the “protected characteristic” and “social perception” approaches, in addition to the particularity requirement, as described above.

V. APPLICATION TO THE RESPONDENT

In our prior decision in this case, we rejected the respondent’s gang-related claim based on the reasoning set forth in *Matter of S-E-G-* and *Matter of E-A-G-*. * * *³

* * *

Against the backdrop of widespread gang violence affecting vast segments of the country’s population [in El Salvador], the applicant in *Matter of S-E-G-* could not establish that he had been targeted on a protected basis. Although he was subjected to one of the many different criminal activities that the gang used to sustain its criminal enterprise, he did not demonstrate that he was more likely to be persecuted by the gang on account of a protected ground than was any other member of the society.

The prevalence of gang violence in many countries is a large societal problem. The gangs may target one segment of the population for recruitment, another for extortion, and yet others for kidnapping, trafficking in drugs and people, and other crimes. Although certain segments of a population may be more susceptible to one type of criminal activity than another, the residents all generally suffer from the gang’s criminal efforts to sustain its enterprise in the area. A national community may struggle with significant societal problems resulting from gangs, but not all societal problems are bases for asylum. * * *

Nevertheless, we emphasize that our holdings in *Matter of S-E-G-* and *Matter of E-A-G-* should not be read as a blanket rejection of all factual scenarios involving gangs. Social group determinations are made on a case-by-case basis. For example, a factual scenario in which gangs are targeting homosexuals may support a particular social group claim. While persecution on account of a protected ground cannot be inferred merely from acts of random violence and the existence of civil strife, it is clear that persecution on account of a protected

³ We also rejected the applicant’s second proposed social group of “young persons who are perceived to be affiliated with gangs.” We held that membership, or perceived membership, in a criminal gang cannot constitute a particular social group because “[t]reating affiliation with a criminal organization as being protected membership in a social group is inconsistent with the principles underlying the bars to asylum and withholding of removal based on criminal behavior.” *Id.* at 596; see also *Arteaga v. Mukasey*, 511 F.3d 940 (9th Cir. 2007).

ground may occur during periods of civil strife if the victim is targeted on account of a protected ground.

VI. CONCLUSION

We interpret the “particular social group” ground of persecution in a manner consistent with the other enumerated grounds of persecution in the Act and clarify that our interpretation of the phrase “membership in a particular social group” requires an applicant for asylum or withholding of removal to establish that the group is (1) composed of members who share a common immutable characteristic, (2) defined with particularity, and (3) socially distinct within the society in question. Not every “immutable characteristic” is sufficiently precise to define a particular social group. The additional requirements of “particularity” and “social distinction” are necessary to ensure that the proposed social group is perceived as a distinct and discrete group by society. * * *

* * *

The clarification and guidance provided by our decision in this matter may have an impact on the validity of the respondent’s proposed group, which, in turn, may affect whether any persecution would be “on account of” his membership in such group. On remand, both parties will have an opportunity to present updated country conditions evidence and arguments regarding the respondent’s particular social group claim, and the Immigration Judge may conduct further proceedings as is deemed appropriate under the circumstances. Accordingly, the record will be remanded to the Immigration Judge.

p. 364, add new subsection:

c. Threats to Family Members of Individuals Targeted by Gangs

Gang-related violence has continued to generate asylum claims from a variety of individuals targeted by gangs. In the following excerpt the Fourth Circuit considered the asylum claim of a mother threatened by gang members for her opposition to their recruitment of her son.

HERNANDEZ-AVALOS v. LYNCH

United States Court of Appeals for the Fourth Circuit, 2015
784 F.3d 944

SHEDD, CIRCUIT JUDGE:

[Maydai Hernandez-Avalos and her minor son, citizens of El Salvador, requested asylum in the United States. In testimony deemed credible by the Immigration Judge, Hernandez-Avalos testified that heavily armed members of the Mara 18 gang came to her house and threatened to kill her on three different occasions. Twice gang members put a gun to her head and said they would kill her if she prevented her twelve-year-old son from joining the gang; the evening before she fled the gang members threatened to kill her the next day if she interfered with their forced recruitment of her son. The Immigration Judge ruled that she had not shown she was likely to suffer future persecution based on membership in a particular social group, denied relief, and ordered her removed to El Salvador. The BIA affirmed.]

* * * Hernandez claims, and the government correctly acknowledges, that membership in a nuclear family qualifies as a protected ground for asylum purposes.

The government argues, however, that the BIA was correct in holding that Hernandez's persecution was not "on account of" her family ties. * * *

The BIA * * * reasoned that "[s]he was not threatened because of her relationship to her son (i.e. family), but rather because she would not consent to her son engaging in a criminal activity." The government argues that * * * the fact that the person blocking the gang members' recruitment effort was their membership target's mother was merely incidental to the recruitment aim.

We believe that this is an excessively narrow reading of the requirement that persecution be undertaken "on account of membership in a nuclear family." Hernandez's relationship to her son is why she, and not another person, was threatened with death if she did not allow him to join Mara 18, and the gang members' demands leveraged her maternal authority to control her son's activities.

The BIA's conclusion that these threats were directed at her not because she is his mother but because she exercises control over her son's activities draws a meaningless distinction under these facts. It is therefore unreasonable to assert that the fact that Hernandez is her son's mother is not *at least one* central reason for her persecution.

* * *

[I]n this case Mara 18 threatened Hernandez in order to recruit her son into their ranks, but they also threatened *Hernandez*, rather than another person, because of her family connection to her son. Thus, * * * there were multiple central reasons for the threats Hernandez received.

Because any reasonable adjudicator would be compelled to conclude that Hernandez's maternal relationship to her son is at least one central reason for two of the threats she received, we hold that the BIA's conclusion that these threats were not made "on account of" her membership in her nuclear family is manifestly contrary to law and an abuse of discretion.
* * *

* * *

[The court also reviewed the evidence concerning whether the Salvadoran government was unable or unwilling to protect Hernandez-Avalos from the gang members, concluded that it was legally deficient, and held that she had established her eligibility for asylum.]

For the foregoing reasons, we grant Hernandez's petition for review and remand the case to the BIA for further proceedings consistent with this opinion.

Many questioned whether the Fourth Circuit's *Hernandez-Avalos* ruling in favor of asylum for a mother of a youth resisting gang recruitment in El Salvador could be reconciled with the BIA's conclusion in *Matter of M-E-V-G*—that young men who resist recruitment by

Honduran gangs do not constitute a particular social group. Are *mothers* (or *families*) more socially distinct than *youth*? Is it sensible to deny protection to the recruit, but to grant protection to the person who is threatened on account of the recruit? Federal courts have come to different conclusions on these issues. Compare *Hernandos-Avalos v. Lynch*, *supra*, and *Flores-Rios v. Lynch*, 807 F. 3d 1123 (9th Cir. 2015) (applicant’s family constitutes particular social group when applicant’s father was killed by gangs) with *Ramirez-Mejia v. Lynch*, 794 F. 3d 485 (5th Cir. 2015) (brother’s murder by rival gang does not constitute persecution based on particular social group), *Lin v. Holder*, 411 F. App’x 901 (7th Cir. 2011) (persecution by father’s creditors is not particular social group-based persecution), and *Malonga v. Holder*, 621 F. 3d 757 (8th Cir. 2010) (father’s death during civil war does not support particular social group claim).

The circuit split led the BIA to invite supplemental briefing and amicus briefs on the circumstances in which persecution of a family member supports the applicant’s particular social group claim. DHS filed a supplemental brief contending that it would be sufficient for an applicant to provide evidence that her membership in her immediate family was a central reason for the persecution she feared, and that the applicant would not need to furnish additional evidence that the persecutor targeted the initial family member on account of one of the five protected grounds. DHS Supplemental Brief, *In the Matter of Luis Enrique Alba*, April 21, 2016. As we go to press, the BIA has not rendered a ruling.

After *Hernandez-Avalos v. Lynch*:

NOTE TO INSTRUCTORS:

Option 1: Instructors may choose to cover *Matter of L-E-A-* here because it addresses membership in a particular social group. It also refers back to *Matter of A-B-* and comments on domestic violence and gang cases more broadly.

Option 2: Instructors may wish to substitute *Matter of L-E-A-* for *Matter of A-B-* and/or *Matter of A-R-C-G*, which *Matter of A-B-* overrules, or instead to cover *Matter of A-R-C-G-* as a point of comparison with *Matter of L-E-A-*.

Gang-related violence has continued to generate asylum claims. In December 2018, Acting Attorney General Matthew Whitaker referred the decision in the following case to himself for decision. Parties and interested amici were invited to submit briefs on issues in the case, including “*Whether and under what circumstances, an alien may establish persecution on account of membership in a ‘particular social group’ under [INA 101(a)(42)(A)] based on the alien’s membership in a family unit.*” In July 2019, Attorney General William Barr issued the following opinion.

MATTER OF L-E-A-

Attorney General, 2019
27 I & N Dec. 581

* * *

BEFORE THE ATTORNEY GENERAL

* * * This case once again requires interpretation of what it means to suffer persecution on account of “membership in a particular social group” * * *.

The respondent contends that he was persecuted by a criminal gang on account of his membership in the “particular social group” defined as the “immediate family of his father,” who owned a store targeted by a local drug cartel. Under existing Board precedent, a particular social group must share “a common immutable characteristic” that is defined with particularity and “set apart, or distinct, from other persons within the society in some significant way.” The alien bears the burden of showing that his proposed group meets these criteria, and he will not satisfy that burden solely by showing that his social group has been the target of private criminal activity. The fact that a criminal group—such as a drug cartel, gang, or guerrilla force—targets a group of people does not, standing alone, transform those people into a particular social group.

At the same time, the Board has recognized that a clan or similar group bound together by common ancestry, cultural ties, or language *may* constitute a “particular social group.” But what qualifies certain clans or kinship groups as particular social groups is not merely the genetic ties among the members. Rather, it is that those ties or other salient factors establish the kinship group, on its own terms, as a “recognized component of the society in question.” In that respect, the large and prominent kinship and clan groups that have been recognized by the Board as cognizable particular social groups stand on a very different footing from an alien’s immediate family, which generally will not be distinct on a societal scale, whether or not it attracts the attention of criminals who seek to exploit that family relationship in the service of their crimes.

Consistent with these prior decisions, I conclude that an alien’s family-based group will not constitute a particular social group unless it has been shown to be socially distinct in the eyes of its society, not just those of its alleged persecutor. Because the record does not support the determination in this case that the immediate family of the respondent’s father constituted a particular social group, I reverse the Board’s conclusion to the contrary.

I.

In 1998, the respondent, a Mexican citizen, illegally entered the United States. After a criminal conviction for driving under the influence, the Department of Homeland Security (“DHS”) initiated removal proceedings. The respondent accepted voluntary departure and returned to Mexico in May 2011. But he did not stay there long. By August 2011, the respondent had again illegally returned to the United States. DHS apprehended him and commenced removal proceedings. The respondent conceded removability, but this time sought asylum based upon a claim of persecution allegedly suffered during his brief return to Mexico.

According to the respondent, upon returning to Mexico, he had gone to live with his parents in Mexico City. His father operated a neighborhood general store there, but he had run afoul of La Familia Michoacana, a Mexican drug cartel. Because his father refused to sell the cartel’s drugs out of his store, the drug dealers evidently decided to retaliate against the

respondent upon his return. About a week after returning to Mexico City, the respondent was walking a few blocks from his home when he heard gunshots coming out of a black sport-utility vehicle. He dropped down to the ground and was unharmed. Although the respondent did not initially believe that he was the target of the shooting, he later concluded that he was, based upon the cartel's subsequent actions.

About a week later, four armed cartel members, driving the same black sport-utility vehicle, approached the respondent and asked him to agree to sell the cartel's drugs at his father's store. When the respondent declined, the cartel members threatened him and advised him to reconsider. Shortly thereafter, four masked men, in the same sport-utility vehicle, attempted to kidnap the respondent, but he managed to escape. After that incident, the respondent left Mexico City for Tijuana, where two months later, he illegally crossed back into the United States and was thereafter apprehended.

In his removal proceeding, the respondent claimed persecution in Mexico based on his membership in the particular social group comprising his father's immediate family. The immigration judge denied relief on the ground that the respondent had not shown he was the victim of anything more than criminal activity.

On appeal, the Board found that the respondent's relationship with his father established membership in a particular social group, namely "his father's immediate family." In reaching that conclusion, the Board relied upon DHS's concession "that the immediate family unit of the respondent's father qualifies as a cognizable social group." The Board recognized that, under the relevant precedents, a family-related group must satisfy the requirements of particularity and social distinction to qualify as a "particular social group" under the INA. And the Board noted that such a determination requires "a fact-based inquiry made on a case-by-case basis," and will not be satisfied by "all social groups that involve family members." But the Board did not perform such an inquiry; instead, it summarily concluded that "[i]n consideration of the facts of this case *and the agreement of the parties*, we have no difficulty identifying the respondent, a son residing in his father's home, as being a member of the particular social group comprised of his father's immediate family." (emphasis added).

Although it approved the claimed social group, the Board denied the respondent's asylum application because of the absence of the necessary nexus between his membership in the group and the persecution. * * *

* * *

II.

[The Attorney General disposed of several challenges to jurisdiction and his authority to review the case.]

III.

Turning now to the merits, I conclude that the Board erred in finding that the respondent's purported social group—the members of his father's immediate family—

qualified as a “particular social group” under the INA. * * * An applicant must establish that his specific family group is defined with sufficient particularity and is socially distinct in his society. In the ordinary case, a family group will not meet that standard, because it will not have the kind of identifying characteristics that render the family socially distinct within the society in question. * * *

A.

* * *

The Board first interpreted “persecution on account of membership in a particular social group” in [Matter of] *Acosta*. Noting that this provision “was added as an afterthought” to the CAT and that “Congress [similarly] did not indicate what it understood this ground of persecution to mean,” the Board turned to the language itself:

A purely linguistic analysis of this ground of persecution suggests that it may encompass persecution seeking to punish either people in a certain relation, or having a certain degree of similarity, to one another or people of like class or kindred interests, such as shared ethnic, cultural, or linguistic origins, education, family background, or perhaps economic activity.

Applying the doctrine of *ejusdem generis*, the Board read “particular social group” in a manner consistent with the other statutory grounds for persecution: race, religion, nationality, and political opinion. Because each of these terms describes “a characteristic that either is beyond the power of an individual to change or is so fundamental to an individual’s identity or conscience that it ought not be required to be changed,” the Board concluded that “membership in a particular social group” must similarly involve the sharing of a “common, immutable characteristic.” According to the Board, “[t]he shared characteristic might be an innate one such as sex, color, or kinship ties,” and immigration judges should engage in a case-by-case analysis to determine whether a particular innate characteristic would qualify. The Board did not clarify whether the sharing of a “common, immutable characteristic” was a sufficient, as opposed to just a necessary, condition for qualifying as a particular social group under the statutory definition of “refugee.”

In *Matter of H-*, the Board addressed the kind of kinship ties that might constitute membership in a particular social group. There, the Board found that the record established credible evidence that the Somali Marehan subclan constituted a “particular social group,” because the subclan was “distinct and recognizable” in Somali society with distinguishing “linguistic commonalities.” The Board relied on a legal opinion by the General Counsel of the Immigration and Naturalization Service, who stated that Somali “[c]lan membership is a highly recognizable, immutable characteristic;” that Somali clans are “defined by discrete criteria”; and that “membership in a clan is at the essence of a Somali’s identity in determining his or her relations to others in and outside of the clan.” The Board also recognized that annual reports issued by the Department of State spoke specifically to the “presence of distinct and recognizable clans and subclans in Somalia and the once-preferred position of the applicant’s Marehan subclan,” due to its association with former Somali President Siad Barre.

Over the decades since, the Board has refined the standard for identifying social groups that qualify for protection under the asylum statute. [A]n asylum applicant claiming membership in a particular social group must “establish that the group is: (1) composed of members who share a common immutable characteristic; (2) defined with particularity; and (3) socially distinct within the society in question.”

In *Matter of A-B*, Attorney General Sessions reaffirmed this approach and emphasized the importance of a rigorous application of that legal standard. Respondents must present facts to establish each of the required elements for asylum status, and the asylum officer, immigration judge, or Board must determine whether those facts satisfy the required elements. Based upon these immigration decisions, in the ordinary case, a nuclear family will not, without more, constitute a “particular social group” because most nuclear families are not inherently socially distinct.

* * *

I * * * recognize that certain courts of appeals have considered the requisite elements of a “particular social group” and, despite the requirements set forth in *M-E-V-G-* and *W-G-R-*, have nonetheless suggested that shared family ties alone are sufficient to satisfy the INA’s definition of “refugee”—regardless of whether the applicant’s specific family is defined with particularity or is socially distinct in his society. For instance, in *Rios v. Lynch*, the Ninth Circuit expressly observed that under the “refined framework” of *Matter of M-E-V-G-*, “the family . . . [is] the quintessential particular social group.” 807 F.3d 1123, 1128 (9th Cir. 2015). In addition, three other circuits have expressed the same view * * * .

* * *

To the extent, however, that any court of appeals decision is best interpreted as adopting a categorical rule that any nuclear family could constitute a cognizable “particular social group,” I believe that such a holding is inconsistent with both the asylum laws and the long-standing precedents of the Board. Since *Matter of Acosta*, the Board has emphasized that a “particular social group” must be particular and socially distinct in the society at question, which itself requires a fact-specific inquiry based on the evidence in a particular case. The application of contradictory rules by the courts of appeals is inappropriate because whether a specific family group constitutes a “particular social group” should be determined by the immigration courts in the first instance, as an exercise of the Attorney General’s delegated authority to interpret the INA.

The Attorney General has primary responsibility for construing and applying provisions in the immigration laws. The INA provides that, within the Executive Branch, the “determination and ruling by the Attorney General with respect to all questions of law shall be controlling.” INA § 103(a)(1). Plainly, the term “particular social group” is ambiguous, and every court of appeals to address the proper application of the phrase “particular social group” has deferred to decisions of the Board in the phrase’s application. Congress thus delegated to the Attorney General the discretion to reasonably interpret the meaning of “membership in a particular social group,” and such reasonable interpretations are entitled to deference. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984). As the

Supreme Court has recognized, “ambiguities in statutes within an agency’s jurisdiction to administer are delegations of authority to the agency to fill the statutory gap in reasonable fashion. Filling these gaps . . . involves difficult policy choices that agencies are better equipped to make than courts.” *Negusie v. Holder*, 555 U.S. 511, 523 (2009) * * *. This principle holds even in cases where the courts of appeals might have interpreted the phrase differently in the first instance. I therefore interpret the ambiguous term “particular social group” in the manner that I believe to be the most faithful to the text, purpose, and policies underlying the asylum statute.

B.

The Board has recognized that “kinship ties” may be one of the kinds of common, immutable characteristics that might form the basis for a “particular social group” under the INA. But the Board has never held that *every* type of family grouping would be cognizable as a particular social group. Here, the respondent argues that the immediate family of his father constitutes a particular social group because a local drug cartel had a dispute with his father, and the cartel chose to take that dispute out upon his family members. But the respondent did not show that anyone, other than perhaps the cartel, viewed the respondent’s family to be distinct in Mexican society. If cartels or other criminals created a cognizable family social group every time they victimized someone, then the social-distinction requirement would be effectively eliminated.

Under the *ejusdem generis* canon, the term “particular social group” must be read in conjunction with the terms preceding it, which cabin its reach, rather than as an “omnibus catch-all” for everyone who does not qualify under one of the other grounds for asylum. The INA expressly grants asylum to spouses and children of aliens who receive asylum if those family members are accompanying or following the original applicant to the United States. By contrast, the INA does not specify family ties alone as an independent basis for qualifying for asylum relief.

Further, as almost every alien is a member of a family of some kind, categorically recognizing families as particular social groups would render virtually every alien a member of a particular social group. There is no evidence that Congress intended the term “particular social group” to cast so wide a net. Moreover, INA § 101, within which the definition of “refugee” appears, uses the term family (or families) ten times in the definitions of other terms. If Congress intended for refugee status to turn on one’s suffering of persecution “on account of” family membership, Congress would have included family identity as one of the expressly enumerated covered grounds for persecution.

Thus, by the terms of the statutory definition of “refugee,” as well as according to long-standing principles set forth in BIA precedent, to qualify as a “particular social group,” an applicant must demonstrate that his family group meets each of the immutability, particularity, and social distinction requirements. While many family relationships will be immutable, some family-based group definitions may be too vague or amorphous to meet the particularity requirement—i.e., where an applicant cannot show discernible boundaries to

the group. *See, e.g.*, [*Matter of S-E-G-*, 24 I & N Dec. 579, 585 (BIA 2008)] (noting that the “proposed group of ‘family members,’ which could include fathers, mothers, siblings, uncles, aunts, nieces, nephews, grandparents, cousins, and others, is . . . too amorphous a category” to satisfy the particularity requirement). Further, many family-based social groups will have trouble qualifying as “socially distinct,” a requirement that contemplates that the applicant’s proposed group be “set apart, or distinct, from other persons within the society in some significant way.” *Matter of M-E-V-G-*, 26 I & N Dec. 227, 238 (BIA 2014).

Asylum applicants generally seek to establish family-based groups as “particular social groups” by raising one of two principal arguments. First, many applicants assert a specific family unit as their “particular social group.” But * * * when an applicant proposes a group composed of a specific family unit, he must show that his proposed group has some greater meaning in society. It is not enough that the family be set apart in the eye of the persecutor, because it is the perception of the relevant society—rather than the perception of the alien’s actual or potential persecutors—that matters.

In analyzing these claims, adjudicators must be careful to focus on the particular social group *as it is defined* by the applicant and ask whether *that group* is distinct in the society in question. If an applicant claims persecution based on membership in his father’s immediate family, then the adjudicator must ask whether *that* specific family is “set apart, or distinct, from other persons within the society in some significant way.” It is not sufficient to observe that the applicant’s society (or societies in general) place great significance on the concept of the family. If this were the case, virtually everyone in that society would be a member of a cognizable particular social group. The fact that “nuclear families” or some other widely recognized family unit generally carry societal importance says nothing about whether a *specific* nuclear family would be “recognizable by society at large.” [*Matter of A-B-*, 27 I & N Dec. 316, 336 (AG 2018).] The average family—even if it would otherwise satisfy the immutability and particularity requirements—is unlikely to be so recognized.

Second, other applicants define the relevant “particular social group” as a collection of familial relatives of persons who have certain shared characteristics. [citing as examples cases recognizing as social groups “immediate family members of Honduran women unable to leave a domestic relationship,” “family members of persons who have been killed by rival gang members,” “relatives of assassination suspects”). This is a common approach in asylum cases concerning gang violence. Often, this category of family classifications fails the social distinction requirement because there is little evidence to indicate that families sharing these characteristics are seen in society as cohesive and identifiable groups. Furthermore, when proposing these kinds of groups, applicants risk impermissibly defining their purported social group in terms of the persecution it has suffered or that it fears.

This opinion does not bar all family-based social groups from qualifying for asylum. To the contrary, in some societies, an applicant may present specific kinship groups or clans that, based on the evidence in the applicant’s case, are particular and socially distinct. But unless an immediate family carries greater societal import, it is unlikely that a proposed family-based group will be “distinct” in the way required by the INA for purposes of asylum.

Moreover, adjudicators should be skeptical of social groups that appear to be “defined principally, if not exclusively, for the purposes of [litigation] . . . without regard to the question of whether anyone in [a given country] perceives [those] group[s] to exist in any form whatsoever.” *In re R-A-*, 22 I & N Dec. 906, 918 (BIA 1999; AG 2001), *remanded for recons. in Matter of R-A-*, 24 I & N Dec. 629 (AG 2008).⁴

Here, * * * [t]he Board summarily concluded that “the facts of this case present a valid particular social group,” without explaining how the facts supported this finding or satisfied the particularity and social visibility requirements. This cursory treatment could not, and did not, satisfy the Board’s duty to ensure that the respondent satisfied the statutory requirements to qualify for asylum. The Board’s conclusion that the respondent’s proposed group presents a valid “particular social group” under the INA must be reversed.

IV.

* * *

For the reasons stated above, I overrule the portion of *Matter of L-E-A* discussing whether the proposed particular social group is cognizable. Furthermore, I abrogate all cases inconsistent with this opinion.

Although the Board relied on the parties’ concessions to find the existence of a particular social group in this case, it ultimately concluded that the respondent failed to establish a nexus between his purported particular social group and the persecution that he alleged and feared. I leave the Board’s analysis of the nexus requirement undisturbed and remand this matter to the immigration judge for further proceedings consistent with this opinion and the remaining portions of the Board’s decision below.

p. 364, Retitle heading:

d. Threats to Gang Members or Former Gang Members

p. 368, add immediately before the Notes on *Benitez Ramos*:

⁴ Some proposed group definitions appear, on their face, to be convoluted and to lack any greater importance in society. *See, e.g., Franco-Reyes v. Sessions*, 740 F. App’x 420, 421 (5th Cir. 2018) (proposed group comprising Salvadoran “nuclear fami[ies] [stet] headed by a woman with a partner who is perceived as being absent and who is perceived as having expatriated himself”); *Solomon-Membreno v. Holder*, 578 F. App’x 300, 301 (4th Cir. 2014) (proposed group comprising “young female students who are related to an individual who opposes gang practices and values”); *Rodriguez [v. U.S. Att’y Gen.]*, 735 F.3d 1302, 1306-07 (11th Cir. 2013) (proposed group comprising “Mexican farmers in the State of Michoacán, owning . . . farmland suitable for producing high yields of illegal drug crops (cannabis), who are subject to Drug Trafficking Organizations’ (DTOs’) extortion tactics on account of their ownership of said farmland and unwillingness to collaborate with the DTOs by refusing to grow and produce illegal drug crops or participate in illegal drug trafficking” (ellipses in original)); *Zavala v. Holder*, 353 F. App’x 631, 633 (2d Cir. 2009) (proposed group comprising “all persons who the Maras have targeted for revenge or recruitment as a form of repayment for that person’s family’s failure to support the guerrillas during the civil war”).

Five years after *Benitez Ramos*, the BIA issued *Matter of W-G-R-*, 26 I & N Dec. 208 (BIA 2014), a precedent decision involving a former gang member. The Board rejected the protection claim from a former member of the Mara Salvatrucha gang in El Salvador who had left the gang in 2001 after less than a year's membership. He had fled to the United States "after he was targeted for retribution for leaving the group." *Id.* at 209. The decision explained (*id.* at 221–22):

The boundaries of a group are not sufficiently definable unless the members of society generally agree on who is included in the group, and evidence that the social group proposed by the respondent is recognized within the society is lacking in this case.

In this regard, the boundaries of the group of "former gang members who have renounced their gang membership" are not adequately defined. The group would need further specificity to meet the particularity requirement. Our analysis illustrates the point that when a former association is the immutable characteristic that defines a proposed group, the group will often need to be further defined with respect to the duration or strength of the members' active participation in the activity and the recency of their active participation if it is to qualify as a particular social group under the Act.

The respondent also has not shown that his proposed social group meets the requirement of social distinction. The record contains scant evidence that Salvadoran society considers former gang members who have renounced their gang membership as a distinct social group. The record contains documentary evidence describing gangs, gang violence, and the treatment of gang members but very little documentation discussing the treatment or status of former gang members.

The BIA also offered an expanded discussion of when the views or perspective of the persecutor versus those of the society are relevant (*id.* at 223–24):

While the views of the persecutor might play a role in causing members of society to view a particular group as distinct, the persecutor's views play a greater role in determining whether persecution is inflicted on account of the victim's membership in a particular social group. Whether that nexus exists depends on the views and motives of the persecutor. The respondent bears the burden of showing that his membership in a particular social group was or will be a central reason for his persecution. Section 208(b)(1)(B)(i). Thus, in this case, even if the respondent had demonstrated a cognizable particular social group, and his membership in it, he also must show that those he fears would harm him because he belongs to that social group.

The respondent has not shown that any acts of retribution or punishment by gang members would be motivated by his status as a former gang member, rather than by the gang members' desire to enforce their code of conduct and punish infidelity to the gang. See *Matter of E-A-G-*, 24 I&N Dec. at 594 (noting that harm to a person who resisted gang recruitment "would arise from the individualized reaction of the gang to the specific behavior of the prospective recruit" and not from his general status as one who resisted recruitment). Thus, even if the respondent were a member of a cognizable particular social group, the record does not show that the retributive harm the respondent fears would bear a nexus to his status as a former gang member, as opposed to his acts in leaving the gang.

p. 368, change heading to *Notes on Former Gang Members*, and add new Note 1:

1. Is *Matter of W-G-R-* consistent with the Seventh Circuit's *Benitez Ramos v. Holder*? With the Ninth Circuit's *Arteaga v. Mukasey*? If asked to synthesize the three case holdings, how would you do so? In *Benitez Ramos*, Judge Posner says that Mara Salvatrucha is a "specific, well-recognized, indeed notorious gang. . . . It is neither unspecific nor amorphous." Does it follow from his statements that he would take judicial notice that all former members of Mara Salvatrucha meet the "particularity" and "social distinction" requirements and therefore constitute a particular social group?

p. 368, renumber Note 1 as Note 2 and replace first sentence with the following two sentences:

2. The BIA issued *Matter of W-G-R-* as a companion case to *Matter of M-E-V-G-*, *supra*. In both *Matter of W-G-R-* and *Matter of M-E-V-G-*, the Board applied a "social distinction" test. How is "social distinction" different from the government attorney's "social visibility" test in the *Benitez Ramos* case?

p. 368, renumber Note 2 as Note 3.

p. 368, add new Note 4:

4. Violent encounters with gangs continue to play a prominent role in asylum claims in the United States. New research sheds light on gender dynamics within gang culture, see Thomas Boerman & Jennifer Knapp, *Gang Culture and Violence Against Women in El Salvador, Honduras, Guatemala*, Immigration Briefings, March 2017, and on gang violence directed against religious leaders. Sabrineh Ardalan & Thomas Boerman, *Dynamics Between Gangs and the Church: An Overlooked Dimension of Central American Asylum Claims*, Immigration Briefings, July 2016. For a valuable and thorough analysis of gang-related research as relevant to asylum jurisprudence in the United States, see Jayesh Rathod, Eric Hershberg, & Dennis Stinthcomb, *Country Conditions in Central America and Asylum Decision-Making: Report from a January 2017 Workshop*, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2954216.

p. 369, add new heading and new text:

e. Unaccompanied Children and Youth Fleeing Gang Violence

More than 47,000 children and youth traveling without their parents crossed the Mexico-United States border between October 2013 and June 2014, 92% more than in the same period in the prior year. Most were from Honduras, El Salvador, and Guatemala, and many said that they were fleeing gangs and gang violence. Julia Preston, *New U.S. Effort to Aid Unaccompanied Child Migrants*, N.Y. Times, June 3, 2014, at A14. President Obama ordered FEMA, the Federal Emergency Management Agency, to coordinate efforts to shelter the minors while their legal claims could be assessed and family members in the United States could be located. *Id.* By July 29, 2014, the number had increased to 57,000. Julia Preston, *Most in Poll Say Children at Border Merit Relief*, N.Y. Times, July 29, 2014, at A14. House and Senate Committees held hearings, DOJ and EOIR announced measures to redeploy resources to respond to the urgent new circumstances, and the President sought a \$4.3 billion emergency supplemental appropriation to respond to the crisis, with \$3.7 billion earmarked for the health and safety of the recently arrived unaccompanied children and youth. 91 Interp. Rel. 1204-1210, July 14, 2014.

Political debate became heated. Republicans proposed to amend the 2008 Trafficking Victims Protection Reauthorization Act (TVPRA), which mandates that unaccompanied children from all countries other than Mexico and Canada be placed in formal removal proceedings and cared for by the Department of Health and Human Services while in U.S. custody. The initial Republican bill would expedite the removal of all unaccompanied minors, deploy the National Guard on the border with Mexico, and appropriate \$1.7 billion to respond to the crisis. Democratic lawmakers generally opposed amending the TVPRA and sought greater emergency funding. Theodore Schleifer, *G.O.P. Plan on Migrants Calls for Less Cash than Democrats and Obama Seek*, N.Y. Times, July 23, 2014, at A19. Before leaving on August 1st for a five-week recess, the House passed two bills, neither of which had a chance of becoming law. The first authorized \$694 million for the border crisis, approved expedited removal for children at the border, and supported an increased presence of the National Guard. The second would phase out the Deferred Action for Childhood Arrivals (DACA) program started in June 2012. With Congress deadlocked and in recess, no legislative action was in sight. Jonathan Weisman and Ashley Parker, *Congress Off for the Exits, But Few Cheer*, N.Y. Times, Aug. 1, 2014, at A1. For a useful summary of the legal issues, see Lisa Seghetti, Alison Siskin, & Ruth Ellen Wasem, *Unaccompanied Alien Children: An Overview*, Congressional Research Service, June 23, 2014, <http://fas.org/sgp/crs/homsec/R43599.pdf>.

UNHCR interviewed hundreds of unaccompanied children from Honduras, El Salvador, Guatemala, and Mexico and reported that 58% presented credible claims that warranted international protection. UNHCR, *Children on the Run: Unaccompanied Children Leaving Central America and Mexico and the Need for International Protection*, March 2014, http://www.unhcrwashington.org/sites/default/files/1_UAC_Children%20on%20the%20Run_Full%20Report.pdf. Advocates for immigrants stressed the importance of thorough and deliberate hearings to ascertain whether vulnerable children are eligible for asylum,

humanitarian asylum, special immigrant juvenile status (SIJS), T visas (trafficking victims), U visas (crime victims), or protection under the Convention Against Torture (CAT). *See, e.g.*, American Immigration Council, *Children in Danger: A Guide to the Humanitarian Challenge at the Border*, July 2014.

The Obama Administration responded to this crisis in several ways. DHS applied the expedited removal provision, INA § 235(b), to arriving Central American children accompanied by their mothers. This led to the controversial detention of children and mothers, which, in turn, led to litigation and to subsequent revisions in detention policies. In August 2015 a federal district court in California ruled that the detention policy violated a decades-old consent decree prohibiting DHS from detaining minors in secure, unlicensed facilities. *Flores v. Lynch*, No. CV 85-04544 DMG (C.D. Cal. 2015). In July 2016 the Ninth Circuit affirmed the district court in part and reversed in part. *See Flores v. Lynch*, 828 F.3d 898 (9th Cir. 2016) (affirming the holding that the *Flores* settlement agreement prohibited detention of minors but reversing the conclusion that minors must be released with an accompanying parent). More recently, the Ninth Circuit rejected the government's argument that intervening legislation deprived the minors of a bond hearing. *Flores v. Sessions*, 862 F.3d 863, 881 (9th Cir. 2017).

In addition, the Administration issued an extensive package of executive reform measures in November 2014, including a re-formulation of DHS-wide enforcement priorities and expansive deferred action programs for certain immigrant children and parents in the United States.

The Administration also established the Central American Minor (CAM) Refugee/Parole program in El Salvador, Guatemala, and Honduras. Designed to provide a safe alternative to long, risky journeys to the United States, the CAM program allows parents who are lawfully present in the United States to petition to bring their minor children to the United States as refugees. Faye Hipsman & Doris Meissner, *In-Country Refugee Processing in Central America: A Piece of the Puzzle*, Migration Policy Institute (August 2015). Children who have a well-founded fear of persecution and otherwise satisfy the refugee definition are eligible. Children who do not meet the statutory requirements for refugee status may be considered for humanitarian parole on a case by case basis. During the first year of the CAM program, more than 5,400 children applied. DHS interviewed 90 and approved 10 for refugee status and 75 for humanitarian parole. Michael D. Schear, *Red Tape Slows U.S. Help for Children Fleeing Central America*, N.Y. Times, Nov. 5, 2015. By mid-2016, 267 children had entered the United States as refugees under the CAM system, and 2,880 more children had been approved to come to the United States. Julie H. Davis, *U.S. To Admit More Central American Refugees*, N.Y. Times, July 26, 2016.

In July 2016 the Obama Administration announced a significant expansion in eligibility for resettlement via the CAM program. In addition to minors, children over the age of 21 were eligible, as were parents and relatives who were caretakers of children at risk of persecution. Costa Rica agreed to provide temporary shelter for the most vulnerable Central American refugees as they were processed for the CAM program. Individuals who did not

satisfy the statutory refugee definition could be paroled into the United States. Julie H. Davis, *U.S. To Admit More Central American Refugees*, N.Y. Times, July 26, 2016.

The Trump Administration suspended the CAM program in January 2017 (see material in this Update for casebook page 39) and ultimately terminated it in August 2017, barring the roughly 3,000 children who had been conditionally granted parole from entering the United States. See Exec. Order No. 13,769 (“Protecting the Nation from Foreign Terrorist Entry into the United States”), 82 Fed. Reg. 8,977, Sect. 5(a) (Jan. 27, 2017) (“The Secretary of State shall suspend the U.S. Refugee Admissions Program (USRAP) for 120 days.”); Termination of the Central American Minors Parole Program, 82 Fed. Reg. 38,926 (Aug. 16, 2017); see also Tal Kopan, *DHS ends program for Central American minors*, CNN: POLITICS, (Aug. 16, 2017), <https://www.cnn.com/2017/08/16/politics/trump-ending-central-american-minors-program/index.html>. In June 2018, the International Refugee Assistance Project filed a class-action lawsuit against the Trump Administration, alleging that the administration’s cancellation of the Program was an abuse of discretion based on discriminatory intent that violated the defendants’ due process and equal protection rights. *S.A. v. Trump*, Case No. 18-cv-03539-LB (N.D. Ca. 2018).

Researchers predict continuing migration flows from Central America, in light of the high levels of violence, political instability, and food insecurity in El Salvador, Honduras, and Guatemala, as well as the Central American immigrant communities already established in the United States and the current immigration court backlogs. Marc R. Rosenblum & Isabel Ball, *Trends in Unaccompanied Child and Family Migration from Central America*, Migration Policy Institute Fact Sheet (Jan. 2016); see also Danielle Renwick, *Central America’s Violent Northern Triangle*, Council of Foreign Relations (CFR) Backgrounder (Jan. 19, 2016); Muzaffar Chishti & Faye Hipsman, *Increased Central American Migration to the United States May Prove an Enduring Phenomenon*, Migration Policy Institute (Feb. 18, 2016). For a catalog of recent opinions involving asylum claims filed by children and families, see Gerald Seipp, *A Year in Review—Increasing Emphasis on Families and Children and Torture Convention Claims*, 93 Interp. Rel. 1 (2016).

Migration of children and families from Central America continues to headline the Administration’s immigration agenda. Apprehensions have risen steeply, from 41,435 unaccompanied children and 75,622 families apprehended by CBP in 2017 to 63,624 Central American children and 390,308 families apprehended by CBP in the first nine months of fiscal 2019. Compare Southwest Border Migration, U.S. Customs and Border Protection, (Jul. 3, 2017) with Southwest Border Migration, U.S. Customs and Border Protection, (Jul. 10, 2019).

In May 2018, the Trump administration took a new approach to border control that led to both higher detention levels of adults, including families, and the separation of thousands of mostly Central American children from their parents. The administration adopted a “zero tolerance” policy of criminal prosecution for unlawful entry of all adults who entered without inspection through the southwestern border. The administration classified any child as an “unaccompanied minor” who crossed the border with an adult who was

subsequently placed in immigration or criminal custody. The agency justified this decision on the basis that the parent or guardian was no longer “available to provide care and physical custody” while in custody, per the Trafficking Victims Protection Reauthorization Act. CBP separated the children from the parent or other accompanying adult, and placed them in the custody of the Office of Refugee Resettlement. *See* U.S. Att’y Gen., Attorney General Sessions Delivers Remarks Regarding the Immigration Enforcement Actions of the Trump Administration (May 7, 2018); *Ms. L. v. U.S. Immigr. & Customs Enforcement*, 310 F. Supp. 3d 1133 (S.D. Cal. 2018). Also relevant here is the Attorney General’s decision in *Matter of M-S-*, 27 I & N Dec. 509 (AG 2019), on the detention for asylum seekers who have passed credible fear interviews and subsequent litigation that has blocked its implementation as of early August 2019.

The Trump administration’s “zero tolerance” policy led to the Office of Refugee Resettlement taking custody of thousands of minors who immigration authorities had separated from their parents or guardians. In June 2018, the Office of Refugee Resettlement (ORR) of the Department of Health and Human Services (HHS), which took custody of the majority of the separated children, identified 2,737 children in its care who had been separated from their parents. *Separated Children Placed in Office of Refugee Resettlement Care*, HHS Office of Inspector General (Jan. 17, 2019).

On June 20, 2018, the Administration modified the “zero tolerance” policy in favor of “maintaining family unity.” *See* Executive Order 13,841 of June 20, 2018, Affording Congress an Opportunity to Address Family Separation, 83 Fed. Reg. 29435 § 1, July 30, 2018. The Order mandated that while adults who illegally crossed the border with minors would still be prosecuted, they would not be separated. Instead, families would be detained together “during the pendency of any criminal improper entry or immigration proceedings” to the extent permitted by law and “available resources.” *Id.* § 3. On June 26, 2018, a class of parents separated from their children obtained a preliminary injunction against the Trump administration’s family separation policy. The court ordered the reunification of children with their families within 30 days, prohibited the deportation of parents without their children, and barred the future separation of children from their parents unless it was in the child’s best interest. *Ms. L.*, 310 F. Supp. at 1149.

In September 2018, the government reported that it had identified 2,654 children of parents who had been taken into federal immigration agency custody. Of those children, 103 fell into the newborn to 4 year old age range, and 2,551 were ages 5 to 17. This number did not include children who were separated from parents but released to sponsors prior to the June 2018 court order in *Ms. L v. ICE*, or the more than 500 children that CBP reunified with parents in late June 2018. ORR reported that by September 10, 2018, it had released 2,217 of the 2,654 children it had identified as separated from parents. ORR reunited about 90 percent of the released children with the parent from whom they were separated, with the rest released under other circumstances, such as to another suitable sponsor. Government

Accountability Office, *Unaccompanied Children: Agency Efforts to Reunify Children Separated from Parents at the Border*, GAO-19-163, at 25 (Oct. 09, 2018).

The criteria for reunification of families became the subject of a class action alleging that ORR, the agency responsible for housing unaccompanied minors, was unlawfully sharing information about the children's sponsors in order to facilitate immigration enforcement efforts. See *J.E.C.M. v. Lloyd*, 2018 WL 6004672 (E.D. Va. Nov. 15, 2018). The allegations centered on an agreement between ORR, ICE, and CBP to share information regarding unaccompanied minors, including the vetting of "potential sponsors and adult members of potential sponsors' households." *Id.* It challenged under the Administrative Procedures Act ORR's alleged policy of denying release where an immigrant child's sponsor lived with other adults who were unwilling to provide their fingerprints and biographic information. The complaint survived a motion to dismiss. The court concluded that, once assumed true, plaintiffs' allegations plausibly indicated that the information-sharing policy put children at greater risk. "A policy that systematically elevates immigration enforcement over child welfare, one whose effects are to destabilize would-be sponsors' home environments and to discourage potential sponsors from applying for reunification, is flatly inconsistent with ORR's statutory responsibility to care for unaccompanied minors in its custody and release them promptly to safe and stable environments. Plaintiffs also state a plausible claim that the policy violates ORR's ongoing legal obligation under the *Flores* Agreement to release minors "without unnecessary delay." *Id.*

Litigation over government confinement of children and conditions of custody. Family separation brought to the forefront the related issue of the length and conditions of mass government custody of children, addressed largely through the *Flores* litigation. In August 2018, as allegations of abuse and overmedication of detained children arose, the district court in *Flores* found that conditions at the Shiloh Residential Treatment Center in Texas violated the *Flores* settlement and ordered the government to transfer all minors out of the detention facility unless a licensed psychiatrist or psychologist had made an individual determination that the placement was appropriate. The court also ordered the government, absent an emergency, to obtain parental consent or a court order before giving children psychotropic drugs, to provide written notice to the children of the reason they were being detained, and to refrain from detaining a minor solely for "reported gang involvement." *Flores v. Sessions*, CV 85-4544-DMG (AGRx) (July 30, 2018)

In September 2018, the government proposed a regulation that would terminate the *Flores* settlement agreement. The summary of the proposed regulation indicated it would largely implement the provisions of the *Flores* agreement, while removing the agreement's requirement that facilities holding children comply with state child care licensing standards. *Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children*, 83 Fed. Reg. 45486 (Sept. 7, 2018).

In November 2018, responding to allegations of overcrowded and unsanitary conditions for children in CBP detention facilities and Office of Refugee Resettlement facilities, the court in *Flores* tasked a special monitor with ascertaining compliance with prior

court orders from 2015 and 2017 finding multiple breaches of the Flores agreement in facilities at the border. *See Flores v. Barr*, Case No. CV 85-4544-DMG, 2019 WL 2723798 (AGRx) (June 28, 2019) (citing court orders finding “widespread and deplorable conditions in holding cells of CPB stations” and “unsanitary conditions at certain CBP facilities in the Rio Grande Valley Sector”); *Flores v. Sessions*, No. CV 85-4544-DMG (AGRx), 2018 WL 6133665 (Nov. 5, 2018).

The litigation and public attention to custody and conditions issues sharpened the focus on developments around the family separation policy. In January 2019, the Office of Inspector General of HHS reported that “thousands” more children may have been separated. The report also revealed that the Department of Justice and DHS had begun separating families as early as July 1, 2017, well before the public announcement of the zero tolerance policy in May 2018. *Separated Children Placed in Office of Refugee Resettlement Care*, HHS Office of Inspector General (Jan. 17, 2019).

In March and April 2019, relying on the Office of Inspector General report, the district court in *Ms. L. v. ICE* enlarged the class to include these separated parents and imposed a six-month deadline on the government to identify all of the children it separated from parents. *See Ms. L. v. U.S. Immigration and Customs Enforcement (“ICE”)*, 330 F.R.D. 284, 292-93 (2019); *Ms. L. v. ICE, Order Following Status Conference*, 18cv0428 DMS (MDD)(Apr. 24, 2019).

p. 369, retitle heading:

f. Further Perspectives on the BIA’s Criteria

p. 375, at end of current Notes, add new Note 3 and a new principal case, *Matter of A-B*:

3. Two months prior to the BIA’s decisions in *Matter of M-E-V-G-* and *Matter of W-G-R-*, the Court of Justice of the European Union (CJEU) analyzed whether homosexuals constitute a particular social group subject to persecution in Senegal, Sierra Leone, and Uganda. *X, Y, Z v. Minister voor Immigratie en Asiel*, Judgment of November 7, 2013, C-199/12, C-201/12. Interpreting the EU Qualification Directive (see pp. 60, 1020 of the casebook), the CJEU ruled that a particular social group must have “a distinct identity in the relevant country because it is perceived as being different by the surrounding society.” Para. 45. Further, the CJEU concluded that ““the existence of criminal laws * * * which specifically target homosexuals, supports a finding that those persons form a separate group which is perceived by the surrounding society as being different.” Para. 48. The CJEU added that criminalization of homosexual acts does not by itself constitute persecution, but that criminal penalties that are actually enforced amount to disproportionate or discriminatory punishment and, therefore, constitute persecution. Moreover, the Court held that it is illegitimate to expect asylum applicants to conceal their homosexuality in their home country.

p. 375, after new Note 3:

OPTIONS:

Instructors have multiple options for covering the U.S. Attorney General’s July 2018 decision in *Matter of A-B*:

Option 1: on page 375, in the materials on membership in a particular social group

Option 2: on page 442, in the materials on domestic violence-related asylum

p. 375, after new note 4, add *Matter of A-B* as a new case* with Notes and Questions following:

Attorney General Sessions referred the unpublished decision in the following case to himself for decision. Parties and interested amici were invited to submit briefs on issues in the case, including “whether, and under what circumstances, being a victim of private criminal activity constitutes a cognizable ‘particular social group’ for purposes of an application for asylum or withholding of removal.” In June 2018, he issued the following opinion.

MATTER of A–B–

Attorney General, 2018.

27 I. & N. Dec. 316.

* * *

The prototypical refugee flees her home country because the government has persecuted her—either directly through its own actions or indirectly by being unwilling or unable to prevent the misconduct of non-government actors—based upon a statutorily protected ground. Where the persecutor is not part of the government, the immigration judge must consider both the reason for the harm inflicted on the asylum applicant and the government’s role in sponsoring or enabling such actions. An alien may suffer threats and violence in a foreign country for any number of reasons relating to her social, economic, family, or other personal circumstances. Yet the asylum statute does not provide redress for all misfortune. It applies when persecution arises on account of membership in a protected group and the victim may not find protection except by taking refuge in another country.

* * *

Generally, claims by aliens pertaining to domestic violence or gang violence perpetrated by non-governmental actors will not qualify for asylum.¹ While I do not decide

* Instructors may choose to cover *Matter of A-B* here because it addresses not just domestic violence cases, but also gang violence cases and membership in a particular social group more broadly.

¹ Accordingly, few such claims would satisfy the legal standard to determine whether an alien has a credible fear of persecution. See [INA § 235(b)(1)(B)(v)], 8 U.S.C. § 1225(b)(1)(B)(v) (requiring 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 [INA § 208]”).

that violence inflicted by non-governmental actors may never serve as the basis for an asylum or withholding application based on membership in a particular social group, in practice such claims are unlikely to satisfy the statutory grounds for proving group persecution that the government is unable or unwilling to address. The mere fact that a country may have problems effectively policing certain crimes—such as domestic violence or gang violence—or that certain populations are more likely to be victims of crime, cannot itself establish an asylum claim.

I.

The respondent, a native and citizen of El Salvador, entered the United States illegally and was apprehended by U.S. Customs and Border Protection agents in July 2014. After being placed in removal proceedings, the respondent filed an application for asylum and withholding of removal under the INA, §§ 208, 241(b)(3), and for withholding of removal under the regulations implementing the United Nations Convention Against Torture.

The respondent claimed that she was eligible for asylum because she was persecuted on account of her membership in the purported particular social group of “El Salvadoran women who are unable to leave their domestic relationships where they have children in common” with their partners. The respondent asserted that her ex-husband, with whom she shares three children, repeatedly abused her physically, emotionally, and sexually during and after their marriage.

In December 2015, the immigration judge denied all relief and ordered the respondent removed to El Salvador. * * *

In December 2016, the Board reversed and remanded with an order to grant the respondent asylum after the completion of background checks. The Board found the immigration judge’s adverse credibility determinations clearly erroneous. The Board further concluded that the respondent’s particular social group was substantially similar to “married women in Guatemala who are unable to leave their relationship,” which the Board had recognized in *Matter of A-R-C-G-*, 26 I&N Dec. at 390. Moreover, the Board held that the immigration judge clearly erred in finding that the respondent could leave her ex-husband, and that the respondent established that her ex-husband persecuted her because of her status as a Salvadoran woman unable to leave her domestic relationship. Finally, the Board determined that the El Salvadoran government was unwilling or unable to protect the respondent.

* * *

On March 7, 2018, * * * I directed the Board to refer this matter to me for my review. I invited the parties and any interested amici to submit briefs on the following question:

Whether, and under what circumstances, being a victim of private criminal activity constitutes a cognizable “particular social group” for purposes of an application for asylum or withholding of removal.

* * *

III.

* * *

A.

* * * Here, the respondent claims that she is eligible for asylum because of persecution she suffered on account of her purported membership in a particular social group—“El Salvadoran women who are unable to leave their domestic relationships where they have children in common” with their partners.

As the Board and the federal courts have repeatedly recognized, the phrase “membership in a particular social group” is ambiguous. * * *

The Attorney General has primary responsibility for construing ambiguous provisions in the immigration laws. * * * The Attorney General’s reasonable construction of an ambiguous term in the Act, such as “membership in a particular social group,” is entitled to deference. *See Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005); *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984). Thus, every court of appeals to have considered the issue has recognized that the INA’s reference to the term ““particular social group” is inherently ambiguous and has deferred to decisions of the Board interpreting that phrase.

* * * “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.” *Brand X*, 545 U.S. at 982.

B.

In a number of opinions spanning several decades, the Board has articulated and refined the standard for persecution on account of membership in a “particular social group” so that this category is not boundless. The Board first interpreted the term in *Matter of Acosta*, 19 I&N Dec. at 233. Applying the canon of *ejusdem generis*, the Board concluded that the phrase “particular social group” should be construed in a manner consistent with the other grounds for persecution in the statute’s definition of refugee: race, religion, nationality, and political opinion. Noting that each of these terms describes “a characteristic that either is beyond the power of an individual to change or is so fundamental to individual identity or conscience that it ought not be required to be changed,” the Board concluded that persecution on account of membership in a particular social group must similarly mean “persecution that is directed toward an individual who is a member of a group of persons all of whom share a common, immutable characteristic.” The Board stated that this definition “preserve[d] the concept that refuge is restricted to individuals who are either unable by their own actions, or as a matter of conscience should not be required, to avoid persecution.”

In 1999, the Board, sitting *en banc*, considered for the first time “whether the repeated spouse abuse inflicted on the respondent makes her eligible for asylum as an alien who has been persecuted on account of her membership in a particular social group.” *R-A-*, 22 I&N

Dec. at 907. In a thorough, well-reasoned opinion, the Board first looked to the plain language of the INA to determine whether Congress intended the Act to provide asylum to battered spouses who are leaving marriages to aliens having no ties to the United States. Finding no definitive answer in the language of the statute, the Board “look[ed] to the way in which the other grounds in the statute’s ‘on account of’ clause operate.” Following that “significant guidance,” the Board concluded that R-A- was not eligible for asylum for two reasons. First, her claimed social group—“Guatemalan women who have been involved intimately with Guatemalan male companions, who believe that women are to live under male domination”—did not qualify as a “particular social group” under the INA. And second, even if it did qualify, she failed to show a sufficient nexus between her husband’s abuse and her membership in that social group.

The Board first observed that the purported social group appeared “to have been defined principally, if not exclusively, for purposes of this asylum case, and without regard to the question of whether anyone in Guatemala perceives this group to exist in any form whatsoever.” * * * The Board reasoned that for a social group to be viable for asylum purposes, there must be some showing of how the immutable characteristic shared by the group is understood in the alien’s home country so that the Board can “understand that the potential persecutors in fact see persons sharing the characteristic as warranting suppression or the infliction of harm.”

The Board held that a “particular social group” should be recognized and understood to be a societal faction or a recognized segment of the population in the alien’s society. The Board found that R-A- had “shown neither that the victims of spouse abuse view themselves as members of this group, nor, most importantly, that their male oppressors see their victimized companions as part of this group.” * * *

In addition to holding that R-A-’s proposed group did not qualify as a “particular social group,” the Board also held that she had not shown the persecution was “on account of” her membership in the group. Even if the Board were to accept the respondent’s proposed social group, she “has not established that her husband has targeted and harmed [R-A-] because he perceived her to be a member of this particular social group.” R-A-’s husband targeted her “because she was his wife, not because she was a member of some broader collection of women, however defined, whom he believed warranted the infliction of harm.”

On January 19, 2001, Attorney General Reno summarily vacated *R-A-* and directed the Board to stay consideration of the case pending final publication of a proposed rule offering guidance on the definitions of “persecution” and “membership in a particular social group” and what it means to be “on account of” a protected characteristic. No final rule ever issued, however. In September 2008, Attorney General Mukasey lifted the stay and directed the Board to reconsider the case in light of intervening Board and judicial decisions. In December 2009, before the Board issued an opinion, R-A- and DHS jointly stipulated that she was eligible for asylum, resolving the case.

Despite its vacatur, both the Board and federal courts have continued to rely upon *R-A*. * * *

* * *

In 2014, the Board issued a pair of complementary precedential opinions, *M-E-V-G* and *W-G-R*, clarifying what is necessary to establish a particular social group. In those cases, the Board held that an asylum applicant claiming membership in a particular social group must “establish that the group is (1) composed of members who share a common immutable characteristic, (2) defined with particularity, and (3) socially distinct within the society in question.” The Board explained that those applicants also bear the burden of showing that their membership was a central reason for their persecution, and that their home government was “unable or unwilling to control” the persecutors.

Again echoing *R-A*, the Board explained that the requirement that a group be socially distinct “considers whether those with a common immutable characteristic are set apart, or distinct, from other persons within the society in some significant way. In other words, if 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.” * * * To be socially distinct, a particular social group “must be perceived as a group by society.”

M-E-V-G also clarified that “a group’s recognition for asylum purposes is determined by the perception of the society in question, rather than by the perception of the persecutor.” The Board explained that to do otherwise would create two significant problems. First, it would conflate the inquiry into whether a “particular social group” is cognizable under the INA with the separate and distinct requirement that the persecution be “on account of” membership. Second, defining a particular social group from the perspective of the persecutor would contradict the Board’s prior holding that a social group may not be defined exclusively by the fact that its members have been subjected to harm.

* * *

C.

Although the Board has articulated a consistent understanding of the term “particular social group,” not all of its opinions have properly applied that framework. Shortly after *M-E-V-G* and *W-G-R*, the Board decided *A-R-C-G*, 26 I&N Dec. 388, which held that “married women in Guatemala who are unable to leave their relationship” could constitute a particular social group. Importantly, the Board based its decision on DHS’s concessions that: (1) *A-R-C-G* suffered harm rising to the level of past persecution; (2) *A-R-C-G*’s persecution was on account of her membership in a particular social group; and (3) *A-R-C-G*’s particular social group was cognizable under the INA. * * *

Because of DHS’s multiple concessions, the Board performed only a cursory analysis of the three factors required to establish a particular social group. The Board concluded that *A-R-C-G*’s purported particular social group was “composed of members who share the common immutable characteristic of gender,” and that “marital status can be an immutable characteristic where the individual is unable to leave the relationship.” With respect to

particularity, the Board observed that the terms defining the group—“married,” “women,” and “unable to leave the relationship”—had commonly accepted definitions within Guatemalan society. And finally, with respect to social distinction, the Board cited evidence that Guatemala has a “culture of machismo and family violence,” and that although Guatemala’s criminal laws that prohibit domestic violence, “enforcement can be problematic because the National Civilian Police often failed to respond to requests for assistance related to domestic violence.”

Subsequent Board decisions, including the decision certified here, have read *A-R-C-G-* as categorically extending the definition of a “particular social group” to encompass most Central American domestic violence victims. Like *A-R-C-G-*, these ensuing decisions have not performed the detailed analysis required. * * *

By contrast, several courts of appeals have expressed skepticism about *A-R-C-G-*. * * *

IV.

A-R-C-G- was wrongly decided and should not have been issued as a precedential decision. DHS conceded almost all of the legal requirements necessary for a victim of private crime to qualify for asylum based on persecution on account of membership in a particular social group. To the extent that the Board examined the legal questions, its analysis lacked rigor and broke with the Board’s own precedents.

A.

* * *

B.

* * * By accepting DHS’s concessions as conclusive, the Board in *A-R-C-G-* created a misleading impression concerning the cognizability of similar social groups, and the viability of asylum claims premised upon persecution on account of membership in such groups.

1.

In *A-R-C-G-*, DHS conceded that *A-R-C-G-* was a member of a “cognizable” social group that was both particular and socially distinct. The Board thus avoided considering whether *A-R-C-G-* could establish the existence of a cognizable particular social group without defining the group by the fact of persecution.

To be cognizable, a particular social group *must* “exist independently” of the harm asserted in an application for asylum or statutory withholding of removal. If a group is defined by the persecution of its members, then the definition of the group moots the need to establish actual persecution. For this reason, “[t]he individuals in the group must share a narrowing characteristic other than their risk of being persecuted.” *Rreshpja*, 420 F.3d at 556 *A-R-C-G-* never considered that “married women in Guatemala who are unable to leave their relationship” was 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.

In accepting DHS's concession that this proposed particular social group was defined with particularity, the Board limited its analysis to concluding that the terms used to describe the group—"married," "women," and "unable to leave the relationship"—have commonly accepted definitions within Guatemalan society. *A-R-C-G-*, 26 I&N Dec. at 393. But that misses the point. To say that each term has a commonly understood definition, standing alone, does not establish that these terms have the requisite particularity in identifying a distinct social group as such, or that people who meet all of those criteria constitute a discrete social group. * * *

Social groups defined by their vulnerability to private criminal activity likely lack the particularity required under *M-E-V-G-*, given that broad swaths of society may be susceptible to victimization. For example, groups comprising persons who are "resistant to gang violence" and susceptible to violence from gang members on that basis "are too diffuse to be recognized as a particular social group." *Constanza v. Holder*, 647 F.3d 749, 754 (8th Cir. 2011). Victims of gang violence often come from all segments of society, and they possess no distinguishing characteristic or concrete trait that would readily identify them as members of such a group.

Particular social group definitions that seek to avoid particularity issues by defining a narrow class—such as "Guatemalan women who are unable to leave their domestic relationships where they have children in common"—will often lack sufficient social distinction to be cognizable as a distinct social group, rather than a description of individuals sharing certain traits or experiences. A particular social group must avoid, consistent with the evidence, being too broad to have definable boundaries and too narrow to have larger significance in society.

DHS similarly admitted that *A-R-C-G-*'s proposed particular social group was socially distinct by conceding that it was cognizable. In support of that concession, the Board cited evidence that Guatemala has a "culture of machismo and family violence" and that, although Guatemala has laws in place to prosecute domestic violence crimes, "enforcement can be problematic because the National Civilian Police often failed to respond to requests for assistance related to domestic violence." The Board provided no explanation for why it believed that that evidence established that Guatemalan society perceives, considers, or recognizes "married women in Guatemala who are unable to leave their relationship" to be a distinct social group. * * * By contrast, there is significant room for doubt that Guatemalan society views these women, as horrible as their personal circumstances may be, as members of a distinct group in society, rather than each as a victim of a particular abuser in highly individualized circumstances.

2.

In *A-R-C-G-*, DHS also conceded that the respondent established that she had suffered past persecution. It can be especially difficult, however, for victims of private violence to prove persecution because "[p]ersecution is something a *government* does," either directly or indirectly by being unwilling or unable to prevent private misconduct. *Hor v. Gonzales*, 400 F.3d 482, 485 (7th Cir. 2005) (emphasis in original). Persecution under the asylum statute

“does not encompass all treatment that our society regards as unfair, unjust, or even unlawful or unconstitutional.” *Fatin*, 12 F.3d at 1240.

Board precedents have defined “persecution” as having three specific elements. First, “persecution” involves an intent to target a belief or characteristic. Yet private criminals are motivated more often by greed or vendettas than by an intent to “overcome [the protected] characteristic of the victim.” *Matter of Kasinga*, 21 I&N Dec. 357, 365 (BIA 1996). For example, in *R-A-*, R-A-’s husband targeted her “because she was his wife, not because she was a member of some broader collection of women, however defined, whom he believed warranted the infliction of harm.”

Second, the level of harm must be “severe.” Private violence may well satisfy this standard, and I do not question that A-R-C-G-’s claims of repugnant abuse by her ex-husband were sufficiently severe.

Third, 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.” *Acosta*, 19 I&N Dec. at 222. The Board declined to address this prong of the analysis, instead remanding to the immigration judge for further proceedings to determine whether the Guatemalan government was unwilling or unable to control A-R-C-G-’s ex-husband.

An applicant seeking to establish persecution based on violent conduct of a private actor “must show more than ‘difficulty . . . controlling’ private behavior.” *Menjivar v. Gonzales*, 416 F.3d 918, 921 (8th Cir. 2005) (quoting *Matter of McMullen*, 17 I&N Dec. 542, 546 (BIA 1980)). * * * The fact that the local police have not acted on a particular report of an individual crime does not necessarily mean that the government is unwilling or unable to control crime, any more than it would in the United States. * * *

3.

Finally, DHS conceded the nexus requirement by agreeing that persecution suffered by A-R-C-G- “was, for at least one central reason, on account of her membership in a cognizable particular social group.” This conclusion simply does not follow from the facts of that case or similar cases. * * *

* * * The focus in determining whether an alien was persecuted “on account of” her group membership is on “the persecutors’ motives”—why the persecutors sought to inflict harm. *INS v. Elias-Zacarias*, 502 U.S. 478, 483 (1992). Reasons incidental, tangential, or subordinate to the persecutor’s motivation will not suffice. *Matter of J-B-N- & S-M-*, 24 I&N Dec. 208, 214 (BIA 2007).

* * *

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. A criminal gang may target people because they have money or property within the area where the gang operates, or simply because the gang inflicts violence on those who are

nearby. That does not make the gang’s victims persons who have been targeted “on account of” their membership in any social group.

Similarly, in domestic violence cases, like *A-R-C-G-*, the Board cited no evidence that her ex-husband attacked her because he was aware of, and hostile to, “married women in Guatemala who are unable to leave their relationship.” Rather, he attacked her because of his preexisting personal relationship with the victim. * * *

4.

* * *

Future social group cases must be governed by the analysis set forth in this opinion.

V.

Having overruled *A-R-C-G-*, I must vacate the Board’s December 2016 decision in this case as well. The Board’s cursory analysis of the respondent’s social group consisted of a general citation to *A-R-C-G-* and country condition reports. Neither immigration judges nor the Board may avoid the rigorous analysis required in determining asylum claims, especially where victims of private violence claim persecution based on membership in a particular social group. Such claims must be carefully analyzed under the standards articulated in this opinion and in past Board decisions, such as *M-E-V-G-* and *W-G-R-*.

* * *

Of course, if an alien’s asylum application is fatally flawed in one respect—for example, for failure to show membership in a proposed social group, *see Guzman-Alvarez v. Sessions*, 701 F. App’x 54, 56-57 (2d Cir. 2017)—an immigration judge or the Board need not examine the remaining elements of the asylum claim.

Having subjected the Board’s decision to plenary review, I also address several additional errors and outline other general requirements relevant to all asylum applications to provide guidance to the Board and immigration judge on remand.

A.

* * *

1.

Here, the Board admitted that the immigration judge identified discrepancies and omissions in the respondent’s testimony, but discounted the adverse credibility determination on various grounds including that the supportive affidavits were due greater weight, that the respondent sufficiently explained some discrepancies, and that the discrepancies did not ultimately undermine the respondent’s account. In so doing, the Board failed to give adequate deference to the credibility determinations and improperly substituted its own assessment of the evidence.

When an asylum applicant makes inconsistent statements, the immigration judge is uniquely advantaged to determine the applicant’s credibility, and the Board may not substitute its own view of the evidence on appeal. * * *

2.

The Board further erred in concluding that the immigration judge’s factual findings concerning the respondent’s ability to leave her relationship and El Salvador’s ability to protect her were clearly erroneous. In support of his findings, the immigration judge cited evidence that the respondent was able to divorce and move away from her ex-husband, and that she was able to obtain from the El Salvadoran government multiple protective orders against him. Although the Board questioned the significance of these facts in light of other evidence, it did not establish that the immigration judge’s conclusions were “illogical or implausible,” or without support from the record. *See Rodriguez*, 683 F.3d at 1170.

* * *

B.

The Board also erred when it found that the respondent established the required nexus between the harm she suffered and her group membership. Whether a purported persecutor was motivated by an alien’s group affiliation “is a classic factual question,” *Zavaleta-Policiano v. Sessions*, 873 F.3d 241, 247-48 (4th Cir. 2017) (internal quotation marks omitted), which the Board may overturn only if “clearly erroneous.”

* * * There was simply no basis in the Board’s summary reasoning for overturning the immigration judge’s factual findings, much less finding them clearly erroneous.

C.

The Board also erred when it overruled the immigration judge’s finding that the respondent failed to demonstrate that the government of El Salvador was unable or unwilling to protect her from her ex-husband. This inquiry too involved factual findings to which the Board did not give proper deference. No country provides its citizens with complete security from private criminal activity, and perfect protection is not required. In this case, the respondent not only reached out to police, but received various restraining orders and had him arrested on at least one occasion.

* * * The persistence of domestic violence in El Salvador, however, does not establish that El Salvador was unable or unwilling to protect A-B- from her husband, any more than the persistence of domestic violence in the United States means that our government is unwilling or unable to protect victims of domestic violence. * * *

D.

The Board, immigration judges, and all asylum officers should consider the following points when evaluating an application for asylum. First, 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 immigration judge, the exact delineation of any proposed particular social group. *See Matter of W-Y-C- & H-O-B-*, 27 I&N Dec. 189, 190-91 (BIA 2018). * * *

Furthermore, the Board, immigration judges, and all asylum officers must consider, consistent with the regulations, whether internal relocation in the alien’s home country

presents a reasonable alternative before granting asylum. * * * 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.

Finally, there are alternative proper and legal channels for seeking admission to the United States other than entering the country illegally and applying for asylum in a removal proceeding. * * * Aliens seeking a better life in America are welcome to take advantage of existing channels to obtain legal status before entering the country. * * * Aliens seeking an improved quality of life should seek legal work authorization and residency status, instead of illegally entering the United States and claiming asylum.

VI.

In reaching these conclusions, I do not minimize the vile abuse that the respondent reported she suffered at the hands of her ex-husband or the harrowing experiences of many other victims of domestic violence around the world. I understand that many victims of domestic violence may seek to flee from their home countries to extricate themselves from a dire situation or to give themselves the opportunity for a better life. But the “asylum statute is not a general hardship statute.” *Velasquez*, 866 F.3d at 199 (Wilkinson, J., concurring).
* * *

I therefore overrule *Matter of A-R-C-G-*, 26 I&N Dec. 388 (BIA 2014) and all other opinions inconsistent with the analysis in this opinion, vacate the Board's decision, and remand to the immigration judge for further proceedings consistent with this opinion.

NOTES AND QUESTIONS ON MATTER OF A-B-

1. On July 11, 2018, USCIS published a policy memorandum instructing agency adjudicators on how to apply *Matter of A-B-* in “reasonable fear, credible fear, asylum, and refugee adjudications.” The memo seems to encourage adjudicators to read *Matter of A-B-* broadly, among other things: to view claims of membership in a particular social group based on domestic violence or gang violence to be approvable only in exceptional cases; to read more strictly the requirement that persecution by non-state actors is cognizable only if the government is unable or unwilling to protect the applicant; and to consider entry without inspection to be a negative factor weighing against the favorable exercise of discretion in deciding to grant or deny asylum. See U.S. Citizenship and Immigration Services, Policy Memorandum PM-602-0162, *Guidance for Processing Reasonable Fear, Credible Fear, Asylum, and Refugee Claims in Accordance with Matter of A-B-*, July 11, 2018.

2. *Matter of A-B-* cites with approval two BIA decisions: *M-E-V-G-* (casebook page 842) and *W-G-R-* (casebook page 854). Both BIA decisions involved asylum claims that cited gang violence to try to establish persecution on account of membership in a particular social group. Does *Matter of A-B-* maintain or narrow the possibilities that *M-E-V-G-* and *W-G-R-* appeared to leave open for asylum claims based on gang violence?

3. As noted in *Matter of A-B-*, the BIA held earlier in 2018 that 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 immigration judge, the exact delineation of any proposed particular social group. See *Matter of W-Y-C- & H-O-B-*, 27 I&N Dec. 189, 190-91 (BIA 2018). In other words, the BIA generally will not address a newly articulated particular social group that was not advanced before the immigration judge.

4. *Matter of A-B-* reaches beyond the domestic violence context in this particular case to address several key issues that arise in many asylum cases, including gang violence, harm perpetrated by nongovernmental actors more generally, BIA review of immigration judges' credibility determinations and factual findings more generally, and as noted in connection with materials at the material in this Update for casebook page 246, on discretionary denials of asylum.

5. In December 2018, the federal district court for the District of Columbia issued a permanent injunction blocking the application of the new asylum standards set forth in *Matter of A-B-* and the subsequent Policy Memorandum to credible fear interviews. See *Grace v. Whitaker*, 344 F. Supp. 3d 96 (D.D.C. 2018). The court found that applying these more restrictive standards to credible fear interviews would violate the Immigration and Nationality Act and the Administrative Procedure Act. The injunction does not directly affect the application of *Matter of A-B-* to the ultimate decisions in asylum cases.

6. *Matter of A-B-* explicitly anticipates the likelihood that unsuccessful asylum applicants will seek review in the federal courts of appeals. The general rule in *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984), is that a federal court of appeals must defer to a reasonable agency interpretation of an ambiguous statute. The U.S. Supreme Court later held in *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005), such deference is due even when the agency interpretation postdates the court of appeals decision. See casebook pages 292-95. Are there persuasive arguments that a federal court of appeals should not defer to *Matter of A-B-*?

CHAPTER FIVE
GENDER AND PERSECUTION

p. 421, add new Notes 2 and 3:

2. The UN Convention on the Abolition of Slavery and Institutions and Practices Similar to Slavery calls on states to abolish slavery-like institutions, defined to include debt bondage, serfdom, and

(c) Any institution or practice whereby:

(i) A woman, without the right to refuse, is promised or given in marriage on payment of a consideration in money or in kind to her parents, guardian, family or any other person or group; or

(ii) The husband of a woman, his family, or his clan, has the right to transfer her to another person for value received or otherwise; or

(iii) A woman on the death of her husband is liable to be inherited by another person.

Art. 1, Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, 226 U.N.T.S. 3, T.I.A.S. No. 6418, signed Sept. 7, 1956. More than 120 States are parties. The Convention entered into force with regard to the United States on Dec. 6, 1967, 18 U.S.T. 3201.

3. Courts and commentators have sometimes used the terms “forced marriage” and “arranged marriage” interchangeably. The U.K. Foreign and Commonwealth Office contrasts the two:

In arranged marriages, the families of both spouses take a leading role in choosing the marriage partner but the choice of whether or not to accept the arrangement remains with the potential spouses. They give their full and free consent. By contrast, in a forced marriage, one or both spouses do not consent to the marriage or consent is extracted under duress. Duress includes both physical and emotional pressure.

U.K. Foreign and Commonwealth Office, *Forced Marriage: A Wrong, Not a Right* 7 (2005).

In the United States, USCIS training materials provide: “Forced marriages * * * may under some circumstances qualify, as a form of persecution. * * * The key question in determining whether a forced marriage might constitute persecution is whether the victim experienced or would experience the marriage, or events surrounding the marriage, as serious harm.” Asylum Officer Basic Training Course: Female Asylum Applicants and Gender-Related Claims 15 (March 12, 2009).

p. 421, delete current Note 2 and renumber current Notes 3 – 7 as Notes 4 – 8.

p. 424, replace the second full paragraph as follows:

Against this background, the BIA considered the case of a Moroccan woman who had been abused by her father.

pp. 424-436, delete *Matter of R-A-* and go directly to *Matter of S-A-* excerpt.

p. 440, after *Matter of S-A-* and immediately before Notes and Questions, add new text, but note that *Matter of A-B-* overruled *Matter of A-R-C-G-*:

Several weeks prior to *Matter of S-A-*, the BIA had denied asylum to Rody Alvarado, a Guatemalan woman who had suffered years of physical and sexual abuse from her husband. *Matter of R-A-*, 22 I & N Dec. 906 (BIA, 1999), vacated by the Attorney General pending further action, 2001. The Board concluded that “Guatemalan women who have been involved intimately with Guatemalan male companions, who believe that women are to live under male domination” did not constitute a particular social group within the meaning of U.S. law.

[T]he respondent must show more than a lack of protection or the existence of societal attitudes favoring male domination. She must make a showing from which it is reasonable to conclude that her husband was motivated to harm her, at least in part, by her asserted group membership.

* * *

The respondent in this case has been terribly abused and has a genuine and reasonable fear of returning to Guatemala. Whether the district director may, at his discretion, grant the respondent relief upon humanitarian grounds – relief beyond the jurisdiction of the Immigration Judge and this Board—is a matter the parties can explore outside the present proceedings. * * * The issue of whether our asylum laws * * * should be amended to include additional protection for abused women * * * is a matter to be addressed by Congress.

22 I & N Dec. at xx, xx.

Litigation involving Rody Alvarado’s claim for asylum spanned several administrations and lasted for more than a decade. The Notes and Questions at the end of this section, on pp. 440-42 of the casebook, set forth many of the significant historical details. In 2014, the BIA revisited this issue again.

MATTER OF A-R-C-G-

Board of Immigration Appeals, 2014
26 I. & N. Dec. 388

ADKINS-BLANCH, Vice Chairman:

In a decision dated October 14, 2009, an Immigration Judge found the respondents removable and denied their applications for asylum and withholding of removal under [INA] sections 208(a) and 241(b)(3). The respondents have appealed from that decision, contesting only the denial of their applications for relief from removal. We find that the lead respondent, a victim of domestic violence in her native country, is a member of a particular social group composed of “married women in Guatemala who are unable to leave their relationship.” The record will be remanded to the Immigration Judge for further proceedings.

I. FACTUAL AND PROCEDURAL HISTORY

The lead respondent is the mother of the three minor respondents. The respondents are natives and citizens of Guatemala who entered the United States without inspection on December 25, 2005. The respondent filed a timely application for asylum and withholding of removal under the Act.

The Immigration Judge found the respondent to be a credible witness, which is not contested on appeal. It is undisputed that the respondent, who married at age 17, suffered repugnant abuse by her husband. This abuse included weekly beatings after the respondent had their first child.⁹ On one occasion, the respondent's husband broke her nose. Another time, he threw paint thinner on her, which burned her breast. He raped her.

The respondent contacted the police several times but was told that they would not interfere in a marital relationship. On one occasion, the police came to her home after her husband hit her on the head, but he was not arrested. Subsequently, he threatened the respondent with death if she called the police again. The respondent repeatedly tried to leave the relationship by staying with her father, but her husband found her and threatened to kill her if she did not return to him. Once she went to Guatemala City for about 3 months, but he followed her and convinced her to come home with promises that he would discontinue the abuse. The abuse continued when she returned. The respondent left Guatemala in December 2005, and she believes her husband will harm her if she returns.

The Immigration Judge found that the respondent did not demonstrate that she had suffered past persecution or has a well-founded fear of future persecution on account of a particular social group comprised of "married women in Guatemala who are unable to leave their relationship." The Immigration Judge determined that there was inadequate evidence that the respondent's spouse abused her "in order to overcome" the fact that she was a "married woman in Guatemala who was unable to leave the relationship." He found that the respondent's abuse was the result of "criminal acts, not persecution," which were perpetrated "arbitrarily" and "without reason." He accordingly found that the respondent did not meet her burden of demonstrating eligibility for asylum or withholding of removal under the Act.

On appeal, the respondent asserts that she has established eligibility for asylum as a victim of domestic violence. * * *

In response to our request for supplemental briefing, the DHS now concedes the respondent established that she suffered past harm rising to the level of persecution and that the persecution was on account of a particular social group comprised of "married women in Guatemala who are unable to leave their relationship." However, the DHS seeks remand, arguing that "further factual development of the record and related findings by the Immigration Judge are necessary on several issues" before the asylum claim can be properly resolved. The respondent opposes remand and maintains that she has met her burden of proof regarding all aspects of her asylum claim. We accept the parties' position on the

⁹ This child was born in 1994 and was residing in Guatemala at the time of the proceedings.

existence of harm rising to the level of past persecution, the existence of a valid particular social group, and the issue of nexus under the particular facts of this case. We will remand the record for further proceedings.

II. ANALYSIS

A. Particular Social Group

The question whether a group is a “particular social group” within the meaning of the Act is a question of law that we review *de novo*. The question whether a person is a member of a particular social group is a finding of fact that we review for clear error.

* * *

B. Respondent’s Claim

The DHS has conceded that the respondent established harm rising to the level of past persecution on account of a particular social group comprised of “married women in Guatemala who are unable to leave their relationship.” The DHS’s position regarding the existence of such a particular social group in Guatemala under the facts presented in this case comports with our recent precedents clarifying the meaning of the term “particular social group.” In this regard, we point out that any claim regarding the existence of a particular social group in a country must be evaluated in the context of the evidence presented regarding the particular circumstances in the country in question.

In *Matter of W-G-R-* and *Matter of M-E-V-G-*, we held that an applicant seeking asylum based on his or her membership in a “particular social group” must establish that the group is (1) composed of members who share a common immutable characteristic, (2) defined with particularity, and (3) socially distinct within the society in question. The “common immutable characteristic” requirement incorporates the standard set forth in *Matter of Acosta*. The “particularity” requirement addresses “the question of delineation.” That is, it clarifies the point that “not every ‘immutable characteristic’ is sufficiently precise to define a particular social group.” The “social distinction” requirement renames the former concept of “social visibility” and clarifies “the importance of ‘perception’ or ‘recognition’ to the concept of the particular social group.”

In this case, the group is composed of members who share the common immutable characteristic of gender. Moreover, marital status can be an immutable characteristic where the individual is unable to leave the relationship. A determination of this issue will be dependent upon the particular facts and evidence in a case. A range of factors could be relevant, including whether dissolution of a marriage could be contrary to religious or other deeply held moral beliefs or if dissolution is possible when viewed in light of religious, cultural, or legal constraints. In evaluating such a claim, adjudicators must consider a respondent’s own experiences, as well as more objective evidence, such as background country information.

The DHS concedes that the group in this case is defined with particularity. The terms used to describe the group—“married,” “women,” and “unable to leave the relationship”—

have commonly accepted definitions within Guatemalan society based on the facts in this case, including the respondent's experience with the police. In some circumstances, the terms can combine to create a group with discrete and definable boundaries. We point out that a married woman's inability to leave the relationship may be informed by societal expectations about gender and subordination, as well as legal constraints regarding divorce and separation. *See Matter of W-G-R-*, 26 I&N Dec. at 214 (observing that in evaluating a group's particularity, it may be necessary to take into account the social and cultural context of the alien's country of citizenship or nationality); Committees on Foreign Relations and Foreign Affairs, 111th Cong., 2d Sess., *Country Reports on Human Rights Practices for 2008* 2598 (Joint Comm. Print 2010) ("*Country Reports*") (discussing sexual offenses against women as a serious societal problem in Guatemala); Bureau of Human Rights, Democracy, and Labor, U.S. Dep't of State, *Guatemala Country Reports on Human Rights Practices-2008* (Feb. 25, 2009).¹⁴ In this case, it is significant that the respondent sought protection from her spouse's abuse and that the police refused to assist her because they would not interfere in a marital relationship.

The group is also socially distinct within the society in question. To have "social distinction," there must be "evidence showing that society in general perceives, considers, or recognizes persons sharing the particular characteristic to be a group." The group's recognition is "determined by the perception of the society in question, rather than by the perception of the persecutor."¹⁵

When evaluating the issue of social distinction, we look to the evidence to determine whether a society, such as Guatemalan society in this case, makes meaningful distinctions based on the common immutable characteristics of being a married woman in a domestic relationship that she cannot leave. Such evidence would include whether the society in question recognizes the need to offer protection to victims of domestic violence, including whether the country has criminal laws designed to protect domestic abuse victims, whether those laws are effectively enforced, and other sociopolitical factors. *Cf. Davila-Mejia v. Mukasey*, 531 F.3d 624, 629 (8th Cir. 2008) (finding that competing family business owners are not a particular social group because they are not perceived as a group by society).

Supporting the existence of social distinction, and in accord with the DHS's concession that a particular social group exists, the record in this case includes un rebutted evidence that Guatemala has a culture of "machismo and family violence." *See Guatemala Failing Its Murdered Women: Report*, Canadian Broad. Corp. (July 18, 2006). Sexual offenses, including spousal rape, remain a serious problem. *See Country Reports, supra*, at 2608. Further, although the record reflects that Guatemala has laws in place to prosecute domestic violence

¹⁴ Notably, the group is not defined by the fact that the applicant is subject to domestic violence. *See Matter of W-G-R-*, 26 I&N Dec. at 215 (noting that circuit courts "have long recognized that a social group must have 'defined boundaries' or a 'limiting characteristic,' other than the risk of being persecuted").

¹⁵ The perception of the persecutor, however, is critical to the question whether a person is persecuted "on account of membership in a particular social group. *See Matter of M-E-V-G-*, 26 I&N Dec. at 242; *Matter of W-G-R-*, 26 I&N Dec. at 218.

crimes, enforcement can be problematic because the National Civilian Police “often failed to respond to re-quests for assistance related to domestic violence.” *Id.* at 2609.

We point out that cases arising in the context of domestic violence generally involve unique and discrete issues not present in other particular social group determinations, which extends to the matter of social distinction. However, even within the domestic violence context, the issue of social distinction will depend on the facts and evidence in each individual case, including documented country conditions; law enforcement statistics and expert witnesses, if proffered; the respondent’s past experiences; and other reliable and credible sources of information

C. Remaining Issues

The DHS stipulates that the respondent suffered mistreatment rising to the level of past persecution. The DHS also concedes in this case that the mistreatment was, for at least one central reason, on account of her membership in a cognizable particular social group. We note that in cases where concessions are not made and accepted as binding, these issues will be decided based on the particular facts and evidence on a case-by-case basis as addressed by the Immigration Judge in the first instance. In particular, the issue of nexus will depend on the facts and circumstances of an individual claim.

We will remand the record for the Immigration Judge to address the respondent’s statutory eligibility for asylum in light of this decision. Under controlling circuit law, in order for the respondent to prevail on an asylum claim based on past persecution, she must demonstrate that the Guatemalan Government was unwilling or unable to control the “private” actor.

If the respondent succeeds in establishing that the Government was unwilling or unable to control her husband, the burden shifts to the DHS to demonstrate that there has been a fundamental change in circumstances such that the respondent no longer has a well-founded fear of persecution. Alternatively, the DHS would bear the burden of showing that internal relocation is possible and is not unreasonable. The Immigration Judge may also consider, if appropriate, whether the respondent is eligible for humanitarian asylum.^b

* * *

p. 440, rename heading as *Notes and Questions on Asylum Claims based on Domestic Abuse*, and add new Notes 1 and 2:

1. Both *Matter of A-R-C-G-* and *Matter of R-A-* arose when married women fled repeated physical violence inflicted by their husbands in Guatemala and sought asylum in the United States. Social attitudes recognizing the gravity of domestic violence and its widespread occurrence have changed in the 15 years between the two cases. During the same period, however, the BIA has adopted a more restrictive analysis of the “particular social group” concept as shown in *Matter*

^b See casebook pp. 178-85 for a discussion of discretionary grants of asylum based on past persecution despite the absence of threats of future persecution.—eds.

of *M-E-V-G-* and *Matter of W-G-R-*, *supra*. As you read the *Matter of A-R-C-G-* opinion, what factors do you think are most important to the Board's holding?

2. Some question whether asylum and withholding claims based on domestic violence are better understood as claims involving persecution on account of religion or political opinion, rather than on account of particular social group membership. See Marisa Silenzi Cianciarulo, *Batterers as Agents of the State: Challenging the Public/Private Distinction in Intimate Partner Violence-Based Asylum Claims*, 35 Harv. J.L. & Gender 117 (2012). For an analysis of domestic violence asylum cases before the immigration courts and the BIA for almost two decades, see Blaine Bookey, *Domestic Violence as a Basis for Asylum: An Analysis of 206 Case Outcomes in the United States From 1994 to 2012*, 24 Hastings Women's L.F. 107 (2013) (arguing that the analyzed cases reached "contradictory and arbitrary outcomes" and that "the absence of binding norms remains a major impediment to fair and consistent outcomes").

pp. 440-442, renumber current Notes 1 - 5 as Notes 3 - 7 and delete current Note 6.

p. 442: this is Option 2 for covering *Matter of A-B-*; after new note 7, add *Matter of A-B-* as a new case* with Notes and Questions following:

[add from materials in this Update for casebook page 375]

p. 458, at end of carryover paragraph, add:

Asylum applications based on abuse by family members and neighbors of young boys perceived as effeminate have asserted that the family constitutes a particular social group, as well as alleged that government officials are culpable for failing to protect vulnerable children. See *Bringas-Rodriguez v. Sessions*, 850 F. 3d 1051 (9th Cir. en banc 2017) (failure of young child to report sexual abuse by family members to Mexican police does not preclude finding of past persecution).

* Instructors may choose to cover *Matter of A-B-* here because it addresses not just domestic violence cases, but also gang violence cases and membership in a particular social group more broadly.

The Attorney General's 2018 decision in *Matter of A-B-*, 27 I & N Dec. 316 (AG 2018), took a more restrictive view of persecution by nongovernmental actors as part of an asylum claim.

CHAPTER SIX

LIMITATIONS ON PROTECTION: EXCLUSION AND CESSATION

p. 468, at end of first full paragraph, add:

S. 744, the immigration reform bill passed by the Senate in June 2013, included a provision repealing the one-year filing deadline. The House of Representatives has not acted on S. 744 (or on any immigration reform proposals).

p. 472, Note 3, line 2, after 1st sentence replace “See” with:

For an extensive analysis of current strategies employed by Canadian authorities concerning asylum seekers at the U.S.-Canada border, see Efrat Arbel, Alletta Brenner, & Harvard Immigration and Refugee Law Clinic Program, *Bordering on Failure: Canada – U.S. Border Policy and the Politics of Refugee Exclusion* (November 2013), <http://harvardimmigrationclinic.files.wordpress.com/2013/11/bordering-on-failure-harvard-immigration-and-refugee-law-clinical-program1.pdf>. Additional commentary can be found in [continue with current text in casebook]

page 493, add new Note 5:

5. Without addressing duress, the BIA recently reiterated that the persecutor bar applies to a soldier who stood guard while superiors interrogated and mistreated a prisoner even though the soldier lacked a persecutory motive. *Matter of J. M. Alvarado*, 27 I & N Dec. 27 (BIA 2017). Then, in June 2018, the BIA issued its decision on remand in *Negusie*. It held that the persecutor bar is subject to a duress defense, but that the defense is very limited, as follows:

at a minimum the applicant must establish by a preponderance of the evidence that he (1) acted under an imminent threat of death or serious bodily injury to himself or others; (2) reasonably believed that the threatened harm would be carried out unless he acted or refrained from acting; (3) had no reasonable opportunity to escape or otherwise frustrate the threat; (4) did not place himself in a situation in which he knew or reasonably should have known that he would likely be forced to act or refrain from acting; and (5) knew or reasonably should have known that the harm he inflicted was not greater than the threatened harm to himself or others. Only if the applicant establishes each element by a preponderance of the evidence would it be appropriate to consider whether the duress defense applies.

Matter of Negusie, 27 I. & N. Dec. 347, 363 (BIA 2018). In October 2018, then-Attorney General Sessions referred this decision to himself for review on whether “coercion and duress

are relevant to the application of the Immigration and Nationality Act's persecutor bar." *Matter of Negusie*, 27 I & N Dec. 481 (AG 2018).

p. 551, after the first full paragraph, add new paragraph:

DHS continued to exercise the group-based exemption authority throughout the Obama Administration. In April 2016 DHS determined that exemptions should be applied to the All Burma Muslim Union, the Karen National Defense Organization, and 19 other Burmese resistance groups. 81 Fed. Reg. 21891, Apr. 13, 2016. In October 2016, USCIS revised its policy on processing TRIG grounds in asylum cases, Policy Memorandum PM 602-0317, *Revised Guidance for Processing Asylum Cases Involving Terrorism-Related Inadmissibility Grounds*, October 5, 2016. Whether the policies remain in place, however, remains to be seen. Section 7 of Executive Order 13780, *Protecting the Nation from Foreign Terrorist Entry into the United States*, in the statutory supplement, directed Trump Administration officials to consider rescinding all TRIG exemptions and prior directives and guidance. Discussions of "pulling back" the waivers are underway. Mica Rosenberg & Yeganeh Torbati, *Trump Administration May Change Rules that Allow Terror Victims to Immigrate to U.S.*, Reuters, April 21, 2017.

p. 551, in the second full paragraph, replace the first two words "In general" with:

If TRIG exemptions remain in place, it is important to note that

p. 555, at end of penultimate paragraph, add:

In February 2014, the Secretaries of State and of Homeland Security jointly issued two more exemptions under INA § 212(d)(3)(B)(i) that potentially benefit a wide range of persons otherwise barred by the provisions relating to support for or activities with Tier III terrorist organizations or their members. The first deals with the provision of "insignificant material support," and the other covers "certain routine commercial * * * or social transactions," "certain humanitarian assistance," and certain assistance provided "under substantial pressure that does not rise to the level of duress." 79 Fed. Reg. 6913-15 (2014). As is customary, detailed application of these complicated provisions will be administered primarily by USCIS, in a discretionary process not subject to judicial review.

p. 563, to the end of the first full paragraph, add:

In 2014 the BIA addressed the burden of proof in a termination proceeding before an immigration judge. In *Matter of P-S-H*, 26 I & N Dec. 329 (BIA 2014), an attorney had been convicted of making false statements and submitting false medical documents in the applicant's asylum application. The BIA ruled that DHS did not need to prove an asylee knew there was fraud in the asylum application in order to terminate a grant of asylum. It was sufficient if DHS proved by a preponderance of the evidence that there was fraud in the application and that without the fraud the applicant was not eligible for asylum.

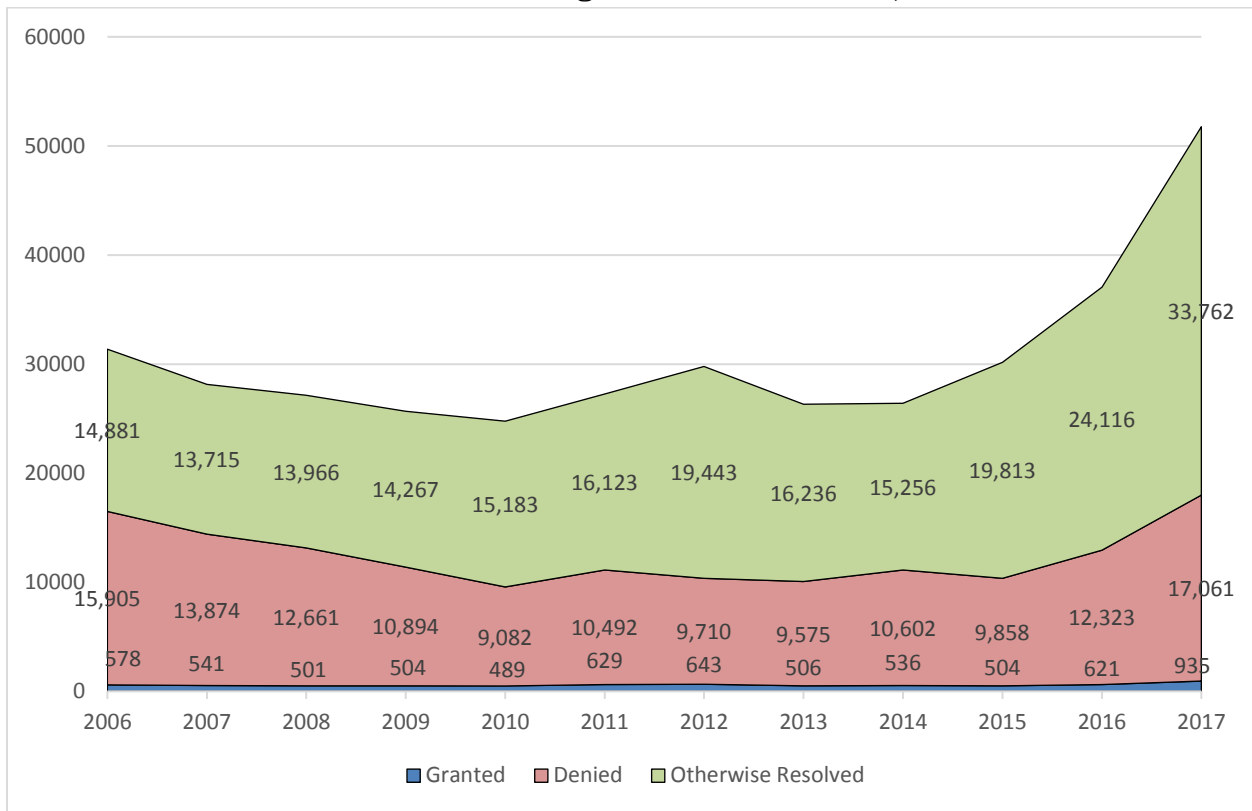
CHAPTER SEVEN

THE CONVENTION AGAINST TORTURE

p. 592, at end of first full paragraph, add new text and new Figure 7.1:

Many individuals who would be entitled to protection under the CAT receive either asylum or withholding of removal. Few of those whom the Immigration Judge considers for CAT protection are successful. As Figure 7.1 shows, a minuscule number of CAT applicants are successful.

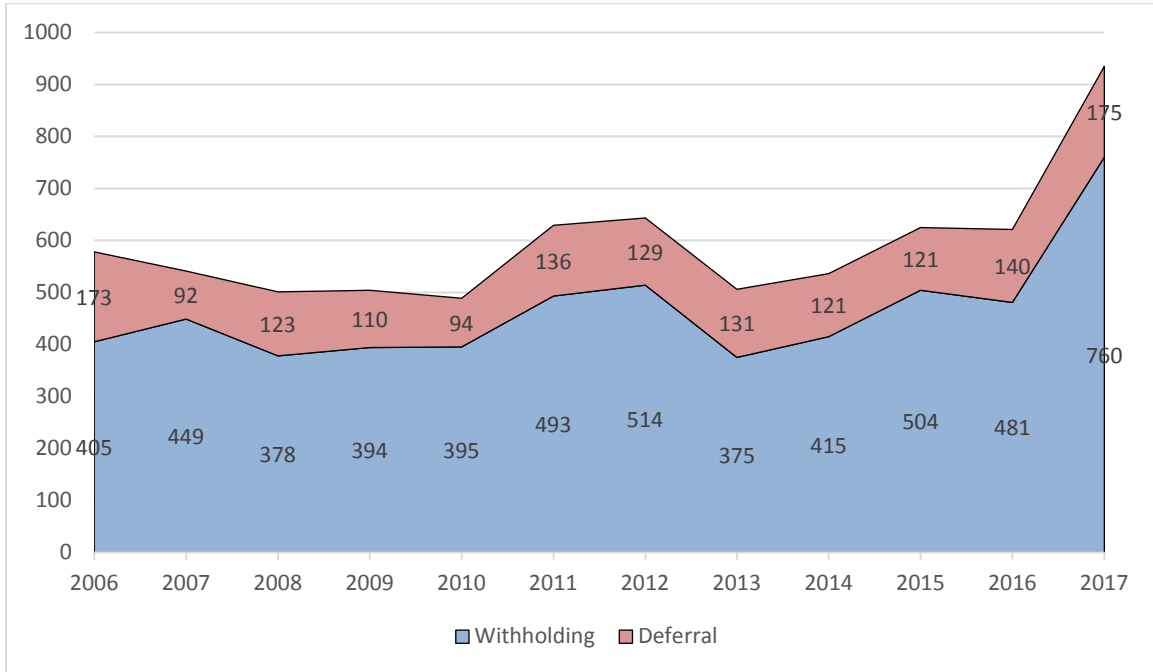
Figure 7.1
Results in Convention Against Torture Cases, 2006-2017



Source: EIOR Statistical Yearbooks 2006-2016.

p. 593, replace Figure 7.1 with new Figure 7.2:

Figure 7.2
Convention Against Torture Cases
Grants of Withholding and Deferral of Removal, 2006–2017



Source: EOIR Statistical Yearbooks 2006-2017, Table 16.

p. 594, at end of carryover paragraph:

replace the final reference to “2011” with “2016.”

p. 606, at end of current Notes, add new Note 4:

4. The Fifth Circuit overturned the denial of CAT protection to an El Salvadoran beaten and threatened at gunpoint by men in police uniforms in *Garcia v. Holder*, 756 F.3d 885 (5th Cir. 2014), though the applicant said he could not tell if they were police officers or criminals who had stolen police uniforms. Even if the assailants were only low-level policemen or were private citizens, the court concluded that there was evidence of government acquiescence. The applicants had provided information to public officials and a short time later the assailants appeared to act pursuant to that information; the court ruled that this indicated the beatings and extortion had occurred “under color of law.”

p. 616, at end of current Notes, add new Note 3:

3. Courts continue to adjudicate claims for CAT protection in removal proceedings of noncitizens convicted of crimes in the United States who will likely face lengthy or indefinite detention in deplorable prison condition in their homelands. See *Mervil v. Lynch*, 813 F. 3d 1108 (8th Cir. 2016) (no specific intent to inflict pain or suffering by incarcerating individuals in appalling prisons conditions in Haiti); *Oxygene v. Lynch*, 813 F. 3d 541 (4th Cir. 2016)

(despite evidence of widespread severe pain and suffering in Haitian prisons, evidence does not support inference of officials' intent to cause pain); *but see Ridore v. Holder*, 696 F. 3d 907 (9th Cir. 2012) (evidence supports inference that government officials intended to subject prisoners to cruel, abusive treatment that constitutes torture). For a catalog of recent opinion involving CAT claims, see Gerald Seipp, *A Year in Review—Increasing Emphasis on Families and Children and Torture Convention Claims*, 93 Interp. Releases 1 (2016).

CHAPTER EIGHT
THE FACTFINDING CHALLENGE

p. 731, at end of current Notes, add new Note 8:

8. UNHCR undertook a research study comparing credibility assessment in the asylum systems in Belgium, the Netherlands, and the United Kingdom and reported that there were significant variations in approaches to determining credibility in all three countries. In particular, there were differences in the circumstances in which the asylum seeker would be given the benefit of the doubt. The authors criticized the extent to which decisions on credibility rely on an “individual decision-maker’s subjective approach, assumptions, impressions and intuition” and called for “transparent and principled approaches” based on “law and good practice.” UNHCR, *Beyond Proof: Credibility Assessment in EU Asylum Systems* (May 2013), 250, 251, <http://refworld.org/docid/519b1fb54.html>.

CHAPTER NINE

DETENTION, DETERRENCE, AND RESTRICTIONS ON ACCESS TO THE ASYLUM PROCEDURE

p. 832, after last paragraph, add:

Accompanying the large increase in unaccompanied children at the U.S.-Mexico border, see the material in this Update for casebook 364, as well as a separate significant increase in adult applications for asylum, the number of credible fear screenings there almost tripled between 2012 and 2013, from 13,931 in 2012 to 36,026 in 2013. Julia Preston, *Hoping for Asylum, Migrants Strain U.S. Border*, N.Y. Times, April 10, 2014, at A1. These numbers have continued to rise. USCIS reported that it conducted 42,279 credible fear interviews between October 2014 and September 2015 and 48,118 in FY 2016. Asylum Division, USCIS, Credible Fear Workload Report Summary, FY 2015, FY 2016 Total Caseload.

on p. 855, replace d. Conditions of Confinement with:

d. Family Detention at the Border

In the spring of 2014, the Obama Administration's plans for a more generous immigration approach collided with news of the arrival of thousands of unaccompanied children and families at the southern U.S. border. Most had left Central American countries that were experiencing unprecedented levels of gang activity and violence. David Martin frames the conflict between the situation at the border and the Administration's goals in this way:

Record numbers of child migrants began arriving from Central America - sometimes alone and sometimes accompanied by family members. Up until that point, a major selling point for some form of legalization of long-resident undocumented populations (whether done through legislation or by executive action) had been the public perception that the border was under increasingly effective control. The arrival of children in such large numbers vividly undermined that perception, because this was a flow that seemed unlikely to yield to the tools previously used to beef up the border, such as frontier fencing or massive new deployments of the Border Patrol. The children and their family members were not trying to evade *la migra*. They were actually seeking officers out, in order to turn themselves in. They apparently perceived that this would lead to haven in the United States, perhaps through political asylum or through other special measures for children....

David A. Martin, *Resolute Enforcement Is Not Just for Restrictionists: Building A Stable and Efficient Immigration Enforcement System*, 30 J.L. & Pol. 411, 421 (2015).

Facing congressional pressure to act, resistance from some communities to locating shelter care for the children within their boundaries, and a drop in public support for a

legalization program, the Administration took an enforcement-minded approach to the crisis. In June 2014, DHS began to apply the expedited removal provisions of INA § 235(b)(1) to arriving Central American children accompanied by their mothers. The Administration announced it would detain the mothers and children rather than releasing them while their asylum claims were processed, as had been the common practice. DHS established a temporary facility in Artesia, New Mexico and contracted with private prison contractors to build and expand additional facilities in Dilley and Karnes City, Texas, bringing the capacity for family detention from approximately 100 beds to over 3,000.⁵ High-level executive officials announced the opening of the Artesia facility, to be paired with a new policy of rapid removal processing. *See Remarks to the Press with Q&A by Vice President Joe Biden in Guatemala*, <https://www.whitehouse.gov/the-press-office/2014/06/20/remarks-press-qa-vice-president-joe-biden-guatemala>, June 20, 2014; Preston & Archibold, *U.S. Moves to Stop Surge in Illegal Immigration*, N.Y. TIMES, June 20, 2014.

The decision to channel the mothers and their children into expedited removal proceedings had two consequences. It triggered mandatory detention and a truncated removal process that lacks judicial review, unless the person is found to have a credible fear of persecution. *See* INA § 235 (b)(1)(B)(iii)(IV) (“Any alien subject to the procedures under this clause shall be detained pending a final determination of credible fear of persecution and, if found not to have such a fear, until removed.”). The expedited removal process requires Customs and Border Patrol agents to inquire whether apprehended noncitizens have a fear of returning to their country of origin. Expressing a fear of return leads to an interview with a USCIS asylum officer to determine whether the noncitizen has a credible fear or reasonable fear of return. INA § 235(b)(1)(A) & (B); 8 C.F.R. § 208.30(d)-(g). If the asylum officer makes a positive determination, the noncitizen exits the expedited removal process and is entitled to pursue an asylum claim in a traditional removal proceeding under INA § 240. 8 C.F.R. § 235.6(a)(2)(ii). (For a lengthier discussion of expedited removal at the border, limits on judicial review, the procedure for identifying asylum seekers, and detention, see pp. 569-580 in the casebook.)

Litigation and controversy enshrouded the detention facilities almost immediately. The detention of asylum-seeking mothers and children, a highly sympathetic group, inspired fierce critique from immigrant and child advocates, members of Congress, and other groups that the Administration usually counted as allies. It galvanized immigration advocates, law school clinics and law students around the country. Brigades of volunteer legal teams traveled to the remote town of Artesia to represent the detainees and, after the Artesia facility closed, to the larger contractor-run sites in Karnes City and Dilley. *See Manning, Ending Artesia*, Chap. VI, Jan. 2015, <https://innovationlawlab.org/the-artesia-report>.

⁵ The agency opened its first family detention center in 2001 in Berks, Pennsylvania, with a capacity of 96 women and children. A second 600-bed facility, operated by the Corrections Corporation of America, opened in 2006 but closed in 2009 after intense litigation and advocacy. *See* Nina Bernstein, *U.S. to Reform Policy on Detention for Immigrants*, N.Y. TIMES, Aug. 5, 2009.

The Administration took a hard line on efforts to release the mothers and children on bond, initially declining to set any bond for release or setting unreachably high bonds for nearly all of the detained women and children. *See R.I.L-R v. Johnson*, No. CV 15-11 (JEB), 2015 WL 737117, *4-5 (D.D.C. 2015); *see also* Martin, *supra* at 424 (reflecting that the Administration’s severe reaction to the migrants “is explainable largely as a White House recognition that its long-term goals for dealing with the resident undocumented population can succeed only if that population exhibits no significant or visible net growth”). The government argued that the detainees lacked constitutional due process and habeas protections, relying on *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542-44 (1950). *See M.S.P.C. v. U.S. Customs & Border Prot.*, 60 F. Supp. 3d 1156, 1167-72 (D.N.M. 2014) (also citing *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 215, 73 S.Ct. 625, 97 L.Ed. 956 (1953)). DHS maintained that detention was necessary to deter other children and families from making the journey, and that preventing further mass migration was a matter of national security. *See Matter of D–J–*, 23 I. & N. Dec. 572 (2003).

One federal district court agreed with the government that the detainees were not covered by the Constitution’s guarantee of due process. *M.S.P.C. v. U.S. Customs and Border Protection*, 2014 WL 6476125, at *20, *24-30 (D.N.M. Oct. 16, 2014). Another rejected that argument and enjoined the government from detaining the families if the basis for detention was the deterrence of others. *R.I.L-R v. Johnson*, 2015 WL 737117 (D.D.C. 2015).

Underlying the decision to institute detention and speedy deportation processing was an expectation that few, if any, of the mothers and children would establish meritorious asylum cases. *See* Remarks to the Press with Q&A by Vice President Joe Biden in Guatemala, <https://www.whitehouse.gov/the-press-office/2014/06/20/remarks-press-qa-vice-president-joe-biden-guatemala>, June 20, 2014 (predicting that the “vast majority” of detainees would be denied asylum and removed). Aided by the BIA’s issuance of *Matter of A-R-C-G-*, 26 I&N Dec. 388 (BIA 2014) recognizing domestic violence as a basis for asylum, fourteen of the fifteen families who went forward with asylum claims in the fall of 2014 prevailed on the merits. *See* Manning, *supra* at Chap. XIV. Average bond amounts at the Texas facilities dropped as immigration judges consistently reduced ICE’s initial bond determinations, and release through conditional parole became more common.

Detainees acknowledged that the new detention facilities were an improvement over the holding cells at the border, nicknamed *hieleras* (iceboxes) for their temperature settings and *perreras* (dog kennels) after their chain-link box construction. *See Flores v. Lynch*, No. CV 85-04544 DMG, at 16 (July 24, 2015). The new detention facilities featured playgrounds, a school, a basketball gym, and a medical clinic. However, evidence mounted of psychological deterioration of the detained women and children. Allegations of substandard medical care by the private contractors appeared in the media, increasing the pressure on the Administration to back away from detention as a solution to the presence of families at the border. *See* Julia Preston, *Hope and Despair as Families Languish in Texas Immigration Centers*, N.Y. TIMES, June 14, 2015; Lucas, et al, *Letter to Megan Mack re The Psychological Impact of Family Detention on Mothers and Children Seeking Asylum*,

<https://womensrefugeecommission.org/images/zdocs/CRCL-Complaint-Psych-Impact-of-Family-Detention.pdf>, June 30, 2015 (summarizing academic research on the mental health impacts of detaining asylum seekers and the psychological evaluations of nine detained women and their children).

In May and June 2015, the Administration announced a softening of its strict position on releasing the detainees, promising to review the cases of mothers and children detained for longer than 90 days and to release those who had established a credible fear or reasonable fear of return. Nevertheless, in August 2015, a federal district court in California ruled that the agency's detention policy violated a decades-old consent decree that prohibited DHS from detaining minors in secure, unlicensed facilities and required DHS to place children with a suitable relative—even if that meant releasing the accompanying parent. *Flores v. Lynch*, No. CV 85-04544 DMG (Aug. 21, 2015).

In July 2016, the Ninth Circuit affirmed the district court's ruling that the earlier settlement concerning detention of minors applied to both unaccompanied children and to children accompanied by their parents. The appellate court, however, overturned the district court's ruling that the settlement provided release rights to the adults accompanying their children. *See Flores v. Lynch*, 828 F.3d 898 (9th Cir. 2016).

The *Flores* settlement returned to center stage in May 2018, when the Trump administration took a new approach to border control that led to the separation of thousands of mostly Central American children from their parents. The administration adopted a “zero tolerance” policy of criminal prosecution for unlawful entry of all adults entering without inspection through the southwestern border. As an adjunct to the policy, the administration classified any child as an “unaccompanied minor” who crossed the border with an adult who was subsequently placed in immigration or criminal custody. The agency reasoned that the parent or guardian was no longer “available to provide care and physical custody” while in custody, per the Trafficking Victims Protection Reauthorization Act. CBP separated the children from the parent or other accompanying adult, and placed them in the custody of the Office of Refugee Resettlement. *See U.S. Att’y. Gen., Attorney General Sessions Delivers Remarks Regarding the Immigration Enforcement Actions of the Trump Administration* (May 7, 2018), <https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-discussing-immigration-enforcement-actions>; *Ms. L. v. U.S. Immigr. & Customs Enforcement*, 310 F. Supp. 3d 1133 (S.D. Cal. 2018).

On June 20, 2018, the Administration modified the “zero tolerance” policy in favor of “maintaining family unity.” *See Executive Order 13,841 of June 20, 2018, Affording Congress an Opportunity to Address Family Separation*, 83 Fed. Reg. 29435 § 1, July 30, 2018. The Order mandated that while adults who illegally crossed the border with minors would still be prosecuted, they would not be separated. Instead, families would be detained together “during the pendency of any criminal improper entry or immigration proceedings” to the extent permitted by law and “available resources.” *Id.* § 3. On June 26, 2018, the ACLU obtained a preliminary injunction against the Trump administration's family separation

policy. The court ordered the reunification of children with their families within 30 days, prohibited the deportation of parents without their children, and barred the future separation of children from their parents unless it was in the child's best interest. *Ms. L.*, 310 F. Supp. at 1149.

e. Conditions of Confinement

[continue with text of first full paragraph on p. 855]

CHAPTER TEN

RESETTLEMENT AND OTHER DURABLE SOLUTIONS

p. 891, after the last full paragraph, add a new paragraph:

In response to the huge outpouring of refugees caused by the Syrian civil war, President Obama proposed the admission of 85,000 refugees in 2016 and 110,000 refugees in 2017. After Donald Trump became President, he issued executive orders suspending the refugee resettlement program for 120 days and reducing to 50,000 the number of refugees admitted in 2017.

The January 27, 2017, executive order suspended all refugee admissions for 120 days and the admission of all refugees from Syria indefinitely. It also directed the Secretary of State “to make changes, to the extent permitted by law, to prioritize refugee claims made by individuals on the basis of religious-based persecution, provided that the religion of the individual is a minority religion in the individual’s country of nationality.” The order further stated that the entry of more than 50,000 in FY 2017 would be “detrimental to the interests of the United States” and suspended entries in excess of 50,000.

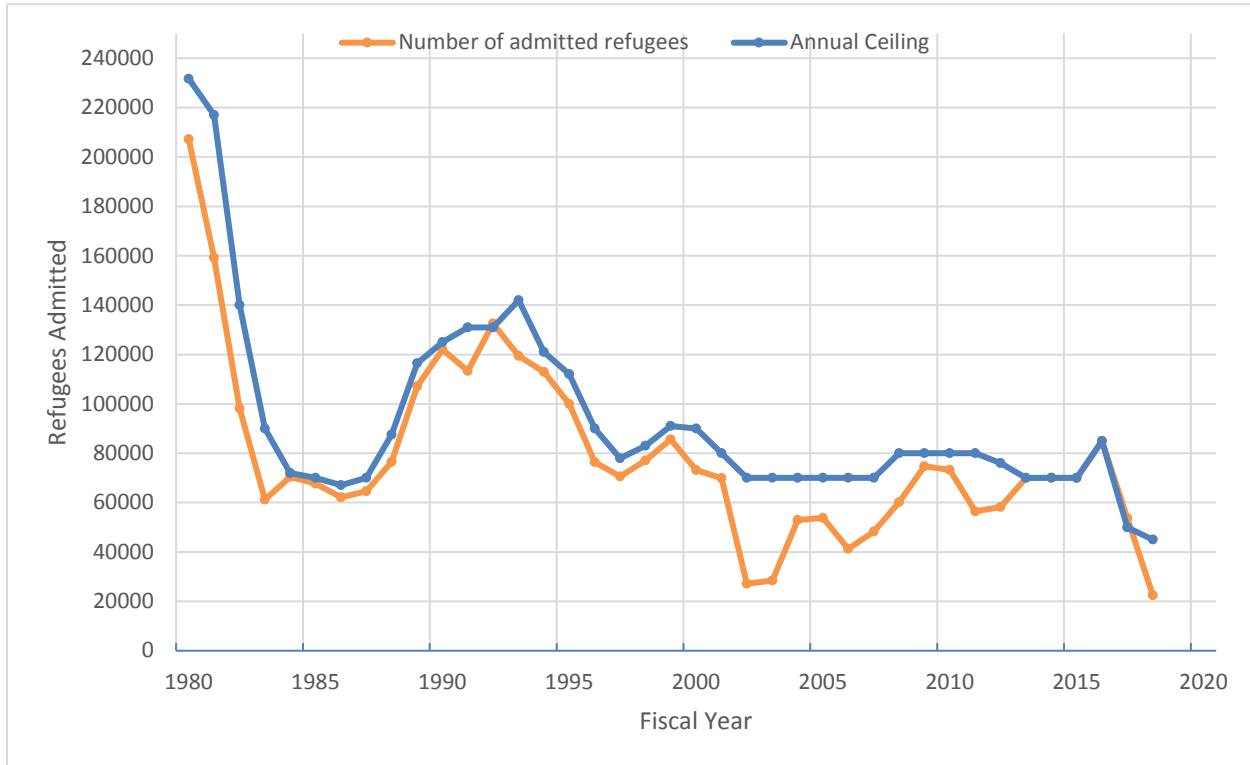
The second version of the travel ban, by executive order of March 16, 2017, also suspended all refugee admissions for 120 days, but no group of refugees was suspended indefinitely as Syrian refugees had been. The language regarding prioritizing persecution claims was struck. EO-2 carried forward the declaration that the entry of more than 50,000 refugees in FY 2017 would be “detrimental to the interests of the United States.”

The third version of the travel ban—the one at issue in the U.S. Supreme Court decision in *Trump v. Hawaii*, did not refer to refugee admissions. On October 24, 2017, another executive order resumed refugee admissions. *See Resuming the United States Refugee Admissions Program With Enhanced Vetting Capabilities*, 82 Fed. Reg. 50055 (Oct. 24, 2017). However, the administration made clear that it would subject refugee admissions, both individually and for particular countries, to much closer scrutiny than previous administrations had. In particular, the October 24 order deprioritized refugee resettlement for applications from 11 countries (Egypt, Iran, Iraq, Libya, Mali, North Korea, Somalia, South Sudan, Sudan, Syria, and Yemen) regarded as “high risk” to national security. *See White House, Executive Order 13815 of October 24, 2017: Resuming the United States Refugee Admissions Program with Enhanced Vetting Capabilities*, 82 Fed. Reg. 50055 (2017). The administration also implemented additional screening for applications from those countries. *See DHS, DHS Announces Additional, Enhanced Security Procedures for Refugees Seeking Resettlement in the United States* (press release, Jan. 29, 2018).

The administration has also set refugee admissions numbers much lower than previous administrations. Actual admissions have run lower. The FY 2018 ceiling was 45,000, but with 22,491 actual admissions. The FY 2019 ceiling is 30,000, but only 21,260 actual admissions in the first nine months of the fiscal year. *See State Department, Worldwide Refugee Admissions Processing System (WRAPS)*.

p. 906, replace Figure 10.7 with updated graph:

Figure 10.7
U.S. Annual Refugee Resettlement Ceilings and
Number of Refugees Admitted, FY 1980–2018



Source: Originally Published on the Migration Policy Institute Data Hub,
<http://www.migrationpolicy.org/programs/data-hub/us-immigration-trends>.

p. 923, after carryover paragraph, add new paragraph:

In December 2014, the Obama Administration launched an in-country processing program for minors in El Salvador, Guatemala, and Honduras. The Central American Minors (CAM) Refugee/Parole Program opened in response to the large increase in unaccompanied children arriving at the U.S.-Mexico border in 2014. In July 2016 the Obama Administration announced a significant expansion in eligibility for resettlement via the CAM program. In addition to minors, children over the age of 21 were eligible, as were parents and relatives who were caretakers of children at risk of persecution. Costa Rica agreed to provide temporary shelter for the most vulnerable Central American refugees as they were processed for the CAM program. Individuals who did not satisfy the statutory refugee definition could be paroled into the United States. Julie H. Davis, *U.S. To Admit More Central American Refugees*, N.Y. Times, July 26, 2016. It is noteworthy that the CAM in-country processing program expressly recognizes a humanitarian parole exception for minors who do not satisfy the refugee definition.

The Trump Administration suspended the CAM program in January 2017 (see material in this Update for casebook page 39) and ultimately terminated it in August 2017, barring the roughly 3,000 children who had been conditionally granted parole from entering the United States. *See* Exec. Order No. 13,769 (“Protecting the Nation from Foreign Terrorist Entry into the United States”), 82 Fed. Reg. 8,977, Sect. 5(a) (Jan. 27, 2017) (“The Secretary of State shall suspend the U.S. Refugee Admissions Program (USRAP) for 120 days.”); Termination of the Central American Minors Parole Program, 82 Fed. Reg. 38,926 (Aug. 16, 2017); *see also* Tal Kopan, *DHS ends program for Central American minors*, CNN: POLITICS, (Aug. 16, 2017), <https://www.cnn.com/2017/08/16/politics/trump-ending-central-american-minors-program/index.html>. In June 2018, the International Refugee Assistance Project filed a class-action lawsuit against the Trump Administration, alleging that the administration’s cancellation of the Program was an abuse of discretion based on discriminatory intent that violated the defendants’ due process and equal protection rights. *S.A. v. Trump*, Case No. 18-cv-03539-LB (N.D. Ca. 2018).

CHAPTER ELEVEN

BEYOND ASYLUM: OTHER FORMS OF PROTECTION FOR FORCED MIGRANTS

p. 957, replace first full paragraph and Table 11.1 with:

As of August 2017, nationals of ten countries were eligible for TPS in the United States. The most recent designations, in 2015, were of Nepal, which suffered a massive earthquake and Yemen, where civil war broke out. Honduras and Nicaragua were still on the list, after being first designated for TPS more than fifteen years earlier, in January 1999, after Hurricane Mitch struck both countries. More than 200,000 Salvadorans, first eligible for TPS in 2001 after severe earthquakes, were covered by a TPS designation valid until March 2018. DHS had announced in April 2017 that it would extend TPS until January 2018 for Haitians displaced by the 2010 earthquake. TPS was scheduled to expire for Sudan and South Sudan in November 2017, and for the rest of these countries in 2018.

In the second half of 2017 and in 2018, DHS moved to limit TPS significantly. DHS terminated TPS for Honduras (announced June 2018, to end January 2020), Nepal (announced April 2018, to end June 2019), El Salvador (announced January 2018, to end September 2019), Nicaragua (announced December 2017, to end January 2019), Haiti (announced January 2018, to end July 2019), and Sudan (announced September 2017, to end November 2018), and terminated Deferred Enforced Departure (DED) for Liberians (announced March 2018, to end March 2019). During the current administration, the number of countries with TPS has dropped from ten to the current four: Somalia, South Sudan, Syria, and Yemen. The number of current TPS recipients whose status would expire is substantial but varies widely by country. There are, for example, about 260,000 from El Salvador, 86,000 from Honduras, 58,550 from Haiti, 15,000 from Nepal, 5,000 from Nicaragua, as well as about 4,000 Liberians with DED. *See* Jill H. Wilson, *Temporary Protected Status: Overview and Current Issues* (Cong. Res. Serv. 2018).

Federal lawsuits challenging the legality of TPS terminations are currently pending. The plaintiffs allege that the terminations are unlawful on several grounds, including that they reflected failure to apply the statutory criteria for TPS designation, and were pretexts for invidious discrimination on the part of the president and DHS officials. A federal district court blocked termination of TPS for Haiti, Sudan, Nicaragua, and El Salvador. *See Ramos v. Nielsen*, 336 F. Supp. 3d 1075 (N.D. Cal. 2018), *appeal filed*, Oct. 12, 2018. The government later agreed not to terminate TPS for Nepal and Honduras while the *Ramos* litigation is pending. *See Bhattarai v. Nielsen*, 3:19-cv-00731-EMC (N.D. Cal. Mar. 12, 2019) (stipulation to stay proceedings); 84 Fed. Reg. 20647 (May 10, 2019).

p. 974, at end of current Notes, add new Note 6:

6. In February 2014 UNHCR issued Guidelines on Temporary Protection or Stay Arrangements (TPSAs). UNHCR envisions these arrangements as suitable for circumstances in which individual examination of refugee claims is not practical, and refers specifically to

“responses to humanitarian crises and complex or mixed population movements.” UNHCR, Guidelines on Temporary Protection or Stay Arrangements, <http://refworld.org/docid/52fba2404.html>.

p. 985, add new heading and text after the carryover paragraph:

c. Childhood Arrivals and Parents of U.S. Citizens and Lawful Permanent Residents

The exercise of prosecutorial discretion in the context of immigration enforcement became front page news in June 2012 when DHS Secretary Janet Napolitano announced Deferred Action For Childhood Arrivals (DACA). The DACA guidelines provide that individuals who came to the United States as young children can seek the exercise of prosecutorial discretion to defer their removal from the United States for a renewable two-year period. Though deferred action does not convey a lawful status, approved DACA applicants are not unlawfully present and can receive work authorization. The eligibility criteria for DACA follow:

- The applicant was under the age of 31 as of June 15, 2012
- The applicant came to the United States before the age of 16
- The applicant has continuously resided in the United States since June 15, 2007
- The applicant was physically present in the United States on June 15, 2012
- The applicant entered without inspection before June 15, 2012 or his or her lawful immigration status expired as of June 15, 2012
- The applicant is currently in school, has graduated from high school, has obtained a certificate of completion or a GED certificate, or is an honorably discharged veteran
- The applicant has not been convicted of a felony, significant misdemeanor, or three or more other misdemeanors, and does not pose a threat to public safety or national security.

As of March 31, 2017, 1,586,657 of 1,771,475 initial DACA applications had been approved. Those with expiring initial two-year DACA periods have been able to file renewal applications. As of March 31, 2017, USCIS received 884,661 renewal applications and approved 779,007 of them. Updated statistics on DACA applications can be found on the USCIS website at

<http://www.uscis.gov/tools/reports-studies/immigration-forms-data/data-set-form-i-821d-deferred-action-childhood-arrivals>

Interesting data on the opportunities opened to DACA recipients, such as obtaining driver’s licenses, opening bank accounts, and finding new jobs, can be found in Roberto G. Gonzales & Angie M. Bautista-Chavez, *Two Years and Counting: Assessing the Growing Power of DACA*, American Immigration Council (Special Report, June 2014), available at <http://>

www.immigrationpolicy.org/special-reports/two-years-and-counting-assessing-growing-power-daca. Other useful reviews of the DACA program and those seeking relief under it can be found in Tom K. Wong, Kelly K. Richter, Ignacia Rodriguez & Philip Wolgin, *Results from a Nationwide Survey of DACA Recipients Illustrate the Program's Impact*, Center for American Progress (July 2015), available at <https://www.americanprogress.org/issues/immigration/news/2015/07/09/117054/results-from-a-nationwide-survey-of-daca-recipients-illustrate-the-programs-impact/>; Tom K. Wong, Angela S. Garcia, Marisa Abrajano, David FitzGerald, Karthick Ramakrishnan & Sally Le, *Undocumented No More: A Nationwide Analysis of Deferred Action for Childhood Arrivals, or DACA*, Center for American Progress (Sept. 2013), available at <http://www.americanprogress.org/issues/immigration/report/2013/09/20/74599/undocumented-no-more/>; Angelo Mathay & Margie McHugh, *DACA at the Three-Year Mark: High Pace of Renewals, But Processing Difficulties Evident*, Migration Policy Institute Issue Brief (Aug. 2015), available at <http://www.migrationpolicy.org/research/daca-three-year-mark-high-pace-renewals-processing-difficulties-evident>; Elizabeth Carlson, *A Practitioner's Guide to Deferred Action for Childhood Arrivals*, 13–03 Immigr. Briefings (Mar. 2013).

The second phase of President Obama's executive actions arrived in November 2014, when he announced an expansion of the DACA program in several dimensions. One expansion was to eliminate the maximum age limit of thirty-one years. The second change was to move up from June 15, 2007, to January 1, 2010, the date by which noncitizens must have come to the United States. According to one estimate, the combination of these two changes would make approximately 290,000 additional noncitizens eligible for DACA. See Migration Policy Institute, *MPI: As Many as 3.7 Million Unauthorized Immigrants Could Get Relief from Deportation under Anticipated New Deferred Action Program* (press release, Nov. 19, 2014), <http://www.migrationpolicy.org/news/mpi-many-37-million-unauthorized-immigrants-could-get-relief-deportation-under-anticipated-new>. The third change in DACA was to lengthen from two to three years the duration of a DACA grant. The expanded DACA was the same as the original version in all other respects.

At the same time that the President announced this expansion of DACA, he also launched a new deferred action program called Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA). DAPA would provide DACA-like temporary reprieves from deportation to parents of U.S. citizens and lawful permanent residents. These parents had to have been in the United States for five years before the program was announced in November 2014. Successful applicants would, as in the expanded DACA program, have a renewable but revocable reprieve for three years, and they would be eligible for employment authorization based on a showing of economic necessity. As with DACA, certain criminal convictions would be categorically disqualifying. According to one estimate, about 3.7 million people would qualify for DAPA. See Migration Policy Institute, *MPI: As Many as 3.7 Million Unauthorized Immigrants Could Get Relief from Deportation under Anticipated New Deferred Action Program*, *supra*.

As part of the deliberations that led to DAPA, the Administration considered deferred action for parents of noncitizens granted deferred action through DACA. On November 19, 2014, the Department of Justice Office of Legal Counsel issued an opinion explaining that a DACA-like deferred action program for parents of U.S. citizens and lawful permanent residents would be legally permissible, but that it would not be permissible for any such program to include parents of DACA recipients. OLC found that the former proposed program (which became DAPA) was permissible largely because it would be “consonant with congressional policy embodied in the INA.” The opinion noted the numerous provisions of the statute that tend to favor family members of U.S. citizens and, to a lesser extent, of lawful permanent residents, but the latter program could not claim the same consonance. *See Memorandum Opinion from Karl R. Thompson, Principal Deputy Assistant Att’y Gen., Office of Legal Counsel, to the Sec’y of Homeland Sec. and the Counsel to the President 31-33 (Nov. 19, 2014), available at <http://www.justice.gov/sites/default/files/olc/opinions/attachments/2014/11/20/2014-11-19-auth-prioritize-removal.pdf>.* The government took the unusual step of releasing the OLC opinion at the time it announced its package of executive actions on November 20, 2014, in which DAPA was limited to certain parents of U.S. citizens and lawful permanent residents.

Almost immediately after the first DACA announcement in June 2012, various opponents of the program filed lawsuits intended to challenge the President’s authority to adopt and implement it. And after President Obama announced the expansion of DACA and the new DAPA program, opponents filed additional lawsuits, again arguing that the President had exceeded his authority under the U.S. Constitution and federal statutes. Of these lawsuits, the one that found the most success has been *Texas v. United States*, No. CIV. B-14-254, 2015 WL 648579 (S.D. Tex. Feb. 16, 2015), filed by Texas and 25 other states in the federal district court for the Southern District of Texas.

On February 16, 2015, federal district judge Andrew Hanen issued a preliminary injunction blocking the implementation of DAPA. *See id.*; Michael D. Shear & Julia Preston, *Dealt Setback, Obama Puts Off Immigrant Plan*, N.Y. Times, Feb. 17, 2015, at A1. He found first that the state of Texas had standing to sue the federal government based on the cost of issuing state driver’s licenses to noncitizens who would become eligible for licenses if the federal government approved their DAPA applications. Judge Hanen then reached the merits of the plaintiffs’ arguments. He seemed to concede, at least for the sake of further analysis, the federal executive branch may exercise prosecutorial discretion in immigration law enforcement. At the same time, he viewed the issue in the case as whether DAPA was within that executive authority to exercise prosecutorial discretion. On this issue, Judge Hanen’s opinion reflects deep skepticism that the President has any authority to exercise prosecutorial discretion to grant anything more than a bare temporary reprieve from removal. This part of Hanen’s opinion targeted the threshold eligibility that deferred action recipients gain to apply for work authorization.

Despite the breadth of Judge Hanen’s apparent skepticism of executive authority to grant any broad form of relief from removal, the ultimate basis of his preliminary injunction

was much narrower. He held that DAPA was a change in law that required the Department of Homeland Security to follow the notice and comment procedures set out in the Administrative Procedure Act, which DHS had not followed. A key aspect of this conclusion was Judge Hanen’s view that DAPA did not call for DHS to make discretionary decisions. Rejecting the federal government’s argument that DHS would exercise meaningful discretion after an applicant met threshold eligibility requirements, Hanen found that DAPA would automatically grant a reprieve to any applicant who met the threshold eligibility criteria. This meant, in turn, that DAPA represented a legislative rule that could not be adopted without notice and comment procedures. Judge Hanen did not address the states’ other claims—that the implementation of DAPA would violate the substance of the Administrative Procedure Act or be unconstitutional as a violation of separation of powers or of the constitutional provision requiring the President to “take Care that the Laws be faithfully executed.”

The federal government appealed the preliminary injunction and moved for a stay of that injunction pending resolution of the merits of that appeal. A Fifth Circuit panel majority affirmed in an opinion that first upheld Judge Hanen’s reasoning and conclusion on the standing issue. *Texas v. United States*, 787 F.3d 733, 747-54 (5th Cir. 2015). It then agreed that DAPA went beyond the nonenforcement at the core of prosecutorial discretion by conferring benefits beyond a temporary reprieve from deportation. Finally, the Fifth Circuit affirmed the basis of the district court’s decision—that the APA notice-and-comment requirements applied to DAPA. Judge Higginson dissented on the grounds that DAPA reflected non-justiciable agency discretion, and that the APA notice-and-comment requirements do not apply to DAPA because the program is not a legislative rule. In June 2016, the U.S. Supreme Court split 4 to 4 in *United States v. Texas*, 579 U.S. ___ (June 23, 2016), leaving an injunction against the DAPA and expanded DACA programs in place.

After the change in presidential administrations, a February 2017 memorandum from DHS Secretary Kelly rescinded most of the prior administration’s priority-setting policies, but it explicitly preserved the DACA and DAPA programs. *See* Memorandum from John Kelly, Sec’y of Homeland Sec., on Enforcement of the Immigration Laws to Serve the National Interest (Feb. 20, 2017), in the statutory supplement.

On June 15, 2017, DHS rescinded the November 20, 2014 DAPA memo. *See* Memorandum from John Kelly, Sec’y of Homeland Sec., on Rescission of November 20, 2014 Memorandum Providing for Deferred Action for Parents of Americans and Lawful Permanent Residents, in the statutory supplement.

Then, in September 2017, the administration rescinded the 2012 memo establishing DACA. *See* Memorandum from Elaine Duke, Acting Sec’y of Homeland Sec., on Rescission of the June 15, 2012 Memorandum Entitled “Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children,” in the statutory supplement. The announced rescission called for a one-month phase-out period until October 5, 2017, during which DACA recipients with grants set to expire by March 5, 2018, could apply for renewals. DACA recipients with grants set to expire after March 5, 2018, could not apply for

renewals. Moreover, DHS would not accept applications from anyone who had never received a grant of deferred action under DACA. The planned result was to have DACA recipients start to lose DACA status starting March 6, 2018.

Nine separate lawsuits to block the rescission soon followed in four different federal district courts, raising a variety of claims. The result so far has been multiple nationwide injunctions blocking rescission as to DACA recipients who sought to renew their DACA grants, but allowing DHS to decline applications from anyone who had never received DACA.

Of the courts that have heard challenges to DACA's rescission, only the federal district court in *Casa De Maryland v. U.S. Dep't of Homeland Security* upheld the rescission. 284 F. Supp. 3d 758 (D. Md. 2018). On appeal, however, a divided panel of the Fourth Circuit Court of Appeals reversed that ruling, concluding instead that DHS's rescission was "not adequately explained and thus was arbitrary and capricious" in violation of the Administrative Procedure Act. No. 18-1469, – F.3d -- (4th Cir. May 17, 2019).

Another important development in the DACA rescission litigation regards the Administration's second attempt at explaining its decision to rescind DACA. In *NAACP v. Trump*, the D.C. district court initially delayed its decision by 90 days to allow the government to better explain its decision. In response, on June 22, 2018, the federal government filed a memorandum by then-DHS Secretary Kirstjen Nielsen with the court. Memorandum from Secretary Kirstjen M. Nielsen, June 22, 2018.

Like the prior memo from Acting Secretary Duke and the DOJ's arguments in litigation until that point, the Nielsen Memo repeated the claim that DACA was unlawful. However, it also added a rationale that the Trump Administration had, prior till then, resisted articulating. The Nielsen Memo argued that regardless of legality, DHS was rescinding DACA because it should "not adopt public policies of non-enforcement of [Congress'] laws for broad classes and categories of aliens" and that "DHS should only exercise its prosecutorial discretion not to enforce the immigration laws on a truly individualized, case-by-case basis." The Nielsen Memo, at least in part, presented DACA rescission as a discretionary enforcement decision made by the agency imbued with the authority to make such policy choices.

It remains to be seen how Nielsen's inclusion of a policy rationale for rescinding DACA influences judicial analysis, especially at the Supreme Court (see below). Is the articulation of a different enforcement preference sufficient to cure the legal defect in the rescission identified by several courts? If DACA is just a systematized exercise of prosecutorial discretion, is disagreeing with that discretion sufficient to lawfully rescind the program?

In the midst of these challenges to DACA's rescission, on May 1, 2018, a group of states led by the state of Texas sued the federal government arguing that DACA was unlawful and sought an injunction against the program. *Texas v. United States*, 328 F. Supp. 3d 662 (S.D. Tex. 2018). The case was filed in the same federal district, and assigned to the same Judge Hanen who blocked implementation of the DAPA program in 2015. Judge Hanen concluded that the plaintiffs were likely to succeed on their claims that DHS had no statutory

authority to implement DACA, that DACA contradicted the INA, and that creating DACA required notice and comment rulemaking. Despite this conclusion, however, Hanen denied the states' request for a preliminary injunction because he found that plaintiffs' delay in filing suit prevented them from satisfying their burden of showing irreparable harm; in addition, the district court concluded that the plaintiffs could not meet the preliminary injunction factors of showing hardship and the balance of public interest. *Id.* at 736-42.

After several failed attempts to convince the Supreme Court to hear an appeal of any of the DACA rescission cases over the past two years, the federal government recently succeeded. On June 28, 2019, the Supreme Court granted *certiorari*, consolidating the *Regents of Univ. of Cal., Batalla Vidal*, and *NAACP* cases. The Court set oral argument in the case for November 12, 2019, with a decision expected no later than June 2020. In addition to its consequences for the nearly 800,000 DACA recipients and their families, the decision and its timing will add intrigue to the 2020 presidential campaign.

Pending the Supreme Court's resolution of DACA's fate, the orders from three federal district courts (in California and New York, plus the District of Columbia) continue to have nationwide effect and require USCIS to continue processing DACA renewals.

p. 1009, at end of current Notes, add new Note 10:

10. In November 2014 the European Court of Human Rights applied the reasoning developed in *M.S.S.* to prohibit Switzerland from returning a family of Afghan asylum seekers to Italy. *Tarakhel v. Switzerland*, European Court of Human Rights, Judgment of 4 November 2014, Application No. 29217/12. There was compelling evidence of serious long-standing problems throughout the Italian asylum system, with the number of asylum seekers far outstripping government accommodations. In addition, asylum seekers housed in government asylum centers frequently faced overcrowded, unhealthy, and violent conditions. In light of this evidence and the unique vulnerabilities of child asylum seekers, the Court concluded that transferring the asylum seekers to Italy might result in the separation of the minors from their parents, leading to a real risk of inhuman or degrading treatment. Accordingly, the Court forbade Switzerland from returning the asylum seekers to Italy without first obtaining individualized guarantees that the Italian authorities would provide accommodations appropriate to the age of the children and would keep the family together.