[ORAL ARGUMENT NOT YET SCHEDULED]

No. 19-5013

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

GRACE, et al.,

Plaintiffs-Appellees,

v.

WILLIAM P. BARR, et al.,

Defendants-Appellants.

On Appeal from the United States District Court for the District of Columbia (No. 18-cv-1853) (Hon. Emmet G. Sullivan)

BRIEF OF CURRENT MEMBERS OF CONGRESS AND BIPARTISAN FORMER MEMBERS OF CONGRESS AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLEES

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STATEMENT REGARDING CONSENT TO FILE AND SEPARATE BRIEFING

Pursuant to D.C. Circuit Rule 29(b), undersigned counsel for *amici curiae* current and former Members of Congress represents that counsel for all parties have been sent notice of the filing of this brief and have consented to the filing.[1]

Pursuant to D.C. Circuit Rule 29(d), undersigned counsel for *amici curiae* certifies that a separate brief is necessary. *Amici* are current and former Members of Congress who are familiar with the laws Congress has passed to govern when and how individuals may seek asylum in the United States. As *amici* well know, in 1980, Congress enacted the Refugee Act to establish uniform, non-discriminatory standards that would be applied consistently in all asylum cases and adopted a definition of the term "refugee" that was broad enough to ensure that valid claims of persecution arising in unique or unforeseen contexts would not be foreclosed. Moreover, in 1996, Congress amended the immigration laws to provide for expedited removal of certain noncitizens seeking admission to the United States, but in so doing, made clear that individuals with a "credible fear" of persecution should not be subject to expedited removal. The rules being challenged in this case violate these laws and undermine Congress's carefully considered plan about how our

[1] Pursuant to Fed. R. App. P. 29(c), *amici curiae* state that no counsel for a party authored this brief in whole or in part, and no person other than *amici curiae* or their counsel made a monetary contribution to its preparation or submission.

nation's asylum laws should operate. *Amici* have a strong interest in ensuring that the executive branch complies with the immigration laws passed by Congress.

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

I. PARTIES AND AMICI

Except for *amici* current and former Members of Congress and any other *amici* who had not yet entered an appearance in this case as of the filing of Appellants' brief, all parties, intervenors, and *amici* appearing before the district court and in this Court are listed in the Brief for Appellants.

II. RULINGS UNDER REVIEW

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

III. RELATED CASES

Reference to any related cases pending before this Court appears in the Brief for Appellants and the Brief for Appellees.

Dated: August 1, 2019 By: /s/ Elizabeth B. Wydra
Counsel for Amici Curiae

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GLOSSARY

AEDPA	Antiterrorism and Effective Death Penalty Act
BIA	Board of Immigration Appeals
IIRIRA	Illegal Immigration Reform and Immigrant Responsibility Act of 1996
INS	Immigration and Naturalization Service
U.N.	United Nations

STATUTES AND REGULATIONS

The pertinent statutes and regulations are set forth in the addendums to the Brief for Appellants and the Brief for Appellees.

INTEREST OF *AMICI CURIAE*

Amici are current and former Members of Congress who are familiar with the laws Congress has passed to govern when and how individuals may seek asylum in the United States. As *amici* well know, in 1980 Congress passed the Refugee Act to establish uniform, non-discriminatory standards that would be applied consistently in all asylum cases, adopting a definition of "refugee" that was broad enough to ensure that valid claims of persecution arising in unforeseen contexts would not be foreclosed. Moreover, when Congress amended the immigration laws in 1996 to create an expedited removal process for certain noncitizens, Congress made clear that individuals fearing persecution who have potentially valid asylum claims should not be subject to expedited removal. The rules being challenged in this case violate these laws and undermine Congress's carefully considered plan about how our nation's asylum laws should operate. *Amici* have a strong interest in ensuring that the executive branch complies with the immigration laws passed by Congress.

A full listing of *amici* appears in the Appendix.

INTRODUCTION

In 1980, Congress passed the Refugee Act, authorizing executive branch officials to grant asylum to "refugee[s]," 8 U.S.C. § 1158(b)(1)(A), persons who are unable or unwilling to return to their home country "because of persecution or a

well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion," *id.* § 1101(a)(42)(A). To guard against the risk of individuals who are potentially eligible for asylum being returned to countries where they will face persecution, federal law prevents anyone with a "credible fear of persecution" from being subject to an expedited removal process. *Id.* § 1225(b)(1)(B)(ii).

The plaintiffs here are adults and children who fear returning to their home countries because they will face persecution there at the hands of domestic partners or gang members. Although asylum officers concluded that these plaintiffs offered credible accounts of the violence they feared in their home countries, their claims were rejected in the expedited removal process in light of a 2018 precedential decision issued by then–Attorney General Jeff Sessions and subsequent policy guidance issued by the Department of Homeland Security.

The Attorney General's decision established new standards for adjudicating asylum claims that arise from a person's fear of persecution on account of "membership in a particular social group." *See Matter of A-B-*, 27 I. & N. Dec. 316, 320 (A.G. 2018). It also indicated that these new standards should be applied in expedited removal proceedings during the threshold screening interviews that are meant to determine if a person has a "credible fear" of persecution. *Id*. at 320 n.1 ("few such claims ... would satisfy the legal standard to determine whether an alien

has a credible fear of persecution"). The Department of Homeland Security subsequently issued policy guidance to immigration officers directing them to apply the Attorney General's new standards in making those credible-fear determinations. *See* Policy Memorandum from U.S. Dep't of Homeland Security to U.S. Citizenship & Immigration Services 1 (July 11, 2018) (Dkt. No. 100) (hereinafter "Policy Memorandum"); *id.* at 6 ("In general," such claims "will not establish the basis for ... a credible or reasonable fear of persecution.").

Although Attorney General Sessions purported to merely "restate[]" and "elaborate[] upon" existing standards, *Matter of A-B-*, 27 I. & N. Dec. at 319, his decision and the subsequent guidance imposed several new rules that make it significantly more difficult for applicants to succeed at the credible-fear stage and receive the chance to pursue their asylum claims. Among other things, *Matter of A-B-* established a general rule that fear of domestic or gang violence cannot serve as the basis for an asylum claim: "Generally, claims by aliens pertaining to domestic violence or gang violence perpetrated by non-governmental actors will not qualify for asylum." *E.g.*, *id*. at 320; *see also generally* Policy Memorandum.

This new rule against asylum claims that arise from gang and domestic violence is at odds with the nation's immigration laws, as the text and history of those laws make clear. Congress passed the Refugee Act of 1980 to ensure that durable, uniform, and non-discriminatory standards would be applied consistently in

all asylum cases. To accomplish that goal, the Act defined the term "refugee" in a manner broad and flexible enough to encompass asylum claims arising from the unique social and political dynamics of individual countries. Claims of persecution based on "membership in a particular social group," which is often the basis for asylum claims arising from domestic and gang violence, must therefore be assessed on an individualized basis, in light of the country conditions, social customs, and particular circumstances surrounding each case. The Attorney General's new rule, which effectively imposes a categorical bar on asylum claims related to domestic and gang violence, regardless of social context, violates the Refugee Act.

This and other changes made by *Matter of A-B-* and the related guidance also violate the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA") by impermissibly raising the standards that individuals must satisfy to show that they have a "credible fear" of persecution and thus should not be subject to expedited removal. In passing IIRIRA, Congress struck a careful balance between the need to enhance immigration controls and the need to make sure that people with potentially valid asylum claims would not be summarily forced back to their countries of persecution. Congress achieved that balance by shielding individuals who express a fear of persecution from expedited removal if they can surmount a threshold screening process meant only to establish that their claims are "'credible'" and offer "a significant possibility" of making them eligible for asylum. 8 U.S.C.

§ 1225(b)(1)(B)(v).

This generous standard was designed to exclude only those who "indisputably" have no right to claim protection as refugees. H.R. Rep. No. 104-828, at 209 (1996) (Conf. Rep.). The changes wrought by the Attorney General's decision and the guidance, however, are inconsistent with the low bar that Congress adopted. Alone and in combination, they will prevent potentially valid asylum claims from proceeding past the credible-fear stage and receiving the fulsome consideration they deserve. The clear purpose of these changes, moreover, is to increase the threshold rejection of asylum claims brought by groups disfavored politically by this Administration. The district court's judgment that these new rules violate the nation's immigration laws should be affirmed.

ARGUMENT

I. The Attorney General's New Rule Singling Out Victims of Domestic and Gang Violence Contravenes the Refugee Act and Its Requirement that Uniform, Non-Discriminatory Standards Be Applied Consistently to the Facts of Individual Cases.

A. Text and Context

"Statutory interpretation … begins with the text," *Ross v. Blake*, 136 S. Ct. 1850, 1856 (2016), and with "the assumption that the ordinary meaning of that language accurately expresses the legislative purpose," *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 175 (2009) (citation and quotation omitted). Unlike "race," "religion," and similar words, the term "a particular social group" is open-ended.

See Castellano-Chacon v. INS, 341 F.3d 533, 549 (6th Cir. 2003) ("the definition of a 'social group' is a flexible one, which encompasses a wide variety of groups who do not otherwise fall within the other categories of race, nationality, religion, or political opinion").

Congress easily could have limited the definition of "refugee" to the other protected categories enumerated in 8 U.S.C. § 1101(a)(42)(A), but "Congress did not adopt that ready alternative," *Advocate Health Care Network v. Stapleton*, 137 S. Ct. 1652, 1659 (2017). Indeed, the fact that "a particular social group" accompanies a number of more specific terms underscores Congress's choice to supplement those well-defined categories with a more flexible formulation—one capable of ensuring that valid claims of persecution arising in unforeseen contexts would not be foreclosed. *See Lozano v. Montoya Alvarez*, 572 U.S. 1, 16 (2014) (when there was an "obvious alternative" to the approach "the drafters actually adopted," "the natural implication is that they did not intend" the alternative).

The inclusion of this broad language was deliberate: aware that it would be impossible to anticipate every form of social division on which persecution could be based, and cognizant of the risk that a rigid statutory definition could foreclose valid claims, "Congress chose statutory language broad enough to meet that threat." *DePierre v. United States*, 564 U.S. 70, 85 (2011); *see* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 101 (2012) ("Without some

indication to the contrary, general words ... are to be accorded their full and fair scope. They are not to be arbitrarily limited.").

Given the broad formulation Congress adopted, the courts and the Board of Immigration Appeals ("BIA") have long recognized that "[t]he particular kind of group characteristic that will qualify under this construction" must be "determined on a case-by-case basis," *Matter of Acosta*, 19 I. & N. Dec. 211, 233 (BIA 1985). For example, the fact that "parents of Burmese student dissidents" qualifies as a particular social group at a specific point in history, *see Lwin v. INS*, 144 F.3d 505, 512 (7th Cir. 1998), does not mean that parents of student dissidents will always qualify as a valid group in every society. So too for "Iranian women who advocate women's rights or who oppose Iranian customs relating to dress and behavior." *Safaie v. INS*, 25 F.3d 636, 640 (8th Cir. 1994); *see Fatin v. INS*, 12 F.3d 1233, 1241 (3d Cir. 1993).

Indeed, the statute's reference to a *social* group reinforces this need for case-by-case analysis because it indicates that in some cases one must examine the particular society in question and how its customs bear on the unique circumstances of that person's claim to decide who constitutes a distinct group within that society. *Cf. Sch. Bd. of Nassau Cty. v. Arline*, 480 U.S. 273, 284, 287 (1987) (because Congress responded to "society's accumulated myths and fears about disability" by defining "'handicapped individual' to include not only those who are actually

physically impaired, but also those who are regarded as impaired," the law requires "an individualized inquiry" to protect against "deprivations based on prejudice, stereotypes, or unfounded fear").

In keeping with Congress's design, courts have consistently interpreted the term "membership in a particular social group" as requiring individualized, context-specific determinations. *See, e.g.*, *Pirir-Boc v. Holder*, 750 F.3d 1077, 1084 (9th Cir. 2014) ("the BIA may not reject a group solely because it had previously found a similar group in a different society to lack social distinction or particularity"); *Sazo-Godinez v. Attorney Gen. of the U.S.*, 629 F. App'x 271, 276 (3d Cir. 2015) (rejecting "the blanket proposition that cases involving perceived wealth, gangs, and crime do not implicate a cognizable social group" because "[t]he cognizability of a proposed social group must be addressed on a case-by-case basis"); *Alvarez-Flores v. INS*, 909 F.2d 1, 7 (1st Cir. 1990) (denying claim for lack of evidence that society regarded collection of individuals "as a group" (emphasis omitted)).

The Attorney General himself purported to acknowledge that a group's recognition for asylum purposes can be "determined by the perception of the society in question." *Matter of A-B-*, 27 I. & N. Dec. at 330 (quoting *Matter of M-E-V-G-*, 26 I. & N. Dec. 227, 242 (BIA 2014)). As discussed later, however, his decision grossly departed from this principle by effectively adopting a categorical rule forbidding certain types of asylum claims from being recognized without regard to

the individual circumstances that should be considered when assessing all asylum claims.

B. Legislative Plan

The "message conveyed by the plain language of the [Refugee] Act is confirmed by an examination of its history." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 432 (1987); *see King v. Burwell*¸ 135 S. Ct. 2480, 2496 (2015) ("A fair reading of legislation demands a fair understanding of the legislative plan.").

Before the Refugee Act, "there was no statutory basis for granting asylum to aliens who applied from within the United States" or at its borders. *Cardoza-Fonseca*, 480 U.S. at 433. Instead, since World War II, "provision ha[d] been made for the admission of refugees into the United States under a series of *ad hoc* legislative and administrative authorizations." H.R. Rep. No. 96-608, at 2 (1979) (emphasis added). Prompted by the latest crises or geopolitical developments, refugee legislation was a patchwork of measures geared "towards persons uprooted by the war, or as a gesture to the anti-communist preoccupation of the Cold War Era." Deborah E. Anker & Michael H. Posner, *Forty Year Crisis: A Legislative History of the Refugee Act of 1980*, 19 San Diego L. Rev. 9, 13 (1981); *see, e.g.*, H.R. Rep. No. 96-608, at 2 (describing legislation limited to Eastern Europeans facing "fear of persecution by newly-formed communist governments").

Meanwhile, the executive branch used refugee admissions as "an instrument

of foreign policy." Anker & Posner, *supra*, at 13. Relying on a provision of the Immigration and Nationality Act that allowed the Attorney General, "in his discretion," 8 U.S.C. § 1182(d)(5)(A), to temporarily parole aliens into the United States "for emergent reasons" or "the public interest," the executive branch developed a practice of setting refugee admission policy through this parole authority. *See* H.R. Rep. No. 96-608, at 3; *INS v. Stevic*, 467 U.S. 407, 415-16 (1984).

Although a permanent statutory basis for refugee admissions was created in 1965, *see* An Act To Amend the Immigration and Nationality Act, and For Other Purposes, Pub. L. 89-236, 79 Stat. 911 (1965), asylum eligibility based on persecution was still limited to refugees fleeing communist-dominated countries or the Middle East. Anker & Posner, *supra*, at 14. Proposals to broaden or abolish these geographic restrictions were rejected at the time. *Id.* at 18 (citing *Hearings on H.R. 7700 Before the Subcomm. on Immigration and Naturalization of the House Comm. on the Judiciary*, 90th Cong., 1st Sess. 559 (1964)). As a result, the executive procedures that had been developed to work around the statutory framework remained dominant, and by the end of the 1970s, "the majority of refugees continue[d] to be admitted outside the regular procedure established by statute." H.R. Rep. No. 96-608, at 2. Consequently, the nation's asylum system was characterized by discriminatory distinctions based not on whether a person had a

well-founded fear of persecution, but rather on geopolitical imperatives, with the executive branch wielding considerable power to use refugee protection as a tool of foreign policy. *See Stevic*, 467 U.S. at 420 n.13.

"In 1968, however, the United States agreed to comply with the substantive provisions of Articles 2 through 34 of the 1951 United Nations Convention Relating to the Status of Refugees," *Cardoza-Fonseca*, 480 U.S. at 429, by ratifying the 1967 United Nations Protocol Relating to the Status of Refugees. *See Stevic*, 467 U.S. at 416. Soon after, Members of Congress began introducing legislation to bring U.S. refugee policy in line with the U.N. Protocol. *E.g.*, 115 Cong. Rec. 36,964 (1969) (introducing S. 3202); *see* Anker & Posner, *supra*, at 22. Throughout the 1970s, bills were introduced that included a non-discriminatory definition of "refugee" consistent with the Protocol. *See, e.g.*, 119 Cong. Rec. 61 (1973) (introducing H.R. 981); 121 Cong. Rec. 193 (1975) (introducing H.R. 367); 123 Cong. Rec. 3431 (1977) (introducing H.R. 3056); *see also* Anker & Posner, *supra*, at 25, 28, 31.

These efforts finally bore fruit in the Refugee Act of 1980, "the culmination of a decade of legislative proposals for reform in the refugee laws." *Cardoza-Fonseca*, 480 U.S. at 442 n.27. "The principal motivation" for the Act "was a desire to revise and regularize the procedures governing the admission of refugees" and to "eliminate the piecemeal approach to admission of refugees previously existing." *Stevic*, 467 U.S. at 425 (citing committee reports).

The Refugee Act "eliminated the ideological and geographical restrictions on admission of refugees" and adopted a definition of "refugee" matching that of the U.N. Protocol. *Id.* at 422. Declaring that "it is the historic policy of the United States to respond to the urgent needs of persons subject to persecution in their homelands," the Act described one of its objectives as providing "a permanent and systematic procedure for the admission to this country of refugees of special humanitarian concern to the United States." Act of Mar. 17, 1980, Pub. L. No. 96-212, § 101(a) & (b), 94 Stat. 102, 102 (1980). As the Act's text and history make clear, Congress's plan was to accomplish three interrelated goals: (1) establish a durable, universal, and non-discriminatory standard for the admission of refugees; (2) conform American policy to the humanitarian obligations of the U.N. Protocol to which the United States voluntarily became a party; and (3) remove asylum policy from the domain of unilateral executive-branch discretion.

Introducing the bill's conference report, chief sponsor Senator Ted Kennedy explained that the legislation would "insure greater equity in our treatment of all refugees" and "make our law conform to the United Nations Convention and Protocol Relating to the Status of Refugees." 126 Cong. Rec. S1753 (1980). Indeed, the Act's definition of "refugee" was lauded as adopting "a more universal standard based on uprootedness rather than ideology," *Action on Refugees*, Wash. Post, Mar. 12, 1979, *in The Refugee Act of 1979, S. 643: Hearing Before the S. Comm. on the*

Judiciary, 96th Cong. 1st Sess. 187 (1979), replacing older approaches that were criticized as "inadequate, discriminatory, and totally out of touch with today's needs," *The Refugee Act of 1979, S. 643: Hearing Before the S. Comm. on the Judiciary*, 96th Cong. 1st Sess. 1 (1979). The House Judiciary Committee explained that the bill's purpose was "to eliminate current discrimination on the basis of outmoded geographical and ideological considerations." H.R. Rep. No. 96-608, at 1. Thus, in place of *ad hoc* measures driven by political motives and executive fiat, the Act was meant to enshrine universal, non-discriminatory standards for asylum.

These standards, moreover, were meant to embody those found in the U.N. Protocol and Convention. "[T]he definition of 'refugee' that Congress adopted is virtually identical to the one prescribed by Article 1(2) of the Convention …." *Cardoza-Fonseca*, 480 U.S. at 436-37 (citation omitted). "Not only did Congress adopt the Protocol's standard in the statute, but there were also many statements indicating Congress' intent that the new statutory definition of 'refugee' be interpreted in conformance with the Protocol's definition." *Id.* at 437; *id.* (the definition "is based directly upon the language of the Protocol and it is intended that the provision be construed consistent with the Protocol" (quoting S. Rep. No. 96-590, at 20 (1980))).[2] Thus, "[i]f one thing is clear from the legislative history of

[2] *See, e.g.*, H.R. Rep. No. 96-781, at 119 (1980) (Conf. Rep.) ("The House Amendment incorporated the U.N. definition …."); H.R. Rep. No. 96-608, at 9 ("the new definition ... will finally bring United States law into conformity with the

the new definition of 'refugee,' and indeed the entire 1980 Act, it is that one of Congress' primary purposes was to bring United States refugee law into conformance with the 1967 United Nations Protocol." *Id.* at 436.

Significantly, when the Refugee Act was passed, the Protocol was understood to define the term "particular social group" broadly. According to the 1979 handbook construing the Protocol issued by the Office of the U.N. High Commissioner for Refugees, which "provides some guidance in construing the provisions added to the INA by the Refugee Act," *INS v. Aguirre-Aguirre*, 526 U.S. 415, 427 (1999), the term encompassed "persons of similar background, habits, or social status," *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* pt. 1, ch. 2, § B(3)(e)77 (1979, re-edited Jan. 1992). Moreover, it was recognized that the U.N. had adopted this flexible term precisely to ensure comprehensiveness: because "the notion of 'social group' was considered to be of broader application than the combined notions of racial, ethnic, and religious groups," it was included "in order to stop a possible gap." *Matter of Acosta*, 19 I. & N. Dec. at 232 (citing 1 Atle Grahl-Madsen, *The Status of Refugees in International Law* 219 (1966)).

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internationally-accepted definition of the term 'refugee' set forth in the [U.N. Protocol]").

To establish a policy that was durable, universal, nondiscriminatory, and in conformity with the U.N. Protocol, it was necessary to curb the discretion that the executive branch had long enjoyed to set refugee policy nearly unilaterally. Congress did just that in the Refugee Act. Indeed, throughout the process, "members of Congress insisted upon the need for statutory devices to control the exercise of executive discretion." Anker & Posner, *supra*, at 48. While much of this controversy concerned the process for calculating annual admissions numbers now found in 8 U.S.C. § 1157, "[t]he same mistrust of the Executive's use of politically motivated selection criteria ... reinforced earlier demands for universal statutory asylum procedures," *id.*; *see* § 203(f), 94 Stat. 102, 107-08 (limiting the executive's discretionary parole power).

For instance, as the criteria for asylum eligibility were debated throughout the 1970s, the executive branch repeatedly "objected to the 'well-founded fear' standard, arguing: '[I]t should be limited by providing that it be a well-founded fear in the opinion of the Attorney General.'" *Cardoza-Fonseca*, 480 U.S. at 442 n.27 (quotation marks omitted). Concerned about "the politicized nature of executive practice in the asylum area," Anker & Posner, *supra*, at 41, Congress rejected that "entirely subjective" approach, *Cardoza-Fonseca*, 480 U.S. at 442 n.27 (quoting *Western Hemisphere Immigration: Hearings on H.R. 981 before Subcomm. No. 1 of the Comm. on the Judiciary*, 93d Cong., 1st Sess. 95 (1973)), and inscribed objective

statutory criteria instead.

C. The Attorney General's New Rule

As shown above, the Refugee Act was meant to establish universal, non-discriminatory qualifications for asylum that would conform to the U.N. Protocol and curtail the executive branch's ability to dictate asylum policy unilaterally. To achieve those ends and ensure the durability of its standards, Congress defined "refugee" broadly enough to encompass variations in country conditions and social divisions. Whether a given classification of people qualifies as "a particular social group" can be answered only by reference to the facts of individual asylum claims and the societies in question.

The Attorney General's decision in *Matter of A-B-* tramples upon these standards, as does its instruction (and that of the guidance) to apply the decision to credible-fear interviews. Although deference is appropriate when the Attorney General interprets ambiguous language in a statute Congress has charged it with administering, *Aguirre-Aguirre*, 526 U.S. at 424, "the question for the court [remains] whether [his] answer is based on a permissible construction of the statute," *id.* (quoting *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984)). Here, it is not. Establishing a nearly absolute rule against asylum claims based on domestic abuse or gang violence violates the Refugee Act.

To be sure, *Matter of A-B-* recites the established standards for construing the

phrase "a particular social group." *E.g.*, *Matter of A-B-*, 27 I. & N. Dec. at 339 (acknowledging the need to evaluate "any claim regarding the existence of a particular social group in a country ... in the context of the evidence presented regarding the particular circumstances in the country in question" (citation and quotation omitted)). But in the key passages of his decision, the Attorney General establishes a nearly categorical rule to be applied regardless of the evidence presented concerning the particular circumstances in the country in question. *Id*. at 320 ("Generally, claims by aliens pertaining to domestic violence or gang violence perpetrated by non-governmental actors will not qualify for asylum."); *id*. at 320 n.1 ("few such claims would satisfy the legal standard to determine whether an alien has a credible fear of persecution"); *see Grace v. Whitaker*, 344 F. Supp. 3d 96, 133 (D.D.C. 2018) (discussing "[t]he Policy Memorandum's interpretation of the rule against circularity").

In reaching this result the Attorney General discounts the significance of the Refugee Act's text, declaring that "the statutory language standing alone is not very instructive." *Matter of A-B-*, 27 I. & N. Dec. at 326 (quoting *Fatin*, 12 F.3d at 1238). He likewise dismisses the relevance of Congress's plan in passing the Act. *See id.* at 326 n.5 (stating that "[t]he [U.N.] Protocol offers little insight into the definition of "'particular social group'"). And his new rule ignores long-established precedent, discussed above, indicating the need for case-by-case evaluations of claims

involving "membership in a particular social group." Instead of faithfully construing the Refugee Act by using the standard tools of statutory interpretation, the Attorney General simply devised his own policy that is inconsistent with the Refugee Act.

This policy, moreover, is built on faulty reasoning. For instance, the decision notes that "[v]ictims of gang violence often come from all segments of society," linked by "no distinguishing characteristic or concrete trait that would readily identify them as members of ... a group." *Id.* at 335. But the fact that this may "often" be true does not mean that it is *always* true or even *usually* true. For instance, in a society where gang membership is prevalent and where gangs aggressively target young people for recruitment, it is conceivable that those who have resisted these efforts and remained unaffiliated are indeed seen as a distinct class of people. In a different society, even one plagued by gang violence, that may not be the case. This is why a categorical rule that does not allow for context-specific examinations of the society in question is inappropriate. As the BIA has noted, "landowners" may constitute a sufficiently distinct social group "in an underdeveloped, oligarchical society," but not likely in Canada. *Matter of M-E-V-G-*, 26 I. & N. Dec. at 241.

Similarly, the decision questions the BIA's conclusion "that Guatemalan society perceives ... 'married women in Guatemala who are unable to leave their relationship' to be a distinct social group," asserting (without any citation to evidence) that there is "significant room for doubt" about that proposition. *Matter*

of A-B-, 27 I. & N. Dec. at 336. That unsupported assertion, in turn, underpins the decision's general rule against claims involving domestic violence—a rule that the decision and the guidance instruct asylum officers to apply worldwide, not just to women from Guatemala.

Contrary to the Attorney General's indiscriminate rule, there is reason to think that married women, especially those with children, are in some societies "marginalized or subjected to social stigma and prejudice," *Velasquez v. Sessions*, 866 F.3d 188, 198 (4th Cir. 2017) (Wilkinson, J., concurring), to the extent that society regards them as properly subordinated to their husbands' wishes and considers it improper for them to leave their husbands or challenge their authority. That is why, as the text requires and precedent has long recognized, those adjudicating asylum claims must engage in individualized consideration of each asylum claim.

By establishing a nearly absolute bar against certain types of claims, the general rule announced in *Matter of A-B-* runs roughshod over this principle and does not represent a "fair and permissible reading of the [Refugee Act]." *Aguirre-Aguirre*, 526 U.S. at 428.

The disconnect between the standards articulated by the Attorney General and the new rule he established suggests that this rule, rather than arising from a genuine effort to interpret the Refugee Act, is a mere pretext aimed at stemming the current

arrival of asylum-seekers from Central America—part of the Administration's broader effort to target refugees in general and those from certain regions in particular. As the District Court noted, "the applicant in *Matter of A-B-* never claimed gang members had any involvement in her case," yet the decision "discusses gang-related violence at length," *Grace*, 344 F. Supp. 3d at 109 n.4, and sweeps gang-related claims within the new general rule it establishes. By all appearances, the decision is an attempt to selectively burden asylum applicants from one geographic region who are fleeing particular types of persecution. Congress enacted the Refugee Act to eliminate such discriminatory use of the asylum laws by the executive branch as a tool of politics. In place of politicized, *ad hoc* measures, Congress imposed universal and non-discriminatory criteria for asylum eligibility. Because the Administration and the courts must respect that choice, the general rule against claims involving gangs and domestic violence must be struck down.

II. The Heightened Requirements Imposed on Asylum Applicants During their Credible-Fear Determinations Violate IIRIRA By Causing Potentially Valid Claims To Be Summarily Dismissed.

In 1996, "Congress amended the immigration laws to provide for expedited removal of those seeking admission to the United States," *Grace*, 344 F. Supp. 3d at 104, empowering immigration officers to summarily remove certain noncitizens seeking admission without further review. 8 U.S.C. § 1225(b)(1)(A)(i). Congress took care, however, to ensure that this new process of expedited removal would not

prevent individuals who were afraid to return home from pursuing asylum claims—by directing that anyone who indicates "either an intention to apply for asylum ... or a fear of persecution" may not be summarily removed, but rather must go through a threshold screening process intended to identify and exclude people who lack "a credible fear of persecution." *Id*. § 1225(b)(1)(A)(ii), (b)(1)(B).

Congress designed this threshold screening process to weed out clearly meritless cases while ensuring that no person with a potentially valid asylum claim would be prohibited from pursuing that claim. To achieve this balance, Congress established a generous standard that could easily be met by asylum seekers. The new rules promulgated in *Matter of A-B-* and the guidance violate that law because—particularly in combination—these rules impermissibly heighten the requirements an asylum applicant must meet to obtain a favorable credible-fear determination.

Under the law, a "'credible fear of persecution'" is defined as "a significant *possibility*, taking into account the credibility of the statements made by the alien in support of the alien's claim and such other facts as are known to the officer, that the alien *could* establish eligibility for asylum." *Id*. § 1225(b)(1)(B)(v) (emphasis added). While the word "possible" is qualified by the adjective "significant," which can mean "of a noticeably or measurably large amount," *Webster's Ninth Collegiate Dictionary* 1096 (1990 ed.), adjectives "modify nouns—they pick out a subset of a category that possesses a certain quality," *Weyerhaeuser Co. v. U.S. Fish & Wildlife*

Serv., 139 S. Ct. 361, 368 (2018). They do not "alter the meaning of the word" they modify. *Rimini St., Inc. v. Oracle USA, Inc.*, 139 S. Ct. 873, 878 (2019); *see id.* at 879 ("A 'full breakfast' means breakfast, not lunch .... [T]he term 'full costs' means *costs*, not other expenses."). Thus, a "significant possibility" still means a "possibility," not some higher likelihood of occurrence.

Moreover, at the time Congress passed this legislation, the Supreme Court had already established that a person can be eligible for asylum if the "applicant only has a 10% chance of being ... persecuted." *Cardoza-Fonseca*, 480 U.S. at 440. So under the new scheme that Congress put in place, "to prevail at a credible fear interview, the alien need only show a 'significant possibility' of a one in ten chance of persecution, i.e., a fraction of ten percent." *Grace*, 344 F. Supp. 3d at 127; *see Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1386 (2015) ("when 'judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute' is presumed to incorporate that interpretation" (quoting *Bragdon v. Abbott*, 524 U.S. 624, 645 (1998))).

Congress's decision to adopt this generous standard was a considered one. When the expedited-removal and credible-fear provisions were first added to the U.S. Code earlier that year by the Antiterrorism and Effective Death Penalty Act ("AEDPA"), they contained a similar "significant possibility" standard, but this standard also required it to be "more probable than not that the statements made by

the alien in support of the alien's claim are true." Antiterrorism & Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 422(b)(1)(C)(v), 110 Stat. 1214, 1271 (1996).[3] The initial drafts of IIRIRA employed the same text, *see* H.R. 2022, 104th Cong. § 235(b)(1)(B)(v) (1995), and the original bill, therefore, would have provided that "only applicants with a *likelihood of success* will proceed to the regular asylum process," H. Rep. 104-469, pt. 1, at 158 (1996) (emphasis added).[4]

Congress ultimately rejected that standard, passing instead the language found in the U.S. Code today, which requires only a "significant possibility" of establishing asylum eligibility and does not impose a more-likely-than-not standard. As the Conference Report explained:

> The purpose of these provisions is to expedite the removal from the United States of aliens who *indisputably* have no authorization to be admitted to the United States, while providing an opportunity for such an alien who claims asylum to have the merits of his or her claim promptly assessed ….

H.R. Rep. No. 104-828, at 209 (Conf. Rep.) (emphasis added).

By making these changes to the text, Congress sought to ensure that

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[3] *See id.* ("the term 'credible fear of persecution' means (I) that it is more probable than not that the statements made by the alien in support of the alien's claim are true, and (II) that there is a significant possibility, in light of such statements and of such other facts as are known to the officer, that the alien could establish eligibility for asylum").

[4] Notably, even under this more stringent standard, the Committee expressed confidence that "there should be no danger that an alien with a genuine asylum claim will be returned to persecution." *Id*.

individuals with potentially valid asylum claims would not have those claims summarily rejected and face removal to countries where they could be persecuted. Representative Henry Hyde explained that the conferees "struggled with the issue of how to fairly and expeditiously adjudicate asylum claims of persons arriving without documents," and that while the Committee sought to prevent abuse of the asylum process, "[a]t the same time, we recommend major safeguards against returning persons who meet the refugee definition to conditions of persecution." 142 Cong. Rec. H11081 (daily ed. Sept 25, 1996).

Other House members similarly acknowledged the importance of "speedy" procedures to "exclude persons who would abuse our generous immigration laws," but explained: "It is also important, however, that the process be fair—and particularly that it not result in sending genuine refugees back to persecution." 142 Cong. Rec. H11066-67 (daily ed. Sept 25, 1996) (statement of Rep. Christopher Smith). By lowering the burden imposed by the credible-fear standard, the new legislation "cure[d] important deficiencies in current law." *Id*. at H11066 (contrasting this new standard with the higher standard in force as a result of AEDPA).

In the Senate, legislators likewise noted that the revised bill modified existing provisions in AEDPA that "would not have provided adequate protection to asylum claimants." 142 Cong. Rec. S11491 (daily ed. Sept. 27, 1996) (statement of Sen.

Orrin Hatch). As Senator Hatch explained: "The standard adopted in the conference report is intended to be a low screening standard for admission into the usual full asylum process." *Id.*; *see N. Haven Bd. of Ed. v. Bell*, 456 U.S. 512, 529 (1982) ("deletion of a provision by a Conference Committee militates against a judgment that Congress intended a result that it expressly declined to enact" (internal quotation omitted)).

In sum, the credible-fear screening standard emerged from a careful compromise, in which Congress balanced the need to buttress immigration controls with the need to ensure that refugees would not be forced back to their country of persecution. The low standard evident in the statute's plain text represents the considered judgment of Congress.

By ratcheting up the showing that an asylum applicant must make to prevail at the credible-fear stage, the new standards promulgated in *Matter of A-B-* and the guidance upend the balance struck by Congress. Asylum officers have been directed to consider a slew of restrictive new principles when making credible-fear determinations, the upshot of which is that valid asylum claims—particularly those involving a government's failure to prevent violence committed by private actors—are now at serious risk of summary dismissal.

Among other things, the new policies, as previously discussed, establish a general rule that claims involving gang or domestic violence will not qualify for

asylum, while also directing asylum officers as to how to implement that rule in the context of credible-fear determinations. *See* Policy Memorandum 6. Further, the guidance directs that any claim of "membership in a particular social group" must generally be rejected if the group's definition includes the members being "unable to leave their relationship." *Id*. at 5.

On top of that, the new policies narrow the long-established interpretation of "persecution" in cases involving private violence, requiring a showing that the government "condoned" the violence or demonstrated "'complete helplessness'" in preventing it. *Matter of A-B-*, 27 I. & N. Dec. at 337 (internal citation omitted). Even if the Attorney General's intent in quoting that formulation were unclear, its frequent repetition in the guidance removes any doubt that it represents a new standard that officers must apply in credible-fear determinations. *See* Policy Memorandum 2; *id*. at 6; *id*. at 10 ("Again, the home government must either condone the behavior or demonstrate a complete helplessness to protect victims of such alleged persecution.").

Collectively, these changes raise the bar for success far higher than "a fraction of ten percent." *Grace*, 344 F. Supp. 3d at 127. Thus, many individuals fearing persecution—even those with "a significant possibility" of establishing asylum eligibility, 8 U.S.C. § 1225(b)(1)(B)(v)—will lose their chance to make the fulsome legal and factual showing that could substantiate their claims. The effect is that

certain types of claims disfavored by the current Administration will be dismissed without further development, based on an asylum officer's conclusion, after one screening interview, that the facts alleged do not meet the qualifications for refugee status.

These heightened requirements cannot be squared with the plain text of 8 U.S.C. § 1225, and they clearly transgress Congress's plan that expedited removal provisions should create "no danger that an alien with a genuine asylum claim will be returned to persecution." H. Rep. 104-469, pt. 1, at 158. "Passing a law often requires compromise," and the executive branch may not unravel that compromise or disturb its careful balancing of "competing interests." *NLRB v. SW Gen., Inc.*, 137 S. Ct. 929, 942 (2017). Because the executive branch has no authority to rewrite the immigration laws passed by Congress, its new standards governing credible-fear screenings must be rejected.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(i) because it contains 6,402 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

I further certify that the attached brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6), because it has been prepared in a proportionally spaced typeface using Microsoft Word 14-point Times New Roman font.

Executed this 1st day of August, 2019.

/s/ Elizabeth B. Wydra
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CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of August, 2019, I electronically filed the foregoing document using the Court's CM/ECF system, causing a notice of filing to be served upon all counsel of record.

Dated: August 1, 2019

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