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Fatma Marouf

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Becoming Unconventional: Constricting the ‘Particular Social Group’ Ground for Asylum

Fatma Marouf[†]

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I. Introduction

In order to qualify as a refugee, an asylum seeker must demonstrate a well-founded fear of persecution on account of at least one of five protected grounds: race, religion, nationality, political opinion, or membership in a particular social group (“PSG”).¹ This definition in the Immigration and Nationality Act (“INA”) reflects the international definition of a refugee in the U.N.

[†] Fatma E. Marouf (B.A., Yale University; J.D., M.P.H., Harvard University) is a Professor of Law and Director of the Immigrant Rights Clinic at Texas A&M University School of Law. This Article draws on ideas and arguments developed during the federal litigation challenging *Matter of W-Y-C- & H-O-B-*, 27 I. & N. Dec. 189 (BIA 2018). Deepest thanks to my co-counsel and *amici* in that case, including Zachary Albus, Jean-Claude Andre, Deborah Anker, Jeffrey Chase, Geoffrey Hoffman, Andrea Meza, and Monique Sherman.

¹ 8 U.S.C. § 1101(a)(42) (2014).

Convention and Protocol Relating to the Status of Refugees (“Refugee Convention”).² Among the five grounds, membership in a particular social group (“PSG”) has created the most confusion. The U.S. Board of Immigration Appeals initially approached interpreting the PSG ground in a manner consistent with the other four grounds.³ Recent administrative decisions issued under the Trump Administration, however, have imposed uniquely strict requirements for claims based on the PSG ground, rather than striving for consistency across the five grounds.⁴ This trend disproportionately disadvantages women and children asylum seekers fleeing violence by private actors who tend to rely on the PSG ground.⁵ In fact, the constrictions of the PSG ground may be specifically targeted at curbing asylum claims by women and children fleeing Central America.⁶

Part I of this Article provides a brief background about the evolution of the PSG ground in the United States and how it has become increasingly complicated and constricted over time. Part II discusses several ways that recent administrative decisions have imposed uniquely strict requirements for PSG-based asylum claims, both procedurally and substantively. Namely, the recent decision of the Board of Immigration Appeals (“BIA”) in *Matter of W-Y-C- & H-O-B-* creates two new procedural restrictions. First, it imposes an exceedingly strict pleading standard in PSG cases by requiring “exact delineation” of the PSG.⁷ Second, *Matter of W-Y-C-* prohibits asylum seekers from revising their PSG in an administrative appeal, departing from longstanding practice.⁸ At the same time, the Attorney General’s recent decision in *Matter of A-B-* imposes two significant substantive restrictions.⁹ It purports

² Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 150; Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267.

³ *Matter of Acosta*, 19 I. & N. Dec. 211, 233 (BIA 1985).

⁴ See Rachel Gonzalez Settlage, *Rejecting the Children of Violence: Why U.S. Asylum Law Should Return to the Acosta Definition of “a Particular Social Group,”* 30 GEO. IMMIGR. L.J. 287, 287 (2016).

⁵ *Id.*

⁶ See *id.*

⁷ *Matter of W-Y-C- & H-O-B-*, 27 I. & N. Dec. 189, 191 (BIA 2018).

⁸ *Id.*

⁹ *Matter of A-B-*, 27 I. & N. Dec. 316, 316 (A.G. 2018).

to exclude entire categories of claims from the PSG ground.¹⁰ Additionally, it imposes a heightened legal standard for showing persecution by non-governmental actors, which is especially common in gender-related cases brought under the PSG ground.¹¹ Part III explores the significant implications of these recent developments.

II. The Evolution of the PSG Ground in U.S. Asylum Jurisprudence

The BIA first interpreted the PSG ground in 1985 in the seminal case *Matter of Acosta*, which applied the statutory construction principle of *ejusdem generis* to define a PSG consistently with the four other protected grounds.¹² Reasoning that the other four grounds for asylum (race, nationality, religion, and political opinion) all involved an immutable characteristic—something that a person cannot or should not have to change because it is fundamental to identity—the BIA applied that same definition to membership in a PSG.¹³ For two decades, *Acosta*'s interpretation of a PSG based on an “immutable characteristic” remained definitive. Under *Acosta*, the BIA recognized many types of PSGs, including, but not limited to, those based on sexual orientation, past employment, tribe, and family.¹⁴

Beginning in 2006, however, the BIA began to revise the definition of a PSG.¹⁵ Between 2006 and 2014, the BIA issued eight precedent decisions addressing the PSG ground.¹⁶ In 2006 and 2008, the BIA introduced the concepts of “social visibility” and

¹⁰ *Id.*

¹¹ *Id.* at 317–19.

¹² *Matter of Acosta*, 19 I. & N. Dec. 211, 233 (BIA 1985).

¹³ *Id.* at 233–34.

¹⁴ *Id.* at 233.

¹⁵ See Fatma E. Marouf, *The Emerging Importance of “Social Visibility” in Defining a Particular Social Group and its Potential Impact on Asylum Claims Related to Sexual Orientation and Gender*, 27 YALE L. & POL'Y REV. 47, 63 (2008).

¹⁶ See *Matter of C-A-*, 23 I. & N. Dec. 951, 951 (BIA 2006); *Matter of A-M-E- & J-G-U-*, 24 I. & N. Dec. 69, 69 (BIA 2007); *Matter of S-E-G-*, 24 I. & N. Dec. 597, 597 (BIA 2008); *Matter of E-A-G-*, 24 I. & N. Dec. 591, 591 (BIA 2008); *Matter of M-E-V-G-*, 26 I. & N. Dec. 227, 227 (BIA 2014); *Matter of W-G-R-*, 26 I. & N. Dec. 208, 208 (BIA 2014), *aff'd in relevant part sub nom.* *Garay-Reyes v. Lynch*, 842 F.3d 1125 (9th Cir. 2016), *cert. denied*, 138 S. Ct. 736 (2018); *Matter of A-R-C-G-*, 26 I. & N. Dec. 388, 388 (BIA 2014).

“particularity” into the PSG analysis, first as factors and then as requirements.¹⁷ All the while, the BIA denied that these new requirements departed from prior decisions and practice, and instead claimed that they had applied the same principles.¹⁸ Because the BIA failed to explain clearly what it meant by the terms “social visibility” and “particularity,” much confusion resulted and the new requirements were challenged in the appellate courts. In 2009 and 2011 respectively, the Seventh and Third Circuits rejected them as unreasonable under a *Chevron* analysis.¹⁹

Eventually, in 2014, the BIA issued two precedent decisions, *Matter of M-E-V-G-* and *Matter of W-G-R-*, attempting to clarify the new requirements.²⁰ These decisions renamed “social visibility” as “social distinction,” explaining that ocular visibility was not required.²¹ Rather, the group has to be seen as distinct by the rest of society.²² The BIA also explained that “particularity” referred to whether the group in question has clear boundaries, so that one can determine if someone is in or out of the group.²³ While the Third Circuit ultimately accepted the “social distinction” and “particularity” requirements in 2018, those elements have not been applied in the Seventh Circuit.²⁴

Despite the BIA’s efforts to clarify the meanings of social distinction and particularity, they remain confusing even for

¹⁷ *Matter of C-A-*, 23 I. & N. Dec. 951, 951 (BIA 2006); *Matter of A-M-E- & J-G-U-*, 24 I. & N. Dec. 69, 69 (BIA 2007); *Matter of S-E-G-*, 24 I. & N. Dec. 579, 579 (BIA 2008); *Matter of E-A-G-*, 24 I. & N. Dec. 591, 591 (BIA 2008).

¹⁸ Some circuit courts accepted the BIA’s position. *See, e.g., Hernandez de la Cruz v. Lynch*, 819 F.3d 784, 786–87 n.1 (5th Cir. 2016) (stating that Board’s decision in *M-E-V-G-* clarified but did not depart from principles in prior cases).

¹⁹ *See Gatimi v. Holder*, 578 F.3d 611, 611 (7th Cir. 2009); *Valdiviezo-Galdamez v. Att’y Gen. of U.S.*, 663 F.3d 582, 582 (3d Cir. 2011). In 2018, the Third Circuit ultimately accepted the particularity and social distinction requirements after the BIA’s clarifications. *See S.E.R.L. v. Att’y Gen.*, 894 F.3d 535, 535 (3d Cir. 2018).

²⁰ *Matter of M-E-V-G-*, 26 I. & N. Dec. 227, 227 (BIA 2014); *Matter of W-G-R-*, 26 I. & N. Dec. 208, 208 (BIA 2014), *aff’d in relevant part sub nom; Garay-Reyes v. Lynch*, 842 F.3d 1125, 1125 (9th Cir. 2016), *cert. denied*, 138 S. Ct. 736 (2018).

²¹ *Matter of M-E-V-G-*, 26 I. & N. Dec. at 227; *Matter of W-G-R-*, 26 I. & N. Dec. at 208.

²² *Matter of M-E-V-G-*, 26 I. & N. Dec. at 238.

²³ *Id.* at 239.

²⁴ *See Gatimi v. Holder*, 578 F.3d at 611. In 2018, the Third Circuit ultimately accepted the particularity and social distinction requirements after the BIA’s clarifications. *See S.E.R.L. v. Att’y Gen.*, 894 F.3d at 535.

attorneys and are almost impossible for unrepresented asylum seekers to understand.²⁵ One reason for the persistent confusion is that the BIA's various explanations have been contradictory. For example, the BIA has defined "particularity" to mean that a group has "definable boundaries," but it has also rejected groups with clear boundaries on the basis that the group is too broad.²⁶ Similarly, the BIA held that social distinction is based on the view of society as a whole, but in maintaining that previously recognized PSGs satisfied this standard, it relied on the perspective of the persecutors.²⁷ Former Attorney General Sessions added to this confusion in *Matter of A-B-*, by rejecting the BIA's analysis of particularity and social distinction in *Matter of A-R-C-G-*.²⁸ In *A-B-*, Sessions stated that even if "each term [in the PSG] has a commonly understood definition," that "does not establish that these terms have the requisite particularity in identifying a distinct social group."²⁹ However, the Attorney General failed to explain what *would* provide a clear benchmark for who falls within the group.

Additionally, the difference between "social distinction" and "particularity" remains unclear. In *Valdiviezo-Galdamez*, the Third Circuit noted that it was "hard-pressed to discern any difference" between the requirements.³⁰ Part of the confusion is that the BIA and Attorney General have defined *both* factors by referencing societal perceptions of discreteness and distinction.³¹ The two

²⁵ *Matter of M-E-V-G-*, 26 I. & N. Dec. at 241 (acknowledging that the social distinction and particularity requirements may overlap); *Rios v. Lynch*, 807 F.3d 1123, 1126 (9th Cir. 2015) (describing membership in a particular social group as "an enigmatic and difficult-to-define term"); *Rivera-Barrientos v. Holder*, 666 F.3d 641, 647 (10th Cir. 2012) (noting "the evolving boundaries of social group membership"); see also DEBORAH ANKER, *LAW OF ASYLUM* §5:40-43 (Thompson Reuters ed., 2018).

²⁶ See, e.g., *Matter of W-G-R-*, 26 I. & N. Dec. at 221 (finding that the proposed group of "former members of the Mara 18 gang in El Salvador who have renounced their gang membership" was not particular because it "could include persons of any age, sex, or background"); *Matter of M-E-V-G-*, 26 I. & N. Dec. at 239 (stating that a PSG must not be "overbroad").

²⁷ *Matter of W-G-R-*, 26 I. & N. Dec. at 218-19.

²⁸ *Matter of A-B-*, 27 I. & N. Dec. 316, 335-36 (A.G. 2018) (overruling *Matter of A-R-C-G-*, 26 I. & N. Dec. 388 (BIA 2014)).

²⁹ *Id.* at 335.

³⁰ *Valdiviezo-Galdamez v. Att'y Gen. of U.S.*, 663 F.3d 582, 604 (3d Cir. 2011).

³¹ See *Matter of W-G-R-*, 26 I. & N. Dec. at 216; *Matter of A-B-*, 27 I. & N. Dec. at 335 (reasoning that social groups based on resistance to gang violence likely lack particularity because they "possess no distinguishing characteristic or concrete trait that

requirements also often conflict with each other, such that satisfying one undermines the other. The Attorney General acknowledged this tension in *Matter of A-B-*, stating that “[PSG] definitions that seek to avoid particularity issues by defining a narrow class . . . will often lack sufficient social distinction to be cognizable as a distinct social group, rather than a description of individuals sharing certain traits or experiences.”³² Thus, asylum seekers are often trapped between trying to avoid a PSG that is “too broad to have definable boundaries” and one that is “too narrow to have larger significance in society.”³³

The social distinction and particularity requirements not only create a bewildering legal standard but also impose an incredibly high evidentiary burden. Satisfying these requirements generally requires submitting voluminous country conditions documents, which unrepresented detainees cannot obtain. In addition, expert testimony is often required. Many detainees cannot afford counsel, much less have the wherewithal for an expert to testify on their behalf.

It also remains unclear what type of evidence actually establishes the requirements. In *Matter of A-R-C-G-*, the BIA relied on country conditions evidence that Guatemala has a “culture of machismo and family violence,” and that police often fail to respond to requests for assistance related to domestic violence. Based on this, the BIA found that the group defined as “married women who are unable to leave the relationship” is socially distinct.³⁴ However, former Attorney General Sessions found that same evidence inadequate in *Matter of A-B-*.³⁵ Without explaining what type of evidence *would* establish social distinction, Sessions speculated that each victim of domestic violence is viewed “as a victim of a particular abuser in highly individualized circumstances” rather than as any type of group.³⁶ This leaves asylum seekers with little practical guidance about how to establish that a group satisfies the particularity and social distinction requirements.

would identify them as members of such a group,” which sounds more like an analysis of social distinction).

³² *Matter of A-B-*, 27 I. & N. Dec. at 336.

³³ *Id.*

³⁴ *Matter of A-R-C-G-*, 26 I. & N. Dec. at 394.

³⁵ *Matter of A-B-*, 27 I. & N. Dec. at 336.

³⁶ *Id.*

III. Recent Developments Constricting the PSG Ground

The recent decision in *Matter of W-Y-C* imposes two new procedural restrictions on the PSG ground, while *Matter of A-B* creates two new substantive restrictions. As discussed below, *Matter of W-Y-C* imposes an extremely high pleading standard unlike any other by requiring an “exact delineation” of the PSG. At the same time, it prohibits applicants from revising the definition of PSG at the administrative level. Meanwhile, *Matter of A-B* purports to restrict entire categories of PSG-based asylum claims, while also imposing a higher legal standard for persecution by non-governmental actors.

A. Procedural Constrictions

1. Imposing an Exceedingly Strict Pleading Standard for PSG Claims

Pleading rules are supposed to play a “gatekeeping” function by allowing courts to get rid of meritless cases quickly, thereby reducing litigation costs and promoting judicial efficiency.³⁷ If a pleading standard is too strict, however, it may also exclude cases with merit before relevant information can come to light. Furthermore, at least one empirical study has found that heightened pleading standards do not actually do a better job of filtering out meritless lawsuits.³⁸

The BIA’s decision in *Matter of W-Y-C* imposes an extremely strict pleading standard. It singles out asylum cases based on the PSG ground as an area where the litigant must provide an “exact delineation” of a claim to avoid waiver.³⁹ This “exact delineation” standard is not applied in any other area of law, or to any other type of asylum case.⁴⁰ Asylum seekers whose cases are based on religion or political opinion are not required to provide an “exact

³⁷ Alexander A. Reinert, *The Costs of Heightened Pleading*, 86 INDIAN L.J. 119, 123–24 (2011).

³⁸ *Id.* at 125–26 (finding that the heightened “plausibility” pleading standard does not do better than the notice pleading standard for filtering out meritless claims in federal civil litigation).

³⁹ *Matter of W-Y-C- & H-O-B-*, 27 I. & N. Dec. 189, 191 (BIA 2018).

⁴⁰ See note 42 below and accompanying text (explaining that courts traditionally require a litigant to “adequately raise” an issue, not provide an “exact delineation”).

delineation” of their claim.⁴¹

The traditional legal standard to avoid waiver of a claim is that the litigant must “adequately raise” an issue below. This is true even in the Fifth Circuit where *W-Y-C-* arose. For example, the Fifth Circuit has explained, “For this court to have jurisdiction over an issue that the BIA has adequate means of addressing, a petitioner must *adequately raise that issue* before the BIA.”⁴² In *Eduard v. Ashcroft*, the Fifth Circuit found that a petitioner had “adequately raised” a claim under the Convention Against Torture even though he never explicitly stated that he was applying for that form of relief and did not check the box for it on the application form.⁴³ Similarly, in *Hongyok v. Gonzales*, the court allowed the petitioner to present a PSG that did not “significantly differ” from the one presented to the Board, reasoning that she had “adequately presented” her proposed ground for relief to the agency.⁴⁴ Requiring an asylum seeker to provide an “exact delineation” of a PSG is a much stricter standard than simply requiring the applicant to “adequately raise” the claim. In other contexts, federal courts have also applied the “adequately raise” standard for preserving a claim.⁴⁵ Indeed, in no area of law is “exact delineation” the pleading standard.

The rigidity of the “exact delineation” requirement is also at odds with congressional intent. The INA makes it clear that asylum is not supposed to be an exclusionary process by giving immigration

⁴¹ *Matter of W-Y-C-* applies only to the PSG ground, and no other cases mention “exact delineation” as a standard in asylum cases.

⁴² *Omari v. Holder*, 562 F.3d 314, 424 (5th Cir. 2009) (emphasis added); *see also* *Calix v. Lynch*, 784 F.3d 1000, 1003 (5th Cir. 2015) (finding that the petitioner had “adequately raised” the argument that his conviction did not trigger the stop-time rule for cancellation of removal); *see also* *Lucio-Rayos v. Sessions*, 875 F.3d 573, 577 n.6 (10th Cir. 2017) (declining to address an argument that the petitioner “did not adequately raise to the BIA”); *Garcia-Gonzalez v. Holder*, 737 F.3d 498, 501 n.3 (8th Cir. 2013) (“An alien has not adequately raised an issue before the BIA if he does not address it in his briefing before the BIA.”).

⁴³ *Eduard v. Ashcroft*, 379 F.3d 182, 195 (5th Cir. 2004).

⁴⁴ *Hongyok v. Gonzales*, 492 F.3d 547, 550 (5th Cir. 2007) (emphasis added).

⁴⁵ *See, e.g.*, *United States v. Garza*, 70 F. App'x 212, 213 (5th Cir. 2003) (“Because Garza did not adequately raise the issue of whether the activation of the overhead lights on the Border Patrol vehicle after Garza stopped his vehicle constituted a seizure in his motion to suppress before the district court, he has waived this argument”) (emphasis added); *Cupit v. Whitley*, 28 F.3d 532, 535 (5th Cir. 1995) (holding, in a habeas case, that the procedural default and exhaustion doctrine objections were waived, because the petitioner “did indeed adequately raise his hearsay arguments through his state court proceedings”) (emphasis added).

judges (“IJs”) an affirmative obligation to develop the record.⁴⁶ Likewise, the regulations require IJs to advise noncitizens about their “apparent eligibility” to apply for any benefits in the INA.⁴⁷ The new “exact delineation” standard conflicts with this collaborative approach. Courts have found that an IJ’s failure to advise a noncitizen of “apparent eligibility” to apply for relief is a due process violation.⁴⁸ Furthermore, the BIA has explained that although the burden of proof is ultimately on the respondent, the IJ should take an active role in helping the respondent develop her legal theory from the facts presented.⁴⁹

The U.N. High Commissioner for Refugees (UNHCR) has also stressed that “the adjudicator shares the duty to ascertain and evaluate all the relevant facts,” noting that “[t]his is achieved, to a large extent, by the adjudicator . . . guiding the applicant in providing the relevant information.”⁵⁰ While *W-Y-C* assumes that every asylum applicant should be able to define her PSG perfectly, UNHCR recognizes that “[o]ften the applicant himself may not be aware of the reasons for the persecution feared.”⁵¹ It is not, however, his duty to analyze the case to such an extent as to identify

⁴⁶ See 8 U.S.C. §§ 1158(b)(1), 1241(b)(3)(A), 1641(b)(1); see also *Sankoh v. Mukasey*, 539 F.3d 456, 467 (7th Cir. 2008) (“Unlike Article III courts, an immigration court is a more inquisitorial tribunal.”).

⁴⁷ 8 C.F.R. § 240.11(a)(2).

⁴⁸ See, e.g., *United States v. Lopez-Velasquez*, 629 F.3d 894, 896–97 (9th Cir. 2010) (en banc); *Toure v. Att’y Gen. of U.S.*, 443 F.3d 310, 325 (3d Cir. 2006) (“an [immigration judge] has a duty to develop an applicant’s testimony, especially regarding an issue that she may find dispositive”); *Agyeman v. INS*, 296 F.3d 871, 877 (9th Cir. 2002) (“[T]he IJ must adequately explain the hearing procedures to the alien, including what he must prove to establish his basis for relief.”).

⁴⁹ See *Matter of S-M-J-*, 21 I. & N. Dec. 722, 723–24 (BIA 1997) (recognizing the responsibility of the immigration judge to ensure that refugee protection is provided when warranted, and specifying that a “cooperative approach” between the immigration judge and the applicant is therefore necessary in immigration court); see also *Matter of Y-L-*, 24 I. & N. Dec. 151, 161 (BIA 2007) (admonishing the immigration judge for failing to notify an asylum applicant of her concerns with the application and providing the applicant with an opportunity to respond).

⁵⁰ U.N. Office of the United Nations High Commissioner for Refugees, *Note on Burden and Standard of Proof in Refugee Claims* (Dec. 16, 1998).

⁵¹ UNHCR, HANDBOOK AND GUIDELINES ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS, U.N. Doc. HCR/IP/4/ENG/REV.3, 15–16 [hereinafter UNCHR HANDBOOK], available at <https://www.unhcr.org/publications/legal/3d58e13b4/handbook-procedures-criteria-determining-refugee-status-under-1951-convention.html> [https://perma.cc/8CFX-DJGV].

the reasons in detail.”⁵² According to UNHCR, “it is for the examiner, when investigating the facts of the case, to ascertain the reason or reasons for the persecution feared and to decide whether the definition in the 1951 Convention it met within this respect.”⁵³

Although the BIA’s decision in *W-Y-C-* quotes an earlier decision, *Matter of A-T-*, as setting forth the “exact delineation” requirement—suggesting that this has been the standard for over a decade—the language in *A-T-* was mere dicta in remand instructions and did not set forth a general rule. In its initial 2007 decision in *Matter of A-T-*, the BIA found that a woman from Mali who had suffered female genital mutilation had failed to establish a risk of future persecution because there was no chance she would be persecuted again by the same procedure.⁵⁴ The BIA noted that in a prior motion to reconsider, the applicant had “presented a much broader group in arguing that FGM was only one aspect in the lifelong subjugation of women in her culture.”⁵⁵ The BIA did not refuse to consider the group, but instead found that the record in the case did not support that claim.⁵⁶

The Attorney General vacated that decision in 2008, concluding that the BIA had erred in denying the application because the feared future persecution could not “take precisely the same form as past persecution.”⁵⁷ The Attorney General instructed the BIA to determine whether the past FGM triggered a presumption of a continuing threat to the applicant’s life or freedom on account of her membership in a particular social group.⁵⁸ In a footnote, the Attorney General remarked, “[i]n most cases of this sort, it would be better practice for Immigration Judges and the Board to address at the outset whether the applicant has established persecution on account of membership in a particular social group, rather than assuming it as the Board did here.”⁵⁹ This language clearly reflects

⁵² *Id.*

⁵³ *Id.*; see also *American Courts and the U.N. High Commissioner for Refugees: A Need for Harmony in the Face of a Refugee Crisis*, 131 HARV. L. REV. 1399 (2018) (arguing that U.S. courts should defer to UNHCR in interpreting the Refugee Convention).

⁵⁴ *Matter of A-T-*, 24 I. & N. Dec. 296, 296–97 (BIA 2007).

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Matter of A-T-*, 24 I. & N. Dec. at 621.

⁵⁸ *Id.* at 622.

⁵⁹ *Id.* at 623 n.7.

a recommendation, not a rule. Furthermore, the decision states the applicant “must initially *identify* the particular social group or groups in which membership is claimed,” not provide an exact delineation of the group.⁶⁰

In 2009, after the case was remanded to the BIA, the BIA issued another published decision in *Matter of A-T*.⁶¹ That decision provides “[b]ecause the matter was not consistently presented below, the DHS requests that on remand the respondent specifically delineate the particular social group(s) [to which] she claims to belong.”⁶² DHS requested the respondent to provide other information as well, such as whether she was invoking any other grounds for asylum, and the identity of her past persecutor.⁶³ In instructing the respondent to provide an “exact delineation” of her PSG on remand, the Board stressed “this is an issue that has not been consistently presented by the respondent in these proceedings, and this alone precludes us from resolving her case on the record now before us.”⁶⁴ Thus, the BIA never suggested that *all* applicants relying on the PSG ground should be required to provide an exact delineation of the PSG. Rather, its remand instructions were highly specific to the facts and history of the case. Exact delineation was important in *A-T* because the agency was trying to determine whether the applicant’s “fear of forced marriage [was] on account of the same enumerated ground as [her] past persecution.”⁶⁵ *A-T* did not establish a general rule requiring all asylum seekers to provide an exact delineation of the PSG.

Recent changes in how IJs are handling cases post *W-Y-C* show that *W-Y-C* is the case that changed the rules, not the BIA’s 2009 decision in *A-T*. Relying on *Matter of W-Y-C*, some IJs have been issuing orders stylized as “summary judgments” and denying asylum early on in the proceedings without even giving the applicant an evidentiary hearing, based on the applicant’s failure to provide an exact delineation of the PSG.⁶⁶ As former Immigration Judge Jeffrey S. Chase has explained, such “summary denials” are

⁶⁰ *Id.*

⁶¹ *Matter of A-T*, 25 I. & N. Dec. 4, 4 (BIA 2009).

⁶² *Id.* at 9.

⁶³ *Id.*

⁶⁴ *Id.* at 10.

⁶⁵ *See id.* at 10 n.6.

⁶⁶ Summary judgment forms are on file with author.

a predictable by-product of a rule requiring “exact delineation.”⁶⁷ There is no evidence of immigration judges pretermittting asylum claims based on other protected grounds; only PSG-based asylum claims are being denied without an evidentiary hearing or any opportunity to testify.

Decisions issued by former Attorney General Sessions shortly before the BIA’s decision in *W-Y-C-* paved the way for these summary dismissals. In *E-F-H-L-*, Sessions vacated a Board decision recognizing the right to a full asylum hearing.⁶⁸ Shortly thereafter, in *Castro-Tum*, Sessions stressed the importance of expeditious processing.⁶⁹ Similarly, in *Matter of L-A-B-R-*, which dealt with continuances, Sessions stressed the “efficient enforcement of the immigration laws.”⁷⁰ These decisions all prioritize speed in decision-making at the expense of a fair process.

Immigration judges who are pretermittting PSG-based asylum cases without a full hearing may be violating longstanding agency requirements and constitutional due process norms. In a 1989 decision called *Matter of Fefe*, the BIA stressed that full examination of the applicant is “an essential aspect of the asylum adjudication.”⁷¹ There, the BIA cited the *UNHCR Handbook*, which recognizes that testimony (a personal interview in the context of refugee status determinations), rather than simply written materials, is required to properly assess a claim for refugee status.⁷² The Supreme Court has recognized that the *UNHCR Handbook* provides “significant guidance in constructing the United Nations Protocol . . . to which Congress sought to conform United States refugee law.”⁷³

⁶⁷ See Jeffrey S. Chase, *Are Summary Denials Coming to Immigration Court?*, JEFFREYSCHASE.COM (June 24, 2018), <https://www.jeffreyschase.com/blog/2018/6/24/are-summary-denials-coming-to-immigration-court> [<https://perma.cc/FGU8-8TA4>]; Jeffrey S. Chase, *The Impact of the BIA’s Decision in Matter of W-Y-C- & H-O-B-*, JEFFREYSCHASE.COM (Jan. 26, 2018), <https://www.jeffreyschase.com/blog/2018/1/26/0sg8ru1tl0gz4becqimcrtt4ns8yjj> [<https://perma.cc/WH4R-Y88U>].

⁶⁸ *Matter of E-F-H-L-*, 27 I. & N. Dec. 226, 226 (A.G. 2018).

⁶⁹ See *Matter of Castro-Tum*, 27 I. & N. Dec. 271, 293 (A.G. 2018); *Matter of L-A-B-R- et al.*, 27 I. & N. Dec. 405, 406–07 (A.G. 2018).

⁷⁰ See *Matter of L-A-B-R- et al.*, 27 I. & N. at 407.

⁷¹ *Matter of Fefe*, 20 I. & N. Dec. 116, 117–18 (BIA 1989).

⁷² *Id.* at 118 (citing UNHCR HANDBOOK, *supra* note 51, at ¶ 199–200).

⁷³ *INS v. Cardoza-Fonseca*, 480 U.S. 421, 439–40 n.22 (1987).

When the Supreme Court raised the pleading standard for federal civil litigation from “notice” pleading to “plausibility” in *Iqbal* and *Twombly*, commentators criticized the change for foreclosing certain classes of plaintiffs from relief,⁷⁴ creating “disarray,”⁷⁵ introducing unpredictability into the process of pretrial disposition for all types of claims,⁷⁶ reflecting “procedural judicial activism,”⁷⁷ and violating procedural due process rights by imposing a pleading standard that is difficult for laypeople to satisfy.⁷⁸ One commentator claimed that *Iqbal* “may be one of the most infamous and harmful [decisions] to . . . individual rights of this generation.”⁷⁹

Similar critiques can be made of the new “exact delineation” standard for PSG-based asylum claims. Appellate courts will likely soon have to address whether this is an appropriate pleading standard, especially as more cases of asylum claims being pretermitted without an evidentiary hearing come to light. Courts should reject this new pleading standard as an arbitrary departure from precedent that conflicts with all other pleading standards. A

⁷⁴ See, e.g., David Marcus, *The Past, Present, and Future of Trans-Substantivity in Federal Civil Procedure*, 59 DEPAUL L. REV. 371, 426 (2010); see Alex Reinert, *Procedural Barriers to Civil Rights Litigation and the Illusory Promise of Equity*, 78 UMKC L. REV. 931, 940–41 (2010).

⁷⁵ Joseph A. Seiner, *After Iqbal*, 45 WAKE FOREST L. REV. 179, 192 (2010) (“*Iqbal* ha[s] left the requirements for pleading intentional employment-discrimination claims in disarray . . .”).

⁷⁶ See Kevin M. Clermont & Stephen C. Yeazell, *Inventing Tests, Destabilizing Systems*, 95 IOWA L. REV. 821, 832 (2010) (criticizing *Iqbal* for “fix[ing] on a novel and unpredictable test”); Erwin Chemerinsky, *Closing the Courthouse Doors: Transcript of the 2010 Honorable James R. Browning Distinguished Lecture in Law*, 71 MONT. L. REV. 285, 291 (2010) (describing the *Iqbal* standard as “mean [ing] . . . that it all depends on the luck of the draw and who your district judge is”); Lisa Eichhorn, *A Sense of Disentitlement: Frame-Shifting and Metaphor in Ashcroft v. Iqbal*, 62 FLA. L. REV. 951, 953 (2010) (noting “the unbounded discretion that the opinion grants to judges . . .”).

⁷⁷ See generally Goutam U. Jois, *Pearson, Iqbal, and Procedural Judicial Activism*, 37 FLA. ST. U. L. REV. 901–907 (2010) (addressing problems posed by the *Pearson Iqbal* interaction, specifically and the curtailment of remedy availability in civil litigation).

⁷⁸ Melodee C. Rhodes, *The Battle Lines of Federal Rule of Civil Procedure 8(a)(2) and the Effects on a Pro Se Litigant’s Inability to Survive a Motion to Dismiss*, 22 ST. THOMAS L. REV. 527, 529 (2010) (arguing that under *Iqbal*, FRCP 8(a)(2) “violates an individual’s procedural due process rights by requiring a pleading standard that a layperson finds difficult to satisfy”).

⁷⁹ Darwinder S. Sidhu, *First Korematsu and Now Ashcroft v. Iqbal: The Latest Chapter in the Wartime Supreme Court’s Disregard for Claims of Discrimination*, 58 BUFF. L. REV. 419, 423 (2010).

recent Fifth Circuit precedent affirmed the BIA's decision in *Matter of W-Y-C-*, but a concurring opinion by Judge Dennis rejected the "exact delineation" standard as "exacting and unnecessary."⁸⁰ Recognizing that "[d]efining a PSG is unspeakably complex and the requirements ever-changing," Judge Dennis concluded that "[s]omeone who faces persecution on account of a protected ground is no less deserving of asylum's protections because of her inability to delineate a convoluted legal concept."⁸¹ The "exact delineation" standard does not weed out meritless claims and protect judicial efficiency. Rather, it unfairly disadvantages particular classes of asylum seekers whose claims happen to be based on the most perplexing and unpredictable ground for asylum.

2. *Prohibiting Revision or Clarification of the PSG at the Administrative Level*

The second way that *Matter of W-Y-C-* restricts PSG-based asylum claims is by prohibiting revision of the PSG definition at the administrative level. This new rule conflicts with the BIA's longstanding practice of reviewing revised PSGs, and even revising them itself, based on an existing evidentiary record.⁸² In *Matter of W-Y-C-*, the BIA reasoned its role as an appellate body that cannot make factual findings in the first instance prevented it from reviewing a revised PSG, explaining that "[a] determination whether a social group is cognizable is a fact-based inquiry" and stressing the "inherently factual nature of the social group analysis."⁸³ At the same time, however, the BIA acknowledged that it "review[s] the ultimate determination whether a proposed group is cognizable de novo."⁸⁴ Federal appellate court decisions confirm that the question of whether a PSG is cognizable is a legal question that the BIA reviews de novo.⁸⁵ Yet the subsidiary elements of

⁸⁰ *Cantarero-Lagos v. Barr*, 2019 WL 1986920 at *6 (5th Cir. 2019) (Dennis, J., concurring).

⁸¹ *Id.*

⁸² *See generally* *Matter of Kasinga*, 21 I. & N. Dec. 357 (BIA 1996) (allowing both parties to reform on appeal).

⁸³ *Matter of W-Y-C-*, 27 I. & N. Dec. 189, 191 (BIA 2018) (quoting *Matter of L-E-A-*, 27 I. & N. Dec. 40, 42 (BIA 2017)).

⁸⁴ *Id.*

⁸⁵ *See, e.g.,* *Hernandez-De La Cruz v. Lynch*, 819 F.3d 784, 786 (5th Cir. 2016) ("Petitioner's challenge to the determination that 'former informants' do not constitute a 'particular social group' is a legal question that we have jurisdiction to review"); *Hongyok*

immutability, social distinction, and particularity, as well as membership in the group and nexus (the connection between the PSG and the persecution), are all factual findings.

The question then becomes whether the BIA can determine whether a PSG is cognizable when an IJ has not made the subsidiary findings about the PSG. The Eighth Circuit recently explained that while immutability, particularity, and social distinction are necessary elements to a particular social group, the analysis “does not require the immigration judge to make findings on each element.”⁸⁶ There, the IJ rejected the PSG without addressing any of the specific elements.⁸⁷ Despite having no findings on these elements from the IJ, the BIA ruled that the PSG lacked particularity.⁸⁸ In that case, the BIA was able to assess particularity on its own, and the Eighth Circuit denied Mayorga-Rosa’s petition for review.⁸⁹ If the BIA does not need to review factual findings made by the IJ on each of the elements, then it should be able to determine if a reformulated PSG is cognizable *de novo* based on an existing record.

Additionally, if the original PSG presented to the IJ and the revised PSG presented to the BIA are substantially similar, then the IJ’s findings on the subsidiary elements may apply equally to the revised PSG. This raises the potentially tricky question of how to determine whether two groups are substantially similar. In the case of *W-Y-C-*, the BIA found that the two groups were not substantially similar.⁹⁰ There, the original PSG presented to the IJ was “[s]ingle Honduran women, age 14 to 30 who are victims of sexual abuse

v. Gonzales, 492 F.3d 547, 550 (5th Cir. 2007) (“We need not and do not address the BIA’s legal conclusion that escaped sex slaves are not a protected social group”); *Matter of A-R-C-G-*, 26 I. & N. Dec. 388, 390 (BIA 2014) (“The question whether a group is a ‘particular social group’ within the meaning of the Act is a question of law that we review *de novo*.”); *Ngugi v. Lynch*, 826 F.3d 1132, 1137–39 (8th Cir. 2016); *Paloka v. Holder*, 762 F.3d 191, 195 (2d Cir. 2014); *Cece v. Holder*, 733 F.3d 662, 668 (7th Cir. 2013) (en banc); *Ayala v. Holder*, 640 F.3d 1095, 1096 (9th Cir. 2011); *Castañeda-Castillo v. Holder*, 638 F.3d 354, 362 (1st Cir. 2011); *Cruz-Funes v. Gonzales*, 406 F.3d 1187, 1191 (10th Cir. 2005).

⁸⁶ *Mayorga-Rosa v. Session*, 888 F.3d 379, 383 (8th Cir. 2018).

⁸⁷ *See generally id.* (rejecting PSG overlooking specific elements).

⁸⁸ *Id.* at 384.

⁸⁹ *See id.* at 384–85.

⁹⁰ *See Matter of W-Y-C-*, 27 I. & N. Dec. 189, 192 (BIA 2018) (“social group is substantially different from the one delineated below.”).

within the family and whom the government fails to protect.”⁹¹ The group presented to the BIA was “Honduran women and girls who cannot sever their family ties.”⁹² At first glance, these groups may seem quite different, but they both share the immutable characteristics of gender, family ties, childhood status, and nationality. Moreover, “lack of government protection for women in Honduras is what makes it so difficult for women to sever family ties.”⁹³ Nevertheless, the BIA found that they were not substantially similar.⁹⁴ Since neither the BIA nor any appellate court has set forth a test for determining whether two groups are substantially similar, the determination can be a very subjective analysis that leaves much to the BIA’s discretion. A more objective test would be whether the BIA can determine if a PSG is cognizable based on the existing evidentiary record.

Numerous cases show a longstanding practice of allowing asylum seekers to reformulate their groups, not only at the administrative level in an appeal to the BIA, but even at the circuit court level.⁹⁵ The BIA and federal courts have frequently considered these reformulated groups as long as they can analyze them based on the existing record. For example, in *Matter of Kasinga*, an en banc decision on female genital mutilation, the BIA allowed both parties to reformulate the PSG on appeal, and then ultimately adopted its own definition of the PSG.⁹⁶ There, the IJ analyzed “all tribal women from certain northern tribes” as the

⁹¹ *Id.* at 189.

⁹² *Id.* at 190.

⁹³ Opening Brief for Petitioners at 25, *Petitioners v. Sessions*, (No. 18 -60115) (challenging *Matter of W-Y-C- and H-O-B-*).

⁹⁴ See *Matter of W-Y-C-*, 27 I. & N. Dec. at 192.

⁹⁵ See *Hongyok v. Gonzales*, 492 F.3d 547, 550 (showing reformulation at the circuit court level, allowing “semantic” revisions to the social group in a circuit court appeal); *Calel-Chitic v. Holder*, 333 F. App’x 845, 847 (5th Cir. 2009) (allowing the petitioner to proceed with a particular social group claim in his Fifth Circuit appeal even though he had never articulated a social group in immigration court); see also *Sanchez-Robles v. Lynch*, 808 F.3d 688, 692 (6th Cir. 2015) (considering but ultimately rejecting a reformulated social group); *Valdiviezo-Galdamez v. Att’y Gen. of U.S.*, 502 F.3d 285, 290 n.3 (3d Cir. 2007) (reformulating the social group by omitting part of the original definition); *Hernandez-Montiel v. INS*, 225 F.3d 1084, 1094 (9th Cir. 2000) (redefining the social group as gay men with “female sexual identities”); *Lwin v. I.N.S.*, 144 F.3d 505, 512 (7th Cir. 1998) (refining the social group to be “parents of Burmese student dissidents”).

⁹⁶ *Matter of Kasinga*, 21 I. & N. Dec. 357, 365 (BIA 1996).

PSG.⁹⁷ Before the BIA, Kasinga proposed a PSG defined as “[Y]oung women of the Tchamba-Kusuntu tribe who are opposed to the tribal practices of FGM and forced polygamous marriages, and have no protection against it.”⁹⁸ The INS proposed a PSG defined as “Young women of the Tchamba Kunsuntu tribe who are opposed to FGM.”⁹⁹ The BIA ultimately adopted its own PSG, defined as “young women of the Tchamba-Kusuntu Tribe who have not had FGM, as practiced by that tribe, and who oppose the practice.”¹⁰⁰

In *Matter of M-E-V-G-*, another important case that defined the “social distinction” and “particularity” requirements for a PSG, the BIA remanded the case for further fact-finding, in part because “the respondent’s proposed particular social group has evolved during the pendency of his appeal.”¹⁰¹ Most recently, in *Matter of A-B-*, the Attorney General himself reformulated the social group.¹⁰² There, the applicant had defined the group as “El Salvadoran women who are unable to leave their domestic relationships where they have children in common.”¹⁰³ Yet the Attorney General’s decision addressed “whether, and under what circumstances, being a victim of a private criminal activity constitutes persecution on account of membership in a particular social group.”¹⁰⁴ Allowing the Attorney General, but not an asylum seeker, to reformulate a PSG shows that different rules are being applied to the government and to litigants. This violates the basic principle that the government must be held to the same standards as any other litigant to ensure a fair proceeding.¹⁰⁵

Federal court precedents further demonstrate that the BIA previously allowed reformulation of the PSG at the administrative

⁹⁷ See *Matter of Kasinga*, File No. A73476695 12 (U.S. Dep’t of Justice 1995).

⁹⁸ Resp’t Br. at 31, *Matter of Kasinga*, 21 I. & N. Dec. at 365.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ See *Matter of W-G-R-*, 26 I. & N. Dec. 208, 252 (BIA 2014).

¹⁰² See *Matter of A-B-*, 27 I. & N. Dec. 316 (A.G. 2018).

¹⁰³ *Id.* at 343.

¹⁰⁴ *Id.* at 325.

¹⁰⁵ See Fed. R. Civ. P. 1 (the Government as a litigant in a denaturalization proceeding is bound by the same rules which apply to all other litigant); *U.S. v. Stinson*, 197 U.S. 200, 205 (1905) (“The government is subjected to the same rules respecting the burden of proof, the quantity and character of evidence, the presumptions of law and fact, that attend the prosecution of a like action by an individual.”).

level. In *De Abarca*, the First Circuit noted that the IJ had considered the PSG defined as “mothers of individuals who resist gang activity,” but the BIA redefined group as “nuclear family” and analyzed the redefined group.¹⁰⁶ In *Pirir-Boc*, the Ninth Circuit noted that the Board had changed the applicant’s articulation of the PSG from “persons taking concrete steps to oppose gang membership and gang authority” to “those who have taken direct action to oppose criminal gangs.”¹⁰⁷ In *Paloka*, the Second Circuit explained that the petitioner had presented three different PSGs to IJ and merged them into one PSG on appeal to the BIA; she also refined her PSG on appeal.¹⁰⁸ In *Pedromo*, the court noted that the original PSG was “women between the ages of 14 and 40 who are Guatemalan and live in the US,” but the BIA considered a reformulated PSG of “all women in Guatemala.”¹⁰⁹ And in *Cece*, the Seventh Circuit stressed that even though “the description of [the petitioner’s] social group varied from one iteration to the next,” these “inconsistencies . . . do not upset the claim.”¹¹⁰

In some cases, the BIA considered PSGs that were dramatically different from those presented to the IJ. For example, in *Hernandez-Navarro*, the initial PSG was “individuals in fear of the violence and gangs in Mexico,” but the PSG presented to the BIA was “family in Mexico.”¹¹¹ In *Hernandez-Morales*, the Sixth Circuit noted that the BIA had reformulated the PSG from “individuals enrolled in school in Guatemala who are tall or have a muscular build so as to command respect resulting in their recruitment by gangs for their capacity to sell drugs” to “young male

¹⁰⁶ *De Abarca v. Holder*, 757 F.3d 334, 336 (1st Cir. 2014); *see also Cardona v. Sessions*, 848 F.3d 519, 520–21 (1st Cir. 2017) (recognizing that the petitioner may change the definitions of particular social groups between the immigration court and appeal to the BIA).

¹⁰⁷ *Pirir-Boc v. Holder*, 750 F.3d 1077, 1080–1081 (9th Cir. 2014) (noting that the BIA changed the applicant’s articulation of his particular social group).

¹⁰⁸ *Paloka v. Holder*, 762 F.3d 191, 198–99 (2d Cir. 2014).

¹⁰⁹ *Pedromo v. Holder*, 611 F.3d 662, 665 (9th Cir. 2010).

¹¹⁰ *Cece* originally proposed the PSG “young Orthodox women living alone in Albania.” The IJ changed it to “young women who are targeted for prostitution by traffickers in Albania. The IJ then revised it a second time to “women in danger of being trafficked as prostitutes.” After remand, the IJ revised the PSG a third time to “a young woman from a minority religion who has lived by herself most of the time in Albania, and thus is vulnerable, particularly vulnerable to traffickers for this reason.” *Cece v. Holder*, 733 F.3d 662, 670–71 (7th Cir. 2013).

¹¹¹ *Hernandez-Navarro*, 605 F. App’x 419, 419–20 (5th Cir. 2015).

evangelicals.”¹¹² Indeed, there are even cases where the applicant never defined the PSG before the IJ, yet the BIA considered a PSG defined for the first time in the administrative appeal.¹¹³

These cases indicate that the BIA’s claim in *W-Y-C*—that it lacks the authority to consider a revised PSG—is disingenuous; the BIA has been doing precisely that for decades. Appellate bodies of all kinds routinely make legal determinations based on an existing factual record. Since the question of whether a PSG is cognizable is a legal determination, the BIA should be able to address it based on the existing record.

The complexity of the PSG determination, discussed above, makes it unreasonable to expect litigants to come up with the perfect definition of the PSG themselves, especially if they are unrepresented. The vast majority of asylum seekers are detained, and detained asylum seekers are unlikely to obtain representation.¹¹⁴ A nationwide study of deportation cases found that only 14% of detained respondents were represented between 2007 and 2012.¹¹⁵ The same study concluded that represented detainees are over ten times as likely as unrepresented detainees to succeed on the merits in immigration court.¹¹⁶ Unrepresented detainees have limited options to pursue their case as law libraries in detention centers often lack accessible materials, there are language and literacy barriers, and access to mail and the internet are limited.¹¹⁷ Given these limitations, imposing an “exact delineation” pleading

¹¹² *Hernandez-Morales v. Sessions*, 729 F. App’x 443, 444–45 (6th Cir. 2018).

¹¹³ *See* *Chen v. Holder*, 448 F. App’x 610, 611 (7th Cir. 2011) (noting that the petitioner had never defined his particular social group before the IJ and then argued that he was being persecuted for being a ‘government cooperator’” before the BIA).

¹¹⁴ The Trump Administration is expanding the use of immigration detention, including for asylum seekers. HARV. IMMIGR. AND REFUGEE CLINICAL PROGRAM, THE IMPACT OF PRESIDENT TRUMP’S EXECUTIVE ORDERS ON ASYLUM SEEKERS 1 (2017) (noting that in 2014, 77% of all asylum seekers in removal proceedings were held in detention); Miriam Jordan, *Court Blocks Trump Administration from Blanket Detention of Asylum Seekers*, N.Y. TIMES (July 2, 2018), <https://www.nytimes.com/2018/07/02/us/asylum-court-ruling-detention.html> [<https://perma.cc/UQ2Z-GWJK>].

¹¹⁵ Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. PA. L. REV. 1, 32 (2015).

¹¹⁶ *Id.* at 49.

¹¹⁷ *See* U.S. COMM’N ON CIVIL RIGHTS (USCCR), WITH LIBERTY AND JUSTICE FOR ALL: THE STATE OF CIVIL RIGHTS AT IMMIGRATION DETENTION FACILITIES 42 (2015), https://www.usccr.gov/pubs/docs/Statutory_Enforcement_Report2015.pdf [<https://perma.cc/WX5Z-W67R>].

requirement on asylum seekers pursuing the PSG ground, and prohibiting clarification or revision of the PSG in an administrative appeal, makes little sense.

B. Substantive Constrictions

Not long after the BIA's decision in *Matter of W-Y-C-* imposed the significant procedural limitations on the PSG ground discussed above, the Attorney General's decision in *Matter of A-B-* created two more substantial obstacles. These include restricting entire categories of PSG claims and imposing a heightened legal standard for persecution by non-governmental actors

1. Restricting Entire Categories of PSG Claims

The Attorney General's decision in *Matter of A-B-* discounts domestic violence as a valid basis for asylum, along with any cases involving "gang violence."¹¹⁸ Additionally, the BIA's decision in *Matter of L-E-A-*, which is currently pending review by the Attorney General, limits family-based asylum claims.¹¹⁹ This section examines how these decisions limit domestic violence and family-based asylum claims, which uniquely impact women asylum seekers.

a. Domestic Violence Related PSG Claims

One of the biggest substantive changes in the area of PSG-based asylum claims in recent years was former Attorney General Sessions's decision to overrule *Matter of A-R-C-G-*, the only BIA precedent recognizing a PSG in an asylum case involving domestic violence.¹²⁰ As noted above, in *Matter of A-R-C-G-*, the PSG that the BIA accepted was "married Guatemalan women who are unable to leave the relationship."¹²¹ Subsequently, in unpublished decisions, IJs and the BIA recognized similar groups involving unmarried women abused by their partners, as well as children abused by family members.¹²² Between 2014 and 2018, numerous women and children were granted asylum in cases involving

¹¹⁸ See *Matter of A-B-*, 27 I. & N. Dec. 316, 335 (A.G. 2018).

¹¹⁹ See *Matter of L-E-A-*, 27 I. & N. Dec. 40, 44-45 (BIA 2017); *Matter of L-E-A-*, 27 I. & N. Dec. 494, 494 (A.G. 2018).

¹²⁰ See *Matter of A-B-*, 27 I. & N. Dec. at 317.

¹²¹ *Matter of A-R-C-G-*, 26 I. & N. Dec. 388, 389 (BIA 2014).

¹²² *Id.*

domestic violence.¹²³

However, in *Matter of A-B-* the Attorney General overruled *Matter of A-R-C-G-*, finding that the BIA's explanation of how the proposed PSG satisfied the criteria of social distinction and particularity was not well reasoned.¹²⁴ Critically, *Matter of A-B-* states that “[g]enerally, claims by aliens pertaining to domestic violence or gang violence perpetrated by non-governmental actors will not qualify for asylum.”¹²⁵ This near-blanket rule purports to exclude entire categories of asylum claims without any individualized assessment of the facts and circumstances. That approach conflicts with the longstanding requirement for individualized determinations of asylum applications.¹²⁶ In *Grace v. Whitaker*, the D.C. District Court rejected this general rule against asylum claims based on domestic violence and gang violence as arbitrary and capricious in the context of credible fear interviews.¹²⁷ The same reasoning supports rejecting the near-blanket rule in removal proceedings.

b. Family-Related PSG Claims

Another entire category of PSG claims that appears to be under attack are those based on family. The BIA has long recognized that family membership may establish a particular social group. This line of cases dates at least as far back as 1985, when *Matter of Acosta* mentioned “kinship ties” as an example of an immutable characteristic that can define a PSG.¹²⁸ In recent years, however, the BIA has limited the use of family as a PSG.

In 2008, the BIA held in *Matter of S-E-G-* that a group comprised of “‘family members,’ which could include fathers, mothers, siblings, uncles, aunts, nieces, nephews, grandparents, [and] cousins” of “Salvadoran youth who have been subjected to recruitment efforts by MS-13 and who have rejected or resisted membership in the gang” is too amorphous to constitute a

¹²³ See Blaine Bookey, *Gender-Based Asylum Post Matter of A-R-C-G-: Evolving Standards and Fair Application of the Law*, 22 SW. J. INT'L L. 1, 3–9 (2016).

¹²⁴ See *Matter of A-B-*, 27 I. & N. Dec. at 317.

¹²⁵ *Id.* at 320.

¹²⁶ See Blaine Bookey, *Gender-Based Asylum Post Matter of A-R-C-G-: Evolving Standards and Fair Application of the Law*, 22 SOUTHWESTERN J. INT'L L. 1, 8 (2016).

¹²⁷ *Grace v. Whitaker*, 344 F. Supp. 3d 96, 126–27 (D.C. 2018).

¹²⁸ See *Matter of Acosta*, 19 I. & N. Dec. 211 (BIA 1985).

cognizable particular social group.¹²⁹

More recently, in 2017, the BIA issued *Matter of L-E-A-*, a decision that recognized the longstanding precedents recognizing family as a PSG but went on to stress that “[n]ot all social groups that involve family members meet the requirements of particularity and social distinction.”¹³⁰ The BIA “agree[d] with the DHS’s argument that the inquiry in a claim based on family membership will depend on the degree of the relationships involved and how those relationships are regarded by the society in question.”¹³¹

In *Matter of L-E-A-*, the BIA concluded the proposed family qualified as a PSG but affirmed the denial of asylum on the basis that the applicant had failed to show that his family membership was at least one central reason for the persecution.¹³² The BIA explained that a nexus “often arise[s] in cases where the family status is connected to another protected ground, particularly where there is a political motive . . . that it intertwined with or underlies the dispute.”¹³³ The BIA also reasoned that “the fact that a persecutor targets a family member simply as a means to an end is not by itself, sufficient to establish a claim, especially if the end is not connected to another protected ground.”¹³⁴ This “means to an end” test is much more restrictive than a simple “but for” test (i.e. the asylum seeker would not have been targeted but for the familial relationship). The “means to an end” test will likely result in the denial of many family-based claims brought by individuals fleeing Mexico and Central America. In that context, it is easy for immigration judges to conclude that gangs and cartels threaten family members in order to obtain extortion or ransom, to increase their ranks, or to avoid arrest, all of which may be characterized as a means to an end.¹³⁵

While the BIA’s decision did not go so far as to hold that family-based asylum claims require another protected ground to be

¹²⁹ *Matter of S-E-G-*, 24 I. & N. Dec. 579, 585 (BIA 2008).

¹³⁰ *Matter of L-E-A-*, 27 I. & N. Dec. 40, 42–43 (BIA 2017).

¹³¹ *Id.* at 43.

¹³² *Id.* at 47.

¹³³ *Id.* at 45.

¹³⁴ *Id.*

¹³⁵ See Jeffrey S. Chase, *Matter of L-E-A-: The BIA’s Missed Opportunity*, JEFFREYSCHASE.COM (June 22, 2017), <https://www.jeffreyschase.com/blog/2017/6/11/matter-of-l-e-a-the-bias-missed-opportunity> [<https://perma.cc/K23D-QM95>].

involved (i.e. a “double nexus”)—a highly controversial issue—it suggests that family-based claims are strongest in that situation. A double nexus would require the applicant to show not only that she was targeted on account of a family relationship (the PSG) but also that the family member whose relationship created the risk to the applicant was targeted on account of a separate protected ground.

In December 2018, Acting Attorney General Whitaker directed the BIA to refer him *Matter of L-E-A-* for review of the decision.¹³⁶ Whitaker stayed the BIA’s decision in *Matter of L-E-A-* and requested briefing on “[w]hether, and under what circumstances, an alien may establish persecution on account of a membership in a ‘particular social group’ . . . based on the aliens’ membership in a family unit.”¹³⁷ This phrasing suggests that the Acting Attorney General was considering whether family may ever be the basis of a PSG. It is very likely that Whitaker certified the decision to himself in order to reconsider the double nexus issue. Whitaker has since been replaced by William Barr as Attorney General,¹³⁸ but the future of family-based asylum claims remains uncertain.

2. *Applying a Heightened Standard for Persecution by Non-Governmental Actors*

The second substantive change imposed by *Matter of A-B-* is a heightened standard for persecution by non-governmental actors. Although this standard applies to all of the protected grounds, not just the PSG ground, it uniquely impacts the PSG ground because cases involving gender-related harm by private actors are often brought under that ground.¹³⁹

¹³⁶ *Matter of L-E-A-*, 27 I. & N. Dec. at 494.

¹³⁷ *Id.* at 494.

¹³⁸ *Attorneys General of the United States*, U.S. DEP’T OF JUST., <https://www.justice.gov/ag/historical-bios> [<https://perma.cc/3VMW-63M6>].

¹³⁹ See Linda Kelly, “On Account of” *Private Violence: The Personal/Political Dichotomy of Asylum’s Nexus*, 21 UCLA J. INT’L L. & FOREIGN AFF. 98 (2017) (explaining that the PSG ground provides “terrific new opportunities for personal violence victims” but “such optimism is checked by high standards”); Nina Rabin, *At the Border between Public and Private: U.S. Immigration Policy for Victims of Domestic Violence*, 7 L. & ETHICS HUM. RTS. 109, 109 (2013); Marisa Silenzi Cianciarulo, *Batters as Agents of the State: Challenging the Public/Private Distinction in Intimate Partner Violence-Based Asylum Claims*, 35 HARV. J.L. & GENDER 117, 117 (2013); Hilary Charlesworth, Christine Chinkin & Shelly Wright, *Feminist Approaches to International Law*, 85 AM. J. INT’L L. 613, 613 (discussing “a public/private dichotomy based on gender”); Karen Musalo and Blaine Bokey, *Crimes Without Punishment: An Update on Violence Against Women and*

Under the INA, a noncitizen must show either “past persecution or a well-founded fear of future persecution” to qualify for asylum.¹⁴⁰ In *Matter of Acosta*, the BIA recognized that persecution could be inflicted “either by the government of a country or by persons or an organization that the government was unable or unwilling to control.”¹⁴¹ The BIA explained that statutes predating the Refugee Act of 1980 used the term “persecution,” and that it already had a well-settled judicial and administrative meaning of “harm or suffering . . . inflicted either by the government of a country or by persons or an organization that the government was unable or unwilling to control.”¹⁴² The BIA therefore construed the INA as carrying forward the same established meaning of the term.¹⁴³ Consistent with the BIA’s interpretation in *Acosta*, the *UNHCR Handbook* recognizes that persecution includes “serious discriminatory or other offensive acts . . . committed by the local populace . . . if they are knowingly tolerated by the authorities, or if the authorities *refuse, or prove unable, to offer effective protection.*”¹⁴⁴

Yet, in *Matter of A-B-*, the Attorney General imposed a stricter standard for persecution by non-governmental actors, requiring the applicant to show that “the government *condoned* the private actions or at least demonstrated a *complete helplessness* to protect the victim.”¹⁴⁵ Under this heightened standard, no asylum seeker who received assistance from the government, regardless of how ineffective that assistance was, could meet the persecution requirement when the persecutor is a non-government actor.¹⁴⁶

That interpretation conflicts with numerous appellate court precedents,¹⁴⁷ and, in *Grace v. Whitaker*, which addressed credible

Impunity in Guatemala, 10 HASTINGS RACE & POVERTY L.J. 265, 265 (2013); Deborah Anker, Lauren Gilbert & Nancy Kelly, *Women Whose Governments Are Unable or Unwilling to Provide Reasonable Protection from Domestic Violence May Qualify as Refugees Under United States Asylum Law*, 11 GEO. IMMIGR. L.J. 709, 709 (1997).

¹⁴⁰ 8 U.S.C. § 1101(a)(42)(A) (2012).

¹⁴¹ *Matter of Acosta*, 19 I. & N. Dec. 211, 222 (BIA 1985).

¹⁴² *Id.*

¹⁴³ *Id.* at 223.

¹⁴⁴ UNHCR HANDBOOK, *supra* note 51, at 65.

¹⁴⁵ *Matter of A-B-*, 27 I. & N. Dec. 316, 337 (A.G. 2018) (emphasis added).

¹⁴⁶ *See Grace v. Whitaker*, 344 F. Supp. 3d 96, 129 (D.C. 2018).

¹⁴⁷ *See, e.g., Rosales Justo v. Sessions*, 895 F.3d 154, 159 (1st Cir. 2018) (holding that a petitioner satisfied the “unable or unwilling” standard, even though there was a

fear interviews, the D.C. District Court found that it is “simply not the law.”¹⁴⁸ To the extent some appellate courts have used the “condoned” or “complete helplessness” language utilized in *Matter of A-B-*, *Grace* explains that those courts actually applied the “unable or unwilling” standard despite using different language.¹⁴⁹ Reasoning that the “unable or unwilling” standard for non-governmental persecution was settled at the time the Refugee Act of 1980 was codified in the INA, *Grace* concluded that the “condoned” or “complete helplessness” standard in *A-B-* is not a permissible construction of persecution.¹⁵⁰

Because the decision in *Grace* pertains specifically to credible fear interviews, it has no direct impact on cases pending before the immigration courts or BIA. Thus, immigration courts can continue to apply the heightened standard in *A-B-* in removal proceedings. However, the logic of *Grace* applies equally to asylum cases in removal proceedings, as well as to affirmative asylum applications submitted to U.S. Citizenship and Immigration Services by individuals who are not facing deportation. Immigration judges who apply the heightened standard in *A-B-* will likely be challenged on appeal, and the circuit courts that receive those appeals will ultimately need to address the same issue addressed by *Grace*.

IV. Implications of Constricting the PSG Ground

The recent developments discussed above have serious implications for the future of asylum claims based on the PSG ground. These changes appear targeted at the current populations fleeing Central America. Policies calling for a “border wall” and stopping migration from Mexico and Central America go hand-in-hand with these administrative decisions making it harder for people escaping those countries to obtain asylum in the United States.¹⁵¹ But the procedural and substantive changes created by *Matter of W-Y-C-* and *Matter of A-B-* will impact all asylum claims based on the

significant police response to the claimed persecution).

¹⁴⁸ *Grace v. Whitaker*, 344 F.Supp. 3d at 129.

¹⁴⁹ *Id.* (discussing *Galina v. INS*, 213 F.3d 955, 955 (7th Cir. 2000)).

¹⁵⁰ *Id.* at 130.

¹⁵¹ See Robert Moore, *Border Agents Are Using a New Weapon Against Asylum Seekers*, TEX. MONTHLY (June 2, 2018), <https://www.texasmonthly.com/politics/immigrant-advocates-question-legality-of-latest-federal-tactics/> [<https://perma.cc/X9MV-AHCG>].

PSG ground.

In the short term, we are likely to see much higher rates of denial of asylum claims related to domestic violence, which had become accepted under *Matter of A-R-C-G-*, as well as higher rates of denials in cases involving family-based PSGs, which have been accepted for decades. We are also likely to see a proliferation of appeals challenging these new procedural and substantive rules in the circuit courts, similar to what occurred when the BIA introduced the social visibility distinction and particularity requirements.

One key difference, however, is that the new procedural rules in *Matter of W-Y-C-* should not be subject to *Chevron* deference. While the BIA's decisions addressing social visibility/distinction and particularity were interpreting the term "particular social group" in the INA, the procedural rules announced in *Matter of W-Y-C-* do not involve statutory interpretation. The BIA is not interpreting the meaning of a PSG in *W-Y-C-*; it is adopting procedural rules that are completely independent of the statute. The appellate courts should review these new procedural rules *de novo*, which makes them much easier to overturn than under the deferential *Chevron* test.

The substantive changes created by *Matter of A-B-* and, depending on the ultimate decision by the Attorney General, *Matter of L-E-A-*, on the other hand, *do* interpret terms in the INA ("particular social group" and "persecution") and should therefore be reviewed under *Chevron*. Nevertheless, they may well fail that standard as arbitrary or unreasonable interpretations of the INA. The D.C. District Court's decision in *Grace* provides compelling rationale for rejecting any type of blanket exclusion of entire categories of claims and a heightened standard for persecution by non-governmental actors under step two of *Chevron*. It is also quite possible that a circuit split will emerge on these issues, just as occurred with respect to the social distinction and particularity requirements. As the PSG analysis becomes increasingly complex and produces such circuit splits, it will continue to undermine the uniform and consistent application of asylum law.

This discussion also requires highlighting and contextualizing the unique impact of the procedural and substantive changes explained above on gender-related asylum claims. These recent cases reveal how gender-related asylum claims are being suppressed in the United States at the same time that the "me too" movement

has exploded worldwide.¹⁵² In fact, *Matter of A-B-* injects antiquated notions of domestic violence as “private violence” back into asylum jurisprudence.¹⁵³ Describing domestic violence as “private violence” is wrong for many reasons.¹⁵⁴ Scholars such as Kimberlé Crenshaw have demonstrated how the convergences between private and public power create intersectional dimensions of social control.¹⁵⁵ Government actors are often complicit in private violence, allowing public and private forces to work symbiotically.¹⁵⁶ The inadequate response of police to domestic violence exemplifies this type of symbiosis.¹⁵⁷ Additionally, government actors participate in creating social constructions of “private life” as something distinct from the public sphere.¹⁵⁸ For all of these reasons, the concept of state responsibility in international human rights law, which includes refugee law, has evolved to include obligations to prevent, investigate, and punish abuses by private actors.¹⁵⁹ Attempting to isolate “private violence” from state action undermines decades of work to show how the public and private sphere are intertwined and risks forfeiting our international obligations.

On the other hand, it is possible that by overruling *Matter of A-R-C-G-* and the complicated definition of the PSG that the BIA

¹⁵² See Katie Benner and Caitlin Dickerson, *Sessions Says Domestic and Gang Violence Are Not Grounds For Asylum*, N.Y. TIMES (Jun. 11, 2018), <https://www.nytimes.com/2018/06/11/us/politics/sessions-domestic-violence-asylum.html> [<https://perma.cc/FY5U-GJVA>].

¹⁵³ See *Matter of A-B-*, 27 I. & N. Dec. 316, 317 (A.G. 2018).

¹⁵⁴ See Marisa Silenzi Cianciarulo, *Batters as Agents of the State: Challenging the Public/Private Distinction in Intimate Partner Violence-Based Asylum Claims*, 35 HARV. J.L. & GENDER 117, 134–36, 155 (2013).

¹⁵⁵ See Kimberlé W. Crenshaw, *From Private Violence to Mass Incarceration: Thinking Intersectionally About Women, Race and Social Control*, 59 UCLA L. REV. 1418 (2012).

¹⁵⁶ See Susanne M. Browne, *Due Process and Equal Protection Challenges to the Inadequate Response of the Police in Domestic Violence Situations*, 68 S. CAL. L. REV. 1295, 1307 (1995) (explaining that “[i]n the domestic violence context, the state’s action combined with private forces may collectively place a battered woman in a worse-off position, which would not be recognized if the focus was solely upon the state’s actions”).

¹⁵⁷ See *id.* at 1298.

¹⁵⁸ See Alice M. Miller and Meghan Faux, *Reconceiving Responses to Private Violence and State Accountability: Using an International Human Rights Framework in the United States*, 1 GEO. J. GENDER & L. 67, 72–73 (1999).

¹⁵⁹ See *id.* at 78.

accepted in that case (“married women who are unable to leave the relationship”), former Attorney General Sessions unintentionally made some immigration judges more open to consider a much simpler, more logical version of the PSG that has long been advocated by immigration lawyers and scholars: women.¹⁶⁰ In at least three asylum decisions issued after *Matter of A-B-*, immigration judges in Philadelphia, San Francisco, and Arlington have done just that, finding that gender alone defined the PSG.¹⁶¹ Gender or sex is an immutable characteristic, similar to race, religion, nationality and political opinion, and also satisfies the requirements of social distinction and particularity.

In the past, many judges have rejected PSGs defined solely based on gender or sex out of fear of opening the floodgates. But fear of opening the floodgates is not a legal reason to reject a PSG. That fear is also unfounded, since establishing a PSG is just one of several requirements to qualify for asylum.¹⁶² The other elements an applicant needs to show include a well-founded fear of severe harm that rises to the level of persecution, a nexus between the persecution and the PSG, and, in cases involving nongovernmental persecutors, that the government is unable or unwilling to provide protection.¹⁶³ Thus, merely accepting a PSG defined solely by sex or gender would not render all women fleeing a given country eligible for asylum.

The most troubling implication of *W-Y-C-* is the risk to due

¹⁶⁰ See Bethany Lobo, *Women as a Particular Social Group: A Comparative Assessment of Gender Asylum Claims in the United States and United Kingdom*, 26 GEO. IMMIGR. L.J. 361 (2012); Deborah E. Anker, *Refugee Law, Gender, and the Human Rights Approach*, 15 HARV. HUM. RTS. J. 133 (2002); Deborah E. Anker, Nancy Kelly & John Wilshire-Carrera, *Defining “Particular Social Group” in Terms of Gender: The Shah Decision and U.S. Law*, 76 INTERPRETER RELEASES 1005 (1999); David L. Neal, *Women as a Social Group: Recognizing Sex-Based Persecution as Grounds for Asylum*, 20 COLUM. HUM. RTS. L. REV. 203 (1988).

¹⁶¹ Jeffrey S. Chase, *IJs Grant Gender-Based Asylum Claims*, JEFFREYS.CHASE.COM (Jan. 20, 2019), <https://www.jeffreyschase.com/blog/2019/1/20/ijs-grant-gender-based-asylum-claims> [<https://perma.cc/FFL8-HU8N>]; see also Decision by Immigration Judge Miriam Howard in the San Francisco Immigration Court (on file with author); Decision by Immigration Judge Nadkarni in the Arlington Immigration Court (on file with author).

¹⁶² See Jack Herrera, *In asylum claims, is domestic abuse ‘private violence’ or a societal issue?*, PAC. STANDARD (Nov. 19, 2018), <https://psmag.com/news/in-asylum-claims-is-domestic-abuse-private-violence-or-a-societal-issue> [<https://perma.cc/2DT2-69Y2>]; 8 U.S.C. § 1101 (a)(42) (2018).

¹⁶³ 8 U.S.C. § 1101 (a)(42) (2018).

process posed by premitting asylum cases without giving applicants the opportunity for an evidentiary hearing. All noncitizens have a fundamental right to procedural due process in removal proceedings, which requires a full and fair hearing.¹⁶⁴ Noncitizens have due process (and statutory) rights to testify, present witnesses and documentary evidence, and cross-examine any witnesses presented by the government.¹⁶⁵ Premitting applications based on the failure to provide an “exact delineation” of the PSG undermines these rights. While there may be cases where premitting an application for asylum is appropriate because the person is clearly ineligible for that form of relief (for example, where the noncitizen is statutorily barred from asylum based on an aggravated felony conviction), the proper definition of the PSG may only emerge after all the evidence is presented, including testimony. Thus, premitting an asylum case based on failing to define the PSG perfectly at an early stage of the proceedings is a dangerous approach.

One of the biggest challenges noncitizens will face when appealing decisions to premit their applications is proving prejudice from the due process violation. Some circuit courts have an especially high standard for establishing prejudice, which requires showing that the outcome of the proceedings *would* have been different, not just that they *may* have been different, if the due process violation had not occurred.¹⁶⁶ Even circuit courts that have applied a more lenient prejudice standard have previously denied due process challenges brought by noncitizens when immigration judges premitted cases without a full evidentiary hearing based on the failure to demonstrate prejudice.¹⁶⁷ There are some cases,

¹⁶⁴ *See id.*

¹⁶⁵ 8 U.S.C. § 1229a(b)(4)(B) (2018); *see also* Romanishyn v. Att’y Gen., 455 F.3d 175, 185 (3d Cir. 2006) (recognizing that due process entitles noncitizens to “a full and fair hearing and a reasonable opportunity to present evidence”).

¹⁶⁶ *See, e.g.,* Ozuna v. U.S. Att’y Gen., 568 F. App’x 733, 736–37 (11th Cir. 2014) (denying a due process challenge to a decision to premit application because the noncitizen failed to show that the outcome would have been different); Pierre v. U.S. Att’y Gen., 879 F.3d 1241 (11th Cir. 2018) (holding that the IJ’s decision to premit an application for cancellation of removal did not violate due process, even though the government delayed filing a motion to premit the application until the day of the merits hearing, because the noncitizen failed to show prejudice).

¹⁶⁷ *See* Zangiat v. Ashcroft, 102 F. App’x 774 (4th Cir. 2004) (affirming a decision to premit an asylum application where the applicant failed to obtain relevant documents, reasoning that she had not shown prejudice because she had not established that the alleged due

however, where courts have found a violation of due process that resulted in prejudice, stemming from the IJ's decision to pretermite an application. For example, in one unpublished case, the Third Circuit found that an IJ's refusal to allow an applicant for cancellation of removal to present additional evidence violated due process, resulting in prejudice.¹⁶⁸ In that case, the noncitizen actually had an opportunity to testify at a hearing but was denied an opportunity to present additional evidence at a subsequent hearing to clarify ambiguity in his prior testimony.¹⁶⁹ In cases where the noncitizen is deprived of *any* opportunity to testify, the due process concerns are even greater.

Another complication in bringing due process challenges where IJs have pretermitted asylum cases is that some courts have found there is no due process interest in discretionary forms of relief, and asylum is ultimately discretionary. Courts have been inconsistent in their approach to this issue. For instance, the Third Circuit found a due process violation in the case mentioned above, even though cancellation of removal is discretionary, but in other cases, the Third Circuit has held there is no constitutionally protected due process interest in discretionary forms of relief like cancellation of removal.¹⁷⁰ However, other courts have reasoned that even though discretionary relief such as asylum is not a protected liberty interest, due process principles apply because noncitizens in removal proceedings are entitled to a full and fair hearing.¹⁷¹

process violation was “likely to impact the result of the proceedings”); *Sosa v. Ashcroft*, 76 F. App'x 220, 221 (9th Cir. 2003) (finding no prejudice even under the Ninth Circuit's more lenient standard, which allows the court to consider “anything in [the] record from which we can infer prejudice despite [the noncitizen's] failure to pinpoint the evidence she would have presented had she been given the opportunity”); *Yeglaryan v. Holder*, 500 F. App'x 583, 585 (9th Cir. 2012) (“Although the IJ pretermitted Yeglaryan's opportunity to present evidence regarding his marriage to a U.S. citizen, making the proceeding incomplete and, therefore, unfair . . . Yeglaryan has not shown prejudice . . .”).

¹⁶⁸ *Jaimez-Perez v. Att'y Gen. of U.S.*, 563 F. App'x 136, 138–39 (3d Cir. 2014).

¹⁶⁹ *Id.*

¹⁷⁰ *See Turcios-Ocampo v. Att'y Gen. of U.S.*, 382 F. App'x 154, 157–58 (3d Cir. 2010); *United States v. Torres*, 383 F.3d 92, 104–05 (3d Cir. 2004) (holding that noncitizens do not have a due process interest in being considered for discretionary relief); *Pinho v. INS*, 249 F.3d 183, 189 (3d Cir. 2001) (holding change in eligibility criteria for suspension of deportation, a discretionary form of relief, did not implicate due process rights); *see also Pinos-Gonzalez v. Mukasey*, 519 F.3d 436, 441 (8th Cir. 2008); *Smith v. Ashcroft*, 295 F.3d 425, 429 (4th Cir. 2002) (holding that the noncitizen had “no property or liberty interest in the ‘right’ to discretionary section 212(c) relief”).

¹⁷¹ *See Pagoada-Galeas v. Lynch*, 659 F. App'x 849, 858 (6th Cir. 2016); *Solis-*

V. Conclusion

The recent developments in PSG jurisprudence discussed above further distance the United States' interpretation of the PSG ground from UNHCR's authoritative interpretations of the Refugee Convention and Protocol. This backwards slide undercuts the fundamental human rights protections that these treaties aim to provide and injects ever greater inconsistencies and uncertainty into our asylum system.

