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Summer 2020 Asylum Litigation Update to the
Vera Unaccompanied Children Legal Services Program

Below is an update on select current litigation issues relevant to the Vera network for the period of April through June 2020. Please note that the list below is a snapshot of recent relevant decisions and not intended to be exhaustive of developing case law. Please contact CGRS (CGRS-TA@uchastings.edu) for further information.

While some of the following cases may not be directly applicable to unaccompanied children's asylum claims, they may be informative to Vera network providers. The following include both favorable and unfavorable decisions.

PUBLISHED SUPREME COURT OPINIONS

***Dep't of Homeland Security v. Thuraissigiam*, 140 S.Ct. 1959 (Jun. 25, 2020) [habeas petitions/expedited removal – denying asylum seekers in expedited removal access to habeas review in federal courts]:** In a 7-2 opinion by Justice Alito, the Supreme Court reversed the Ninth Circuit and ruled that certain asylum seekers cannot seek federal court review of their fast-track removal orders. Thuraissigiam, a Sri Lankan national of Tamil ethnicity, was placed in expedited removal upon apprehension and expressed fear of return after being abducted and assaulted in his home country. *Id.* at 1968. The asylum officer, supervising asylum officer, and the immigration judge found Thuraissigiam did not have a credible fear of persecution on a protected ground. *Id.* Thuraissigiam then filed a federal habeas petition, asserting his fear of persecution based on his Tamil ethnicity and his political views, challenging the credible fear proceedings and its negative finding, and requesting a new opportunity to apply for asylum and other applicable relief. *Id.* The Supreme Court, prefacing the opinion with strong concern that the "credible-fear process and abuses of it can increase the burdens currently 'overwhelming our immigration system,'" held that the limited scope of review available to asylum seekers subject to expedited removal as codified in 8 U.S.C. § 1252(e)(2) does not violate the Suspension Clause or due process protections. *Id.* at 1966, 1983.

Justice Thomas issued a separate concurring opinion, agreeing with the majority that Thuraissigiam's habeas claim fails because he seeks administrative relief (for the District Court to review his credible fear finding) rather than physical release from unlawful detention. *Id.* at 1988. Justice Breyer issued an opinion concurring in the judgment, which Justice Ginsberg joined, noting that "in this particular case" he does not find § 1252(e)(2) to violate the Suspension Clause or due process and warning the majority not to make sweeping statements beyond this case. *Id.* at 1988-89, 1993. Justice Sotomayor, joined by Justice Kagan, issued a dissent, writing that the majority "paves the way toward transforming already summary expedited removal proceedings into arbitrary administrative adjudications," criticizing the majority as having misconstrued Thuraissigiam's claims and habeas precedent, and positing that "[a]pplying the correct (and commonsense) approach to defining the Great Writ's historic scope

reveals that respondent's claims have long been recognized in habeas." *Id.* at 1993, 1998-99.

***Nasrallah v. Barr*, 140 S.Ct. 1683 (Jun. 1, 2020) [CAT/judicial review – distinguishing judicial review of factual challenges to CAT orders from final orders of removal for convictions specified in 8 U.S.C. § 1252(a)(2)(C)]:** The Supreme Court reversed the judgment of the Court of Appeals for the Eleventh Circuit, which found judicial review of a Lebanese man's factual challenges to the Board of Immigration Appeals' (BIA or Board) denial of Convention Against Torture (CAT) relief was precluded pursuant to 8 U.S.C. § 1252(a)(2)(C)'s prohibition against judicial review of a "final order of removal" predicated on certain criminal offenses. *Id.* at 1688-89. The Supreme Court, in an opinion issued by Justice Kavanaugh, conducted statutory analysis to find that CAT claims are distinct from and do not merge with final orders of removal, and judicial review of factual challenges is not precluded by 8 U.S.C. § 1252(a)(2)(C). *Id.* at 1689, 1691. The Court did not address reviewability of statutory withholding but affirmed the preclusion of review of discretionary relief and expedited removal proceedings. *Id.* at 1694 n.5. In a dissenting opinion, joined by Justice Alito, Justice Thomas argues that CAT orders fall within § 1252(b)(9), the "zipper clause," which would preclude judicial review. *Id.* at 1695.

PUBLISHED FEDERAL COURTS OF APPEALS DECISIONS

***Xochihua-Jaimes v. Barr*, 962 F.3d 1175 (9th Cir. Jun. 26, 2020) [LGBTQ/acquiescence/safe relocation – remanding to BIA to grant CAT relief]:** The Ninth Circuit granted the petition for review of a lesbian Mexican woman who was kicked out of her family home for her sexual orientation and was subjected to intimate partner violence. *Id*. Her partner was a member of the Zetas cartel and prevented Petitioner from leaving him through abuse, rape, and threats to take her children away. *Id.* at 1179. In underlying proceedings, the immigration judge (IJ) acknowledged evidence of general mistreatment of LGBTQ individuals and cartel violence in Mexico but denied CAT relief, finding insufficient evidence that the Petitioner would "personally be at risk of torture." *Id.* at 1180. The IJ also found that no one outside of Petitioner's family knew of her sexual orientation and that Petitioner could safely relocate to an area outside of the Zetas' control. *Id.* at 1181-82. The BIA affirmed. *Id.* at 1182. The Ninth Circuit vacated and remanded the Board's denial, finding that the Board misapplied precedent on acquiescence and safe relocation. *Id.* at 1183. The Ninth Circuit found the country conditions evidence and specific testimony Petitioner provided more than sufficient to demonstrate government acquiescence to cartel violence. *Id.* at 1185-86 (reminding the BIA that "a rogue public official is still a 'public official'" under CAT). Furthermore, the Court held that the IJ and Board misapplied the burden of proof for safe relocation and found the government failed to affirmatively show where Petitioner could relocate without being targeted by the Zetas or for her sexual orientation. *Id.* at 1186-87. After considering all relevant evidence that demonstrated a likelihood of future torture, the Ninth Circuit remanded to the Board to grant CAT relief. *Id.* at 1188.

***Tanusantoso v. Barr*, 962 F.3d 694 (2d Cir. Jun. 23, 2020) [religion/MTR/changed country conditions – vacated BIA's MTR denial and remanded for explicit consideration of changed country conditions]:** The Second Circuit granted the petition for review of an Indonesian couple who filed their third motion to reopen asylum proceedings based on their

Catholic faith. Without engaging with evidence detailing the increased levels of persecution for Indonesian Christians upon the election of "hardline, intolerant" religious groups, the BIA denied the motion to reopen on the ground that Petitioners failed to submit a new asylum application in support of the motion. *Id.* at 696-97. The Second Circuit held that the BIA abused discretion by failing "to acknowledge Petitioners' material evidence and to explain why its view of the facts departed from that of the experts who produced the 2017 U.S. Commission Report," and remanded for consideration of the evidence. *Id.* at 697-98. The Court further held that Petitioners were not required to submit a new, duplicative asylum application and that the BIA abused discretion by denying the motion on that ground. *Id.* at 699.

***Ferreyra v. Barr*, 962 F.3d 331 (7th Cir. Jun. 16, 2020) [family PSG/nexus/unable or unwilling to protect – upheld BIA finding of ineligibility for cancellation of removal and asylum denial]:** The Seventh Circuit denied the petition for review of an Argentinian man who entered the United States as a child under the Visa Waiver Program and subsequently applied for asylum based on childhood sexual abuse he experienced on account of his family membership. He also sought cancellation of removal based on family hardship. In the underlying proceedings the IJ denied asylum based on nexus—finding that Ferreyra was a "victim of convenience" rather than targeted for family membership—and failure to prove that the Argentinian government was unable or unwilling to protect him if he had reported the crime. *Id.* Additionally, the IJ denied cancellation of removal, holding that Petitioner waived his right to relief other than asylum when he entered on the Visa Waiver Program. *Id.* The Seventh Circuit affirmed that family membership constitutes a cognizable particular social group (PSG) but upheld the agency's finding that Petitioner failed to establish a causal link between the abuse he experienced and his family membership. Citing *Gonzalez Ruano v. Barr*, 922 F.3d 346, 354 (7th Cir. 2019), the Court held that the causal link between persecution and family membership is not established "simply because a particular social group of family membership exists and the family members experience harm." Additionally, the Seventh Circuit found that mere "speculation" that the Argentinian government did not have processes in place to protect Petitioner from the abuse he experienced was insufficient, especially since the record contained no evidence that Ferreyra ever reported the abuse to a parent or adult that could have asked the police for help. *Id.* at 338. The Court further affirmed the agency's finding that Petitioner "knowingly" waived alternative forms of relief when his father signed the waiver form on his behalf and that Petitioner himself conceded the grounds of removability in later proceedings. *Id.* at 336-37.

***Cordoba v. Barr*, 962 F.3d 479 (9th Cir. Jun. 16, 2020) [wealthy landowner PSG – upheld BIA asylum denial]:** The Ninth Circuit denied the petition for review of a Colombian man who was persecuted by the Revolutionary Armed Forces of Colombia (FARC). The Ninth Circuit previously affirmed the BIA's denial of asylum and CAT relief to the extent the claims were based on Petitioner's political opinion but remanded to determine the cognizability of his proposed social group of "wealthy landowners in Colombia." *Id.* at 581. The IJ and BIA again denied relief. Arriving before the Ninth Circuit for a second time, the Court affirmed the BIA's finding that "wealthy landowners" does not meet the requisite particularity or social distinction standards to be a cognizable PSG. *Id.* at 482. Deferring to the social distinction requirement articulated in *Matter of M-E-V-G-*, the Ninth Circuit found that, although relevant, "the persecutor's perception is not itself enough to make a group socially distinct, and persecutory conduct alone cannot define the group." (citing 26 I&N Dec. 227, 242 (B.I.A. 2014)). As such,

the Court held that Cordoba failed to establish that Colombian society as a whole perceives wealthy landowners differently. *Id.* at 483. By focusing his evidence on FARC's Marxist origins and perception of landowners, Cordoba failed to "link FARC's views to those of Colombian society generally," proving fatal to his petition for review. *Id.*

***Hernandez Lara v. Barr*, 962 F.3d 45 (1st Cir. Jun. 15, 2020) [right to counsel – vacated and remanded to the BIA for further proceedings allowing access to counsel]:** The First Circuit granted the petition for review of a Salvadoran woman who was denied her statutory right to be represented by counsel during removal proceedings. *Id* at 47. Petitioner was forced to proceed *pro se* despite her detention, lack of proficiency in English, and repeated requests for a continuance so that her counsel may enter an appearance. *Id.* at 47-51. The IJ then summarily denied asylum, withholding of removal, and CAT relief. *Id.* at 51. The BIA denied Petitioner's motion to reopen and remand, affirming the IJ's denial of a continuance because Petitioner failed to demonstrate "good cause." *Id.* at 52. By requiring "good cause," the Board applied the incorrect standard and failed to ask, "whether the IJ afforded [Petitioner] 'a reasonable and realistic period of time to provide a fair opportunity' for her to secure counsel." *Id.* at 53-54 (citing *In re C-B-*, 25 I&N Dec. 888, 889 (B.I.A. 2012)). The First Circuit recognized that Petitioner's detention and language barriers hindered her ability to secure counsel within the short time frame and concluded that the IJ failed to "meaningfully effectuate" the statutory right to counsel. *Id.* at 56. Accordingly, the First Circuit found the denial of right to counsel prejudiced the outcome and vacated the BIA's findings. *Id.* at 58. In a concurring opinion, Judge Lipez argued that no showing of prejudice should be required if the statutory right to counsel has been violated. *Id.* at 59-60.

***Garcia v. Barr*, 960 F.3d 893 (6th Cir. Jun. 8, 2020) [asylum jurisdiction for age-outs/CAT – upheld the BIA finding of IJ jurisdiction over asylum and denial of relief]:** The Sixth Circuit denied the petition for review of a nineteen-year-old Salvadoran national who entered the United States as an unaccompanied child. *Id.* at 894. Around one year later, after he turned 19, Garcia attempted to file for asylum affirmatively before U.S. Citizenship and Immigration Services (USCIS). The IJ took jurisdiction of his case, reasoning that he was no longer an unaccompanied child as defined by the statute. *Id.* The IJ subsequently denied asylum, withholding of removal, and CAT relief, which the BIA affirmed. Garcia was then removed even though he had been granted Special Immigrant Juvenile status and his application for adjustment of status remained pending. *Id.* On appeal, the Sixth Circuit affirmed that the IJ properly took jurisdiction, finding that the plain language of the statutory provision "requires that the alien *be* an 'unaccompanied alien child' when he applies for asylum; it's not enough that the alien *was* an 'unaccompanied alien child' when he first entered the country." *Id.* at 894-95 (also citing *In re M-A-C-O-*, 27 I&N Dec. 477, 480 (B.I.A. 2018)). The Court held that even if the 2013 USCIS Memorandum from Ted Kim, which provides initial jurisdiction to USCIS for all asylum applications filed by those designated as unaccompanied children, was valid in divesting the IJ of jurisdiction, Petitioner still would not be an unaccompanied child *at the time of filing* his asylum application. *Id.* at 896. Finding the IJ's jurisdiction over Petitioner's asylum case proper, the Sixth Circuit held that the IJ used the correct "willful blindness" standard for "private torture" and affirmed the agency's denial of CAT protection. *Id.* at 896-97.

Judge Merritt dissented, asserting that USCIS maintained initial and sole jurisdiction over

Petitioner's asylum application because his status as an unaccompanied child did not lapse when he turned 18. *Id.* at 902. Judge Merritt's dissent evaluates the legislative history and historical agency interpretation of the Trafficking Victims Protection Reauthorization Act (TVPRA), finding that while the statute addresses the criteria for initial receipt of unaccompanied child status and protection, "[i]t is silent upon where and how the designation lapses." *Id.* Furthermore, Petitioner received no notice of the agency's changed, unwritten policy—issued without reasoning—that effectively rescinded his unaccompanied child status. *Id.* The dissent considers this policy change "arbitrary and capricious" government action and upholds *J.O.P. v. Dep't of Homeland Sec.*, 409 F. Supp. 3d 367 (D. Md. 2019) (enjoining USCIS from implementing the 2019 Memorandum that would allow USCIS to redetermine unaccompanied child status), as evidence of such. *Id.* at 903. Judge Merritt would have vacated the Board's order and remanded for review in accordance with the reasoning underlying *J.O.P. Id.* at 905.

***Grigoryan v. Barr*, 959 F.3d 1233 (9th Cir. Jun. 2, 2020) [credibility/terminating asylum/due process – remanded to BIA after IJ violated due process rights in terminating asylum]:** The Ninth Circuit granted the petition for review of an Armenian man and his derivative family members whose asylum status was terminated by the IJ. This case has a lengthy procedural history after USCIS first attempted to improperly terminate Petitioner's asylum in 2005. On remand, the IJ terminated Grigoryan's asylum and ordered the family's removal without conducting a new evidentiary hearing. *Id.* at 1238. The IJ relied almost exclusively on the Report of Investigation to find adverse credibility, even though the veracity of the Petitioner proved at least two of the documents listed on the Report of Investigation were not fraudulent. *Id.* The case then returned to the Ninth Circuit, which ultimately held that the IJ violated Grigoryan's due process rights by admitting and heavily relying upon the Report of Investigation without providing the family an opportunity to rebut the allegations of fraud. *Id.* at 1240. Because the government did not meet its burden in proving that the Grigoryans were ineligible for asylum, the Ninth Circuit vacated the order of removal and remanded the case for a new hearing, with a full and fair opportunity to rebut the Report of Investigation. *Id.* at 1243.

***Prieto-Pineda v. Barr*, 960 F.3d 516 (8th Cir. May 28, 2020) [gang violence/family PSG/nexus/anti-gang political opinion – upheld BIA denial of asylum, withholding, and CAT]:** The Eighth Circuit denied the petition for review of a Salvadoran man who feared persecution by the Mara 18 because of his membership in the particular social groups of a local fishing cooperative and his family, and his political opinion of opposition to joining the gang. *Id.* at 520. The BIA denied asylum and withholding of removal based on Petitioner's failure to establish nexus or prove that the Salvadoran government was unable or unwilling to protect him. After quickly dismissing the political opinion grounds, the Eighth Circuit "assume[d], without deciding," that both PSGs *could* be cognizable but affirmed the IJ's finding that Petitioner failed to establish persecution on account of his membership in either of those groups. *Id.* The Court held he was targeted based on his access to the cooperative's boats rather than his membership in the fishing cooperative and that the "harassment of his family was merely a means to coerce him into providing rides to the gang." *Id.* The Court deemed his wife's murder "unrelated" to the threats that Petitioner received because Petitioner did not know if the perpetrators were part of the gang. *Id.* Lastly, the Court upheld the Board's finding that the Salvadoran government was not unwilling or unable to protect Petitioner because the police came to his house to defend him after he reported gang threats and charged the men responsible for his wife's murder. *Id.* at 521.

The Eighth Circuit also rejected Petitioner's withholding of removal and CAT claims. *Id.* at 521-22.

***Juan Antonio v. Barr*, 959 F.3d 778 (6th Cir. May 19, 2020) [domestic violence/PSG membership/unable or unwilling – vacating BIA denial and remanding for consideration of PSG membership, government willingness, withholding, and humanitarian asylum]:** The Sixth Circuit granted the petition for review of an indigenous Guatemalan woman who suffered horrific and prolonged intimate partner violence at the hands of her husband. In the underlying proceedings, the IJ found that Petitioner suffered past persecution on account of her membership in the cognizable PSG "married indigenous women in Guatemala who are unable to leave their relationship" but denied relief, concluding "changed circumstances"—petitioner physically left the relationship with her husband before fleeing to the United States even though he continued to threaten her—defeated the presumption of a well-founded fear of future persecution. *Id.* at 787. The BIA affirmed the denial of asylum, withholding, and CAT, agreeing that "Maria's ability to live separately from her husband for a year in Guatemala indicated that she was no longer part of the articulated group and could reasonably relocate." *Id.* at 788. The BIA also found that the Guatemalan government was "able and willing" to control her husband and that Petitioner's humanitarian asylum claim was waived because she did not raise it separately before the IJ. *Id.*

The Court found the Board's finding that Petitioner was able to physically separate from her husband without incident was not supported by substantial evidence, noting that her husband violated the restraining order against him, attempted to kidnap their child, and threatened to kill her. The Court concluded that Petitioner remains a member of her proposed group. *Id.* at 791-92. Next, the Sixth Circuit vacated the Board's finding that the Guatemalan government was able and willing to control Petitioner's husband, noting that the Guatemalan government's issuance of a restraining order means nothing if her husband knew there would be no consequence for disobeying it and that the country lacks the "resource[s] and infrastructure necessary to protect indigenous Mayan women from their perpetrators." *Id.* at 793-94. The Court further found that the "complete helplessness" standard articulated in *Matter of A-B-* is an impermissible construction of the persecution requirement. *Id.* (citing *Grace v. Whitaker,* 344 F. Supp. 3d at 130) Finally, the Court held that the Board failed to correctly shift the burden of proof for safe and reasonable relocation and that the government failed to meet its burden. *Id.* at 796-97.

Though the cognizability of Petitioner's PSG was not at issue during the underlying proceedings, which took place prior to *Matter of A-B-*, 27 I&N Dec. 316 (A.G. 2018), the Sixth Circuit nevertheless took this opportunity to suggest that the policies articulated in *Matter of A-B-* are arbitrary, capricious, and contrary to law. *Juan Antonio*, 959 F.3d at 790 n.3 (citing with approval *Grace v. Whitaker,* 344 F. Supp. 3d 96 (D.D.C. 2018)) The Court even went as far as to state that, in light of *Grace*, *Matter of A-R-C-G-*, 26 I&N Dec. 388 (B.I.A. 2014) "likely retains precedential value," and instructed the BIA on remand to consider specifically what effect *Matter of A-R-C-G-* and *Grace* have on the particular social group analysis. *Juan Antonio*, 959 F.3d at 790 n.3.

In a separate concurring opinion, Judge Boggs distinguished his opinion from the majority on three counts. First, he highlighted ambiguity in Petitioner's proposed social group, noting confusion as to whether her inability to leave the relationship referred to an ability to physically

separate, personally disentangle, or legally divorce her spouse. *Id.* at 799. Second, he cautioned the Court not to "stretch" its characterization of the Guatemalan government as *unwilling* to enforce its laws "simply because it is not always successful" in doing so. *Id.* at 800. Third, he disagreed with the majority's "coloring" of some aspects of the record but ultimately agreed with the Court's judgment. *Id.*

***Munoz-Granados v. Barr*, 958 F.3d 402 (5th Cir. May 12, 2020) [indirect threats/family membership – upheld BIA denial of asylum]:** The Fifth Circuit denied the petition for review of a Mexican man who feared persecution by members of the Zetas cartel on account of his family relationship after they extorted, beat, and threatened his father. After Petitioner arrived in the United States, the Zetas began extorting his father, who was a vendor in the local flea market. *Id.* at 405, 406 n.3. The BIA upheld the IJ's denial of withholding and asylum, finding that Petitioner failed to establish past persecution and that his PSG was not cognizable. *Id.* at 406 n.3 (citing *Matter of L-E-A-*, 27 I&N Dec. 581 (A.G. 2019)). Although the Fifth Circuit has recently stated that *Matter of L-E-A-* "is not at odds with any precedent in the Fifth Circuit" and therefore does not constitute a radical departure from existing asylum law, the Court chose not to decide this issue and affirmed the denial based on Petitioner's failure to establish persecution. *Id.* The Fifth Circuit affirmed the BIA's denial of withholding of removal and CAT protection, holding that: (1) the indirect threat Petitioner's father received lacked the immediacy necessary to rise to level of past persecution; and (2) that Petitioner had failed to demonstrate a likelihood of future persecution because the extortionists had not harmed or threatened his family in Mexico and Petitioner had not demonstrated that relocation would be unsafe or unreasonable. *Id.* at 407-08.

***De Pena-Paniagua v. Barr*, 957 F.3d 88 (1st Cir. Apr. 24, 2020) [domestic violence/PSG/circularity/gender – remanding to the BIA to consider cognizability of the PSGs as articulated]:** The First Circuit granted the petition for review of a Dominican woman who endured physical, sexual, verbal, and emotional abuse by her former domestic partner. After Petitioner moved out of the house, her partner continued threatening her and attempted to gain custody of their child. *Id.* at 89. Petitioner reported the threats and abuse to the Dominican police twice, and although they took down reports, the police did nothing to prevent her ex-partner from attacking her again. *Id.* at 89-90. In underlying proceedings, the BIA determined Petitioner's PSG to be "fatally flawed" in light of *Matter of A-B-*. *Id.* at 91-92. Addressing only the cognizability of Petitioner's proposed social groups—all variations of "Dominican women viewed as property and unable to leave a domestic relationship"—the First Circuit held the categorical presumptions against these groups articulated in *Matter of A-B-* and reinforced by the BIA's denial to be arbitrary. *Id.* at 93. Specifically, the First Circuit found that the characteristic "unable to leave a domestic relationship" is not categorically flawed on the basis of circularity and could see "no logic or reason behind the assertion that the abuse cannot do double duty, both helping define the abuse, and providing the basis for a finding of persecution." *Id.* at 94. Accordingly, the First Circuit rejected the BIA's holding as "arbitrary and unexamined" and remanded for analysis of each of the social groups articulated. *Id.*

Further, in a lengthy discussion on the cognizability of gender-plus-nationality groups, the First Circuit encouraged the BIA to consider whether "Dominican women" satisfies the particularity and social distinction requirements on its own. *Id.* at 95-98. Acknowledging that the issue must be remanded for the BIA to decide in the first instance, the First Circuit noted that gender-based

social groups comply with *Acosta* standards, First Circuit jurisprudence, and have been accepted as cognizable by sister circuits. *Id.* at 97-98.

***Cano v. Barr*, 956 F.3d 1034 (8th Cir. Apr. 23, 2020) [cartel violence/family PSG – upheld denial of asylum]:** The Eighth Circuit denied the petition for review of a Mexican woman who received death threats from a cartel that kidnapped and murdered her son. *Id.* at 1037-38. In underlying proceedings, the IJ denied Petitioner's applications for asylum and withholding of removal, finding that the threats she received did not rise to the level of past persecution and that she failed to prove the Mexican government was unwilling or unable to control her persecutors. *Id.* at 1038. Her request for CAT protection was denied based on the possibility of relocation, her past experiences not rising to the level of torture, and her failure to show that public officials would acquiesce in her torture. *Id.* The BIA affirmed the denials. The Eighth Circuit similarly affirmed the IJ's findings. First, the Eighth Circuit agreed that because Petitioner never suffered physical harm, the threat she received at gunpoint while watching her son be beaten and abducted did not rise to the level of persecution on its own. *Id.* at 1039. Although the Eighth Circuit acknowledged that her *son* experienced a "pattern of persecution" by the cartel, it found insufficient evidence tying the persecution to Petitioner, finding her presence during his kidnapping to be an "isolated incident." *Id.* at 1040. Petitioner's membership in the cognizable social group of her son's immediate family was undisputed, *Id.* at 1039 n.2, and the Eighth Circuit refrained from deciding whether the persecution was on account of her family membership, whether the Mexican government was unable or unwilling to protect her, and whether she could safely or reasonably relocate. *Id.* at 1040 n.4. Lastly, the Eighth Circuit quickly disposed of Petitioner's CAT claim, finding no separate analysis necessary because the reasons she may be tortured were not unrelated to her asylum claim. *Id.* at 1041.

***Doe v. Att'y Gen. U.S.*, 956 F.3d 135 (3d Cir. Apr. 6, 2020) [LGBTQ/death threats/unwilling or unable – vacated and remanded to the BIA to consider discretionary asylum]:** The Third Circuit granted the petition for review of a man from Ghana who was assaulted and threatened based on his sexual orientation and identity as a gay man. *Id.* at 138. The Court rejected the agency's findings that Petitioner—who was attacked by a mob that attempted to murder him—had failed to establish past persecution or fear of future persecution on account of a protected ground and that Petitioner could "live a full life" if he "[kept] his homosexuality a secret." *Id.* at 140. The Court found it indisputable that the harms Petitioner suffered were on account of his sexual orientation and that the death threats he faced were "concrete and menacing," such that that they rose to the level of "outright persecution." *Id.* at 142, 144 (citing *Herrera-Reyes v. Att'y U.S.*, 952 F.3d 101, 108 (3d Cir. 2020) (clarifying that threats become persecutory when "the cumulative effect of the threat and its corroboration presents a real threat to a Petitioner's life or freedom")). Holding that the IJ and BIA misstated and ignored certain evidence and misapplied the law, the Third Circuit overturned the finding on past persecution. *Id.* at 146. The Court further found that "the record is replete with evidence that Ghanaian law deprives gay men" of meaningful government protection and concluded that the Ghanaian government was unable or unwilling to protect Petitioner and that reporting the abuse to the police would prove futile and dangerous. *Id.* at 147, 149. Accordingly, the Third Circuit vacated and remanded to the BIA after finding that Petitioner qualifies as a refugee. *Id.* at 153-56.

***Avelar-Oliva v. Barr*, 954 F.3d 757 (5th Cir. Apr. 3, 2020) [reliability of CFIs/credibility – upheld BIA denial of asylum]:** The Fifth Circuit denied the petition for review of a Salvadoran woman who feared a man who forced her to be an indentured servant and raped her for two years during her childhood. Ten years later—as a police officer—the same man threatened her and attempted to rape her. *Id.* at 761. In the underlying proceedings, the IJ denied Petitioner relief after finding her not credible, citing a lack of corroborating evidence—namely affidavits of support from her mother and siblings—and "multiple inconsistencies" between her testimony in immigration court and during her credible fear interview (CFI). *Id.* at 762. Further, the IJ found it "implausible" that Petitioner suffered such egregious abuse without "visible signs of injury, or evident emotional distress, such that no one was ever aware of her suffering." *Id.* The BIA affirmed. *Id.* at 763. The Fifth Circuit upheld the BIA's determination, affirming the agency's reliance on the CFI, because the asylum officer had asked follow-up questions and had not indicated any confusion or lack of understanding. *Id.* at 765. The Court further held that Petitioner failed to exhaust her claim that the BIA abused its discretion by relying on only a "subset" of the IJ's findings to uphold the adverse credibility determination. *Id.* at 766. Finally, the Fifth Circuit held that the IJ is not obligated to provide advance notice of specific corroborating evidence necessary to meet the applicant's burden of proof, nor is the applicant entitled to an automatic continuance to obtain additional evidence, and affirmed the adverse credibility finding. *Id.* at 771-72 (citing *Marroquin-Almengon v. Barr*, 778 F. App'x 330, 331-32 (5th Cir. 2019)).

***Garcia v. Barr*, 954 F.3d 1095 (8th Cir. Apr. 1, 2020) [credibility/domestic violence – upheld asylum denial]:** The Eighth Circuit denied the petition for review of a Salvadoran petitioner who suffered domestic violence at the hands of her partner and sought asylum, withholding of removal, and CAT relief. *Id.* at 1097. In Petitioner's underlying *pro se* proceedings, the IJ found her not credible and denied all relief. *Id.* The BIA adopted and affirmed the IJ's adverse credibility finding, pointing to inconsistencies in the record—i.e., the date Petitioner's partner raped her (and whether that was the only time or the first time), whether she relocated on her own or stayed with her uncle after she left her partner, and when the last time she saw her partner was. *Id.* The Eighth Circuit found these inconsistencies material and her explanations insufficient to conclude she is credible, thereby upholding the adverse credibility finding and denying all relief. *Id.* at 1098.

UNPUBLISHED FEDERAL COURTS OF APPEALS DECISIONS

Unpublished courts of appeals decisions do not form precedent and are not binding on adjudicators. The following are notable unpublished decisions referencing the Attorney General's decisions in *Matter of A-B-*, 27 I&N Dec. 316 (A.G. 2018), overruling *Matter of A-R-C-G-*, 26 I&N Dec. 388 (B.I.A. 2014), and *Matter of L-E-A-*, 27 I&N Dec. 581 (A.G. 2019), overruling in part *Matter of L-E-A-*, 27 I&N Dec. 40 (BIA 2017).

UNPUBLISHED COURTS OF APPEALS DECISIONS CITING MATTER OF A-B-, 27 I&N Dec. 316 (A.G. 2018)

***Djelassi v. Barr*, 2020 WL 3496670, --F. App'x-- (9th Cir. Jun. 29, 2020) [unable/unwilling – upheld asylum denial]:** In a memorandum decision, the Ninth Circuit denied the petition for

review of a Tunisian man who feared religious persecution, finding that he failed to show the Tunisian government was unwilling or unable to control his past persecutors because Tunisia has recently taken steps to address religious violence. *Id.* at *1. The Court briefly observed that the Attorney General's language in *Matter of A-B-* did not alter the standard. *Id.*

***Hasan-Chowdhury v. U.S. Att'y Gen.*, 2020 WL 3121294, --F. App'x-- (11th Cir. Jun. 12, 2020) [private actors/unable or unwilling – upheld denial of asylum]:** The Eleventh Circuit denied the petition for review of a Bangladeshi national, addressing only the BIA's determination that the government was willing to protect him from the Awami League, who are non-governmental actors. *Id.* at *2. The Eleventh Circuit adopted the "completely helpless" standard articulated in *Matter of A-B-* and held that Petitioner failed to demonstrate that the Bangladeshi government was unwilling or unable to protect him because: (1) the government did not condone, or participate, in violence against opposition party members, (2) "the Bangladeshi police's alleged failure to investigate his claims of violence does not demonstrate that the government was unwilling to protect him," and (3) that "inconsistent prosecution" of those that commit violence against opposition party members does not mean the government "condoned" violence against them. *Id.* at *3. Moreover, the Court found Petitioner could safely relocate. *Id.*

***Bernal-Garcia v. Barr*, 2020 WL 3034632, --F. App'x-- (9th Cir. Jun. 5, 2020) [family membership/generalized violence/nexus – upheld asylum denial]:** In a memorandum decision, the Ninth Circuit denied the petition for review of a Mexican national who experienced child abuse by his father when he was too young to personally remember it, once witnessed his father hit his mother, and feared retributive violence by persons his father had harmed in Mexico. *Id.* at *1. The Ninth Circuit denied asylum, withholding of removal, and CAT protection. The Court upheld the BIA's findings that Petitioner's abuse was insufficient to rise to the level of persecution and that Petitioner failed to establish fear of persecution on account of his family membership or his proposed group of "young, Mexican males in a conscriptive relationship that they are unable to leave." *Id.* The Court rejected nexus based on family membership since no other family members had suffered retribution by the people his father had harmed. *Id.* The other PSG, which Petitioner likened to *Matter of A-R-C-G-* before it was abrogated by *Matter of A-B-*, failed on nexus because it was "based on his fear of generalized violence by drug cartels." *Id.*

***Jimenez-Perez v. U.S. Att'y Gen.*, 2020 WL 2787601, --F. App'x-- (11th Cir. May 29, 2020) [domestic violence/family membership – upheld denial of asylum]:** The Eleventh Circuit dismissed in part and denied in part the petition for review of a Guatemalan woman who feared persecution on account of her membership in the social groups "Guatemalan women viewed as property" and "the Jimenez family." *Id.* at *5. The Eleventh Circuit upheld the BIA's denial of Petitioner's asylum application, cementing the Court's adherence to *Matter of A-B-*. The Court found Petitioner's first PSG of "Guatemalan women viewed as property" to lack social distinction and particularity. *Id.* at *5. It found that the group lacked particularity because the phrase "viewed as property" provides "no obvious criterion" to identify this "subset" of Guatemalan women and also is "impermissibly circular." *Id.* The Court further found the group lacked social distinction "because nothing suggests that Guatemalan society recognizes women who are viewed as property to be socially distinct." *Id.* Finally, the Eleventh Circuit upheld the BIA's denial of her family membership claim for lack of nexus and affirmed the BIA's "reasoned" and "detailed" denial of humanitarian asylum and CAT relief. *Id.* at *5-6.

***Bautista-Lopez v. U.S. Att'y Gen.*, 2020 WL 2316042, --F. App'x-- (11th Cir. May 11, 2020) [domestic violence/unwilling or unable – upheld asylum denial]:** The Eleventh Circuit denied the petition for review of a Salvadoran woman who experienced prolonged and extreme intimate partner violence. In underlying proceedings, the IJ found her PSG of "El Salvadoran women in domestic relationships who are unable to leave" cognizable but concluded she was not a member of the group, and then rejected her claims on all other grounds. *Id.* While her appeal was pending with the BIA, *Matter of A-B-* was issued, and Petitioner provided two additional PSGs to the Board—"El Salvadoran women" and "El Salvadoran women in domestic relationship who oppose male domination"—and requested remand to consider those groups. *Id.* at *2 n.3. *Id.* The BIA did not address the two newly proposed PSGs and affirmed the IJ's finding that she was not a member of the originally articulated group because she was able to leave her relationship. *Id.* Without grappling with PSG cognizability or membership, the Eleventh Circuit affirmed the BIA's determination that Petitioner failed to prove the Salvadoran government was unable or unwilling to protect her, finding that she failed to report the abuse to the police and noting that El Salvador has made efforts to prevent domestic violence. *Id.* at *4.

***Guillen-Urquilla v. U.S. Att'y Gen.*, 2020 WL 2116406, --F. App'x-- (3d Cir. May 4, 2020) [political opinion/nexus – upheld denial of withholding and CAT relief]:** The Third Circuit dismissed the petition for review of a Salvadoran man who was targeted by gang members because of his political affiliation with the ARENA party. *Id.* at *1. In the underlying proceedings the IJ and BIA denied his withholding claim, holding that Petitioner's political opinion was not a central reason for his persecution "because the gang's *primary* motive for targeting him was monetary." *Id.* The Third Circuit held that the BIA's conclusion on nexus was supported by substantial evidence and that it was not compelled to overturn the Board's finding that the beating, death threats, and loss of employment suffered by Petitioner did not rise to the level of persecution. *Id.* at *2. The Third Circuit noted that it remains "unclear" whether *Matter of A-B-* changed the legal standard for unwilling or unable to control, but upheld the BIA's finding that Petitioner provided insufficient evidence that the government would "refuse to act." *Id.* at *2, n.11. Lastly, the Third Circuit affirmed the BIA's rejection of Petitioner's CAT claim for insufficient evidence to prove he would be subjected to "severe pain or suffering" with the acquiescence of the Salvadoran government, because he failed to identify any "specific evidence to challenge the agency's findings." *Id.*

***Hernandez Rosales v. Barr*, 809 F. App'x 507 (10th Cir. Apr. 17, 2020) [cartel violence/future persecution/acquiescence – upheld asylum and CAT denial]:** The Tenth Circuit denied the petition for review of the BIA's denial of a Mexican man's applications for asylum, withholding of removal, and CAT protection. Petitioner feared persecution and torture in Mexico due to his status as a "long-term [resident] of the United States who [has] to return to Mexico and [has] family members in the United States." *Id.* at 509. While visiting Mexico Petitioner was extorted and threatened at gunpoint, told that he would be killed if his U.S. citizen wife failed to pay a $2,000 ransom. *Id.* The Tenth Circuit affirmed the BIA's denial of Petitioner's claims, finding his proposed PSG failed on particularity grounds because it was too "amorphous, overbroad, diffuse, or subjective." *Id.* at 510 (citing *Matter of A-B-* and comparing to *Matter of W-G-R-*, 27 I&N Dec. 208, 223 (B.I.A. 2014) ("deportees" are too diverse and overbroad to form a cognizable group with particularity)). The Tenth Circuit further held that

Petitioner failed to meet the "willful blindness" requirement for CAT because Mexico is making efforts to combat criminal organizations, though it is not always successful in doing so. *Id.* at 511.

***Solares Mijangos v. Barr*, 801 F. App'x 588 (9th Cir. Apr. 16, 2020) [internal relocation – upheld denial of withholding of removal]:** The Ninth Circuit denied the petition for review of a Guatemalan woman who was beaten, raped, and kidnapped by a man who brought her to the United States and forced her to do field and house work, but with whom she had had no contact for nine years. *Id.* at 588. After Petitioner returned to Guatemala, the man continued threatening her when she relocated. *Id.* at 589. She was placed in withholding-only proceedings, and her case moved back and forth between the IJ and BIA due to intervening changes in asylum law. *Id.* Skirting the issue of cognizability of her proffered gender-based social groups and the applicability of *Matter of A-B-*, the Ninth Circuit upheld the BIA's conclusion that Petitioner was ineligible for withholding of removal because she could safely relocate within the Guatemala and it would be reasonable to do so. *Id.*

***Orellana v. U.S. Att'y Gen.*, 806 F. App'x 119 (3d Cir. Apr. 3, 2020) [LGBTQ/gang violence/ acquiescence – vacated and remanded for consideration of his specific sexual violence claim and the material evidence provided for CAT]:** The Third Circuit granted the petition for review of a gay man from El Salvador, who suffered repeated sexual violence and extortion by the *maras* due to his sexual orientation. *Id.* at 121. Petitioner was raped by five members of MS-13 when he was 13 years old, threatened and sexually harassed by Mara 18, and threatened with rape and murder in front of his wife and children. *Id.* When Petitioner reported the abuse to the police, the police stated that by being gay he was "looking for [abuse]." *Id.* In underlying proceedings, the IJ found Petitioner credible but denied withholding based on "insufficient information" to prove his sexual orientation was *the* one central reason for the harm, relied on *Matter of A-B-* to find that Petitioner was "no different from any other unfortunate victim of gang violence," and denied CAT relief based on government acquiescence. *Id.* The BIA affirmed, adding that future torture was "speculative." *Id.* The Third Circuit vacated and remanded the BIA's denial, finding that "vague statements such as 'the evidence is insufficient' are too thin a reed upon which to deny relief." *Id.* at 123. The Court further found that the IJ and BIA failed to analyze whether the heightened sexual violence Orellana experienced was due to his sexual orientation and faulted the agency for failing to consider the ample evidence and testimony Orellana provided in support of his claim. *Id.* at 124-26. Moreover, the Third Circuit explicitly criticized the IJ and BIA's attempt to "lump [Petitioner]—almost automatically—into a generic group of 'victims of gang violence' under the Attorney General's recent guidance," which categorically disqualifies "members of cognizable social groups who are singled out and stigmatized with particular types of harm." *Id.* at 126.

The Third Circuit also remanded for further consideration of the CAT claim, finding the IJ and BIA failed to engage with Petitioner's evidence and credible testimony that reporting to the police is futile or even harmful for LGBTQ individuals, and instead relied almost exclusively on the letter from Petitioner's hometown mayor expressing his "plight and difficulties" in protecting LGBTQ individuals from gang violence. *Id.* at 129. The Third Circuit also reprimanded the BIA for independently concluding that Petitioner's claim was too "speculative," reminding the BIA "that its role is to *review*." *Id.* (emphasis in original).

***Bravo-Domingo v. Barr*, 806 F. App'x 443 (6th Cir. Apr. 2, 2020) [family membership/ nexus/acquiescence – upheld denial of asylum and CAT]:** The Sixth Circuit denied the petition for review of a Guatemalan woman who was threatened and extorted by her uncle after he falsely accused her of stealing his necklace. *Id.* at 445. Her family reported the uncle to the police on three occasions, but the police did not investigate because the family was unable to pay them. *Id.* The Sixth Circuit upheld the agency's denial of asylum, agreeing that Petitioner was targeted by her uncle for his belief that she stole his necklace, rather than because of family membership or another protected ground. *Id.* at 448 (citing *Matter of A-B-*, 27 I&N Dec. 316, 337 (A.G. 2018) ("[P]rivate criminals are motivated more often by greed or vendettas than by an intent to 'overcome' [the protected] characteristic of the victim.'" (internal citations omitted))). The Sixth Circuit also rejected her CAT claim, finding that "the police's failure or inability to protect citizens, alone, does not show acquiescence." *Id.* at 449.

UNPUBLISHED COURTS OF APPEALS DECISION CITING MATTER OF L-E-A-, 27 I&N Dec. 581 (A.G. 2019)

***Martinez De Artoga v. Barr*, 961 F.3d 586 (2nd Cir. Jun. 10, 2020) [family membership/gang recruitment –remanded]:** The Second Circuit granted the petition for review of a Salvadoran national who fled persecution from MS-13 members who threatened her because of her interference with their attempts to recruit her son. In the underlying proceedings the agency assumed cognizability of Petitioner's proposed family group but denied on nexus, finding the gang was motivated by its desire to "increase its ranks" and not by Petitioner's relationship to her son. *Id.* at 590. It further denied CAT, stating that Petitioner "failed to meet her burden." The Second Circuit rejected the agency's conclusion that an applicant must be threatened more than once and suffer physical harm before fleeing as clear error, and remanded for a determination of the likelihood of future torture. Regarding nexus and PSG, the Court acknowledged that these issues can be addressed on remand, and declined to discuss PSG given that cognizability of groups defined by family membership are fact-intensive and "issues with respect to which the approaches of the BIA and of [the] Court are currently in a state of flux." *Id.* at 593 (citing *Hernandez-Chacon v. Barr*, 948 F.3d 94 (2d Cir. 2020); *Matter of L-E-A-*, 27 I&N Dec. 581 (A.G. 2019)).

***Zapata Suquilanda v. U.S. Att'y Gen.*, 2020 WL 2843036, --F. App'x-- (3d Cir. Jun. 1, 2020) [family membership/landowner – upheld denial of withholding of removal]:** The Third Circuit denied the petition for review of an Ecuadorian man who fears persecution on account of his family membership. Petitioner's father was shot by a man with whom he was involved in a land dispute, and the man threatened Petitioner and the rest of his father's children. *Id.* at *1. The BIA noted that, pursuant to *Matter of L-E-A-*, 27 I&N 581, 593-96 (A.G. 2019), his nuclear family "should not be assumed to be inherently socially distinct" and denied Petitioner's application for withholding for removal based on lack of nexus. *Id.* at *2. The Third Circuit declined to address the cognizability of Petitioner's family-based social group because the BIA had merely "expressed doubts" and had not reached a conclusion, but affirmed the Board's decision on nexus, finding that Zapata was more likely targeted over "greed or some kind of retribution" than over landownership. *Id.*

***Montiel-Guerrero v. Barr*, 804 F. App'x 703 (9th Cir. May 6, 2020) [PSG delineation – remanding to the BIA to clarify the proposed group]:** In a memorandum decision, the Ninth Circuit granted the petition for review and remanded to the BIA the withholding of removal and CAT applications of a Mexican national with "fair skin" and "fair eyes" whom "the Mexican authorities identified . . . as a non-Mexican migrant without national ties and therefore susceptible to their criminal scheme." *Id.* at 704. Although the proposed group differed in delineation on appeal, the Ninth Circuit held that the description remained the same and remanded to the BIA to "focus on the particular social group *as it is defined* by the applicant and ask whether *that group* is distinct in the society in question." *Id.* (quoting *Matter of L-E-A-*, 27 I&N Dec. 581, 594 (A.G. 2019)). The Ninth Circuit also found the BIA may have applied the wrong standard when denying Petitioner CAT relief, because it failed to specifically address violence by local police officers that suggested public officials would acquiesce in Petitioner's torture. *Id.* at 704-05.