

May 27, 2021

The Honorable Merrick B. Garland
Attorney General of the United States
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

The Honorable Alejandro Mayorkas
Secretary of Homeland Security
Washington, DC 20528

RE: U.S. Department of Justice and U.S. Department of Homeland Security’s Comprehensive Asylum Review in relation to the State Protection Element of the Refugee Definition

Dear Attorney General Garland and Secretary Mayorkas:

As your agencies conduct a “comprehensive examination of current rules, regulations, precedential decisions, and internal guidelines governing the adjudication of asylum claims . . . to evaluate whether the United States provides protection . . . consistent with international standards,”¹ we wish to express our views—as immigration law scholars—on the proper construction and application of the state protection element of the refugee definition.

For decades, immigration adjudicators and U.S. courts have recognized that a refugee can be one fleeing state-perpetrated persecution or nonstate persecution from which the state is either “unable or unwilling” to provide effective protection.² This unable-or-unwilling nonstate actor test has been adopted and applied by every U.S. court of appeals in the country that reviews these decisions.³ However, where to situate that test in the Refugee definition and how to measure the efficacy of state protection have been far more elusive. We contend that the longstanding unable-or-unwilling standard should be anchored in the text of the Refugee Act that defines a refugee as one who is “unable or unwilling to avail . . . of [state] protection. . . because of persecution or a well-founded fear of persecution.”⁴ Gauging the effectiveness of state protection by the extent to which a state has prevented past persecution or can reduce the risk of future persecution below the well-founded fear threshold is an approach both faithful to the will of Congress and vital to providing clarity for adjudicators evaluating nonstate persecutor claims.⁵

In contrast to the approach we advance, the previous administration departed from the unable-or-unwilling standard by requiring applicants to demonstrate that their governments “condoned” their

¹ *Executive Order on Creating a Comprehensive Framework to Address the Causes of Migration, to Manage Migration Throughout North and Central America, and to Provide Safe and Orderly Processing of Asylum Seekers at the United States Border*, February 2, 2021, available [here](#).

² Charles Shane Ellison & Anjum Gupta, *Unwilling or Unable: The Failure to Conform the Nonstate Actor Standard in Asylum Claims to the Refugee Act*, 52.2 COLUMBIA HUMAN RIGHTS LAW REVIEW 441, 461-63 (2021), available [here](#) (analyzing decisions back to 1967).

³ *Id.* at 467-490.

⁴ 8 U.S.C. 1101(a)(42) (emphasis added).

⁵ Ellison & Gupta, *supra* note 2 at 511-16.

persecution or were “completely helpless” to stop it.⁶ In *Matter of A-B-*, the former Attorney General recognized the dramatic winnowing effect that his condone-or-completely-helpless test would entail, writing that “[g]enerally,” claims based upon harms “perpetrated by non-governmental actors *will not qualify for asylum*.”⁷ Not only does that heightened nonstate actor test find no support in the existing statutes, regulations, or former agency precedent, it has sown considerable confusion within the courts of appeals.⁸ It has also markedly narrowed the pathway for bona fide refugees fleeing nonstate persecution in a manner irreconcilable with the plain language of the Refugee Act or international legal standards.

I. The Regulations Should Properly Situate the State Protection Element in the Relevant Statutory Text.

To both address the heightened nonstate actor problem and provide critical guidance to adjudicators and courts evaluating nonstate persecutor claims moving forward, we collectively urge the Departments of Justice and Homeland Security to promulgate regulations that closely and carefully adhere to the intent and plain language of the Refugee Act. Specifically, we maintain that the nonstate actor test must be anchored in the explicit terms of the Refugee Act and Refugee Convention that define a refugee in relevant part as one who is “*unable or unwilling to avail himself or herself of the protection of [his or her country of nationality] because of persecution or a well-founded fear of persecution*.”⁹ There are at least three conclusions to be drawn from that statutory language: (1) Congress intended for relief to be available for applicants who are fleeing nonstate persecutors; (2) the statute does not permit an applicant to be denied relief for being “unwilling” to seek state protection; and (3) the effectiveness of state protection must be measured against the neighboring statutory provisions related to past harm and a well-founded fear of future harm.

First, the unadorned language of the Refugee Act is sufficiently capacious to encompass both harms inflicted by state actors as well as nonstate actors. To be able to *avail* of state protection, such protection must be *available*. Where the state is the source of persecution, such protection is obviously *unavailable* and an applicant for asylum would be reasonable in being *unwilling* to seek state protection. Similarly, where the state lacks the capacity or desire to provide meaningful and effective protection vis-à-vis a nonstate persecutor, such protection is *unavailable* and thus a refugee would be *unable* to avail of it. The statute contains nothing to suggest that refugees fleeing nonstate persecution are somehow less worthy of relief relative to those fleeing state persecution.

Second, the refugee definition clearly includes those who are simply “*unwilling to avail [themselves] of [state] protection*.”¹⁰ The statute leaves absolutely no room to penalize or otherwise disadvantage a refugee who flees his or her country without first seeking the help of the police or other

⁶ *Matter of A-B-*, 27 I&N Dec. 316 (A.G. 2018); *Matter of A-B-*, 28 I&N Dec. 199 (A.G. 2021). If the Biden administration wishes to secure the traditional nonstate actor test against future changes similar to those advanced by the Trump administration, it should ground the test in the more explicit state protection language the statute employs. *Ellison & Gupta*, *supra* note 2 at 505-506, 511-15.

⁷ *Matter of A-B-*, 27 I&N Dec. at 320 (emphasis added).

⁸ *Ellison & Gupta*, *supra* note 2 at 494-503.

⁹ 8 U.S.C. 1101(a)(42) (emphasis added). The Refugee Convention similarly defines a refugee as one who “*owing to [a] well founded fear of being persecuted . . . is unable or, owing to such fear, is unwilling to avail himself of the protection of that country*.” Convention Relating to the Status of Refugees, art. 1, July 28, 1951, 19 U.S.T. 6259 (entered into force Apr. 22, 1954) (emphasis added).

¹⁰ *Id.* (emphasis added).

authorities. Case law by the agency and courts of appeals has recognized that there may be many reasonable bases for not seeking state protection prior to fleeing one's country.¹¹ Provided that the choice not to seek protection is rooted in an experience of past persecution or a well-founded fear of future persecution, the statute does not contemplate additional hurdles for refugees who are unwilling to avail themselves of state protection.¹²

Third, the text of the statute provides a guide for gauging how ineffective state protection must be for a refugee to be reasonably unable or unwilling to avail of that protection. The statutory reference to being “unable or unwilling to avail . . . of [state] protection” in § 1101(a)(42)(A) is explicitly linked to the existence of past persecution or a “well-founded fear” of future persecution. Thus, the statute must be construed consistently with those neighboring elements of the refugee definition.¹³ Requisite state protection must be measured by the extent to which the refugee-producing country was able and willing to protect an applicant from past persecution or would be able and willing to provide sufficient protection such that the risk of future persecution falls below the well-founded fear threshold. In the absence of past persecution (where a well-founded fear is presumed), the Supreme Court has held that an applicant possesses a well-founded fear even if there is “only a 10% chance of being . . . persecuted.”¹⁴ Thus, the nonstate actor test should be satisfied where a state lacks the will or ability to protect an applicant from a nonstate actor in a way that reduces the applicant's probability of future harm below that 10% chance. In this way, the well-founded fear analysis serves as the lodestar for nonstate actor determinations based upon a fear of future harm.¹⁵ Any interpretation or construction of the state protection requirement that is untethered to considerations of past persecution or a well-founded fear simply cannot be squared with the statute.

¹¹ An applicant is not required to “seek[] government assistance when doing so (1) ‘would have been futile’ or (2) ‘would have subjected [him] to further abuse.’” *Orellana v. Barr*, 925 F.3d 145, 153 (4th Cir. 2019); *Matter of S-A*, 22 I&N Dec. 1328, 1335 (BIA 2000) (finding the nonstate actor test satisfied even though applicant “did not request protection from the government”). In *Bringas-Rodriguez v. Sessions*, 850 F.3d 1051 (9th Cir. 2017), the en banc court explained that reporting is not necessary where: (1) “a country's laws or customs effectively deprive the petitioner of any meaningful recourse to governmental protection;” (2) “[p]rior interactions with authorities” reveal governmental inability or unwillingness to protect; (3) “others have made reports of similar instances to no avail;” (4) “private persecution of a particular sort is widespread and well-known, but not controlled by the government;” or (5) reporting “would have been futile or would have subjected the applicant to further abuse.”

¹² See *supra* note 11. While those who do not seek state protection are, of course, unable to point to the police's reaction to their complaint as evidence in support of their claim, that cannot be dispositive. See *Bringas-Rodriguez*, 850 F.3d at 1072. At times, reporting will place the applicant in grave danger, or their lived experience (or that of similarly situated individuals) may reveal that reporting would be futile. In either case, there can be no penalty for simply being “unwilling to avail . . . [of state] protection” consistent with the statute. *Id.* This conclusion aligns with the original intent of the Refugee Convention's drafters. See Andrew Paul Janco, “Unwilling”: *The One-Word Revolution in Refugee Status*, 1940-51, 23 *Contemp. Eur. Hist.* 429-446, 440 (2014) (tracing the historical development behind the phrase “unwilling to avail,” showing that “the original intent of the word ‘unwilling’ was to emphasize that it was the individual who refused to return home and refused state protection,” and demonstrating that such individuals were explicitly included within the refugee definition).

¹³ *Ellison & Gupta*, *supra* note 2 at 511-519; Deborah E. Anker, *Law of Asylum in the United States* § 4:8.

¹⁴ *INS v. Cardoza-Fonseca*, 480 U.S. 421, 440 (1987).

¹⁵ The Board's interpretation of the well-founded fear test provides further support for this framing. The Board has held that to establish a well-founded fear, an applicant must show, *inter alia*, that their feared persecutor is both *able* to harm them and *inclined* to harm them. *Matter of Mogharrabi*, 19 I&N Dec. 439, 446 (B.I.A. 1987). In the context of nonstate persecutors, the question of whether a feared persecutor is *able* to harm necessarily turns upon the degree to which the state has both the will and capacity to protect.

II. The Regulations Should Measure the Effectiveness of State Protection through the Lens of Well-founded Fear.

Faithful adherence to the relevant statutory language for which we advocate would solve the problems of confusion and past problematic constructions regarding the state protection element. Conversely, grounding the nonstate actor test in the term *persecution* provides no clarity on the level, nature, or quality of effectiveness of state protection to be expected. Instead, the term *persecution* is almost universally recognized as an ambiguous term¹⁶ that relates to whether past or feared harm is sufficiently severe.¹⁷ Conflating these elements has already resulted in confusion in the courts of appeals and will only persist unless clarity is provided.¹⁸ Anchoring the state protection analysis instead in the relevant terms of the statute that actually speak of the *availability* of state *protection* is more faithful to congressional intent and provides more guidance to adjudicators.¹⁹ When properly framed, requisite state protection is measured by whether the applicant has suffered *past persecution* from a nonstate actor (and thus the state failed to protect) or whether the applicant possesses a *well-founded fear* of future harm that the state is either unable or unwilling to prevent.²⁰ In either case, state protection was not (or is) not *available*.²¹

Understanding the state protection element consistently with the well-founded fear analysis is likewise consistent with international legal standards.²² The United Nations High Commissioner for Refugees (UNHCR)—in its Handbook on Procedures and Criteria for Determining Refugee Status—provides that refugees fleeing nonstate persecution should be granted protection where the authorities are unwilling or unable “to offer *effective* protection.”²³ International law scholars have explained that the “only criterion . . . [for such determinations] is whether the person will be subject to substantial risk of harm from the non-state actor. If there is such a risk, the human rights treaty

¹⁶ *Ellison & Gupta*, *supra* note 2 at 506.

¹⁷ See, e.g., *Nelson v. INS*, 232 F.3d 258, 263 (1st Cir. 2000) (“To qualify as persecution,” a person’s experienced harm must be sufficiently severe); *Beskovic v. Gonzales*, 467 F.3d 223, 226 (2d. Cir. 2006) (finding that a “minor beating . . . may rise to the level of persecution” under certain circumstances); *Gomez-Zulaga v. U.S. Att’y Gen.*, 527 F.3d 330, 342 (3d Cir. 2008) (providing guidance on what harms “rise to the level of ‘persecution’”); *Li v. Gonzales*, 405 F.3d 171, 178 (4th Cir. 2005) (discussing when “economic penalties rise to the level of persecution”); *Munoz-Granados v. Barr*, 958 F.3d 402, 407 (5th Cir. 2020) (discussing when threats “rise to the level of ‘persecution’”); *Mikhailevitch v. INS*, 146 F.3d 384, 389–90 (6th Cir. 1998) (providing examples of harms that do not “rise to the level of ‘persecution’”); *Stanojkova v. Holder*, 645 F.3d 943, 947–48 (7th Cir. 2011) (stating that, to constitute “persecution,” the harm must be more severe than discrimination or harassment); *Abmed v. Ashcroft*, 396 F.3d 1011, 1014 (8th Cir. 2007) (“Economic discrimination” can “rise to the level of persecution” under certain conditions); *Abmed v. Keisler*, 504 F.3d 1183, 1194 (9th Cir. 2007) (stating that whether harm constitutes “persecution” depends upon their cumulative effect); *Witjaksano v. Holder*, 573 F.3d 968, 977 (10th Cir. 2009) (discussing when assault rises to the level of persecution); *Mejia v. U.S. Att’y Gen.*, 498 F.3d 1252, 1258 (11th Cir. 2007) (considering whether the “cumulative effects of the escalating threats and attacks” constitutes “persecution.”).

¹⁸ *Ellison & Gupta*, *supra* note 2 at 494-503, 516.

¹⁹ 8 U.S.C. 1101(a)(42).

²⁰ *Id.* (defining a refugee as one who is “unable or unwilling to avail himself or herself of . . . [state] protection . . . because of persecution or a well-founded fear of persecution.”) (emphasis added).

²¹ *Id.*

²² The Supreme Court has explained that “the legislative history of the new definition of ‘refugee,’ and indeed the entire 1980 Act,” clearly reveals that “Congress’ primary purpose was to bring United States refugee law into conformance with the 1967 United Nations Protocol Relating to the Status of Refugees . . . to which the United States acceded in 1968.” *INS v. Cardoza-Fonseca*, 480 U.S. at 436-37.

²³ UNHCR Handbook ¶ 65 (1979, rev. 1992) (emphasis added).

obligation . . . should prevent . . . a state from sending individuals into harm's way."²⁴ The availability of state protection is "an integral part of the . . . determination that a well-founded fear of persecution exists," but it should not be elevated above, or to the exclusion of, the probability of harm analysis.²⁵

III. The Regulatory Burden-Shifting Framework Should Be Adjusted to Encompass the State Protection Requirement.

Based upon the foregoing observations related to the text, structure, and international legal interpretations of the state protection element, we believe that the burden-shifting framework in the asylum and withholding of removal regulations should be adjusted to provide that once an applicant has shown past persecution, the burden shifts to the Department of Homeland Security (DHS) to demonstrate that the state would be *willing and able* to stop that persecution in the future. Existing regulations provide that a refugee is able to satisfy the threshold substantive eligibility requirements for asylum by establishing that "he or she has suffered persecution in the past in the applicant's country of nationality . . . on account of race, religion, nationality, membership in a particular social group, or political opinion."²⁶ Where past persecution has been established, the applicant "shall also be presumed to have a well-founded fear of persecution on the basis of the original claim."²⁷

Given that the statutory structure tethers the well-founded fear and state protection analyses, we believe that the new regulations should make clear that the presumption of well-founded fear should include the nonstate actor element, particularly because, if an applicant was persecuted by a nonstate actor in the past, the state clearly failed to protect that applicant. And, consistent with the existing regulatory burden-shifting scheme, the new regulations should similarly provide that DHS could rebut the presumption of well-founded fear by showing (1) that there has been a "fundamental change in circumstances"; (2) that there is a reasonable "internal relocation" option; or (3) that the state is able and willing to provide effective protection.²⁸ In that event, the applicant would have to demonstrate eligibility for humanitarian asylum to be granted relief.²⁹ Where there is an absence of past persecution, an applicant would need to independently demonstrate a well-founded fear of persecution, including showing that there is insufficient state protection to reduce the probability of future harm below the well-founded fear threshold (i.e., 10% chance of future persecution). Such an approach would provide a "symmetrical and coherent regulatory scheme" that would "fit . . . all [statutory and regulatory] parts into a harmonious whole."³⁰ This proposed burden assignment would also be consonant with the existing regulatory scheme and thus would not unduly burden DHS, given the factual similarity between showing changed country conditions and internal relocation on the one hand, and available state protection on the other.

²⁴ Andrew Clapham, *Human Rights Obligations of Non-State Actors* 335–41 (Grainne de Burca et al. eds 2006); see also Guy S. Goodwin-Gill & Jane McAdam, *The Refugee in International Law* 10 (Oxford Univ. Press 3rd ed. 2007).

²⁵ Guy S. Goodwin-Gill & Jane McAdam, *supra* note 24 at 23.

²⁶ 8 C.F.R. § 1208.13(b)(1).

²⁷ *Id.*

²⁸ See *id.*

²⁹ 8 C.F.R. § 1208.13(b)(1)(iii).

³⁰ See e.g., *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000).

IV. The Regulations Should Recognize there is No Requirement to Seek State Protection.

Next, we believe that the new regulations should provide that a refugee must not to be penalized for failing to seek state protection where that decision was grounded upon an experience of past persecution or a well-founded fear of future persecution. For examples, in *Bringas-Rodriguez v. Sessions*, the applicant—as a mere child—had been regularly beaten, raped, and sexually assaulted by two family members and a neighbor on account of their perception that he was gay.³¹ Additionally, his “abusers [] threatened” further harm “if he ever reported[] [f]earing that they would follow through on their threats, Bringas did not” seek the protection of the police.³² Despite his being just fourteen years old when he fled his country and his credible testimony that similarly situated individuals were persecuted by the police upon reporting, the BIA affirmed the IJ’s decision denying relief for failure to satisfy the nonstate actor requirement.³³ A divided three-judge panel affirmed, reasoning that Mr. Bringas’ failure to report left a “gap in proof about how the government would have responded” had he reported the abuse.³⁴ The en banc court reversed, correctly recognizing that there is no per se reporting requirement and that it was wrong to impose any “gap-filling proof requirement.”³⁵

In gauging the reasonableness of an applicant’s decision to not report where he or she fears future harm, the regulations should codify what many courts, and the BIA, have recognized: reporting cannot be required, particularly where it places the refugee at risk of harm or would be futile to do so.³⁶ Such clarity around reporting, along with the other recommendations made in this letter, would ensure that asylum-seekers like Mr. Bringas would not be errantly denied protection in the future. There is no doubt that Mexico failed him and that the harms he suffered should be treated as “persecution.” But the existing framework placed a near impossible burden for protection on him, and he only prevailed because the circuit court took the relatively rare step of agreeing to hear his case en banc.

V. The Regulations Should Explicitly Reject the Condone-or-Completely-Helpless Standard.

Finally, the new regulations should state explicitly both that the correct standard for assessing state protection is the familiar unwilling-or-unable standard, and that neither party is required to demonstrate whether the refugee-producing country “condoned” or was “completely helpless” to stop the persecution. Understanding the state protection analysis consistently with the Refugee Act and its well-founded fear component removes any possibility for the imposition of a condone-or-completely helpless standard. This point can be saliently demonstrated by looking at a recent

³¹ 850 F.3d at 1056-57.

³² *Id.*

³³ *Id.* at 1057.

³⁴ *Id.* at 1058.

³⁵ *Id.* at 1065-66, 1072.

³⁶ *See supra* note 11-12.

example. In *Jimenez-Galloso*,³⁷ where the applicant had experienced years of domestic violence, rape and credible death threats from her spouse, the IJ had concluded that that applicant “easily met her [withholding] burden” because she was facing a greater than fifty percent probability of being murdered by her husband in Mexico.³⁸ However, the IJ denied relief (and the BIA affirmed) in part because she said she would not seek state protection and because the government was not “completely helpless” to protect Ms. Jimenez Galloso.³⁹ Even though it was undisputed that she had surpassed her withholding of removal burden (and therefore easily had surpassed the well-founded fear threshold), the agency denied her relief under a nonstate actor standard entirely unmoored from the statute. Indeed, any interpretation of the nonstate actor element that renders superfluous the well-founded fear element (as elaborated by *Cardoza-Fonseca*)—or that requires reporting—must be rejected.⁴⁰ Ms. Jimenez Galloso’s case (and many more like hers) represent sad and sobering examples of how the “complete helplessness” standard—or any approach that views the nonstate actor standard in isolation from its statutory context—will lead to tragic results.

Moreover, despite the clear difference in the meanings of the words “condone” and “unwilling,” and of the words “completely helpless” and “unable,” and despite the real impact of the heightened standard,⁴¹ in the wake of *Matter of A-B* the courts of appeals have disagreed as to whether the two standards differ and whether the heightened standard is permissible.⁴² Simply stating in the regulations that the unwilling-or-unable standard applies may not be sufficient, as some courts have found the two standards to be “interchangeable.”⁴³ Thus, the new regulations should explicitly reject the condone-or-completely-helpless standard.

* * *

Instead of the misguided approach of the past to view the nonstate actor standard divorced of its context and its explicit statutory connection to well-founded fear (whether presumed⁴⁴ or actual⁴⁵), we write to urge you to ground the longstanding nonstate actor unable-or-unwilling standard in the relevant text of the Refugee Act. The statutory terms, which defines a refugee as one who is “unable

³⁷ Charles Shane Ellison & Anjum Gupta, *Un(avail)able Protection: The Shifting Legal Landscape in the Eighth Circuit and Beyond for Asylum Seekers Fleeing Nonstate Persecution*, 25 BENDER’S IMMIGR. BULL. 1061 (2020) (discussing *Jimenez-Galloso v. Barr*, 954 F.3d 1189 (8th Cir. 2020) and the agency decisions reviewed in that case).

³⁸ *Id.*

³⁹ *Id.* While the record demonstrated that the Mexican government was utterly ineffective in providing protection, because they were making some efforts to protect, the agency did not deem the country to be completely helpless.

⁴⁰ It should be beyond dispute that the well-founded fear and nonstate actor elements of the refugee definition must be understood consistently with one another. See *Yates v. United States*, 135 S. Ct. 1074, 1085 (2015). Yet, if complete state helplessness carries the ordinary meaning those words suggest, then theoretically even a refugee facing a 90% probability of harm (in a country where the state protects just 10% of victims) could be denied asylum under that heightened standard because the state is not completely helpless. Such a complete helplessness rule nullifies the 10% probability of harm analysis where the feared persecutor is a nonstate actor. As such, that construction must be rejected. *Id.*

⁴¹ *Ellison & Gupta*, *supra* note 2 at 509-10 (finding that petitioners in one circuit “succeeded at more than twice the rate when the lower unable-or-unwilling standard was cited” as compared with the condone-or-complete-helplessness test).

⁴² *Id.* at 494-503.

⁴³ See e.g., *Scarlett v. Barr*, 957 F.3d 316, 333 (2d Cir. 2020); *Gonzales-Veliz v. Barr*, 938 F.3d 219, 233 (5th Cir. 2019); *Galeas Figueroa v. Att’y Gen.*, 2021 WL 1991889, at *6 (3d Cir. May 19, 2021).

⁴⁴ 8 C.F.R. § 1208.13(b)(1) (well-founded fear is presumed when an applicant establishes past persecution).

⁴⁵ 8 C.F.R. § 1208.13(b)(2) (an applicant may independently establish a well-founded fear even in the absence of past persecution).

*or unwilling to avail . . . of [state] protection. . . because of persecution or a well-founded fear of persecution*⁴⁶ provide clarity that is currently lacking for measuring effective state protection. The new regulations should provide that, once an applicant establishes past persecution, the burden shifts to DHS to show that the state is willing and able to stop the persecution. The regulations should make clear that there is no penalty for refugees who reasonably elect not to seek state protection. Finally, the regulations should explicitly provide that applicants are not required to establish that their government “condones” or is “completely helpless” to stop their persecution.⁴⁷ Making the regulatory changes proposed above are consistent with the statute, the existing regulatory scheme with regard to burdens of proof, and international legal principles. Thank you for your attention to this matter of grave importance to countless refugees.

Should you have any questions, please contact Professor Shane Ellison at ellison@law.duke.edu or Professor Anjum Gupta at anjum.gupta@rutgers.edu.

Signed,⁴⁸



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⁴⁶ 8 U.S.C. 1101(a)(42) (emphasis added).

⁴⁷ Cf. *Matter of A-B-*, 27 I&N Dec. 316 (A.G. 2018); *Matter of A-B-*, 28 I&N Dec. 199 (A.G. 2021). Such an explicit regulatory statement here is critical given that several courts of appeal have found—incorrectly in our view—that there is an equivalency between the two standards. See *supra* note 41-43.

⁴⁸ Signatories are listed in their individual capacities. Institutional affiliations are listed for identification purposes only.

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