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## When Will Asylum Law Protect Women?: The Abusive Relationship Between Agency Decision Making and Asylum Claims Involving Domestic Violence

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# WHEN WILL ASYLUM LAW PROTECT WOMEN?: THE ABUSIVE RELATIONSHIP BETWEEN AGENCY DECISION MAKING AND ASYLUM CLAIMS INVOLVING DOMESTIC VIOLENCE

**Abstract:** Over the past several decades, applications for asylum by women who claim membership in a particular social group related to domestic violence have been largely unsuccessful. Attitudes regarding violence against women, the asylum requirements, and the failure to explicitly include gender as a protected group under both domestic and international law contribute to the difficulty that women face in asserting these claims. In addition, the volatile nature of agency decision making, bolstered by the broad deference afforded to agencies by federal courts under *Chevron* and *Brand X*, make outcomes inconsistent and unpredictable. During the summer of 2018, Attorney General Jeff Sessions issued an opinion in *Matter of A-B-* that appeared to heighten the asylum requirements further, not only for women with domestic violence-related claims, but for all asylees who claim persecution by non-state actors. The decision received criticism from immigration advocates, as it did not adhere to past asylum requirements from the Board of Immigration Appeals. Subsequently, federal courts will have to determine whether to defer to this heightened standard in the future. The far-reaching implications of the decision—as well as the power the Attorney General claimed in issuing it—should spur courts to take a second look at their *Chevron* jurisprudence. In order to maintain the well-established standard for persecution by non-state actors in asylum claims, the Supreme Court must re-examine, clarify, and limit the applicability of *Chevron* and *Brand X*.

## INTRODUCTION

This year, Rosa, a Honduran woman, will flee to the United States after suffering years of emotional, mental, and physical abuse at the hands of her husband, whom she married when she was just sixteen.<sup>1</sup> Rosa will have to

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<sup>1</sup> See *Asylum Decisions and Denials Jump in 2018*, TRAC IMMIGR. (Nov. 29, 2018), <http://trac.syr.edu/immigration/reports/539> [<https://perma.cc/YH4Z-9YWS>] (tracking the asylum decisions and denials in 2018). The incidence of intimate partner violence and femicide is extremely high in the geographic area known as the “Northern Triangle,” which encompasses El Salvador, Honduras, and Guatemala. CHILDREN’S DEFENSE FUND—NEW YORK, DOMESTIC AND GANG VIOLENCE VICTIMS BECOME INELIGIBLE FOR ASYLUM 2 (Aug. 2018), <https://www.childrensdefense.org/cdfny/wp-content/uploads/sites/3/2018/08/Domestic-Gang-Violence-Report-with-GRAPHIC.pdf> [<https://perma.cc/RBA5-ZRNZ>]. Statistics show that half of women from these countries experience intimate partner

make a long and often dangerous journey from her home country through Guatemala and Mexico to get to the United States.<sup>2</sup> In order to seek asylum, Rosa must be physically present in the United States or seeking entrance into the United States at a port of entry.<sup>3</sup> Next, she will have to pass a “credible fear interview” with an asylum officer.<sup>4</sup> Rosa will be asked to describe the specifics of the abuse she endured and what, if anything, prevented her from escaping or relocating in her home country.<sup>5</sup> The interview will last several hours; Rosa may have difficulty with the technical nature of the questions or may struggle to understand the importance of it for her claim.<sup>6</sup> To move forward in the process, Rosa will have to convince the interviewer that she has a credible fear of returning to her country.<sup>7</sup>

If Rosa passes the credible fear interview, the next obstacle is developing a legal argument to convince an immigration judge that she satisfies the asylum claim requirements.<sup>8</sup> For Rosa, like many asylum seekers, this will be incredibly difficult, because noncitizens are not provided an attorney—even in adversarial proceedings before an immigration judge that may result in a final deportation order.<sup>9</sup> It is extremely difficult for noncitizens representing them-

violence of some kind and fourteen of the twenty-five countries with the highest rates of femicide are located in Latin America. *Id.*

<sup>2</sup> See Dara Lind, *The Migrant Caravan, Explained*, VOX (Oct. 25, 2018), <https://www.vox.com/2018/10/24/18010340/caravan-trump-border-honduras-mexico> [<https://perma.cc/VJ83-7URE>] (describing the conditions that migrants deal with during their journey from their home country to the United States).

<sup>3</sup> *The Affirmative Asylum Process*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Apr. 19, 2019), <https://www.uscis.gov/humanitarian/refugees-and-asylum/affirmative-asylum-process> [<https://perma.cc/4HBG-LWN8>]. If migrants appear at an official port of entry, they are entitled to make an asylum claim and undergo a credible fear interview to determine if their claim can go forward. Lind, *supra* note 2.

<sup>4</sup> *Questions & Answers: Credible Fear Screening*, U.S. CITIZENSHIP & IMMIGR. SERVS. (July 15, 2015) [hereinafter USCIS Q & A], <https://www.uscis.gov/humanitarian/refugees-asylum/asylum/questions-answers-credible-fear-screening> [<https://perma.cc/XQ8N-6XSL>].

<sup>5</sup> CONCHITA CRUZ ET AL., *URBAN JUSTICE CTR., VINDICATING THE RIGHTS OF ASYLUM SEEKERS AT THE BORDER AND BEYOND: A GUIDE TO REPRESENTING ASYLUM SEEKERS IN EXPEDITED REMOVAL AND REINSTATEMENT OF REMOVAL PROCEEDINGS* 28 (June 2018), <https://asylumadvocacy.org/wp-content/uploads/2018/06/ASAP-Expedited-Removal-Guide.pdf> [<https://perma.cc/8DSV-BHUIJ>].

<sup>6</sup> *Id.* at 30.

<sup>7</sup> *Id.*; USCIS Q & A, *supra* note 4. The credible fear interview is conducted by an asylum officer employed by the Department of Homeland Security (DHS). USCIS Q & A, *supra* note 4. The interview consists of a series of questions, at the conclusion of which the asylum officer will refer the case for further proceedings if it is determined that the applicant has a credible fear of persecution or torture. *Id.* DHS defines “credible fear of persecution” as a “significant possibility” that the applicant was persecuted or has a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group (PSG), or political opinion if returned to his or her home country. *Id.* “Credible fear of torture” is defined as a “significant possibility” that the applicant would be subjected to torture if returned to his or her home country. *Id.*

<sup>8</sup> See CRUZ ET AL., *supra* note 5, at 36.

<sup>9</sup> See Gretchen Frazee, *What Constitutional Rights Do Undocumented Immigrants Have?*, PBS NEWSHOUR (June 25, 2018), <https://www.pbs.org/newshour/politics/what-constitutional-rights-do>

selves *pro se* to conduct the legal research and gather the evidence necessary to assert a successful claim.<sup>10</sup> Based on data from deportation cases decided between 2007 and 2012, only 37% of all immigrants with removal cases secured representation.<sup>11</sup> The impact is clear: among those immigrants who were detained and obtained counsel, 49% had successful outcomes, while only 23% of detained immigrants who were not represented received the relief for which they applied.<sup>12</sup>

Further, in order for Rosa to successfully assert her claim, she must show that she faced persecution in her home country on account of her race, religion, nationality, membership in a particular social group (PSG), or political affiliation.<sup>13</sup> Although Rosa is far from the first woman fleeing domestic violence to

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undocumented-immigrants-have [<https://perma.cc/4REK-HHY9>] (explaining that, because immigration proceedings are civil rather than criminal, the constitutional right to counsel does not apply to undocumented people). The statute provides that an individual in removal proceedings may be represented by counsel should she so choose; however, it specifically states that such representation shall be at no cost to the government. Immigration and Nationality Act of 1952 (INA), Pub L. No. 414, § 292, 66 Stat. 163, 235 (codified as amended at 8 U.S.C. § 1362 (2018)). The only exception is for mentally disabled immigrants in removal proceedings where the appointment of counsel is required as a “reasonable accommodation.” *Franco-Gonzalez v. Holder*, No. CV 10–02211 DMG, 2013 WL 3674492, at \*3 (C.D. Cal. Apr. 23, 2013).

<sup>10</sup> BRYAN LONEGAN, LEGAL AID SOC’Y, IMMIGRATION DETENTION AND REMOVAL: A GUIDE FOR DETAINEES AND THEIR FAMILIES 1 (Feb. 2006), [https://www.nilc.org/wp-content/uploads/2015/12/detentionremovalguide\\_2006-02.pdf](https://www.nilc.org/wp-content/uploads/2015/12/detentionremovalguide_2006-02.pdf) [<https://perma.cc/M7TM-CLZP>]. Types of evidence that may be appropriate to present at a deportation hearing include letters of support from relatives, letters from employers or pay stubs, attendance in rehabilitation programs, school records, and other pieces of evidence that support the respondent’s testimony or corroborate their claims. *Id.* at 18–19.

<sup>11</sup> INGRID EAGLY & STEVEN SHAFER, AM. IMMIGRATION COUNCIL, ACCESS TO COUNSEL IN IMMIGRATION COURT 2 (Sept. 2016), [https://www.americanimmigrationcouncil.org/sites/default/files/research/access\\_to\\_counsel\\_in\\_immigration\\_court.pdf](https://www.americanimmigrationcouncil.org/sites/default/files/research/access_to_counsel_in_immigration_court.pdf) [<https://perma.cc/KQM4-P37N>]. Detained immigrants are much less likely to obtain counsel than non-detained immigrants—only 14% of detained immigrants are represented, while two-thirds of non-detained immigrants are represented. *Id.*

<sup>12</sup> *Id.* at 3. Barriers that immigrants face in obtaining representation include difficulty finding and retaining the services of an attorney while in detention, the inconvenient location of detention facilities, and inability to pay. *Id.* at 6. Not only are noncitizens more likely to win their cases when they have representation, they are also more likely to be released from detention (44% of represented people are released compared with 11% who are without representation) and to apply for relief in the first place (32% of detained noncitizens who are represented apply for relief compared with only 3% who are without representation). *Id.* at 2.

<sup>13</sup> Refugee Act of 1980, Pub. L. No. 96-212, §§ 201, 208, 94 Stat. 102, 105 (codified as amended at 8 U.S.C. § 1101(a)(42)). Persecution on account of membership in a PSG as valid grounds for asylum in the United States is drawn from the definition of refugee in Article 1 of the United Nations Convention Relating to the Status of Refugees (the Convention), which was approved in 1951. Convention Relating to the Status of Refugees, art. 1(A), July 28, 1951, 19 U.S.T. 6577, 189 U.N.T.S. 150, 152; see also Nicholas R. Bednar, *Social Group Semantics: The Evidentiary Requirements of Particularity and Social Distinction in Pro Se Asylum Adjudication*, 100 MINN. L. REV. 355, 359–60 (2015) (explaining that the United States drew the definition of refugee from the Convention). The Convention expands upon Article 14 of the Universal Declaration of Human Rights, which was approved by the United Nations in 1948. G.A. Res. 217 (III) A, Universal Declaration of Human Rights, at art. 14 (Dec. 10, 1948); Vic Ullom, *Voluntary Repatriation of Refugees and Customary International Law*, 29 DENV. J. INT’L L. & POL’Y 115, 119 (2001). The Declaration established the right of

seek asylum in the United States, her chance for success is incredibly uncertain, because the PSG requirements remain volatile and are the subject of intense debate between immigration prosecutors, advocates, and adjudicators.<sup>14</sup>

Evolution in case law over the past thirty-five years has drastically changed how Rosa must argue her asylum case.<sup>15</sup> In 1985, the Board of Immigration Appeals (BIA) defined a PSG as a “group of persons all of whom share a common, immutable characteristic,” and that remained the consensus definition for decades.<sup>16</sup> But in the late 2000s, in response to increased gang activity in Latin America that led to a dramatic rise in asylum claims from refugees and internally displaced persons escaping the violence, the BIA chose to narrow the definition.<sup>17</sup> Subsequently, the BIA added the additional requirements of “particularity” and “social distinction” to the definition.<sup>18</sup> The requirements were addressed again during the summer of 2018, when Attorney General (AG) Jeff Sessions issued an opinion in *Matter of A-B*.<sup>19</sup> *A-B* overturned

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persons to apply for asylum in a member nation if they experienced persecution in their home country. Ullom, *supra*, at 119.

<sup>14</sup> Liliya Paraketsova, Note, *Why Guidance from the Supreme Court Is Required in Redefining the Particular Social Group Definition in Refugee Law*, 51 U. MICH. J.L. REFORM 437, 460 (2017) (describing how the inconsistent PSG caselaw leads to continued uncertainty). For two decades, the Board of Immigration Appeals (BIA) case *Matter of Acosta* instructed courts on the requirements for a cognizable PSG claim. *Id.*; see 19 I. & N. Dec. 211, 233 (B.I.A. 1985). Yet, once the BIA began to revise the PSG definition in an attempt to clarify the test, the opposite resulted. Paraketsova, *supra*, at 460. Some federal circuit courts chose to adopt the updated definition based on *Chevron* doctrine, while others refused to apply it. *Id.*

<sup>15</sup> See Johanna K. Bachmair, Note, *Asylum at Last?: Matter of A-R-C-G-’s Impact on Domestic Violence Victims Seeking Asylum*, 101 CORNELL L. REV. 1053, 1060–63 (2016) (outlining the changes in the definition of PSG, including the addition of the social distinction and particularity requirements).

<sup>16</sup> See *Matter of Acosta*, 19 I. & N. Dec. at 233 (finding that, based on the United Nations High Commissioner for Refugees (UNHCR) and case precedent, the definition of PSG for the purposes of asylum is a group that shares common, immutable characteristics); Paraketsova, *supra* note 14, at 449–50 (describing the wide acceptance of the *Matter of Acosta* definition of PSG). With the exception of the Second Circuit, all federal circuit courts found the agency construction of particular social group under *Matter of Acosta* to be permissible after analyzing it based on *Chevron* doctrine. Rachel Gonzalez Settlage, *Rejecting the Children of Violence: Why U.S. Asylum Law Should Return to the Acosta Definition of “Particular Social Group,”* 30 GEO. IMMIGR. L.J. 287, 298 (2016).

<sup>17</sup> Settlage, *supra* note 16, at 312.

<sup>18</sup> See *Matter of E-A-G-*, 24 I. & N. Dec. 591, 594 (B.I.A. 2008) (establishing the additional requirement of social visibility to the definition of PSG); *Matter of S-E-G-*, 24 I. & N. Dec. 579, 582–83 (B.I.A. 2008) (establishing the additional requirement of particularity to the definition of PSG). After much criticism of the additional requirements of particularity and social distinction (or “social visibility”) from federal circuit courts, immigration advocates, and the UNHCR, the BIA attempted to clarify these requirements. Settlage, *supra* note 16, at 305–06; see *infra* notes 147–157 and accompanying text.

<sup>19</sup> See *Matter of A-B-*, 27 I. & N. Dec. 247, 317 (A.G. 2018) (overturning *Matter of A-R-C-G-*); *Matter of A-R-C-G-*, 26 I. & N. Dec. 388, 392–95 (B.I.A. 2014) (determining that “married women in Guatemala who are unable to leave their relationship” satisfied all of the requirements of a cognizable PSG). Attorney General (AG) Jefferson Sessions became aware of the *A-B-* proceeding after the BIA reversed and remanded the case to the immigration judge who first heard it. NAT’L IMMIGRATION

*Matter of A-R-C-G-*, a previous case that held that “married women . . . who are unable to leave their relationship” was a permissible PSG for asylum.<sup>20</sup> The case was overturned because, in the AG’s view, the BIA did not accurately apply the social distinction and particularity requirements.<sup>21</sup> The decision also called into question whether persecution by non-state actors could ever be grounds for asylum.<sup>22</sup> After *A-B-*, immigration advocates were left wondering how to argue cases for women like Rosa who claim asylum based on persecution in the form of domestic violence.<sup>23</sup>

The requirements for asylum are volatile and subject to changing political winds and country conditions that influence immigration trends.<sup>24</sup> In recent times, this is especially true for claims that involve private actor violence generally and claims by women based on domestic violence specifically.<sup>25</sup> This volatility can be attributed to changing views held by political administrations regarding asylum requirements, the well-entrenched policy of deference to agency decisions, and the refusal of some federal circuit courts to adopt the

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JUSTICE CTR., ASYLUM PRACTICE ADVISORY: APPLYING FOR ASYLUM AFTER *MATTER OF A-B-7* (Jan. 2019), <https://www.immigrantjustice.org/media/173/download> [<https://perma.cc/EL7Q-XV5P>]. The BIA granted asylum to the respondent and found that the claim was similar to that of *A-R-C-G-* and thus needed to be reconsidered. *Id.* After the case was remanded back to the immigration judge, AG Sessions instead referred the case to himself. *Id.*

<sup>20</sup> See generally *A-R-C-G-*, 26 I. & N. Dec. 388. Although *A-R-C-G-* was a victory for advocates who sought recognition that survivors of domestic violence are eligible for asylum, critics consider the PSG analysis inconsistent and difficult to reconcile with prior BIA case law. NAT’L IMMIGRATION JUSTICE CTR., *supra* note 19, at 5.

<sup>21</sup> *Matter of A-B-*, 27 I. & N. Dec. at 319. AG Sessions also noted that the particular social group involved in *Matter of A-R-C-G-* involved so-called “private criminal activity” rather than violence perpetuated by the government of the applicant’s home country and stated that, generally, claims will be unsuccessful when brought by noncitizens who are victims of domestic violence or gang violence. *Id.* at 320.

<sup>22</sup> See *id.* at 319, 335 (holding that social groups defined by their susceptibility to criminal activity conducted by non-state actors are unlikely to meet the requirements of a cognizable asylum claim because they encompass large parts of society and thus lack particularity). AG Sessions mentions that there may be some circumstance wherein private criminal activity could be the basis of a cognizable claim, but does not give any guidance as to what that claim might look like. *Id.* at 317.

<sup>23</sup> See *id.* at 317 (overruling *Matter of A-R-C-G-* and noting that victims of private violence will rarely meet the requirements of asylum).

<sup>24</sup> See, e.g., Lind, *supra* note 2. Increased immigration over the past decade is largely the result of bloodshed and turbulence in the Northern Triangle, which comprises Guatemala, Honduras, and El Salvador. *Id.*; see Daniel J. Steinbock, *Refugee and Resistance: Casablanca’s Lessons for Refugee Law*, 7 GEO. IMMIGR. L.J. 649, 674 (1993) (describing the tendency of refugee policy to shift according to political changes and pressures).

<sup>25</sup> See Katie Benner & Caitlin Dickerson, *Sessions Says Domestic and Gang Violence Are Not Grounds for Asylum*, N.Y. TIMES (June 11, 2018), <https://www.nytimes.com/2018/06/11/us/politics/sessions-domestic-violence-asylum.html> [<https://perma.cc/JLY8-PSBT>] (noting that attorneys general have gone back and forth regarding their view on how to treat asylum claims involving domestic violence for the last three decades, beginning with Janet Reno).

interpretation offered by agency decisionmakers.<sup>26</sup> Through an examination of agency decision making and deference to agencies in federal courts, first established in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, this Note focuses on the process by which the asylum requirements were altered over time.<sup>27</sup> Part I discusses the *Chevron* doctrine, focusing on the leading cases and their impact on immigration law, as well as the factors that courts consider when they determine whether agency actions are legitimate.<sup>28</sup> Part II traces the development of the domestic violence asylum claim of persecution based on membership in a PSG, responses to such claims, and the impact of the AG's decision in *Matter of A-B*.<sup>29</sup> Part III argues that the AG's interpretation of the law in *Matter of A-B* was unreasonable and thus cannot be justified under *Chevron* and its progeny; it also argues that the *Chevron* doctrine should be reconsidered in light of decisions like *Matter of A-B*.<sup>30</sup>

#### I. COURTS ANSWERING TO AGENCIES: *CHEVRON*, ITS SUCCESSORS, AND THEIR IMPACT ON IMMIGRATION POLICY

In 1984, in *Chevron*, the Supreme Court laid the foundation for determining whether and when a court affords deference to agency decisions.<sup>31</sup> Thereafter, the Court has taken divergent stances in interpreting *Chevron*.<sup>32</sup> *United States v. Mead Corp.* envisioned a more robust role for federal courts in determining whether an agency is owed *Chevron* deference at all.<sup>33</sup> *National Cable*

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<sup>26</sup> Nitzan Sternberg, Note, *Do I Need to Pin a Target to My Back?: The Definition of "Particular Social Group" in U.S. Asylum Law*, 39 FORDHAM URB. L.J. 245, 249–50, 274, 280 (2011); see Benner & Dickerson, *supra* note 25 (indicating that different attorneys general have approached domestic violence-based asylum claims differently). The First, Second, Fourth, Sixth, Eighth, Tenth, and Eleventh Circuits give deference to the BIA interpretation of particular social group. *Id.* at 270–72. The Third and Seventh Circuits reject the current BIA approach and maintain the approach established in *Matter of Acosta*. *Id.* at 274–75. The Ninth Circuit applies its own definition of particular social group in cases where the BIA has not considered a similar group, and defers in cases where it has. *Id.* at 276.

<sup>27</sup> See 467 U.S. 837 (1984).

<sup>28</sup> See *infra* notes 31–102 and accompanying text.

<sup>29</sup> See *infra* notes 103–207 and accompanying text.

<sup>30</sup> See *infra* notes 208–269 and accompanying text.

<sup>31</sup> See 467 U.S. at 866 (determining that an Environmental Protection Agency regulation allowing for the treatment of all pollution-producing devices within the same industry equally was a permissible interpretation of the Clean Air Act). In coming to its conclusion, the Court looked at both the legislative history and the statutory language interpreted by the agency. *Id.* at 859–64. The Court also discussed the tension between the policy choices advocated for by each of the parties and determined that the “wisdom of the agency’s policy” is not a legitimate justification when challenging an agency’s interpretation of an ambiguous statutory provision. *Id.* at 865–66.

<sup>32</sup> Jack M. Beermann, *Chevron at the Roberts Court: Still Failing After All These Years*, 83 FORDHAM L. REV. 731, 740 (2014) (describing an ideological divide on the Supreme Court with regard to views on agency regulation).

<sup>33</sup> See 533 U.S. 218, 234 (2001) (holding that a United States Customs tariff classification ruling was not entitled to *Chevron* deference because treating the rulings as having the force of law was not justified by the statute); see also Eric R. Womack, *Into the Third Era of Administrative Law: An Em-*

& *Telecommunications Ass'n v. Brand X Internet Services*, decided five years after *Mead*, instructs courts to defer in the majority of cases.<sup>34</sup> Section A of this Part explores the leading cases and policies that shape the *Chevron* doctrine as it is implemented today.<sup>35</sup> Section B discusses the overlap between arbitrary and capricious review under the Administrative Procedure Act (APA) and *Chevron* Step Two.<sup>36</sup> Section C looks at how the *Chevron* doctrine applies in the immigration context.<sup>37</sup>

### A. *Who Says What the Law Is? Agency Decision Making and Chevron*

Even prior to the ratification of the Constitution, the Founders acknowledged the inevitability of statutory ambiguities and knew they would require resolution.<sup>38</sup> Throughout U.S. history, views on the role of agency decision making, and how much leeway agencies should have to interpret their own organic statutes, have fluctuated in response to current events and the political climate.<sup>39</sup> In the post-New Deal era, the dominant thinking was that agencies were in the best position to address the nation's problems without interference by robust judicial review.<sup>40</sup> It was in this context that Congress passed the APA

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*pirical Study of the Supreme Court's Retreat from Chevron Principles in United States v. Mead*, 107 DICK. L. REV. 289, 291 (2002) (analyzing the limiting impact of *Mead* on the *Chevron* framework).

<sup>34</sup> 545 U.S. 967, 982 (2005) (determining that *Chevron* applied and that the Federal Communication Commission's interpretation of the Communications Act was permissible even though it conflicted with Ninth Circuit precedent).

<sup>35</sup> See *infra* notes 38–69 and accompanying text.

<sup>36</sup> See *infra* notes 78–88 and accompanying text.

<sup>37</sup> See *infra* notes 89–102 and accompanying text.

<sup>38</sup> Terrence J. McCarrick, Jr., *In Defense of a Little Judiciary: A Textual and Constitutional Foundation for Chevron*, 55 SAN DIEGO L. REV. 55, 67 (2018). For example, in Federalist No. 37, James Madison acknowledged that imprecision was inevitable despite his belief that new laws were written by those who paid special attention to technicalities. *Id.*; see also THE FEDERALIST NO. 37, at 182–83 (James Madison) (Yale Univ. Press ed., 2009). In *Edwards' Lessee v. Darby*, the Supreme Court first acknowledged that where an ambiguous law exists, those who were appointed to enforce its provisions are entitled to respect. McCarrick, *supra*, at 67; see also 25 U.S. (12 Wheat.) 206, 210 (1827).

<sup>39</sup> GARY LAWSON & PHILIP S. BECK, FEDERAL ADMINISTRATIVE LAW 72 (7th ed. 2016).

<sup>40</sup> See generally Charles H. Koch, Jr., *James Landis: The Administrative Process*, 48 ADMIN. L. REV. 419, 425–28 (1996) (outlining preeminent administrative law scholar James Landis's strong belief in the advantages of the administrative state over the judicial process). Landis's background in administrative law included experience helping to found the Securities and Exchange Commission. *Id.* at 419. He envisioned a robust administrative state as the most efficient, cost-effective way to run a government. *Id.* Landis emphasized the comparative advantage of a robust administrative process in terms of flexibility, technical and specialized knowledge, and participation. *Id.* at 425. Landis seemed to disregard concerns about the dangers of agency capture by the industries that they were tasked to regulate, instead conceiving the relationship between agency and industry as one of sensitivity and responsiveness to evolving problems. *Id.* at 427–28. Although Landis did see judicial review as the final check on agency decision making, he criticized the tendency to be wary of agencies and did not support the imposition of judicial limitations on the options available to agencies in fulfilling their mandate. *Id.* at 428–29.



in 1946.<sup>41</sup> The APA provides that, when reviewing questions of law or interpreting statutory provisions, courts should set aside any agency action determined to be unlawful or illegitimate for a number of reasons.<sup>42</sup> Despite the plain language of the APA indicating that interpreting statutes should be within the purview of the courts, the Supreme Court dictated another path.<sup>43</sup> The Court presumed that where Congress intentionally or accidentally left a statutory gap, it intended for the administering agency to resolve or fill the gap by providing an interpretation of ambiguous language.<sup>44</sup>

In 1984, in *Chevron*, the Court provided guidance to courts on how to review decisions made by agencies interpreting their organic statutes.<sup>45</sup> The case created a two-step test that courts follow when determining whether an agency's interpretation is sound.<sup>46</sup> At Step One, a court must look at whether the statute passed by Congress speaks on the issue being considered.<sup>47</sup> If the statute is clear and unambiguous on the issue, a court simply looks at whether the agency action accords with that directive.<sup>48</sup> But if there is a statutory ambiguity with various possible interpretations, the court must continue to Step Two to determine whether the policy implemented by the agency is a reasonable interpretation of the statute.<sup>49</sup> Since *Chevron*'s adoption, very few cases fail at Step Two.<sup>50</sup> Where courts do conduct a robust analysis at Step Two, they generally

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<sup>41</sup> See Administrative Procedure Act of 1946 (APA), Pub. L. No. 89-554, § 706, 80 Stat. 378, 393 (1966) (codified as amended at 5 U.S.C. § 706 (2018)) (describing the scope of review that courts are allowed when faced with litigation involving agency decision making or policy).

<sup>42</sup> *Id.* § 706(1)(A).

<sup>43</sup> Bernard W. Bell, *The Model APA and the Scope of Judicial Review: Importing Chevron into State Administrative Law*, 20 WIDENER L.J. 801, 803 (2011). Before Congress passed the APA, the Supreme Court established its role in interpreting statutes, although it acknowledged that agency interpretations may merit consideration. *Id.* at 802–03. Furthermore, in *Skidmore v. Swift & Co.*, the Court found that courts remain the ultimate arbiters where more than one reasonable interpretation of statutory language is possible, though agency interpretations could be considered and given some weight. 323 U.S. 134, 140 (1994).

<sup>44</sup> *Chevron*, 467 U.S. at 865–66.

<sup>45</sup> *Id.* at 842–44.

<sup>46</sup> *Id.* at 842–43.

<sup>47</sup> Robin Kundis Craig, *Agencies Interpreting Courts Interpreting Statutes: The Deference Conundrum of a Divided Supreme Court*, 61 EMORY L.J. 1, 12 (2011).

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> See Kent Barnett & Christopher J. Walker, *Chevron Step Two's Domain*, 93 NOTRE DAME L. REV. 1441, 1444 (2018) (describing the lack of development of guidelines for Step Two because few cases fail at Step Two); Craig, *supra* note 47, at 12–13 (describing the limited nature of a court's review at Step Two). Challenges based upon the wisdom of an agency's policy choice will rarely be successful at *Chevron* Step Two because the court is not instructed to consider whether it agrees that the agency interpretation is superior to other possible interpretations. Craig, *supra* note 47, at 12–13. Instead, the court looks at whether the interpretation falls within the spectrum of reasonable choices based upon the relevant statute. *Id.*

use one of three possible approaches.<sup>51</sup> The Court has used all three of these approaches but has provided no definitive determination as to the correct method at Step Two.<sup>52</sup> Although *Chevron* appeared to create a simple framework to determine when and how to afford agencies deference, in practice, the guidance from the Court is unclear and inconsistently applied.<sup>53</sup>

In the decade following *Chevron*, the Court did not make any attempt to simplify its purview, despite calls by administrative lawyers for clarity.<sup>54</sup> Although courts deferred to agencies more frequently after *Chevron*, there was a sense that courts sometimes applied deference without engaging in the *Chevron* analysis.<sup>55</sup> In response, Justice Stevens, who intended *Chevron* to provide a role for judicial oversight, and Justice Scalia, who believed that the decision permitted a wide berth for agencies, led the majorities and dissents in a number of cases that complicated the *Chevron* doctrine.<sup>56</sup>

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<sup>51</sup> Barnett & Walker, *supra* note 50, at 1448, 1451. One approach is akin to arbitrary and capricious review under the APA, wherein the reviewing court looks to see if the interpretation is adequately justified by the agency and whether the agency considered several factors in charting its course. *Id.* at 1454. A second approach focuses primarily on the structure and text of the statute to determine whether the interpretation is reasonable. *Id.* at 1451. The third approach focuses on the purpose of the statute as a whole and inquires whether the agency interpretation is consistent with that purpose and is therefore reasonable. *Id.* at 1452–53.

<sup>52</sup> *Id.* at 1457. *See, e.g.*, Util. Air. Regulatory Grp. v. EPA, 573 U.S. 302 (2014) (taking a textualist approach at *Chevron* Step Two); *Judulang v. Holder*, 565 U.S. 42 (2011) (engaging in arbitrary and capricious review at *Chevron* Step Two); *Chevron*, 467 U.S. at 865 (determining that courts, in reviewing agency decisions at Step Two of the inquiry, must look to the purpose of the statute that is being interpreted to determine reasonableness).

<sup>53</sup> *See* Linda Jellum, *Chevron's Demise: A Survey of Chevron from Infancy to Senescence*, 59 ADMIN. L. REV. 725, 726 (2007). The confusion over the correct way to apply *Chevron* Step One is of concern for courts. *Id.* at 727. Justice Stevens saw Step One as an inquiry into the intent of the legislature in order to determine whether they had spoken on the issue at hand. *Id.* at 728. This inquiry focused on statutory interpretation through methods such as legislative history, purpose, and social context. *Id.* Soon after *Chevron* was decided, Justice Scalia ascended to the Court, bringing with him the ascendancy of textualism. *Id.*; Jonathan R. Siegel, *The Legacy of Justice Scalia and His Textualist Ideal*, 85 GEO. WASH. L. REV. 857, 858 (2017). Scholars argue that the trend toward prioritizing the plain meaning of statutory text over the underlying intention of Congress leads to more frequent findings of statutory ambiguity than Justice Stevens likely envisioned for *Chevron*. Jellum, *supra*, at 728.

<sup>54</sup> *See* Thomas W. Merrill & Kristin E. Hickman, *Chevron's Domain*, 89 GEO. L.J. 833, 835 (2001) (considering the ways in which *Chevron* deference has been further complicated and identifying outstanding questions regarding the breadth of its applicability).

<sup>55</sup> Nicholas R. Bednar & Kristin E. Hickman, *Chevron's Inevitability*, 85 GEO. WASH. L. REV. 1392, 1403–04 (2017). The first Supreme Court decisions that followed *Chevron* indicate that the Court was ambivalent about adhering to *Chevron*. *Id.* Justice Scalia, who frequently called for the application of *Chevron* doctrine in such cases, was eventually successful in cementing *Chevron* as the dominant framework and, by 1990, each justice on the Court signed on to at least one opinion that followed the *Chevron* framework. *Id.* at 1404.

<sup>56</sup> *See* William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 GEO. L.J. 1083, 1088 (2008) (describing the doctrinal “tug of war” between Justices Stevens and Scalia on the correct conception of *Chevron*).

*Mead*, decided in 2001, represented a major shift in how *Chevron* should be applied and is seen as a watershed moment in the development of the doctrine.<sup>57</sup> *Mead* stands for the presumption that *Chevron* deference is only appropriate where it is clear that Congress has delegated the authority to make law to the federal agency in question.<sup>58</sup> This implies that a statute must meet a preliminary threshold, known as *Chevron* Step Zero, before a court can determine whether an agency's interpretation of that statute passes muster.<sup>59</sup> *Mead* envisioned a more robust role for the judiciary in applying *Chevron* and implied that the Court was willing to limit the degree to which it accepted agency expertise.<sup>60</sup> Although *Mead* sought to create a more concrete framework for lower courts to weed out cases where *Chevron* deference was not appropriate, data shows that the haphazard application of *Chevron* continued after *Mead*.<sup>61</sup>

In 2005, in *Brand X*, the Court swung back to a broader reading of *Chevron* doctrine, holding that the agency was permitted to overrule federal court precedent of the organic statute at issue.<sup>62</sup> *Brand X* instructs federal circuit courts to yield to agency interpretation wherever such an interpretation survives *Chevron*, regardless of whether the agency's interpretation conflicts with the court's own precedent.<sup>63</sup> This decision forced federal courts to set aside their own previous decisions where they conflicted with a later agency inter-

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<sup>57</sup> Bednar & Hickman, *supra* note 55, at 1408–09. The demonstrable impact of *Mead* is that since the case was decided, the Court has not deferred to agency decisions under *Chevron* unless they were expressed in the form of a regulation issued under APA notice-and-comment procedures or formal adjudication. *Id.* at 1409. Therefore, agency decisions that overcome lesser procedural hurdles, such as policy statements or agency guidelines, are reviewed under *Skidmore* deference rather than *Chevron* deference. *Id.*

<sup>58</sup> *Mead*, 533 U.S. at 226–27, 230–33.

<sup>59</sup> Thomas W. Merrill, *Step Zero After City of Arlington*, 83 FORDHAM L. REV. 753, 756 (2014). Scholars argue that the goal posts for Step Zero are difficult to discern in *Mead*. *Id.* Although it remains muddled, Step Zero is an important tool for courts in determining whether it is appropriate to move to the two-step *Chevron* test, because of how frequently courts are forced to decide whether a perceived legislative “gap” should be construed as an implied delegation of legislative authority by Congress. *Id.* at 758–59.

<sup>60</sup> See Craig, *supra* note 47, at 13 (describing the characteristics of agency decision making that courts should consider in determining whether it warranted deference after *Mead*, namely the process by which the agency arrived at its decision and whether the authority they relied upon was legitimate).

<sup>61</sup> See Eskridge & Baer, *supra* note 56, at 1128 (aggregating data that demonstrates that courts are inconsistent in how they approach agency deference questions).

<sup>62</sup> See 545 U.S. at 982–83, 1000–03. The Court specified that the federal court precedent only trumps an agency interpretation when the court determines that the statute was unambiguous and therefore not entitled to *Chevron* deference in the first place. *Id.* at 982–83. The reasoning employed by the Court in *Brand X* parallels *Chevron*, but goes beyond: not only must a court defer to agency interpretations, they must also overrule their own previous interpretations when they conflict with later interpretive decisions made by federal agencies. Craig, *supra* note 47, at 18.

<sup>63</sup> See *Brand X*, 545 U.S. at 982 (holding that *Brand X* applies except in circumstances where it is found that the terms of the statute are unambiguous and thus there is no gap for the agency to fill with its own interpretation).

pretation, a missive they resist only in limited circumstances.<sup>64</sup> Ironically, the Supreme Court has been unwilling to yield when its *own* precedent conflicts with a new agency interpretation.<sup>65</sup>

Critics argue that *Brand X* severely restricts courts' authority to interpret the law and transfers it to the executive branch administrative agencies, posing constitutional concerns over violation of separation of powers.<sup>66</sup> Nevertheless, when agencies alter interpretations previously adopted by administrations with different policy objectives, they often cite *Brand X* to force reviewing courts to accept these reinterpretations.<sup>67</sup> When this occurs, critics are even more inclined to accuse agencies of using the doctrine to execute political objectives rather than accurately interpret the underlying statute.<sup>68</sup> Notwithstanding this

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<sup>64</sup> Craig, *supra* note 47, at 18–19. A lower court might refuse to apply *Brand X* to overrule its own precedent for one of two reasons. *Id.* The court might consider the precedent so well-established that it essentially leaves the statute unambiguous and therefore no longer eligible for *Chevron* deference. *Id.* Alternatively, a lower court might decline to apply *Brand X* where it has already considered the agency interpretation in the past and ruled it unreasonable under *Chevron*. *Id.* at 20. Circuit courts are unwilling to allow agencies to use *Brand X* to evade a previous decision that an agency decision failed a *Chevron* challenge. *Id.* at 21.

<sup>65</sup> See *id.* at 21–22 (citing *Cuomo v. Clearing House Ass'n*, 557 U.S. 519, 535–36 (2009)) (refusing to overrule Supreme Court precedent interpreting enforcement of National Bank Act regulations). In *Cuomo*, the majority, in a footnote, raises—and disregards—the dissent's contention that *Brand X* should apply. 557 U.S. at 528 n.2.

<sup>66</sup> See *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1149–50 (10th Cir. 2016) (Gorsuch, J., concurring) (describing the tension between *Brand X* and separation of powers as a guard against the invasion of the people's liberties). Then-Judge Gorsuch also noted that *Brand X* might create due-process and equal-protection concerns because of fair notice problems—namely, statutory interpretations can be altered by a federal agency at any time based on a shift in the political winds. *Id.* at 1152.

<sup>67</sup> See, e.g., *Matter of A-B-*, 27 I. & N. at 327 (noting that the agency is not bound by any previous judicial interpretation of a statute and that the agency, not any reviewing court, has the power to resolve any statutory ambiguity). AG Sessions cites *Brand X* to assert that the agency is the ultimate authority on the interpretation of immigration legislation. *Id.* at 326.

<sup>68</sup> See Harold M. Greenberg, *Why Agency Interpretations of Ambiguous Statutes Should Be Subject to Stare Decisis*, 79 TENN. L. REV. 573, 587–88 (2012) (raising constitutional suspicions where agencies reinterpret statutes because it looks more like the agency is legislating rather than executing the law). One example of the danger of reinterpreting statutes based on political motivations is the global gag rule. *Id.* at 579–80. The global gag rule prohibits any U.S. funding to international non-governmental organizations that provide abortion services or offer information about abortions. Molly Redden, 'Global Gag Rule' Reinstated by Trump, *Curbing NGO Abortion Services Abroad*, THE GUARDIAN (Jan. 23, 2017), <https://www.theguardian.com/world/2017/jan/23/trump-abortion-gag-rule-international-ngo-funding> [<https://perma.cc/VN36-7WJV>]. Since the Reagan Administration, each Republican president has invoked the rule, and each Democratic president has rescinded it. See Greenberg, *supra*, at 579–80 (describing the gag rule put in place by the George H.W. Bush Administration, rescinded by the Clinton Administration, and reinstated by the George W. Bush Administration). The rule changes based on ping-ponging interpretations of the word "method" in Title X of the Public Health Services Act as either allowing or disallowing abortion services. *Id.* at 579. One way that the Court might limit *Brand X* to prevent vast fluctuations between presidential administrations and ensure a reasoned process would be to look more seriously at the procedural steps taken by the agency in reinterpreting a policy. See Richard W. Murphy, *Hunters for Administrative Common Law*, 58 ADMIN. L. REV. 917, 937–38 (2006) (describing the concern that without procedural requirements, discretion allows agencies to easily switch between reasonable interpretations in order to make a polit-

critique, it remains permissible for agencies to reinterpret their previous position on the meaning of statutory language as long as the new interpretation passes the two-step *Chevron* test.<sup>69</sup> Those who criticize the widening of *Chevron* deference also highlight the risk of agency turf-grabbing and capture by politically motivated administrators.<sup>70</sup>

Proponents of *Brand X* and an expansive *Chevron* doctrine argue that agencies possess qualities that Congress and courts lack, which put them in the best position to effectuate congressional intent.<sup>71</sup> Namely, those who support a broad interpretation of *Chevron* point to agency advantages such as technical expertise, legitimacy of decision making, and adherence to the rule of law.<sup>72</sup> Importantly, proponents argue that putting Congress on notice of *Chevron* deference provides legitimacy for the deference.<sup>73</sup>

Deference is not uniform, however; through a comparative study of *Chevron* application in a variety of subject matter, scholars have found that there is a correlation between the subject and nature of the policy being considered, and the frequency and degree of deference a court affords that policy.<sup>74</sup> Su-

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ically motivated change). For example, where an agency seeks to replace one reasonable statutory interpretation with another, the agency should require that the new policy go through notice-and-comment rulemaking to increase transparency and legitimize the change. *Id.* at 938.

<sup>69</sup> *Brand X*, 545 U.S. at 1001; *Chevron*, 467 U.S. at 843. An agency's authority to interpret statutes is not subject to *stare decisis*, meaning an agency can adopt any permissible interpretation of a statute at any time, so long as it survives *Chevron*. Greenberg, *supra* note 68, at 576. The same two-step *Chevron* test, including whether the reversal is reasonable, applies regardless of whether a court is considering an original interpretation or a reinterpretation. *Id.* at 577.

<sup>70</sup> Connor N. Raso & William N. Eskridge, Jr., *Chevron as a Canon, Not a Precedent: An Empirical Study of What Motivates Justices in Agency Deference Cases*, 110 COLUM. L. REV. 1727, 1730–31 (2010). The threat of agency capture, wherein interest groups are able to push forth their goals with the agencies that are meant to regulate them, often occurs to the detriment of the public interest. Michael A. Livermore & Richard L. Revesz, *Regulatory Review, Capture, and Agency Inaction*, 101 GEO. L.J. 1337, 1340 (2013).

<sup>71</sup> See Alina Das, *Unshackling Habeas Review: Chevron Deference and Statutory Interpretation in Immigration Detention Cases*, 90 N.Y.U. L. REV. 143, 168 (2014) (discussing rationales for *Chevron* deference proposed by both the Court and academics).

<sup>72</sup> Raso & Eskridge, *supra* note 70, at 1730 (noting the legitimacy of deference when Congress expressly or impliedly delegates to an agency and that executive agencies are more easily held responsible by the electorate than courts); see also Evan J. Criddle, *Chevron's Consensus*, 88 B.U. L. REV. 1271, 1286 (2008) (discussing a federal agency's technical knowledge and experience in a particular area as a rationale for *Chevron* deference).

<sup>73</sup> Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 517. Justice Scalia himself acknowledged the likelihood that Congress, in leaving statutory gaps, did not intend any one particular outcome nor intend for the agency to determine the outcome, but rather that they did not strongly consider the impact of any ambiguity. *Id.* Still, Justice Scalia was comfortable with the fictionalized legislative intent that agencies prescribe to Congress through *Chevron* analysis, because Congress is now aware of the doctrine and knows that any ambiguities it creates will be solved by a particular agency rather than the courts. *Id.*

<sup>74</sup> See generally Eskridge & Baer, *supra* note 56, at 1144–47 (aggregating the *Chevron* decisions related to a variety of subject matter and finding them consistent with a hypothesis that subject matter impacts how judges approach *Chevron* problems).

preme Court justices appear to weigh their own expertise against the expertise held by the agency interpreting a statute when deciding whether deference is appropriate.<sup>75</sup> The Court tends to afford an agency deference more frequently in areas that require politically motivated calculations, such as foreign affairs, national security, and immigration, or in areas such as technical and economic regulations, which require extensive specialized knowledge.<sup>76</sup> In areas where justices might see themselves as more knowledgeable, such as procedural rules or criminal law, the Court applies *Chevron* deference less frequently.<sup>77</sup>

### *B. But When Do Courts Step In?: Unreasonableness and Arbitrary and Capricious Review*

As described in Section A, there is no consensus as to the appropriate approach to analysis of agency decision making at *Chevron* Step Two.<sup>78</sup> Yet, scholars point to a trend in the Step Two approach that resembles arbitrary and capricious review, wherein the reviewing court considers a number of factors to ascertain whether the agency action is justified by sufficient reasoning.<sup>79</sup> This may be due to the inherent similarities between arbitrary and capricious review and the reasonableness inquiry at *Chevron* Step Two.<sup>80</sup> Several scholars have noted this similarity and the Court, when performing a *Chevron* analysis, also implies it through reference to arbitrary and capricious review during Step Two.<sup>81</sup>

<sup>75</sup> *Id.* at 1144. Chief Justice John Roberts' majority opinion in *King v. Burwell* demonstrates the importance that the Court places on subject matter in determining whether *Chevron* deference is appropriate. See 135 S. Ct. 2480, 2489 (2015) (determining that because it is unlikely that Congress would delegate health care policy to the IRS, the subject matter involved necessitated a determination first that *Chevron* deference was not appropriate, and second that interpreting the statute fell within the purview of the Court).

<sup>76</sup> Eskridge & Baer, *supra* note 56, at 1044.

<sup>77</sup> *Id.* Behind the refusal of courts to defer under *Chevron* in criminal law cases is the rule of lenity, which is an anti-deference approach dictating that statutory ambiguities should be interpreted in favor of criminal defendants. *Id.* at 1115.

<sup>78</sup> See *supra* notes 50–53 and accompanying text.

<sup>79</sup> See Barnett & Walker, *supra* note 50, at 1454–57. Professors Barnett and Walker looked at all of the cases considered by the Court that contained *Chevron* Step Two analysis between 1984 and 2016, and found that five out of eight clearly contained arbitrary and capricious review. *Id.* at 1457.

<sup>80</sup> See *id.* at 1454 (noting that many scholars have made the connection between *Chevron* Step Two and arbitrary and capricious review); see also Ronald M. Levin, *The Anatomy of Chevron: Step Two Reconsidered*, 72 CHI.-KENT L. REV. 1253, 1254–55 (1997) (describing the overlap between arbitrary and capricious review and *Chevron* Step Two); Cass R. Sunstein, *Law and Administration After Chevron*, 90 COLUM. L. REV. 2071, 2105 (1990) (arguing that the Step Two reasonableness inquiry should resemble arbitrary and capricious review).

<sup>81</sup> See *supra* note 80 and accompanying text, see also *Judulang v. Holder*, 565 U.S. 42, 52 n.7 (2011) (determining that the outcome would be the same if analyzed under *Chevron* Step Two or arbitrary and capricious review); *Mayo Found. for Med. Educ. & Research v. United States*, 562 U.S. 44, 53 (2011) (noting that when conducting *Chevron* analysis at Step Two, a court looks at whether the agency decision is arbitrary and capricious); *Mead*, 533 U.S. at 229 (quoting the APA's arbitrary and capricious provision after outlining *Chevron* Step Two).

Many of the relevant factors in arbitrary and capricious review were articulated in *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Insurance Co.*<sup>82</sup> The Court articulated additional factors in two other cases. In *Judulang v. Holder*, the Court dictated that a decision is arbitrary and capricious where it is not sufficiently tied to the purpose of the law on which it is based, or if the rule will lead to decisions that vary based on the adjudicator, or if the agency fails to distinguish past precedent that conflicts with the current decision.<sup>83</sup> In *Massachusetts v. Environmental Protection Agency*, the Court added that an agency's refusal to regulate when instructed to by statute may constitute arbitrary and capricious behavior.<sup>84</sup>

Despite the extensive list of factors the Court has articulated in its arbitrary and capricious jurisprudence, the Court has repeatedly reiterated that arbitrary and capricious review is ultimately narrowed by deference to agency decisions.<sup>85</sup> This narrowness is emphasized because the Court continues to adhere to the belief that agencies are often in a better position than courts to administer statutes.<sup>86</sup> The frequent conflation of the analysis under arbitrary and capricious review and at *Chevron* Step Two is the result of a general agreement that the factors considered under arbitrary and capricious review are essentially testing the reasonableness of an agency decision, and are thus highly relevant in the Step Two realm.<sup>87</sup> Although there is a strong argument for this approach, some note that the inconsistency and lack of consensus regarding the appropriate analysis at Step Two adds to the inconsistency and incoherence of the *Chevron* doctrine.<sup>88</sup>

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<sup>82</sup> See 463 U.S. 29, 43 (1983) (determining that a court must consider whether an agency looked at all relevant factors in choosing a policy). The factors included whether the agency relied on information that Congress did not mean for it to consider, whether the agency offered an explanation for the policy that did not accord with the evidence before it, whether the agency did not consider an important facet of the issue, and whether the conclusion was so implausible that it could not be justified by differences in expertise or policy views. *Id.*

<sup>83</sup> See 565 U.S. at 55, 57–58, 62–63 (determining that the Department of Justice (DOJ) immigration policy did not pass arbitrary and capricious review based on an analysis of relevant factors).

<sup>84</sup> See 549 U.S. 497, 534–35 (2007) (finding that, based on the Environmental Protection Agency's statutory obligation to respond to any finding of endangerment under the Clean Air Act, the agency did not provide a sufficiently reasoned explanation for its refusal to respond to concerns about greenhouse gases, and the action was therefore arbitrary and capricious).

<sup>85</sup> See, e.g., *Judulang*, 565 U.S. at 52–53 (noting that arbitrary and capricious review is narrow in scope and that courts cannot override the reasoned judgment of agencies); *Massachusetts*, 549 U.S. at 527 (noting that review of agency action based on their statutory mandate is narrow).

<sup>86</sup> See, e.g., *State Farm*, 463 U.S. at 42–43 (noting that arbitrary and capricious review is limited to whether the decision was based upon a set of reasonable factors and does not allow courts to substitute their own judgment).

<sup>87</sup> *Supra* notes 79–81 and accompanying text (describing the similarities between arbitrary and capricious review and *Chevron* Step Two).

<sup>88</sup> See Beermann, *supra* note 32, at 741–44 (describing the unclear boundaries between *Chevron* deference, *Skidmore* deference, and arbitrary and capricious review, and lamenting the inability of parties to predict under which standard an agency decision will ultimately be reviewed).

### C. What Does the BIA Know? Why and When We Defer to Agency Decision Making

*Brand X* and *Chevron* are relevant in the immigration space when one party in deportation proceedings appeals an agency decision in federal court.<sup>89</sup> Noncitizens who petition for relief from deportation proceedings are heard first by an immigration judge.<sup>90</sup> Once the immigration judge issues a decision, either party may appeal the decision to the BIA.<sup>91</sup> The BIA is the adjudicative body within the Executive Office for Immigration Review (EOIR), which is the Department of Justice (DOJ) subsidiary that oversees immigration litigation.<sup>92</sup> After the BIA issues a decision, the case may be appealed in federal court.<sup>93</sup>

Immigration cases make up the vast majority of administrative law cases that come before federal courts, and there is a strong trend of deference toward agency decisions.<sup>94</sup> The Court tends to afford a high level of deference to BIA and AG interpretations of immigration statutes, premised on the belief that

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<sup>89</sup> See, e.g., *Judulang*, 565 U.S. at 45 (considering whether an agency's interpretation of an immigration statute was reasonable); see also Shrutu Rana, *Chevron Without the Courts?: The Supreme Court's Recent Chevron Jurisprudence Through an Immigration Lens*, 26 GEO. IMMIGR. L.J. 313, 343–45 (2012) (discussing the shift in immigration jurisprudence towards agency deference based on the application of *Chevron* and *Brand X*). *Chevron* is highly relevant in immigration law because of the huge volume of immigration cases that are appealed in the federal courts. *Id.* at 345.

<sup>90</sup> U.S. DEP'T OF JUSTICE, EXEC. OFFICE OF IMMIGRATION REVIEW, BOARD OF IMMIGRATION APPEALS PRACTICE MANUAL § 4.2(a) (2020) [hereinafter BIA PRACTICE MANUAL], <https://www.justice.gov/eoir/page/file/1250701/download> [<https://perma.cc/A48C-THRV>]. Both the BIA and immigration courts are administered by the Executive Office for Immigration Review (EOIR), which is a subsidiary of the DOJ. *Id.* § 1.2(b).

<sup>91</sup> *Id.* § 4.2(a)(ii).

<sup>92</sup> Executive Office of Immigration Review, *About the Office*, U.S. DEP'T JUSTICE (Oct. 15, 2018), <https://www.justice.gov/eoir/about-office> [<https://perma.cc/G7Y4-5629>]. The BIA consists of twenty-one members, who are appointed by the Attorney General. BIA PRACTICE MANUAL, *supra* note 90, § 1.3(a).

<sup>93</sup> BIA PRACTICE MANUAL, *supra* note 90, § 1.4(h). Published BIA decisions are binding on the parties, on future cases before the BIA, on immigration courts, and on the DHS. *Id.* § 1.4(d)(i). In addition to the regular procedures for adjudicating an immigration appeal, the AG may choose to issue a separate opinion that overrules the BIA, should the AG office disagree. *Id.* § 1.4(g). The AG is referred BIA cases at the request of the AG. *Id.* The DOJ argues that under *Brand X*, deference to its agencies' interpretations is appropriate, regardless of whether federal courts of jurisdiction have precedent that conflicts with such an interpretation. Rana, *supra* note 89, at 347. Even in cases where no statutory ambiguity for the agency to interpret is firmly established, courts tend to defer to immigration agency interpretations. *Id.* at 348.

<sup>94</sup> See Rana, *supra* note 89, at 313 (noting that immigration cases make up 90% of administrative law cases heard in federal court and that courts tend to ask whether deference is appropriate rather than whether the agency is correctly interpreting the relevant statute). Scholars note that there is a lack of robust review by the BIA due to an overwhelming caseload. *Id.* at 318. The BIA often hands down brief summary affirmations of lower immigration court decisions without any reasoned analysis, and yet federal courts continue to support the BIA under *Chevron*. *Id.* at 318–19.



they possess more specialized knowledge than federal courts.<sup>95</sup> Additionally, courts are encouraged to rely on agency decisions in order to streamline the process and make it more efficient, eliminating contradictory precedent to produce consistent results in immigration cases that raise similar issues.<sup>96</sup> Nevertheless, the current volume of cases heard by agency decisionmakers, and the inconsistent outcomes they produce, leads practitioners to conclude that broad deference is not being implemented as intended.<sup>97</sup> In practice, the application of *Chevron* and *Brand X* could create uncertainty because the BIA decisions that outline certain immigration requirements, such as what groups are sufficiently socially distinct in asylum cases, have changed over time and resulted in circuit splits.<sup>98</sup> The backlog of immigration cases is steadily growing—in 2009, the average wait time for a case pending in immigration court was 430

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<sup>95</sup> Rana, *supra* note 89, at 334; see Jeffrey S. Chase, *The BIA vs. The Supreme Court?*, OPINIONS/ANALYSIS ON IMMIGR. L. (Dec. 24, 2018), <https://www.jeffreyschase.com/blog/2018/9/1/the-bia-vs-the-supreme-court> [<https://perma.cc/38SQ-WAMU>] (describing the impact of strong *Chevron* deference in immigration court). In addition to specialized knowledge and expertise, *Chevron* deference is premised on the belief that agencies tend to be more politically accountable than judges, who are protected because of their Article III lifetime tenures. Rana, *supra* note 89, at 324, 334. Nevertheless, agency adjudication may be influenced by other politically motivated moves—for example, in 2002, Republican-appointed AG John Ashcroft reduced the size of the BIA from twenty-three to eleven members and removed many members who were selected by his predecessor, who was a Democrat. Jaya Ramji-Nogales et al., *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295, 352 (2007). The members removed did not correspond with seniority. *Id.*

<sup>96</sup> Rana, *supra* note 89, at 324.

<sup>97</sup> See, e.g., Ramji-Nogales et al., *supra* note 95, at 296, 301 (describing the inconsistent result among different adjudicators and suggesting that reforms are necessary in immigration adjudication to streamline results). For example, Colombian applicants whose cases were heard in Miami had a 5% chance of a positive outcome with one immigration judge and an 88% chance of success with one of his colleagues sitting in the same courthouse. *Id.* at 296. It is difficult to determine the degree of deviation between individual members of the BIA because the agency does not keep records that indicate which individual members participated in which decision as they do for immigration judges and asylum officers. *Id.* at 354. Still, it is clear that the success rate for asylum applicants has decreased significantly—in 2009, 29.11% of applicants who applied for asylum were denied, while in 2018 the denial rate increased to 41.82%. EXEC. OFFICE FOR IMMIGRATION APPEALS, IMMIGRATION COURT STATISTICS FOR FISCAL YEAR 2018 (May 2018), <https://www.justice.gov/opa/press-release/file/1060936/download> [<https://perma.cc/L6N7-FLZR>].

<sup>98</sup> Bednar, *supra* note 13, at 374–75. One major barrier to asylum applicants, particularly those who are unrepresented by counsel, is determining the appropriate evidence required to be granted asylum. *Id.* at 362. It is difficult to discern what evidence will be required because shifting case law over the years has changed what constitutes sufficient evidence in an asylum case. *Id.* In addition, adjudicators determine the existence of a PSG on a case-by-case basis, so an adjudicator is free to find in favor of one applicant who relies solely on testimony, but find against another with similar facts. *Id.* Although circuit courts are largely deferential to the BIA's evolving PSG standards, the Third and Seventh Circuits have raised concerns regarding the utility of the criteria of particularity and social distinction. *Id.* at 379.

days; in 2019, it was 736 days, indicating that the agency process is not becoming more efficient.<sup>99</sup>

In addition, the degree of deviation between immigration courts with respect to petitions for asylum suggests that the outcome of a noncitizen's case depends not on their legal argument, but instead on the judge they are randomly assigned.<sup>100</sup> The subjective nature of the asylum elements has led to inconsistent results both in immigration courts and upon review by the BIA.<sup>101</sup> This is what led to the circuit split, as some federal circuit courts have refused to defer to the agency's definition of a PSG, determining that the BIA's interpretation of the statute is unreasonable.<sup>102</sup>

## II. ONE STEP FORWARD, TWO STEPS BACK: THE DOJ'S TREATMENT OF PSG CLAIMS BASED ON DOMESTIC VIOLENCE

In *Matter of A-B-*, AG Sessions severely limited the viability of asylum claims wherein victims of domestic violence assert persecution based on membership in a PSG.<sup>103</sup> This was a departure from the BIA approach in *Matter of A-R-C-G-* and exemplifies the volatile nature of the DOJ's response to asylum claims rooted in private, gender-based violence.<sup>104</sup> This Part will trace the history of gender-based asylum claims, from how they were addressed by agencies beginning in the mid-to-late 1990s to their status after *Matter of A-B-*.<sup>105</sup> Section A will discuss the major gender-based asylum cases decided prior to *Matter of A-R-C-G-*, as well as the response from immigration advocates to these cases.<sup>106</sup> Section B will discuss the evolution of the requirements for asylum based on membership in a PSG, focusing on the reasoning and the path forward for those with gender-based asylum claims.<sup>107</sup> Section C will discuss *Matter of A-B-*, in-

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<sup>99</sup> *Average Time Pending Cases Have Been Waiting in Immigration Courts as of November 2018*, TRAC IMMIGR. (Nov. 2018), [http://trac.syr.edu/phptools/immigration/court\\_backlog/apprep\\_backlog\\_avgdays.php](http://trac.syr.edu/phptools/immigration/court_backlog/apprep_backlog_avgdays.php) [<https://perma.cc/6WVM-TM46>].

<sup>100</sup> Ramji-Nogales et al., *supra* note 95, at 302.

<sup>101</sup> See Bednar, *supra* note 13, at 362, 388 (describing the case-by-case nature of adjudication of asylum claims based on membership in a PSG and the concerns this raises about the BIA's consistency in considering cases); *infra* notes 157–158 and accompanying text.

<sup>102</sup> Sternberg, *supra* note 26, at 270; see *infra* notes 158–160 and accompanying text.

<sup>103</sup> See 27 I. & N. Dec. 316, 317, 320 (A.G. 2018) (noting that only under “exceptional circumstances” can violence perpetrated by non-state actors meet the requirements for asylum).

<sup>104</sup> See 26 I. & N. 388, 392–95 (B.I.A. 2014) (determining that the respondent's claim met all of the requirements of a successful asylum claim); Bachmair, *supra* note 15, at 1058–59 (discussing the inconsistent outcomes of gender-based violence claims and the tendency for outcomes to differ based on an adjudicator's understanding of the elements of an asylum claim).

<sup>105</sup> See *infra* notes 109–207 and accompanying text.

<sup>106</sup> See *infra* notes 109–144 and accompanying text.

<sup>107</sup> See *infra* notes 145–169 and accompanying text.

cluding AG Sessions' authority to decide the case, grounds for overturning it, and how practitioners are approaching similar claims going forward.<sup>108</sup>

*A. Grappling with Gender Based Claims: Early Advocacy Makes Tentative Inroads and the Saga of In re R-A-*

The requirements for asylum were first outlined in the Refugee Act of 1980, which authorizes the AG to grant asylum to an individual unable to return to her home country because she has suffered past persecution (or has a well-founded fear of future persecution on account of a protected ground).<sup>109</sup> The United States' obligation to accept valid asylum claims comes from its ratification of the 1951 Convention Relating to the Status of Refugees (the Convention) and the 1967 Protocol Relating to the Status of Refugees.<sup>110</sup>

Historically, noncitizens who assert gender-based asylum claims are unsuccessful.<sup>111</sup> Applicants have experienced some small steps forward in asserting their claims, but results remain inconsistent.<sup>112</sup> Part of the reason for this struggle lies in the exclusion of gender as an explicitly protected group for asylum in both domestic and international law.<sup>113</sup> Because asylum statutes do not specifically discuss gender as a protected group, either in United States immi-

<sup>108</sup> See *infra* notes 170–207 and accompanying text.

<sup>109</sup> Refugee Act of 1980, Pub. L. No. 96-212, §§ 102, 201, 208, 94 Stat. 102, 102–05 (codified as amended at 8 U.S.C. § 1101(a)(42) (2018)). Prior to the passage of the Refugee Act, there were refugees admitted to the United States; however, Congress handled admission on a piecemeal basis in response to international crises. Charles J. Ogletree, Jr., *America's Schizophrenic Immigration Policy: Race, Class, and Reason*, 41 B.C. L. REV. 755, 765 (2000). For example, the Immigration and Nationality Act of 1965 provided refugee status to only those who escaped countries under communist rule or countries in the Middle East. *Id.*

<sup>110</sup> Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267; Convention Relating to the Status of Refugees, art. 1(A), July 28, 1951, 19 U.S.T. 6577, 189 U.N.T.S. 150, 151–52.

<sup>111</sup> See Michael G. Heyman, *Asylum, Group Membership and the Non-State Actor: The Challenge of Domestic Violence*, 36 U. MICH. J.L. REFORM 767, 790 (2003) (describing the failure of asylum adjudicators to protect victims of domestic violence from persecution). Scholars contextualize the arguments for and against asylum in such cases as representative of two different views regarding the suffering of domestic violence victims: one view is that the suffering is personal, the other is that it is a product of the culture. *Id.* at 795.

<sup>112</sup> Laura S. Adams, *Fleeing the Family: A Domestic Violence Victim's Particular Social Group*, 49 LOY. L. REV. 287 (2003). Although state actors do not inflict domestic violence, many governments do not provide sufficient protection for those who are victimized by their parents, spouses, or intimate partners. *Id.* at 288. Some of the proposed social groups for those who experience domestic violence and wish to seek asylum include women, children, or victims of domestic violence. *Id.* at 293. The latter was accepted by Australia and Canada as the basis for granting asylum. *Id.* The distinction between other nations who accept "victims of domestic violence" as a PSG for asylum and the United States is that U.S. courts are unwilling to accept the circular reasoning that domestic violence victims are persecuted because they are victims of domestic violence. *Id.* at 294–95.

<sup>113</sup> See Karen Musalo, *Revisiting Social Group and Nexus in Gender Asylum Claims: A Unifying Rationale for Evolving Jurisprudence*, 52 DEPAUL L. REV. 777, 781–82 (2003) (describing the challenges that arise when women assert asylum claims based on gender-based violence).

gration law or in the Convention, women asserting gender-based claims of violence face the same barriers that victims of domestic violence traditionally face, in that the law sees the harm to which they are subjected as not worthy of public concern.<sup>114</sup> This is because such claims almost always involve harms perpetrated by non-state actors, such as family or community members.<sup>115</sup>

Women asserting asylum claims must not only show that the harm they endured amounted to persecution rather than a personal vendetta, but also that the harm was on account of membership in a protected group and that the government was “unable or unwilling” to stop the perpetrators of the harm.<sup>116</sup> Applicants must also fit their claims into one of the five statutorily recognized categories (gender is not included), the most common of which is persecution based on membership in a PSG.<sup>117</sup> Although immigration advocates argue that women who have experienced spousal abuse should be eligible for asylum based on their gender alone, courts are reluctant to allow such a broad category, and thus applicants must define their group in a different way.<sup>118</sup>

On May 26, 1995, the DOJ issued guidance titled “Considerations for Asylum Officers Adjudicating Asylum Claims for Women” (the Considerations), intending to provide criteria for immigration courts to consider with regard to gender-based applications.<sup>119</sup> This guidance was not binding on immigration judges, the BIA, or federal circuit courts, but could be used persuasively in considering such asylum claims.<sup>120</sup> Immigration advocates generally

<sup>114</sup> See *id.* (discussing the challenges that women face in asserting claims, both because of cultural views regarding gender-based violence and because gender is not included as a protected group in international asylum law). Beyond the issue of the statutory exclusion of gender, cultural barriers keep women from successfully asserting claims of gender-based violence. *Id.* Adjudicators may be hesitant to issue favorable decisions where women have experienced harm based on religious or cultural norms, such as female genital mutilation. *Id.*

<sup>115</sup> See T.S. Twibell, *The Development of Gender as a Basis for Asylum in United State Immigration Law and Under the United Nations Refugee Convention: Case Studies of Female Asylum Seekers from Cameroon, Eritrea, Iraq and Somalia*, 24 GEO. IMMIGR. L.J. 189, 208 (2010) (noting that gender-based persecution is usually perpetrated by non-state actors).

<sup>116</sup> *Id.* Although there is no technical difference in the requirements for gender-based asylum claims and other claims based on membership in a PSG, cultural and political resistance to such claims is an additional barrier that may influence these asylum decisions. *Id.* at 209.

<sup>117</sup> *Id.* at 208.

<sup>118</sup> See Bachmair, *supra* note 15, at 1063 (discussing the limiting effect of the “particularity” requirement, which limits the creation of PSGs that include large and diffuse sectors of society). Under this argument, “women” as a group should be recognized as a PSG because they are sufficiently particular, identifiable, and share common social characteristics within a society. Sarah Siddiqui, *Membership in a Particular Social Group: All Approaches Open Doors for Women to Qualify*, 52 ARIZ. L. REV. 505, 526 (2010). They thus fulfill the basic requirements of the PSG definition. *Id.*

<sup>119</sup> PHYLLIS COVEN, U.S. DEP’T OF JUSTICE, CONSIDERATIONS FOR ASYLUM OFFICERS ADJUDICATING CLAIMS FROM WOMEN (1995).

<sup>120</sup> Karen Musalo, *A Short History of Gender Asylum in the United States: Resistance and Ambivalence May Very Slowly Be Inching Towards Recognition of Women’s Claims*, 29 REFUGEE SURV. Q. 46, 52–53 (2010). Several years after DOJ issued the Considerations, the UNHCR issued its own Gender Guidelines. *Id.* at 51–52. The UNHCR Gender Guidelines state their position that, interpreted

supported the Considerations, which noted that serious physical harm that accumulates or intensifies over time could rise to the level of persecution.<sup>121</sup>

The Considerations acknowledged one of the most difficult issues that arises in gender-based claims: the nexus requirement.<sup>122</sup> The nexus requirement necessitates that the claimant show that the protected ground—in this case, the claimant’s gender—is the motivation for the persecution.<sup>123</sup> The practical reason this element is difficult to prove is illustrated by the Supreme Court’s decision in *INS v. Elias-Zacarias*, wherein the Court found that there must be a nexus between the membership in the proposed group and the private actor’s motive in persecuting the asylum applicant.<sup>124</sup> The evidentiary burden of proving the motivation of a persecutor is often extremely difficult for applicants to meet, as it requires more than a showing that they are likely to be harmed on account of their membership in a protected group, but also an inquiry into the state of mind of the persecutor.<sup>125</sup>

In 1996, shortly after the DOJ disseminated the Considerations, the BIA decided *In re Kasinga*, seemingly indicating that gender-based claims were gaining traction in immigration court.<sup>126</sup> The BIA found a cognizable PSG in the group defined as, “young women who are members of the Tchamba-Kunsuntu Tribe of northern Togo who have not been subjected to female genital mutilation (FGM), as practiced by that tribe, and who oppose the prac-

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properly, the definition of refugee covers gender-based claims. *Id.* at 51. These guidelines specifically reference domestic violence, along with other forms of abuse, as falling within the definition of persecution. *Id.* They did not recommend that gender itself be added as an additional ground for asylum, aside from the existing five categories, but indicated that many gender-based claims would fall under the PSG category. *Id.* Like the UNHCR Gender Guidelines, the Considerations also referenced domestic violence as a potential form of persecution. *Id.* at 53.

<sup>121</sup> See *id.* at 53 (noting that the Considerations are by and large helpful in their attitude towards gender-based claims); COVEN, *supra* note 119, at 2.

<sup>122</sup> COVEN, *supra* note 119, at 10. The nexus requirement is otherwise known as the “on account of” requirement. *Id.*

<sup>123</sup> See Christian Cameron, Note, *Why Do You Persecute Me? Proving the Nexus Requirement for Asylum*, 18 U. MIAMI INT’L & COMP. L. REV. 233, 234 (2011) (describing the nexus requirement). Establishing this nexus is necessary for a successful asylum application because it is part of the definition of “refugee” found in the INA. Refugee Act of 1980, § 102.

<sup>124</sup> 502 U.S. 478, 481 (1992); Adams, *supra* note 112, at 293–94.

<sup>125</sup> William John Wingert, *Closing the Door on Asylum-Seekers: Persecution on Account of Political Opinion after INS v. Elias Zacarias*, 13 B.C. THIRD WORLD L.J. 287, 305–06 (1993). The Supreme Court reversed the Ninth Circuit in *INS v. Elias-Zacarias*. *Id.* The Ninth Circuit handles a large percentage of immigration appeals and had a high rate of asylum grants compared to other federal circuits at the time. *Id.* at 288 n.14. The United Nations disagreed with the Supreme Court’s decision; it submitted a brief arguing that the case was wrongly decided because it contravenes the international asylum standards. *Id.* at 307 (noting that the UNHCR’s amicus brief argued that the asylum standard established in the case was too stringent and incorrectly found that coerced political activity could deem an applicant ineligible for asylum).

<sup>126</sup> 21 I. & N. Dec. 357, 357 (B.I.A. 1996); Musalo, *supra* note 120, at 55–56. In May of 1995 the United States issued the Considerations, and the *In re Kasinga* respondent arrived in the United States to seek asylum in December of that same year. 21 I. & N. Dec. at 357; Musalo, *supra* note 120, at 53.

tice.”<sup>127</sup> In its finding, the BIA noted that the PSG was united by immutable characteristics and that the respondent had a well-founded fear of persecution should she return to Togo.<sup>128</sup> The BIA also found that the nexus requirement was satisfied because FGM is practiced on account of an individual’s membership in the social group.<sup>129</sup>

In contrast, the case of *In re R-A-*, decided by the BIA in 1999, exemplifies the barriers that women asserting gender-based asylum claims often face.<sup>130</sup> The respondent claimed that she was persecuted based on the PSG of “Guatemalan women who have been involved with Guatemalan male companions, who believe that women are to live under male domination.”<sup>131</sup> In her claim, the respondent described the years of abuse that she endured from her husband, whom she married at the age of sixteen.<sup>132</sup> An immigration judge decided that the respondent fulfilled the statutory requirements and granted asylum, and the Immigration and Naturalization Service (INS) appealed the decision to the BIA.<sup>133</sup> In its analysis, the BIA acknowledged the sympathetic facts

<sup>127</sup> 21 I. & N. Dec. at 357. *In re Kasinga* was the first case where the BIA recognized female genital mutilation (FGM) as persecution. *See id.* at 358 (noting several findings in the respondent’s case, including a finding that FGM constitutes persecution); *Female Genital Cutting*, CTR. FOR GENDER & REFUGEE STUD., <https://cgrs.uchastings.edu/our-work/female-genital-cutting> [<https://perma.cc/S8B8-XG8U>] (noting that *In re Kasinga* is the first BIA decision that established asylum eligibility for women who fear persecution in the form of FGM). In its opinion, the BIA cited the Considerations, which lists FGM as one of the potential forms of persecution in gender-based asylum claims. 21 I. & N. Dec. at 362 (citing COVEN, *supra* note 119, at 4).

<sup>128</sup> *In re Kasinga*, 21 I. & N. Dec. at 365. Specifically, the BIA applied the PSG test from *Matter of Acosta* to determine that the characteristics of “young women” and “member of the Tchamba-Kunsuntu Tribe” are unchangeable. *Id.* at 366 (citing 19 I. & N. Dec. 211, 233 (B.I.A. 1985)). The BIA also noted young women should not be required to change the characteristic of maintaining intact genitalia because it is fundamental to their identity. *Id.* The BIA found that the respondent had a well-founded fear of persecution because any reasonable person would, under the circumstances, fear persecution should they be forced to return to Togo. *Id.*

<sup>129</sup> *Id.* at 367. In determining that the *In re Kasinga* respondent met the nexus requirement, the BIA reasoned that FGM was conducted in order to exert control over the sexuality of women, and thus the persecution feared by her was “on account of” her membership in the prescribed PSG. *Id.*

<sup>130</sup> *See* 22 I. & N. Dec. 906 (B.I.A. 1999).

<sup>131</sup> *Id.* at 907.

<sup>132</sup> *See id.* at 908–10 (describing acts of physical and sexual violence perpetrated against the respondent by her husband, her inability to flee, and the failure of the Guatemalan police to respond to or prevent the abuse). She also included country conditions information, citing attitudes towards domestic abuse in Latin America as well as a lack of resources for battered women, including failure to respond to reports of domestic violence or to prosecute these crimes. *See id.* at 910–12 (referencing information submitted by the respondent describing attitudes towards domestic violence in Guatemalan society).

<sup>133</sup> *See id.* at 911 (describing the immigration judge’s finding that the respondent’s PSG was cognizable and that the respondent was targeted by her abuser based on her resistance to his power and dominance over her). The Immigration and Naturalization Service (INS) ceased to exist in February of 2003; its duties were divided and absorbed into three different bureaus of the newly created Department of Homeland Security. U.S. CITIZENSHIP & IMMIGRATION SERVS., OVERVIEW OF INS HISTORY 11 (2012), <https://www.uscis.gov/sites/default/files/USCIS/History%20and%20Genealogy/Our%20History/INS%20History/INSHistory.pdf> [<https://perma.cc/PUW9-U5BX>].

of the case and found both that the harm suffered by the applicant rose to the level of persecution and that the government of Guatemala was “unable or unwilling” to control such persecution.<sup>134</sup> Despite this finding, the BIA ultimately held that the respondent’s claim could not succeed because it failed the nexus requirement: they were not convinced that the respondent was harmed on account of her membership in a PSG.<sup>135</sup>

The *In re R-A*- decision was widely criticized by immigration advocates, and on December 7, 2000, the INS issued a proposed rule to address these criticisms.<sup>136</sup> Based on the proposed rule, then-AG Janet Reno vacated the BIA decision and remanded it for reconsideration following final publication in the federal register.<sup>137</sup> The proposed rule guided judges as to the definitions of persecution, membership in a PSG, and the requirements for what constitutes persecution of a protected characteristic under refugee law.<sup>138</sup> It also emphasized that gender or status in a domestic relationship may form the basis of a PSG, even though a woman’s abuser is only motivated to harm *one* member of the group that shares this characteristic.<sup>139</sup>

Before the rule could be finalized, George W. Bush was elected president, and the Bush administration stopped its implementation.<sup>140</sup> Because the proposed rule was never published, the BIA and federal courts continued to come to inconsistent results on similar claims because they never got any concrete guidance from the agency.<sup>141</sup> During the Obama administration, respondent R-

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<sup>134</sup> *In re R-A*-, 22 I. & N. at 914.

<sup>135</sup> *Id.* The BIA noted that it appeared that the PSG was created for the purposes of the asylum claim and that there was insufficient evidence that women who are victims of domestic violence or their male perpetrators see them as part of such a group. *Id.* at 918.

<sup>136</sup> Asylum and Withholding Definitions, 65 Fed. Reg. 76,588 (proposed Dec. 7, 2000). The proposed regulation was designed not only to address the issues created by *In re R-A*-, but a variety of issues present in the area of asylum. Heyman, *supra* note 111, at 778–79. Recognizing that BIA decisions and federal court decisions addressing the definition of a PSG were in conflict with each other, the regulation sought to lay out a more uniform set of factors that courts could consider in making these determinations. *Id.* at 779. Some of the factors include group affiliation, collective motive or interest, consensual association between members of a proposed group, whether the group is recognized by the society or population of the country in question, whether members define themselves as part of the group, and whether membership in the group leads them to be singled out for disparate treatment within the society in question. *Id.* One of the reasons that *In re R-A*- was so widely criticized was that, although the case concerned domestic violence in particular, the BIA’s reasoning seemed to impact all gender-based claims involving persecution by private actors that the state cannot or will not control. Musalo, *supra* note 120, at 58.

<sup>137</sup> See *In re R-A*-, 22 I. & N. at 906 (vacating the BIA decision and remanding the respondent’s case for reconsideration once the final proposed rule was published in the federal register).

<sup>138</sup> Asylum and Withholding Definitions, 65 Fed. Reg. at 76,588.

<sup>139</sup> *Id.* at 76,593.

<sup>140</sup> Twibel, *supra* note 115, at 289. In 2004, AG Ashcroft received a brief from DHS wherein it agreed to stipulate that the respondent of *In re R-A*- should be granted asylum and indicated that it planned to work with the DOJ to finalize the proposed rule. *Id.* at 290.

<sup>141</sup> Siddiqui, *supra* note 118, at 531 (describing the inconsistency between the *In re R-A*- reasoning and the approach employed by some circuit courts). In *Matter of A-R-C-G*-, the BIA specifically

A-'s case was finally resolved when the government agreed to stipulate that she met the requirements for asylum.<sup>142</sup> This stipulated conclusion meant that advocates still lacked guidance as to the reasoning used to grant the respondent asylum.<sup>143</sup> After AG Sessions succeeded AG Eric Holder, the government's position seemed to reverse again in *Matter of A-B-*, with Sessions reviving the original rationale from *In re R-A*.<sup>144</sup>

### *B. What's All This Extra Stuff? Reconceiving the Requirements of a Particular Social Group and Matter of A-R-C-G-*

After *In re R-A-*, the BIA decided several other cases that did not specifically involve domestic violence in their facts but impacted the way domestic violence claims are argued.<sup>145</sup> When *In re R-A-* was decided, the standard for

noted that *In re R-A-* was no longer pending. *Matter of A-R-C-G-*, 26 I. & N. Dec. 388, 391 (B.I.A. 2014). On September 25, 2008, *In re R-A-* was remanded for reconsideration in light of recent jurisprudence. *Matter of R-A-*, 24 I. & N. Dec. 629, 630–31 (A.G. 2008). The respondent's application was granted in late 2009 after the Obama Administration agreed to recommend her for asylum. Julia Preston, *U.S. May Be Open to Asylum for Spouse Abuse*, N.Y. TIMES (Oct. 29, 2009), <https://www.nytimes.com/2009/10/30/us/30asylum.html> [<https://perma.cc/242L-GFV8>].

<sup>142</sup> Preston, *supra* note 141.

<sup>143</sup> See *Matter of L-R-*, CTR. FOR GENDER & REFUGEE STUD., <https://cgrs.uchastings.edu/our-work/matter-l-r> [<https://perma.cc/T2KS-3A6Q>] (describing the stipulated finding, which provided no further guidance as to the reasoning employed by the BIA in coming to its decision). Similarly, in *Matter of L-R-*, upon appeal of a case wherein the respondent had an asylum claim based on domestic violence, DHS stipulated that the respondent was eligible for asylum, and she was granted relief in a summary order by a San Francisco immigration judge. *Id.* In an unpublished brief for the case, DHS acknowledged that the PSG of "Mexican women in domestic relationships who are unable to leave" and "Mexican women who are viewed as property by virtue of their position in a domestic relationship" could meet the social visibility and particularity requirements. *Id.*; see also Department of Homeland Security's Supplemental Brief at 14, *Matter of L-R-* (B.I.A. Apr. 13, 2009) [hereinafter DHS Supplemental Brief], [https://cgrs.uchastings.edu/sites/default/files/Matter\\_of\\_LR\\_DHS\\_Brief\\_4\\_13\\_2009.pdf](https://cgrs.uchastings.edu/sites/default/files/Matter_of_LR_DHS_Brief_4_13_2009.pdf) [<https://perma.cc/2EYD-6ART>] (describing PSGs that DHS believes may meet the asylum requirements). Although the respondent was granted asylum after a protracted process, the fact that the findings in the case were stipulated meant that the decision is not always adhered to by immigration adjudicators. See Blaine Bookey, *Domestic Violence as a Basis for Asylum: An Analysis of 206 Case Outcomes in the United States from 1994 to 2012*, 24 HASTINGS WOMEN'S L.J. 107, 140–42 (2013) (discussing the inconsistent applications of the *Matter of L-R-* and *In re R-A-* precedents). Accordingly, immigration judges continued to deny PSGs that were virtually identical to *Matter of L-R-*, on grounds that the identified PSG lacked sufficient particularity or social distinction, rejecting the *In re R-A-* and *Matter of L-R-* decisions. *Id.* at 141–42.

<sup>144</sup> See *infra* notes 171–207 and accompanying text (describing the result and response to *Matter of A-B-*).

<sup>145</sup> See *Matter of E-A-G-*, 24 I. & N. Dec. 591, 595 (B.I.A. 2008) (noting that analysis of whether a PSG is cognizable should focus on social visibility and other fundamental characteristics within the respondent's home country); *Matter of S-E-G-*, 24 I. & N. Dec. 579, 585 (B.I.A. 2008) (finding that social groups lack particularity where they make up a large and dispersed part of society); *In re C-A-*, 23 I. & N. Dec. 951, 960 (B.I.A. 2006) (determining that particular social groups should be defined by characteristics that are both observable and identifiable by individuals in the respondent's home country). Although these cases implied that PSGs must be physically visible, the BIA attempted to clarify the visibility requirements discussed in all three of these cases by reframing the element as "social



PSG required only that the PSG be composed of members who share a common immutable characteristic.<sup>146</sup> The BIA later added the requirements of “social visibility” and “particularity.”<sup>147</sup>

The social visibility requirement posed an obstacle for gender-based claims in that many of the groups previously recognized by the BIA, such as women who have or have not undergone FGM, do not possess characteristics that are visible to the naked eye.<sup>148</sup> Later, the BIA attempted to clarify the social visibility requirement, now known as “social distinction.”<sup>149</sup> In *Matter of W-G-R-*, the BIA held that the element of social distinction did not require “ocular” visibility, but they must have an immutable trait that defines them.<sup>150</sup> The impact of this change on victims of domestic violence who sought to claim asylum was that it clarified that a non-physical trait might be sufficient to establish a PSG.<sup>151</sup>

In order for a PSG to be sufficiently particular, it must be defined by “characteristics that provide a clear benchmark for determining who falls with-

distinction” and noting that ocular visibility is not necessary for a PSG to be viable. *Matter of W-G-R-*, 26 I. & N. Dec. 208, 216 (B.I.A. 2014).

<sup>146</sup> *Matter of Acosta*, 19 I. & N. Dec. at 233–34.

<sup>147</sup> See *Matter of W-G-R-*, 26 I. & N. Dec. at 212 (describing the particularity and social visibility requirements). The social visibility requirement was particularly difficult for advocates to grapple with, as there was no clarity as to the definition of the requirement. Musalo, *supra* note 120, at 60. For several years, it was unclear whether the requirement meant that the PSG had to possess characteristics that were visible in the literal sense or the societal and cultural sense. *Id.*

<sup>148</sup> Musalo, *supra* note 120, at 60–61; see also *Gatimi v. Holder*, 578 F.3d 611, 615 (7th Cir. 2009) (indicating that literal visibility does not make sense as a requirement because, for example, women who have not undergone FGM or homosexuals who have not come out are not visible in the ocular sense, but they have been recognized as members of a PSG by the BIA).

<sup>149</sup> See *Matter of W-G-R-*, 26 I. & N. Dec. at 212 (adhering to the requirement that social visibility is required for a cognizable PSG claim, but renaming the element “social distinction” in order to clarify its definition).

<sup>150</sup> See *id.* at 216 (directing adjudicators to consider whether a PSG is perceived or recognized as distinct within a society rather than visible in the ocular sense). The BIA noted in *Matter of W-G-R-* that a number of PSGs previously found cognizable, including that of *In re Kasinga*, were not ocularly visible. *Id.* at 217. Aside from *In re Kasinga*, the BIA also referenced cases that found Cuban homosexuals to be a valid PSG, as well as finding that former police officers could constitute a PSG under some conditions. *Id.* (citing *Matter of Toboso-Alfonso*, 20 I. & N. Dec. 819, 822–23 (B.I.A. 1990) and *Matter of Fuentes*, 19 I. & N. Dec. 658, 662 (B.I.A. 1988)). The BIA noted that even groups who take steps to keep their membership hidden for safety reasons are not deprived of protected status if they meet the requirements of a PSG. *Id.*

<sup>151</sup> See *id.* at 217. Although the BIA clarified that social distinction did not require literal visibility, immigration judges continued to find that victims of domestic violence did not have cognizable claims. Bookey, *supra* note 143, at 141–42. For example, many asylum applicants arrive from countries that ignore or fail to address domestic violence, and at least two decisions hold that failure to address these crimes means that their victims are not recognized as a group in the society. See *id.* at 142 (citing a case from India wherein the immigration judge found that the applicant’s PSG lacked social visibility because only 30% of victims of domestic violence seek assistance from law enforcement authorities). An examination of hundreds of asylum adjudications revealed that the outcome of such cases depended on the view of the particular immigration judge before whom the applicant appeared. *Id.* at 147–48.

in the group.”<sup>152</sup> Essentially, the BIA directed adjudicators to determine whether the potential PSG as described is subject to different interpretations, or whether the description is decisive in determining which individuals are members of the group.<sup>153</sup> For example, in *Matter of S-E-G-*, the BIA found that “Salvadoran youth who have resisted gang recruitment, or family members of such Salvadoran youth” was insufficiently particular because the group was too large and diffuse to determine whether gangs targeted members because they were identified as part of the group or for some unrelated reason.<sup>154</sup> This directive poses a problem for gender-based claims, which often include terms such as “unable to leave” or “viewed as property.”<sup>155</sup> Different adjudicators may have different views regarding a term such as “unable to leave” based on their personal conceptions of gender-based violence, leading to findings that such groups are insufficiently particular.<sup>156</sup> In practice, to assess whether an individual is “unable to leave” would involve a fact-specific inquiry into the ability of a victim of domestic violence to leave a potentially unsafe situation, which allows for exactly the type of amorphous, indistinguishable group that immigration adjudicators repeatedly hold incognizable.<sup>157</sup>

After the BIA added the social distinction and particularity requirements, the federal circuit courts had to consider whether to adopt these requirements.<sup>158</sup> Most deferred per *Brand X*, with the exception of the Courts of Appeals for the Third and Seventh Circuits, which elected not to adopt the requirements.<sup>159</sup> The BIA’s current interpretation of the elements of a cognizable

<sup>152</sup> *Matter of M-E-V-G-*, 26 I. & N. Dec. 227, 239 (B.I.A. 2014).

<sup>153</sup> *Id.*

<sup>154</sup> 24 I. & N. Dec. at 584–85; see also *In re A-M-E- & J-G-U-*, 24 I. & N. Dec. 69, 76 (B.I.A. 2007) (finding that the terms “wealthy” and “affluent” are too amorphous to determine whether an individual is a member of a PSG because they can be interpreted differently by different people).

<sup>155</sup> Jessica Marsden, *Domestic Violence Asylum After Matter of L-R-*, 123 YALE L.J. 2512, 2534 (2014). *M-E-V-G-* represents a departure from the conception of particularity previously put forth by DHS in *L-R-*. See generally DHS Supplemental Brief, *supra* note 143. The Supplemental Brief submitted in that case by DHS indicates the government’s belief that “Mexican women in domestic relationships who are unable to leave” or “Mexican women who are viewed as property by virtue of their positions within a domestic relationship” were sufficiently particular. *Id.* at 14. The DHS position was that these PSGs were sufficiently particular because these proposed groups allow an adjudicator to definitively determine whether an individual is or is not a member of the prescribed group. *Id.* at 19.

<sup>156</sup> Marsden, *supra* note 155, at 2535.

<sup>157</sup> *Id.* at 2534; see, e.g., *Perez-Rabanales v. Sessions*, 881 F.3d 61, 66 (1st Cir. 2018) (finding that the purported PSG of “Guatemalan women who try to escape systemic and severe violence but who are unable to receive official protection” did not meet the social distinction requirement).

<sup>158</sup> Marsden, *supra* note 155, at 2531.

<sup>159</sup> See *Valdiviezo-Galdamez v. Attorney Gen.*, 663 F.3d 582, 608 (3d Cir. 2011) (rejecting social visibility and particularity); *Benitez Ramos v. Holder*, 589 F.3d 426, 430 (7th Cir. 2009) (rejecting the social visibility requirement); *Gatimi v. Holder*, 578 F.3d 611, 615–16 (7th Cir. 2009) (rejecting the social visibility test). In *Gatimi v. Holder*, Judge Posner did not cite *Chevron* or *Brand X* but held that the BIA provided inadequate reasoning in adding the social visibility requirement to PSG descriptions and thus was not entitled to discretion. 578 F.3d at 615–16. Similarly, in *Valdiviezo-Galdamez v. Attorney*

PSG are that the group is composed of individuals who share an immutable characteristic, are defined with particularity, and are socially distinct within the society.<sup>160</sup> The first (and only) binding decision that accepted a gender-based domestic violence claim under the reconceived definition of PSG was *Matter of A-R-C-G*.<sup>161</sup> In the decision, issued on August 26, 2014, the BIA determined that “married women in Guatemala who are unable to leave their relationship” was a cognizable PSG for the purposes of asylum under the INA.<sup>162</sup> An immigration judge previously denied the respondent’s application, determining that the abuse she described constituted criminal acts, not persecution, and that she could not meet the requirement that the persecution be on account of her membership in an alleged PSG.<sup>163</sup> The BIA overturned the immigration judge’s decision and determined that the respondent’s PSG was cognizable.<sup>164</sup>

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*General*, the Third Circuit determined that the asylum claimant did not have to meet social distinction and particularity requirements to prove a cognizable PSG. 663 F.3d at 603–04. The court conducted a *Chevron* analysis and determined that because the new requirements could not be reconciled with previous BIA cases, including *In re Kasinga*, they were unreasonable and thus not entitled to deference. *Id.* at 604. The court stated that consistency and the ability to reconcile interpretations over time are relevant factors in determining whether the agency policy passes *Chevron* Step Two. *Id.* The Third Circuit also cited *INS v. Cardoza-Fonseca* in its *Chevron* analysis for the proposition that inconsistent interpretation of a statutory provision is entitled to less deference than an agency view that remains constant. *Id.* (citing 480 U.S. 421, 446 n.30 (1987)).

<sup>160</sup> See *Matter of A-R-C-G*, 26 I. & N. Dec. at 392 (laying out the requirements that must be met in order for a PSG to be recognized by an adjudicator).

<sup>161</sup> See *id.* at 388; *Domestic Violence*, CTR. FOR GENDER & REFUGEE STUD., <https://cgrs.uc-hastings.edu/our-work/domestic-violence> [<https://perma.cc/772Q-NM3U>] (noting that *Matter of A-R-C-G* was the first case in fifteen years that addressed domestic violence as the basis for asylum).

<sup>162</sup> *Matter of A-R-C-G*, 26 I. & N. Dec. at 388–89. The claim was buttressed by a factual background that detailed years of verbal, physical, and sexual abuse. *Id.* The respondent repeatedly contacted the police and family members for help, but was unable to break free of her husband’s abuse. *Id.*

<sup>163</sup> *Id.* at 389–90 (noting the immigration court distinguished between the abuse the applicant experienced and persecution by finding that the abuse was “perpetrated ‘arbitrarily’ and ‘without reason,’” and therefore the applicant was not eligible for asylum).

<sup>164</sup> See *id.* at 392–95 (analyzing each element of a PSG and determining that the respondent’s proffered PSG was cognizable). It found that the immutability requirement was met because gender is an immutable characteristic. *Id.* at 392. The BIA stated that marital status may be immutable where an applicant shows that they are “unable to leave the relationship.” *Id.* at 392–93. An adjudicator may consider cultural or legal restraints on the dissolution of marriage in ascertaining whether the respondent is unable to leave. *Id.* The BIA also conceded that the PSG was defined with particularity based on the social and cultural norms of the applicant’s home country. *Id.* The BIA specifically noted that the respondent attempted to seek help from police to stop her husband’s abuse and that the police were unwilling to protect her because they would not interfere with a marriage. *Id.* It further found that the PSG was socially distinct because of the cultural conditions of Guatemala, specifically the dominant machismo culture, prevalence of family violence, and inability or unwillingness of the police force to adequately respond to domestic violence complaints. *Id.* at 394. A report cited by the BIA in *Matter of A-R-C-G* notes that in Guatemala, nearly 70% of murders of women go uninvestigated, and in 97% no arrests are made at all. *Guatemala Failing Its Murdered Women: Report*, CBC (July 18, 2006), <https://www.cbc.ca/news/world/guatemala-failing-its-murdered-women-report-1.627240> [<https://perma.cc/SV77-2S3U>]. Machismo culture is prevalent in Guatemala, encouraging gender discrimination and imposing social conditions where women occupy a lower status than men within society. Karen Musalo et al., *Crimes*

In its decision, the BIA found that the respondent had met all three requirements, albeit on the facts specific to her claim.<sup>165</sup>

*Matter of A-R-C-G-* was a victory for advocates who sought for decades to achieve recognition for gender-based asylum claims.<sup>166</sup> But the concessions made by DHS, as well as repeated proclamations by the BIA that each element of the claim needed to be considered on a case-by-case basis, left some advocates wanting.<sup>167</sup> Although the *Matter of A-R-C-G-* precedent seemed favorable, it also created a different set of challenges because immigration judges refused to accept PSGs that did not match *Matter of A-R-C-G-* exactly, even if the facts were similar.<sup>168</sup> Four years later, to the dismay of advocates, *Matter of A-R-C-G-* was overturned by *Matter of A-B-*, a case initially decided by the BIA on December 6, 2016, and vacated by AG Sessions during the summer of 2018.<sup>169</sup>

### *C. Back to Square One?: The Death of Matter of A-R-C-G-, the Reasoning of Matter of A-B-, and the Response from Practitioners*

Four years after *Matter of A-R-C-G-*, Donald Trump was elected President of the United States; under his leadership there has been a dramatic shift in DOJ priorities with regards to immigration.<sup>170</sup> President Trump and former AG Sessions shared a vision of immigration policy that included a wall spanning the entire Mexican border, a crackdown on undocumented immigrants, and a marked increase in deportation.<sup>171</sup> As a senator, Sessions was known for his

*Without Punishment: Violence Against Women in Guatemala*, 21 HASTINGS WOMEN'S L.J. 161, 182–83 (2010). Violence against women may be seen as socially acceptable at best, and, at worst, as a positive attribute. *Id.* As a result, countries that are dominated by machismo culture often experience crises in domestic violence and femicide. *Id.* Instead of challenging this finding, DHS opted to stipulate that the respondent's experiences constituted persecution and that the persecution was on account of her membership in a PSG. *Matter of A-R-C-G-*, 26 I. & N. Dec. at 395.

<sup>165</sup> See *Matter of A-R-C-G-*, 26 I. & N. Dec. at 388, 392–93 (discussing the government's concessions that the respondent's group members share a common immutable characteristic, that it is defined with particularity, and that it is socially distinct).

<sup>166</sup> NAT'L IMMIGRATION JUSTICE CTR., *supra* note 19, at 5.

<sup>167</sup> See *id.* One immigration advocacy group's practice advisory noted that despite the favorable outcome of the case, the analysis of the PSG in *Matter of A-R-C-G-* was inconsistent with prior BIA precedent. *Id.*

<sup>168</sup> *Id.* at 5–6. Even after *Matter of A-R-C-G-*, some immigration judges continued to deny claims involving PSGs that seemed cognizable under the case's reasoning, including those involving LGBTQ people, rape, or unmarried individuals. *Id.*

<sup>169</sup> *Matter of A-B-*, 27 I. & N. 316, 317 (A.G. 2018).

<sup>170</sup> See generally Pete Williams, *Trump's Victory—One Year Later: Sessions Remakes Justice Department*, NBC NEWS (Nov. 12, 2017), <https://www.nbcnews.com/storyline/trumps-victory-1-year-later/trump-s-victory-one-year-later-sessions-remakes-justice-department-n817551> [<https://perma.cc/5S6E-JNP8>] (describing changes made to the DOJ under the Trump administration, including in the areas of immigration, prosecution of drug offenses, policing policy, and civil rights).

<sup>171</sup> Jonathan Blitzer, *Jeff Sessions Is Out, but His Dark Vision for Immigration Policy Lives On*, NEW YORKER (Nov. 8, 2018), <https://www.newyorker.com/news/news-desk/jeff-sessions-is-out-but-his-dark-vision-for-immigration-policy-lives-on> [<https://perma.cc/5VP4-9X2T>].

anti-immigration stance and was instrumental in halting comprehensive immigration reform in 2007 and 2013.<sup>172</sup> As AG, Sessions was the primary decisionmaker in such immigration-hostile policies as cancelling Deferred Action for Childhood Arrivals (DACA), enforcing family separation at the border, attempting to cut off funding for sanctuary cities, enacting the travel bans in their various iterations, and reshaping immigration courts.<sup>173</sup>

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<sup>172</sup> Jonathan Weisman, *Senator Tries to Run Out the Clock on Immigration*, N.Y. TIMES (June 17, 2013), <https://www.nytimes.com/2013/06/18/us/politics/in-round-3-immigration-bill-faces-sessions-who-won-rounds-1-and-2.html> [<https://perma.cc/A7FS-H7CJ>]. In 2007, Sessions played a leading role in the defeat of a bipartisan immigration bill written by Senators Ted Kennedy and John McCain. *Id.* Similarly, in 2013, he was a leading opponent of another reform bill, which was championed by a bipartisan group of senators known as the “Gang of Eight.” *Id.* In 2006, Sessions controversially stated in a speech on the Senate floor that almost no Dominican immigrants coming to the United States have skills that would make them successful or benefit the United States. *Id.* In a 2015 memo, Sessions blamed the Republican loss of the 2012 presidential election in part on the party’s failure to retrench legal immigration. Memorandum from Sen. Jeff Sessions to Republican Members, Immigration Handbook for the New Republican Majority, at 2–3 (Jan. 2015), <https://www.aila.org/File/DownloadEmbeddedFile/69750> [<https://perma.cc/GML2-B7WT>] (outlining Sessions’ immigration platform, which espouses limiting work visas and increasing border control and implies that lax immigration policies drive up unemployment of “U.S.-born Americans”).

<sup>173</sup> See Memorandum from Elaine C. Duke, Acting Sec’y, U.S. Dep’t of Homeland Sec., to James W. McCament, Acting Dir., U.S. Citizenship & Immigration Servs., et al. (Sept. 5, 2017), <https://www.dhs.gov/news/2017/09/05/memorandum-rescission-daca> [<https://perma.cc/ULV5-C38B>] (declaring that the DACA program, which provided undocumented persons who entered the United States before the age of sixteen with a means to obtain work authorization, should be terminated); see also Exec. Order No. 13768, 82 Fed. Reg. 8799 (Jan. 30, 2017) (stating that sanctuary cities are no longer eligible to receive federal grants); Memorandum from Kevin K. McAleenan et. al., Comm’r, U.S. Customs & Border, to Sec’y, Dep’t of Homeland Sec. at 3 (Apr. 23, 2018), <https://www.documentcloud.org/documents/4936568-FOIA-9-23-Family-Separation-Memo.html> [<https://perma.cc/EQ5X-CX84>] (stating that it is permissible for DHS to separate parents from their children so that parents could be prosecuted for immigration-related offenses); Priscilla Alvarez, *Jeff Sessions Is Quietly Transforming the Nation’s Immigration Courts*, THE ATLANTIC (Oct. 17, 2018), <https://www.theatlantic.com/politics/archive/2018/10/jeff-sessions-carrying-out-trumps-immigration-agenda/573151/> [<https://perma.cc/46LD-XZPX>]. Eventually, the U.S. Court of Appeals for the Ninth Circuit ruled that President Trump’s executive order cutting off funding for sanctuary cities was unconstitutional. Deanna Paul, *Trump’s Order Threatening to Withhold Funding from ‘Sanctuary Cities’ Is Unconstitutional, Court Rules*, WASH. POST (Aug. 1, 2018), <https://www.washingtonpost.com/news/post-nation/wp/2018/08/01/trumps-order-threatening-to-withhold-funding-from-sanctuary-cities-is-unconstitutional-court-rules/> [<https://perma.cc/8VYN-89JY>]. See generally San Francisco v. Trump, 897 F.3d 1225 (9th Cir. 2018) (holding that the executive order violated separation of powers). The third iteration of the travel ban was upheld by the Supreme Court. See Sabrina Siddiqui, *Trump’s Travel Ban: What Does the Supreme Court Ruling Mean?*, THE GUARDIAN (June 26, 2018), <https://www.theguardian.com/us-news/2018/jun/26/trump-travel-ban-supreme-court-ruling-explained> [<https://perma.cc/894U-NFTM>] (noting that the third version of the travel ban limits immigration from Iran, Libya, Syria, Somalia, Yemen, North Korea, and Venezuela). Additionally, during AG Sessions’ tenure, he oversaw a number of changes to the structure and staffing of immigration courts. *Id.* Throughout the Trump administration, critics have levied allegations of politically motivated hiring practices for immigration judges. *Id.* Since the beginning of 2017, the DOJ has hired a total of 128 immigration judges concentrated in “adjudication centers” in Falls Church, Virginia and Fort Worth, Texas, where they hear cases via teleconference. *Id.* Hiring has been concentrated on those who have an immigration enforcement or prosecutorial background rather than one in advocacy, and some ex-

It is also noteworthy to recognize AG Sessions' history in regards to policies intended to protect women who are immigrants.<sup>174</sup> As a senator, Jeff Sessions also voted against the 2013 reauthorization of the Violence Against Women Act, which included new provisions regarding immigrants.<sup>175</sup> Sessions stated that he did not support the bill because he thought that the additional protections were politically motivated, not genuine attempts to protect women from violence.<sup>176</sup>

In addition to sweeping policy overhauls, AG Sessions took advantage of his power to refer cases to himself even after the BIA has issued its decision.<sup>177</sup> During his tenure of less than two years as AG, Sessions referred eight cases to himself and subsequently issued his own precedential legal opinion for each.<sup>178</sup> The AGs for the Bush and Obama administrations, by contrast, only used this power a combined thirteen times over sixteen years.<sup>179</sup>

One opinion issued by AG Sessions with far-reaching consequences for noncitizens applying for asylum was *Matter of A-B*.<sup>180</sup> The case, decided on June 11, 2018, overturned the BIA's decisions in both *Matter of A-B* and *Matter of A-R-C-G*.<sup>181</sup> Though his final opinion was contrary to BIA precedent, AG Sessions justified it by citing *Brand X* and *Chevron*.<sup>182</sup> He stated that the statutory term "particular social group," as it appears in the Immigration and

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pressed worry that Sessions is attempting to pack immigration courts with conservative-leaning judges who are less likely to decide cases favorably for noncitizens. *Id.* In addition, AG Sessions issued a new mandate that immigration judges must hear at least seven hundred cases per year, increasing pressure on adjudicators to decide cases more quickly. *Id.*

<sup>174</sup> Amy K. Matsui, *Senator Jeff Sessions's Problematic Record on Women's Rights*, NAT'L WOMEN'S L. CTR. (Dec. 20, 2016), <https://nwlc.org/blog/sen-jeff-sessions-problematic-record-on-womens-rights/> [<https://perma.cc/32C8-Z2ZE>]. The National Women's Law Center has criticized Sessions' record on the rights of survivors of sexual assault, access to reproductive healthcare, employment discrimination and equal pay, and civil rights. *Id.* After release of the 2005 Access Hollywood tape featuring a recording of Donald Trump talking about grabbing a woman by her genitals, Sessions said of the described conduct, "I don't characterize that as sexual assault." John McCormack, *Jeff Sessions: Behavior Described by Trump in 'Grab Them by the P—y' Tape Isn't Sexual Assault*, WASH. EXAMINER (Oct. 10, 2016), <https://www.washingtonexaminer.com/weekly-standard/jeff-sessions-behavior-described-by-trump-in-grab-them-by-the-p-y-tape-isnt-sexual-assault> [<https://perma.cc/9D7L-2HNP>].

<sup>175</sup> See Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, §§ 801–910, 127 Stat. 54, 55 (including provisions for the protection of immigrants who are victims of domestic violence or abuse).

<sup>176</sup> Kaitlin Washburn, *Violence Against Women Act at Risk of Lapsing*, OPENSECRETS.ORG (Oct. 3, 2018), <https://www.opensecrets.org/news/2018/10/vawa-at-risk-of-lapsing/> [<https://perma.cc/Y6KJ-ZJXL>].

<sup>177</sup> Blitzer, *supra* note 171; see 8 C.F.R. § 1003.1(h)(1)(i) (2018) (granting the Attorney General the power to order the BIA to refer any case to himself).

<sup>178</sup> Blitzer, *supra* note 171.

<sup>179</sup> *Id.*

<sup>180</sup> See generally 27 I. & N. Dec. 316 (determining that an applicant for asylum based on a PSG related to domestic violence did not have a cognizable claim); *Domestic Violence*, *supra* note 161.

<sup>181</sup> See generally *Matter of A-B*, 27 I. & N. Dec. at 316.

<sup>182</sup> *Id.* at 326–27.

Nationality Act is unquestionably ambiguous, and thus the agency's (here, the AG's) construction of the term should control.<sup>183</sup>

AG Sessions indicated that he took the case specifically to address the issue of whether being subjected to private violence may be a cognizable PSG for the purposes of asylum.<sup>184</sup> In so doing, he determined that only under "exceptional circumstances" may private criminal activity meet the requirements of a cognizable PSG.<sup>185</sup> He also indicated that violence inflicted by non-state actors will rarely meet the requirement that the government is "unable or unwilling" to control such conduct.<sup>186</sup> Ultimately, AG Sessions disagreed with the concessions that DHS made in *Matter of A-R-C-G-*, and he found that the BIA did not conduct a thorough analysis of the respondent's PSG in that case.<sup>187</sup> Conducting his own analysis, Sessions found that the PSG in *Matter of A-R-C-G-* lacked the requisite particularity and social distinction to be recognized as a cognizable PSG.<sup>188</sup> Thus, he overturned the BIA determinations on both of these elements.<sup>189</sup> He also wrote in his opinion that for an asylum applicant to prove the "unable or unwilling" element, they must show more than the failure of their government to prosecute or investigate private criminal activity.<sup>190</sup> Finally, Sessions invoked the reasoning from *In re R-A-* to determine that the respondent in *Matter of A-R-C-G-* did not meet the nexus requirement because there was insufficient evidence that her PSG membership motivated her husband's abuse, rather than their preexisting personal relationship.<sup>191</sup> Sessions used very similar reasoning to overturn the BIA's decisions in both *Matter of A-R-C-G-* and *Matter of A-B-*.<sup>192</sup>

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<sup>183</sup> *Id.* at 327 (citing *Brand X*, 545 U.S. at 982).

<sup>184</sup> NAT'L IMMIGRATION JUSTICE CTR., *supra* note 19, at 7. After certifying the case to himself, AG Sessions requested amicus briefing regarding whether being a victim of private violence may constitute a valid PSG for an applicant applying for asylum or withholding of removal. *Id.*

<sup>185</sup> *Matter of A-B-*, 27 I. & N. Dec. at 317.

<sup>186</sup> *Id.* at 320.

<sup>187</sup> *Id.* at 331.

<sup>188</sup> *Id.* at 335–36. Sessions stated that PSGs defined by their susceptibility to private violence fail the particularity requirement outlined in *Matter of M-E-V-G-*. *Id.* at 335. Although he acknowledges the difficulty of the personal circumstances of Guatemalan women such as the respondent in *Matter of A-R-C-G-*, Sessions found that there was no indication that "married women in Guatemala who are unable to leave their relationship" are a group that is recognized by society at large, as is required to establish social distinction. *Id.* at 336.

<sup>189</sup> *Id.* at 335–36. It is important to note that this approach does not follow the Third and Seventh Circuits, which chose not to adopt the particularity and social distinction requirements. *See supra* note 159 and accompanying text.

<sup>190</sup> *Matter of A-B-*, 27 I. & N. Dec. at 337–38.

<sup>191</sup> *Id.* at 339 (citing *In re R-A-*, 22 I. & N. Dec. at 921).

<sup>192</sup> *See generally id.* at 340–44 (considering various determinations by the BIA in *Matter of A-B-* and determining that it did not meet the requirements of a successful asylum claim). In his analysis of the nexus requirement, Sessions noted that the BIA neither cited any evidence that the respondent's husband was aware of her membership in a PSG nor indicated that her husband did not persecute her for any other reason. *Id.* at 343. One distinction that can be drawn between the two cases is that unlike

Immigration advocacy groups and practitioners responded to AG Sessions' decision with a variety of objections and critiques.<sup>193</sup> One of the major critiques was that the decision included expansive language that, though technically dicta, seemed to foreclose any possibility for domestic violence to qualify as a harm that satisfies the asylum nexus requirement.<sup>194</sup> Additionally, although he cites the “unable or unwilling to control” standard for persecution by a non-state actor, Sessions also states in dicta that the government must either “condone” the violence or be “completely helpless” to assist victims.<sup>195</sup> Immigration advocates worry that Sessions' intent was to heighten the accepted “unable and unwilling” standard for asylum claims that involve private violence.<sup>196</sup> A third prominent criticism of *Matter of A-B-* is that it potentially raises due process concerns for future asylum applicants because it encourages government officials to dismiss claims involving domestic violence without thoroughly considering the specific facts of each case.<sup>197</sup> Finally, although AG Sessions cites *Brand X* and *Chevron* in justifying his right to overturn a prior agency decision, he does not actually change any of the elements of a PSG claim described above, and thus some immigration advocates argue that the decision does not overrule circuit court precedent, but is instead narrow and limited to

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*Matter of A-R-C-G-*, the respondent in *Matter of A-B-* did receive a response when she reported abuse to the police and obtained restraining orders, but this did not prevent the abuse from continuing. *Id.* AG Sessions found that although the police did not succeed in preventing the abuse, this did not amount to a finding that the government was “unable or unwilling” to control the respondent's abuser. *Id.* at 343–44.

<sup>193</sup> See, e.g., IMMIGRANT LEGAL RES. CTR., *MATTER OF A-B- CONSIDERATIONS* (Oct. 2018), [https://www.ilrc.org/sites/default/files/resources/matter\\_a\\_b\\_considerations-20180927.pdf](https://www.ilrc.org/sites/default/files/resources/matter_a_b_considerations-20180927.pdf) [<https://perma.cc/H5TQ-6XRB>] (providing critiques of the reasoning in *Matter of A-B-* and guidance for practitioners who pursue domestic violence-based claims on behalf of their clients); NAT'L IMMIGRATION JUSTICE CTR., *supra* note 19 (criticizing the rhetoric regarding the nature of domestic violence exhibited in *Matter of A-B-* and providing practitioners with an explanation of the decision as well as tips for bringing similar claims in the future).

<sup>194</sup> See *MATTER OF A-B- CONSIDERATIONS*, *supra* note 193, at 3 (pointing out AG Sessions' characterization of domestic violence and gang violence as private criminal activity perpetrated against individuals who are no more vulnerable to violence or violations of human rights than anyone else within society).

<sup>195</sup> *Matter of A-B-*, 27 I. & N. Dec. at 337; see *MATTER OF A-B- CONSIDERATIONS*, *supra* note 193, at 4.

<sup>196</sup> See generally *INS v. Cardoza Fonseca*, 480 U.S. 21 (1987) (describing the “unable or unwilling” standard for persecution); see also *Thomas v. Ashcroft*, 359 F.3d 1169, 1179 (9th Cir. 2004) (noting that when a private, non-state actor is the persecutor, an applicant need not establish that the government condoned or promoted the violence), *vacated on other grounds*, *Gonzales v. Thomas*, 547 U.S. 183 (2006); *MATTER OF A-B- CONSIDERATIONS*, *supra* note 193, at 4–5 (noting that the “unable or unwilling standard” is well-established by precedent and arguing that AG Sessions' assertion that the government needs to condone the persecution is not correct).

<sup>197</sup> *MATTER OF A-B- CONSIDERATIONS*, *supra* note 193, at 5; U.S. CITIZENSHIP & IMMIGR. SERVS., PM-602-0162, GUIDANCE FOR PROCESSING REASONABLE FEAR, CREDIBLE FEAR, ASYLUM, AND REFUGEE CLAIMS IN ACCORDANCE WITH *MATTER OF A-B-* 6, 10 (July 11, 2018) [hereinafter *GUIDANCE AFTER MATTER OF A-B-*], <https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2018/2018-06-18-PM-602-0162-USCIS-Memorandum-Matter-of-A-B.pdf> [<https://perma.cc/N24E-PN3F>].



*Matter of A-B-* and *Matter of A-R-C-G-*.<sup>198</sup> No federal circuit court to date has issued a decision on a gender-based asylum claim since *Matter of A-B-*.<sup>199</sup>

On the same day that Sessions decided *Matter of A-B-*, DHS issued guidelines for U.S. Citizenship and Immigration Services (USCIS) employees to help determine asylum eligibility in light of the decision.<sup>200</sup> The USCIS guidelines instruct that claims involving gang violence or domestic violence will not generally establish credible or reasonable fear of persecution.<sup>201</sup> Based on the *Matter of A-B-* precedent and the new USCIS guidelines, a group of plaintiffs were denied asylum at the credible fear interview stage and brought suit before the United States District Court for the District of Columbia in *Grace v. Whitaker*.<sup>202</sup>

In the case, decided on December 17, 2018, the District Court found that despite the government's argument that *Matter of A-B-* and the USCIS guidelines did not bar all domestic violence claims, the decision and guidelines *did* constitute a blanket rule against all domestic violence claims at the credible fear stage.<sup>203</sup> The District Court held that the INA's definition of persecution was unambiguous and it did not include the heightened standard used by AG Sessions, therefore failing *Chevron* Step One.<sup>204</sup> The District Court held that the "unable or unwilling" standard was adopted by Congress and that an agency could not apply any heightened standard for non-state actors.<sup>205</sup> Finally, the District Court found that the USCIS guidelines did not warrant deference under *Brand X* because it was not a permissible interpretation of the INA, and

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<sup>198</sup> NAT'L IMMIGRATION JUSTICE CTR., *supra* note 19, at 14.

<sup>199</sup> See Jeffrey S. Chase, *IJs Grant Gender-Based Asylum Claim*, OPINIONS/ANALYSIS ON IMMIGR. L. (Jan. 20, 2019), <https://www.jeffreyschase.com/blog/2019/1/20/ijs-grant-gender-based-asylum-claims> [<https://perma.cc/3EB8-6V3S>] (noting that, although some immigration judges have accepted gender-based asylum claims, no appeal involving such a claim has been decided in a federal circuit court since *Matter of A-B-*, and the BIA has remained silent on the issue of whether gender-based claims remain viable).

<sup>200</sup> See generally GUIDANCE AFTER *MATTER OF A-B-*, *supra* note 197.

<sup>201</sup> *Id.* at 6; see also Dara Lind, *Jeff Sessions Is Pushing Asylum Officers to Reject More Migrants. Will They Go Along?*, VOX (July 20, 2018), <https://www.vox.com/2018/7/20/17568480/border-asylum-sessions-credible-fear> [<https://perma.cc/8A6R-BF5G>] (indicating that certain claims would generally be denied).

<sup>202</sup> 344 F. Supp. 3d 96, 104–05, 119 (D.D.C. 2018), *appeal filed sub nom.* *Grace v. Barr*, No. 19-5013 (D.C. Cir. filed Jan. 30, 2019). Only the United States District Court for the District of Columbia has jurisdiction to review whether certain immigration procedures or policy directives are impermissible. INA § 242(e)(3)(A) (codified as amended at 8 U.S.C. § 1152(e)(3)(A)).

<sup>203</sup> See *Grace*, 344 F. Supp. 3d at 126–27 (determining that although the term "particular social group" is ambiguous and subject to the *Chevron* framework, the general rule created by *Matter of A-B-* and the USCIS guidelines is not a reasonable interpretation of the statute).

<sup>204</sup> See *id.* at 128 (finding that the standard set by *Matter of A-B-* and the USCIS guidelines that a government condone or be completely helpless to stop a non-state actor is inconsistent with the standard set for the term "persecution" in the INA).

<sup>205</sup> See *id.* (determining that Congress adopted the "unable or unwilling" standard in the Refugee Act of 1980 and thus AG Sessions' condoned or completely helpless standard is an impermissible reinterpretation of the persecution requirement).

therefore contradictory court precedent could not be ignored.<sup>206</sup> The District Court decision applies to asylum officers who conduct credible fear interviews, but it is unclear whether the decision will be used persuasively by immigration judges and the BIA going forward.<sup>207</sup> At present, *Grace* dictates that asylum claims based on domestic violence cannot be barred at the credible fear stage, but might not prevent many claims based on domestic violence from failing later on in the asylum adjudication process.<sup>208</sup>

### III. SESSIONS ISN'T JUST WRONG, HE'S UNREASONABLE: WHY *MATTER OF A-B-* SHOULD NOT BE AFFORDED *CHEVRON* DEFERENCE

It must be seriously considered whether AG Sessions' controversial decision in *Matter of A-B-* represents a legitimate exercise of agency decision-making power under *Chevron*.<sup>209</sup> Section A of this Part asserts that the heightened standard for persecution established by *Matter of A-B-* should not be analyzed under the *Chevron* framework.<sup>210</sup> Section B argues that, on the basis of either arbitrary and capricious review under the APA or Step Two of *Chevron*, federal courts should not follow the precedent set by AG Sessions in *Matter of A-B-*.<sup>211</sup> Section C contends that in light of the concerns raised by *Matter of A-B-* about agency decision making, the Supreme Court should clarify the boundaries of *Chevron* and *Brand X*.<sup>212</sup>

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<sup>206</sup> See *id.* at 137–38 (holding that the USCIS guidelines could not direct asylum officers to ignore circuit court precedent based on *Brand X* because the ruling only applies where there is a finding that agency deference is appropriate). The issue that the court in *Grace* had with the agency's interpretation of *Brand X* in the USCIS guidelines was its scope. *Id.* at 137. The USCIS guidelines did not simply direct agency employees to ignore circuit court precedent on the definition of particular social group, the interpretation of which the agency was clearly owed deference under *Chevron*. *Id.* The directive went further, asking asylum officers to ignore *any* past or future federal court decision that did not comport with *any* part of *Matter of A-B-*. *Id.* The court in *Grace* rejected the government's argument that it could use *Brand X* to ignore any court decisions that conflicted with the "sweeping proclamations" made in *Matter of A-B-*. *Id.* According to the court, this kind of directive could only be legitimate if every aspect of *Matter of A-B-* was both entitled to deference and reasonable under *Chevron* Step Two. *Id.* at 138.

<sup>207</sup> Jeffrey S. Chase, *How Far Reaching Is the Impact of Grace v. Whitaker?*, OPINIONS/ANALYSIS ON IMMIGR. L. (Dec. 24, 2018), <https://www.jeffreyschase.com/blog/2018/12/24/how-far-reaching-is-the-impact-of-grace-v-whitaker> [<https://perma.cc/ZHR2-HY2N>].

<sup>208</sup> *Id.*

<sup>209</sup> See *infra* notes 213–269 and accompanying text.

<sup>210</sup> See *infra* notes 213–230 and accompanying text.

<sup>211</sup> See *infra* notes 231–250 and accompanying text.

<sup>212</sup> See *infra* notes 251–269 and accompanying text.

*A. Step One: Circuit Courts Should Not Defer to the Heightened Standard for Persecution Imposed in Matter of A-B- at Chevron Step One*

*Matter of A-B-* represents a reversal of the previous agency position regarding asylum claims based on PSGs that involve domestic violence.<sup>213</sup> For the most part, circuit courts have determined that Congress did not provide a definition of PSG in the Immigration and Nationality Act or in earlier immigration statutes, and therefore reasonable agency interpretations of the term should be afforded deference under *Chevron*.<sup>214</sup> Yet this is only one part of the *Matter of A-B-* decision; Sessions also opines on other elements of an asylum claim.<sup>215</sup> One of those elements is the standard for persecution by a non-state actor, which AG Sessions attempted to heighten.<sup>216</sup> Based in part on the analysis from *Grace v. Whitaker* that the AG's interpretation of the definition of persecution was unlawful, this precedent should not be applied by federal courts when they review claims involving non-state actors.<sup>217</sup>

Although *Grace* instructs asylum officers who conduct credible fear interviews not to apply the unlawful aspects of *Matter of A-B-* and accompanying USCIS guidelines, no such bar exists for immigration court judges, the BIA, or the federal circuit courts.<sup>218</sup> Notwithstanding *Grace*, AG Sessions argues that his findings in *Matter of A-B-* are acceptable because he has the au-

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<sup>213</sup> See *supra* notes 180–192 and accompanying text (describing the outcome of *Matter of A-B-* and its impact on domestic violence-related asylum claims); 27 I. & N. 316 (A.G. 2018).

<sup>214</sup> See, e.g., *Orellana-Monson v. Holder*, 685 F.3d 511, 520–21 (5th Cir. 2012) (holding that the BIA's "particularity" and "social visibility" requirements for a cognizable PSG are entitled to deference under *Chevron*); *Valdiviezo-Galdamez v. Attorney Gen.*, 663 F.3d 582, 590 (3d Cir. 2010) (determining that the BIA's interpretation of the requirements of a PSG should be analyzed under the *Chevron* doctrine); *Lwin v. INS*, 144 F.3d 505, 511–12 (7th Cir. 1998) (affording *Chevron* deference to the BIA's construction of PSG in *Matter of Acosta*); see also *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984). It should be noted, however, that there is a strong argument that when Congress included the term "particular social group" in legislation, they intended to tether the meaning of the term to international refugee treaties rather than allow the term to be interpreted independently. Bassina Farbenblum, *Executive Deference in U.S. Refugee Law: Internationalist Paths Through and Beyond Chevron*, 60 DUKE L.J. 1059, 1078 (2011).

<sup>215</sup> See 27 I. & N. at 337–39 (determining that the applicant satisfied neither the requirement that the government be "unable or unwilling" to control the persecution nor the requirement that the persecution be "on account of" membership in a PSG).

<sup>216</sup> *Id.* at 318.

<sup>217</sup> See 344 F. Supp. 3d 96, 115 (D.D.C. 2018) (determining that *Matter of A-B-* could not be construed to bar domestic violence-based asylum claims at the credible fear stage), *appeal filed sub nom. Grace v. Barr*, No. 19-5013 (D.C. Cir. filed Jan. 30, 2019).

<sup>218</sup> See *id.* (describing the limited jurisdiction of the District Court under 8 U.S.C. § 1252(e)(3)(A) to review negative credible fear determinations where the challenge concerns a question of legality of a written policy or guideline issued under the authority of the AG that pertains to the expedited removal of immigrants); see also *supra* note 206 and accompanying text (explaining the limits on how USCIS could use *Brand X* to direct asylum officers to ignore past or future circuit court precedent that conflicted with *Matter of A-B-*).

thority to reverse previous precedent under *Brand X*.<sup>219</sup> But the definition of persecution is not ambiguous; the “condoned or complete helplessness” standard for persecution by non-state actors suggested by AG Sessions should not be afforded deference under *Brand X* because it should not be afforded deference under *Chevron*.<sup>220</sup>

*Chevron* deference is inapplicable because the “unable or unwilling to protect” standard in the definition of “persecution” is so entrenched in congressional intent and BIA precedent that the term is not ambiguous.<sup>221</sup> An agency’s statutory interpretation fails Step One of *Chevron* when there is no statutory ambiguity at issue.<sup>222</sup> Although Sessions does claim to apply the “unable or unwilling” to protect standard, the standard he is imposing is in practice heightened.<sup>223</sup> Using a standard where a government must condone or be completely helpless to prevent persecution would require circuit courts to overturn previous cases that AG Sessions does not purport to touch.<sup>224</sup> AG Ses-

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<sup>219</sup> *Matter of A-B-*, 27 I. & N. Dec. at 327; see Nat’l Cable & Telecomm. Ass’n v. Brand X Internet Servs., 545 U.S. 967, 982 (2005) (holding that previous federal court precedent does not foreclose agencies from implementing a different reasonable interpretation of an ambiguous statute).

<sup>220</sup> See *Pereira v. Sessions*, 138 S. Ct. 2105, 2113 (2018) (stating that where Congress provides unambiguous guidance, *Chevron* analysis is not necessary or appropriate); *Brand X*, 545 U.S. at 981 (noting that a change of policy is only legitimate if the statute is ambiguous and the agency provides a reasoned explanation for the reversal).

<sup>221</sup> *Grace*, 344 F. Supp. 3d at 128. In *Matter of Acosta*, the BIA determined that Congress intended to impose a standard that the harm inflicted on an asylum applicant be either inflicted by the government or be of the type that the government was “unable or unwilling” to control. 19 I. & N. Dec. 211, 222–23 (B.I.A. 1985). The BIA came to this conclusion because the persecution language in the INA is identical to that which was used in statutes in existence prior to the Refugee Act of 1980. *Id.* Applying rules of statutory interpretation, the BIA then reasoned that where Congress continues to use a term from a previous statute, it carries forward the established meaning of that term. *Id.* at 223. In addition, it is important to note that one of the established exceptions to the application of *Brand X* is where precedent is so well established that it effectively renders the statute unambiguous and therefore no longer eligible for *Chevron* deference. Craig, *supra* note 47, at 19.

<sup>222</sup> *Chevron*, 467 U.S. at 842–43.

<sup>223</sup> *Matter of A-B-*, 27 I. & N. Dec. at 320. AG Sessions dictates that an applicant must show that private violence was “condoned” by the government or that the government “demonstrated a complete helplessness” to protect the victim. *Id.* at 337; see *Grace*, 344 F. Supp. 3d at 130 (determining that the “condoned or complete helplessness” standard referenced by AG Sessions in *Matter of A-B-* was impermissible because the correct standard is “unwilling or unable to control”) (internal quotations omitted).

<sup>224</sup> See *Matter of A-B-*, 27 I. & N. Dec. at 337, 343 (determining that although the police were unable to stop the abuse that respondent A-B- endured with restraining orders or arrests, she did not meet the “unable or unwilling” to protect standard). For example, there are a number of cases wherein the BIA determined that even where the respondent did not seek assistance from the police, they established that the government was “unable or unwilling” to control the non-state actor that perpetrated the harm because the government would not have helped even if the respondent reported it. See, e.g., *In re S-A-*, 22 I. & N. Dec. 1328, 1335 (B.I.A. 2000) (determining that although the respondent did not request assistance from the government, she established past persecution by showing that the government of Morocco was not in a position to assist her). In contrast, the respondent in *Matter of A-B-* not only provided country conditions describing the inability and unwillingness of the Salvadoran government to protect her against domestic violence, but also demonstrated that she sought assistance and

sions goes on to dictate that neither the failure to act on a report nor the ineffectiveness of police response to reports of domestic violence are sufficient to meet such a standard, casting considerable doubt on whether any factual circumstances would satisfy the standard after *Matter of A-B*.<sup>225</sup> If the standard set in *Matter of A-B* cannot be satisfied, then AG Sessions effectively created a general rule against domestic violence claims, which is an unreasonable interpretation of the statute and fails *Chevron* Step Two.<sup>226</sup>

Moreover, to use *Brand X* to force the adoption of this heightened standard would be an offense to separation of powers of the type described by then-Judge Gorsuch in his concurrence in *Gutierrez-Brizuela v. Lynch*.<sup>227</sup> Judge Gorsuch also raised the concern that the broad application of *Brand X* would allow political appointees to alter existing laws without advanced notice to the parties impacted.<sup>228</sup> By altering the well-established, unambiguous definition of persecution as harm that the government is “unable or unwilling” to control, AG Sessions does just that.<sup>229</sup> At the very least, federal courts reviewing *Matter of A-B* or attempting to apply it in the future should construe as dicta the language that AG Sessions uses to heighten the standard for persecution by a non-state actor and decline to apply it.<sup>230</sup>

### *B. Step Two: Even if Courts Defer at Chevron Step One, AG Sessions Fails Arbitrary and Capricious Review*

Even if a reviewing court were to allow the *Chevron* analysis to proceed past Step One, AG Sessions’ decision with regard to persecution by a non-state actor fails Step Two.<sup>231</sup> There is no consensus as to the appropriate approach to

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that it was ineffective. 27 I. & N. Dec. at 343–44. AG Sessions held this was insufficient to establish persecution. *Id.*

<sup>225</sup> See *Matter of A-B*, 27 I. & N. Dec. at 337, 343 (finding that the government’s lack of assistance, even after reports to law enforcement, was insufficient to establish that they were unable or unwilling to protect the respondent).

<sup>226</sup> See Craig, *supra* note 47 (noting that if Congress’s intent is unambiguously expressed, the agency must give effect to the statutory language); see also Grace, 344 F. Supp. 3d at 126–27 (determining that even where the agency is owed deference, a general rule against certain claims created by the USCIS Guidelines is not a reasonable interpretation of the statute and thus fails *Chevron* Step Two).

<sup>227</sup> See 834 F.3d 1142, 1149–50 (10th Cir. 2016) (Gorsuch, J., concurring) (arguing that *Brand X* requires the neutral judiciary to yield its authority to a politically motivated arm of government, which inherently blurs the lines between the distinct branches of government).

<sup>228</sup> *Id.* at 1149.

<sup>229</sup> See *supra* note 225 and accompanying text (describing the types of evidence that are insufficient to meet the heightened standard imposed by Sessions in *A-B*, which includes information previously found to meet the requirements); Grace, 344 F. Supp. 3d at 130 (determining that AG Sessions impermissibly applied a “condoned or complete helplessness” standard) (internal quotations omitted).

<sup>230</sup> NAT’L IMMIGRATION JUSTICE CTR., *supra* note 19, at 1.

<sup>231</sup> See *Chevron*, 467 U.S. at 842–44 (describing the two questions a court must consider when determining whether the way that an agency construed a statute is permissible); see also *Matter of A-*

analysis of agency decision making at *Chevron* Step Two, and further, whether there is any practical distinction between Step Two review and APA arbitrary and capricious review.<sup>232</sup> Nonetheless, recent Court precedent suggests a trend towards analysis at *Chevron* Step Two with an approach akin to arbitrary and capricious review.<sup>233</sup> In light of the likelihood that courts reviewing *Matter of A-B-* will undertake analysis resembling arbitrary and capricious review at *Chevron* Step Two, there are several components of the decision that bely its unreasonableness.<sup>234</sup>

One factor in the Court's arbitrary and capricious jurisprudence is particularly relevant here: the creation of a rule that will cause decisions to vary wildly depending on the adjudicator.<sup>235</sup> In *Matter of A-B-*, AG Sessions writes that the Salvadoran government's failure to enforce the respondent's restraining order did not establish that they were "unable or unwilling" to protect her.<sup>236</sup> AG Sessions also states that the fact that police did not respond to her emergency call does not establish that the government was "unable or unwilling" to protect the respondent.<sup>237</sup> These statements leave immigration advocates and immigration judges wondering what could ever constitute persecution by a non-state actor; although AG Sessions purports not to foreclose all asylum claims which involve violence by non-state actors, he fails to give any further guidance.<sup>238</sup> It therefore follows that it is likely that adjudicators who endeavor

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*B-*, 27 I. & N. at 343–44 (discussing whether the private criminal activity involved in the claim rose to the level of persecution by a non-state actor).

<sup>232</sup> Barnett & Walker, *supra* note 50, at 1448, 1451.

<sup>233</sup> *Id.* at 1454–57 (describing the reasoning in several Supreme Court cases wherein the court analyzed agency decisions under arbitrary and capricious review or a similar approach at *Chevron* Step Two); *see, e.g.*, *Judulang v. Holder*, 565 U.S. 42, 52 n.7 (2011) (determining that the outcome would be the same under both *Chevron* Step Two and arbitrary and capricious review); *see also* Administrative Procedure Act of 1946 (APA), Pub. L. No. 89-554, § 706(1)(A), 80 Stat. 378, 393 (1966) (codified as amended at 5 U.S.C. § 706(2)(a) (2018)) (dictating that a reviewing court should find that an agency decision is unlawful if it is determined to be arbitrary, capricious, an abuse of discretion, or otherwise in violation of the law).

<sup>234</sup> *See Motor Vehicle Mfrs. Assoc. v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 43 (1983) (determining that a court must consider whether an agency looked at all relevant factors in choosing a policy).

<sup>235</sup> *See Judulang*, 565 U.S. at 55, 57–58, 62–63 (determining that an agency's policy must be related to the purposes of the laws, cannot hinge wholly upon the discretion of a single agency official, and cannot be justified because the agency failed to adequately distinguish its approach from the variety of approaches used by the agency previously).

<sup>236</sup> *See* 27 I. & N. at 343–44 (determining that the BIA erred in finding that the Salvadoran government was "unable or unwilling" to protect the respondent).

<sup>237</sup> *Id.* at 337–38.

<sup>238</sup> *See id.* at 317 (noting that criminal activity by non-state actors meets the asylum requirements only under "exceptional circumstances"); *see also* *MATTER OF A-B- CONSIDERATIONS*, *supra* note 193, at 4 (noting that AG Sessions attempted to heighten the "unable or unwilling" to control standard and indicating that the assertion that government inaction was insufficient to meet the standard lacked clarity); NAT'L IMMIGRATION JUSTICE CTR., *supra* note 19, at 24 (emphasizing the importance of

to adhere to *Matter of A-B-* will essentially have to make their best guess about what meets the “unable or unwilling” standard.<sup>239</sup> This determination will likely vary amongst adjudicators even where similar facts are involved.<sup>240</sup> Because of this lack of clarity as to what can constitute persecution by a non-state actor, decisions will turn upon the views of individual adjudicators as to what meets the standard, rather than any reasoned approach to review.<sup>241</sup> This, according to *Judulang*, belies a decision that is likely arbitrary and capricious.<sup>242</sup>

Another factor in the Court’s arbitrary and capricious jurisprudence is also relevant here: the failure to distinguish past precedent or show reasoning if making a decision that contradicts past precedent.<sup>243</sup> AG Sessions did not distinguish his decision in *Matter of A-B-* regarding the “unable or unwilling” standard with prior federal court and BIA decisions involving persecution by non-state actors, providing further support that the decision was arbitrary and capricious.<sup>244</sup> First, AG Sessions ignores case law regarding the “unable” prong of the standard by asserting that the government’s willingness to protect the respondent by issuing multiple restraining orders and having her abuser arrested meant that she did not suffer persecution.<sup>245</sup> Multiple federal circuit courts found that the failure of police to prevent further violence indicates their inability to protect the victim, and AG Sessions failed to reconcile his decision with this precedent.<sup>246</sup> AG Sessions also states that the persistence of domestic

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asserting that AG Sessions did not actually change the “unable or unwilling” standard for persecution and anticipating that adjudicators will look much more closely at this element in the future).

<sup>239</sup> *Supra* note 238 and accompanying text (noting the lack of clarity in how to prove persecution by a non-state actor after *A-B-*).

<sup>240</sup> *See Judulang*, 565 U.S. at 57 (determining that the BIA decision failed the arbitrary and capricious test because, in part, the eligibility for relief turned upon the decision of an individual adjudicator, which could result in different outcomes in cases with similar facts).

<sup>241</sup> *See id.* at 58 (finding that a policy that hinges on an individual’s subjective assessment is arbitrary and capricious).

<sup>242</sup> *See id.* at 59–60 (stating that deportation decisions should not be a “sport of chance”).

<sup>243</sup> *See Massachusetts v. EPA*, 549 U.S. 497, 534–35 (2007) (finding that the action is arbitrary and capricious, where there is a statutory obligation to respond, if the agency did not provide a sufficiently reasoned explanation for its refusal to respond).

<sup>244</sup> *See, e.g., Gathungu v. Holder*, 725 F.3d 900, 908–09 (8th Cir. 2013) (finding that evidence that the police did not take sufficient action to combat gang violence or were complicit in such violence established that the government was “unable or unwilling” to control it). Even in *In re R-A-*, despite its similarities to *Matter of A-B-*, the BIA recognized that the domestic violence suffered by the respondent constitutes persecution because she could not get any protection from the government. *In re R-A*, 22 I. & N. 906, 914 (B.I.A. 2001).

<sup>245</sup> *See Matter of A-B-*, 27 I. & N. at 343 (describing the actions that the respondent and the police took to try to prevent the abuse from continuing); BLAINE BOOKEY ET AL., CTR FOR GENDER & REFUGEE STUDIES, *MATTER OF A-B- PRACTICE ADVISORY* 25 (July 6, 2018), <https://uchastings.app.box.com/s/57k2hk6rpyjh7bbmebl4195r2wsdzt0/file/302956088950> [<https://perma.cc/X843-RR6D>] (arguing that AG Sessions failed to consider both the unable and unwilling elements of the standard).

<sup>246</sup> *See, e.g., Afriyie v. Holder*, 613 F.3d 924, 931 (9th Cir. 2010) (finding that the ability to file a police report speaks to whether the government is willing to protect an asylee, not whether they are

violence in El Salvador does not help to establish that the respondent met the “unable or unwilling” standard, despite precedent that the prevalence of such violence in a country is relevant to the determination.<sup>247</sup> AG Sessions claims to adhere to the “unable or unwilling” standard and does not purport to overturn any existing precedent involving non-state actors, but he does not make any attempt to distinguish *Matter of A-B-* from cases adverse to it.<sup>248</sup>

Based upon the guidance from *Judulang*, Sessions’ approach to the “unable or unwilling” standard for persecution by a non-state actor likely fails arbitrary and capricious review based on these two factors.<sup>249</sup> If a decision based on a statute is unreasonable or arbitrary and capricious, it cannot reflect the intent of Congress and therefore fails *Chevron* Step Two.<sup>250</sup>

### *C. Step Three?: In Light of the Concerns Raised by Matter of A-B-, the Supreme Court Should Clarify Chevron and Brand X Precedents*

The Supreme Court’s *Chevron* jurisprudence often creates more confusion than clarity, particularly with regard to the opposing ideological positions presented in *Mead* and *Brand X*.<sup>251</sup> Both *Chevron* and *Brand X* call upon courts to defer to agency decision making, based upon a belief that agencies are better equipped than courts to make specialized, technical determinations about the meaning of ambiguous statutory language.<sup>252</sup> In theory, this is beneficial to political accountability, cohesive statutory interpretation, and judicial efficiency.<sup>253</sup> Although *Brand X* states that the mere fact that an interpretation contradicts the agency’s previous stance does not make the new interpretation unrea-

able to); *Guchshenkov v. Ashcroft*, 366 F.3d 554, 944 (7th Cir. 2004) (finding that failure of police to respond after a report was filed and the violence continued was significant).

<sup>247</sup> See *Valdiviezo-Galdamez*, 502 F.3d at 289 n.2 (noting that the prevalence of gang violence actually supports the conclusion that the government was unable to protect the respondent).

<sup>248</sup> 27 I. & N. at 325–26 (citing the “unable or unwilling” to protect standard).

<sup>249</sup> See *supra* note 235 and accompanying text (describing factors that should be considered under arbitrary and capricious review); see also 565 U.S. at 62–63 (determining that the agency view was arbitrary and capricious because it was not supported by consistent practice).

<sup>250</sup> *Judulang*, 565 U.S. at 52 n.7.

<sup>251</sup> See *Beermann*, *supra* note 32, at 732, 740–43 (outlining the problems with the *Chevron* doctrine under the Roberts court, including the applicability of *Brand X* and the unclear boundaries of *Chevron*’s domain).

<sup>252</sup> See *Brand X*, 545 U.S. at 1002–03 (resolving that because the agency was dealing with technical, specialized subject matter, it was in a better position to resolve a statutory ambiguity than the Court); *Chevron*, 467 U.S. at 864 (describing the area in which the EPA was dictating policy as technical and complex).

<sup>253</sup> Nicholas R. Bednar & Barbara Marchevsky, *Deferring to the Rule of Law: A Comparative Look at United States Deference Doctrines*, 47 U. MEM. L. REV. 1047, 1053–54 (2017). Deference addresses the goal of political accountability by vesting statutory interpretation in the hands of administrative agencies led by political appointees rather than life-tenured federal judges who do not ultimately answer to voters. *Id.* Deference promotes cohesiveness by seeking to ensure that all federal courts interpret a statute the same way, as dictated by the administrative agency. *Id.* at 1054.



sonable, this concept should not be stretched to allow for complete policy reversals each time a different political party assumes the presidency.<sup>254</sup> When agencies are allowed to act based on political motivations rather than providing an adequately reasoned justification for their policy choice, they diminish the role of Congress and the judiciary.<sup>255</sup>

Even before *Matter of A-B-*, it was clear that federal courts did not always feel compelled to uphold immigration agency decisions despite the high level of deference courts are instructed to give agencies.<sup>256</sup> The Third and Seventh Circuits' refusals to adopt the BIA's "particularity" and "social distinction" requirements for PSGs are indicative of this history.<sup>257</sup> Even where courts determined that their decisions must give way under *Brand X*, they sometimes questioned whether the doctrine should be reconsidered, as then-Judge Gorsuch did in his concurrence in *Gutierrez-Brizuela*.<sup>258</sup> Specifically, he noted that the current framework might allow politically motivated decisionmakers to designate disfavored groups for maltreatment, which is arguably what AG Sessions did in *Matter of A-B*.<sup>259</sup>

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<sup>254</sup> See *Brand X*, 545 U.S. at 980 (determining that stare decisis should not prevent a federal court from analyzing a new agency interpretation under *Chevron*); Lisa Schultz Bressman, *Chevron's Mistake*, 58 DUKE L.J. 546, 556 (2009) (cautioning against complete abandonment of the role of the judiciary and suggesting some possible limitations on *Chevron*); e.g., Greenberg, *supra* note 68, at 579–80 (describing the gag rule put in place by the George H.W. Bush administration, rescinded by the Clinton administration, and reinstated by the George W. Bush administration).

<sup>255</sup> See *Gutierrez-Brizuela*, 834 F.3d at 1152 (Gorsuch, J., concurring) (raising a concern that *Brand X* allows courts to abandon their constitutional responsibilities); Bressman, *supra* note 254 (calling upon courts to make certain that agency choices remain within the powers granted to them by Congress).

<sup>256</sup> See, e.g., *Judulang*, 565 U.S. at 52–54 (considering a BIA policy under APA arbitrary and capricious review and determining that the agency should not be granted discretion); *Valdiviezo-Galdamez*, 663 F.3d at 608 (determining that because BIA decisions on the social visibility and particularity elements of a PSG were not consistent, *Chevron* deference was not appropriate); *Gatimi v. Holder*, 578 F.3d 611, 615–16 (7th Cir. 2009) (noting that the BIA precedent on the social visibility requirement was inconsistent and determining that, based on this inconsistency, they were not compelled to pick one inconsistent interpretation to defer to).

<sup>257</sup> *Valdiviezo-Galdamez*, 663 F.3d at 608; *Gatimi*, 578 F.3d at 615–16.

<sup>258</sup> See, e.g., *Gutierrez-Brizuela*, 834 F.3d at 1149–58 (Gorsuch, J., concurring) (raising questions as to the constitutional legitimacy of *Brand X*). Although Gorsuch determined that the Tenth Circuit was compelled by *Brand X* to defer to the BIA, and in fact wrote the majority opinion in the case, he also wrote separately to send a strong message regarding the separation of powers, fair notice, and equal protection concerns that he had about *Brand X*. *Id.* at 1149.

<sup>259</sup> See *id.* at 1149–50 (asserting that the founders employed separation of powers to avoid the very dangers that *Brand X* allows for); *supra* notes 171–179 and accompanying text (describing AG Sessions' extensive history of animosity towards women and immigrants during his decades-long political career). The reasoning employed in *Matter of A-B*—particularly disfavors such women because the primary reasons that men and women are displaced and seek asylum are often different. See Ariadna Estevez, *Sexual and Domestic Violence: The Hidden Reasons Why Mexican Women Flee Their Homes*, THE CONVERSATION (Sept. 27, 2017), <https://theconversation.com/sexual-and-domestic-violence-the-hidden-reasons-why-mexican-women-flee-their-homes-65352> [<https://perma.cc/5KEG-5GF7>] (indicating research that Mexican men are displaced for reasons of criminal and state violence, such as extortion,

Although there is a role for agencies to play in the interpretation of statutes and in policy making, the Supreme Court should clarify and narrow the degree of deference afforded to agencies under *Chevron* Step Two and *Brand X*.<sup>260</sup> Because the Court has in effect created a spectrum of deference according to subject matter, the Court should clarify *what* deference is appropriate and *when* it is appropriate.<sup>261</sup> For example, it may be appropriate to be extremely deferential to the technical determinations of EPA scientists regarding toxic pollutant limitations under the Clean Water Act, but not in determining the evidence needed to show persecution in an asylum case.<sup>262</sup> In fact, many of the leading cases that establish the formula for *Chevron* deference involve technical or scientific subject matter; the Court may not have considered how *Chevron* should apply to more accessible subject matter when it was developing the doctrine.<sup>263</sup>

In the future, the Court should also seriously consider whether a broad reading of *Chevron* and *Brand X* creates separation of powers crisis.<sup>264</sup> The

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while rape, gender-based violence, and sex trafficking are the primary motivators for Mexican women to seek asylum). Immigration advocates argue that AG Sessions' labeling of domestic violence as "private violence" fails to acknowledge that these claims are part of a bigger trend of government attitudes towards gender-based violence in many Latin American countries. 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/PRN6-QGCW>].

<sup>260</sup> See Barnett & Walker, *supra* note 50, at 1142–45 (describing the evolving nature of the *Chevron* doctrine, how additional considerations were added over time, and the lack of clarity that remains with regards to the correct application). In fifty-one cases where an agency faced a Step Two analysis of its chosen policy, courts applied several different approaches, and in 28% of cases the approach did not conform with any recognized Step Two analysis. *Id.* at 1445. Part of the problem is that most of the scholarship surrounding *Chevron* is focused on Step Zero or Step One. See *id.* at 1143–44.

<sup>261</sup> See Eskridge & Baer, *supra* note 56, at 1144; see also *supra* notes 74–77 and accompanying text (describing the spectrum of deference afforded to agencies based on subject matter).

<sup>262</sup> Compare *INS v. Cardoza-Fonseca*, 480 U.S. 421, 447–49 (1987) (determining that although the term "well-founded fear" is ambiguous, the BIA's interpretation that it required an asylum applicant to prove a clear probability of future persecution was unreasonable and therefore not entitled to *Chevron* deference), with *Chem. Mfrs. Ass'n v. Nat. Res. Def. Council, Inc.*, 470 U.S. 116, 134 (1985) (finding that the EPA's interpretation of limitations on toxic pollutants under the Clean Water Act was reasonable based on the statute and therefore should be afforded deference under *Chevron*).

<sup>263</sup> See *Brand X*, 545 U.S. at 974 (considering whether the FCC's determination that broadband internet service sold by cable companies was not a telecommunications service under the Communications Act of 1934); *Chem. Mfrs. Ass'n*, 470 U.S. at 132–33 (considering whether the EPA was reasonable in its development of a "fundamentally different factor" test to determine whether a variance may be granted with regard to the limitations to toxic pollutants established by the Clean Water Act); *Chevron*, 467 U.S. at 839–40 (considering whether the EPA's definition of "stationary source" was reasonable in relation to regulations under which the agency could impose requirements on states that had not achieved national air-quality standards under the Clean Air Act).

<sup>264</sup> See Jill E. Family, *Immigration Law Allies and Administrative Law Adversaries*, 32 GEO. IMMIGR. L.J. 99, 100–02 (2018) (describing the separation of powers concerns that immigration advocates and administrative law opponents share). Immigration law particularly exemplifies these concerns in two respects. *Id.* at 100–01. First, the plenary power doctrine grants the political branches

Court appears to have exempted itself from *Brand X* by refusing to give way when its own precedent runs up against an agency directive.<sup>265</sup> This indicates that the Court is not willing to completely abandon its constitutionally prescribed role to determine what the law is.<sup>266</sup> It is necessary for the Court to limit *Chevron* and *Brand X* to preserve that role for lower federal courts as well.<sup>267</sup> By clarifying what the *Chevron* analysis should look like at Step Two through definitively adopting the arbitrary and capricious standard, the Court can, at least in part, address this problem.<sup>268</sup> By narrowing the application of *Brand X* and allowing federal circuit courts to make more reasoned decisions where their own precedents contradict agency interpretations, the Court can support the stated goals of *Chevron*: efficiency, predictability, and the use of agency expertise to best satisfy the legislative intent of Congress.<sup>269</sup>

### CONCLUSION

Underlying asylum law in the United States is an international commitment to provide protection for individuals persecuted on account of their membership in a protected group. AG Sessions' decision in *Matter of A-B* stands in violation of this commitment. His decision to refer *Matter of A-B* to himself, as well as his failure to issue a decision consistent with past precedent, indicates that his intent was to prevent virtually all asylum claims based on domestic violence rather than adhere to the law. Though this decision was particularly egregious, it was preceded by a decades-long history of unpredictability and inconsistency with regard to asylum claims that involve violence against women. Despite the policy arguments and trends in domestic law that favor protecting women who are abused, agency decisions in the immigration

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broad powers over immigration policy. *Id.* Second, in legislating immigration policy, Congress limited judicial review. *Id.*

<sup>265</sup> See *United States v. Home Concrete & Supply, LLC*, 566 U.S. 478, 486–87 (2012) (determining that *Brand X* did not apply to a new agency interpretation of a statute previously considered by the Court, even though it had, in its previous opinion, described the statutory provision at hand as not unambiguous); see also *Cuomo v. Clearing House Ass'n*, 557 U.S. 519, 548–49 (2009) (Thomas, J., dissenting) (noting that the Court's refusal to find that the agency construction trumps the Court's prior judicial construction is inconsistent with *Brand X*).

<sup>266</sup> See *Home Concrete*, 566 U.S. at 486–87 (2012). In fact, in his concurrence in *Brand X*, Justice Stevens noted that the directive that agencies could adopt a contrary interpretation to federal appellate precedent would not necessarily apply to the Court itself. 545 U.S. at 1003 (Stevens, J., concurring).

<sup>267</sup> See *Gutierrez-Brizuela*, 834 F.3d at 1152 (Gorsuch, J., concurring) (characterizing *Brand X* as a judge-created abandonment of judicial responsibility).

<sup>268</sup> *Supra* notes 231–249 and accompanying text (applying an APA arbitrary and capricious approach at Step Two when analyzing AG Sessions' decision in *Matter of A-B*); see Barnett & Walker, *supra* note 50, at 1454–57 (describing the similarities between Step Two and arbitrary and capricious review, and referencing cases where courts engaged in something akin to arbitrary and capricious review at Step Two).

<sup>269</sup> *Chevron*, 467 U.S. at 843–44 (identifying the Court's policy rationales for its holding); see *supra* notes 96–99 and accompanying text (describing the policy justifications underlying *Chevron*).

space have not followed suit. The DOJ's inability to "pick a side" when it comes to these claims creates confusion for federal courts, which feel compelled to obey agency directives under *Chevron* and *Brand X* over their own interpretation of the law. These concerns should lead the Supreme Court to question whether it should take another look at *Chevron* jurisprudence in order to provide more guidance for both agencies and courts. Ultimately, whatever path agencies and courts take has a direct impact on the lives of women like Rosa, who remain in a position of particular vulnerability because of the lack of protection they would otherwise receive under asylum law.

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