

NOT YET SCHEDULED FOR ORAL ARGUMENT

No. 19-5013

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

WILLIAM P. BARR, *et al.*,
APPELLANTS,

v.

GRACE, *et al.*,
APPELLEES.

ON APPEAL FROM A JUDGMENT OF THE
UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

**BRIEF FOR THE DISTRICT OF COLUMBIA AND THE STATES OF
CALIFORNIA, COLORADO, CONNECTICUT, DELAWARE, HAWAII,
ILLINOIS, MAINE, MARYLAND, MASSACHUSETTS, MICHIGAN,
MINNESOTA, NEVADA, NEW JERSEY, NEW YORK, OREGON,
PENNSYLVANIA, RHODE ISLAND, VERMONT, VIRGINIA, AND
WASHINGTON AS *AMICI CURIAE* IN SUPPORT OF APPELLEES**

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. *Parties and amici*.—All parties, intervenors, and amici appearing before the district court and in this Court are listed in the Brief for Appellants.

B. *Ruling under review*.—References to the rulings at issue appear in the Brief for Appellants.

C. *Related cases*.—This case has not previously come before this Court. Two related cases are identified in the Brief for Appellees.

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GLOSSARY

BIA	Board of Immigration Appeals
DOJ	Department of Justice
INA	Immigration and Nationality Act
UNHCR	United Nations High Commissioner on Refugees
USCIS	United States Citizenship and Immigration Service
VAWA	Violence Against Women Act

STATEMENT OF INTEREST OF *AMICI CURIAE*

Amici curiae are the District of Columbia and the States of California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New York, Oregon, Pennsylvania, Rhode Island, Vermont, Virginia, and Washington. The *Amici* States—who together are home to the majority of this country’s successful asylum grantees—have an interest in ensuring the availability of asylum-related protections for individuals and families with a well-founded fear of persecution due to domestic or gang-related violence. Such protections are crucial, not only to the vulnerable population involved, but also to facilitating the substantial contributions these individuals make in the *Amici* States’ economies and communities.

The *Amici* States are concerned that former-Attorney General Jeff Sessions’s precedential opinion in *Matter of A-B-*, 27 I&N Dec. 316 (A.G. 2018), and the United States Citizenship and Immigration Services (“USCIS”) policy memorandum will undercut the longstanding, positive contribution made by these immigrant populations. The opinion and policy memorandum break sharply from prior precedent and call for the denial of asylum claims based on domestic and gang-related violence. The *Amici* States believe that those fleeing from domestic and gang-related violence should continue to receive a fair and individualized

opportunity to establish their eligibility for asylum, and that such an opportunity is consistent with federal law. If applicants with viable claims were turned away before establishing their eligibility, the *Amici* States would suffer both economically and culturally.

When the federal government fails to follow the law, it has very real consequences for the several States. This is especially so with immigration policy—it shapes the destiny of the nation, and of the individual States. *See Arizona v. United States*, 567 U.S. 387, 415 (2012). It is thus vitally important to the *Amici* States that courts police and protect the federal executive's compliance with immigration and asylum law.

SUMMARY OF ARGUMENT

The district court properly enjoined the United States from applying the policies set forth in *Matter of A-B-* and the related USCIS policy memorandum, which impermissibly heightened the standards for asylum claims.

The United States has an obligation to welcome those forced from their homelands, and the *Amici* States are committed to fulfilling that obligation. Immigrants, including asylees, are a vital part of the *Amici* States' communities. States benefit immensely from immigrants who build new lives here, and the *Amici* States strive to be places where immigrants can flourish. Immigrants contribute, for example, to state economies: they participate at every level of the workforce

and across all economic sectors. Excluding broad swaths of people from the opportunity to seek asylum by foreclosing their claims at the credible fear stage, as *Matter of A-B-* and the policy memorandum attempt to do, diminishes the *Amici* States' economic and community development.

In addition, state and federal governments, as well as the United Nations High Commissioner on Refugees (“UNHCR”), have all recognized the need for specific protections against—and programs tailored to address—domestic and gang-related violence. Each of the 50 States and the District of Columbia has enacted civil and criminal provisions to protect victims of domestic violence, and the federal government too has acknowledged the need to assist immigrant women subject to domestic violence. The guidance found in the UNHCR’s Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status (Geneva 2011 ed.)¹ makes clear that women who suffer from gender-based violence can qualify as refugees. Similarly, the States and the federal government have enacted programs and committed resources to preventing gang violence and ensuring that victims’ rights are respected. And the UNHCR has recognized that victims of gang violence may be eligible for asylum as well. Refusing victims of domestic and gang-related violence assistance—as *Matter of A-B-* and the policy

¹ Available at <https://tinyurl.com/yyfs6dbf>.

memorandum would require—is thus contrary to state and federal policies and UNHCR guidelines.

Domestic and gang-related violence persist at crisis levels in Guatemala, El Salvador, and Honduras in particular, and the victims of this violence deserve to establish their eligibility for asylum and to seek protection in the States and the United States. In 2016, those countries produced nearly 30 percent of all asylum grantees. Women and girls are distinctly targeted: El Salvador and Honduras have the world's highest rates of femicide. Domestic violence persists there, in part, because the laws prohibiting it are often poorly enforced or carry only minor penalties. *Matter of A-B-* and the policy memorandum deprive victims of domestic and gang-related violence of an opportunity to show that their government is unable or unwilling to protect them or that they have been targeted because of membership in a particular social group. As a result, *Matter of A-B-* would deprive States of the contributions that these victims might otherwise make if they were given refuge and the ability to thrive in our country—all because the federal government is defying its commitment to aid eligible refugees.

ARGUMENT

I. ***Matter of A-B-* And The Subsequent USCIS Guidelines Contravene Established Federal Law.**

Together, the policies in *Matter of A-B-* and the policy memorandum subvert longstanding federal law, to the detriment of the States—as well as to the rule of

law itself. *Matter of A-B-* and the policy memorandum heighten the standards used in expedited removal proceedings, establishing a near categorical bar to asylum claims based on domestic or gang-related violence. Because these policies may be used to illegally foreclose victims of domestic or gang-related violence from attaining asylum protection, the district court properly enjoined the United States from implementing them.

Federal law provides that “[a]ny alien who is physically present in the United States or who arrives in the United States . . . irrespective of such alien’s status, may apply for asylum.” 8 U.S.C. § 1158(a)(1). To qualify for asylum, the individual must establish that she is a refugee, *id.* § 1158(b)(1)(A), meaning that she is “unable or unwilling to return” to her home country “because of 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). The applicant need not establish a fear of certain persecution; rather, according to the Supreme Court, she must simply show that persecution is a reasonable possibility. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 440 (1987).

Eligibility for asylum is especially important for migrants reaching the United States who are subject to “expedited removal,” a summary deportation process without hearings or meaningful review. 8 U.S.C. § 1225(b)(1)(A)(i); 8 C.F.R. § 235.3(b). Persons subject to expedited removal who express a fear of

returning to their home country or express an intent to apply for asylum must be referred to an asylum officer for a “credible fear determination,” which may entitle them to referral for regular removal proceedings before an immigration judge. 8 U.S.C. § 1225(b)(1)(A)(ii); *see* 8 C.F.R. § 235.3(b)(4); *see also* 8 U.S.C. § 1225(b)(1)(B)(ii), (v); 8 U.S.C. § 1229a. Because a negative credible fear determination is entitled to limited review, Congress designed these interviews to have a low threshold of proof.² In 2016, for example, 75 percent of individuals referred to a credible fear interview met that standard.³

Asylum applicants fleeing from domestic and gang-related violence often claim a well-founded fear of persecution on account of their “membership in a particular social group.” 8 U.S.C. § 1101(a)(42)(A). Federal courts of appeals have recognized that such an applicant persecuted by non-state actors may still merit asylum if she establishes that the persecution was “committed by . . . forces the government is either unable or unwilling to control.” *Knezevic v. Ashcroft*, 367

² *See* 142 Cong. Rec. 25347 (1996) (statement of Sen. Hatch) (“[T]he standard adopted in the conference report is intended to be a low screening standard for admission into the usual full asylum process.”).

³ Nadwa Mossaad & Ryan Baugh, *Refugees and Asylees: 2016* at 6 (2018), <https://tinyurl.com/yxblggst>.

F.3d 1206, 1211 (9th Cir. 2014); 8 U.S.C. § 1101(a)(42)(A).⁴ Notably, in a 2014 decision, *Matter of A-R-C-G*, 26 I&N Dec. 388 (BIA 2014), the BIA explicitly acknowledged that victims of domestic violence targeted because of their gender could qualify for asylum under prevailing law. *Id.* at 389 (holding that “married women in Guatemala who are unable to leave their relationship” was a particular social group and granting the applicant asylum).

Despite the entrenched and widespread recognition of the validity of domestic violence and gang-related asylum claims, on June 11, 2018, Attorney General Sessions issued *Matter of A-B-*, a precedential opinion that reversed the BIA’s grant of asylum to an El Salvadoran woman who was brutalized by her husband. 27 I&N Dec. at 321, 346. The opinion overruled the BIA’s decision in *Matter of A-R-C-G-* and proposed that few claims based on domestic or gang-related violence perpetrated by non-governmental actors would satisfy the credible fear standard. *Id.* at 320 n.1. Following the publication of *Matter of A-B-*, USCIS issued a policy memorandum for implementing that decision entitled “Guidance

⁴ See also *Martinez v. Holder*, 740 F.3d 902, 909-13 (4th Cir. 2014) (finding former gang membership to constitute a particular social group); *Cece v. Holder*, 733 F.3d 662, 672 (7th Cir. 2013) (determining “young Albanian women living alone” constituted a particular social group); *Henriquez-Rivas v. Holder*, 707 F.3d 1081, 1091-94 (9th Cir. 2013) (en banc) (recognizing that individuals who publicly testify against gangs may qualify as a particular social group); *Fiadjoe v. Attorney Gen. of U.S.*, 411 F.3d 135, 160-62 (3d Cir. 2005) (overturning the BIA’s determination that a victim of incest and domestic violence did not qualify for asylum).

for Processing Reasonable Fear, Credible Fear, Asylum, and Refugee Claims in Accordance with *Matter of A-B-*.” App. 353-62. The policy memorandum reiterates in bold font the near-categorical rejection of asylum claims based on domestic and gang-related violence. App. 358.

Coupled together, *Matter of A-B-* and the policy memorandum repudiate legally recognized asylum protections for individuals and families fleeing from domestic and gang-related violence. The opinion and guidance make it exceedingly difficult for those vulnerable populations to establish their eligibility for asylum. As explained by appellees, *Matter of A-B-* and the policy memorandum contravene both existing statutes and precedent from multiple courts of appeals. These policies would, in effect, raise the bar for immigrants seeking to show a credible fear of persecution, and effectively exclude victims of gang and domestic violence from the asylum process. That result conflicts with the intent of Congress in drafting the Immigration and Nationality Act, and with the policies of *Amici* States.

II. *Matter of A-B-* And The Subsequent USCIS Guidelines Contravene The *Amici* States’ Interest In Welcoming Individuals Seeking Asylum.

A. Providing immigrants refuge from persecution not only fulfills our nation’s obligations, but it also strengthens States’ economies.

The United States is a nation founded by immigrants, many of whom came here fleeing persecution. When the country became a signatory to the 1967 United

Nations Protocol Relating to the Status of Refugees (“Protocol”), it vowed to protect individuals escaping persecution. *INS v. Stevic*, 467 US 407, 416-17 (1984); see *Mossaad & Baugh, supra*, at 2. Congress affirmed this national commitment in the 1980 Refugee Act, declaring “the historic policy of the United States to respond to the urgent needs of persons subject to persecution in their homelands.” Refugee Act of 1980, Pub. L. No. 96-212, § 101(a), 94 Stat. 102, 102. Breaking from prior policies that restricted asylum based on geography and political preference, Congress sought to align the United States’ immigration policy with its international commitments by enacting a nondiscriminatory refugee policy that would apply uniformly.⁵

Amici States and their constituents fundamentally benefit when society lives up to the ideals of these commitments. Experience has shown that the benefits associated with immigration, including the asylum process, are reciprocal; not only do immigrants benefit from the opportunities associated with living in the United States, but the States and country as a whole benefit from immigrants. Detractors of our nation’s immigration and asylum laws have argued that immigrants—and

⁵ Deborah Anker & Michael Posner, *The Forty Year Crisis: A Legislative History of the Refugee Act of 1980*, 19 San Diego L. Rev. 9, 9-10, 63-64 (1981).

asylum seekers in particular—drain our nation’s resources. Nothing could be further from the truth, as the *Amici* States know from experience.⁶

Immigrants enhance the nation’s prosperity by contributing to the state and national economies. Nearly one in six workers is an immigrant.⁷ Nationally, successful asylum grantees have a median age much lower than citizens, which means that the majority of asylum grantees are of working age and thus contribute to the economic output of states and the country as a whole.⁸

Immigrants provide necessary labor in a variety of fields such as healthcare, manufacturing, food services, and agriculture,⁹ often taking jobs that native-born citizens either do not want or cannot fill.¹⁰ For example, in the Great Lakes region

⁶ For an empirical analysis of this point in a different context, see Hippolyte d’Albis et al., *Macroeconomic Evidence Suggests that Asylum Seekers Are Not a “Burden” for Western European Countries*, *Science Advances* (Jun. 20, 2018), <https://tinyurl.com/y269tm7e>.

⁷ Am. Immigration Council, *Immigrants in the United States 2* (Oct. 4, 2017), <https://tinyurl.com/y3h72n23>.

⁸ See Mossaad, *supra*, at 8 (finding that 57 percent of those granted asylum in 2016 were between the ages of 18 and 44).

⁹ New Am. Econ., *New Americans and a New Direction, The Role of Immigrants in Reviving the Great Lakes Region* 6 (Oct. 2017), <https://tinyurl.com/yxgt5u9x>.

¹⁰ Brenan Hoban, *Do Immigrants “Steal” Jobs from American Workers?* (Aug. 24, 2017), <https://tinyurl.com/y3xw8nvo>.

of Wisconsin, Illinois, Michigan, Ohio, Pennsylvania, and New York,¹¹ population growth fell behind the national average, resulting in decreased tax revenue and a reduction in jobs.¹² However, as residents were leaving the area, immigrants began steadily moving into the region.¹³ Nearly half of the new residents in the Great Lakes region from 2000 to 2015 were foreign-born individuals, contributing to population growth in areas that otherwise would have declined.¹⁴ This increased population led to added jobs and increased wages for U.S.-born workers.¹⁵ What is more, these immigrants are keeping the workforce viable as baby boomers age into retirement.¹⁶

Additionally, immigrants pursue entrepreneurship at disproportionately high levels. Although nationally immigrants make up around 15 percent of the workforce, approximately 20 percent of business owners are immigrants, with even

¹¹ New Am. Econ., *supra* at 6.

¹² *See id.* at 7.

¹³ *See id.* at 7-8.

¹⁴ *Id.* at 8.

¹⁵ *Id.* at 2, 17, 32

¹⁶ *Id.* at 2, 12.

higher percentages in metropolitan areas.¹⁷ For example, immigrants make up over half of all business owners in the Washington, D.C. metropolitan area,¹⁸ and over 40 percent of the business owners in the Los Angeles metropolitan area.¹⁹ These companies, which employ both immigrants and non-immigrants, create jobs and support a thriving local economy.²⁰ On a national level, in 2015 alone, immigrant-owned companies generated \$72.3 billion in business income.²¹

In California, for example, immigrant-owned businesses generated almost \$22 billion in business income in 2015.²² One such business is Huy Fong Foods, which produces the popular Sriracha sauce.²³ That company is led by David Tran, who escaped persecution in Vietnam and came to this country as a refugee in

¹⁷ See *Immigrants in the United States*, *supra*, at 4; see also Dany Bahar, *A Spicy Red Sauce and How Immigrants Generate Jobs and Growth in the US* (Feb. 7, 2017), <https://tinyurl.com/y2qtkcww>.

¹⁸ Am. Immigration Council, *Immigrants in the District of Columbia* 4 (Oct. 16, 2017), <https://tinyurl.com/yx9xm42k>.

¹⁹ Am. Immigration Council, *Immigrants in California* 4 (Oct. 4, 2017), <https://tinyurl.com/ybe2bdpf>.

²⁰ See Bahar, *supra*.

²¹ *Immigrants in the United States*, *supra*, at 4.

²² *Immigrants in California*, *supra*, at 4.

²³ See Bahar, *supra*.

1978.²⁴ With a factory located in Irwindale, California, Mr. Tran's company employs hundreds of workers and brings in over \$60 million in revenue yearly.²⁵

Refugees and asylees are making similar contributions in other States. In the District of Columbia, for instance, the popular new business Foodhini, founded by the son of refugees, offers a delivery service for immigrant chefs selling homecooked meals.²⁶ Majed Abdulraheem, one of the refugee chefs employed by Foodhini, worked as a cook in Syria before being displaced by the war. He is now again pursuing his dream of opening his own restaurant after making his way to the United States.²⁷ By limiting the asylum process, *Matter of A-B-* and the policy memorandum will make it more difficult for refugees like Mr. Tran and Mr. Abdulraheem to bring their talents to the several States, which threatens the economic and cultural development of States and localities across the country.

B. *Matter of A-B-* is inconsistent with state, federal, and international policies intended to protect victims of domestic and gang-related violence.

Victims of domestic and gang-related violence also make important contributions to their communities—and are capable of doing so on a much greater

²⁴ *Id.*

²⁵ *Id.*

²⁶ Rebecca Oh, *Foodhini Works With Immigrant Chefs to Deliver Home-Cooked Meals*, NBC News (June 29, 2017), <https://tinyurl.com/yydr8hbc>.

²⁷ *Id.*

scale when they are given safe haven. Indeed, such violence hampers the ability of victims to thrive and achieve their full potential. By allowing survivors to seek shelter in the several States, our nation's immigration system encourages them to bring their talents here, where they can contribute to their new communities free from their abusers. Acknowledging the importance of protecting these individuals more broadly, many States have adopted strong policies to protect victims of domestic and gang-related violence.

1. Governments have long recognized that victims of domestic violence merit protection.

In issuing *Matter of A-B-* and the policy memorandum, the federal executive has attempted to unilaterally strip away an essential lifeline for victims of domestic violence. State, federal, and international policies have recognized the importance of protecting this vulnerable population from that harm, yet *Matter of A-B-* and the policy memorandum disregard this consensus.

States throughout the country recognize that domestic violence is a public health issue with staggering societal consequences. All 50 States and the District of Columbia have enacted both civil and criminal laws to protect the victims of domestic violence.²⁸ These innovative laws demonstrate the States' understanding

²⁸ See Am. Bar Assoc., *Domestic Violence Civil Protection Orders (CPOs)* (Mar. 2014), <https://tinyurl.com/yxtsf34a> (describing state civil penalties for domestic violence and abuse); see also Am. Bar Assoc., *Domestic Violence Arrest*

that it “is in the public interest to reduce domestic violence, sexual assault, and [related crimes].”²⁹ Washington’s Domestic Violence Leave Act is a prime example of innovative protections for, and States’ commitment to, victims of domestic violence.³⁰ The Act grants victims the ability to take reasonable leave from work to handle the aftermaths of abuse, such as seeking legal or medical assistance.³¹ California’s Healthy Workplaces, Healthy Family Act functions in a similar manner by requiring employers to provide paid days off “for employees who are subjected to domestic violence, sexual assault, or stalking.”³² Additionally, recognizing the toll domestic violence takes on an individual’s ability to work, the District of Columbia allows individuals who leave work due to domestic abuse to recover unemployment compensation.³³

In the criminal context, New York Penal Law § 240.75 is another example of innovative state domestic abuse policy. The law imposes heightened penalties

Policies (Jun. 2011), <https://tinyurl.com/y6l3fhgb> (describing state criminal laws and arrest policies).

²⁹ See, e.g., Wash. Rev. Code § 49.76.010(1).

³⁰ See *id.* § 49.76 *et seq.*

³¹ See *id.* § 49.76.030.

³² Cal. Labor Code § 246.5(a)(2).

³³ D.C. Code § 51-131.

for repeat domestic abuse offenders by creating the crime of “aggravated family offense.”³⁴ Indeed, nationally, the prosecution and conviction rate of state domestic abuse cases is significantly higher than that of non-domestic abuse cases.³⁵

The federal government has also taken significant steps to deter and prevent domestic violence. In 1994, Congress enacted the comprehensive Violence Against Women Act (“VAWA”), Pub. L. No. 103-322, 108 Stat. 1902 (1994), with the goal of ensuring that all “persons within the United States shall have the right to be free from crimes of violence motivated by gender,” *United States v. Morrison*, 529 U.S. 598, 605 (2000). VAWA not only included protection for U.S. citizens facing domestic violence, but it also aided immigrants facing the same issues. The Act introduced new immigration procedures which enable those who “ha[ve] been battered or ha[ve] been the subject of extreme cruelty perpetrated by” a spouse or fiancé to self-petition for a visa. 8 U.S.C. § 1154(a)(1)(A)(iii)(bb). Moreover, Congress made significant appropriations advancing the purposes of VAWA through grants and creation of the Office on Violence Against Women

³⁴ N.Y. Penal Law § 240.75.

³⁵ See U.S. Dep’t of Justice, *State Court Processing of Domestic Violence Cases* 1 (Mar. 21, 2008), <https://tinyurl.com/y5ype8nd>.

within the Department of Justice (“DOJ”).³⁶ Since its inception, that office has administered over \$8 billion in grants to State, local, and tribal governments, nonprofit organizations, and universities.³⁷

In 2000, Congress heightened protections for immigrants who were victims of sex trafficking and domestic abuse. *See* Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464. It created two new categories of visas for those seeking admission to the United States—“T” visas for victims of sex trafficking, *id.* div. A § 107, 114 Stat. 1474-80 (codified at 8 U.S.C. § 1101(a)(15)(T)), and “U” visas for victims of other serious crimes, like domestic abuse, who testify against their attackers, *id.* div. B § 1513, 114 Stat. 1533-37 (codified at 8 U.S.C. § 1101(a)(15)(U)). With the passage of this Act, Congress recognized the importance of “providing battered immigrants . . . who [are] experiencing domestic violence at home with protection against deportation.” *Id.* § 1502(a)(2), 114 Stat. 1518. Indeed, in discussing the need for T and U visas, members of Congress noted that the visas would provide protection for domestic violence victims in the United States,³⁸ who if coming to this country alone, could

³⁶ Congressional Research Service, *The Violence Against Women Act (VAWA): Historical Overview, Funding, and Reauthorization* 4 (updated Apr. 23, 2019).

³⁷ *Id.*

³⁸ *See* U.S. Citizenship & Immigration Servs., *Victims of Human Trafficking: T Nonimmigrant Status*, <https://tinyurl.com/yxton2te> (last visited July 20, 2019)

seek and qualify for asylum, but may have difficulty doing so when their abuser is also within the United States.³⁹ Yet, *Matter of A-B-*, which was issued solely by the Attorney General, and the USCIS policy memorandum threaten to foreclose asylum protection and contravene States' and Congress's desire to aid immigrants who are victims of domestic abuse.

Moreover, a policy that categorically rejects asylum claims from victims of domestic abuse is contrary to the guidelines set forth by the UNHCR. The Supreme Court and, consequently, federal appellate courts, consider the guidance found in the UNHCR's Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status (Geneva 2011 ed.) ("Handbook") to be of particular relevance when interpreting the INA. *See Cardoza-Fonseca*, 480 U.S. at 438-39 (relying on the Handbook's analysis to interpret the definition of "refugee" in the

(stating that only those who are "in the United States, American Samoa, the Commonwealth of the Northern Mariana Islands, or at a port of entry due to trafficking" are eligible for T visas); *see also* U.S. Citizenship & Immigration Servs., *Victims of Criminal Activity: U Nonimmigrant Status*, <https://tinyurl.com/hferp74> (last visited July 20, 2019) (considering that "[t]he crime occurred in the United States or violated U.S. law" to be a requirement for a U visa).

³⁹ *Battered Immigrant Protection Act of 1999: Hearing on H.R. 3083 Before the H. Comm. on the Judiciary*, 106th Cong. 70 (2000) (statement of Rep. Sheila Jackson Lee) ("A battered woman who is not a legal resident, whose immigration status depends completely on her partner . . . may [be] prevented from leaving her husband or seeking asylum.").

INA). The Handbook notes that immigrants who suffer from gender-related persecution, such as “sexual violence, family/domestic violence, coerced family planning, [and] female genital mutilation” may qualify as refugees.⁴⁰ That remains the case when there is “a risk of being persecuted at the hands of a non-State actor” such as a “husband [or] partner.”⁴¹ *Matter of A-B-* blatantly ignored the Handbook’s reasoning, which this Court should take into account when construing the INA. *See Cardoza-Fonseca*, 480 U.S. at 439 n.22.

2. Governments have long recognized the importance of protecting victims of gang-related violence.

Matter of A-B- also diverges from State, federal, and international policies designed to protect victims and communities from gang-related violence. States in particular have a strong policy commitment to deterring gang violence and aiding victims. Each State has provisions in its criminal code intended to address gang violence,⁴² recognizing that gang-related crimes may be exceedingly harmful. These provisions typically criminalize active participation in gangs⁴³ and gang-

⁴⁰ Handbook at 84.

⁴¹ *Id.* at 87.

⁴² *See* National Gang Center, *Compilation of Gang Related Legislation*, <https://tinyurl.com/yxjwd5rp> (last visited July 22, 2019).

⁴³ *See, e.g.*, Cal. Pen. Code § 182.5; Va. Code Ann. § 18.2-46.2.

related activities like solicitation of new members.⁴⁴ State criminal codes also typically include penalty enhancements for gang-related violence: Virginia Code Section 18.2-46.3:3, for example, increases the penalty for gang activities undertaken on public school grounds and for recruitment targeting children. States have additionally passed legislation protecting witnesses and victims who testify against gang members, further underscoring their commitment to aiding these individuals.⁴⁵

States have also partnered with and encouraged local governments to implement tailored strategies to combat this destabilizing form of violence. Programs like Boston, Massachusetts's Operation Ceasefire, which has been noted for its effectiveness to reducing gang violence since its inception in 1996, represent a more holistic approach, involving preventative messaging and direct interventions like conflict mediation between gang members and potential

⁴⁴ See, e.g., La. Rev. Stat. § 15:1403.1; N.H. Rev. Stat. Ann. § 644:20; Wash. Rev. Code § 9A.46.120.

⁴⁵ See, e.g., Conn. Gen. Stat. § 54-82t; 725 Ill. Comp. Stat. § 173/20; W. Va. Code § 61-6-9. Victims are additionally supported by state victims' rights acts and state constitutional amendments that, at minimum, entitle victims to certain information about criminal proceedings, and may offer additional protection and compensation. See The National Center for Victims of Crime, *Victims' Rights*, <https://tinyurl.com/y9r9bvuj> (last visited July 22, 2019).

victims.⁴⁶ Operation Ceasefire relied on the involvement of social workers and community organizations like churches to help divert at-risk youth away from gang activities.⁴⁷ Project BUILD, an anti-gang program in Chicago, Illinois, implemented an anti-gang curriculum in middle schools and hosted after-school activities that reduced recidivism markedly, helping at-risk youth avoid falling into gang membership.⁴⁸ These programs recognize the importance of creating alternatives to gang life and, for young people who are targets for gang recruitment, diverting them from a cycle of violence and victimization.

The federal government too is committed to protecting victims by investing in programs to deter and remediate gang violence. It has invested significantly in studying and piloting gang interventions and in improving collaboration between law enforcement agencies targeting gang-related violence.⁴⁹ For example, federal

⁴⁶ U.S. Dep't of Justice, *Reducing Gun Violence: The Boston Gun Project's Operation Ceasefire* (Sep. 2001), <https://tinyurl.com/y5we6pdq>.

⁴⁷ *Id.* at 10.

⁴⁸ National Gang Center, *Broader Urban Involvement and Leadership Development*, <https://tinyurl.com/yy8zx59g> (last visited July 22, 2019). BUILD, in its current iteration, receives public funding from Illinois and the U.S. Department of Education. BUILD, *Sponsorship and Support*, <https://tinyurl.com/yxu5mofp> (last visited July 29, 2019).

⁴⁹ U.S. Dep't of Justice, Office of Juvenile Justice and Delinquency Prevention, *Comprehensive Anti-Gang Initiative*, <https://tinyurl.com/y3atzmdq> (last visited July 22, 2019). For a selection of federal initiatives from the 1980s

funds support nationwide programming implementing anti-gang curricula in schools.⁵⁰ DOJ also works closely with States and localities in developing and implementing gang violence reduction strategies. One of DOJ's flagship programs, Project Safe Neighborhoods, builds upon the success of approaches pioneered at the local level.⁵¹ State and federal law enforcement policy thus recognizes the endemic nature of gang-related violence, and the need for innovative measures to help communities and victims of that violence.

Finally, similar to its guidance regarding domestic violence, UNHCR has noted that there are circumstances in which victims of gang violence can establish eligibility for asylum—specifically, by showing that they are members of a particular social group whose government has been unwilling and unable to protect them from persecution.⁵² UNHCR acknowledges that “individuals may be targeted

through 2008, *see* Congressional Research Service, *Youth Gangs: Background, Legislation, and Issues* (updated Jan. 2008).

⁵⁰ *See* Gang Resistance Education and Training, <https://www.great-online.org/Home/About/What-Is-GREAT> (last visited July 22, 2019).

⁵¹ *See* Edmund F. McGarrell et al., *Project Safe Neighborhoods – A National Program to Reduce Gun Crime: Final Project Report* at iii (Apr. 2009), <https://tinyurl.com/y2e9kp4f> (noting that the program expands upon Boston's Operation Ceasefire and Richmond's Project Exile).

⁵² UNHCR, *Guidance Note on Refugee Claims Relating to Victims of Organized Gangs* 21 (Mar. 2010), <https://tinyurl.com/y6lzljk>.

because of their age, occupation, socio-economic status and their refusal to comply with gangs.”⁵³

Matter of A-B- and the policy memorandum arbitrarily block the victims of such violence from asylum protection and thwart *Amici* States’ humanitarian and policy interest in protecting and supporting victims of gang violence—as well as the federal government’s own commitment to ameliorating gang activity.

C. Victims of domestic and gang-related violence fleeing from the Northern Triangle deserve the protection of the States and the United States.

Because of their focus on domestic and gang-related violence, *Matter of A-B-* and the policy memorandum are likely to disproportionately affect asylum seekers from specific Central American countries. But those refugees deserve equal protection of the States and the United States and must have an opportunity to prove their eligibility for asylum. A large portion of asylum applicants fleeing from El Salvador, Honduras, and Guatemala, collectively known as the “Northern Triangle,” are women and children.⁵⁴ This area is widely regarded as one of the most dangerous regions in the world.⁵⁵ As the number of asylum applications from

⁵³ *See id.*

⁵⁴ Silva Mathema, *They Are (Still) Refugees: People Continue to Flee Violence in Latin American Countries* (Jun. 11, 2018), <https://tinyurl.com/y5hozuz9>.

⁵⁵ *Id.*

the region has increased in recent years, so too has the region's share of successful claims,⁵⁶ illustrating the continued validity and necessity of aiding these refugees fleeing persecution in its many forms.

The Northern Triangle is in close proximity to the United States and to thriving *Amici* States like California, yet violence and crime in the region is widespread and the vast majority is gang-related.⁵⁷ Because of this violence, the Northern Triangle has been likened to “the deadliest war zones around the world.”⁵⁸ Consistently, El Salvador, Honduras, and Guatemala rank among the top ten countries with the highest homicide rates in the world.⁵⁹ In 2017, El Salvador

⁵⁶ Mossaad, *supra*, at 7-8 (depicting in table 5 & 6 that in 2016 nearly 30 percent of successful affirmative and defensive asylum claimants came from the Northern Triangle).

⁵⁷ See Mathema, *supra*.

⁵⁸ Int'l Rescue Comm., *Families Seeking Asylum from Violence in Central America Are Not Criminals*, <https://tinyurl.com/y4zk7x26> (last updated July 26, 2018). El Salvador and Honduras were roiled by decades long civil wars that killed hundreds of thousands. Rocio Cara Labrador & Danielle Renwick, Council on Foreign Relations, *Central America's Violent Northern Triangle* (June 26, 2018), <https://tinyurl.com/yxdpm2de>. The prevalence of gang activity in the Northern Triangle today is inextricable from these violent conflicts. *Id.*

⁵⁹ Labrador & Renwick, *supra*.

and Honduras were reported to have the highest rates of violent deaths per capita among countries not engaged in armed conflict.⁶⁰

Women and children in the region are particularly vulnerable. El Salvador and Honduras hold the first- and second-highest rates of femicide in the world, respectively.⁶¹ In 2017, more than nine women were killed each week in El Salvador.⁶² Women are seen as targets for gangs.⁶³ As one victim reported, “it’s never just sex with the one [gang member]; it’s forced sex with all of them.”⁶⁴ To make matters worse, not only do these women face gang-related violence, but they also suffer from violence at home. Domestic violence and gang violence are often linked as abusers may use gang affiliation to intimidate their partners or threaten

⁶⁰ Claire McEvoy & Gergely Hideg, Small Arms Survey, *Global Violent Deaths 2017* at 25 (2017), <https://tinyurl.com/y7tdxglt> (ranking El Salvador as number one and Honduras as number three).

⁶¹ Humanitarian Innovation Fund, *Gender Based Violence Interventions: Opportunities for Innovation* 89-90 (2016), <https://tinyurl.com/y4xjjmfa>.

⁶² Mathema, *supra*.

⁶³ United Nations High Comm’r for Refugees, *Women on the Run* 16 (Oct. 2015), <https://tinyurl.com/y3p46cfo>; *see also* Oliver Jutersonke et al., *Gangs, Urban Violence, and Security Interventions in Central America* at 6 (2009), <https://tinyurl.com/y5g4rnqk> (noting that pervasive *machismo* drives gang mobilization).

⁶⁴ *Women on the Run* at 6.

them from leaving.⁶⁵ Gang members and other abusers take advantage of weak institutions to perpetrate violence with impunity.⁶⁶ Studies show that “[d]omestic violence in the [Northern Triangle] is commonplace and is rarely discussed openly.”⁶⁷ And gangs target children for recruitment and attempt to coerce them to join through violence.⁶⁸

Reports from the State Department show widespread human rights violations associated with domestic and gang-related violence. *See Sowe v. Mukasey*, 538 F.3d 1281, 1285 (9th Cir. 2008) (recognizing State Department Country Reports as “the most appropriate and perhaps the best resource for information on political situations in foreign nations”). In El Salvador, although there are laws that carry trivial prison sentences for domestic violence, these laws “remain[] poorly

⁶⁵ *Id.* at 25

⁶⁶ *Id.*; *see also* World Justice Project, *Rule of Law Index 2017-2018* (2018), <https://tinyurl.com/y2xuo72o> (ranking countries in the Northern Triangle in the lowest third for adherence to rule of law, with Guatemala and Honduras ranked at 96 and 103 of 113 countries analyzed).

⁶⁷ *Women on the Run*, *supra*, at 17.

⁶⁸ Seth Robins, *3 Crime Factors Driving Northern Triangle Migrants Out*, *InSight Crime* (Oct. 30, 2018), <https://tinyurl.com/y2qf2plu>; Labrador & Renwick, *supra*.

enforced.”⁶⁹ Furthermore, “police officers, soldiers, and their families,”⁷⁰ as well as “women and girls,” remain gang targets.⁷¹ Honduras fares no better, as there is violence and harassment perpetrated by “organized criminal elements and gangs.”⁷² Additionally, in Guatemala, the most egregious human rights issues include “killing of women because of their gender” and the gang recruitment of children, many of whom are the victims of domestic abuse.⁷³

These reports confirm the continued need to protect these individuals escaping domestic and gang-related persecution. The *Amici* States do not contend that all applicants who seek asylum based on domestic violence and gang-related activity should automatically succeed on their claims. But under current law, such claims require individualized analysis. In cases of non-governmental persecution, including cases of domestic and gang-related violence, courts have held that

⁶⁹ U.S. Dep’t of State, Bureau of Democracy, H.R. and Lab., *Country Reports on Human Rights Practices for 2017, El Salvador* 23 (2017), <https://tinyurl.com/yy2bas6v>.

⁷⁰ *Id.* at 10.

⁷¹ *Id.* at 1.

⁷² U.S. Dep’t of State, Bureau of Democracy, H.R. and Lab., *Country Reports on Human Rights Practices for 2017, Honduras* 13 (2017), <https://tinyurl.com/yybzyzes>.

⁷³ U.S. Dep’t of State, Bureau of Democracy, H.R. and Lab., *Country Reports on Human Rights Practices for 2017, Guatemala* 1, 19 (2017), <https://tinyurl.com/y5l4w6lx>.

applicants must show that the government is unable or unwilling to control the specific criminal actor. *See Afriyie v. Holder*, 613 F.3d 924, 931-34 (9th Cir. 2010). *Matter of A-B-*'s general rule against asylum claims based on domestic and gang-related violence ignores this necessarily individualized analysis. The prevalence of such persecution, as shown by the above data, evidences the inability of multiple countries to protect women and targets of gang violence. *See Fiadjoe*, 411 F.3d at 160-62 (considering evidence of widespread human rights abuses against women in concluding that the government was unable or unwilling to aid the petitioner).

The context and endemic nature of violence in the Northern Triangle underscores the potential for asylum seekers to establish that they are targeted because of membership in a particular social group. These claims must not be summarily disposed of as “unlikely” at the credible fear stage, as *Matter of A-B-* instructs. 27 I&N Dec. at 320. *Matter of A-B-* and the policy memorandum wrongfully deny asylum applicants any meaningful opportunity to establish their eligibility for asylum, and puts lives at risk as a result. It has long been the policy of the States and the United States to protect such victims—especially those fleeing persecution in neighboring countries—and the Court should enforce those protections here.

CONCLUSION

For the foregoing reasons, the *Amici* States urge this Court to affirm the judgment of the district court.

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CERTIFICATE OF SERVICE

I certify that on August 1, 2019, electronic copies of this brief were served through the Court's ECF system to all counsel of record.

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CERTIFICATE OF COMPLIANCE

I further certify that this brief complies with the type-volume limitation in Federal Rules of Appellate Procedure 29(a)(5) and 32(a)(7)(B) because the brief contains 5,988 words, excluding exempted parts. This brief complies with the typeface and type style requirements of Federal Rule of Appellate Procedure 32(a)(5) and (6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman 14 point.

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