

MATTER OF A-B-, LGBTQ ASYLUM CLAIMS, AND THE RULE OF LAW IN THE U.S. ASYLUM SYSTEM

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ABSTRACT—On June 11, 2018, then-Attorney General Jeff Sessions released his decision in a case called *Matter of A-B-*, purporting to eliminate domestic violence and gang violence as grounds for asylum. The decision also cast doubt on the continued viability of asylum claims predicated on non-state actor violence, which alarmed LGBTQ advocates, whose asylum claims often involve non-state actor persecutors. In making this change, Sessions used a previously rarely used feature of the asylum system, the Attorney General’s self-certification power. This Note analyzes the potential impact of *Matter of A-B-* on LGBTQ asylum seekers. Based on the text of the decision, *Matter of A-B-* should have a less extreme impact on LGBTQ and other asylum seekers than advocates initially feared. But the actual impact of the decision is nonetheless alarming. Statistical and anecdotal evidence indicates that *Matter of A-B-* contributed to record high denial rates in 2018, and some asylum seekers denied as a result identified as LGBTQ. This discrepancy between the text of the decision and its practical impact highlights several deeply troubling features of the U.S. asylum system, including the broad discretion afforded to adjudicators and lack of judicial independence. Because of these factors, when the Attorney General uses his self-certification power in the asylum context, one person has vast power to make sweeping changes to a process with life and death stakes, a level of power that is contrary to the norms of checks and balances that underpin our democratic system. This Note argues that the case study of *Matter of A-B-* and its impact on LGBTQ asylum claims reveals serious problems with the rule of law in the U.S. asylum system.

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“The very essence of the rule of law . . . is that individual cases should be disposed of by reference to standardized norms rather than by arbitrary factors, particularly the personal biases, attitudes, policies, or ideologies of government adjudicators.”

Jaya Ramji-Nogales et al., *Refugee Roulette*[†]

INTRODUCTION

On June 11, 2018, then-Attorney General Jeff Sessions used a previously rarely used self-certification power¹ to release an opinion in a case called *Matter of A-B-* that appeared to eliminate domestic violence and gang violence as potential grounds for asylum.² After decades of efforts by asylum

[†] Jaya Ramji-Nogales et al., *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295, 299–300 (2007).

¹ Because the Board of Immigration Appeals is situated within the Department of Justice, the Attorney General has the power to refer immigration cases to himself and issue decisions. *Infra* Section I.B.2.

² *A-B-*, 27 I&N Dec. 316, 320 (A.G. 2018); Katie Benner & Caitlin Dickerson, *Sessions Says Domestic and Gang Violence Are Not Grounds for Asylum*, N.Y. TIMES (June 11, 2018), <https://www.nytimes.com/2018/06/11/us/politics/sessions-domestic-violence-asylum.html> [https://perma.cc/AH5B-Z29T]. Despite misleading headlines issued by numerous media outlets at the

and women’s rights advocates, domestic violence was officially recognized as grounds for asylum in 2014,³ a hard-fought victory that Sessions’s decision in *A-B-* appeared to erase overnight.⁴ The viability of domestic violence and gang violence as bases for asylum claims is of vital importance to tens of thousands of lives.⁵ Since 2014, the United States has seen an influx of asylum seekers at the southern border fleeing violence in Central America,⁶ the vast majority of whom are escaping domestic violence, gang violence, or a combination of both.⁷ In the asylum context, the stakes are life and death.⁸

Along with references to domestic violence and gang violence, Sessions’s opinion in *Matter of A-B-* also contained language that seemed to

time of the decision’s release, *see infra* note 21, this Note argues that *Matter of A-B-* did not create a categorical bar on domestic violence and gang violence-based asylum claims. *Infra* Section II.C.

³ A-R-C-G-, 26 I&N Dec. 388, 394–95 (B.I.A. 2014).

⁴ NAT’L IMMIGRANT JUSTICE CTR., ASYLUM PRACTICE ADVISORY: APPLYING FOR ASYLUM AFTER *MATTER OF A-B-*, at 2–3 (2018), <https://www.immigrantjustice.org/sites/default/files/content-type/resource/documents/2018-06/Matter%20of%20A-B-%20Practice%20Advisory%20-%20Final%20-%20206.21.18.pdf> [<https://perma.cc/RVV7-JZQW>] [hereinafter NIJC ADVISORY]. Meanwhile, applicants fleeing gang violence have never had a precedential decision to rely on, and such applicants have rarely succeeded in receiving asylum, though it was possible. SEBASTIAN AMAR ET AL., CAPITAL AREA IMMIGRANTS’ RIGHTS COAL., SEEKING ASYLUM FROM GANG-BASED VIOLENCE IN CENTRAL AMERICA: A RESOURCE MANUAL 8 (2007), <https://www.unhcr.org/en-ie/585a96a34.pdf> [<https://perma.cc/9FGB-QZZN>] (“To put it simply, it is extremely difficult to succeed in an asylum claim that is based on Central American gang violence.”).

⁵ While data on the grounds for asylum seekers’ claims is not publicly available, domestic violence and gang violence are among the most common concerns cited by asylum seekers fleeing Central America. DORIS MEISSNER ET AL., MIGRATION POLICY INST., THE U.S. ASYLUM SYSTEM IN CRISIS: CHARTING A WAY FORWARD 18–19 (2018). In 2017, U.S. immigration courts received 142,961 asylum applications. U.S. DEP’T OF JUSTICE, EXEC. OFFICE FOR IMMIGRATION REVIEW, STATISTICS YEARBOOK: FISCAL YEAR 2017, at 24 (2017), <https://www.justice.gov/eoir/page/file/1107056/download> [<https://perma.cc/6LHD-3RD3>] [hereinafter STATISTICS YEARBOOK 2017].

⁶ MEISSNER ET AL., *supra* note 5, at 10–11, 19; Benner & Dickerson, *supra* note 2.

⁷ MEISSNER ET AL., *supra* note 5, at 19; Jonathan Blitzer, *Jeff Sessions Is Out, but His Dark Vision for Immigration Policy Lives On*, NEW YORKER (Nov. 8, 2018), <https://www.newyorker.com/news/news-desk/jeff-sessions-is-out-but-his-dark-vision-for-immigration-policy-lives-on> [<https://perma.cc/W3NS-FW6D>] (reporting that after *A-B-* was released, an asylum officer stated, “Ninety per cent of the people I’ve referred to a judge for an asylum hearing were referred on the basis of gang-related violence or domestic violence in Central America. Now what?”).

⁸ Sarah Stillman, *When Deportation Is a Death Sentence*, NEW YORKER (Jan. 8, 2018), <https://www.newyorker.com/magazine/2018/01/15/when-deportation-is-a-death-sentence> [<https://perma.cc/MKV2-SEX6>] (identifying over sixty cases of deportees who were later murdered or greatly harmed); *see also* Maria Sacchetti, ‘Death Is Waiting for Him,’ WASH. POST (Dec. 6, 2018), https://www.washingtonpost.com/graphics/2018/local/asylum-deported-ms-13-honduras/?noredirect=on&utm_term=.4bc0447fe43b [<https://perma.cc/2S49-P3DN>] (telling the story of a father of two who was denied asylum, deported, and found murdered within a year). *See generally* DAVID NGARURI KENNEY & PHILIP G. SCHRAG, ASYLUM DENIED: A REFUGEE’S STRUGGLE FOR SAFETY IN AMERICA (2008) (providing an in-depth account of a Kenyan man whose asylum claim was denied and who, upon his return to Kenya, was nearly murdered).

threaten the continued viability of other claims based on persecution perpetrated by non-state actors.⁹ This alarmed LGBTQ advocates.¹⁰ Like domestic violence claims, LGBTQ asylum claims often involve persecution perpetrated not by the police or the military, but by non-state actors that the government is either unable or unwilling to control, such as family members.¹¹ In addition, both types of claims usually rely on proving membership in a “particular social group,” as opposed to one of the other protected grounds for asylum.¹²

Thousands of LGBTQ individuals likely seek asylum in the United States every year.¹³ Although LGBTQ people have made great strides over

⁹ A-B-, 27 I&N Dec. 316, 320 (A.G. 2018) (“While I do not decide 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.”). This Note argues that while this language appears to call the continued viability of non-state actor claims into question, such claims are still cognizable after *Matter of A-B-*. *Infra* Section II.C.

¹⁰ See, e.g., *Immigration Equality Statement on AG Sessions’ Decision in Matter of A-B-*, IMMIGR. EQUALITY (June 12, 2018, 4:53 PM), available at https://www.immigrationequality.org/immigration-equality-statement-on-ag-sessions-decision-in-matter-of-a-b/#.XBJX_WhKjIU [<https://perma.cc/5X7V-C87M>] (“The Attorney General’s decision in *Matter of A-B-* will certainly make it harder for many refugees to secure the safety they deserve.”); Arthur S. Leonard, *Sessions’ New Asylum Posture & LGBTQ Refugees*, GAY CITY NEWS (Sept. 4, 2018, 2:20 PM), <https://gaycitynews.nyc/stories/2018/12/w30542-sessions-new-asylum-posture-lgbtq-refugees-2018-06-13.html> [<https://perma.cc/Q529-ZQUK>] (describing Sessions’s opinion as a “hardline position” and underscoring that continued treatment of LGBTQ people as a protected class depends on administrative interpretation by “the anti-LGBTQ Trump administration”); Mark Joseph Stern, *Jeff Sessions’ Latest Immigration Ruling Is a Violation of International Law*, SLATE (June 14, 2018, 11:19 AM), <https://slate.com/news-and-politics/2018/06/jeff-sessions-ruling-in-matter-of-a-b-is-a-violation-of-international-law.html> [<https://perma.cc/3KEY-E84W>] (“By reaching so far, Sessions’ opinion creates a problem for LGBTQ asylum-seekers.”). Although various sources use different acronyms, this Note uses the acronym LGBTQ to refer to lesbian, gay, bisexual, transgender, and queer people. This Note will also use the umbrella term “queer” to refer to this community. For a discussion of this terminology, see GLAAD MEDIA REFERENCE GUIDE 6 (10th ed. 2016), <http://www.glaad.org/sites/default/files/GLAAD-Media-Reference-Guide-Tenth-Edition.pdf> [<https://perma.cc/39JR-Q52V>].

¹¹ See *infra* Section II.B.

¹² To receive asylum in the United States, applicants must prove that they have a well-founded fear of persecution in their home country because of one of five protected grounds: race, religion, nationality, political opinion, or particular social group. *Infra* notes 67–68 and accompanying text.

¹³ It is impossible to know for sure how many asylum claims are based on sexual orientation and gender identity, as the U.S. government does not collect this information. However, one organization estimated that such claims comprise approximately 5% of U.S. asylum claims as of 2012. LGBT FREEDOM ASYLUM NETWORK, STRONGER TOGETHER: A GUIDE TO SUPPORTING LGBT ASYLUM SEEKERS IN THE UNITED STATES 10 (2015), available at https://assets2.hrc.org/files/assets/resources/LGBT_Asyllum_Seekers_FINAL.pdf [<https://perma.cc/PA4Z-CJT7>]. In 2017, U.S. immigration courts received 142,961 asylum applications. STATISTICS YEARBOOK 2017, *supra* note 5, at 24.

the past decades in terms of both legal protections¹⁴ and social acceptance¹⁵ in the United States, being LGBTQ still carries a heavy price in many parts of the world.¹⁶ As of 2018, seventy-three countries outlaw homosexuality; in eight it is punishable by death.¹⁷ Even when not explicitly criminalized, LGBTQ people in many countries are heavily stigmatized and frequently face violence perpetrated by family members, neighbors, and other non-state actors.¹⁸ If *Matter of A-B-* negatively impacts the viability of LGBTQ asylum claims, forcing applicants to return to countries where they face persecution, it could jeopardize tens of thousands of lives.

At first glance, *Matter of A-B-* did not appear to have as severe an impact on LGBTQ claims as advocates feared.¹⁹ The language in the opinion that poses the greatest threat to LGBTQ asylum claims is nonbinding dicta, and the actual holding of the case is narrow—it merely overturns the 2014 precedential domestic violence case *Matter of A-R-C-G-*.²⁰ Despite alarming media coverage of the decision,²¹ it does not categorically bar domestic

¹⁴ See, e.g., *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (finding a constitutional right to same-sex marriage); *U.S. v. Windsor*, 133 S. Ct. 2675 (2013) (striking down the Defense of Marriage Act, a federal law that defined marriage as a union between a woman and a man); *Lawrence v. Texas*, 539 U.S. 558 (2003) (finding laws criminalizing sodomy unconstitutional).

¹⁵ Press Release, NORC at the University of Chicago, Americans Move Dramatically Toward Acceptance of Homosexuality Finds GSS Report (Sept. 2011), <http://www.norc.org/NewsEventsPublications/PressReleases/Pages/american-acceptance-of-homosexuality-gss-report.aspx> [<https://perma.cc/DEU3-D2Z5>] (based on data released in September 2011). In 2018, GLAAD data showed an increase in non-LGBTQ Americans who reported feeling uncomfortable around LGBTQ people in some situations for the first time in many years. GLAAD, *Accelerating Acceptance 2018: Executive Summary* (2018), <http://www.glaad.org/files/aa/Accelerating%20Acceptance%202018.pdf> [<https://perma.cc/84UV-PECV>] [hereinafter GLAAD Acceptance Report]. However, 79% still reported support for equal rights for the LGBTQ community, *id.*, a sharp increase in support over less than a decade prior when only 46% reported support for marriage equality. See Press Release, NORC at the University of Chicago, *supra*.

¹⁶ Rosamond Hutt, *This Is the State of LGBTI Rights Around the World in 2018*, WORLD ECON. F. (June 14, 2018), <https://www.weforum.org/agenda/2018/06/lgbti-rights-around-the-world-in-2018> [<https://perma.cc/9EJP-9SQH>].

¹⁷ *Id.*

¹⁸ See *id.*; VIOLENCE ASIA, *infra* note 133 at 16–17 (“Individual violators [of LBT women’s rights] include neighbors, passersby in public spaces, family members, intimate partners, religious vigilantes, or co-workers.”).

¹⁹ See *infra* Section II.C.

²⁰ See *infra* Section II.C.

²¹ See, e.g., Benner & Dickerson, *supra* note 2; Joel Rose, *Attorney General Denies Asylum to Victims of Domestic Abuse, Gang Violence*, NPR (June 11 2018, 4:49 PM), <https://www.npr.org/2018/06/11/618988483/attorney-general-denies-asylum-to-victims-of-domestic-abuse-gang-violence> [<https://perma.cc/8N4C-XJJ5>]; Maria Sacchetti, *Sessions: Victims of Domestic Abuse and Gang Violence Generally Won’t Qualify for Asylum*, WASH. POST (June 11, 2018), https://www.washingtonpost.com/local/immigration/sessions-signals-that-victims-of-domestic-abuse-and-gang-violence-generally-will-not-qualify-for-asylum/2018/06/11/45e54602-6d9e-11e8-bd50-b80389a4e569_story.html [<https://perma.cc/3HED-SXL9>].

violence claims, gang violence claims, or other claims involving non-state actor persecutors.²² Analysis of the court decisions that have cited the case since its release supports this interpretation.²³ In theory, the case's impact on LGBTQ asylum seekers should be limited.

However, *Matter of A-B-*'s practical impact on LGBTQ claims is likely far more consequential than the text of the opinion or those citing decisions would make one believe.²⁴ The year 2018 saw the highest overall rate of asylum denials in the U.S. in two decades, and statistics show a spike in denials shortly after *A-B-* was released.²⁵ Anecdotal evidence indicates that many asylum adjudicators have interpreted the holding of *A-B-* to be broader than it truly is, causing them to reject claims that previously would have been viable, including several documented LGBTQ claims.²⁶

The discrepancy between the text of *A-B-* and its potential impact reveals serious problems with the rule of law in the U.S. asylum system.²⁷ In particular, it shows that the existence of the Attorney General's (AG's) self-certification power allows individuals like Sessions to make sweeping changes to the asylum system with few limitations.²⁸ Because of the nature of the U.S. asylum system—which has limited binding precedent, little meaningful appellate review, broad discretion afforded to adjudicators, and a lack of judicial independence—a decision like *A-B-* can have far-reaching consequences.²⁹

This Note explores the potential impact of *Matter of A-B-* on LGBTQ-based asylum claims and argues that that impact lays bare the absence of the rule of law in the U.S. asylum system. Part I provides an overview of the asylum process and highlights several problematic features of that process. Part II summarizes relevant case law in both the domestic violence and LGBTQ contexts, with emphasis on the similarities between the two types of claims, and explores *Matter of A-B-* itself. Part III explores the impact of *A-B-* so far, including its impact on LGBTQ asylum claims, and argues that the broad discretionary power granted to asylum adjudicators will allow adjudicators to either misinterpret the holding of *A-B-* or be emboldened to reject more claims on the basis of personal anti-LGBTQ bias.

²² See *infra* Section II.C.

²³ See *infra* Sections III.A.1–III.A.2.

²⁴ See *infra* Sections III.A.4–III.A.5.

²⁵ See *infra* note 207–209 and accompanying text.

²⁶ See *infra* Section III.A.5.

²⁷ See *infra* Part IV.

²⁸ See *infra* Part IV.

²⁹ See *infra* Part IV.

Ultimately, the discrepancy between what the *Matter of A-B-* decision actually says and what its practical impact will be highlights a broader problem in the asylum context: the serious threat to the rule of law that Attorney General review and broad adjudicator discretion pose in the asylum system. Therefore, Part IV proposes potential changes that could be implemented to address some of the wider systemic problems in the asylum system that *Matter of A-B-* illuminates. Part IV suggests that eliminating the AG’s self-certification power and reducing adjudicator discretion through increased data collection and transparency or creating a new system of Article I immigration courts could help to restore confidence in the rule of law in the asylum system. Additionally, Part IV proposes ensuring representation of all asylum seekers, given the extremely high human stakes of asylum proceedings and as an additional measure to guarantee the rule of law.

I. THE U.S. ASYLUM SYSTEM

This Part provides general background information on relevant features of the U.S. asylum process. It introduces the way the asylum system functions and the elements of an asylum claim. It then highlights several unique features of the asylum process, including the unusually powerful role of the Attorney General, the comparative scarcity of binding precedent, and the broad discretion granted to adjudicators.

A. *The Asylum Process*

This Section describes the basic steps an asylum applicant must take, the Credible Fear Interview, and the elements of an asylum claim.

1. *Asylum Process Basics*

U.S. asylum law has its roots in international law.³⁰ In 1968, the United States became a party to the United Nations Convention relating to the Status of Refugees (Refugee Convention).³¹ The heart of the Refugee Convention was the idea that member nations cannot return people to countries where they face threats to their “life or freedom.”³² Key provisions of the Refugee

³⁰ DEBORAH E. ANKER, *LAW OF ASYLUM IN THE UNITED STATES* 9–13, 19–24 (2018 ed. 2018) (discussing the ways in which domestic asylum laws were passed to bring the U.S. into compliance with international agreements).

³¹ *Id.* at 9.

³² Text of the 1951 Convention and 1967 Protocol Relating to the Status of Refugees at 3, *opened for signature* July 28, 1951, 19 U.S.T. 6259, 6261, 189 U.N.T.S. 150, 152 (entered into force Apr. 22, 1954), <https://www.unhcr.org/en-us/3b66c2aa10> [<https://perma.cc/UW9X-CKGR>] [hereinafter *Refugee Convention*] (“The principle of *nonrefoulement* is so fundamental that no reservations or derogations may be made to it. It provides that no one shall expel or return . . . a refugee against his or her will, in any

Convention, including the definition of “refugee,” were codified into U.S. law through the Refugee Act of 1980, an amendment to the Immigration and Nationality Act (INA).³³ The difference between a refugee and an asylum seeker is essentially one of geography—asylum seekers apply when physically present in the United States or at the border, while refugees apply while abroad.³⁴ People who are granted asylum receive permanent status in the U.S., including employment authorization and access to government benefits.³⁵ They are eligible to become a lawful permanent resident one year after receiving asylum and can become U.S. citizens four years after that.³⁶

There are two main routes an asylum seeker can take to apply for asylum.³⁷ Asylum seekers who have not been apprehended by government agents and placed in removal proceedings can file an “affirmative application.”³⁸ Affirmative applications are handled by the Department of Homeland Security.³⁹ Applicants are interviewed by a United States Citizenship and Immigration Services (USCIS) asylum officer, who can grant or deny their claim.⁴⁰ If their claim is denied, they are placed in removal proceedings and are then in the “defensive” asylum track.⁴¹

The majority of asylum applications are filed using this second, “defensive” route after an individual has already been placed in removal

manner whatsoever, to a territory where he or she fears threats to life or freedom.”). International commitment to this norm arose in the wake of World War II, during which several countries, including the United States, turned away Jews fleeing Nazism, many of whom were later killed. *See* Naomi S. Stern, *Evian’s Legacy: The Holocaust, the United Nations Refugee Convention, and Post-War Refugee Legislation in the United States*, 19 GEO. IMMIGR. L.J. 313, 324–25 (2004).

³³ 8 U.S.C. § 1101(a)(42)(A) (2012) (defining “refugee”); ANKER, *supra* note 30, at 13–14, 19. The INA is the primary statute governing immigration issues, including asylum. *See Immigration and Nationality Act*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/legal-resources/immigration-and-nationality-act> [<https://perma.cc/KQ5T-VM7T>].

³⁴ ANKER, *supra* note 30, at 26.

³⁵ *If You’ve Won Asylum*, IMMIGR. EQUALITY (2015), <https://www.immigrationequality.org/get-legal-help/our-legal-resources/asylum/if-youve-won-asylum> [<https://perma.cc/8AZY-57P8>].

³⁶ *Id.* Two similar, but slightly different, forms of relief are withholding of removal under the INA and protection under the Convention Against Torture, usually sought by applicants who are ineligible for asylum. ANKER, *supra* note 30, at 4. These forms of relief have a slightly higher burden of proof and offer fewer benefits; for instance, withholding of removal does not grant applicants a permanent legal status in the United States and recipients may be removed to third-party countries. *Id.* at 6–8.

³⁷ *Obtaining Asylum in the United States*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/humanitarian/refugees-asylum/asylum/obtaining-asylum-united-states> [<https://perma.cc/DC5V-YSEQ>] [hereinafter USCIS Obtaining Asylum].

³⁸ ANKER, *supra* note 30, at 28; USCIS Obtaining Asylum, *supra* note 37.

³⁹ ANKER, *supra* note 30, at 28.

⁴⁰ *Id.* at 28–29.

⁴¹ *Id.* at 29.

proceedings.⁴² While the Department of Homeland Security oversees all affirmative applications, the Department of Justice (DOJ) has jurisdiction over defensive claims.⁴³ These claims are heard in immigration courts by immigration judges (IJs) under the Executive Office of Immigration Review.⁴⁴ Unlike affirmative asylum interviews before asylum officers, which are closer to a conversation than a trial, defensive claims are argued in immigration court, an adversarial process.⁴⁵ Asylum officers and IJs make determinations of whether the applicant satisfied the requirements of an asylum claim and whether the applicant was credible.⁴⁶

If an immigration judge denies a claim, the applicant may appeal to the Board of Immigration Appeals (BIA), which reviews cases for the entire nation.⁴⁷ The BIA defers to IJ findings of fact using a “clearly erroneous” standard of review.⁴⁸ If a party loses on appeal to the BIA, they can then appeal an adverse finding to the federal court of appeals where the case was initially filed.⁴⁹ Courts of appeals review BIA decisions using a “substantial evidence” test for factual determinations, and review questions of law *de novo*.⁵⁰ The court of appeals’ heightened “substantial evidence” standard is even more deferential to the lower courts’ decisions on questions of fact than the BIA’s “clearly erroneous” standard, meaning that an applicant’s chances of having an adverse decision reversed decreases at every step of the process.⁵¹

⁴² *Id.*; Asylum Decisions Graph Tool, TRACIMMIGRATION, SYRACUSE UNIV., <https://trac.syr.edu/phptools/immigration/asylum> [<https://perma.cc/EHF3-KTDL>] [hereinafter TRAC Immigration Graph Tool] (showing that 88% of asylum applications filed in fiscal year 2019 were defensive).

⁴³ ANKER, *supra* note 30, at 29 n.1.

⁴⁴ USCIS Obtaining Asylum, *supra* note 37.

⁴⁵ *Id.*

⁴⁶ Ramji-Nogales et al., *supra* note †, at 306.

⁴⁷ ANKER, *supra* note 30, at 30. The Department of Homeland Security (DHS) attorneys opposing the claim may also appeal decisions to grant asylum to the BIA. As of September 2019, the BIA consists of twenty members. *Board of Immigration Appeals*, U.S. DEP’T OF JUSTICE (Sept. 16, 2019), <https://www.justice.gov/eoir/board-of-immigration-appeals-bios> [<https://perma.cc/KTW5-MGGQ>].

⁴⁸ ANKER, *supra* note 30, at 30.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ Michael English, *Distinguishing True Persecution from Legitimate Prosecution in American Asylum Law*, 60 OKLA. L. REV. 109, 187–88 (2007) (describing the Court’s interpretation of the “substantial evidence” standard for asylum cases as “all but insurmountable”); Matthew H. Joseph, Comment, *Immigration and Naturalization Service v. Elias-Zacarias: Partially Closing the Door on Political Asylum*, 52 MD. L. REV. 478, 499 (1993) (noting that the Supreme Court’s interpretation of the “substantial evidence” standard in *INS v. Elias-Zacarias*, 502 U.S. 478 (1992), raised the standard of review to the point that “[o]nly glaringly unreasonable decisions will be overturned” (footnote omitted)). In theory, parties could appeal a court of appeals decision to the Supreme Court, but the Supreme Court has only reviewed a handful of asylum cases since the Refugee Act’s passage in 1980. Thus, in practice,

2. *Credible Fear Interviews*

In 1996, Congress created a procedure called “expedited removal” that allows undocumented non-citizens who were apprehended within two weeks of their arrival and 100 miles of the border to be immediately removed from the country without a hearing.⁵² Because it would be a violation of international law to return people to a place where they would face persecution,⁵³ Congress included an exception in the form of the “Credible Fear Interview” (CFI).⁵⁴ Non-citizens can temporarily avoid expedited removal if they state that they are afraid to return to their home country or intend to apply for asylum.⁵⁵ In that event, they are entitled to a CFI, which is conducted by an asylum officer.⁵⁶ If they are found to have a credible fear of persecution in their home country, they are taken out of expedited removal proceedings and placed in regular defensive removal proceedings before an IJ.⁵⁷ The applicant will then have an opportunity to develop a full record and have access to all of the normal routes of appeal.⁵⁸ If a non-citizen receives a negative credible fear assessment, they remain in expedited removal proceedings and are swiftly deported.⁵⁹ They can request review of the negative finding by an IJ, but they receive no additional access to appeals.⁶⁰ The level of review afforded in these circumstances is minimal; IJs can forgo

the courts of appeals are the final stop for appealing adverse asylum decisions made by immigration judges. Ramji-Nogales et al., *supra* note †, at 310.

⁵² 8 U.S.C. § 1225(b)(1) (2009); ANKER, *supra* note 30, at 26–27. In July 2019, the Trump administration attempted to remove these temporal and geographic limitations and expand the application of expedited removal to include people apprehended within two years of their arrival anywhere in the country. *Practice Alert: Trump Administration Expands Application of Expedited Removal*, AM. IMMIGR. LAW. ASS’N (July 22, 2019), <https://www.aila.org/advo-media/aila-practice-pointers-and-alerts/trump-administration-expands-expedited-removal> [<https://perma.cc/PY8L-YUS3>]; *see also* Designating Aliens for Expedited Removal, 84 Fed. Reg. 35409 (July 23, 2019). A federal judge issued a nationwide preliminary injunction blocking implementation of these changes during pending litigation over their legality in September 2019. *Make the Rd. New York v. McAleenan*, No. 19-CV-2369 (KBJ), 2019 WL 4738070, at *3 (D.D.C. Sept. 27, 2019). As of this writing, the government appeal of the injunction is pending in the D.C. Circuit. *Make the Rd. New York v. McAleenan*, No. 19-CV-2369 (KBJ), 2019 WL 4738070, appeal docketed, No. 19-5298 (D.C. Cir. Oct. 31, 2019).

⁵³ Refugee Convention, *supra* note 32, at 30.

⁵⁴ ANKER, *supra* note 30, at 27. A “Reasonable Fear Interview” (RFI) is the equivalent for withholding of removal and Convention Against Torture claims. *Id.* at 28.

⁵⁵ *Id.* at 27.

⁵⁶ *Id.*

⁵⁷ MEISSNER ET AL., *supra* note 5, at 2; *Questions & Answers: Credible Fear Screening*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://uscis.gov/humanitarian/refugees-asylum/asylum/questions-answers-credible-fear-screening> [<https://perma.cc/VB93-HEJC>] [hereinafter USCIS Credible Fear].

⁵⁸ *See Questions & Answers, supra* note 57.

⁵⁹ *See id.*; 8 U.S.C. § 1225(b)(1)(B)(iii)(I) (2012).

⁶⁰ 8 U.S.C. § 1225(b)(1)(B)(iii)(I).

meeting the applicant in person and conduct their review via videoconference or on the phone.⁶¹

The statutory standard for establishing a credible fear through the CFI is whether there is a “significant possibility” that the non-citizen “could establish eligibility for asylum.”⁶² The applicant is not required to prove their asylum claim at this stage. In short, Congress intended “credible fear” to be a low bar so that no one with a possibly valid asylum claim would be sent to face possible death in their home country.⁶³ In 2016, a credible fear was found in almost eighty percent of interviews.⁶⁴ The number of CFIs conducted annually has skyrocketed over the past decade—coinciding with a spike in asylum-seekers fleeing violence in Central America⁶⁵—making the CFI an increasingly important feature of the asylum process.⁶⁶

3. *Elements of an Asylum Claim*

To receive asylum, applicants must prove that they meet the definition of “refugee.”⁶⁷ This requires proving four elements: (1) that they have a well-founded fear of persecution if they return to their home country; (2) that the persecution is “on account of” (3) a protected ground (race, religion, nationality, political opinion, or membership in a particular social group); and (4) that the persecution is perpetrated by the government or by an actor the government is “unable or unwilling” to control.⁶⁸

⁶¹ *Id.* § 1225(b)(1)(B)(iii)(III).

⁶² *Id.* § 1225(b)(1)(B)(v) (emphasis added).

⁶³ H.R. REP. NO. 104-469, pt. 1, at 158 (1996) (“[T]here should be no danger that an alien with a genuine asylum claim will be returned to persecution.”); Hillary Gaston Walsh, *Forever Barred: Reinstated Removal Orders and the Right to Seek Asylum*, 66 CATH. U. L. REV. 613, 624–25 (2017) (discussing the “extremely low” bar that Congress set to protect people with credible asylum claims).

⁶⁴ *Credible Fear Cases Completed and Referrals for Credible Fear Interview*, DEP’T OF HOMELAND SECURITY (Apr. 29, 2019), <https://www.dhs.gov/immigration-statistics/readingroom/RFA/credible-fear-cases-interview> [<https://perma.cc/7ELE-ZEAZ>].

⁶⁵ MEISSNER ET AL., *supra* note 5, at 2.

⁶⁶ In fiscal year 2008, 5,047 CFIs were conducted, as compared with 91,786 in fiscal year 2016. *Credible Fear Cases*, *supra* note 64.

⁶⁷ 8 U.S.C. § 1158(b)(1)(B)(i).

⁶⁸ *Id.* § 1101(a)(42)(A); *see also* NAT’L IMMIGRANT JUSTICE CTR., BASIC PROCEDURAL MANUAL FOR ASYLUM REPRESENTATION AFFIRMATIVELY AND IN REMOVAL PROCEEDINGS 9 (2019), <https://immigrantjustice.org/for-attorneys/legal-resources/file/nijc-procedural-manual-asylum-representation-pdf> [<https://perma.cc/C6GF-DQEM>] [hereinafter NIJC Asylum Basics Manual]. To prove a well-founded fear of persecution, many applicants rely on evidence of past persecution. ANKER, *supra* note 30, at 49. There is no set definition of what constitutes persecution. *Mei Fun Wong v. Holder*, 633 F.3d 64, 71–72 (2d Cir. 2011) (“[Persecution] is not statutorily defined and courts have not ‘settled on a single, uniform definition’” (quoting *Ivanishvili v. U.S. Dep’t of Justice*, 433 F.3d 332, 340 (2d Cir. 2006))). Most circuits’ definitions encompass a requirement that the harm be severe. *See, e.g.*, *Vasilis v. Holder*, 732 F.3d 83, 90 (1st Cir. 2013) (“[P]ersecution requires more than mere discomfiture, unpleasantness, harassment, or unfair treatment” (quoting *Lopez–Castro v. Holder*, 577 F.3d 49, 54 (1st Cir. 2009)) (internal quotations omitted)); *Camara v. U.S. Att’y Gen.*, 580 F.3d 196, 202 (3d Cir. 2009) (“Importantly, ‘the

For both victims of domestic or gang violence and LGBTQ asylum applicants, the most relevant protected ground is “membership in a particular social group” (PSG). In *Matter of Acosta*, the BIA stated that members of a PSG must share an “immutable characteristic” that they “either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences;”⁶⁹ this “immutable characteristic” test was the prevailing standard for determining membership in a PSG for many years.⁷⁰ In more recent cases, the BIA added requirements that PSGs have sufficient “particularity” and “social distinction.”⁷¹ “Particularity” essentially means that a group must have clearly discernable boundaries and must not be overbroad.⁷² Social distinction refers to the fact that a PSG must be a grouping recognized by society, not one formulated merely for the purposes of the asylum claim.⁷³

The “on account of” prong is frequently referred to as “nexus,” meaning applicants must show a connection between the protected ground and the reason for their persecution. In other words, applicants’ membership in the protected group must be a factor motivating their persecution.⁷⁴ Notably, the

concept of persecution does not encompass all treatment that our society regards as unfair, unjust, or even unlawful or unconstitutional.” (quoting *Fatin v. INS*, 12 F.3d 1233, 1240 (3d Cir. 1993)).

⁶⁹ *Acosta*, 19 I&N Dec. 211, 233 (B.I.A. 1985).

⁷⁰ NIJC Asylum Basics Manual, *supra* note 68, at 14.

⁷¹ See *M-E-V-G-*, 26 I&N Dec. 227, 232–33 (B.I.A. 2014) (discussing the particularity and social visibility requirements, and clarifying that literal, ocular visibility is not required); *S-E-G-*, 24 I&N Dec. 579 (B.I.A. 2008) (discussing particularity and social visibility requirements); *E-A-G-*, 24 I&N Dec. 591 (B.I.A. 2008). The “social distinction” requirement was originally termed “social visibility,” but the BIA amended the phrasing as a result of confusion in the lower courts. *M-E-V-G-*, 26 I&N at 236.

⁷² *M-E-V-G-*, 26 I&N at 239 (noting that particularity means that particular social groups “must not be amorphous, overbroad, diffuse, or subjective”).

⁷³ *Id.* at 240, 242. Whether a group is considered “socially distinct” is highly fact dependent. For example, the Board suggested that in an underdeveloped, oligarchic country, “landowners” might be viewed as a discrete group by society in a way that they would not be in, for example, Canada. *Id.* at 241. While most circuits have adopted the particularity and social distinction requirements, the Seventh Circuit has found that they did not merit *Chevron* deference, and it continues to apply only the *Acosta* “immutable characteristic” formulation. *Id.* at 233 (“Our articulation of these requirements has been met with approval in the clear majority of the Federal courts of appeals. However, it has not been universally accepted.” (citations omitted)). See also *Cece v. Holder*, 733 F.3d 662, 669 (7th Cir. 2013); *Gatimi v. Holder*, 578 F.3d 611, 615–16 (7th Cir. 2009).

⁷⁴ Applicants may prove nexus with direct or circumstantial evidence, as obtaining direct evidence is often impossible because persecutors rarely announce the reasons for their actions. *ANKER*, *supra* note 30, at 373 n.3 (“[N]oting, in an imputed political opinion case, that it would be ‘absurd’ to expect applicant to produce direct evidence of persecutor’s reasons and, in certain cases, ‘factual circumstances alone may constitute sufficient circumstantial evidence.’” (citing *Espinosa-Cortez v. Att’y Gen. of U.S.*, 607 F.3d 101, 109 (3d Cir. 2010)) (internal quotations omitted)); *id.* (“[N]oting that, where persecution of petitioner was just as likely motivated by his wealth as by his prior partisan affiliation, petitioner must provide some evidence—either direct or circumstantial—of persecutor’s reasons.” (citing *Pablo-Sanchez v. Holder*, 600 F.3d 592, 595 (6th Cir. 2010))).

BIA has found that it is acceptable for a perpetrator to have mixed motives, as long as the protected ground is “one central reason” motivating the persecution.⁷⁵

With regard to the fourth prong, the cases with which this Note is concerned are more likely to involve the government being “unable or unwilling to control” a persecutor than the government itself being the persecutor, because the persecutors in domestic violence, gang violence, and LGBTQ asylum claims are most frequently non-state actors.⁷⁶ It is well-established, both in the INA definition of a refugee and in case law, that non-state-actor persecution can qualify for asylum purposes as long as the applicant shows that the government was “unable or unwilling” to control the persecutor.⁷⁷

B. *Judicial Actors and Discretion*

There are several kinds of decision-makers within the asylum system, and they operate under precious few constraints. The AG plays an outsize role in defining immigration policy for the entire nation, and these policy goals are implemented by IJs with a great deal of discretion over individual cases.⁷⁸

⁷⁵ S-P-, 21 I&N Dec. 486, 495 (B.I.A. 1996) (“In some fact situations, the evidence may reasonably suggest mixed motives, at least one or more of which is related to a protected ground.”); 8 U.S.C. § 1158(b)(1)(B)(i) (2012) (“To establish that the applicant is a refugee within the meaning of such section, the applicant must establish that race, religion, nationality, membership in a particular social group, or political opinion was or will be at least one central reason for persecuting the applicant.”).

⁷⁶ *Infra* Section II.A.

⁷⁷ 8 U.S.C. § 1101(a)(42)(A) (2012); NIJC Asylum Basics Manual, *supra* note 68 at 12; *see, e.g.*, *Morales-Morales v. Sessions*, 857 F.3d 130, 135 (1st Cir. 2017) (noting that an asylum applicant must show that the harm suffered was “the direct result of government action, government-supported action, or government unwillingness or inability to control private conduct” (quoting *Guaman-Loja v. Holder*, 707 F.3d 119, 123 (1st Cir. 2013)) (citation and alterations omitted)); *Khan v. Holder*, 727 F.3d 1, 7 (1st Cir. 2013) (“Persecution ‘always implies some connection to government action or inaction’ . . .” (quoting *Harutyunyan v. Gonzales*, 421 F.3d 64, 68 (1st Cir. 2005)); *Lopez Perez v. Holder*, 587 F.3d 456, 462 (1st Cir. 2009) (“[T]he government must practice, encourage, or countenance [persecution], or at least prove itself unable or unwilling to combat it.”); *Pavlova v. INS*, 441 F.3d 82, 87, 91 (2d Cir. 2006) (rejecting decisions of the Board and immigration judge, where the latter determined the applicant “ha[d] at no time indicated that she was ever subjected to persecution, abuse, or harassment by any element of the Russian Government,” emphasizing that “it is well established that private acts may be persecution if the government has proved unwilling to control such actions” (quoting *Ivanishvili v. U.S. Dep’t of Justice*, 433 F.3d 332, 342 (2d Cir. 2006))).

⁷⁸ S. POVERTY LAW CTR., *THE ATTORNEY GENERAL’S JUDGES: HOW THE U.S. IMMIGRATION COURTS BECAME A DEPORTATION TOOL* (2019), https://www.splcenter.org/sites/default/files/com_policyreport_the_attorney_generals_judges_final.pdf [<https://perma.cc/VK4H-L4K4>].

1. *Precedent*

A unique feature of the immigration system is the relative scarcity of binding precedent. In the asylum context, these few precedents come from several sources, including IJ, BIA and Attorney General decisions. Decisions of IJs are not binding on other IJs but can still be persuasive.⁷⁹ Published BIA decisions set precedent for IJs and asylum officers throughout the country.⁸⁰ Circuit courts may contradict a BIA decision, but the circuit court's decision is controlling only within that circuit; the BIA must follow the precedents of the circuit where the case originated.⁸¹ Attorney General decisions have the same precedential value as BIA decisions and are therefore generally binding nationwide.⁸²

The majority of asylum decisions, however, are unpublished and therefore nonbinding.⁸³ Asylum officers usually do not issue a written decision in affirmative asylum proceedings, and IJs are only required to document those decisions that are later appealed to the BIA, which is a small minority of cases.⁸⁴ The BIA, meanwhile, publishes only a miniscule fraction of its decisions, a number that has been reduced even further by policy changes.⁸⁵ Unpublished BIA decisions are merely persuasive, and it is now

⁷⁹ IMMIGRATION EQUALITY, LGBTQ ASYLUM MANUAL: 2. ASYLUM BASICS: SOURCES OF LAW (3d ed. 2006), <https://www.immigrationequality.org/get-legal-help/our-legal-resources/immigration-equality-asylum-manual/asylum-basics-sources-of-law> [<https://perma.cc/53BD-AHSR>] [hereinafter IMMIGRATION EQUALITY MANUAL].

⁸⁰ Ramji-Nogales et al., *supra* note †, at 349.

⁸¹ Ramji-Nogales et al., *supra* note †, at 349–50. Attorney Generals have the power to designate cases as precedential that were not originally published. Zsea Bowmani, *Queer Refuge: The Impacts of Homoantagonism and Racism in U.S. Asylum Law*, 18 GEO. J. GENDER & L. 1, 33–34 (2017).

⁸² The exception is if a circuit declines to afford an AG decision *Chevron* deference. *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–44 (1984) (establishing the two-part test for judicial review of federal agency interpretations of federal statutes). When doing a *Chevron* analysis, courts first ask whether Congress has spoken on a given issue; if so, the court and the agency are required to follow Congress. If, however, the statute is silent or ambiguous on the specific issue, the courts are required to defer to the agency's interpretation unless that interpretation is "arbitrary, capricious, or manifestly contrary to the statute." *Id.*

⁸³ See Bowmani, *supra* note 81, at 19.

⁸⁴ *Id.* In 2015, only 8% of IJ decisions were appealed to the BIA, *id.* at 34, and in 2017, only 11%, STATISTICS YEARBOOK 2017, *supra* note 5, at 41. Asylum officers are also not required to release their CFI notes to the asylum seekers, which are often incomplete, inaccurate, or both. James Feroli, *Real ID, Airport and Credible Fear Interview Notes, and the Myth of Reliability for Asylum Applicants Subject to Expedited Removal*, 13-01 IMMIGR. BRIEFINGS 1, 2 (2013) (discussing the ways in which inaccurate CFI notes can contribute to adverse credibility determinations for asylum seekers).

⁸⁵ In 2002, Department of Justice "streamlining" regulations changed the dominant form of BIA review from three-member panels to review by a single Board member. ANKER, *supra* note 30, at 12. As a result, the percentage of published BIA decisions dropped from approximately 0.256% in 1996 to 0.01% in 2004. Katie R. Eyer, *Administrative Adjudication and the Rule of Law*, 60 ADMIN. L. REV. 647, 676–77 (2008). In 2017, the BIA published 24 decisions out of 31,820, or 0.075%. STATISTICS YEARBOOK 2017, *supra* note 5, at 36; Executive Office of Immigration Review, *Vol 27: AG/BIA Decisions Listing*,

common for BIA decisions to consist only of a summary affirmance without any written opinion.⁸⁶ And while circuit court decisions are binding within their jurisdiction, few cases ever make it that far. This paucity of binding precedent gives asylum adjudicators at every stage of the process far greater flexibility in reaching their decisions than judges in traditional courts, contributing to a system with vast disparities in outcomes between individual judges, regions, and courts.⁸⁷

2. *The Attorney General's Outsize Role*

The Attorney General has an unusually powerful role in the immigration context.⁸⁸ The BIA and immigration courts are bodies of the Department of Justice that were established by the Attorney General through an exercise of his “delegated authority.”⁸⁹ The AG therefore has the power to overrule BIA decisions, change its procedures, and “appoint and remove Board members who disagree with his political ideology.”⁹⁰ Furthermore, immigration judges are employees of the Department of Justice under the control of the Attorney General.⁹¹ Unlike traditional Article III judges, who are largely insulated from political pressures by constitutional guarantees of

U.S. DEP'T OF JUSTICE (Aug. 23, 2019), <https://www.justice.gov/eoir/volume-27> [<https://perma.cc/JFR8-F74K>] [hereinafter AG/BIA Precedent Listing]. From 2013 to 2018, the BIA published an average of twenty-five decisions a year. *Id.*

⁸⁶ IMMIGRATION EQUALITY MANUAL, *supra* note 79; Bowmani, *supra* note 81, at 19; Ramji-Nogales et al., *supra* note †, at 350–51.

⁸⁷ *See generally* Ramji-Nogales et al., *supra* note † (finding significant disparities in the asylum judicial system). The implications of this feature of the asylum system will be discussed in greater detail below. *Infra* Section I.B.3.

⁸⁸ *See, e.g.*, Henderson v. INS, 157 F.3d 106, 126 (2d Cir. 1998) (“[T]he extraordinary and pervasive role that the Attorney General plays in immigration matters is virtually unique.”).

⁸⁹ Ramji-Nogales et al., *supra* note †, at 309.

⁹⁰ *Id.* at 350. In 2003, for instance, then-AG John Ashcroft decided that the size of the BIA should be reduced to eleven members, supposedly to make the Board more efficient. *Id.* at 352–53. The Board members he fired as a result were not the least senior members, but rather five Clinton appointees who disagreed with him ideologically. *Id.* Three years later, he increased the size of the Board to fifteen, essentially allowing him to replace five Democratic appointees with five Republican ones. *Id.* at 386–87. Professor Stephen Legomsky suggests that the collective message of these maneuvers to immigration judges and the BIA was clear: “You rule against the government at your personal peril.” Stephen H. Legomsky, *Deportation and the War on Independence*, 91 CORNELL L. REV. 369, 370 (2006). He argues that the effect was to “drain the administrative phase of the deportation process of all meaningful decisional independence.” *Id.*

⁹¹ Ramji-Nogales et al., *supra* note †, at 387. The INA defines an immigration judge as an attorney appointed by the AG who “shall be subject to such supervision and shall perform such duties as the Attorney General shall prescribe.” 8 U.S.C. § 1101(b)(4) (2012).

salary protections and lifetime tenure during good behavior,⁹² IJs have no such protections and can be removed from office for any reason.⁹³

Moreover, the Attorney General has the power to refer any BIA decision to himself for review and to issue precedential decisions.⁹⁴ This makes the AG the most powerful policymaker and even lawmaker in the U.S. immigration system.⁹⁵ Prior to Attorney General Jeff Sessions's brief tenure in office, this "certification power" was rarely used.⁹⁶ Agency head review is not an uncommon power in the executive branch, and its purpose is related to efficiency, as well as promoting "consistency and coherence" in agency decisions.⁹⁷ However, in the immigration context, the use of this tool is controversial, as it essentially enables the AG to create law without going through the typical notice and comment procedures involved in promulgating new agency regulations.⁹⁸ Use by the AG of this power often involves creating "profound changes" to legal doctrine that affect tens of thousands of immigrants.⁹⁹ The existing BIA regulations do not place any limitations on when use of the AG's certification power is appropriate.¹⁰⁰

3. *Judicial Discretion in the Asylum System*

Another unique feature of the immigration system is the large amount of discretion afforded to adjudicators, which is baked into the system in

⁹² U.S. CONST. art. III, § 1.

⁹³ Catherine Y. Kim, *The President's Immigration Courts*, 68 EMORY L.J. 1, 17 (2018) (noting that DOJ regulations indicate that IJs are "subject to removal or reassignment effectively at the Attorney General's discretion"); Legomsky, *supra* note 90, at 374 (noting that the AG could remove or reassign both BIA members and IJs at any time); Ramji-Nogales et al., *supra* note †, at 387. The Attorney General and Department of Justice management also have the power to decide which cases end up on which judge's dockets. After one senior IJ issued a decision that did not reach the outcome Sessions wanted in a deportation case, eighty-six similar cases were removed from that IJ's calendar, a "strong warning to the entire IJ corps." Jeffrey S. Chase, *The Immigration Court: Issues and Solutions*, JEFFREY S. CHASE BLOG (Mar. 28, 2019), <https://www.jeffreyschase.com/blog/2019/3/28/i6el1do615p443u1nkf8vwr28dv9qi> [<https://perma.cc/Q2RE-5VQB>].

⁹⁴ 8 C.F.R. § 1003.1(h)(1)(i) (2019) ("The Board shall refer to the Attorney General for review of its decision all cases that . . . [t]he Attorney General directs the Board to refer to him.").

⁹⁵ See Justin Chasco, Comment, *Judge Alberto Gonzales? The Attorney General's Power to Overturn Board of Immigration Appeals' Decisions*, 31 S. ILL. U. L.J. 363, 368 (2007).

⁹⁶ Laura S. Trice, *Adjudication by Fiat: The Need for Procedural Safeguards in Attorney General Review of Board of Immigration Appeals Decisions*, 85 N.Y.U. L. REV. 1766, 1771 (2010) (noting that the Attorney General averaged only about 1.7 certified decisions annually between 1999 and 2009).

⁹⁷ *Id.* at 1770.

⁹⁸ Chasco, *supra* note 95, at 369.

⁹⁹ Trice, *supra* note 96, at 1771. For example, previous uses of this power have affected the following: "the standard for determining whether a conviction constitutes a crime involving moral turpitude; the retroactivity of amendments to the [INA]; the right to effective assistance of counsel in removal proceedings; whether an expunged state conviction constitutes a 'conviction' for purposes of the INA; and the meaning of 'particularly serious crime.'" *Id.* at 1773 (internal citations omitted).

¹⁰⁰ *Id.* at 1771; see also 8 C.F.R. § 1003.1(h)(1).

several different ways. First, asylum is a discretionary, not mandatory, form of relief.¹⁰¹ This means that the United States is not required to grant asylum to every applicant who proves they are statutorily eligible.¹⁰² Even if an asylum applicant credibly proves every element of their claim, the adjudicator still has the power to exercise their discretion to reject their application for any number of reasons.¹⁰³ Although discretionary denials of asylum for otherwise qualified applicants are rare,¹⁰⁴ asylum officers and IJs have additional opportunities to exercise broad discretionary power because they make credibility determinations to which the BIA and courts of appeals are required to be highly deferential. Finally, there is comparatively little binding precedent constraining asylum officer and immigration judge decisions.¹⁰⁵

The high level of discretion inherent in the asylum process is reflected by the vast disparities in asylum grant and denial rates at every step of the asylum process.¹⁰⁶ Rates vary widely between regions, asylum offices, immigration courts, and circuits.¹⁰⁷ Between 2013 and 2018, the IJ with the highest denial rate in the country had a denial rate of 100% while the IJ with the lowest had a denial rate of 3%.¹⁰⁸ Advocates have labeled certain areas of the country “asylum-free zones” due to their high denial rates.¹⁰⁹ Frequently,

¹⁰¹ 8 U.S.C. § 1158(b)(1)(A) (2012) (“The Secretary of Homeland Security or the Attorney General may grant asylum to an alien who has applied for asylum . . . [if] such alien is a refugee” (emphasis added)); *id.* § 1229a(c)(4)(A)(ii) (stating that, with respect to any discretionary forms of relief from removal, applicants have the burden of proving that they “merit[] a favorable exercise of discretion”). See generally Kate Aschenbrenner, *Discretionary (In)Justice: The Exercise of Discretion in Claims for Asylum*, 45 U. MICH. J.L. REFORM 595 (2012) (discussing the problems caused by asylum being a discretionary form of relief); GOV’T ACCOUNTABILITY OFFICE, ASYLUM: VARIATIONS EXIST IN OUTCOMES OF APPLICATIONS ACROSS IMMIGRATIONS JUDGES AND COURTS 9 (2016) [hereinafter GAO 2016] (stating “immigration judges have discretion in rendering decisions” and “asylum is a discretionary form of relief under U.S. immigration law”).

¹⁰² Aschenbrenner, *supra* note 101, at 596.

¹⁰³ *Id.* IJs have used their discretion to deny applications of otherwise eligible asylum seekers over minor criminal records that are not serious enough to constitute a statutory bar and over a lack of family ties in the U.S. *Id.* at 596, 602–03 (citations omitted) (describing cases of individuals denied asylum).

¹⁰⁴ *Id.* at 598.

¹⁰⁵ See *supra* Section I.B.1.

¹⁰⁶ GAO 2016, *supra* note 101, at 29 (“Immigration judges we spoke with in six immigration courts stated that the judicial discretion provided for in U.S. immigration law is one reason that decisions on asylum applications, even among judges in the same court, could vary.”).

¹⁰⁷ Ramji-Nogales et al., *supra* note †, at 302.

¹⁰⁸ *Judge-by-Judge Asylum Decisions in Immigration Courts FY 2013-2018*, TRACIMMIGRATION (2018), <http://trac.syr.edu/immigration/reports/judge2018/denialrates.html> [https://perma.cc/35X2-GLJH] [hereinafter TRAC Judge-by-Judge Decisions]. The judge with the 100% denial rate decided 144 cases and the judge with the 3% denial rate decided 959 cases. *Id.*

¹⁰⁹ Mica Rosenberg et al., *They Fled Danger at Home to Make a High-Stakes Bet on U.S. Immigration Courts*, REUTERS (Oct. 17, 2017), <https://www.reuters.com/investigates/special-report/usa-immigration-asylum> [https://perma.cc/RRH6-R8VQ].

there are also huge variations in grant rates from judge to judge within the same office, even when controlling for the nationality of the applicants.¹¹⁰ From 2013 to 2018, in San Francisco, one judge denied 96.9% of asylum claims while another denied only 9.9%.¹¹¹ In short, despite the life and death nature of asylum claims, whether an applicant's claim is granted or denied often depends on which asylum officer or immigration judge is randomly assigned to their case.¹¹²

The problems with this high level of discretion are compounded by the fact that there is relatively little meaningful appellate review of asylum claims.¹¹³ As discussed above, only a small percentage of cases make it to the BIA.¹¹⁴ Once there, the majority of appeals are now decided by a single Board member,¹¹⁵ who is required to be highly deferential to IJ findings of fact and credibility.¹¹⁶ The shift from three-member review to mostly single-member review has had drastic consequences for asylum seekers; from 2004 to 2006, cases decided by three-member panels favored asylum seekers 52% of the time, while cases decided by single Board members favored asylum seekers 7% of the time.¹¹⁷ The few cases that make it to the courts of appeals are also examined under a highly deferential “substantial evidence” standard.¹¹⁸ Therefore, even with a meritorious claim, an initial denial by an IJ is often never corrected upon review, resulting in deportation—a possible death sentence in the asylum context.¹¹⁹

II. DOMESTIC VIOLENCE CLAIMS, LGBTQ ASYLUM CLAIMS, AND *MATTER OF A-B*

Having described the basic mechanics of the United States asylum process, this Part now provides background on the development of relevant

¹¹⁰ Ramji-Nogales et al., *supra* note †, at 332; *see also* Rosenberg, *supra* note 109.

¹¹¹ TRAC Judge-by-Judge Decisions, *supra* note 108.

¹¹² *See* Rosenberg, *supra* note 109 (quoting Professor Karen Musalo, founding director of the Center for Gender & Refugee Studies at UC Hastings College of the Law).

¹¹³ Chasco, *supra* note 95, at 373.

¹¹⁴ *Supra* Section I.B.1.

¹¹⁵ Ramji-Nogales et al., *supra* note †, at 351.

¹¹⁶ 8 C.F.R. § 1003.1(d)(3)(i) (2019). BIA members apply a “clearly erroneous” standard to IJ findings of fact and credibility. *Id.*

¹¹⁷ GOV'T ACCOUNTABILITY OFFICE, U.S. ASYLUM SYSTEM: SIGNIFICANT VARIATION EXISTED IN ASYLUM OUTCOMES ACROSS IMMIGRATION COURTS AND JUDGES 10 (2008), <https://www.gao.gov/new.items/d08940.pdf> [<https://perma.cc/DW8J-F5NP>].

¹¹⁸ ANKER, *supra* note 30, at 30 (describing how courts review BIA factual determinations under a substantial evidence test, but review legal conclusions *de novo*).

¹¹⁹ Ramji-Nogales et al., *supra* note †, at 327 (“[A] loss in immigration court will likely result in removal—a possible death sentence for some asylum seekers whose cases are wrongly denied.”); *see supra* note 8 (discussing the murders of deportees who had been rejected for asylum).

case law in the realms of both domestic violence and LGBTQ-based asylum claims, and the similarities between the two types of claims. It also analyzes the recent decision in *Matter of A-B-*, which appeared to effect significant changes upon how such claims would be handled.

A. Domestic Violence and LGBTQ Asylum Claims

Until 2014, the issue of whether domestic violence could sustain an asylum claim was an open question.¹²⁰ Historically, many courts often rejected gender-based PSGs because of fears they would open the floodgates to too many asylum claims.¹²¹ But much of the uncertainty surrounding domestic violence-based PSGs was resolved in 2014 in *Matter of A-R-C-G-*.¹²² In this precedential case, the BIA recognized ““married women in Guatemala who are unable to leave their relationship”” as a PSG.¹²³ Domestic violence-based asylum applicants could thereafter rely on binding BIA precedent to prove their membership in a PSG.¹²⁴ In *A-R-C-G-*, the Board was able to rely on stipulations from the Obama Department of Homeland Security, which conceded that the applicant was a member of a PSG,¹²⁵ a fact which Sessions would later use to justify his decision to overturn the case in *Matter of A-B-*.¹²⁶

The history of LGBTQ-based PSGs has been much more straightforward than that of domestic violence ones. In 1990, the BIA recognized “homosexual men in Cuba” as a PSG, allowing sexual orientation to be the basis of PSGs—a decision which AG Reno declared precedential

¹²⁰ See NIJC ADVISORY, *supra* note 4, at 1.

¹²¹ *Id.* at 2. In 1999, the BIA rejected a proposed domestic violence-based PSG in a precedential decision, *Matter of R-A-*, 22 I&N Dec. 906 (B.I.A. 2001). The proposed PSG in this case was “Guatemalan women who have been involved intimately with Guatemalan male companions, who believe that women are to live under male domination.” *Id.* at 911. The case experienced something of a tortured history. NIJC ADVISORY, *supra* note 4, at 3. It was vacated in 2001 by AG Janet Reno because of a proposed Department of Justice rule that would have recognized domestic violence as grounds for a PSG, but the rule was never adopted. *Id.* The applicant’s claim languished for fifteen years until the Department of Homeland Security eventually stipulated that she was eligible. *Id.* Subsequently, some courts relied on the Department of Homeland Security brief from *Matter of R-A-* to conclude that domestic violence-based groups were cognizable. DHS’s Position on Respondent’s Eligibility for Relief, *R-A-*, 23 I&N Dec. 694, 18–19 (A.G. 2005) (A 73 753 922), available at <http://cgrs.uchastings.edu/sites/default/files/Matter%20of%20R-A-%20DHS%20brief.pdf> [<https://perma.cc/KW2F-8AAB>]. Others relied on the BIA’s contrary reasoning in the original *R-A-* opinion that they were not. *R-A-*, 22 I&N Dec. at 914.

¹²² *A-R-C-G-*, 26 I&N Dec. 388 (B.I.A. 2014).

¹²³ *Id.* at 388–89.

¹²⁴ NIJC ADVISORY, *supra* note 4, at 5.

¹²⁵ *A-R-C-G-*, 26 I&N at 395.

¹²⁶ In *A-B-*, Sessions reasoned that because the BIA in *A-R-C-G-* relied on DHS stipulations, the Board failed to perform the rigorous individualized PSG analysis the law requires. *Infra* Section II.C.

in 1994.¹²⁷ Subsequently, homosexuality as a valid PSG has gone largely uncontested in the courts.¹²⁸ The Ninth Circuit has been a leader in LGBTQ asylum jurisprudence, identifying “all alien homosexuals” as a cognizable PSG in 2005.¹²⁹ While there is currently no case identifying being transgender as the basis of a PSG, the Ninth Circuit has identified “gay men with female sexual identities in Mexico” as a PSG which, although an awkward fit, has been used to argue transgender claims.¹³⁰ To date, there has not been a case recognizing bisexuality as a PSG.¹³¹

B. Similarities Between Domestic Violence and LGBTQ-Based Asylum Claims

Domestic violence and LGBTQ-based asylum claims share many similarities which caused concern among advocates about the potential impact of *Matter of A-B-* on LGBTQ asylum claims. Both claims often

¹²⁷ Toboso-Alfonso, 20 I&N Dec. 819, 822–23 (B.I.A. 1990). The opinion was adopted as precedent in all future proceedings. Att’y Gen. Order No. 1895-94 (June 19, 1994).

¹²⁸ ANKER, *supra* note 30, at 497.

¹²⁹ Karouni v. Gonzales, 399 F.3d 1163, 1172 (9th Cir. 2005).

¹³⁰ Hernandez-Montiel v. INS, 225 F.3d 1084, 1087 (9th Cir. 2000); *see also* Reyes-Reyes v. Ashcroft, 384 F.3d 782, 785 (9th Cir. 2004); Ellen A. Jenkins, Comment, *Taking the Square Peg Out of the Round Hole: Addressing the Misclassification of Transgender Asylum Seekers*, 40 GOLDEN GATE U. L. REV. 67, 77–79 (2009) (discussing the ways in which the “homosexual male” with a “deep female identity” formulation of the PSG conflates sexual orientation and gender identity and fails to accurately recognize the applicant’s female gender identity).

¹³¹ IMMIGRATION EQUALITY MANUAL, *supra* note 79, at 11.2 (click on “11. Immigration Basics: Thorny Issues in LGBT/H Asylum Cases” in right sidebar and scroll down to “11.2 Bisexual Claims”). *See generally* Jaclyn Gross, Comment, *Neither Here nor There: The Bisexual Struggle for American Asylum*, 69 HASTINGS L.J. 985 (2018) (discussing the need to change legislation to reflect the immutable nature of bisexuality). Although lesbian and gay asylum applicants have not had to struggle to establish that sexual orientation is grounds for a cognizable PSG, they do face other unique challenges not common to other types of asylum claims, such as proving that they are in fact a member of the PSG. Deborah A. Morgan, *Not Gay Enough for the Government: Racial and Sexual Stereotypes in Sexual Orientation Asylum Cases*, 15 L. & SEXUALITY 135, 140–41 (2006). If, for example, an applicant does not conform to the IJ’s idea of what a gay person looks or acts like, the IJ might conclude either that the applicant is lying, or that they would not face persecution in their home country because their sexual orientation could be hidden. *See, e.g.*, Shahinaj v. Gonzales, 481 F.3d 1027, 1029 (8th Cir. 2007) (finding the IJ’s adverse credibility finds were not supported just because the applicant did not present the IJ’s expectations of homosexual characteristics). Proving “gayness” often depends on the IJ’s discretionary credibility determination, which is highly subjective and can vary widely depending on the official. Morgan, *supra*, at 141. Other frequent hurdles for LGBTQ asylum seekers include proving that their government was unable or unwilling to protect them when their perpetrator was a non-state actor. *See, e.g.*, Malu v. U.S. Att’y Gen., 764 F.3d 1282, 1292 (11th Cir. 2014) (affirming denial of asylum to a Congolese lesbian when the IJ found that the applicant failed to show that the government was unwilling or unable to protect her based on a single instance when the police prevented the lynching of a lesbian); Galicia v. Ashcroft, 396 F.3d 446, 448 (1st Cir. 2005) (denying a gay Guatemalan man’s petition for review because he never contacted authorities regarding beatings and verbal abuse by neighbors). *But see* Ayala v. U.S. Att’y Gen., 605 F.3d 941, 943 (11th Cir. 2010) (finding BIA & IJ erred by failing to consider that the government may have been unwilling or unable to protect applicant from attacks by neighbors and coworkers).

involve what Sessions calls “private violence,” violence committed by non-state actors that requires a showing of government unwillingness or inability to protect.¹³² Like in domestic violence cases, the persecutors in anti-LGBTQ violence cases are often members of the victim’s family.¹³³ It is impossible to quantify the magnitude of this problem due to chronic underreporting and lack of documentation when survivors do report.¹³⁴

In addition, both domestic violence and LGBTQ claims are usually based on membership in a PSG, although applicants can bolster both types of claims with other grounds such as “political opinion,” when available.¹³⁵ While this can be useful tactically to bolster a PSG-based claim,¹³⁶ it also

¹³² A-B-, 27 I&N Dec. 316, 319 (A.G. 2018). This conception of domestic violence as a “private” problem has been frequently debunked by feminist scholars, who point out that it misses the ways in which “the convergences between private and public power create intersectional dimensions of social control.” Fatma Marouf, *Becoming Unconventional: Constricting the ‘Particular Social Group’ Ground for Asylum*, 44 N.C. J. INT’L L. 487, 513 (2019) (describing Sessions’s view of domestic violence as “antiquated” and citing the work of feminist scholar Kimberlé Crenshaw).

¹³³ In a thorough study of violence against lesbian, bisexual, and transgender women in five Asian countries, researchers found that despite high rates of anti-gay violence perpetrated by government actors such as police, the number one perpetrator of violence against queer women was the family. See THE INT’L GAY & LESBIAN HUM. RTS. COMM’N, VIOLENCE: THROUGH THE LENS OF LESBIANS, BISEXUAL WOMEN AND TRANS PEOPLE IN ASIA 17 (2014), https://www.outrightinternational.org/sites/default/files/LBT_ForUpload0614.pdf [<https://perma.cc/M4TL-3UGA>] [hereinafter VIOLENCE ASIA]; see also OUTRIGHT ACTION INT’L & ARAB FOUND. FOR FREEDOMS & EQUAL., ACTIVISM AND RESILIENCE: LGBTQ PROGRESS IN THE MIDDLE EAST AND NORTH AFRICA 52 (2014), https://www.outrightinternational.org/sites/default/files/MENAReport%202018_100918_FINAL.pdf [<https://perma.cc/S6UE-BX7F>] (In a study on Middle Eastern countries, all four countries analyzed mentioned the family as a source of anti-LGBTQ violence, including reports of rape, blackmail, detention in family homes, conversion therapy, social ostracism, and honor killings.) See also INTER-AMERICAN COMM’N ON HUM. RTS., VIOLENCE AGAINST LGBTI PERSONS 173 (2015), <http://www.oas.org/en/iachr/reports/pdfs/violencegbtipersons.pdf> [<https://perma.cc/ZL8Z-ZV98>] (discussing various cases of family violence against LGBTQ people from around the world, including a Haitian man whose brother attacked him with a machete after he came out as gay, a mother in North Carolina who instructed one son to “beat[] the gay out” of his brother, and a boy in Peru whose father set him on fire when he found out he was living with HIV). Queer women, in particular, are “disproportionately impacted” by violence perpetrated by family members. *Id.* at 156. The family home is also one of the two most common sites of violence against LGBTQ children, along with schools. *Id.* at 171.

¹³⁴ *Id.* at 16.

¹³⁵ *Pitcherskaia v. INS*, 118 F.3d 641, 643 (9th Cir. 1997) (remanding case of a Russian lesbian who was active in LGBTQ advocacy and brought claims based on both political opinion and membership in a PSG); *S-A-*, 22 I&N Dec. 1328, 1328 (B.I.A. 2000) (finding a daughter who was beaten by her father was persecuted on account of her political opinion because she did not conform to her father’s strict Muslim beliefs). See generally Victoria Neilson, *Homosexual or Female? Applying Gender-Based Asylum Jurisprudence to Lesbian Asylum Claims*, 16 STAN. L. & POL’Y REV. 417 (2005) (describing emerging differences in the law relating to gender-based and lesbian asylum claims).

¹³⁶ In general, it is strategic for asylum applicants to argue that as many protected grounds as possible are applicable to their case, as only one needs to be successful in order to prevail. Ritu Ghai, *Deciphering Motive: Establishing Sexual Orientation as the “One Central Reason” for Persecution in Asylum Claims*, 43 COLUM. HUM. RTS. L. REV. 521, 538, 540 (2012) (discussing the development of “mixed motive”

unfortunately advantages a certain type of asylum seeker: it is often wealthier queer people who have the privilege to live an openly gay life and advocate for LGBTQ rights in their home country.¹³⁷ Indeed, use of a “political activist”-type narrative can negatively impact less privileged applicants if IJs come to expect that “real” gay people are involved in such activities.¹³⁸

The two categories also directly overlap in cases of intimate partner violence within same-sex relationships. Although domestic violence is typically thought of as a heterosexual problem involving male aggressors and female victims, intimate partner violence frequently occurs in same-sex relationships as well.¹³⁹ Survivors of intimate partner violence within same-sex relationships face additional challenges when compared with their heterosexual counterparts. Especially in countries where homosexuality is criminalized or heavily stigmatized, seeking help from the authorities or civil society organizations risks “outing.”¹⁴⁰ Many survivors have also had highly negative experiences with the police and are reluctant to turn to them for assistance.¹⁴¹ Lesbian and bisexual women are especially at risk of suffering this type of violence; in addition to domestic violence within same-sex relationships, many lesbian and bisexual women are forced into heterosexual marriages by their families or social norms and then abused by their husbands.¹⁴²

Finally, scholars have noted that the asylum system was established in the wake of World War II and thus conceptualized the prototypical refugee

claims in which persecutors have more than one motive for their actions and affirming that a protected ground need only be “one central reason” motivating the persecution).

¹³⁷ Morgan, *supra* note 131, at 158.

¹³⁸ *Mockeviciene v. U.S. Att’y Gen.*, 237 F. App’x 569, 572, 574 (11th Cir. 2007) (denying petition for reversal of IJ’s finding that a Lithuanian lesbian was not credible where the IJ “did not believe she was actually a lesbian” due in part to her not joining groups “that involved lesbian activities” and not having had a lesbian partner during her four years in the U.S., deeming her “at best . . . a non-practicing lesbian”).

¹³⁹ VIOLENCE ASIA, *supra* note 133, at 17 (finding “an unexpectedly high occurrence of intimate partner violence” in study of anti-LBT violence in Asia); The National Intimate Partner and Sexual Violence Survey, *NISVS: An Overview of 2010 Findings on Victimization by Sexual Orientation*, CTR. FOR DISEASE CONTROL, NAT’L CTR. FOR INJURY PREVENTION & CONTROL 1 (2010), https://www.cdc.gov/violenceprevention/pdf/cdc_nisvs_victimization_final-a.pdf [<https://perma.cc/7KM9-GAZF>] (reporting findings of a national survey showing that LGBTQ people experienced intimate partner violence at an equal or higher rate as compared to self-identified heterosexuals).

¹⁴⁰ U.N. Human Rights Council, *Report of the Independent Expert on Protection Against Violence and Discrimination Based on Sexual Orientation and Gender Identity* 15, U.N. Doc. A/HRC/38/43 (May 11, 2018), available at <https://undocs.org/A/HRC/38/43> [<https://perma.cc/DF6T-9NT9>] [hereinafter Independent Expert Report].

¹⁴¹ See, e.g., VIOLENCE ASIA, *supra* note 133, at 12.

¹⁴² See, e.g., *id.* at 31; Independent Expert Report, *supra* note 140, at 8.

as a cisgender, straight, white man fleeing European political persecution.¹⁴³ The modern asylum system that grew out of these roots still contains many biases, such as more easily recognizing forms of persecution that are typically suffered in the public sphere domains dominated by men—like vocal political dissent—than the types of violations that befall primarily women, such as sexual assault.¹⁴⁴ This bias towards recognizing types of persecution most commonly suffered by cisgender, straight men negatively affects domestic violence-based and LGBTQ-based asylum claims equally.¹⁴⁵

C. Matter of A-B-

Matter of A-B- involved the asylum claim of a woman from El Salvador who fled to the U.S. to escape horrific domestic violence perpetrated by her husband over many years.¹⁴⁶ She posited “El Salvadoran women who are unable to leave their domestic relationships where they have children in common” as her PSG, which closely parallels the BIA-recognized group from *Matter of A-R-C-G-*, “married women in Guatemala who are unable to leave their relationship.”¹⁴⁷ Ms. A-B- had the bad luck to have her claim assigned to Judge V. Stuart Couch at the Charlotte Immigration Court, who is considered by immigration advocates to be particularly hostile to asylum claims with a 92.1% overall denial rate.¹⁴⁸ Judge Couch rejected Ms. A-B-’s claim on nearly every element.¹⁴⁹ On appeal, the BIA reversed on all grounds, citing *A-R-C-G-*.¹⁵⁰ On remand, Judge Couch refused to implement the BIA’s decision and attempted to recertify it to the BIA, supposedly based on other federal circuits reaching adverse findings on domestic violence claims, in a

¹⁴³ Bowmani, *supra* note 81, at 14.

¹⁴⁴ *Id.* at 15–16.

¹⁴⁵ See generally Neilson, *supra* note 135 (discussing that persecution of lesbians often occurs in the private sphere and comparing the challenges applicants face in proving lesbian asylum claims to those faced in proving gender-based asylum claims).

¹⁴⁶ A-B-, 27 I&N Dec. 316, 320–21 (A.G. 2018); *Backgrounder and Briefing on Matter of A-B-*, U.C. HASTINGS CTR. FOR GENDER & REFUGEE STUDS. (Aug. 2018), <https://cgrs.uchastings.edu/matter-b/backgrounder-and-briefing-matter-b> [<https://perma.cc/G6WU-YSH4>] [hereinafter CGRS Backgrounder]. Ms. A-B-’s husband beat, raped, and threatened to kill her frequently. When she moved to another town and sought a divorce, her husband tracked her down and threatened to kill her once again. *Id.*

¹⁴⁷ A-B-, 27 I&N Dec. at 321; A-R-C-G-, 26 I&N Dec. 388, 392 (B.I.A. 2014).

¹⁴⁸ *Judge V. Stuart Couch*, TRACIMMIGRATION, <https://trac.syr.edu/immigration/reports/judgereports/00394CHL/index.html> [<https://perma.cc/U29X-GNQW>].

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*; see also A-B- (B.I.A. Dec. 8, 2016), <https://drive.google.com/file/d/1omC8I1KHLk-77hqqOY2XuLZqjmICVHLZ/edit> [<https://perma.cc/NF48-2LAP>] (unpublished opinion, redacted and published by counsel).

striking demonstration of the absence of the rule of law in the asylum system.¹⁵¹

At this point, Sessions stepped in and certified the case to himself, asking for briefing 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”¹⁵² The Department of Homeland Security expressed confusion, given that it believed this question had already been answered by BIA precedent, and requested clarification, which Sessions refused.¹⁵³ Of the twelve amicus briefs submitted in response to the question, eleven were in favor of leaving the BIA’s decision in *A-B-* in place.¹⁵⁴ The one brief that favored overturning the decision and eliminating the domestic violence-based particular social group articulated in *A-R-C-G-* was filed by the Immigration Reform Law Institute,¹⁵⁵ an arm of the anti-immigrant

¹⁵¹ NIJC ADVISORY, *supra* note 4, at 7 (citing *Judge V. Stuart Couch*, *supra* note 148).

¹⁵² *A-B-*, 27 I&N Dec. at 323.

¹⁵³ *A-B-*, 27 I&N Dec. 247, 249 (A.G. 2018) (“DHS requests clarification on the ground that ‘this question has already been answered, at least in part, by the Board and its prior precedent.’”). Sixteen former immigration judges and members of the BIA submitted an amicus brief protesting that Sessions’ use of his self-referral power under these procedural circumstances was impermissible. *See* Brief Amici Curiae of Sixteen Former Immigration Judges and Members of the Board of Immigration Appeals Urging Vacatur of Referral Order and in Support of Respondent at 8, *A-B-*, 27 I&N Dec. 316 (A.G. 2018), available at <https://www.aila.org/infonet/amicus-brief-matter-of-a-b-> [<https://perma.cc/AZS8-9JTU>].

¹⁵⁴ Amici Curiae Brief of Gonzalez Olivieri, LLC, Immigration Counseling Center, Inc., and Fiel Houston, Inc. at 9, *A-B-*, 27 I&N Dec. 316 (A.G. 2018); Brief for The American Bar Association as Amicus Curiae at 21, *A-B-*, 27 I&N Dec. 316 (A.G. 2018); Brief of Amici Curiae The Catholic Legal Immigration Network, Inc., Benedictine Sisters of The Fed’n of St. Scholastica, Conference of Benedictine Prioresses, Conference of Major Superiors of Men, Hias, Lutheran Immigration and Refugee Service, National Council of Jewish Women, National Justice for Our Neighbors, Unitarian Universalist Service Comm., United Methodist Immigration Task Force, and World Relief at 19–20, *A-B-*, 27 I&N Dec. 316 (A.G. 2018); Brief of Amicus Curiae David B. Gardner at 12, *A-B-*, 27 I&N Dec. 316 (A.G. 2018); Brief of Amici Curiae The Harvard Immigration and Refugee Clinical Program, The Am. Immigration Lawyers Ass’n, Human Rights First, and Kids in Need of Defense at 21, *A-B-*, 27 I&N Dec. 316 (A.G. 2018); Brief of Amici Curiae Immigration Law Professors at 23, *A-B-*, 27 I&N Dec. 316 (A.G. 2018); Brief of Amicus Curiae Innovation Law Lab at 33, *A-B-*, 27 I&N Dec. 316 (A.G. 2018); Brief of Amicus Curiae The National Immigrant Justice Ctr. at 31, *A-B-*, 27 I&N Dec. 316 (A.G. 2018); Brief Amici Curiae of Sixteen Former Immigration Judges, *supra* note 153, at 21; Corrected Brief of Tahirih Justice Ctr., The Asian Pacific Institute on Gender-Based Violence, Asista Immigration Assistance, and Casa De Esperanza as Amici Curiae in Support of Respondent *A-B-* at 34, *A-B-*, 27 I&N Dec. 316 (A.G. 2018); Request to Appear as Amicus Curiae and Brief of the George Washington University Immigration Clinic as Amicus Curiae in Response to Amicus Invitation *Matter of A-B-*, at 19, *A-B-*, 27 I&N Dec. 316 (A.G. 2018).

¹⁵⁵ Request to Appear as Amicus Curiae and Supplemental Brief of the Immigration Reform Law Institute at 4, *A-B-*, 27 I&N Dec. 316 (A.G. 2018), available at http://immigrationreformlawinstitute.org/Docs/Matter_of_A_B_Final.pdf [<https://perma.cc/6C2D-YQZQ>]

organization Federation for American Immigration Reform, which has been classified as a hate group with ties to white supremacist organizations.¹⁵⁶

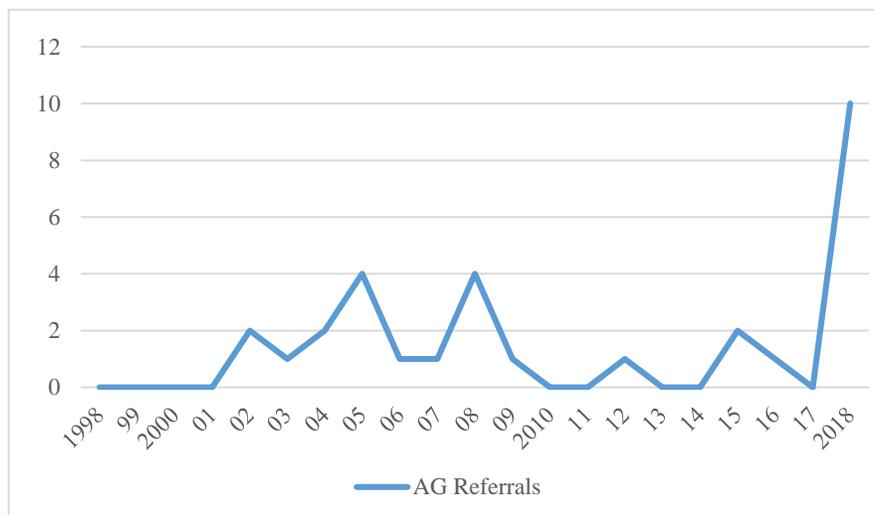
Matter of A-B- was the latest example of the Trump Administration's aggressive use of the AG's certification power, which is unprecedented in modern history.¹⁵⁷ In 2018 alone, the power was used to refer ten cases for AG review, eight certified by Sessions and two by then-Acting AG Matthew Whitaker.¹⁵⁸ This is equivalent to the total number of AG referrals in the prior ten years combined.¹⁵⁹

¹⁵⁶ *Federation for American Immigration Reform*, S. POVERTY L. CTR., <https://www.splcenter.org/fighting-hate/extremist-files/group/federation-american-immigration-reform> [<https://perma.cc/93UA-FMMJ>].

¹⁵⁷ See *infra* Figure 1.

¹⁵⁸ AG/BIA Precedent Listing, *supra* note 85. Whitaker took over as Acting AG in November 2018. Given the open questions about the constitutionality of Mr. Whitaker's appointment to the role of Acting AG, his use of the certification power is particularly alarming. John E. Bies, *Matthew Whitaker's Appointment as Acting Attorney General: Three Lingering Questions*, LAWFARE (Nov. 8, 2018, 10:04 AM), <https://www.lawfareblog.com/matthew-whitakers-appointment-acting-attorney-general-three-lingering-questions> [<https://perma.cc/8T3V-5VAD>].

¹⁵⁹ AG/BIA Precedent Listing, *supra* note 85; see *infra* Figure 1. Observers have noted that the Trump DOJ's use of this power has differed from predecessors' not only in frequency but also in kind. "The decisions are different from those of other administrations, in that they are self-certified through procedural irregularity, are decided based on issues entirely different than those presented before the IJs and the BIA, and depend what had been settled issues of law that were not being questioned by either party to the action." Chase, *supra* note 93.

FIGURE 1: USE OF THE AG REFERRAL POWER OVER THE PAST 20 YEARS¹⁶⁰

As asylum advocates feared, when Sessions released his final decision in *Matter of A-B-* on June 11, 2018, he vacated the BIA’s decision in *Matter of A-B-* and overturned *Matter of A-R-C-G-*.¹⁶¹ *The New York Times* and other major publications ran headlines announcing that Sessions had declared domestic violence and gang violence would no longer be grounds for asylum.¹⁶² And indeed Sessions stated in his opinion that “[g]enerally, claims by aliens pertaining to domestic violence or gang violence perpetrated by non-governmental actors will not qualify for asylum.”¹⁶³ However, a careful reading shows that the decision did not go as far as many domestic violence and asylum advocates initially feared—and perhaps not as far as AG Sessions would have liked. The only actual holding of *Matter of A-B-* is that it overturned *Matter of A-R-C-G-*, meaning that “married women in Guatemala who are unable to leave their relationship” is no longer available as a precedential PSG.¹⁶⁴ This essentially turns back the clock to before 2014, when domestic violence-based asylum applicants had no BIA precedent to rely on, but could still apply for and qualify for asylum; they just needed to

¹⁶⁰ Data compiled from AG/BIA Precedent Listing, *supra* note 85. For a listing of all past volumes of AG and BIA decisions, see *Agency Decisions: AG/BIA Decisions Listing*, U.S. DEP’T OF JUSTICE, <https://www.justice.gov/eoir/ag-bia-decisions>[<https://perma.cc/5HUK-JTH4>].

¹⁶¹ *A-B-*, 27 I&N Dec. 316, 316–17 (A.G. 2018).

¹⁶² See *supra* note 21 and accompanying text.

¹⁶³ *A-B-*, 27 I&N Dec. at 320.

¹⁶⁴ NIJC ADVISORY, *supra* note 4, at 7–8.

prove their membership in a particular social group.¹⁶⁵ The rest of the decision is merely a restatement of preexisting standards, surrounded by copious, but ultimately nonbinding, dicta that attempts to cast doubt on domestic violence, gang-related, and other non-state actor claims.¹⁶⁶

The language of the opinion itself makes clear that Sessions did not create a categorical bar to domestic violence, gang violence, or other non-state actor-based claims.¹⁶⁷ Indeed, Sessions did not have the power to create a categorical bar to certain types of claims. A foundational principle of asylum law is that asylum claims must be decided on a case-by-case basis.¹⁶⁸ While the Attorney General may have the power to overrule prior BIA precedent, he does not have the power to rewrite international law.

Furthermore, despite his seemingly substantive rationale, Sessions overruled *A-R-C-G-* on essentially technical grounds. He found error with the fact that in *A-R-C-G-*, the BIA relied on Department of Homeland Security stipulations on issues of law, including the recognition of the PSG, rather than performing its own analysis to determine whether the posited PSG met the “particularity” and “social distinction” tests to establish a cognizable PSG.¹⁶⁹ Thus, *A-B-* does not stand for the proposition that PSGs similar to the ones articulated in *A-R-C-G-* and *A-B-* can *never* be cognizable PSGs. If applicants engage in the proper analysis to show IJs that the specific domestic violence and gang violence-related PSGs in their case are particular and socially distinct, *A-B-* does not state that those asylum claims cannot be valid.¹⁷⁰

Although at several points in the opinion, Sessions may have appeared to create a heightened standard for non-state actor claims in general, upon closer examination he does not. For instance, he stated that “[a]n applicant seeking to establish persecution based on violent conduct of a private actor ‘must show more than [the government’s] difficulty . . . controlling private

¹⁶⁵ See *supra* notes 120–124 and accompanying text.

¹⁶⁶ NIJC ADVISORY, *supra* note 4 at 8; see, e.g. *A-B-*, 27 I&N Dec. at 344–45.

¹⁶⁷ Sessions explicitly stated, “I do not decide that violence inflicted by non-governmental actors may never serve as the basis for asylum . . . based on membership in a particular social group.” *A-B-*, 27 I&N Dec. at 320. Also, he qualified his sweeping statement about domestic violence and gang violence with “[g]enerally.” *Id.*

¹⁶⁸ *Acosta*, 19 I&N Dec. 211, 233 (B.I.A. 1985) (“The particular kind of group characteristic that will qualify under this construction remains to be determined on a case-by-case basis.”); NIJC ADVISORY, *supra* note 3, at 14.

¹⁶⁹ *A-B-*, 27 I&N Dec. at 333–34.

¹⁷⁰ NIJC ADVISORY, *supra* note 4, at 14. It is well-established that PSG determinations are fact-dependent and must be made on a case-by-case basis. *Acosta*, 19 I&N Dec. at 233 (“The particular kind of group characteristic that will qualify under this construction remains to be determined on a case-by-case basis.”); *M-E-V-G-*, 26 I&N 227, 251 (B.I.A. 2014) (“Social group determinations are made on a case-by-case basis.”).

behavior.’ . . . The applicant must show that the government condoned the private actions ‘or at least demonstrated a complete helplessness to protect the victims.’”¹⁷¹ However, “condoned” or “helplessness” is essentially synonymous with “unwilling” and “unable.”¹⁷² The Seventh Circuit, which originated this language, has since used the language of “condoned” and “helplessness” interchangeably with “unable or unwilling,” indicating that this is not a heightened standard.¹⁷³ Sessions also stated that applicants in non-state actor cases need to show that “government protection from such harm . . . is so lacking that their persecutors’ actions can be attributed to the government.”¹⁷⁴ However, this assertion is merely dicta because it is included only in the introductory section, not the actual opinion. The same limitation applies to his comment that “there may be exceptional circumstances when victims of private criminal activity could meet these requirements.”¹⁷⁵ Tellingly, Sessions repeated the “unwilling or unable” language at several points in the opinion, indicating that he has not changed any standards but has merely rearticulated the preexisting, well-established ones.¹⁷⁶ Even if Sessions had wanted to chip away at the viability of non-state actor claims, he could not, as this prong is included in the definition of refugee in the INA and under international law.¹⁷⁷

Sessions also spent considerable time in the opinion discussing the requirements for establishing a PSG, but once again essentially restates existing precedent. He stated that PSGs must be defined with particularity and social distinction—which was previously established¹⁷⁸—and that PSGs

¹⁷¹ *A-B-*, 27 I&N Dec. at 337 (first quoting *Menjivar v. Gonzales*, 416 F.3d 918, 921 (8th Cir. 2005) (internal quotations and citations omitted); then quoting *Galina v. INS*, 213 F.3d 955, 958 (7th Cir. 2000)).

¹⁷² *A-B-*, 27 I&N Dec. at 337. Sessions took this language from a Seventh Circuit case involving a non-state actor persecutor. *Galina*, 213 F.3d at 957. In *Galina*, the court noted that applicants in cases with non-governmental persecutors must prove that government actors “condoned [the persecution] or at least demonstrated a complete helplessness to protect the victims,” but supported this proposition with four cases which employed the traditional “unwilling or unable” to control language. *Id.* at 958 (citing *Aguilar-Solis v. INS*, 168 F.3d 565, 573 (1st Cir. 1999); *Borja v. INS*, 175 F.3d 732, 735 n.1 (9th Cir. 1999) (en banc) (superseded by statute); *Bucur v. INS*, 109 F.3d 399, 403 (7th Cir. 1997); *Hengan v. INS*, 79 F.3d 60, 62 (7th Cir. 1996)).

¹⁷³ *Galina*, 213 F.3d at 958; NIJC ADVISORY, *supra* note 4, at 24. The government itself argued that “condoned or helpless” did not create a heightened standard in its pleadings in a different case when defending itself against charges that its changes to CFI standards were “arbitrary or capricious.” *Grace v. Whitaker*, 344 F. Supp. 3d 96, 127 (D.D.C. 2018).

¹⁷⁴ *A-B-*, 27 I&N Dec. at 317.

¹⁷⁵ *Id.*; NIJC ADVISORY, *supra* note 4, at 9.

¹⁷⁶ *A-B-*, 27 I&N Dec. at 317, 318, 320; NIJC ADVISORY, *supra* note 4, at 10.

¹⁷⁷ 8 U.S.C. § 1101(a)(42) (2012); *see also* Brief Amici Curiae of Sixteen Former Immigration Judges, *supra* note 153, at 16–17.

¹⁷⁸ *A-B-*, 27 I&N Dec. at 335; *M-E-V-G-*, 26 I&N Dec. 227, 228 (B.I.A. 2014).

cannot be circular, meaning the group cannot be defined by the harm suffered,¹⁷⁹ another requirement already established by prior case law.¹⁸⁰

One of the most troubling parts of *A-B-* is Sessions’s language about discretion. Sessions reminded asylum adjudicators that “a favorable exercise of discretion is a discrete requirement,”¹⁸¹ and encouraged them to consider discretionary factors, including the “circumvention of orderly refugee procedures” and whether the applicant could have remained in any third countries she passed through on her way to the U.S.¹⁸² This language appears to encourage asylum adjudicators to use their discretion to reject asylum seekers with otherwise valid claims who cross the border illegally, despite the fact that such discretionary denials are typically rare.¹⁸³ While manner of entry has been recognized as a potential discretionary factor, the BIA has stated that if an applicant has established a valid asylum claim, “the danger of persecution should generally outweigh all but the most egregious adverse factors.”¹⁸⁴

In short, much of the damage caused by the opinion itself concerns how it was perceived rather than the law it laid down.¹⁸⁵ Although the opinion does not establish a new standard for the “unable or unwilling” element, its focus on this term and on the role of discretion may make it more likely that adjudicators will increase their focus upon and skepticism of this element of asylum claims.¹⁸⁶

III. THE IMPACT OF *MATTER OF A-B-*

This Part examines the impact that *Matter of A-B-* has had on the asylum system. This Part begins by tracing the observable effects of the decision. It

¹⁷⁹ *A-B-*, 27 I&N Dec. at 335. For example, “women who are victims of domestic violence” would not be a proper PSG, because the victims are not persecuted *because* they are victims of domestic violence.

¹⁸⁰ *M-E-V-G-*, 26 I&N Dec. at 236 n.11. The fact that any PSG needs to be clearly delineated on the record was also previously established in *Matter of W-Y-C- & H-O-B-*, as was the fact that adjudicators must consider whether there was a possibility of internal relocation. 27 I&N Dec. 189, 189, 191 (B.I.A. 2018) (denying the appeal of a Honduran mother because she presented a different PSG than the one initially argued before the IJ).

¹⁸¹ *A-B-*, 27 I&N Dec. at 345 n.12; *see also supra* notes 101–105 and accompanying text.

¹⁸² *A-B-*, 27 I&N Dec. at 345 n.12.

¹⁸³ Aschenbrenner, *supra* note 102, at 598. This move is consistent with the Trump Administration’s unsuccessful attempt in November 2018 to categorically bar asylum seekers who enter the country illegally from asylum eligibility via presidential proclamation, which was struck down in August 2019. *O.A. v. Trump*, No. 18-2718 (RDM), 2019 WL 3536334, at *2 (D.D.C. Aug. 2, 2019).

¹⁸⁴ *Pula*, 19 I&N Dec. 467, 474 (B.I.A. 1987) (superseded by statute).

¹⁸⁵ NIJC ADVISORY, *supra* note 4, at 1.

¹⁸⁶ *Id.* at 24.

then examines the potential impact of *Matter of A-B-* on LGBTQ asylum claims.

A. The Impact of Matter of A-B- So Far

Because of the nature of the asylum system, in which many decisions are not documented or published, it can be difficult to quantify the full impact of *Matter of A-B-*. What follows is an overview of what impact can be observed. First is an analysis of the BIA and court of appeals decisions that have cited to *Matter of A-B-* as of July 2019,¹⁸⁷ which identifies several trends, all of which support the fact that, doctrinally speaking, *Matter of A-B-* did not have as severe an impact as asylum advocates initially feared. Nonetheless, although the text of the decision leaves much of asylum doctrine unchanged, the case has had a significant negative impact on asylum seekers because of the lack of rule of law in the asylum system. The USCIS Guidelines—the implementation of which has been halted by a preliminary injunction—ordered that *A-B-* be applied at the credible fear interview stage and would have severely limited the prospects of many asylum seekers advancing past that stage.¹⁸⁸ In addition, statistical evidence shows that the release of *Matter of A-B-* coincided with a spike in asylum denials, and anecdotal evidence indicates that some immigration judges have construed *A-B-* to have broader implications than the BIA and court of appeals decisions indicate, causing them to reject more cases.

1. BIA Cases

None of the handful of post-*A-B-* BIA decisions that cite the opinion were designated as precedential, but they are useful for gaining a sense of how the BIA is applying *Matter of A-B-* so far, and whether that decision is having an impact on asylum claims. First, several cases cited to dicta from *A-B-*, but the decision did not appear to affect the outcome of the claims, which instead failed on other grounds.¹⁸⁹ Second, in several cases the BIA

¹⁸⁷ Cases were identified using Westlaw’s “Citing References” feature.

¹⁸⁸ See *infra* Section III.A.3.

¹⁸⁹ See, e.g., Maria Ren-Lopez, 2019 WL 2160109, at *1 (B.I.A. Jan. 31, 2019) (citing *A-B-*, 27 I&N Dec. 316, 320 (A.G. 2018), for the proposition that “generally” domestic violence is not grounds for asylum, but ultimately upholding the IJ’s order of removal because the respondent failed to actually file an application for asylum, despite claiming fear to return to her home country). In several cases that were decided upon motions to reopen proceedings after applicants failed to appear for their original hearings, the asylum claim failed because the applicants did not show that conditions had changed in their home country, which is a required showing for a motion to reopen. See, e.g., Karla Aracely Hernandez-Calderon, 2018 WL 8062932, at *1–2 (B.I.A. Dec. 21, 2018) (citing *A-B-*’s “[g]enerally . . . gang violence . . . will not qualify” language but denying relief because respondent’s motion to reopen was both time and number-barred, and respondent failed to prove a change in country conditions, 27 I&N Dec. at 320); Amilcar Rene Erazo-Vasquez, 2018 WL 5921037, at *1 (B.I.A. Sept. 28, 2018) (citing the same language but denying relief because respondent’s motion was untimely and because respondent

indicated that applicants could no longer rely on *Matter of A-R-C-G-* as precedent.¹⁹⁰ Third, multiple cases cited to *A-B-* for a proposition that was already supported in prior case law, often citing other cases as well.¹⁹¹

Notably lacking in the publicly available BIA cases that have cited *A-B-* so far is any suggestion from the BIA that *Matter of A-B-* created a categorical bar on domestic violence or gang violence ever supporting a claim for asylum. They also did not indicate that they interpreted *Matter of A-B-* as establishing a heightened standard for the “unable or unwilling to protect” element. In fact, in none of these cases was *Matter of A-B-* outcome-determinative; the claims failed on procedural grounds or on a failure to establish elements that were already part of well-established asylum law prior to *Matter of A-B-*.

2. Court of Appeals Decisions

A review of the circuit court of appeals decisions that have applied *A-B-* so far also reveals several trends. First, in the immediate aftermath of *A-B-*, courts of appeals frequently simply remanded the case to the BIA to

failed to establish changed country conditions that would excuse the untimeliness); Marvin Wilfredo Menjivar-Orellana, 2018 WL 4611484, at *2 (B.I.A. Aug. 3, 2018) (citing the same language to indicate that the applicant would have no incentive to appear at his 2012 removal hearing based on potential eligibility for asylum); Ramon Elias-Menjivar, 2018 WL 4611489, at *1–2 (B.I.A. Aug. 1, 2018) (citing to *A-B-*, 27 I&N Dec. at 320, that “[t]he 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” but ultimately rejecting the appeal because the applicant did not establish a change in country conditions, failed to delineate the contours of his particular social group, and did not tie the general increase in gang violence in El Salvador to his specific circumstances); Melva Danira Mejia-Banegas, 2018 WL 4611496, at *1–2 (B.I.A. July 30, 2018) (citing from *A-B-*, 27 I&N Dec. at 337, that “the government [must] condone[] the private actions or at least demonstrate[] a complete helplessness to protect the victims” without indicating that the Board considered this to be a higher standard than “unwilling or unable” to protect, and rather denying the claim because the applicant failed to provide evidence to satisfy that prong, and regardless failed to show a “change in country conditions” (internal citations omitted in original)).

¹⁹⁰ See, e.g., Mirna Yaneth Lopez-Marroquin, 2018 WL 5921076, at *2 (B.I.A. Sept. 17, 2018) (denying applicant’s motion to reopen proceedings because she relied on *A-R-C-G-*, but not indicating that her domestic violence-based PSG could never be cognizable); Maria Emma Orellana Carranza, 2018 WL 4002314, at *1 (B.I.A., June 25, 2018) (noting that the applicant could not use *Matter of A-R-C-G-* as an “exceptional circumstance” warranting *sua sponte* reopening of claim).

¹⁹¹ See Ilder Serrano-Melgar, 2019 WL 2613163, at *2 (B.I.A. Apr. 5, 2019) (citing *A-B-* along with Seventh Circuit precedent for the proposition that fear of generalized gang violence is not sufficient to establish an asylum claim); Milton Javier Solano, 2018 WL 4692828, at *2 (B.I.A. Aug. 31, 2018) (citing *A-B-*, 27 I&N Dec. at 316, for the well-established proposition that “[f]ear of criminal violence by itself” is not sufficient to establish an asylum claim); Braulio Juarez-Chilel, 2018 WL 4002273, at *2 (B.I.A. July 11, 2018) (citing *A-B-* among multiple other BIA decisions in dismissing an appeal because the applicant indicated only that he feared being extorted by gangs because he had money, not on account of membership in any particular social group).

apply *A-B-* without much discussion of how it might affect the outcome.¹⁹² Second, in several cases, the circuits indicated that *Matter of A-R-C-G-* is no longer precedent, but that fact did not affect the outcomes.¹⁹³ Similarly, in several cases, the circuits quoted dicta from *A-B-*, but *A-B-* seemingly did not affect the outcomes.¹⁹⁴ And in many cases the circuits indicated that *A-B-* was consistent with their preexisting case law.¹⁹⁵

¹⁹² See, e.g., *Padilla-Maldonado v. Att’y Gen. United States*, 751 F. App’x 263, 268–69 (3d Cir. 2018) (remanding to the BIA to apply *A-B-* in order to determine whether respondent’s membership in the posited group is cognizable); *Moncada v. Sessions*, 751 F. App’x 116, 118 (2d Cir. 2018) (remanding because *A-B-* offered “substantial new guidance on the viability of asylum ‘claims by aliens pertaining to . . . gang violence’” since the IJ and BIA’s rulings (quoting *A-B-*, 27 I&N Dec. at 320)).

¹⁹³ In *Padilla-Maldonado v. Att’y Gen. United States*, the Third Circuit was quite explicit that while the applicant could no longer rely on *Matter of A-R-C-G-* to establish her PSG, that did not mean she could not still establish that she is a member of a cognizable PSG, stating that “[w]hile the overruling of *A-R-C-G-* weakens *Padilla-Maldonado*’s case, it does not automatically defeat her claim that she is a member of a cognizable particular social group.” 751 F. App’x at 268; see also *Rivas-Durán v. Barr*, 927 F.3d 26, 31 n.1 (1st Cir. 2019) (recognizing that *A-R-C-G-* was overruled by *A-B-*, but finding that fact irrelevant where the BIA found the applicant failed to prove membership in her proposed PSG even while *A-R-C-G-* was still in effect); *W.M.V.C. v. Barr*, 926 F.3d 202, 210–11 (5th Cir. 2019) (finding *A-B-* overruling *A-R-C-G-* was irrelevant in denying government responsibility for attorneys’ fees where government was “substantially justified” in finding an applicant failed under pre-*A-B-* standards); *Martínez-Pérez v. Sessions*, 897 F.3d 33, 40 n.6 (1st Cir. 2018) (indicating that while applicant had misconstrued the holding of *A-R-C-G-*, her interpretation was irrelevant, even if correct, because *A-B-* overruled *A-R-C-G-*); *S.E.R.L. v. Att’y Gen. United States*, 894 F.3d 535, 545, 550 (3d Cir. 2018) (indicating that it was inappropriate to rely on *A-R-C-G-* to establish a PSG because it had been overruled and confirmed that PSG determination must be made on a case-by-case basis); *Tacam-García v. Whitaker*, 744 Fed. App’x 226, 227 (5th Cir. 2018) (per curiam) (denying appeal because applicant relied on *A-R-C-G-* to establish her PSG, but even if she had established PSG she failed to establish nexus or that the government was unwilling or unable to control); *Najera v. Whitaker*, 745 F. App’x 670, 671 (8th Cir. 2018) (noting that applicant’s proposed PSG “may not be cognizable” given the overruling of *A-R-C-G-* but finding this fact irrelevant where the applicant failed to establish her membership in it even if it were valid).

¹⁹⁴ See, e.g., *Saravia v. Att’y Gen. United States*, 905 F.3d 729, 739 n.49 (3d Cir. 2018) (quoting *A-B-*, 27 I&N Dec. at 320, that “[g]enerally, claims by aliens pertaining to domestic violence or gang violence perpetrated by non-governmental actors will not qualify for asylum,” but ultimately remanding on procedural grounds without reaching the merits of the case); *Moncada*, 751 F. App’x at 118 (quoting *A-B-*, 27 I&N Dec. at 337, that “private criminals are motivated more often by greed or vendettas than by an intent to overcome the protected characteristic of the victim,” but ultimately remanding).

¹⁹⁵ For example, in *Padilla-Maldonado*, the Third Circuit indicated that upon remand the IJ should determine whether “Salvadoran women in domestic relationships who are unable to leave” is cognizable according to the parameters of *A-B-*. 751 F. App’x at 268–69. The court then described those parameters entirely in terms consistent with pre-*A-B-* asylum standards, including the normal “unwilling or unable to protect” standard. *Id.* at 266; see also *Rosales Justo v. Sessions*, 895 F.3d 154, 166 n.9 (1st Cir. 2018) (explicitly quoting *A-B* that “[t]he mere fact that a country may have problems effectively policing certain crimes . . . cannot itself establish an asylum claim” as “consistent with [the First Circuit’s] precedent” concerning government unwillingness or inability to protect in non-state actor claims.); *Gutierrez v. Att’y Gen. United States*, 747 Fed. App’x 106, 108 n.2 (3d Cir. 2018) (finding proposed domestic violence-related PSG was not perceived socially distinct under *Matter of M-E-V-G-*, and therefore it was not necessary to consider the effect, “if any,” of *A-B-*); *Patzan v. Att’y Gen. United States*, 754 Fed. App’x 128, 130 (3d Cir. 2018) (finding that proposed gang-related PSG was not particular or socially distinct

Several circuits explicitly made clear that domestic violence or gang violence claims could still be valid.¹⁹⁶ For instance, in *Juan-Pedro v. Sessions*, the Sixth Circuit remanded because the BIA failed to consider evidence that an attack by gang members was motivated by the applicant's ethnicity.¹⁹⁷ They concluded that *Matter of A-B-* was "not relevant" because the IJ in *Juan-Pedro* "expressly found" that the applicant had established her government's inability to protect her had she gone to them for help.¹⁹⁸ This outcome clearly indicates that the Sixth Circuit does not believe *Matter of A-B-* has created a heightened standard for non-state actor claims and that gang violence claims can still be valid as long as a protected ground is "one central reason" motivating persecution.¹⁹⁹ In addition, the Ninth Circuit remanded *Ticas-Guillen v. Whitaker* because in the past the court had recognized that gender and nationality alone can form the basis of a PSG, so "women in El Salvador" may be sufficient, demonstrating a rejection of any categorical bars on domestic violence claims.²⁰⁰

The Eleventh Circuit is an exception to the general consensus that *Matter of A-B-* has not significantly changed the legal standards applied to

under *Matter of M-E-V-G-*); *Gonzalez-Solares v. Whitaker*, 742 F. App'x 277, 277 (9th Cir. 2018) (proposed PSGs of "persons subject to extortion demands in Guatemala" defined the group in terms of the harm suffered, in violation of preexisting precedent established in *Matter of M-E-V-G-*); *Reyes v. Sessions*, 750 Fed. App'x 656, 659 (10th Cir. 2018) (finding that "female victims of domestic violence" and "females in El Salvador" were not cognizable PSGs under preexisting precedent, not because of *A-B-*).

¹⁹⁶ See, e.g., *Twum v. Barr*, 930 F.3d 10, 22 (1st Cir. 2019) (emphasizing that the BIA "does not expressly or impliedly conclude that domestic abuse is not a cognizable type of harm, nor does its opinion suggest a finding that Twum failed to link the [domestic violence] suffered to one of the enumerated statutory grounds" where the BIA's decision discussed only the amount of time that had elapsed since the harm occurred, not the type of harm); *Alvarez Lagos v. Barr*, 927 F.3d 236, 252–55 (4th Cir. 2019) (remanding to apply *A-B-*, but spending considerable time highlighting the ways in which the IJ failed to conduct a proper analysis of whether "unmarried mothers living under control of gangs" could be a viable PSG, and urging the BIA "on this fourth attempt, to address Alvarez Lagos's claims fully and with attention to all of the relevant evidence").

¹⁹⁷ 740 F. App'x 467, 472 (6th Cir. 2018).

¹⁹⁸ *Id.* at 472 n.1.

¹⁹⁹ *Id.*; see also *Aguilar-Gonzalez v. Barr*, No. 18-3891, 2019 WL 2896442, at *3 (6th Cir. 2019) (per curiam) (noting that an indigenous woman failed to provide any evidence connecting her domestic abuse to her ethnicity, but not indicating that this type of claim was categorically barred); *Rosales Justo*, 895 F.3d at 163–64 (remanding because the BIA erred in determining that it was "clearly erroneous" to determine that the applicant failed to demonstrate the Mexican government was unable or unwilling to protect him simply because the government investigated his son's murder by members of an organized crime group. The First Circuit distinguished the evidence in *A-B-* and other cases concerning government inability or unwillingness to protect from this case, indicating that the standard had not been heightened, and claims concerning organized crime were still eligible, provided all elements are established).

²⁰⁰ 744 Fed. App'x 410 (9th Cir. 2018); see also *Silvestre-Mendoza v. Sessions*, 729 F. App'x 597, 598 (9th Cir. 2018) (remanding for consideration of whether "Guatemalan women" is a socially distinct PSG under Ninth Circuit precedent).

asylum claims.²⁰¹ In *Munguia-Mejia v. U.S. Attorney General*, the asylum applicant, who applied prior to *A-B-*, posited “women in a de facto union who are unable to leave the relationship with their male partner” as her particular social group, relying on *A-R-C-G-*.²⁰² The immigration judge denied her application for various reasons, including a finding that she was not credible.²⁰³ The BIA declined to consider her challenge to the IJ’s adverse credibility determination because *Matter of A-B-* “independently foreclosed” her asylum claim.²⁰⁴ On appeal, the Eleventh Circuit rejected the applicant’s argument that the BIA’s failure to consider her credibility claim was a denial of her due process rights, agreeing that her claim was foreclosed by *Matter of A-B-*.²⁰⁵ The court stated the applicant “cannot show and does not argue that remand would result in a different outcome in light of *Matter of A-B-*, which would preclude the BIA or IJ from concluding that her proposed group was legally cognizable.”²⁰⁶ Thus, the Eleventh Circuit appears to have concluded that after *A-B-*, PSGs similar to the one in *A-R-C-G-* can never be cognizable, a departure from other circuits’ interpretations.²⁰⁷

Still, with the exception of the Eleventh Circuit, none of the other court of appeals cases discussed previously that have cited *A-B-* indicate a belief that the case created a categorical bar on domestic violence claims or a heightened standard for “unable or unwilling” to protect. Circuit court interpretations of the opinion will become clearer with more time once courts no longer need simply to remand the cases that were appealed before *A-B-*’s release.²⁰⁸

²⁰¹ *Munguia-Mejia v. U.S. Att’y Gen.*, 2019 WL 3064490, at *1–2 (11th Cir. July 12, 2019) (per curiam).

²⁰² *Id.*

²⁰³ *Id.* at *1.

²⁰⁴ *Id.*

²⁰⁵ *Id.* at *3.

²⁰⁶ *Id.*

²⁰⁷ The applicant also argued that the BIA should have remanded her case to the IJ to consider whether her PSG could be cognizable after *A-B-*, and that the BIA erred by concluding that her claim was precluded by *A-B-*. The Eleventh Circuit declined to consider these claims for lack of jurisdiction because the applicant failed to exhaust them before the BIA. *Id.* at *2.

²⁰⁸ Prospects for domestic violence and other non-state actor claims look the most optimistic in the Ninth Circuit, but language in the Sixth Circuit opinion is also promising. As of this writing, there has not been a Seventh Circuit decision applying *A-B-* yet, but that will likely also be a favorable circuit, as *Galina* is a Seventh Circuit decision and therefore the court is aware that “condoned or helpless” does not create a higher burden than “unable or unwilling.” *Galina v. INS*, 213 F.3d 955, 958 (7th Cir. 2000). In addition, the Seventh Circuit has historically had one of the highest remand rates (followed by the Ninth). *Ramji-Nogales et al.*, *supra* note †, at 363 fig.46. Prospects are the most negative for asylum seekers in the Eleventh Circuit following its decision in *Munguia-Mejia*. 2019 WL 3064490, at *1. There is also cause for concern in the Second Circuit, where the court indicated that *A-B-* might provide “substantial new guidance” on the viability of gang-related claims. *Moncada v. Sessions*, 751 F. App’x 116, 118 (2d Cir. 2018).

3. Agency Guidelines

While most BIA and Court of Appeals decisions might indicate that *A-B-*'s impact has been relatively mild, its impact at the implementation stage has been far more severe. On July 11, 2018, USCIS issued guidelines on how officers should apply *A-B-*. The guidelines instructed all USCIS personnel to apply the reasoning from *A-B-* at the credible fear interview stage.²⁰⁹ The guidelines cited much of the dicta from *A-B-* that asylum advocates found alarming, and placed the following dicta in boldface type:

In general, in light of the above standards, claims based on membership in a putative particular social group defined by the members' vulnerability to harm of domestic violence or gang violence committed by non-government actors will not establish the basis for asylum, refugee status, or a credible or reasonable fear of persecution.²¹⁰

The ACLU filed a lawsuit in August 2018, *Grace v. Whitaker*,²¹¹ specifically challenging the changes to credible fear standards articulated in the USCIS Guidelines, arguing that the effect of all of the guidelines taken together was "to distort the credible fear process beyond recognition."²¹² In December 2018, a federal judge granted the ACLU's request for a permanent injunction against enforcing the changes to CFI standards in the USCIS

²⁰⁹ Memorandum from U.S. Citizenship & Immigr. Servs., Guidance for Processing Reasonable Fear, Credible Fear, Asylum, and Refugee Claims in Accordance with Matter of A-B- 1 (July 11, 2018), <https://www.aila.org/infonet/uscis-guidance-processing-fear-matter-of-a-b-1> [<https://perma.cc/9SYE-B4AE>] [hereinafter USCIS Guidelines]. Prior to the release of these guidelines, Sessions had publicly lamented the low credible fear threshold and expressed a desire to heighten the standard, stating "[w]e can elevate the threshold standard of proof in credible fear interviews." Jeff Sessions, U.S. Att'y Gen., *Remarks to the Executive Office for Immigration Review* (Oct. 12, 2017), available at <https://www.justice.gov/opa/speech/attorney-general-jeff-sessions-delivers-remarks-executive-office-immigration-review> [<https://perma.cc/QYM5-43MD>] ("The system is being gamed. The credible fear process was intended to be a lifeline for persons facing serious persecution. But it has become an easy ticket to illegal entry into the United States We also have dirty immigration lawyers who are encouraging their otherwise unlawfully present clients to make false claims of asylum providing them with the magic words needed to trigger the credible fear process.").

²¹⁰ USCIS Guidelines, *supra* note 209, at 6 (this Note cites to portions of the USCIS Guidelines that have been redacted in its original form). The guidelines also stated that asylum officers should ignore any federal circuit case law that is inconsistent with *A-B-*, and should only look to the federal circuit where the CFI took place, despite the fact that the prior rule was that asylum officers should apply the law of the federal circuit with the most favorable precedent. *Id.* at 9; Petitioner's Complaint for Declaratory and Injunctive Relief at 20, *Grace v. Whitaker* 344 F. Supp. 3d 96 (D.D.C. Dec. 19, 2018) (No. 1:18-cv-01853) [hereinafter Petitioner's Complaint].

²¹¹ The case was originally filed under the name *Grace v. Sessions*, but the name was changed by the time the judge issued his opinion due to Sessions's ouster as AG and replacement with Acting AG Matthew Whitaker.

²¹² Petitioner's Complaint, *supra* note 210, at 5. The plaintiffs were twelve individuals who had fled domestic violence and gang violence in Central America and who received negative credible fear determinations in the days following *A-B-*'s release. The complaint posited that prior to *A-B-*, all the plaintiffs would have passed their CFIs. *Id.* at 4.

Guidelines.²¹³ In a strong rebuke of the Trump Administration’s overreach in this matter, the judge stated that “it is the will of Congress—not the whims of the Executive—that determines the standard for expedited removal.”²¹⁴

4. Statistics

Fiscal year 2018 saw the overall asylum denial rate hit a record high of 65%.²¹⁵ One analysis indicated that the grant rate in 2018 was the lowest it has been in two decades.²¹⁶ Data shows that the denial rates spiked beginning in June 2018, which is when *A-B-* was released.²¹⁷ While it is impossible to prove that *A-B-* was the cause because the government does not publicize data about the protected grounds various applicants assert or reasons for denial,²¹⁸ the timing suggests that *A-B-* likely contributed to this increase in denials. Data through September 2019 shows that the denial rate never returned to a pre-*A-B-* level.²¹⁹

²¹³ *Grace v. Whitaker*, 344 F. Supp. 3d 96, 146 (D.D.C. Dec. 19, 2018). While traditional immigration claims are not reviewable in the federal district courts, systemic challenges to the legality of written policies issued by the AG may be brought in the D.C. District. 8 U.S.C. § 1252(e)(3)(A)(ii) (2012).

²¹⁴ *Grace*, 344 F. Supp. 3d at 105. The court held that *A-B-* and the USCIS Guidelines created a “general rule” against applicants with domestic violence and gang-violence based claims succeeding at the CFI stage, concluding that this change violated the INA and the Administrative Procedures Act because raising the threshold at the CFI stage was “inconsistent with Congress’ intent” that CFIs be a low bar and because heightening the standard in this way was “arbitrary and capricious.” *Id.* at 126, 127. Further, the court struck down the changes regarding which circuit precedent asylum officers must follow, reaffirming the previously established rule that an asylum applicant can pass the CFI stage if precedent in any circuit is favorable. *Id.* at 135–41. The government appealed the District Court’s decision in January 2019; as of this writing, that appeal is pending. *Grace v. Whitaker*, 2019 WL 329572, at *1 (D.D.C. Jan. 25, 2019), *request for stay denied*. The government moved for a stay pending the appeal of the case that would allow them to continue to enforce the heightened CFI standards, which was denied. *Id.* As of September 2019, oral arguments are scheduled for early December.

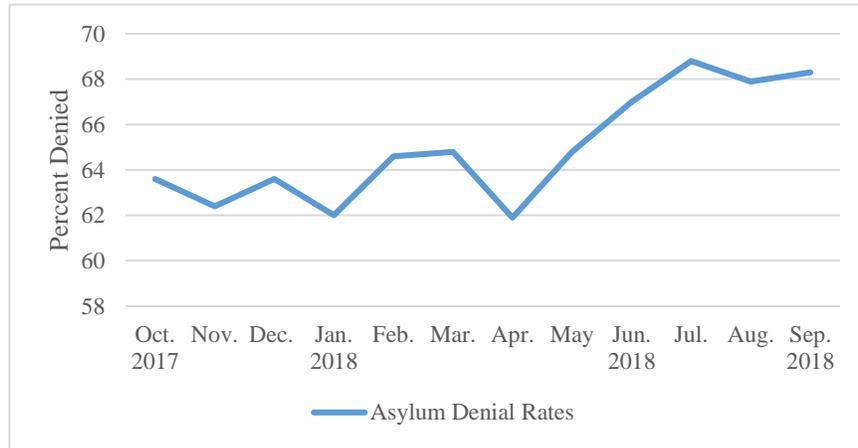
²¹⁵ TRACIMMIGRATION, SYRACUSE UNIV., ASYLUM DECISIONS AND DENIALS JUMP IN 2018 tbl.1 (2018), <http://trac.syr.edu/immigration/reports/539> [<https://perma.cc/6LZ4-NNWZ>] [hereinafter TRAC IMMIGRATION 2018 REPORT].

²¹⁶ Hamed Aleaziz, *The US Is Granting Asylum Requests at the Lowest Rate in Two Decades, New Statistics Show*, BUZZFEED NEWS (Oct. 29, 2018, 5:42 PM), <https://www.buzzfeednews.com/article/hamedaleaziz/asylum-grants-lowest-rate-in-two-decades> [<https://perma.cc/D34B-55VR>] (citing an analysis done by Sarah Pierce of the Migration Policy Institute of data released by the Department of Justice).

²¹⁷ *Infra* Figure 2.

²¹⁸ TRAC IMMIGRATION 2018 REPORT, *supra* note 215, at 1.

²¹⁹ TRAC Immigration Graph Tool, *supra* note 42.

FIGURE 2: ASYLUM DENIAL RATES FY 2018²²⁰

5. Anecdotal Evidence

Anecdotal evidence indicates that *A-B-* had a dramatic effect at the CFI stage prior to the *Grace* injunction.²²¹ Attorneys working at the border reported that they saw women be rejected who would have previously qualified for asylum, and that they saw the CFI grant rate overall “plummet.”²²² The executive director of a New Mexico-based immigration legal aid organization told reporters that before *A-B-*, approximately 80% of her organization’s male clients at a detention center who had fled gang

²²⁰ Data compiled from TRAC Immigration Graph Tool, *supra* note 42. TRAC Immigration analyzes millions of immigration court records obtained through Freedom of Information Act requests to the Executive Office of Immigration Review. The interactive Graph Tool allows users to filter data by various factors, including case outcome. *About the Data*, TRACIMMIGRATION, SYRACUSE UNIV., https://trac.syr.edu/phptools/immigration/asylum/about_data.html [<https://perma.cc/E592-SZNY>].

²²¹ See *supra* notes 211–214 and accompanying text for a discussion of the *Grace* injunction.

²²² Laura Gottesdiener & John Washington, *They’re Refugees, Fleeing Gang Violence and Domestic Abuse. Why Won’t the Trump Administration Let Them In?*, NATION (Nov. 28, 2018), <https://www.thenation.com/article/trump-asylum-gangs-domestic-violence> [<https://perma.cc/LH7S-Q99D>]; Noah Lanard, *Jeff Sessions Has Been Targeting Asylum-Seekers Fleeing Domestic Violence. It’s Been “Devastating.”* MOTHER JONES (July 26, 2018), <https://www.motherjones.com/politics/2018/07/jeff-sessions-has-been-targeting-asylum-seekers-fleeing-domestic-violence-its-been-devastating> [<https://perma.cc/G9JZ-PZJS>] (emphasis added); Dara Lind, *Jeff Sessions Is Pushing Asylum Officers to Reject More Migrants. Will They Go Along?*, VOX (July 20, 2018, 10:50 AM), <https://www.vox.com/2018/7/20/17568480/border-asylum-sessions-credible-fear> [<https://perma.cc/T62C-WCQB>] (quoting one immigration attorney who said “everyone is getting denied”); Will Weisert & Emily Schmall, *‘Credible Fear’ For U.S. Asylum Harder to Prove Under Trump*, CHI. TRIB. (July 16, 2018, 11:10 AM), <https://www.chicagotribune.com/nation-world/ct-credible-fear-asylum-20180716-story.html> [<https://perma.cc/VBA9-5NK8>].

violence passed their CFIs.²²³ She estimated that after *A-B-*, that rate dropped to around five or ten percent.²²⁴ Another immigration attorney who works at a detention center in Texas reported that she has seen credible fear denials amongst her clients increase two to four times the previous rate.²²⁵

There is also anecdotal evidence that IJs are interpreting *Matter of A-B-* broadly, contrary to the actual text of the decision. Denise Gilman, the director of the immigration law clinic at the University of Texas, reported that some judges are reading *A-B-* as categorically denying gender- or gang-violence-based asylum claims, adding, “[y]ou’re definitely seeing a lot of pressure from immigration judges and government attorneys to essentially terminate these cases before they are even heard, to refuse to give asylum applicants a full day in court if they are at all impacted by Sessions[’s] decision.”²²⁶ Women in Hutto Detention Center in Texas have told their lawyers that they have heard IJs say, “[y]our case doesn’t count anymore . . . domestic violence doesn’t qualify anymore.”²²⁷ Attorneys reported that in a case that was denied, the judge specifically indicated that he believed Sessions’s dicta created a higher standard for “unable or unwilling” to protect, and that was a reason for rejecting the claim.²²⁸ An attorney at the Dilley Pro Bono Project reported that IJs have openly stated in court that “after *Matter of A-B-*, no asylum case can be granted using the protected ground of particular social group at all.”²²⁹ In summary, notwithstanding the seemingly modest impact observable in published decisions, many immigration lawyers and advocates perceive *Matter of A-B-* to have substantially reshaped the landscape of U.S. asylum law.²³⁰

B. *Matter of A-B-*’s Potential Effects on LGBTQ Asylum Claims

Matter of A-B- concerned domestic violence- and gang-violence-based asylum claims, but it has potential ramifications for non-state actor and PSG-based asylum claims in general. Due to the parallels between victims of domestic violence and those persecuted for being LGBTQ, this Note now examines *A-B-*’s potential impact on LGBTQ asylum claims.

²²³ Gottesdiener & Washington, *supra* note 222.

²²⁴ *Id.*

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ *Id.*

²²⁸ *Id.*

²²⁹ Lanard, *supra* note 222.

²³⁰ Gottesdiener & Washington, *supra* note 222.

1. Particular Social Group

Although the biggest legal impact of *Matter of A-B-* for domestic violence-related claims was related to the PSG prong, this shift should not have a major effect on LGBTQ claims. *Matter of Toboso-Alfonso* solidified homosexuality as the basis for a PSG in the early 1990s, which has been confirmed by every circuit.²³¹ There is no risk of LGBTQ PSGs being considered circular, as LGBTQ people are clearly identifiable as a group in society independent of any anti-gay violence they may experience. In addition, in *Matter of M-E-V-G-*, the BIA explicitly affirmed that the PSG articulated in *Toboso-Alfonso*, gay men in Cuba, was a group that would satisfy the particularity and social distinction requirements.²³² Moreover, in a post-*A-B-* decision from the Fifth Circuit concerning domestic violence by a same-sex abuser, the court took for granted that the applicant's sexual orientation claim was on solid footing in a post-*A-B-* world.²³³ While transgender and bisexual applicants will have a more difficult time establishing that they are a member of a PSG because they do not have precedent to rely on, these are challenges that existed previously and should not be exacerbated by *A-B-*.²³⁴

However, if any IJs or asylum officers interpret *A-B-* as prohibiting claims based on PSGs altogether, as has been reported anecdotally, this will have serious repercussions for LGBTQ applicants, as most such applicants rely on membership in a PSG as the protected ground to establish their asylum claim.²³⁵ While such an interpretation would be illegal, given that PSG is included as a protected ground in the definition of refugee in the INA,²³⁶ the prospect of an IJ determination being overruled as “clearly erroneous” on appeal to the BIA will not help the applications that never make it that far.²³⁷ In addition, while certain applicants could claim

²³¹ *Toboso-Alfonso*, 20 I&N Dec. 819, 822 (B.I.A. 1990) (recognizing homosexual “men in Cuba” as a PSG); ANKER, *supra* note 30 at 497. This decision was designated as precedential by Attorney General Order No. 1895-94 on June 19, 1994. *See supra* notes 127–131.

²³² *M-E-V-G-*, 26 I&N Dec. 227, 245 (B.I.A. 2014).

²³³ *W.M.V.C. v. Barr*, 926 F.3d 202, 213 (5th Cir. 2019) (“We thus assume, without determining, that the agency’s dismissal of the sexual-orientation claim was unreasonable.”). The issue in this case was government responsibility for attorney’s fees and not the merits of the claim. *Id.* at 207.

²³⁴ *See supra* Section II.A. Some transgender cases have used the PSG recognized by the Ninth Circuit, “gay men with female sexual identities,” to bring their claims, but this PSG is not well-suited to many transgender people’s claims, as it does not accurately reflect their identities. *See Jenkins, supra* note 130, 75–80 (quoting *Hernandez-Montiel v. INS*, 226 F.3d 1084, 1094 (9th Cir. 2000)).

²³⁵ *See Gottesdiener & Washington, supra* note 222.

²³⁶ 8 U.S.C. § 1101(a)(42)(A) (2012).

²³⁷ *See Legomsky, supra* note 90, at 402 (discussing the reasons why meritorious claims might not be appealed, including “lack of awareness, lack of resources, or a variety of other reasons that might have nothing to do with the merits”); *supra* Section I.B.3.

alternative protected grounds, like “political opinion,” this will only help certain types of applicants.²³⁸

2. *Unwilling or Unable to Protect*

The “unwilling or unable” to protect prong is a bigger area of concern for LGBTQ asylum advocates because proving this element was already a challenge for LGBTQ applicants.²³⁹ Although *A-B-* does not create a heightened standard for “unable or unwilling,” this element will likely be subject to greater scrutiny in light of the AG’s copious dicta on the subject.²⁴⁰ This issue is of particular concern in the LGBTQ context, as it was already becoming more difficult to prove this element in countries that enact LGBTQ anti-discrimination statutes or legalize same-sex marriage.²⁴¹ Such measures make it harder to convince asylum adjudicators that governments are “unwilling or unable” to protect LGBTQ people, despite the fact that in reality, passing such statutes often leads to societal backlash that paradoxically results in increased persecution.²⁴² Furthermore, just because the laws are on the books does not mean that the government actually takes steps to protect LGBTQ people.²⁴³ In addition, any positive effects of these statutes largely benefit lesbian and gay people, while transgender people remain disproportionately victimized.²⁴⁴

While these problems already existed prior to *A-B-*, the decision is nevertheless likely to cause adjudicators to be more critical of the “unwilling or unable” to protect element. Tania Garcia, an attorney at the National Immigrant Justice Center’s (NIJC) LGBT Immigrant Rights Initiative, reported within a few months after *A-B-*’s release that she had heard of several LGBTQ asylum claim denials that NIJC suspects were due to *A-B-*.²⁴⁵ Although it is impossible to know the IJ’s grounds for denial until the cases are appealed, Garcia believes the cases were rejected because the IJ incorrectly interpreted *A-B-* as creating a heightened standard for “unable or unwilling” to protect.²⁴⁶

²³⁸ See *supra* Section II.B.

²³⁹ *Id.*

²⁴⁰ Interview with Tania Garcia, Senior Litigation Attorney at NIJC LGBT Rights Initiative and Federal Litigation Project, conducted by author (Oct. 13, 2018) (on file with author) [hereinafter Tania Garcia Interview].

²⁴¹ *Id.*

²⁴² *Id.*; see also ANKER, *supra* note 30, at 503 (“[O]ften times important, but limited, advancements for LGBT individuals result in intense societal backlash.”).

²⁴³ Tania Garcia Interview, *supra* note 240.

²⁴⁴ *Id.*

²⁴⁵ *Id.*

²⁴⁶ *Id.*

3. *Nexus*

The LGBTQ asylum claims that are likely most threatened by *A-B-* are those that most closely resemble the claims discussed in *A-B-*, namely LGBTQ victims of intimate partner violence and gang violence. Such applicants will likely have trouble proving “nexus”— that their persecution was “on account of” their sexual orientation-based PSG.²⁴⁷ LGBTQ victims of gang violence have previously encountered such difficulties.²⁴⁸ In theory, such applicants could still have a valid asylum claim. Asylum applicants need not prove that their protected status is the only reason for their persecution, only that it is “one central reason.”²⁴⁹ However, post-*A-B-* LGBTQ applicants may struggle to prove that their sexual orientation was “one central reason” motivating their persecution alongside a personal relationship or financial interest; IJs who misinterpret the holding of *A-B-* as creating a categorical bar to domestic violence claims may reject same-sex intimate partner violence claims outright, failing to consider the ways that the persecution was motivated in part by the applicant’s sexual orientation.²⁵⁰ In addition, because of the Attorney General’s control over immigration judges and their lack of professional safeguards, even adjudicators who understand that *A-B-* does not create a categorical bar on domestic violence and gang violence claims might feel pressured to summarily reject those types of cases due to the AG’s language in *A-B-*.²⁵¹ If the anecdotal evidence

²⁴⁷ *Infra* notes 74–75 and accompanying text.

²⁴⁸ *See, e.g.,* *Martinez-Almendares v. Att’y Gen. of the U.S.*, 724 F. App’x 168, 171–72 (3d Cir. 2018) (referencing IJ’s holding that sexual orientation was not “one central reason” for an attack by a gang on a gay man in Honduras and that it was instead motivated by greed, and finding insufficient evidence that gay men were systematically persecuted, despite media reports showing gay men were victims of frequently unsolved acts of gang violence, because such reports on gang violence were generalized); *Gonzalez-Posadas v. Att’y Gen. of the U.S.*, 781 F.3d 677, 686–87 (3d Cir. 2015) (affirming denial of asylum where applicant failed to show being gay was “one central reason” motivating his persecution by gangs and where IJ found that his persecution was instead motivated by their financial interest in stealing from him).

²⁴⁹ 8 U.S.C. § 1158(b)(1)(B)(i) (2012); *See generally* S-P-, 21 I&N Dec. 486 (B.I.A. 1996); NIJC Asylum Basics Manual, *supra* note 68, at 12.

²⁵⁰ For an example of this type of reasoning, see *W.M.V.C. v. Barr*, 926 F.3d 202, 207 (5th Cir. 2019). There, the court discussed the IJ’s initial denial of a female applicant’s asylum claim where she was forced into a romantic relationship and repeatedly abused by a female former police officer. The IJ “recogniz[ed] that homosexual individuals may constitute a cognizable particular social group,” but concluded that the abuse was “not motivated by any alleged perception that [W.M.V.C.] was homosexual,” but rather by the personal relationship between the two women and the abuser’s alcohol consumption. *Id.*

²⁵¹ *See supra* Section I.B.2. IJs are currently under tremendous pressure to close cases quickly given an increased backlog of cases and procedural changes made by the Trump Administration, including imposing a strict quota system and eliminating tools that were previously used to manage docket sizes, such as administrative closure. *See Chase, supra* note 93 (discussing IJ quotas). This pressure is especially palpable for new hires, who work on a probationary period for several years. *Id.* Department of Justice officials have emphasized to newly hired IJs the importance of their role as Executive Branch employees

is correct and many asylum officers and IJs are categorically rejecting domestic violence and gang-related claims, many LGBTQ people with those types of claims will likely be rejected before they have an opportunity to properly argue their claim.²⁵²

4. *Credible Fear Interviews*

If the D.C. District Court's injunction in *Grace v. Whitaker* is upheld, it will prevent the greatest threat from *A-B-* to LGBTQ asylum seekers from being realized. The changes to the credible fear standards were particularly concerning to asylum advocates because CFIs are conducted by asylum officers, who are neither attorneys nor judges, and who may be likely to come to erroneous conclusions about what *A-B-* means based on the misleading USCIS Guidelines.²⁵³ CFI decisions are subject to little oversight or review.²⁵⁴ Therefore, the agency guidelines likely would have resulted in LGBTQ victims of intimate partner violence and gang violence being summarily rejected at the border. Whitney Drake, an immigration attorney, stated that her organization witnessed individuals with PSG claims not related to domestic violence or gang violence be rejected at the CFI stage, which she suspected was due to *A-B-*.²⁵⁵ This included a lesbian who fled persecution on account of her sexual orientation in Honduras.²⁵⁶ If the district court's decision in *Grace v. Whitaker* is overturned on appeal, the changes to the CFI standards will likely result in an increase in such incidents.²⁵⁷

and following directives from the AG. *Deputy Attorney General Rod J. Rosenstein Delivers Opening Remarks at Investiture of 31 Newly Appointed Immigration Judges*, U.S. DEP'T OF JUSTICE (Mar. 15, 2019), <https://www.justice.gov/opa/speech/deputy-attorney-general-rod-j-rosenstein-delivers-opening-remarks-investiture-31-newly> [<https://perma.cc/MZ7P-FHBV>]. A former immigration judge has described the effect of cases like *A-B-* as "indoctrinating" new IJs into believing that "these are not real claims." Chase, *supra* note 93.

²⁵² See *supra* Section III.A.5.

²⁵³ See *supra* Section III.A.3.

²⁵⁴ *Supra* note 61 and accompanying text.

²⁵⁵ Gottesdiener & Washington, *supra* note 222.

²⁵⁶ *Id.*

²⁵⁷ After the injunction, the USCIS sent an email to its asylum offices affirming that there is no general rule barring domestic violence and gang-violence based claims at the CFI stage, and that each case must be assessed on its own merits. Email from John L. Lafferty to Refugee, Asylum and International Operations (RAIO) (Dec. 19, 2018, 11:12 PM) (on file with University of California Hastings College of the Law), available at <https://uchastings.app.box.com/s/k99txxw746bg7wghirak8w7d86tq1njl/file/381907557596> [<https://perma.cc/A8MT-RSJV>]. The agency also issued an updated version of its guidelines with the misleading language redacted. USCIS Guidelines, *supra* note 209. Thus, if the injunction is upheld, any erroneous rejections of LGBTQ asylum claims at the CFI stage will no longer be attributable to the *A-B-* agency guidelines, but rather to larger problems in the asylum system related to discretion and lack of meaningful review.

5. Discretion

A-B-'s likely other major impact on LGBTQ asylum claims relates to the role of discretion in the asylum system. Discretion has resulted in major discrepancies in asylum decisions of all types, and Sessions's decision in A-B- encourages adjudicators to use this tool even when an applicant is technically eligible for asylum.²⁵⁸ There are already anecdotal examples of IJs applying inaccurate interpretations of A-B-;²⁵⁹ in a system with less discretion and more meaningful review of IJ decisions, such mistakes could be corrected on review, and adjudicators would be incentivized to apply the correct interpretation of the law due to a threat of reversal.²⁶⁰ However, because of the lack of meaningful review in the asylum system, many of these decisions will likely never be corrected, which can have potentially deadly consequences for many asylum seekers.²⁶¹

This is of particular concern in the LGBTQ context because IJs might have "strong personal opinions" about issues involving sexual orientation and gender identity.²⁶² This could cause them to use their discretion to reject LGBTQ claims, not because of lack of merit, but because of reliance on

²⁵⁸ A-B-, 27 I&N 316, 345 n.12 (A.G. 2018).

²⁵⁹ See *supra* Section III.A.5.

²⁶⁰ See *supra* Section I.B.3.

²⁶¹ See *id.*

²⁶² Paul O'Dwyer, *A Well-Founded Fear of Having My Sexual Orientation Asylum Claim Heard in the Wrong Court*, 52 N.Y. L. SCH. L. REV. 185, 186 (2008). ("[T]he outcome of these claims depends, to an unacceptable extent, on the adjudicator's subjective opinions about sexual identity."). Despite great strides in legal protections for LGBTQ Americans in recent decades, homophobia remains an issue in the U.S. In 2018, GLAAD's annual survey of Americans' social attitudes towards the LGBTQ community showed for the first time in several years an increase in Americans who reported feeling very or somewhat uncomfortable around queer people at least some of the time. GLAAD Acceptance Report, *supra* note 15. Their report also showed a significant increase in LGBTQ people who reported experiencing discrimination on account of their sexual orientation or gender identity. *Id.* Data for 2017 showed an increase in reports of hate crimes motivated by sexual orientation bias. *New FBI Statistics Show Alarming Increase in Number of Reported Hate Crimes*, HUM. RTS. CAMPAIGN (Nov. 13, 2018), <https://www.hrc.org/blog/new-fbi-statistics-show-alarming-increase-in-number-of-reported-hate-crimes> [<https://perma.cc/HZB8-6TBF>]. Immigration judges are not immune from these sentiments, especially those appointed by an administration that shares them. A Department of Justice investigation into politicized hiring by the George W. Bush DOJ found that interviews for new IJs sometimes sought to determine whether candidates had the proper, conservative views on "god, guns + gays"; a candidate whose views on these issues were not aligned with the administration's was not hired. U.S. DEP'T OF JUSTICE, OFFICE OF PROF'L RESPONSIBILITY & OFFICE OF THE INSPECTOR GEN., AN INVESTIGATION OF ALLEGATIONS OF POLITICIZED HIRING BY MONICA GOODLING AND OTHER STAFF IN THE OFFICE OF THE ATTORNEY GENERAL 104 (2008), <https://oig.justice.gov/special/s0807/final.pdf> [<https://perma.cc/H2EM-SSMH>]. The Trump Administration removed procedural safeguards that had helped reduce politicized hiring of IJs for many years, leading to a resurgence of alleged politicized hiring. I AM. BAR ASS'N, 2019 UPDATE REPORT: REFORMING THE IMMIGRATION SYSTEM 14, 17 (2019), https://www.americanbar.org/content/dam/aba/publications/commission_on_immigration/2019_reforming_the_immigration_system_volume_1.pdf [<https://perma.cc/WN4Z-GCFY>].

stereotypes or personal prejudice.²⁶³ Decisions on LGBTQ claims based on improper motives have been overturned in the past, often involving egregious and blatant examples of reliance on stereotypes.²⁶⁴ Therefore, it is not unreasonable to assume there have been and will be additional, less obviously biased rejections of LGBTQ asylum claims based on the IJ's own prejudices. This is cause for concern because other cases in which the IJ appeared to rely on equally suspect reasoning have been upheld because of the deferential standard of review.²⁶⁵ Of the few cases that make it to the level of court of appeals review, only the most extreme will get past the deferential standard of review. Meanwhile, the majority of IJ decisions made for improper reasons are likely less blatant.²⁶⁶ In short, regardless of whether *Matter of A-B-* should have any impact on LGBTQ asylum claims based on its actual contents, the opinion will likely embolden asylum adjudicators who are already biased against LGBTQ asylum seekers to reject more of their claims.²⁶⁷

IV. RESTORING THE RULE OF LAW

The discrepancy between what *Matter of A-B-* says and what it does in terms of LGBTQ asylum claims highlights serious problems with the rule of law in the asylum context: “The very essence of the rule of law . . . is that individual cases should be disposed of by reference to standardized norms rather than by arbitrary factors, particularly the personal biases, attitudes, policies, or ideologies of government adjudicators.”²⁶⁸ In a “government of

²⁶³ O'Dwyer, *supra* note 262, at 186.

²⁶⁴ See, e.g., *Todorovic v. U.S. Att'y Gen.*, 621 F.3d 1318, 1321, 1323–24 (11th Cir. 2010) (remanded because IJ's decision that applicant did not appear “overtly gay” or feminine was “so colored by impermissible stereotyping”); *Razkane v. Holder*, 562 F.3d 1283, 1286, 1288 (10th Cir. 2009) (remanding because IJ used personal opinions and stereotypes to determine applicant would not be identified as gay); *Ali v. Mukasey*, 529 F.3d 478, 479 (2d Cir. 2008) (remanding because IJ relied on gay stereotypes); *Bosede v. Mukasey*, 512 F.3d 946, 952 (7th Cir. 2008) (remanding in part because IJ was flippant about the danger an HIV positive applicant faced); *Shahinaj v. Gonzales*, 481 F.3d 1027, 1029 (8th Cir. 2007) (remanding because IJ's finding that applicant's mannerisms did not show that he was gay tainted the decision).

²⁶⁵ See, e.g., *Mockeviciene v. U.S. Att'y Gen.*, 237 Fed. App'x 569, 572, 574 (11th Cir. 2007) (expressing “skeptical[ism]” about the IJ's conclusion that because a Lithuanian lesbian did not participate in groups involving “lesbian activities” or have a girlfriend in the U.S., she was “[a]t best . . . a non-practicing lesbian,” but ultimately upholding the IJ's decision).

²⁶⁶ Cf. Derald Wing Sue, et. al., *Racial Microaggressions in Everyday Life: Implications for Clinical Practice*, 62 AM. PSYCHOLOGIST 271, 272, 284 (2007) (discussing the ways in which American racism has evolved since the Civil Rights Movement such that “disguised” and “covert” acts of bigotry are more common than overt ones, and suggesting that such “microaggressions” may be equally detrimental in the sexual orientation context).

²⁶⁷ This is additionally concerning because many LGBTQ asylum seekers are also people of color who are vulnerable to multiple forms of prejudice. *Bowmani*, *supra* note 81, at 11.

²⁶⁸ *Ramji-Nogales et al.*, *supra* note †, at 299–300.

laws, and not of men,”²⁶⁹ adjudicators should make decisions based on a fair application of the law to the facts, not irrelevant factors such as their personal feelings towards the parties, or which outcome is most favored by the Attorney General.²⁷⁰ In such a nation, *Matter of A-B-* would have had only a modest impact on the outcomes of asylum claims of all types, and particularly LGBTQ-based claims. Instead the release of *Matter of A-B-* coincided with an increase in denial rates that has persisted for over a year, and there are reports of LGBTQ asylum seekers whose claims have been rejected as a result. This case study shows that the discretion afforded to ground-level decision-makers and the power concentrated in the person of the AG in the immigration context are contrary to the norms of checks and balances fundamental to the U.S. democratic system and reveals the need for major reforms to the asylum process. While the prospects of the following changes being enacted under the current administration are slim, these are nevertheless ideas that Congress could pursue to reduce the odds of situations like *A-B-* recurring in the future.

A. Attorney General’s Certification Power

It is difficult to imagine a clearer illustration of why the Attorney General’s certification power is dangerous than *Matter of A-B-*, and Congress should amend the INA to remove this power. It is reckless to concentrate this much power over the lives of many into the hands of a single person. Agency-head review “entails the substitution of one person’s judgment for the collective judgment of several adjudicators. And the probability that a strong ideological bias will influence the result is greater when one person is deciding.”²⁷¹ While the certification power’s benefits in terms of efficiency may have seemed worth the risks under previous administrations when the power often went unused for years at a time,²⁷² the Trump Administration’s aggressive use of this tool²⁷³ to enact wide-reaching

²⁶⁹ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803).

²⁷⁰ See Legomsky, *supra* note 90, at 401 (discussing the ways in which the lack of decisional independence in the immigration system threatens the rule of law); *id.* at 399 (“If the rule of law means anything, it surely means at a minimum that those charged with interpreting the law must do so on the merits, not on the basis of factors so clearly extraneous to the adjudicative function.”); *id.* at 396 (“Simply put, people who perform adjudicative functions should reach their decisions honestly. We want them to base their findings of fact solely upon the evidence before them, and we want them to base their legal conclusions solely on their honest interpretations of all the relevant sources of law—not on the basis of which outcome they think the person (or public) who will be reappointing them might prefer.”).

²⁷¹ Stephen H. Legomsky, *Learning to Live with Unequal Justice: Asylum and the Limits to Consistency*, 60 STAN. L. REV. 413, 461 (2007).

²⁷² *Supra* notes 96–97 and accompanying text.

²⁷³ *Supra* Figure 1.

policy changes without restriction reveals that the risks of this power outweigh any rewards, especially in light of the life and death stakes.

B. Discretion

Finding ways to rein in discretion at all levels of the asylum process should be a priority of any reform effort. One simple step that could help accomplish this is finding ways to increase transparency and documentation in the asylum process, such as requiring publication of all asylum officer, immigration judge, and BIA decisions, which would allow for better oversight. In addition, agencies at every step of the process should begin tracking data including applicants' stated protected ground for relief and demographic information such as sexual orientation and race.²⁷⁴ With such information available, agencies could begin identifying adjudicators with grant rates that indicate they might be biased against certain types of applicants, such as LGBTQ claims. Once adjudicators are identified as biased against entire groups of claimants, they should no longer be allowed to decide cases involving such claimants on an individual basis. If, for instance, an IJ's grant rate on LGBTQ cases is significantly lower than average or differs significantly from their own grant rates for different types of claims, they could be assigned a partner with whom to review those types of claims. If the two IJs cannot agree, a third judge could be brought in to break the tie. If patterns of discriminatory decision-making persist, disciplinary measures should be required.²⁷⁵

A more far-reaching solution that could help solve many of the problems illuminated by *Matter of A-B-* would be to remove immigration courts from the control of the Department of Justice altogether and convert immigration courts into independent, Article I courts subject to direct review by Article III courts, similar to bankruptcy courts.²⁷⁶ Such a step would both

²⁷⁴ Something similar was adopted by the Canadian government in response to wide grant rate disparities, which helped contribute to a large reduction in disparities. See Ramji-Nogales et al., *supra* note †, at 382 n.153.

²⁷⁵ The EOIR created a complaint system after publicity regarding the high disparities in grant rates. However, it has not proven effective, with 63% of complaints in FY 2018 being dismissed and 0% resulting in disciplinary actions. U.S. DEP'T OF JUSTICE, EXEC. OFFICE FOR IMMIGRATION REVIEW, COMPLAINTS AGAINST IMMIGRATION JUDGES: FISCAL YEAR 2018 (2018), <https://www.justice.gov/eoir/page/file/1100976/download> [<https://perma.cc/KCU8-G7NL>]. Detailed logistics of how this proposal would be implemented are beyond the scope of this Note.

²⁷⁶ Groups including the National Association of Immigration Judges, the American Bar Association, the Federal Bar Association, and the American Immigration Lawyers' Association have all endorsed such a change. Maureen A. Sweeney, *Enforcing/Protection: The Danger of Chevron in Refugee Act Cases*, 71 ADMIN. L. REV. 127, 129–30 (2019); AILA Board of Governors, *Resolution On Immigration Court Reform*, AM. IMMIGR. LAWS. ASS'N (AILA) (Winter 2018), <https://www.aila.org/File/DownloadEmbeddedFile/74919> [<https://perma.cc/98BN-64XB>] [hereinafter AILA Statement].

eliminate the Attorney General’s self-certification power and reign in the discretion of asylum adjudicators by subjecting them to more rigorous and regimented oversight. It would allow for the creation of more binding precedent and a return to a less deferential standard of review. Finally, such courts would be more neutral and independent than executive agency courts by removing them from the control of the Attorney General and protecting IJs and BIA members from the threat of being fired for failing to conform to the AG’s vision.²⁷⁷

C. Representation

Multiple studies have shown that the single most important factor affecting the odds of an asylum seeker’s success is whether they are represented by counsel.²⁷⁸ In the context of a situation like *Matter of A-B-*, this seems particularly relevant. Although most LGBTQ claims should not be prevented from succeeding based on *Matter of A-B-*, many pro se applicants may struggle to make complex legal arguments articulating why that is. An attorney can make sure to take steps such as highlighting the fact that *A-B-* is mostly dicta and does not change any standards, properly articulating a PSG that is most likely to pass muster, and highlighting any other potential protected grounds, such as political opinion. In light of the importance of representation and the consequences of having an asylum claim denied, an urgent reform should ensure that all asylum seekers are provided with representation at the government’s expense, as in the criminal context.²⁷⁹

²⁷⁷ 1 AM. BAR ASS’N, *supra* note 262, at 15 (discussing why transitioning to Article I immigration courts is their recommendation for ensuring independence); Legomsky, *supra* note 90, at 389 (noting that, although less than Article III judges, Article I judges enjoy “considerable” job security). Such a change would require a wholesale restructuring of the current immigration system, and it is beyond the scope of this Note to explore the pros and cons in depth or the specific mechanics of how this change would occur. For a more detailed discussion, see generally Amit Jain, *Bureaucrats in Robes: Immigration “Judges” and the Trappings of “Courts,”* 33 GEO. IMMIGR. L.J. 261 (2019) (arguing that immigration courts are a “hierarchical bureaucracy” and independence should be enhanced by converting them to Article I Courts); Elizabeth J. Stevens, *Making Our ‘Immigration Courts’ Courts,* 65 FED. LAW. 17, 17–18 (2018) (advocating for the removal of immigration courts from the Executive Branch to increase their independence); Sweeney, *supra* note 276 (arguing that Congress did not intend for Article III courts to defer to the BIA); AILA Statement, *supra* note 276 (recommending that Congress create an independent Article I immigration court system).

²⁷⁸ Ramji-Nogales et al., *supra* note †, at 340; GAO 2008, *supra* note 86, at 7 (“Representation generally doubled the likelihood that immigration judges would grant asylum . . .”).

²⁷⁹ See generally Sabrineh Ardalán, *Access to Justice for Asylum Seekers: Developing an Effective Model of Holistic Asylum Representation,* 48 U. MICH. J.L. REFORM 1001, 1026 (2015) (suggesting government-funded representation as one way to ensure universal representation for asylum seekers); Nimrod Pitsker, *Due Process for All: Applying Eldridge to Require Appointed Counsel for Asylum Seekers,* 95 CALIF. L. REV. 169, 171 (2007) (applying the *Mathews v. Eldridge* analysis to find a constitutional guarantee of universal representation for asylum seekers); Andrew I. Schoenholtz &

CONCLUSION

In theory, *Matter of A-B-* should have little to no jurisprudential impact on LGBTQ asylum claims. The decision's only actual holding is to overturn *Matter of A-R-C-G-*, which established a single specific precedential PSG for domestic violence claims. Any language in *A-B-* that appears to create a higher standard for showing the government's unwillingness or inability to protect in non-state actor claims is only dicta—an interpretation that has been reflected by most circuit court and BIA decisions that have applied the decision so far. Although LGBTQ people whose claims involve intimate partner violence or gang violence will likely face increased difficulty, *A-B-* does not create a categorical bar to those types of claims, and they should still be able to prevail if they can prove all the elements. Many of the challenges facing these types of LGBTQ applicants and other LGBTQ applicants existed prior to *A-B-*.

However, *A-B-*'s practical impact is more alarming. Because of the role of discretion in asylum proceedings and the lack of judicial independence, many asylum officers and immigration judges have and will continue to misinterpret and misapply *A-B-*, causing them to reject more claims involving non-state actors. This is particularly concerning in the LGBTQ context because many people already hold personal biases against LGBTQ people. Furthermore, even IJs who are not personally biased may feel pressured to reject more non-state actor claims given the Attorney General's influence over their job security. Because of the nature of the asylum system, the asylum claims denied at this stage are unlikely to receive meaningful review.

The discrepancy between what *Matter of A-B-* says and what it does raises serious concerns about the rule of law in the U.S. asylum system, implicating the Attorney General's self-certification power, the role of discretion, and the lack of judicial independence. The case of *Matter of A-B-* reveals that in the asylum context, one person has the power to release a decision that legally does not change very much, but regardless can be applied in a sweeping way that can impact thousands of lives. In the asylum context, the stakes are life and death. In light of this, systemic changes must

Jonathan Jacobs, *The State of Asylum Representation: Ideas for Change*, 16 GEO. IMMIGR. L.J. 739, 753–54 (2002) (concluding that government-funded representation is the best way to provide representation for all asylum seekers); Andrew Leon Hanna, Comment, *A Constitutional Right to Appointed Counsel for the Children of America's Refugee Crisis*, 54 HARV. C.R.-C.L. L. REV. 257, 259–60 (2019) (finding in the Fifth Amendment a constitutional guarantee of universal representation for children asylum seekers); Kaitlin M. Talley, Comment, *Dignity and Due Process for Asylum Seekers: Why Achieving Universal Representation for Asylum Seekers Is Essential to Due Process*, 52 U. S.F. L. REV. 299, 300 (2018) (discussing how detained asylum seekers without representation are unable to navigate and voice their fears within the complex legal tangle of their case).

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be made to the U.S. asylum system in order to create a fair and just system that protects LGBTQ people and all other victims of persecution.

