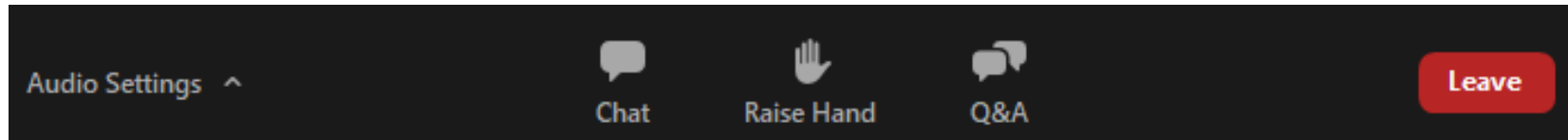


# The webinar is about to start...

**Q&A:** We encourage attendees to submit non-case-specific questions throughout the webinar. Please click on the Q&A box, *not* Chat, in your toolbar to open the Q&A box. Type your question into the Q&A box and click “Send”. Panelists may answer relevant questions in the Q&A box or out loud. While we endeavor to answer as many questions as possible, we may not be able to answer all questions.

**Chat:** The Chat box located on the tool bar may be used to communicate directly with the host/panelists if you encounter problems with the sound quality, viewing of PowerPoint presentations, or other logistics questions. **Do not use the Chat box to ask substantive questions. Use the Q&A box instead.** Participants may use the Chat box to participate where instructed by the panelists.



# Post-*A-B-III* Trends and Strategies on Appeal

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Center for Gender & Refugee Studies

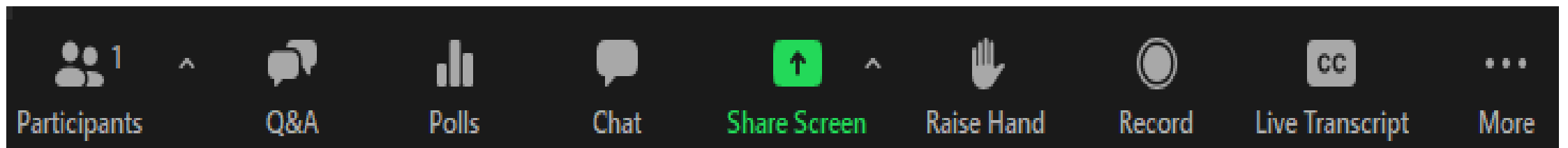
Blaine Bookey, Legal Director

Anne Dutton, Staff Attorney

# Chat vs. Q&A Box

**Chat:** Participants may use the Chat box to participate when prompted.

**Q&A:** We encourage attendees to submit questions throughout the webinar using the Q&A box. Click on the Q&A box to open the window, type your question, and click "Send".





# Agenda

- Background and state of the law
- Post-*A-B-III* trends in DV cases
- Strategies for cases at the BIA
- Strategies for cases at the courts of appeals
- Q&A

# Background and State of the Law

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# Matter of A-R-C-G-

Issued in 2014 by the BIA

- Held that “married women in Guatemala who are unable to leave their relationship” can constitute a social group
- Recognized that marital status can be immutable due to religious, cultural, or legal constraints
- Emphasized case-by-case adjudication of social groups

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

# Matter of A-B- I

Issued in 2018 by AG Sessions

- Overruled *Matter of A-R-C-G-* based on perceived defects in its analysis of the PSG “married women in Guatemala who are unable to leave their relationships”
- Discussed other elements of asylum and included harmful dicta on viability of gang/DV claims generally

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



# Matter of A-B- II

Issued in 2021 by Acting AG Rosen

- Established two-part nexus test
- Held that “condoned/completely helpless” was the same standard as “unable/unwilling”

*Matter of A-B- II*, 28 I&N Dec. 199 (AG 2021)

# Matter of A-B- III

Issued in 2021 by AG Garland

- Fully vacates *A-B- I* and *A-B- II* in light of pending rulemaking
- Acknowledges some harmful aspects of *A-B- I*: sweeping dicta and “condoned/completely helpless” test

Directs adjudicators to not apply the decisions in pending or future cases; *A-R-C-G-* and other pre-*A-B- I* precedent control

*Matter of A-B- III*, 28 I&N Dec. 307 (AG 2021)

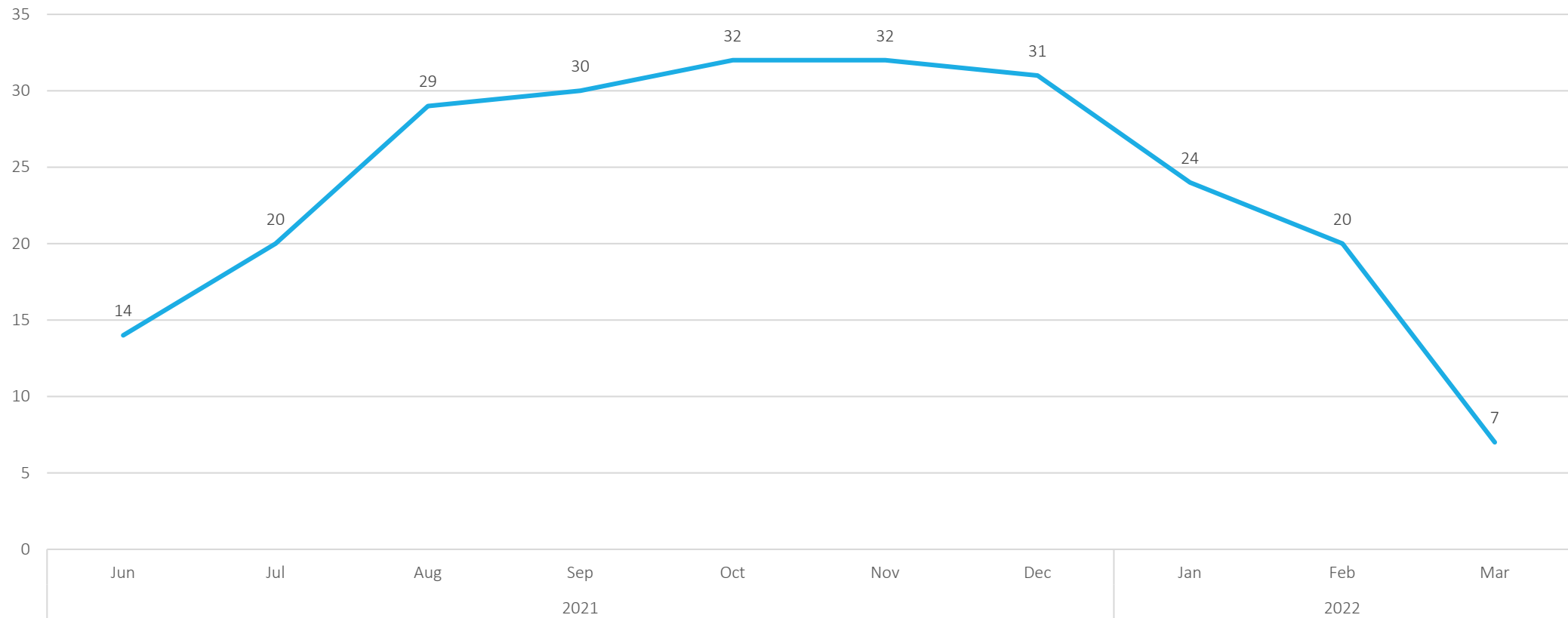
# Current State of the Law

- “A vacated decision has no precedential effect whatsoever.” *Durning v. Citibank, N.A.*, 950 F.2d 1419, 1424 n.2 (9th Cir. 1991).
- Adjudicators should not be relying on *A-B- I* or *A-B- II*
  - Note: AG Garland also vacated *Matter of A-C-A-A- I*, 28 I&N Dec. 84 (AG 2020) and *Matter of L-E-A- II*, 27 I&N Dec. 581 (AG 2019)
- Until a final rule is issued, *A-R-C-G-* is valid precedent

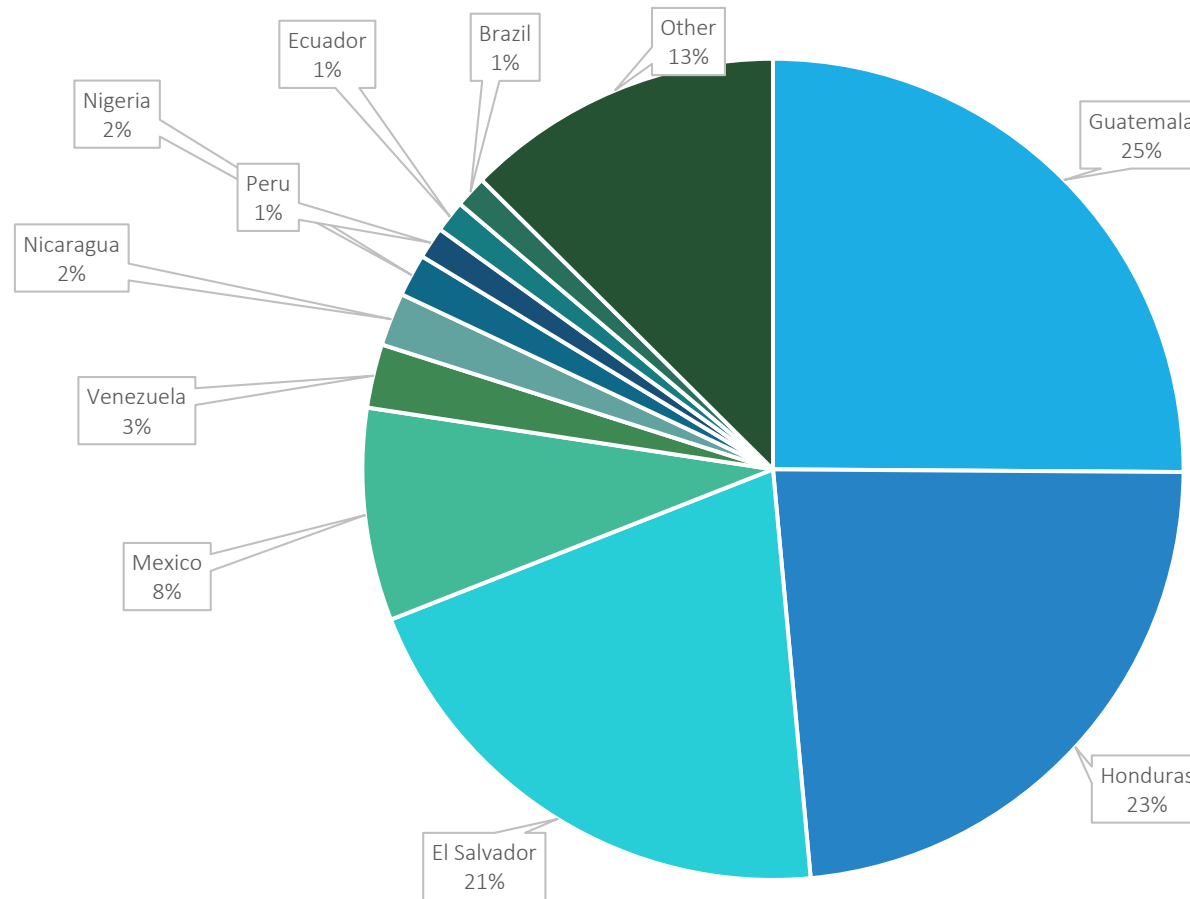
# Post-A-B- III Trends in DV Cases

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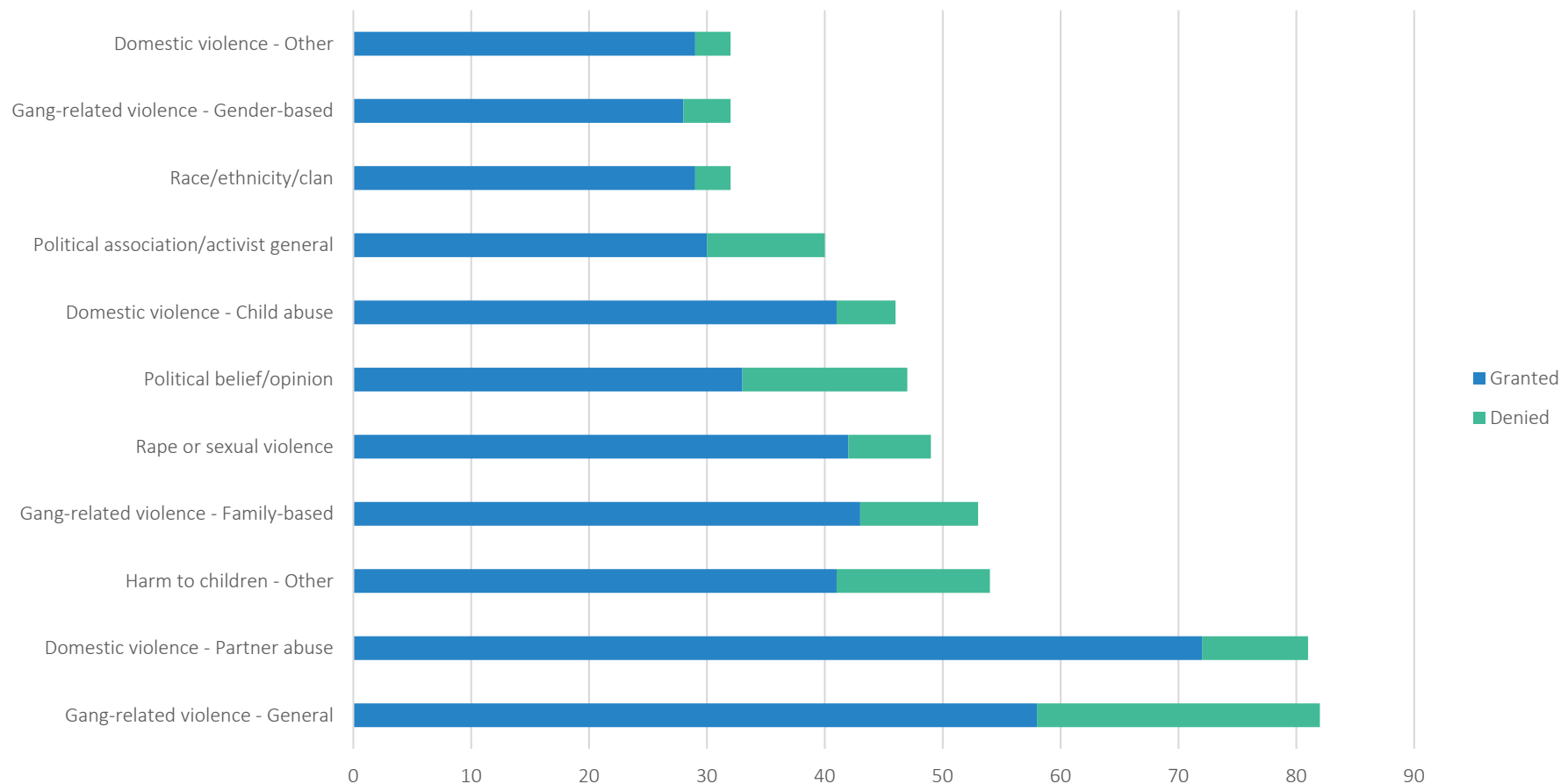
# Post-A-B- III Outcomes Reported to CGRS by Month



# Post-A-B- III Vacatur Outcomes Reported to CGRS by Nationality



# Post-A-B- III Outcomes Reported to CGRS by Type of Persecution



# Trends: Immigration Court

- CGRS has on file at least 101 merits outcomes at the IJ level in cases involving domestic violence (as at least one of the claims)
  - 82 grants of at least one form of protection
  - 9 denials of all relief
  - 10 termination/admin closure
- The outcomes come from IJs across the country including



# Grants in Immigration Court

- IJs have granted on the following legal theories
  - Gender-only PSG (e.g. X nationality women or girls)
  - Gender + other characteristics (e.g. relationship status or ethnicity)
  - Family (e.g. children of X mother)
  - (Imputed) PO (e.g. feminism)
- In at least one case, DHS has stipulated to a grant of asylum in a remanded case where the record was fully developed and the denial was based solely on *A-B-*
  - In others DHS has agreed to narrow issues or not oppose a grant at the close of testimony

# Denials in Immigration Court

- IJs have rejected gender PSGs though with limited analysis
- IJs have distinguished from *A-R-C-G-* on grounds that the individual was not married to her abuser or did not make a police report
- Other grounds for denial include
  - Adverse credibility
  - Failure to show nexus, continuing to employ the now-vacated *A-B-* rationale
  - State protection
- CAT rejected based on the following:
  - Insufficient likelihood of torture
  - Failure to show consent or acquiescence on part of the state

# Trends: BIA

- CGRS has on file at least 9 BIA decisions involving DV claims
  - 6 involved direct appeals
    - 4 resulted in denials of all relief
    - 3 resulted in remands following vacatur of *A-B- I/II*
  - 2 involved consideration of MTRs
- Decisions have been conflicting
  - Some decisions have rejected gender PSGs while others have remanded for consideration of their cognizability
  - Some decisions have upheld flawed nexus findings while others have remanded for reconsideration
- Following remand from the courts of appeals, DHS has agreed to join in remand in at least some cases

# Trends: Courts of Appeals

- To date, the Fifth Circuit is the only court to engage substantively with *A-B- III* in a published decision in *Jaco v. Garland*, 24 F.4th 395 (5th Cir. 2021)
  - Notably, the Third Circuit recently rejected a PSG of “Guatemalan women” in *Chavez-Chilel v. Att’y Gen.*, 20 F.4th 138 (3d Cir. 2021), though it does not cite to *A-B-*
- Unpublished decisions are a mixed bag with respect to requests for remand post-vacatur
  - Courts have denied remand requests where *A-B-* was not considered essential the BIA’s holding
- OIL has agreed to remand where the agency relied on *A-B- I/II* to deny protection
  - This includes not only in cases involving PSG but also nexus or state protection grounds

# Cases Before the AO or Immigration Court

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# General Guidance

- Depending on circuit, foreground a gender-only social group (e.g., “Guatemalan women”)
  - Anticipate argument that the group is too broad to be particular
- Explain why an “unable to leave” group is not circular and avoid circular social groups
- Submit Professor Nancy Lemon’s declaration regarding the gendered dynamics of abusive relationships

# General Guidance

- Present a feminist political opinion claim, when warranted
  - Identify any other protected grounds supported by the facts
- Remember social group cognizability is a case-by-case determination; the record must always support the group
- Think about social group and nexus together
- For more details, see CGRS's Practice Advisory, *Matter of A-B- III and Matter of A-C-A-A- II: Litigation Strategies Post-Vacatur* (July 2021)

# Strategies for Cases at the BIA

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# Briefing (Merits/Supplemental)

- If you have yet to brief the case, you have the opportunity to address the issues and request remand
  - Depending on the way the IJ handled the decision, you can also consider asking the BIA to grant asylum outright
  - May also consider arguing an articulation of a PSG for the first time on appeal if substantially similar to groups raised below
- If briefing has concluded, you may:
  - Submit a motion to accept a supplemental brief (BIA PM Rule 4.6(g)(ii))
  - Submit a statement of new legal authorities (BIA PM 4.6(g)(1))

# Motion to Remand

- When to pursue?
  - Most commonly filed before (or after) briefing occurs
  - Particularly appropriate when IJ relied heavily on the vacated decisions
- What to argue?
  - IJ decision turned on the vacated law, which cannot be applied to pending cases
  - If BIA cannot affirm the IJ decision on the same basis the IJ used, remand is warranted, *Matter of S-H-*, 23 I&N Dec. 462 (BIA 2002)
  - BIA is not allowed to conduct fact-finding in the first instance, 8 CFR § 1003.1(d)(3)(iv)
- Whether to involve DHS?
  - Recommended approach given the minimal (if any) downsides
  - If no response, consider filing anyway
  - Recall that if DHS doesn't file an opposition within 13 days of service, the motion will be deemed unopposed, 8 CFR § 1003.2(g)(3)

# Case Example

- The IJ denied the case of a Salvadoran woman whose claim was based on domestic violence
- Citing to *A-B-* I, the IJ held that the group was not cognizable because it was circularly defined by harm, since the inability to leave was caused by the fear of violence
  - Alternatively, the IJ also found that there was no nexus, the abuse was just personal (not citing to *A-B-*)
- What strategies might you consider?
- What arguments could be raised in briefing?

# Strategies for Cases at the Courts of Appeals

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# Motions with the BIA

If warranted by the client's circumstances or the contents of the BIA decision, consider filing with the BIA:

- Motion to reconsider: due within 30 days of decision
- Motion to reopen: due within 90 days of decision, unless changed country conditions or other arguments for exception to the deadline

**These motions do not stay the 30-day deadline for filing a petition for review with the courts of appeals!**

# Seeking Remand

- For any case denied on *A-B*- grounds, may be worth reaching out to ask OIL to join a motion to remand
  - Can point to the [Gupta memo](#) in support
- Timing of remand requests
  - Earlier in the process is better
  - OIL may be most inclined to join after filing of opening brief
- If OIL is being difficult, can request referral to mediation

**Please reach out to CGRS if OIL is refusing to remand in an *A-B*-case!**

- Can email [cgrs-ta@uchastings.edu](mailto:cgrs-ta@uchastings.edu) with your CGRS case number

# Arguments for Briefing

- Vacatur presents another basis for remand, under the ordinary remand rule
  - Court should let the agency apply the new legal standards in the first instance
- Favorable law of the circuit has been restored
- Unfavorable circuit law that relied on the AG decisions should no longer apply because it's no longer the agency position
  - Note that the Fifth Circuit rejected these arguments in *Jaco v. Garland*, 24 F.4th 395 (5th Cir. 2021); as an alternate argument, focus on distinguishing your case as much as possible

# Other Strategies

- File 28(j) letters to inform the court of a change in law that impacts the case
- Reach out to CGRS if you're interested in amicus support or to talk through legal strategy
  - Email [cgrs-TA@uchastings.edu](mailto:cgrs-TA@uchastings.edu) and include your CGRS case number



# Case Example

- BIA denied the case of a Honduran woman whose claim was based on domestic violence
- Without any factual analysis, BIA held that the group was not cognizable because it was circularly defined by harm, since the inability to leave was caused by the fear of violence
  - But the BIA decision does not cite *A-B- I* or *A-B- II* or *A-R-C-G-*
- What strategies might you consider?
- What arguments could be raised in briefing?

# CGRS Outcomes Tracking

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# Report Case Outcomes

Advocates can report case outcomes at: <https://cgrs.uchastings.edu/outcomes>

## IN THIS SECTION

> GET HELP WITH AN ASYLUM CASE

> TECHNICAL ASSISTANCE FAQ

> FIND AN EXPERT WITNESS

> REPORT AN OUTCOME IN YOUR CASE

## REQUEST ASSISTANCE

To request assistance in your asylum case, please fill out this [form](#).

## Report an Outcome in Your Case

In order to update us about your case, the case must first be in our database. If it isn't, please fill out the [intake form](#), where you can tell us about your case *and* enter an outcome.

If the case is already in our system, please do the following:

- 1. [Log in](#)
- 2. Find the case in our system on [your account page](#).
- 3. On the case page, under the "Outcomes" tab, select "Add an outcome."
- 4. If you would like further assistance on this case (i.e. with an appeal), please also email [CGRS-TA@uchastings.edu](mailto:CGRS-TA@uchastings.edu) and include the case number in the subject line.

## CASE OUTCOME

Fill out the fields below with details pertaining to your case.

Case \*

Case #53441

Date of Decision \*

Month \*

Mar

Day \*

1

Year \*

2022

Level \*

- ☐ Asylum Office
- ☒ Immigration Judge
- ☐ Board of Immigration Appeals
- ☐ Federal Court of Appeals
- ☐ Other

Jurisdiction \*

San Francisco, CA

Judge \*

Savage, Patrick S.

If you do not find your judge, please select "Other."

IJ Outcome \*

Denied all relief

## DECISION RATIONALE

Reason for **asylum** denial (check all that apply):

- ☐ Found not credible
- ☐ Inadequate corroboration
- ☐ Harm not persecution
- ☐ Fear is not well-founded
- ☐ Protected ground is not cognizable
- ☐ Applicant does not possess protected characteristic (e.g. is not a member of the PSG)
- ☐ No nexus
- ☐ Government is able and willing to protect
- ☐ Applicant could relocate
- ☐ Bar to relief
- ☐ Negative discretionary determination

Reason for **withholding** denial (check all that apply):

- ☐ Found not credible
- ☐ Inadequate corroboration
- ☐ Harm not persecution
- ☐ Fear is not well-founded
- ☐ Protected ground is not cognizable
- ☐ Applicant does not possess protected characteristic (e.g. is not a member of the PSG)
- ☐ No nexus
- ☐ Government is able and willing to protect
- ☐ Applicant could relocate
- ☐ Bar to relief
- ☐ Negative discretionary determination

Reason for **CAT** denial (check all that apply):

- ☐ Insufficient likelihood of torture
- ☐ Harm not sufficiently severe
- ☐ Harm will not be intentionally inflicted
- ☐ Public official/other person in official capacity will not consent or acquiesce to the torture
- ☐ Other

# Webinar Evaluation Form & MCLE Certificate

**MCLE Evaluation Form:** Thank you for attending the webinar. We appreciate your feedback and invite you to [fill out a short evaluation form](#).

**MCLE Certificate:** You can [obtain your MCLE certificate here](#) by entering the password provided during the webinar. After completing the information requested, you will be able to download the MCLE certificate for your records.

**Through UC Hastings, CGRS is a State Bar of California approved MCLE provider.**



# Resources Available in the TA Library

- Practice Advisory, *Matter of A-B- III and Matter of A-C-A-A-II: Litigation Strategies Post-Vacatur* (July 2021)
- Template 28(j) letters, for cases pending at the courts of appeals
- Template motion to remand based on vacatur, for cases pending at the BIA
- And more!

# Q&A

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# Information about CGRS

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# Training & Technical Assistance

- Equipping attorneys with resources necessary to win protection for their clients
- Mentoring attorneys in developing winning legal strategies at all levels of adjudication
- Tracking outcomes in asylum cases to identify adjudication trends
- Connecting attorneys to health, country conditions, and issue-specific experts

# CGRS Technical Assistance Resources

## Practice Advisories

- Domestic violence
- Children's asylum
- Fear-of-gang claims
- Gender-based claims
- CAT protection claims
- EAD Rule

## Country Conditions Reports

- Specific topics in individual countries (e.g., children, indigenous, LGBTI, gang)

## Unpublished Case Law

- IJ and BIA decisions

## Expert Declarations

- Country-specific (e.g., violence against women, children, LGBTQ)
- Topic-specific (e.g., domestic violence, incest, trauma and memory)

## Sample Pleadings

- Case documents: declarations, indices, expert affidavits
- Legal briefs

# Request CGRS Technical Assistance

CGRS provides free expert consultation to attorneys and organizations representing asylum seekers, including legal technical assistance, strategy development, sample briefs, unpublished decisions, country conditions evidence, and expert witness affidavits.

**Request assistance in your case:** <http://cgrs.uchastings.edu/assistance>.

**Email:** [CGRS-TA@uchastings.edu](mailto:CGRS-TA@uchastings.edu) with your CGRS Case Number if you have follow-up questions.

**Reach out to CGRS:** [cgrs-ABtracking@uchastings.edu](mailto:cgrs-ABtracking@uchastings.edu) to request CGRS's amicus support in a case involving *Matter of A-B-* before the BIA or courts of appeals.



# CGRS Expert Database

- Free, searchable repository of health, country conditions, and issue-specific professionals who serve as expert witnesses to support the legal claims of asylum seekers in the United States.
- Expert profiles with areas of expertise, availability, and CV.
- Advocates can sign into their CGRS accounts to search and contact experts:  
<https://cgrs.uchastings.edu/expert/search>.
- Experts who wish to be considered for inclusion in the database may create a profile at: <https://cgrs.uchastings.edu/register/expert-witness>.

# Litigation

- Defending asylum seekers in court
- Advancing substantive asylum law
- Protecting the asylum system
- Ensuring due process

# Policy & Advocacy

- Policy analysis and recommendations
- Speaking up for refugees
- Human rights and regional partnerships
- Restoring access to asylum in line with our international obligations

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