WHEN "MATERIAL" LOSES MEANING: *MATTER OF A-C-M-* AND THE MATERIAL SUPPORT BAR TO ASYLUM

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ABSTRACT

The United States asylum system offers the possibility of a safe haven to many individuals who have fled persecution in their home countries. Yet, often the complex system of immigration statutes and its multiple grounds for inadmissibility block the path of deserving asylum seekers. Under one of these grounds for exclusion, the "material support bar," victims of terrorism are barred from asylum because they have provided "material support" to the very groups whose persecution they have escaped.

In 2018, the Board of Immigration Appeals issued a precedential decision in *Matter of A-C-M-*, holding that a woman forced to cook and clean for Salvadoran guerrillas under threat of death was ineligible for asylum in the United States because her actions constituted material support to a terrorist organization. This decision represents the culmination of a series of cases since the statute's enactment that have broadened the definition of "material support." This Note argues that the current interpretation of the material support bar is both untenable from a statutory interpretation perspective and unjust in light of asylum law's purposes, and that the present system of discretionary waivers is inadequate to mitigate this problem.

In order to ensure that deserving victims of persecution remain eligible for asylum in the United States, this Note recommends that Congress and the courts take action. It proposes

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and evaluates several potential solutions: first, a legislative amendment to the relevant statute to add an explicit duress waiver and to clarify the meaning of "material support," and second, judicial review of the *Matter of A-C-M-* decision.

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INTRODUCTION

In 1990, a woman named Ana[1] was kidnapped by guerrillas in her home country of El Salvador.[2] After being forced to witness her husband dig his own grave before he was murdered, Ana was coerced into cooking and cleaning for the guerrillas under threat of death.[3] Subsequently, she sought immigration relief in the United States, but after years of litigation,[4] the Board of Immigration Appeals ("BIA") ruled in June 2018 that Ana was ineligible for asylum because the slave labor she was forced to perform constituted "material support" to a terrorist organization, the unnamed guerrillas.[5]

For many individuals who have fled persecution in their home country, the United States offers the opportunity for a safe haven. Yet far too often, deserving asylum seekers become entangled in a byzantine web of immigration law and its multiple grounds for inadmissibility.[6] Under one of these grounds for exclusion, the "material support bar,"[7] victims of terrorism like Ana are barred from asylum because they have provided "material support" to the very groups whose persecution they have escaped.[8]

This Note will examine the problems associated with the statutory interpretation of the "material support" bar to asylum, specifically in light of the BIA's recent precedential decision in *Matter of A-C-M-*, which for the first time held that even *de minimis* support

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1. Jenna Krajeski, *A Victim of Terrorism Faces Deportation for Helping Terrorists*, NEW YORKER (June 12, 2019), https://www.newyorker.com/news/news-desk/a-victim-of-terrorism-faces-deportation-for-helping-terrorists [https://perma.cc/GMA5-UXWZ]. This piece provides an excellent overview of Ana's story and some additional background on material support laws.

2. Matter of A-C-M-, 27 I. & N. Dec. 303, 304 (B.I.A. 2018); *see* Krajeski, *supra* note 1. In immigration court materials, Ana is referred to by "A-C-M-," her initials.

3. *Matter of A-C-M-*, 27 I. & N. Dec. at 305.

4. Ana first entered the United States in 1992 and was granted Temporary Protected Status, but in 2004 the Department of Homeland Security initiated removal proceedings against her. *Id.* at 304. These proceedings continued for years. *See id.* (noting decisions in 2011, 2014, and 2016).

5. *Id.* at 309–10.

6. *See* 8 U.S.C. § 1182(a) (2012); *Matter of A-C-M-*, 27 I. & N. Dec. at 304 (referring to this statutory provision as the "material support bar").

7. *See* 8 U.S.C. § 1182(a)(3)(B)(iv)(VI) (2012).

8. Melanie Nezer, *The Material Support Problem: Where U.S. Anti-Terrorism Laws, Refugee Protection, and Foreign Policy Collide*, 13 BROWN J. WORLD AFF. 177, 178 (2006).

to a terrorist organization can constitute "material support."[9] Part I provides a history of the material support bar and its status under current U.S. law. Part II asserts that the BIA's overly broad definition of "material support" renders "material" meaningless and unreasonably excludes victims like Ana who would otherwise be eligible for asylum on humanitarian grounds.[10] Finally, in Part III, this Note rejects the current system of discretionary waivers to the material support bar as insufficient to mitigate these concerns, and proposes either a legislative or judicial solution to clarify the meaning of "material support." It argues that the material support bar's overly broad reach prevents otherwise qualified applicants from receiving asylum in the United States, and consequently that our government must limit the material support bar's interpretation in order to provide clarity and justice.

I. OVERVIEW OF U.S. ASYLUM LAW AND THE MATERIAL SUPPORT BAR

Under the Immigration and Nationality Act ("INA"), a non-citizen can become eligible for asylum in the United States by proving that she has suffered past persecution or has a well-founded fear of future persecution on account of one of five enumerated grounds: race, religion, nationality, membership in a particular social group, or political opinion.[11] The INA, enacted in 1952, was a comprehensive statute that gave rise to the modern U.S. immigration system.[12] It represented part of a broader global effort to codify refugee law in the years immediately following World War II, driven by the international community's failure to assist Jewish refugees fleeing Nazi persecution during the 1930s.[13] Prior to World War II,

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9. *Matter of A-C-M-*, 27 I. & N. Dec. at 308.

10. *Id.* at 311 ("[B]ut for the 'material support' bar, the respondent would have been eligible for asylum on humanitarian grounds.").

11. 8 U.S.C. § 1101(a)(42) (2012) (defining "refugee"). An "asylee" is a person who meets the definition of "refugee" but who is already physically present in the United States or at a port of entry to the United States. *See* 8 U.S.C. § 1158(a)(1) (2012). This Note will use "asylum seeker" or "applicant" to refer generally to a person applying for asylum.

12. *Immigration and Nationality Act*, U.S. CITIZENSHIP & IMMIGRATION SERVS., https://www.uscis.gov/legal-resources/immigration-and-nationality-act [https://perma.cc/KFH7-GASF].

13. Susan F. Martin, *The Global Refugee Crisis*, 17 GEO. J. INT'L AFF. 5, 6 (2016). For a discussion of refugees in the interwar period in Europe, *see generally*

international law had a limited role with respect to the humanitarian problems posed by refugee migration.[14] The international community's lukewarm response to the persecution of Jews in Nazi Germany beginning in the 1930s was its "greatest failure to act efficiently" during the early part of the twentieth century.[15] After World War II, "the bad conscience towards the victims of genocide and persecution eventually found expression among statesmen."[16] The modern concept of the "refugee" took shape with an emphasis on "avoid[ing] a repetition of the worst atrocities of World War II."[17] For instance, the International Refugee Organization, established in 1946, focused on victims of Nazi and fascist regimes in its definition of refugee.[18] It specifically enumerated as a refugee category "persons who, having resided in Germany or Austria, and being of Jewish origin . . . were victims of [N]azi persecution."[19] In 1949, the United Nations recognized the right of persons to seek asylum from persecution in other countries through Article 14 of the Universal Declaration of Human Rights.[20] In 1951, the U.N. approved the Convention Relating to the Status of Refugees, the fundamental

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MICHAEL MARRUS, THE UNWANTED: EUROPEAN REFUGEES FROM THE FIRST WORLD WAR THROUGH THE COLD WAR (2002) (discussing impact of 20th-century refugee movements on international politics); CLAUDENA SKRAN, REFUGEES IN INTER-WAR EUROPE: THE EMERGENCE OF A REGIME (1995) (examining refugee movement in the mid-20th century and international responses).

14. Terje Einarsen, *Drafting History of the 1951 Convention and the 1967 Protocol*, *in* THE 1951 CONVENTION RELATING TO THE STATUS OF REFUGEES AND ITS 1967 PROTOCOL: A COMMENTARY 37, 43 (Andreas Zimmermann et al. eds., 2011).

15. *Id.* at 44; *see, e.g.*, Dara Lind, *How America's Rejection of Jews Fleeing Nazi Germany Haunts Our Refugee Policy Today*, VOX (Jan. 27, 2017), https://www.vox.com/policy-and-politics/2017/1/27/14412082/refugees-history-holocaust [https://perma.cc/KFL5-T82W] (discussing anti-Jewish refugee sentiment in the United States in the 1930s and the international community's subsequent shift toward providing refugee assistance).

16. Einarsen, *supra* note 14, at 45.

17. Daniel J. Steinbock, *Interpreting the Refugee Definition*, 45 UCLA L. Rev. 733, 735–36 (1998).

18. Einarsen, *supra* note 14, at 46.

19. Constitution of the International Refugee Organization, Annex I, pt. I(A)(3), *opened for signature* Dec. 15, 1946, 18 U.N.T.S. 3 (entered into force Aug. 20, 1948).

20. G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 14 (Dec. 10, 1948).

international foundation of modern refugee law.[21] Although the United States assisted in the drafting of the 1951 Convention, it did not bind itself to the Convention's international obligations to refugees until almost twenty years later, when it ratified the 1967 United Nations Protocol Relating to the Status of Refugees.[22]

Today, the INA enumerates not only the requirements for asylum eligibility in the United States, but also certain grounds for inadmissibility, or statutory bars to receiving asylum. Applicants may be barred, for example, if they have been resettled in another country or if they pose a danger to the security of the United States.[23] They may also be barred if they have participated in persecution, committed a serious nonpolitical crime, or engaged in terrorist activity.[24] The "material support" bar is a specific provision of the terrorist activity bar.[25] Although intended to exclude those who materially aid terrorist groups, in practice this provision has also excluded victims of those terrorist groups and victims of government persecution.[26] This Part will lay out the text of the material support bar in Section I.A, provide its history in Section I.B, discuss the system of discretionary waivers to the bar in Section I.C, and finally, in Section I.D, describe some of the difficulties with the bar's interpretation that arose prior to *Matter of A-C-M-*.

A. The Material Support Bar Under the INA

Under the INA, an individual can be denied admission upon a finding that he or she has provided material support to terrorism. "Material support" to a terrorist activity or organization is defined as

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21. Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150; *see* U.N. High Commissioner for Refugees, *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol*, 2 (2011); Jane McAdam, *The Enduring Relevance of the 1951 Refugee Convention*, 29 INT'L J. REFUGEE L. 1, 2 (2017) ("[The 1951 Convention] was one of a number of foundational human rights instruments negotiated at the time . . . when the atrocities of the war still loomed large, and the refrain 'never again' was front of mind.").

22. Kathryn M. Bockley, *A Historical Overview of Refugee Legislation: The Deception of Foreign Policy in the Land of Promise*, 21 N.C. J. INT'L L. & COM. REG. 253, 278–79 (1995); Deborah Anker, *U.S. Immigration and Asylum Policy: A Brief Historical Perspective*, 13 IN DEFENSE OF THE ALIEN 74, 77–78 (1990).

23. 8 U.S.C. § 1158(b)(2)(A)(iv), (vi) (2012).

24. *Id.* § 1158(b)(2)(A)(i), (ii), (v); *see* 8 U.S.C. § 1182(a)(3)(B)(i)(I) (2012) ("Any alien who has engaged in a terrorist activity . . . is inadmissible.").

25. 8 U.S.C. § 1182(a)(3(B)(iv)(VI) (2012).

26. This is detailed further *infra* in Section II.B.

"an act that the actor knows, or reasonably should know, affords material support, including a safe house, transportation, communications, funds, transfer of funds or other material financial benefit, false documentation or identification, weapons (including chemical, biological, or radiological weapons), explosives, or training."[27] The INA defines terrorist organizations as falling into one of three categories: Tier I (an organization designated as terrorist by the Secretary of the Department of Homeland Security), Tier II (an organization designated as terrorist by the Secretary of State), or Tier III (an organization consisting of a group of at least two individuals that engages in terrorist activity).[28]

Subsection (dd) of the material support bar provides its sole explicit statutory exception: if the applicant can demonstrate by "clear and convincing evidence" that she "did not know, and should not reasonably have known," that the organization to which she provided support was a terrorist organization, her actions do not constitute material support.[29] Notably, this exception is only available in cases involving Tier III "undesignated" terrorist organizations.[30]

B. History of the Material Support Bar

The material support bar is one of several modern terrorism-related inadmissibility grounds,[31] which Congress added to the INA in 1990.[32] Following the September 11, 2001 terrorist attacks,

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27. 8 U.S.C. § 1182(a)(3(B)(iv)(VI) (2012).

28. *See id.* § 1182(a)(3)(B)(vi)(I)–(III).

29. *Id.* § 1182(a)(3)(B)(iv)(VI)(dd); Matter of S-K-, 23 I. & N. Dec. 936, 943–44 (B.I.A. 2006).

30. 8 U.S.C. § 1182(a)(3)(B)(iv)(VI)(dd).

31. Commonly referred to as "TRIG." *See Terrorism-Related Inadmissibility Grounds (TRIG)*, U.S. CITIZENSHIP & IMMIGRATION SERVS., https://www.uscis.gov/legal-resources/terrorism-related-inadmissability-grounds/terrorism-related-inadmissibility-grounds-trig [https://perma.cc/A6Z3-A4V4]. U.S. Citizenship and Immigration Services itself acknowledges that the "definition of terrorism-related activity is relatively broad and may apply to individuals and activities not commonly thought to be associated with terrorism." *Id.*

32. Immigration Act of 1990, Pub. L. 101–649, Title VI, § 601, 104 Stat. 4978; *see also* MICHAEL JOHN GARCIA & RUTH ELLEN WASEM, CONG. RESEARCH SERV., RL32564, IMMIGRATION: TERRORIST GROUNDS FOR EXCLUSION AND REMOVAL OF ALIENS 3 (2010) (noting that before 1990, there were no express terrorism-related grounds for exclusion, and Congress added the terrorism-related exclusion grounds "as part of a broader effort to streamline and modernize the security and foreign policy grounds for inadmissibility and removal").

Congress broadened the definition of terrorist activity by passing the USA PATRIOT Act.[33] Only a few years later, the REAL ID Act of 2005 widened the definition even further, and expanded the grounds for inadmissibility based on support of terror-related activity.[34]

The BIA's position is that it is "unaware of any legislative history which indicates a limitation on the definition of the term 'material support.'"[35] Although the legislative history surrounding the 1990 enactment of the material support bar does not include an explicit discussion of the meaning of "material support," a report from the Judiciary Committee submitted along with a draft of the bill does provide some limited explanation.[36] In the report, the Committee stated that the material support provision was intended to cover "activities terrorists often find necessary for the accomplishment of their mission," such as "providing any type of material support, such as transportation, communications, funds, weapons, and explosives."[37] It also emphasized the knowledge requirement, noting that exclusion necessitated a "finding that the actor knew, or reasonably should have known, that such activities afforded support to the terrorist act."[38]

Significantly, the Committee also stated the following: "In this regard the Committee notes that an alien who acts as a conduit by running messages or providing food or documents could be found excludable under the bill. On the other hand, the Committee does not intend to penalize an alien for mere membership in any organization."[39] Although mere membership in a terrorist organization was not a bar to asylum for many years—even after the

33. DREE K. COLLOPY, AILA'S ASYLUM PRIMER 231–32 (7th ed. 2015); *see* USA PATRIOT Act, Pub. L. 107–56, 115 Stat. 272 (2001).

34. COLLOPY, *supra* note 33, at 232; *see* REAL ID Act, Pub L. 109–13, 119 Stat. 302 (2005).

35. Matter of S-K-, 23 I. & N. Dec. 936, 943 (B.I.A. 2006).

36. *See* Report of the Committee on the Judiciary to Accompany H.R. 4427, H.R. Rep. No. 100-882, at 29–30, 100th Cong., 2d Sess. (1988).

37. *Id.* ("These activities must be associated with the acts noted above pertaining to the definition of 'terrorist activity.'").

38. *Id.* at 30.

39. *Id.*

passage of the PATRIOT Act[40]—it is now a bar under the current version of the statute.[41]

C. Waiver of the Material Support Bar

As previously stated, there is only one narrow statutory exception to the material support bar, in cases where the applicant can prove that she did not and should not have reasonably known of the organization's terrorist nature.[42] However, under a separate provision of the INA, the Secretary of State or the Secretary of Homeland Security, in her "sole unreviewable discretion," may waive the application of the terrorism-related bars in certain circumstances after consulting with the other Secretary and the Attorney General.[43] For instance, a Secretary may decide to issue a group-based exemption and waive the bar for a group of individuals.[44] For an applicant not covered by a group-specific exemption, only two such discretionary exemptions are available for the material support bar: (1) in cases of duress,[45] and (2) in cases of "insignificant" or "certain

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40. *See* Regina Germain, *Rushing to Judgment: The Unintended Consequences of the USA Patriot Act for Bona Fide Refugees*, 16 GEO. IMMIGR. L.J. 505, 508–09 (2002).

41. *See* 8 U.S.C. § 1182(a)(3)(b)(i)(V)–(VI) (2012) ("Any alien who . . . is a member of a terrorist organization . . . is inadmissible.").

42. 8 U.S.C. § 1182(a)(3)(B)(iv)(VI)(dd).

43. 8 U.S.C. § 1182(d)(3)(B)(i).

44. The first such group-based waiver was issued in 2006 by Secretary of State Condoleezza Rice, after months of argument between the Departments of State, Homeland Security, and Justice. Bradley Graham, *Immigration Waiver Granted to Refugees, Some Burmese Lose Pro-Terrorism Label*, WASH. POST (May 5, 2006), https://www.washingtonpost.com/archive/politics/2006/05/05/immigration-waiver-granted-to-refugees-span-classbankheadsome-burmese-lose-pro-terrorism-labelspan/ (on file with the *Columbia Human Rights Law Review*). Although the waiver rendered up to 9,300 Burmese refugees eligible for resettlement, it only applied to supporters of the Karen National Union who resided in one particular refugee camp. This meant that thousands of similarly-situated individuals in other refugee camps continued to be barred based on material support to U.S.-backed pro-democracy groups. *Id.* For a list of current group-specific exemptions, *see Terrorism-Related Inadmissibility Grounds (TRIG)—Group-Based Exemptions*, U.S. CITIZENSHIP & IMMIGRATION SERVS., https://www.uscis.gov/unassigned/terrorism-related-inadmissibility-grounds-trig-group-based-exemptions [https://perma.cc/GS5D-4QHE].

45. *See Terrorism-Related Inadmissibility Grounds (TRIG)—Situational Exemptions*, U.S. CITIZENSHIP & IMMIGRATION SERVS., https://www.uscis.gov/unassigned/terrorism-related-inadmissibility-grounds-trig-situational-exemptions [https://perma.cc/3C3M-Q3PH].

limited" support.[46] The only way for an applicant to avoid being subject to the broad sweep of the material support bar is through the exercise of these discretionary waivers by the Secretary of State or the Secretary of Homeland Security. Although the Department of Homeland Security ("DHS") has published criteria to be used to assess whether to grant a discretionary duress-based waiver,[47] there is no formal or published procedure for *seeking* one of these exemptions.[48]

1. Duress Waiver

The first discretionary exemption to the material support bar is a duress-based waiver. The only way for an applicant to receive a duress-based exemption is to obtain one of these discretionary waivers, because both Article III courts and immigration courts have rejected the view that the material support bar statute contains a *general* duress exception. Federal courts of appeals have held that *only* the Secretary of State or Secretary of Homeland Security can grant a duress waiver, and that the statute does not imply any general duress exception.[49] The Board of Immigration Appeals addressed this issue in its 2016 decision in *Matter of M-H-Z-*, where it likewise found no implied duress exception in the material support bar.[50] Specifically, it held that the material support bar does not contain an implied statutory exception for an alien whose material support to a terrorist organization was provided under duress.[51] BIA

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46. *See id.*

47. *See infra* Subsection I.C.1.

48. COLLOPY, *supra* note 33, at 242; *see* Sesay v. Att'y Gen., 787 F.3d 215, 223 n.7 (3d Cir. 2015) ("As the Government acknowledged at argument, almost ten years after Congress granted the Executive Branch the power to grant waivers, there remains no published process for requesting one . . . ."); Ay v. Holder, 743 F.3d 317, 321 (2d Cir. 2014) ("At oral argument in the case at bar . . . the Government was unable to identify any published process for seeking such a waiver."); Matter of S-K-, 23 I. & N. Dec. 936, 942 (B.I.A. 2006) ("[T]he Immigration Judges and the Board have no role in the adjudication of such a waiver.").

49. *See Sesay*, 787 F.3d at 222–24 (only Sec'y of DHS has authority to grant duress exception); Annachamy v. Holder, 733 F.3d 254, 267 (9th Cir. 2013); Alturo v. U.S. Att'y Gen., 716 F.3d 1310 (11th Cir. 2013); Barahona v. Holder, 691 F.3d 349, 353–56 (4th Cir. 2012) (stating that the material support bar does not contain an involuntariness or duress exception).

50. Matter of M-H-Z-, 26 I. & N. Dec. 757 (B.I.A. 2016).

51. *Id.* at 764.

decisions are binding on immigration judges unless overturned by a federal court,[52] and at least one circuit court has already deferred to the BIA's interpretation in *Matter of M-H-Z-*.[53]

Although no general duress exemption exists, *discretionary* waivers have been available since 2007, when the Secretary of the Department of Homeland Security first exercised his authority to permit waiver of the material support bar in cases where the support was provided under duress.[54] The discretionary authority to grant these waivers is conferred under a provision of the INA separate from the material support bar.[55]

In determining whether to grant a duress-based waiver, DHS considers the following factors: (1) whether the applicant could have avoided or took steps to avoid providing material support; (2) the severity and type of harm inflicted or threatened; (3) to whom the harm was directed; and (4) in cases of threatened harm, the perceived imminence and likelihood of that harm.[56] Waiver of the material support bar is only granted under a "totality of the circumstances" analysis, which in addition to the four factors already mentioned, also includes the amount, type, and frequency of material support, the nature of the activities committed by the terrorist organization, the applicant's awareness of those activities, the length of time since the material support occurred, and the applicant's conduct since that time.[57]

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52. *Board of Immigration Appeals*, U.S. DEP'T OF JUSTICE, https://www.justice.gov/eoir/board-of-immigration-appeals [https://perma.cc/T9ZU-W6P3]; *see infra* notes 72–76 for a more detailed description of the relationship between the executive and judicial branches in adjudicating asylum cases.

53. Hernandez v. Sessions, 884 F.3d 107, 109 (2d Cir. 2018). The Second Circuit held that the sole alternative to the possibility of an implied duress waiver—obtaining a discretionary DHS waiver—does not violate due process. *Id.*

54. Exercise of Authority under Section 212(d)(3)(B)(i) of the Immigration and Nationality Act, 72 Fed. Reg. 26,138, 26,138–39 (Apr. 27, 2007) (determination by Sec'y of DHS Michael Chertoff) [hereinafter "Duress Waiver"].

55. 8 U.S.C. § 1182(d)(3)(B)(i) (2012).

56. Duress Waiver, *supra* note 54, at 26,138. Although the State Department can grant discretionary waivers as well, it is not clear whether they use DHS criteria or different criteria; however, the statute does require the Secretary of State to consult with the Secretary of DHS before granting a waiver, and vice versa, so there is presumably some amount of coordination. 8 U.S.C. § 1182(d)(3)(B).

57. Duress Waiver, *supra* note 54, at 26,138.

2. Insignificant or Limited Material Support Waiver

More recently, DHS has also exercised its authority to permit waivers of the material support bar in cases where the applicant's support was "insignificant"[58] or "limited."[59]

The discretionary waiver for "insignificant" material support was established because the Secretary of Homeland Security and the Secretary of State found that the terrorism-related grounds for inadmissibility "bar certain aliens who do not pose a national security or public safety risk from admission to the United States and from obtaining immigration benefits or other status."[60] This suggests that the government was aware that the material support bar sweeps broadly and that the "insignificant" waiver is designed to mitigate some of those effects. In a policy memorandum, U.S. Citizenship and Immigration Services ("USCIS") later elaborated that material support is "insignificant" if "(1) it is minimal in amount; and (2) the applicant reasonably believed that it would be inconsequential in effect."[61]

As a result of this waiver, however, under current law, it is now possible for a person to render support that is both "insignificant" and "material," which seems obviously contradictory. This contradiction illustrates a significant problem with the current interpretation of "material support"—it has been interpreted so broadly as to render the "material" component meaningless.

By contrast, the waiver for "limited" material support is based on the type of support rather than the degree. In its Exercise of Authority establishing this waiver, DHS defined "limited" material support as that which involves: (1) routine commercial transactions;

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58. Exercise of Authority Under Section 212(d)(3)(B)(i) of the Immigration and Nationality Act, 79 Fed. Reg. 6913, 6913–14 (Feb. 5, 2014) [hereinafter "Insignificant Waiver"].

59. Exercise of Authority Under Section 212(d)(3)(B)(i) of the Immigration and Nationality Act, 79 Fed. Reg. 6914, 6914–15 (Feb. 5, 2014) [hereinafter "Limited Waiver"].

60. Insignificant Waiver, *supra* note 58, at 6913.

61. U.S. CITIZENSHIP & IMMIGRATION SERVS., PM-602-0113, IMPLEMENTATION OF THE DISCRETIONARY EXEMPTION AUTHORITY UNDER SECTION 212(D)(3)(B)(I) OF THE IMMIGRATION AND NATIONALITY ACT FOR THE PROVISION OF INSIGNIFICANT MATERIAL SUPPORT 4 (May 8, 2015) [hereinafter "Insignificant Policy Memorandum"].

(2) routine social transactions; (3) humanitarian assistance; or (4) sub-duress pressure.[62]

The establishment of these discretionary waivers was announced via Exercises of Authority in the Federal Register, in which no examples were provided of what might constitute the type of support eligible for waiver.[63]

Moreover, these "insignificant" or "limited" exemptions may only be granted in cases involving support to a Tier III "undesignated" terrorist organization or to an individual that the applicant knows or reasonably should know intends to engage in terrorist activity.[64] Thus, no such waiver whatsoever would be available to an asylum seeker who had provided any type of "material" support to an *officially* designated (Tier I or Tier II) terrorist organization, regardless of how minimal it was: giving a pencil or a glass of water to a member of al-Qaeda or Boko Haram would foreclose the possibility of waiver.[65]

As discussed further in Part III, these existing waivers are not a sufficient remedy or solution to the expansive reach of the material support bar. There is no formal procedure through which an applicant can seek these exemptions—it is entirely up to the government to consider cases and grant waivers.[66] In fiscal year 2014,

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62. Limited Waiver, *supra* note 59, at 6914.

63. COLLOPY, *supra* note 33, at 248, 249; *see* Insignificant Waiver, *supra* note 58, at 6913–14; Limited Waiver, *supra* note 59, at 6914–15. USCIS did not issue policy memoranda providing guidance on these terms until over a year later. *See* Insignificant Policy Memorandum, *supra* note 61; U.S. CITIZENSHIP & IMMIGRATION SERVS., PM-602-0112, IMPLEMENTATION OF THE DISCRETIONARY EXEMPTION AUTHORITY UNDER SECTION 212(D)(3)(B)(I) OF THE IMMIGRATION AND NATIONALITY ACT FOR THE PROVISION OF CERTAIN LIMITED MATERIAL SUPPORT (May 8, 2015).

64. Insignificant Waiver, *supra* note 58, at 6913; Limited Waiver, *supra* note 59, at 6914.

65. *See Foreign Terrorist Organizations,* U.S. DEP'T OF STATE, https://www.state.gov/j/ct/rls/other/des/123085.htm [https://perma.cc/UHH2-ZWW6] (listing foreign terrorist organizations designated by the Secretary of State under INA § 219).

66. *See* Ay v. Holder, 743 F.3d 317, 321 (2d Cir. 2014) ("[T]he Government was unable to identify any published process for seeking such a waiver. It has subsequently called the Court's attention to certain publicly-available information about intra-agency waiver procedures and statistics suggesting that the process is in fact utilized, but nothing, still, suggestive of an application process.").

out of over 40,000 filed applications,[67] DHS granted only *nineteen* waivers for asylum applicants in the United States.[68] Additionally, decisions in waiver cases are unreviewable.[69] Finally, beyond the general waiver authority granted by the INA, the specifics of the currently available waivers (duress and limited or insignificant support) are not codified either in legislation or through judicial precedent.[70] As a result, they may be modified or revoked at any time under the discretion of the executive branch.[71]

D. Legal Interpretation of the Material Support Bar

Even before delving into the case law, navigating the statutory provisions of the material support bar is a convoluted process which involves a maze of different categories of terrorist organizations and discretionary waivers. However, perhaps the most fundamental problem that has arisen out of the statute's application since its enactment—leading to the exclusion of victims of

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67. U.S. DEP'T OF JUSTICE, FY 2014 STATISTICS YEARBOOK, at J1, https://www.justice.gov/eoir/pages/attachments/2015/03/16/fy14syb.pdf [https://perma.cc/VP7J-PGX4].

68. Hernandez v. Sessions, 884 F.3d 107, 117 (2d Cir. 2018) (Droney, J., concurring) (citing U.S. CITIZENSHIP & IMMIGRATION SERVS., REPORT ON THE SECRETARY'S APPLICATION OF THE DISCRETIONARY AUTHORITY CONTAINED IN SEC. 212(D)(3)(B)(I) OF THE INA 2 (2015)). Fiscal year 2014 was the only year that waiver data was publicly available. *Id*.

69. 8 U.S.C. § 1182(d)(3)(B)(i) (2012) (noting "sole unreviewable discretion" of Secretaries to grant these waivers).

70. *See id*. (Secretary "may determine in such Secretary's sole unreviewable discretion that [certain terrorism bars] shall not apply with respect to an alien [or group] within the scope of that subsection"). The specifics of the duress-based waiver and insignificant and limited support waivers were established only through agency interpretations of this provision, published in the Federal Register. *See supra* notes 58 and 59.

71. In a March 2017 executive order, President Trump directed the Secretaries of State and Homeland Security, in consultation with the Attorney General, to consider abolishing these waivers completely. Mica Rosenberg & Yeganeh Torbati, *Trump Administration May Change Rules that Allow Terror Victims to Immigrate to U.S.*, REUTERS (Apr. 21, 2017), https://www.reuters.com/article/us-usa-immigration-terrorism-exceptions/trump-administration-may-change-rules-that-allow-terror-victims-to-immigrate-to-u-s-idUSKBN17N13C [https://perma.cc/F7RJ-V934]; *see also* Exec. Order No. 13780, 82 Fed. Reg. 13,209 (Mar. 6, 2017) ("The Secretary of State and the Secretary of Homeland Security shall, in consultation with the Attorney General, consider rescinding the exercises of authority permitted by section 212(d)(3)(B) of the INA, 8 U.S.C. 1182(d)(3)(B), relating to the terrorism grounds of inadmissibility").

terrorism—is the overbroad interpretation of "material support" by both immigration and Article III courts.

Asylum cases begin in administrative courts within the executive branch, but may later be reviewed by Article III courts.[72] Cases are first adjudicated in immigration courts, which are part of the Executive Office for Immigration Review ("EOIR") within the Department of Justice.[73] Decisions by an Immigration Judge ("IJ") can be appealed to the Board of Immigration Appeals, which is also contained within EOIR.[74] BIA decisions are binding unless overruled by the Attorney General or a federal court of appeals.[75] Asylum applicants may seek review of BIA decisions in a U.S. Court of Appeals.[76] For at least fifteen years, federal courts of appeals have upheld findings of asylum inadmissibility based on the material support bar, even as they have struggled to define its meaning. Two examples illustrate this conflict. In 2004, the Third Circuit upheld a denial of asylum based on material support consisting of providing food and shelter.[77] Singh, the asylum applicant, had helped set up tents and provided food to members of Sikh militant groups in India.[78] The BIA found that these actions constituted material support to terrorist organizations,[79] and concluded that Congress intended to include providing food and setting up tents within the

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72. For an overview of the asylum adjudication and review process, *see* Jaya Ramji-Nogales et al., *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295, 305–310 (2008).

73. *Id*. at 308; *see About the Office*, U.S. DEP'T OF JUSTICE., https://www.justice.gov/eoir/about-office [https://perma.cc/LJ97-HLCS] (describing the role of the Executive Office for Immigration Review).

74. *Board of Immigration Appeals*, U.S. DEP'T OF JUSTICE, https://www.justice.gov/eoir/board-of-immigration-appeals [https://perma.cc/HMT6-LS5L].

75. *Id.*; *see* Ramji-Nogales et al., *supra* note 72, at 310.

76. Ramji-Nogales et al., *supra* note 72, at 310.

77. Singh-Kaur v. Ashcroft, 385 F.3d 293, 301 (3d Cir. 2004).

78. *Id.* at 294–96.

79. *Id.* The BIA erroneously stated that these organizations had been designated a terrorist organization by the Department of State. *Id.* at 297. Nevertheless, the Third Circuit found it did not need to consider the question of whether the organizations in question were terrorist organizations because it could still find that Singh provided material support "to any individual who the actor knows, or reasonably should know, has committed or plans to commit a terrorist activity." *Id.* at 298 (quoting INA § 212(a)(3)(B)(iv)(VI)(aa) and (bb); 8 U.S.C. § 1182(a)(3)(B)(iv)(VI)(aa) and (bb)). This holding was criticized by the dissent on the grounds that it was overly narrow and that the record did not contain any evidence as to terrorist acts that the unnamed members of these groups had committed or planned to commit. *Id.* at 302 (Fisher, J., dissenting).

definition of "material support" in INA § 212(a)(3)(B)(iv)(VI).[80] On appeal, the Third Circuit upheld Singh's inadmissibility, finding that the BIA's interpretation of the material support bar was not "arbitrary, capricious or manifestly contrary to the statute."[81] The dissent contended that Singh's acts were "not of the degree and kind contemplated by the 'material support' provision," and that the majority holding "ignore[d] the plain language of the statute by reading 'material' out of 'material support.'"[82]

Similarly, in *Barahona v. Holder*, decided in 2012, the Fourth Circuit denied applicant José Barahona's petition for review, finding that the BIA did not err in determining that Barahona's support of Salvadoran guerrillas fell within the material support bar—even though it was involuntary and provided under duress.[83] The guerrillas had seized control of Barahona's home and used his kitchen to prepare food.[84] Barahona argued that the material support bar did not apply because he had acted under duress; he testified that if he had refused, he would have been killed, and stated that the guerillas had executed both his father and his cousin.[85] Moreover, these actions had occurred more than twenty-five years prior to Barahona's 2011 cancellation of removal hearing, in the midst of a civil war in El Salvador.[86] However, the Fourth Circuit deferred to the BIA's determination, holding that the material support bar "encompass[es] both voluntary and involuntary support and . . . fail[s] to provide for the exception under which Barahona seeks relief."[87] The dissent objected on the grounds that Barahona's "passive acquiescence to the crimes of terrorists"—namely, his failure to prevent the guerrillas from occupying his home—"d[id] not constitute an 'act' that 'affords material support' . . . under the plain language of 8 U.S.C. § 1182(a)(3)(B)(iv)(VI)."[88] It criticized the majority's holding, arguing that such reasoning would still bar Barahona from relief even if he had fled his home or attempted to stop the guerrillas.[89]

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80. *Id.* at 299.
81. *Id.* (quoting Ahmed v. Ashcroft, 341 F.3d 214, 216–217 (3d Cir. 2003)).
82. *Id.* at 301 (Fisher, J., dissenting).
83. Barahona v. Holder, 691 F.3d 349, 352–53, 356 (4th Cir. 2012).
84. *Id.* at 351.
85. *Id.* at 351–53.
86. *Id.* at 351–52.
87. *Id.* at 355–56.
88. *Id.* at 356 (Wynn, J., dissenting).
89. *Id.* at 358.

Although these cases illustrate the problem of the material support bar's breadth, reviewing courts had never explicitly addressed the issue of whether *de minimis* support could count as material support[90]—until the BIA's 2018 decision in *Matter of A-C-M-*.

II. THE DECISION IN *MATTER OF A-C-M-* AND ITS IMPACT ON THE MATERIAL SUPPORT BAR

In June of 2018, the BIA decided Ana's case in *Matter of A-C-M-*, holding that an alien provides "material support" to a terrorist organization as long as the support would reasonably tend to "promote, sustain, or maintain" the organization, even if only to a *de minimis* degree, and regardless of whether the support was intended to aid the organization.[91]

This holding broadened the material support bar's already-wide reach, and will cause not only practical difficulties for asylum seekers going forward, but also difficulties for courts seeking to apply this interpretation of "material," because *Matter of A-C-M-* has rendered the term effectively meaningless.

Matter of A-C-M-'s interpretation of "material support" poses significant concerns. This Part will explore the case's holding in depth, as well as the accompanying dissent. It will then go on to discuss the main concerns with the BIA's interpretation, and demonstrate how *Matter of A-C-M-* is just one example of many problematic applications of the material support bar. Finally, this Part will close with an examination of the potential impact of this decision on future asylum applicants.

A. The BIA's Decision in *Matter of A-C-M-*

Prior to its decision in *Matter of A-C-M-*, the BIA had "explicitly declined to decide whether a trivial or 'de minimis' amount

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90. Barahona argued that his support was *de minimis* and thus could not amount to material support, but the Fourth Circuit declined to address the issue, stating: "Inasmuch as this contention challenges a finding of fact, we lack jurisdiction to reach or address it." *Id.* at 353 n.7; *see also* Ayvaz v. Holder, 564 F. App'x 625, 627 (2d Cir. 2014) (declining to address the issue, and noting that "[t]he BIA has never held that *de minimis* aid is support that is 'material' under the terrorist activity bar.").

91. Matter of A-C-M-, 27 I. & N. Dec. 303, 308 (B.I.A. 2018).

of support qualifies as 'material' support."[92] It had even held, in an unpublished, non-precedential opinion, that assistance must be *more than de minimis* in order to give "material" some independent effect.[93] In that case, the BIA observed that even if the items provided by the asylum applicant—"one packed lunch and the equivalent of about $4 U.S. dollars, which the terrorists expressly stated would be used to buy beer"—constituted support, "it [could not] be said to be material."[94]

However, in 2014, the Second Circuit concluded in *Ayvaz v. Holder* that the term "material" was ambiguous and remanded the case, stating that it would be appropriate for the BIA to issue a precedential decision interpreting the term and providing "further clarification."[95] The decision in *Matter of A-C-M-* constitutes the BIA's explicit response to that request.[96]

1. Factual and Procedural Background

Ana, a citizen of El Salvador, fled to the United States in 1991 after being kidnapped by "guerrillas" in her home country.[97] The BIA's opinion does not identify the guerrillas by any specific group name or designation;[98] a *New Yorker* piece detailing Ana's story describes them as "leftist guerrillas" fighting a civil war against the United States-backed Salvadoran government.[99] The BIA only noted

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92. IRA J. KURZBAN, KURZBAN'S IMMIGRATION LAW SOURCEBOOK 180 (16th ed. 2018); Matter of S-K-, 23 I. & N. Dec. 936, 945 (B.I.A. 2006).

93. In Re: * * *, 2009 WL 9133770, at *2 (B.I.A. July 10, 2009).

94. *Id.*

95. Ayvaz v. Holder, 564 F. App'x 625, 628 (2d Cir. 2014) (reviewing, *inter alia*, the BIA's denial of a Turkey citizen's application for withholding of removal, the Court stated, "Because the term 'material' is ambiguous and the BIA did not address whether the single meal Ayvaz provided qualified as material support, remand is appropriate for further clarification in a precedential decision.").

96. Matter of A-C-M-, 27 I. & N. Dec. 303, 306 n.2 (B.I.A. 2018) ("Our decision in this case responds to the court's request [in Ayvaz v. Holder].").

97. *Id.* at 304; *see* Krajeski, *supra* note 1.

98. *See generally Matter of A-C-M-*, 27 I. & N. Dec. 303 (referring to group only as "guerrillas" throughout).

99. Krajeski, *supra* note 1. Another commentator, a former immigration judge, notes in his analysis of *Matter of A-C-M-* that the guerrillas were presumably members of "FMLN," the Farabundo Martí National Liberation Front. Jeffrey S. Chase, *Punishing the Victims:* Matter of A-C-M-, OPINIONS/ANALYSIS ON IMMIGRATION LAW (June 9, 2018), https://www.jeffreyschase.com/blog/2018/6/9/punishing-the-victims-matter-of-a-c-m- [https://perma.cc/

that in a previous decision in Ana's case, it had determined that the guerrillas did constitute a terrorist organization at the time of her forced labor in 1990.[100] This previous decision was not published,[101] but because of the lack of specific nomenclature used to refer to the guerrillas, it is likely that the BIA found them to be a Tier III "undesignated" terrorist organization.[102]

ZAX8-QKA3]. The FMLN was a coalition of five Salvadoran revolutionary organizations whose opposition to the government resulted in over a decade of civil war. *See* ALBERTO MARTÍN ÁLVAREZ, BERGHOF CONFLICT RESEARCH, FROM REVOLUTIONARY WAR TO DEMOCRATIC REVOLUTION: THE FARABUNDO MARTÍ NATIONAL LIBERATION FRONT (FMLN) IN EL SALVADOR 7 (2010).

100. Matter of A-C-M-, 27 I. & N. Dec. 303, 304 (B.I.A. 2018) ("In a decision dated January 14, 2014, we concluded that the respondent is ineligible for cancellation [of removal], finding that she is inadmissible under section 212(a)(3)(B)(i)(VIII) of the Act because she received military-type weapons training from the guerrillas, who we determined were a terrorist organization in 1990."). Although Ana's asylum proceedings had been ongoing since her arrival in the United States in 1992, the term "material support" was not even introduced in her case until 2011, when DHS flagged the fact that the guerrillas had made a single attempt to train her with a gun. Krajeski, *supra* note 1; *see infra* note 107 (describing how Ana was coerced into the training and how she feigned sickness to avoid it). Before the PATRIOT Act, such details could help an asylum seeker emphasize trauma suffered at the hands of their abusers, but in 2011, DHS argued that this constituted blameworthy support. Krajeski, *supra* note 1.

101. The New York Legal Assistance Group recently filed a Freedom of Information Act ("FOIA") suit against the Department of Justice, alleging that the Board of Immigration Appeals' failure to make unpublished decisions available to attorneys who represent immigrant clients gives the government an unfair advantage in immigration cases. Tiffany Hu, *FOIA Suit Seeks Posting of Unpublished BIA Decisions*, LAW360 (Oct. 17, 2018), https://www.law360.com/articles/1093122/foia-suit-seeks-posting-of-unpublished-bia-decisions [https://perma.cc/B25T-BSTX] (according to the complaint, "although the BIA issues over 30,000 unpublished decisions each year, only six are currently available in its electronic reading room"). In some cases, the Immigration Judge himself may not even be aware of relevant decisions. *See* Uddin v. Att'y Gen., 870 F.3d 282, 291 (3d Cir. 2017). In that case, the IJ "stated that he was 'aware of no BIA or circuit court decision to date which has considered whether the [Bangladesh National Party] constitutes a terrorist organization'" despite the fact that several such decisions did exist at the time. *Id.* Further, "[w]hen asked at oral argument whether the IJ could access unpublished Board decisions regarding BNP's terrorist status, the Government's Attorney responded that he did not know." *Id.* The Third Circuit called this "a troubling state of affairs" and suggested that that this lack of information contributed to the BIA's inconsistent findings on whether or not the group in question was a terrorist organization. *Id.*

102. *See* U.S. CITIZENSHIP & IMMIGRATION SERVS., PM-602-0082, POLICY MEMORANDUM (May 22, 2013) (noting FMLN qualifies as a Tier III terrorist organization under the INA "on the basis of [its] violent activities").

Following her kidnapping, Ana was subjected to what even the BIA acknowledged was "horrific harm" at the hands of the guerrillas.[103] Her husband, Ruby, a sergeant in the Salvadoran army, was also taken captive.[104] The guerrillas forced Ana to watch Ruby dig his own grave, offering her a gun and telling her, "If you shoot him, you can go home to your children."[105] When she refused, they shot him dead in front of her.[106] Subsequently, the guerrillas coerced Ana, under threat of death, into weapons training,[107] and forced her to perform labor in the form of cooking, cleaning, and washing clothes.[108] She testified in detail that she did not agree with the guerrillas' views and ultimately escaped from their camp, after which they searched for her, broadcasting her name on the radio and threatening anyone who might help her.[109] If Ana is sent back to El Salvador, she fears she will be killed.[110]

In a decision dated August 8, 2016, the Immigration Judge found Ana ineligible for asylum because of the material support bar.[111] Notably, the Immigration Judge stated that, but for the material support bar, she would have granted Ana's asylum application on humanitarian grounds, pursuant to *Matter of Chen*.[112]

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103. Matter of A-C-M-, 27 I. & N. Dec. 303, 305 (B.I.A. 2018).

104. Krajeski, *supra* note 1; *see Matter of A-C-M-*, 27 I. & N. Dec. at 305.

105. Krajeski, *supra* note 1; *see Matter of A-C-M-*, 27 I. & N. Dec. at 305.

106. Krajeski, *supra* note 1; *see Matter of A-C-M-*, 27 I. & N. Dec. at 305.

107. The Immigration Judge found that this weapons training consisted of shooting at targets, bottles, and trees. Noah Lanard, *She Was Enslaved by Salvadoran Guerrillas. That Makes Her Ineligible for Asylum.*, MOTHER JONES (June 8, 2018), https://www.motherjones.com/politics/2018/06/she-was-enslaved-by-salvadoran-guerrillas-us-judges-say-that-makes-her-ineligible-for-asylum/ [https://perma.cc/XW9A-SAGQ]. Ana said she found the training repugnant, that she refused training involving large rifles, and that she feigned sickness so she could go back to cooking and cleaning. *Id.*; *see* Krajeski, *supra* note 1.

108. *Matter of A-C-M-*, 27 I. & N. Dec. at 304–05.

109. Lanard, *supra* note 107; Krajeski, *supra* note 1.

110. Tal Kopan, *Woman's Forced Labor for Salvadoran Guerrillas Means She Must Leave U.S., Court Rules*, CNN (June 7, 2018), https://www.cnn.com/2018/06/06/politics/woman-el-salvador-guerillas-ruling/index.html [https://perma.cc/N52D-PCYD].

111. Matter of A-C-M-, 27 I. & N. Dec. 303, 304 (B.I.A. 2018).

112. *Id.* at 304–05 (citing Matter of Chen, 20 I. & N. Dec. 16 (B.I.A. 1989)); *see Matter of Chen*, 20 I. & N. Dec. at 19 ("[T]here may be cases where the favorable exercise of discretion is warranted for humanitarian reasons."). After the BIA's decision in *Matter of A-C-M-*, the Immigration Judge in Ana's original case took the "rare step" of admonishing the BIA in a statement issued in response. Krajeski, *supra* note 1. "Undoubtedly, being targeted and then

Ana appealed the Immigration Judge's decision to the BIA.[113]

2. Arguments on Appeal

Ana raised two main arguments on appeal. Her primary argument was that the assistance she provided to the guerrillas was not material and that an insignificant degree of support does not constitute "material" support.[114] The BIA's consideration of this argument forms the basis of the decision and its holding. She additionally argued that if the material support bar did apply to her, she was entitled to a duress exception.[115] The BIA rejected this argument, reaffirming its holding in *Matter of M-H-Z-* that there is no implied statutory exception for material support provided under duress.[116]

3. Holding

In a decision dated June 6, 2018, the BIA found that Ana was subject to the "material support" bar in § 212(a)(3)(B)(iv)(VI) and thus ineligible for asylum.[117] It held that Ana had provided material support to the guerrillas in El Salvador because her forced labor—cooking, cleaning, and washing their clothes—had aided them in "continuing their mission of armed and violent opposition to the Salvadoran Government in 1990."[118]

Notably, in reaching this decision, the BIA held that an "alien provides 'material support' to a terrorist organization if the act has a logical and reasonably foreseeable tendency to promote, sustain, or maintain the organization, even if only to a de minimis degree"[119]—and that there is no "quantitative" lower limit to material support.[120]

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kidnapped on account of her relationship with her husband, forced into slave labor, persistently threatened by the guerrillas, and in constant fear of her life constitutes torture," she wrote. *Id.*

113. *Matter of A-C-M-*, 27 I. & N. Dec. at 303.

114. *Id.* at 306.

115. *Id.* at 306.

116. *Id.* at 306 (citing Matter of M-H-Z-, 26 I. & N. Dec. 757 (B.I.A. 2016)); *see supra* Subsection I.C.1.

117. Matter of A-C-M-, 27 I. & N. Dec. 303, 311 (B.I.A. 2018).

118. *Id.* at 309–10.

119. *Id.* at 308.

120. *Id.* at 306.

The BIA reasoned that "material" must be ascribed some meaning,[121] but that the meaning does not necessitate a quantitative requirement.[122] The BIA claimed that its interpretation did not render "material" superfluous, because without "material," the bar could be construed to apply to someone who merely expressed general "support" for a terrorist organization.[123] The BIA acknowledged that such an application would raise freedom of expression concerns.[124]

According to the BIA, "material support" is a "term of art that relates to the type of aid provided, that is, aid of a material and normally tangible nature, and it is not quantitative."[125] The BIA adopted the Third Circuit's view, laid out in *Singh-Kaur*, that material support is "anything that has a 'logical connection' to the aims of the terrorist organization," even if it is not done for the specific purpose of aiding in a terrorist act.[126] The BIA further reaffirmed that "material support" is not limited to the enumerated examples in the statute.[127]

The BIA additionally touched upon the possibility of discretionary waivers to the material support bar, asserting that the waivers "effectively addressed the over-inclusive nature of the bar."[128] However, as demonstrated below in Part III, the waivers in their current form fail to mitigate the material support bar's breadth in practice. The BIA further asserted that the existence of a waiver covering "insignificant" support served as evidence that even "insignificant" support can fall within the material support bar. If "insignificant" support is not "material support," the decision

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121. *Id.* at 307 ("We agree with the Third Circuit that the word 'material' in the phrase 'material support' must be 'ascribed some meaning.'") (quoting Sesay v. Att'y Gen., 787 F.3d 215 (3d Cir. 2015)).

122. *Id.* at 307.

123. *Id.* at 307.

124. *Id.* at 307 (citing Holder v. Humanitarian Law Project, 561 U.S. 1, 38–39 (2010) (upholding a conviction under the criminal analogue to the material support bar in the face of a First Amendment challenge)).

125. *Id.* at 307 (quoting Boim v. Quranic Literacy Inst. and Holy Land Found. for Relief and Dev., 291 F.3d 1000, 1015 (7th Cir. 2002) ("material" relates to the "type of aid provided rather than whether it is substantial or considerable")).

126. *Id.* at 308 (citing Singh-Kaur v. Ashcroft, 385 F.3d 293, 298–301 (3d Cir. 2004)).

127. *Id.* at 310.

128. *Id.* at 308.

reasoned, then there would be no need for the DHS waivers.[129] At the same time, however, the BIA also conceded that DHS's view of material support is not binding on the Board or the federal courts.[130]

4. Dissent

Board of Immigration Appeals member Linda Wendtland dissented, arguing that Ana was not subject to the material support bar.[131] The dissent asserted that "material" must have an independent meaning, otherwise, Congress would simply have prohibited "support" to terrorist organizations.[132] It further invoked the canon of *ejusdem generis*,[133] asserting that the listed examples in the statute "imply that certain kinds and levels of support are required in order to constitute 'material' support."[134] It reasoned that if Congress had intended to include such incidental services in the meaning of "material support," there would have been no need to list the specific examples given: "a safe house, transportation, communications, funds, transfer of funds or other material financial benefit, false documentation or identification, weapons (including chemical, biological, or radiological weapons), explosives, or training."[135] In the dissent's view,

> [T]he enumerated examples all involve items that either can directly be used to plan or carry out terrorist activities or, in the case of funds, have the liquidity and fungibility to be readily diverted to such use. Cooking and cleaning services for individuals who happen to belong to a terrorist organization cannot validly be placed in the same category as items that can be used to plan and carry out the organization's goals.[136]

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129. *Id.* at 309.
130. *Id.*
131. *Id.* at 312–13 (Wendtland, Board Member, dissenting).
132. *Id.* at 313.
133. *Ejusdem generis*, Latin for "of the same kind," is a canon of statutory construction, which dictates that when general terms are accompanied by a list of specific examples, "the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words." Circuit City Stores Inc. v. Adams, 532 U.S. 105, 114–15 (2001).
134. *Matter of A-C-M-*, 27 I. & N. Dec. at 313 (Wendtland, Board Member, dissenting).
135. *Id.* at 313 (quoting INA § 212(a)(3)(B)(iv)(VI)).
136. *Id.* at 313–14.

It concluded that because Ana's tasks as a slave for the guerrillas were "menial and incidental" and not of the same class as the enumerated forms of assistance laid out in the statute, her conduct did not fall within the material support bar.[137] Finally, it noted that in light of *Matter of M-H-Z-*, which held that there was no general or implied duress exception in the material support bar, it is now especially important to give meaning to the statutory limit of "material."[138] It called for Immigration Judges, the Board of Immigration Appeals, and courts to strike a balance when analyzing the material support bar, because:

> Individuals arriving in this country from some of the most dangerous and chaotic places on earth may not have been able to avoid all contact with terrorist groups and their members, but we should not interpret the statute to exclude on this basis those who did not provide "material" support to them, since many deserving asylum-seekers could be barred otherwise.[139]

As the dissent makes clear, the problems with the *Matter of A-C-M-* majority's interpretation of "material support" are not limited only to this individual case. Rather, it has significant implications for future cases involving material support.

B. The Problem of Overbreadth of the Material Support Bar After *Matter of A-C-M-*

Under the BIA's current interpretation of "material support" following *Matter of A-C-M-*, there is no meaningful limit to the type of activity that could qualify as material support. The BIA's interpretation not only violates established canons of statutory interpretation, but poses significant problems in its application to real-life asylum cases. This Section will first discuss how canons of statutory construction dictate a narrower interpretation of "material," and next will examine problems with the material support bar's application, both prior to and following *Matter of A-C-M-*.

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137. *Id.* at 313–15.

138. *Id.* at 315.

139. *Id.* (quoting Jabateh v. Lynch, 845 F.3d 332, 348 (7th Cir. 2017) (Hamilton, J., concurring in part and concurring in the judgment) (alterations omitted)).

1. Problems with the BIA's Statutory Interpretation of "Material Support"

The BIA's adoption of the view that material support is "anything that has a 'logical connection' to the aims of the terrorist organization" removes any principled limit on what can constitute material support. If providing cooking and cleaning under duress has a logical connection to the terrorist organization—which is the precedent set by *Matter of A-C-M-*—then a court could find that practically any activity has a logical connection.[140] Indeed, this interpretation runs contrary to established canons of statutory interpretation.

First, the BIA's interpretation of "material" ignores the dictionary meaning of the term. While *Black's Law Dictionary* does define "material" as "[h]aving some logical connection with the consequential facts," it further defines it as "[o]f such a nature that knowledge of the item would affect a person's decision-making; significant; essential."[141] To ignore this crucial second definition—the "significant" and "essential" component of "material"—is to render "material" and "logical" the same. "Material" and "logical" do not mean the same thing—otherwise, Congress would have used the term "logical support," or merely "support," as the dissent in *Matter of A-C-M-* argues.[142] Further, "significant" or "essential" support is a much more obvious reading of the phrase than "logical" support. The first legal definition of "material"—having a logical connection—is used most commonly in the context of evidentiary fact-finding, or "material facts." However, in this context, "material" is not used to describe the type of *fact* at issue, but rather describes the *nature* of the support provided. Additionally, it is nearly impossible for

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140. It is not clear that cooking and cleaning even have a logical connection to the goals of a terrorist organization to begin with. Anwen Hughes, deputy legal director for Human Rights First, criticized the BIA's majority opinion in *Matter of A-C-M-* for defining material support to include activity that does not bear a logical connection to violence, adding: "The consequence of someone not doing the dishes is what—you have a messy terrorist base?" Trevor Aaronson, *She Was Kidnapped by Guerrillas and Forced to Work. That Qualifies as Material Support for Terrorism, According to Immigration Ruling*, INTERCEPT (June 9, 2018), https://theintercept.com/2018/06/09/immigration-terrorism-prosecutions-material-support-united-states/ [https://perma.cc/QE7S-GYAR].

141. *Material*, BLACK'S LAW DICTIONARY (10th ed. 2014).

142. *Matter of A-C-M-*, 27 I. & N. Dec. at 313 (Wendtland, Board Member, dissenting).

"support" *not* to be logical—i.e., having some connection between the action and result. Thus, because "significant support" is a clearer and more obvious meaning than "logical support," courts should give weight to that aspect of "material" when interpreting "material support."

Second, in addition to the dictionary meaning, canons of statutory construction dictate that the scope of "material" must be limited. As discussed above,[143] the dissent in *Matter of A-C-M-* emphasized that under the principle of *ejusdem generis*, "of the same kind," household tasks performed as a slave are not sufficiently within the type of activities enumerated by the statute so as to constitute "material support."[144] The other enumerated activities are those which directly further terrorist activity, such as providing weapons, explosives, and false documentation. Although the statute specifies a "safe house" as an example of material support, "safe house" is a particular term that is closely linked to terrorism and its goals,[145] whereas general household activities lack that connection. Indeed, the Oxford English Dictionary defines "safe house" specifically with reference to terrorism, as "[a] secret place of refuge or rendezvous for a person in hiding or requiring protection, esp. one engaged in espionage, terrorism, etc."[146] A safe house "materially supports" a terrorist by providing a secret place of protection; general household tasks such as laundry contribute neither to secrecy nor protection. Including household tasks within the statute's meaning of "material support" renders any guidance provided by the enumerated examples useless.

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143. *See supra* notes 134 & 133 & 134 and accompanying text.

144. *Matter of A-C-M-*, 27 I. & N. Dec. at 315 (Wendtland, Board Member, dissenting).

145. As explained in a report by the Combating Terrorism Center, a "safe-house" is a location relied upon by "[o]rganized crime syndicates, terrorist networks and traffickers" that "houses individuals involved in nefarious activities." JOSEPH FELTER & JARRET BRACHMAN, COMBATING TERRORISM CENTER, CTC REPORT: AN ASSESSMENT OF 516 COMBATANT STATUS REVIEW TRIBUNAL (CSRT) UNCLASSIFIED SUMMARIES 26 (2007). Safe houses are used by these groups to facilitate discreet transit "by providing them with a place to spend the night, acquire resources, obtain false documentation or secure modes of transportation," and are often run for that specific purpose. *Id.* at 26–27. The report further notes that al-Qaeda and the Taliban have leveraged their safe house network to significant ends. *Id.* at 26.

146. *Safe house*, OXFORD ENGLISH DICTIONARY, http://www.oed.com/view/Entry/280355 (on file with the *Columbia Human Rights Law Review*).

As the dissent in *Matter of A-C-M-* put it: "The majority's apparent interpretation of 'material,' as referencing anything and everything that 'another person would have needed to do' if the respondent had not done it, is without effective limits and would lead to absurd results."[147] Indeed, as noted by another commentator, the canon against absurdity—the "venerable principle that a law will not be interpreted to produce absurd results"[148]—precludes equating slave labor with material support for terrorism.[149]

Finally, to hold that material support includes minimal or unrelated support is inconsistent with the plain language of the statute and violates the rule against surplusage. It is a well-established rule of statutory construction that courts must give effect, if possible, to every clause and every word of a statute.[150] As the dissent in *Singh-Kaur* argued, deeming acts that are minimal or unrelated to terrorism to be material support "reads 'material' out of 'material support' and treats half of the statutory term as surplusage. Such a result is inconsistent with the plain language of the statute and with the normal tools of statutory construction."[151] In that case, after "[e]xamining the statute's plain language and employing the 'normal tools of statutory construction,'" the dissent concluded that Congress did not intend "material support" to "embrace acts that are not of importance or relevance to terrorism."[152] If "material support" is interpreted as including acts that are unimportant or irrelevant to terrorism, then the word "material" is not given effect.

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147. *See Matter of A-C-M-*, 27 I. & N. Dec. at 314 (Wendtland, Board Member, dissenting).

148. K Mart Corp. v. Cartier, Inc., 486 U.S. 281, 324 n.2 (1988) (Scalia, J., concurring in part and dissenting in part); *see id.* ("The same common sense accepts the ruling . . . that the statute . . . which enacts that a prisoner who breaks prison shall be guilty of felony, does not extend to a prisoner who breaks out when the prison is on fire—'for he is not to be hanged because he would not stay to be burnt.'") (quoting United States v. Kirby, 7 Wall. 482, 487 (1869)).

149. Ilya Somin, *Justice Department Rejects Salvadoran Woman's Application for Asylum Because She Provided "Material Support" to Terrorists—By Working as a Slave Laborer for Them*, REASON (June 8, 2018), https://reason.com/volokh/2018/06/08/justice-department-rejects-salvadoran-wo [https://perma.cc/WT7Z-HRBH].

150. *See, e.g.*, Williams v. Taylor, 529 U.S. 362, 404 (2000) ("It is, however, a cardinal principle of statutory construction that we must give effect, if possible, to every clause and word of a statute.") (internal quotation marks omitted).

151. Singh-Kaur v. Ashcroft, 385 F.3d 293, 303 (3d Cir. 2004) (Fisher, J., dissenting).

152. *Id.*

Canons of statutory construction are of course not conclusive; however, the Supreme Court has emphasized the relevance of the *ejusdem generis* maxim when it is in "full accord with other sound considerations bearing upon the proper interpretation of the clause."[153] Similarly, here, the limitation of "material" is counseled not only by *ejusdem generis* but also by its dictionary meaning and the rule against surplusage.

2. Problems with the Application of the Material Support Bar

The material support bar's breadth of exclusion had been criticized for years, even prior to the BIA's decision in *Matter of A-C-M-*.[154] Although this problem existed before *Matter of A-C-M-*, the BIA's newly announced interpretation of "material" exacerbates it even further, and creates new and concerning ramifications for the asylum system by stretching the meaning of "material" to extreme limits.

i. Denying Relief to Qualified Asylum Seekers

First, the all-encompassing interpretation of the term "material support" means that many otherwise deserving asylum seekers have had or will have their applications denied. In the past, the material support bar has operated to deny protection to victims of horrific civil wars,[155] in which nearly any group can be classified as a

153. Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 106 (2001).

154. *See, e.g.*, Mary Armistead, Note, *Harmonizing Immigration Policy with National Foreign Policy: The Contradictions of the Material Support Bar*, 7 ALB. GOV'T L. REV. 611, 620–21 (2014) ("As these examples make clear, the definition of material support has indeed been expanded to an extent that appears to go beyond 'material support' and instead has become a standard that essentially means 'any support.'"); Editorial, *Shutting Out Terrorism's Victims*, N.Y. TIMES (Mar. 9, 2007), https://www.nytimes.com/2007/03/09/opinion/09fri1.html (on file with the *Columbia Human Rights Law Review*).

155. *See, e.g.*, Sesay v. U.S. Att'y Gen., 787 F.3d 215, 218 n.2 (3d Cir. 2015) (applicant fled Sierra Leone civil war involving "ghastly array of atrocities against civilians" including the "amputation of ears, noses, hands, arms, and legs of noncombatants; the use of rape as a terror tactic; the abduction and forced conscription of children into service as soldiers and sexual slaves; [and] the massacre of fleeing civilians").

Tier III undesignated organization.[156] Refugees have been found ineligible based on voluntary support, even when that support was an insignificant or unavoidable part of daily life in areas where armed groups are present and regularly kill civilians who refuse to comply with their demands.[157] One woman merely provided a glass of water to an armed guerrilla at his request; a bakery owner sold bread to guerrillas disguised in civilian clothes.[158] Both were deemed ineligible for resettlement based on material support to terrorism.[159]

In cases involving duress, the U.S. government has applied the material support bar to a citizen of Sierra Leone who was forcibly conscripted, beaten, and made to carry supplies for a rebel group during civil war,[160] as well as a fisherman who made a ransom payment to secure his escape after being kidnapped by the Tamil Tigers in Sri Lanka.[161] As discussed above, the government has also barred from receiving asylum a Salvadoran farmer who allowed guerrillas to use his kitchen under fear of death, after the execution of his father and cousin,[162] and, of course, denied relief to Ana in *Matter of A-C-M-*.

The material support bar has additionally denied protection to victims of oppressive governments, such as the asylum applicant in *Matter of S-K-*, a woman from Burma.[163] S-K- donated money to the Chin National Front ("CNF"), an organization that opposed the Burmese government's military dictatorship and human rights abuses.[164] The military had killed her fiancé,[165] and while the CNF did

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156. *See infra* note 186 for sources discussing the broad sweep of Tier III classification.

157. Jennie Pasquarella, *Victims of Terror Stopped at the Gate to Safety: The Impact of the "Material Support to Terrorism" Bar on Refugees*, 13 HUM. RTS. BRIEF 28, 30 (2006) (discussing how rebel groups controlled or contested 75% of Colombia and many civilians needed to comply with those groups' demands to survive).

158. *Id.*

159. *Id.*

160. *Sesay*, 787 F.3d at 218.

161. Rosenberg & Torbati, *supra* note 71. Raj, the asylum seeker in this case, did eventually receive a discretionary waiver, although it took six years for the government to grant. *Id.*

162. Barahona v. Holder, 691 F.3d 349, 351–52 (4th Cir. 2012); *see supra* notes 83–89 and accompanying text.

163. Matter of S-K-, 23 I. & N. Dec. 936 (B.I.A. 2006).

164. *Id.* at 937; *see* Armistead, *supra* note 154, at 623 ("For those participating in legitimate political movements, the denial of refugee status in the United States may force them to return to a country where the authoritarian,

engage in violence, it only did so as a means of self-defense against the government's systematic persecution of ethnic minorities.[166] Nevertheless, the BIA found S-K- was statutorily barred from asylum.[167] Although the concurring opinion acknowledged that the statute's language required the denial of S-K-'s asylum application, it questioned the result:

> We are finding that a Christian member of the ethnic Chin minority in Burma, who clearly has a well-founded fear of being persecuted by one of the more repressive governments in the world, one that the United States Government views as illegitimate, is ineligible to avail herself of asylum in the United States despite posing no threat to the security of this country . . . it is difficult to conclude that this is what Congress intended.[168]

It further called the statutory language of the material support bar "breathtaking in its scope" and found that S-K- arguably acted in a manner consistent with U.S. foreign policy.[169]

Other notable cases have involved denials of immigration relief to individuals who either aided groups endorsed by the United States government or aided the United States government itself. In 2017, USCIS denied asylum to a Syrian dissident, Radwan Ziadeh, on the grounds that he had provided material support to Syrian groups considered Tier III undesignated terrorist organizations.[170] This "material support" consisted of organizing a conference among Syrian opposition groups—groups that the American government

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even terroristic, government they have opposed may now seek retaliation against them . . . .").

165. *Matter of S-K-*, 23 I. & N. Dec. at 937.

166. *Id.* at 948–49 (Juan P. Osuna, Acting Vice Chairman, concurring).

167. *Id.* at 946.

168. *Id.* at 947 (Juan P. Osuna, Acting Vice Chairman, concurring); *see id.* ("In enacting the material support bar, Congress was rightly concerned with preventing terrorists and their supporters from exploiting this country's asylum laws. It is unclear, however, how barring this respondent from asylum furthers those goals.")

169. *Id.* at 948–50.

170. Somini Sengupta, *Loose Definition of Terrorism Upends a Syrian Asylum Seeker's Life*, N.Y. TIMES (June 23, 2017), https://www.nytimes.com/2017/06/23/world/middleeast/immigration-asylum-syria-terrorism.html (on file with the *Columbia Human Rights Law Review*).

supported.[171] Ziadeh could be killed if he returns to Syria.[172] Previously, in 2008, the government denied a green card to Saman Kareem Ahmad, who had risked his life for nearly four years translating for U.S. forces in Iraq.[173] The denial was based on the grounds that Ahmad had once been a member of the Kurdish Democratic Party, at the time deemed a Tier III undesignated terrorist organization—which had sought to overthrow Saddam Hussein.[174] A *Washington Post* article about Ahmad's denial notes that although waiver provisions do exist, "there is no path for a denied individual to apply for a waiver,"[175] a dilemma which courts have recognized as well.[176]

These various types of unjust denials based on material support grounds will almost certainly continue into the future. Indeed, just a few months after the BIA decided *Matter of A-C-M-*, the Sixth Circuit in *Hosseini v. Nielsen* cited the BIA's holding in support of a determination that a man whose non-violent activities of copying and distributing flyers constituted material support to a terrorist

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171. *Id.* ("Robert S. Ford, a former American ambassador to Syria, said in an email that the American government did not consider either of the groups that Mr. Ziadeh invited to the workshops to be a terrorist organization.").

172. *Id.* ("Going back to Syria is not an option. The government there has a warrant out for his arrest; the Islamic State has him on a list of Syrians it wants dead.")

173. Karen DeYoung, *Stalwart Service for U.S. in Iraq Is Not Enough to Gain Green Card*, WASH. POST (March 23, 2008), http://www.washingtonpost.com/wp-dyn/content/article/2008/03/22/AR2008032202228.html (on file with the *Columbia Human Rights Law Review*).

174. *Id.* Ahmad was eventually granted an exemption, likely in no small part due to the media coverage that followed his initial denial—but asylum applicants should not have to rely on publicity in order to win their cases. *See* Theodoric Meyer, *U.S. Is Arming Syrian Rebels, But Refugees Who've Aided Them Are Considered Terrorists*, PROPUBLICA (Sept. 30, 2013), https://www.propublica.org/article/us-is-arming-syrian-rebels-refugees-whove-aided-them-considered-terrorists [https://perma.cc/4R6A-59MX]; *see also* Anna Husarska, *Freedom Fighters Need Not Apply*, WASH. POST (Dec. 15, 2008), http://www.washingtonpost.com/wp-dyn/content/article/2008/12/14/AR2008121401810.html [https://perma.cc/82MV-P9JN] (calling Ahmad's case an "extreme but hardly isolated instance" and describing how Senator Patrick Leahy asked DHS Secretary Michael Chertoff about Ahmad's case: "Is each of these cases going to require a major story in *The Washington Post* or . . . a congressional hearing before they get resolved?").

175. DeYoung, *supra* note 173.

176. *See supra* note 48; *see generally supra* Section I.C (describing system of discretionary waivers).

organization: the Mujahadin-e Khalq ("MeK").[177] MeK, which opposes the current leadership of the Islamic Republic of Iran, has been praised by prominent members of the U.S. government for its goal of seeking democracy in Iran, and it was removed from the State Department's foreign terrorist organization list in 2012.[178] Yet, the *Hosseini* court reasoned that the copying and distribution of flyers "introduced Iranians to MeK [the Mujahadin-e Khalq] and FeK [the Fadain-e Khalq] and allowed those organizations to redirect some of their communications resources elsewhere." The court found that this support was significant because the "non-violent flyers," which informed Iranians about the ruling regime's human rights abuses, "gave legitimacy" to the organizations.[179]

If such indiscriminate application of the material support bar is allowed to continue, it will only further contribute to the exclusion of deserving victims who are opposing oppressive regimes or fleeing horrific violence—especially now, after *Matter of A-C-M-*, where any support can be considered "material." For instance, Yazidi women who were forced to become sex slaves for ISIS could be excluded under the material support bar.[180] Under the majority's reasoning in *Matter of A-C-M-*, the Yazidi women would be denied asylum because their forced labor had a "'reasonably foreseeable tendency to promote, sustain, or maintain the [ISIS] organization' by improving the morale of ISIS fighters who were allowed to sexually abuse them."[181] Indeed, Alison Parker, managing director of Human Rights Watch, has stated she is "aware of cases in which rape victims were denied asylum because they were forced to work for their sexual assailants."[182]

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177. Hosseini v. Nielsen, 911 F.3d 366, 377 (6th Cir. 2018).

178. Scott Shane, *Iranian Dissidents Convince U.S. to Drop Terror Label*, N.Y. TIMES (Sept. 21, 2012), https://www.nytimes.com/2012/09/22/world/middleeast/iranian-opposition-group-mek-wins-removal-from-us-terrorist-list.html (on file with the *Columbia Human Rights Law Review*).

179. *Hosseini*, 911 F.3d at 377.

180. Teresa Pham Messer, *Barred from Justice: The Duress Waiver to the Material Support Bar*, 6 HLRE: OFF REC. 63, 64 (2015) (asserting material support bar would exclude Yazidi women); Aaronson, *supra* note 140; *see* Rep. of the Independent Int'l Comm'n on the Syrian Arab Republic, "They Came to Destroy": ISIS Crimes Against the Yazidis, U.N. Doc. A/HRC/32/CRP.2, at 1–2 (June 15, 2016) (finding that ISIS has committed genocide against the Yazidis and forced Yazidi women into sexual slavery).

181. Somin, *supra* note 149 (quoting *Matter of A-C-M-*, 27 I. & N).

182. Whitney Kimball, *Woman Who Was Enslaved by Guerrillas Denied Asylum Because She 'Supported' Terrorism*, JEZEBEL (June 10, 2018),

ii. Broader Ramifications of the Material Support Bar's Expansion

Beyond creating alarming implications for individual asylum seekers, *Matter of A-C-M-*'s broad interpretation of "material" threatens some of the fundamental goals of asylum. Courts and commentators have argued that the broad construction of the material support bar and its inadequate waiver system violate international law and the United States' obligation to refugees.[183] This is especially problematic in light of the history of modern refugee law, which, as described in Part I, was conceptualized largely as an international response to Nazi persecution. Now, under current U.S. law and its interpretation of "material support," Jewish refugees who had been forced to work while in Nazi concentration camps during World War II would be barred from asylum today if the Nazis were deemed to be a terrorist organization.[184] Under the overly broad,

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https://theslot.jezebel.com/woman-who-was-enslaved-by-guerrillas-denied-asylum-beca-1826710841 [https://perma.cc/98FX-AV3T].

183. *See, e.g.*, Hernandez v. Sessions, 884 F.3d 107, 113–17 (2d Cir. 2018) (Droney, J., concurring) (describing "serious concerns" that the current waiver system does not comply with U.S. obligations under international law); Camila A. Sosa, *The Forgotten Victims of Terrorism: Asylum Seekers Barred by the Board of Immigration Appeals' Failure to Define De Minimis Support*, 32 N.Y. INT'L L. REV. 21, 37–42 (2019) (arguing post-*Matter of A-C-M-* that the BIA must define *de minimis* support to comply with international law); Marissa Hill, Comment, *No Due Process, No Asylum, and No Accountability: The Dissonance Between Refugee Due Process and International Obligations in the United States*, 31 AM. U. INT'L L. REV. 445, 460–69 (2016) (arguing that the current application of the material support bar violates Article 14 of the International Covenant for Civil and Political Rights, which requires states to provide due process to asylum seekers); Jordan Fischer, *The United States and the Material-Support Bar for Refugees: A Tenuous Balance Between National Security and Basic Human Rights*, 5 DREXEL L. REV. 237, 258–59 (2012) (arguing that the U.S. needs to reassess the material support bar to meet its obligations under international law); GEORGETOWN UNIV. LAW CTR. HUMAN RIGHTS INST., UNINTENDED CONSEQUENCES: REFUGEE VICTIMS OF THE WAR ON TERROR, 14–15 (June 2, 2006), https://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=1000&context=hri_papers [https://perma.cc/74JR-Q6MH] ("Interpretations of the material support bar that do not apply a duress exception or an exception for *de minimis* support violate U.S. obligations under Article 33 of the 1951 Refugee Convention to *non-refoulement*.").

184. A political party is not necessarily precluded from qualifying as a terrorist organization. For example, the Khmer Rouge was previously designated as a foreign terrorist organization by the United States. *Foreign Terrorist Organizations*, U.S. DEP'T OF STATE, https://www.state.gov/j/ct/rls/other/des/123085.htm [https://perma.cc/3MCU-5QDT]. "Terrorist activity" under the

flawed reasoning in *Matter of A-C-M-*, this forced labor would constitute material support to a terrorist organization: first, because no explicit duress exception exists, and second, because the labor would have contributed to the persecutors' goals and someone else would have had to perform that labor had the victims not. This represents a significant departure from the original goals of asylum law and continues to raise concerns for victims of persecution seeking refuge in the future. Indeed, commentators have drawn parallels between the United States' rejection of Jews fleeing Europe during the 1930s and its current response to the refugee crisis today.[185]

INA can be defined broadly as activity that is unlawful under U.S. law and which involves at least one of several enumerated acts, including the use of weapons or dangerous devices (other than for personal monetary gain) with intent to endanger others. 8 U.S.C. § 1182(B)(iii)(V)(b) (2012). Recently, the Third Circuit held that a political party could qualify as a Tier III terrorist organization if there is a showing that the group's leaders authorized the terrorist acts. Uddin v. Att'y Gen., 870 F.3d 282, 290–92 (3d. Cir 2017). The IJ and BIA found that the Bangladesh National Party ("BNP"), one of Bangladesh's two major political parties, qualified as a Tier III organization. *Id.* at 284. The Third Circuit remanded for the BIA to determine whether BNP leadership authorized members to engage in the terrorist activity in question, *id.* at 290, and stated: "As long as the agency finds as a matter of fact that the allegedly terroristic acts were authorized by party leaders, we will accept that finding if supported by substantial evidence." *Id.* at 292. The State Department also designates certain countries as state sponsors of terrorism. *See State Sponsors of Terrorism*, U.S. DEP'T OF STATE, https://www.state.gov/j/ct/list/c14151.htm [https://perma.cc/VF3G-5SQQ] (listing four countries—North Korea, Iran, Sudan, and Syria—currently designated as such). Further, in April 2019, President Donald Trump announced that he was designating Iran's Islamic Revolutionary Guard Corps, a government entity, as a foreign terrorist organization. Edward Wong & Eric Schmitt, *Trump Designates Iran's Revolutionary Guards a Foreign Terrorist Group*, N.Y. TIMES (April 8, 2019), https://www.nytimes.com/2019/04/08/world/middleeast/trump-iran-revolutionary-guard-corps.html (on file with the *Columbia Human Rights Law Review*); *see also* Krajeski, *supra* note 1 (raising the issue of this designation's potential legal consequences for American diplomats in Iran).

185. *See, e.g.*, Susan F. Martin, *Trump's Asylum Policy Is Eerily Similar to America's During the Holocaust*, FORTUNE (June 19, 2018), http://fortune.com/2018/06/19/refugees-asylum-seekers-separation-families-children-border-holocaust/ [https://perma.cc/W6RH-DYTJ] (describing how "administrative actions were used to deny admission to thousands of refugees and asylum seekers" in both cases);; Rebecca Erbelding, *After the Holocaust, the U.S. Promised to Protect Refugees. We're Failing.*, WASH. POST (Jan. 31, 2018), https://www.washingtonpost.com/news/posteverything/wp/2018/01/31/after-the-holocaust-the-u-s-promised-to-protect-refugees-were-failing/ (on file with the *Columbia Human Rights Law Review*) (analogizing the U.S.'s failure to admit more European

If the government does not remedy the current broad sweep of this exclusionary provision, victims of persecution will continue to be denied asylum in the United States. The next Part proposes several ways to achieve a more just application of the material support bar, focusing on legislative amendment and judicial review.[186]

III. LEGISLATIVE AND JUDICIAL SOLUTIONS TO LIMIT THE MATERIAL SUPPORT BAR'S REACH

This Part will analyze three potential solutions that could limit the overbreadth of the material support bar and combat the dangerous effects of the holding in *Matter of A-C-M-*. These potential

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Jewish refugees before the Holocaust to contemporary American inaction on the refugee crisis).

186. Although this Note recognizes that the classification system for terrorist organizations, which permits nearly any group of two or more individuals to be classified as a Tier III terrorist organization, contributes to the exclusion of deserving asylum applicants under the material support bar, a full analysis of this issue is beyond the scope of this Note and will not be addressed here. For further discussion of the problem of the overly broad definition of "terrorist" groups, *see* Wadie E. Said, *The Material Support Prosecution and Foreign Policy*, 86 IND. L.J. 543 (2011); Daniella Pozzo Darnell, Note, *The Scarlet Letter "T": The Tier III Terrorist Classification's Inconsistent and Ineffectual Effects on Asylum Relief for Members and Supporters of Pro-Democratic Groups*, 41 U. BALT. L. REV. 557 (2012); *see also* Jesse Lampel, *Tier III Terrorist Designations: The Trump Administration and Courts Move in Opposite Directions*, LAWFARE (Dec. 5, 2017), https://www.lawfareblog.com/tier-iii-terrorist-designations-trump-administration-and-courts-move-opposite-directions [https://perma.cc/L9W4-NUGR] (explaining Tier III framework and noting "[t]wo disorganized teenagers who planned to smash up a storefront with a baseball bat for kicks would likely qualify as a Tier III terrorist group."); Matter of S-K-, 23 I. & N. Dec. 936, 948 (2006) (Juan P. Osuna, Acting Vice Chairman, concurring) ("Any group that has used a weapon for any purpose other than for personal monetary gain can, under this statute, be labeled a terrorist organization. This includes organizations that the United States Government has not thought of as terrorist organizations because their activities coincide with our foreign policy objectives."). The *Matter of S-K-* concurrence noted that DHS had conceded at oral argument that "an individual who assisted the Northern Alliance in Afghanistan against the Taliban in the 1990s would be considered to have provided 'material assistance' to a terrorist organization under this statute and thus would be barred from asylum." *Id.* DHS has even admitted in oral argument that the "terrorist organization" designation is so broad that it could even apply to *American* entities—in particular, in the case of an Iraqi national who helped the U.S. Marines rescue an American soldier, DHS conceded the Marines would qualify as a Tier III terrorist organization due to their activities fighting against the government in Iraq. Pasquarella, *supra* note 157, at 28–29.

solutions are: (1) enacting an explicit duress waiver into the relevant statute; (2) a legislative amendment to the statute to clarify the definition of "material support"; and (3) judicial review of the BIA's decision in *Matter of A-C-M-*.

First, Section III.A will argue that Congress should enact an explicit duress waiver into the statute. However, it cautions that while such a waiver would be a positive step forward, the waiver alone will not be enough to sufficiently address the concerns described above, since there are cases in which asylum applicants did not act under duress but still provided insignificant or *de minimis* support. Therefore, additional or alternative solutions are needed as well. Next, Section III.B will argue that Congress should amend the statute to clarify the meaning of material support, similar to how it amended the federal criminal material support laws. Finally, Section III.C will address the possibility of judicial review of *Matter of A-C-M-*.

A. Congress Should Enact an Explicit Duress Exception into the Material Support Bar

While it is possible that Ana, the petitioner in *Matter of A-C-M-*, may eventually be granted a duress waiver or some other form of discretionary remedy,[187] such individual relief does not address the central problem with the holding in *Matter of A-C-M-*. The case sets a dangerous precedent for material support cases going forward: that nearly any activity can qualify as "material support," rendering the term effectively meaningless. Asylum applicants who are similarly situated to Ana should not be forced to rely on the hope of a discretionary duress waiver. Discretionary waivers are rarely granted;[188] the waiver process is opaque[189] and drags out the already

187. To even be eligible for a waiver, Ana would "need to concede that she provided material support, a claim that her lawyers strongly dispute." Lanard, *supra* note 107. Instead, she is appealing the BIA's decision. Krajeski, *supra* note 1.

188. *See* Hernandez v. Sessions, 884 F.3d 107, 117 (2d Cir. 2018) (Droney, J., concurring) ("[I]n fiscal year 2014—the only year with publicly available data—DHS processed only nineteen waivers for asylum applicants in the United States.") (citing U.S. CITIZENSHIP & IMMIGRATION SERVS., REPORT ON THE SECRETARY'S APPLICATION OF THE DISCRETIONARY AUTHORITY CONTAINED IN SEC. 212(D)(3)(B)(I) OF THE INA 2 (2015)).

189. *See id.* n. 8 (noting that 2014 USCIS report cited was not originally intended to be publicly available, but rather was obtained and released by an

extremely lengthy process of applying for asylum.[190] Further, the discretionary part of the waiver system places too much trust in actors who have an extremely strong incentive to act in an overly cautious manner. It vests the waiver power in two single, prominent, politically appointed officials, and if the Secretary of Homeland Security or the Secretary of State has even the slightest concern about an asylum applicant, she has no compelling reason to grant the waiver and risk being held responsible for personally waiving a terrorism-related inadmissibility ground. This is especially true after the events of September 11, 2001.

Although the BIA and federal courts have held there is no implied duress exception to the material support bar,[191] Congress could create an explicit duress exception. This would be feasible because DHS has already developed criteria for the discretionary duress waiver, as laid out in Subsection I.C.1, *supra*. Congress could simply adopt the current DHS totality-of-the-circumstances test for granting a duress waiver and enact it into the statute. Similar tests are used elsewhere in the law to assess individuals' eligibility for asylum, such as in reasonable relocation analysis.[192] Thus, the court could simply apply the waiver criteria to determine whether an applicant qualifies for a duress exception, instead of leaving applicants in limbo while they hope for a discretionary waiver to be granted by the Secretary of DHS or Secretary of State, after consultation with the other Secretary and with the Attorney General.

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outside organization); *see also supra* Section I.C (discussing the lack of formal application procedure for the waiver process).

190. The asylum process generally can take years to conclude. Cases in which material support is implicated may take even longer. In 2006, a Georgetown Law report noted that there were 512 asylum cases on indefinite hold because of material support concerns and that many of the asylum seekers had been in limbo for years and unable to present their cases to an immigration judge. GEORGETOWN UNIV. LAW CTR. HUMAN RIGHTS INST., *supra* note 183, at 14; *see also* Messer, *supra* note 180, at 70–71 (discussing case of asylum seeker barred under material support bar who was left in limbo because adjudication of his case was not administratively finalized and thus he could not be considered for waiver); Rosenberg & Torbati, *supra* note 71 (discussing case of asylum seeker who initially applied in 2005 and did not receive waiver until 2011).

191. *See supra* Subsection I.C.1.

192. *See, e.g.*, 8 C.F.R. § 1208.13(b)(2)(ii) (2019) ("An applicant does not have a well-founded fear of persecution if the applicant could avoid persecution by relocating to another part of the applicant's country . . . if *under all the circumstances* it would be reasonable to expect the applicant to do so.") (emphasis added).

This would have the effect of moving the decision process from the Secretaries to Immigration Judges, who have a much greater capacity to consider each case individually.

This change would not only streamline the administrability of the duress waiver, but would also mitigate the incentives problem discussed above. It is better to allocate the determination of duress waivers to a judge whose job it is to be a neutral fact-finder, rather than a high-profile political appointee who faces public scrutiny for every action. While Immigration Judges are not Article III judges and therefore do not have life tenure,[193] they are certainly more politically insulated and have more discretion to use independent judgment than a cabinet official who serves at the pleasure of the President.[194] Although judges may face backlash in certain instances—for example, in the criminal context, releasing someone on bail who then commits another crime[195]—it is a fairer scheme overall to establish the test for a waiver by statute and have judges make neutral determinations, rather than rely on the possibility of a high-level discretionary decision by the head of the department. This ensures that anyone who needs the waiver receives it, rather than only those who are skilled or connected enough to make a political ruckus and receive secretarial attention. Further, under this proposed new system, any duress determination would be subject to multiple levels of judicial

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193. Immigration judges are appointed by the Attorney General as his delegates. *See* 8 C.F.R. § 1003.10(a) (2019) ("The immigration judges are attorneys whom the Attorney General appoints as administrative judges within the Office of the Chief Immigration Judge to conduct specified classes of proceedings.").

194. 8 C.F.R. § 1003.10(b) provides that "immigration judges shall exercise their independent judgment and discretion and may take any action consistent with their authorities under the Act and regulations that is appropriate and necessary for the disposition of such cases."

195. *See, e.g.*, Brian Fraga, *SJC Ruling, Not Fall River Judge, to Blame for Lowering Mickey Rivera's Bail, Lawyers Say*, HERALD NEWS (July 31, 2018), http://www.heraldnews.com/news/20180731/sjc-ruling-not-fall-river-judge-to-blame-for-lowering-mickey-riveras-bail-lawyers-say [https://perma.cc/GDK8-MNKC] (discussing criticism of a judge who lowered bail for a defendant who was subsequently involved in a fatal car chase); John Pfaff, *The Never-Ending 'Willie Horton' Effect Is Keeping Prisons Too Full for America's Good*, L.A. TIMES (May 14, 2017), https://www.latimes.com/opinion/op-ed/la-oe-pfaff-why-prison-reform-isnt-working-20170514-story.html [https://perma.cc/3MTN-V8F8] (discussing the high political costs resulting from single failures of criminal justice reform programs that are otherwise successful).

review,[196] and a high-level executive official—the Attorney General—would still have the power to review the grant of a duress exception.[197] Courts consider duress defenses in the criminal context,[198] and immigration courts regularly apply similar balancing tests in assessing asylum seekers' eligibility.[199] Ironically, only a few weeks after deciding *Matter of A-C-M-*, the BIA concluded in *Matter of Negusie* that not only are duress claims available for a similar bar to asylum—the persecutor bar—such claims are "eminently reasonable" and "justiciable, both in theory and practice."[200] It reasoned:

> [A]ny anticipated difficulty in applying a duress exception should not prevent us from recognizing a narrow exception that will continue to protect those found to have assisted or participated in acts of persecution for which they bear no culpability. The added burden would be one of degree, not of kind, in light of what we and the Immigration Courts routinely face in the adjudication of claims for protection . . . .[201]

This reasoning equally counsels the adoption of a duress exception to the material support bar, especially in cases in which the connection between the applicant's acts and the grounds for inadmissibility is more attenuated—cooking and cleaning for rebels, for instance, compared to engaging in overt acts of persecution against others.

Moreover, although restrictions on asylum policy—such as the limited availability of waivers for terrorism-related inadmissibility grounds—are often driven by concerns that an applicant will become a national security threat after being granted

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196. As discussed in Section I.D, *supra*, determinations of immigration judges are appealable to the BIA and subsequently to federal courts of appeals.

197. 8 C.F.R. § 1003.1(h)(1)(i); *see, e.g.*, Matter of A-B-, 27 I. & N. Dec. 316 (A.G. 2018) (Attorney General overruling decision of BIA).

198. *See* Dixon v. United States, 548 U.S. 1, 7, 15 (2006) (discussing duress defense and referring to its burden of proof as a "long-established common-law rule").

199. *See, e.g.*, Matter of E-A-, 26 I. & N. Dec. 1, 3 (B.I.A. 2012) (in assessing whether "serious nonpolitical crime" asylum bar applies, immigration judges weigh the "seriousness of the criminal acts against the political aspect of the conduct to determine whether the criminal nature of the applicant's acts outweighs their political character." (citing I.N.S. v. Aguirre-Aguirre, 526 U.S. 415, 429–31 (1999))).

200. Matter of Negusie, 27 I. & N. Dec. 347, 352 (B.I.A. 2018).

201. *Id.*

asylum in the United States,[202] those concerns are not justified.[203] That risk is astronomically low: the nonpartisan Migration Policy Institute found that in the fourteen years following September 11, 2001, the United States resettled 784,000 refugees, of which exactly three were arrested for planning terrorist activities.[204] Two were not planning an attack in the United States, and the third had "barely credible" plans.[205] A 2016 study gathering data from a 40-year period additionally estimated that the chance of an American being killed in a terrorist attack committed by a refugee is 1 in 3.64 *billion* a year.[206] A recent U.N. report by a Special Rapporteur on migration and refugees likewise concluded that the perception "that terrorists take advantage of refugee flows to carry out acts of terrorism or that refugees are somehow more prone to radicalization than others" is "analytically and statistically unfounded, and must change."[207] For most refugees, many of whom have fled terrorism in their countries of

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202. *See, e.g.*, Julie Hirschfeld Davis, *Trump to Cap Refugees Allowed Into U.S. at 30,000, a Record Low*, N.Y. TIMES (Sept. 17, 2018), https://www.nytimes.com/2018/09/17/us/politics/trump-refugees-historic-cuts.html (on file with the *Columbia Human Rights Law Review*) (discussing how Trump has restricted refugee resettlement and argued against admitting Syrian refugees because "they could be a danger to the country"); Rosenberg & Torbati, *supra* note 71 (noting director of anti-immigrant group NumbersUSA has called waivers "a potential security risk"); *see also* Dan De Luce & Julia Ainsley, *Trump Admin Rejected Report Showing Refugees Did Not Pose Major Security Threat*, NBC NEWS (Sept. 5, 2018), https://www.nbcnews.com/politics/immigration/trump-admin-rejected-report-showing-refugees-did-not-pose-major-n906681 [https://perma.cc/J5J9-G95L] (discussing how Trump administration sought to exaggerate the security threat posed by refugees).

203. *See* Rosenberg & Torbati, *supra* note 71 (State Department official stated "I don't know of any cases where beneficiaries of exemptions have gotten into trouble after arriving.") Another former State Department official described the waivers as "case-by-case exemptions for people who represent no threat to the United States but rather have been caught in the most unfortunate of circumstances." *Id.*

204. Kathleen Newland, *The U.S. Record Shows Refugees Are Not a Threat*, MIGRATION POLICY INST. (Oct. 2015), https://www.migrationpolicy.org/news/us-record-shows-refugees-are-not-threat [https://perma.cc/V5F5-L4YA].

205. *Id.*

206. Alex Nowrasteh, *Terrorism and Immigration: A Risk Analysis*, 798 CATO INST. POL'Y ANALYSIS 1, 2 (Sept. 13, 2016).

207. Rep. of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, ¶ 8, A/71/384 (Sept. 13, 2016). In fact, the report finds that migration policies which are overly restrictive or which violate human rights may ultimately assist terrorists. *Id.* ¶ 11.

origin, the United States is a safe haven, not a target. Given this low rate of danger, and the BIA's aforementioned reasoning endorsing IJs' adjudication of duress claims related to the persecutor bar, it is unlikely that shifting the responsibility for duress waivers to Immigration Judges will result in any significant problems.

The presence of an explicit duress waiver in the statute would constitute a step forward in addressing the problems posed by "material support." An explicit waiver would undermine the BIA's reasoning in *Matter of A-C-M-*, where it stated that "the fact that the Board and the Federal courts have uniformly rejected a duress exception to the material support bar counsels against adopting the interpretation that the respondent and the dissent support."[208] The BIA reasoned that a person who voluntarily gives assistance has acted with a greater degree of culpability than one who does so under duress, and therefore, if Congress did not intend to exempt individuals who were coerced into support, it was unlikely that Congress intended to permit voluntary, even if insignificant, support.[209] If Congress does decide to create an explicit exemption for individuals who provide material support under duress, that would weaken this reasoning and represent a step forward toward the other solutions discussed in this Part: clarifying the statutory meaning of "material support" or overturning the BIA's holding in *Matter of A-C-M-*.

Although an explicit statutory duress exception would represent a significant advancement toward providing fair process to victims of persecution whose support of terrorism was coerced, it does not fully address the problems posed by the current interpretation of the material support bar. Some asylum applicants do not act under duress. Acts of minimal, non-violent support, such as providing food or copying flyers, might be completely voluntary. Even if Congress establishes a statutory duress waiver, the government would still fail to effectively limit the material support bar to actual terrorists and their supporters by not excluding voluntary yet *de minimis* support. This failure plays out in one of two ways in asylum cases. First, it "extend[s] the material support bar to innocent civilians in war-torn regions throughout the world who are often forced to pay negligible 'war taxes' in currency or goods to rebel or terrorist groups" or who otherwise have no realistic choice but to engage in routine social

208. Matter of A-C-M-, 27 I. & N. Dec. 303, 306 (B.I.A. 2018).
209. *Id.*

transactions with individuals engaged in armed conflicts.[210] Second, it extends the material support bar to individuals who act in a manner "consistent with United States foreign policy,"[211] who oppose repressive regimes and provide voluntary non-violent support to groups that are backed by the U.S. government.[212] Therefore, although a duress exception would be useful and relevant in some cases, the underlying problem of the meaning of "material support" would remain in cases involving voluntary yet insignificant support.

Ultimately, while enacting explicit waivers would be a positive development, the most straightforward solution to the current problems created by the material support bar would be for Congress to clarify the meaning of "material," because the definition set forth in *Matter of A-C-M-* is too broad and provides no guidance for adjudicators moving forward.

B. Congress Should Amend the INA to Clarify the Meaning of "Material Support"

Although passing legislation is often a long and difficult process, Congress has previously amended the federal criminal material support statutes when portions of those laws were declared unconstitutionally vague. This Section will explain the criminal analogue to the material support bar, then discuss how Congress amended that statute after it was challenged in court, and finally argue that Congress should similarly amend the INA's material support bar and add clarifying definitions to narrow the meaning of "material support" and avoid a limitless reach.

1. Background of Federal Criminal Material Support Laws

In addition to being a bar to asylum, material support of terrorism is also a federal crime in the United States.[213] 18 U.S.C. § 2339B, which was enacted as part of the Antiterrorism and

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210. Pasquarella, *supra* note 157, at 30.

211. Matter of S-K-, 23 I. & N. Dec. 936, 950 (B.I.A. 2006).

212. *See* Armistead, *supra* note 154, at 614 (arguing that the U.S. should harmonize its foreign policy with the material support bar and allow an exception for supporters of "legitimate social or revolutionary movements that oppose an authoritarian government and seek to install a democratic government," especially where the U.S. itself supports the overthrow of that government).

213. 18 U.S.C. § 2339B(a)(1) (2012).

Effective Death Penalty Act of 1996 ("AEDPA") in response to concerns about international terrorism,[214] criminalizes the knowing provision of "material support or resources" to "foreign terrorist organizations."[215]

Notably, although § 2339B relies on the INA to define "terrorist activity," it does not use the INA's definition of "material support."[216] Rather, it defines the term separately, with subtle differences from the INA version. "Material support" under § 2339B includes:

> any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel (1 or more individuals who may be or include oneself), and transportation, except medicine or religious materials.[217]

This definition is broader than that of the INA's; it includes "any property . . . or service" and lists "lodging" as well as the more specific "safehouse."[218] Additionally, § 2339B has a higher *mens rea* requirement for material support than the INA.[219] The federal crime of material support requires that the support be provided "knowingly,"[220] whereas under the INA, an individual may be barred from asylum on a finding that she "reasonably should know" that her actions would provide material support to a terrorist organization.[221]

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214. Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104–132, 110 Stat. 1214–1319 (1996).

215. 18 U.S.C. § 2339B(a)(1).

216. *See* 18 U.S.C. §§ 2339A; 2339B(g)(4) (2012) ("[T]he term 'material support or resources' has the same meaning given that term in section 2339A.").

217. 18 U.S.C. § 2339A(b)(1) (2012).

218. *Compare* 18 U.S.C. § 2339A(b)(1) (2012) *with* 8 U.S.C. § 1182 (a)(3)(B)(iv)(VI) (2012).

219. 18 U.S.C. § 2339B(a)(1).

220. *Id.*

221. 8 U.S.C. § 1182(a)(3)(B)(iv)(VI).

2. Constitutional Challenges to the Criminal Material Support Statute

Following AEDPA's enactment in 1996, a group of plaintiffs challenged the material support bar as unconstitutionally vague.[222] In 2003, the Ninth Circuit held that the terms "personnel" and "training," included in the definition of "material support," were void for vagueness.[223] The plaintiffs subsequently challenged the term "expert advice or assistance" as well.[224]

Congress responded in 2004 by amending the statute to provide more detail as to the meaning of "material support or resources."[225] This included, *inter alia*, defining "'training' to mean 'instruction or teaching designed to impart a specific skill, as opposed to general knowledge'" and defining "'expert advice or assistance' to mean 'advice or assistance derived from scientific, technical or other specialized knowledge.'"[226]

Finally, in *Holder v. Humanitarian Law Project*, the Supreme Court held that the criminal material support statute was not unconstitutionally vague.[227] It noted that Congress had added narrowing definitions over time to increase the statute's clarity, such as defining "training" and "expert advice or assistance."[228] Because the statutory terms were clear in their application to plaintiffs' proposed conduct—providing support in the form of monetary contributions, other tangible aid, and legal training—their vagueness challenge was rejected.[229]

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222. *See* Holder v. Humanitarian Law Project, 561 U.S. 1, 9–14 (2010) (outlining timeline of the litigation).

223. Humanitarian Law Project v. U.S. Dep't of Justice, 352 F.3d 382, 405 (9th Cir. 2003), *opinion vacated on reh'g en banc*, 393 F.3d 902 (9th Cir. 2004).

224. *See* Humanitarian Law Project v. Ashcroft, 309 F. Supp. 2d 1185, 1201 (C.D. Cal. 2004) ("[L]ike the terms 'personnel' and 'training,' 'expert advice or assistance' 'could be construed to include unequivocally pure speech and advocacy protected by the First Amendment' or to 'encompass First Amendment protected activities.'") (quoting Humanitarian Law Project v. U.S. Dep't of Justice, 352 F.3d 382, 404 (9th Cir. 2003)).

225. Intelligence Reform and Terrorism Prevention Act of 2004 (IRTPA), § 6603, 118 Stat. 3762–3764.

226. *Holder v. Humanitarian Law Project*, 561 U.S. at 12 (quoting 18 U.S.C.S. § 2339A(b)(2)–(3)).

227. *Id.* at 21.

228. *Id.*

229. *Id.*

3. Potential Amendments to the INA

Congress can and should take similar action to limit the reach of the material support bar in the asylum context. Adding clarifying definitions would greatly assist immigration judges and courts in assessing whether the material support bar applies to certain actions. For instance, Congress could adopt some of the reasoning in the *Matter of A-C-M-* dissent and clarify that "everyday activities that involve the crossing of paths with individuals who happen to be members of terrorist organizations" such as "selling such a member groceries on the same terms as are applied to the public generally" or "doing laundry" are not activities which rise to the level of material support.[230] It could clarify that such "incidental services" are not subject to the material support bar.[231] Amending the statute would provide clarity to courts going forward and would avoid lengthy litigation of the type pursued in the *Humanitarian Law Project* line of cases.

Finally, another option for legislative action would be for Congress to add language drawn from the current waivers for limited and insignificant support into the statute to further limit the application of the material support bar. This would make it explicit within the statute that such conduct fails to rise to the level necessary for the bar to apply. In practice, Immigration Judges would simply rule the bar to be inapplicable to conduct that they deemed *de minimis*, eliminating the need for applicants to ask a cabinet official for a waiver—a remedy which is only available after an asylum proceeding has exhausted review and been finalized.[232] As discussed in Subsection I.C.2, *supra*, DHS defines "limited" material support for

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230. Matter of A-C-M-, 27 I. & N. Dec. 303, 314 (B.I.A. 2018).

231. *See id.*

232. *See* U.S. CITIZENSHIP & IMMIGRATION SERVS., FACT SHEET: DEPARTMENT OF HOMELAND SECURITY IMPLEMENTS EXEMPTION AUTHORITY FOR CERTAIN TERRORIST-RELATED INADMISSIBILITY GROUNDS FOR CASES WITH ADMINISTRATIVELY FINAL ORDERS OF REMOVAL (Oct. 23, 2008), https://www.uscis.gov/sites/default/files/USCIS/Laws/TRIG/USCIS_Process_Fact_Sheet_-_Cases_in_Removal_Proceedings.pdf [https://perma.cc/S8HB-XF62]; Jennifer Daskal & Paul Rosenzweig, *Enslaved and Forced to Watch Her Husband Dig His Own Grave—And Labeled a Terrorist as a Result*, LAWFARE (June 14, 2018), https://www.lawfareblog.com/Watch-Her-Dig-His-Grave-Labeled-Terrorist-Result [https://perma.cc/G2TW-TPH5] ("In effect, applicants in A-C-M's position must go through an entire judicial process—at great expense to themselves and to the immigration system—before they may avail themselves of the opportunity to seek a waiver.")

the purpose of the waiver as support that involves: (1) routine commercial transactions; (2) routine social transactions; (3) humanitarian assistance; or (4) sub-duress pressure.[233] The examples of "everyday activities" given by the dissent in *Matter of A-C-M-* align with these same categories.[234] Congress could take this language and enact it into the statute in order to clarify that these are actions that *do not rise* to the level of material support or *do not constitute* material support. This would eliminate the opaque discretionary waivers and their contradictory phrasing of "limited material support" or "insignificant material support," which, as discussed above in Subsection I.C.2, casts doubt on the meaning of the word "material." Overall, the addition of clarifying language to the statute would help ensure that the bar is applied fairly and would aid adjudicators in determining what does or does not constitute true material support.

C. Judicial Review of the *Matter of A-C-M-* Holding

Finally, judicial review could serve as an additional possible avenue to address the problems highlighted in *Matter of A-C-M-*. Indeed, Ana's attorney has stated that she will pursue an appeal to the Second Circuit.[235] One significant obstacle to meaningful judicial review of this issue, however, is the principle of *Chevron* deference set forth in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,[236] which requires courts to defer to certain agency interpretations of statutes that they administer. This Section nonetheless argues that the BIA's interpretation of "material," as set forth in *Matter of A-C-M-*, is not entitled to deference under *Chevron*, either because the statutory meaning of "material" is unambiguous, or in the alternative, because the BIA's interpretation is unreasonable. It additionally argues that the application of the

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233. Limited Waiver, *supra* note 59, at 6914.

234. *Matter of A-C-M-*, 27 I. & N. Dec. at 314.

235. Lanard, *supra* note 107 (reporting intent of Ana's lawyers to appeal the case to the Second Circuit). The Second Circuit is the Court of Appeals with jurisdiction over Ana's case because her 2016 denial of asylum was handled by an Immigration Judge in New York. *See id.*; *Matter of A-C-M-*, 27 I. & N. Dec. at 306 (mentioning "[t]he United States Court of Appeals for the Second Circuit, in whose jurisdiction this case arises").

236. Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984).

material support bar in its current state violates the Administrative Procedure Act's prohibition on arbitrary and capricious agency action.

Although the INA bars judicial review of factual findings underlying terrorism-related bars to asylum, federal courts retain jurisdiction to address constitutional questions and questions of law.[237] In *Khan v. Holder*, the Ninth Circuit found jurisdiction to determine mixed questions of law and fact, which encompassed review of the terrorism bar, including the definition of "terrorist organization" and "terrorist activity."[238] Because the definition of "material support" is a legal, not factual, determination, the Second Circuit has jurisdiction to review the BIA's determination as set forth in *Matter of A-C-M-*. Other circuits have found jurisdiction to review legal conclusions reached by the BIA in cases involving material support.[239]

Typically, when agencies such as the BIA interpret statutes that they administer, federal courts defer to those agency interpretations on appeal under the principles set forth in *Chevron*.[240] The first step of *Chevron*'s two-step framework asks "whether Congress has directly spoken to the precise question at issue."[241] If it has, then the court and the agency "must give effect to the unambiguously expressed intent of Congress."[242] If the statute is ambiguous, however, the court must proceed to the second step of the *Chevron* analysis and determine whether the agency's interpretation is "based on a permissible construction of the statute."[243] If the agency's interpretation is reasonable, then deference is appropriate.[244]

Here, *Chevron* deference is not appropriate. The Court of Appeals should reach this conclusion in one of two ways: (1) by

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237. 8 U.S.C. § 1252 (2012).

238. Khan v. Holder, 584 F.3d 773, 779–80 (9th Cir. 2009).

239. *See, e.g.*, Jabateh v. Lynch, 845 F.3d 332, 340 (7th Cir. 2017) ("Although we are foreclosed from reviewing the BIA's factual determinations on this issue . . . petitioner asserts a quintessential legal error, one which we are entitled to consider."); Barahona v. Holder, 691 F.3d 349, 353 & n.7 (4th Cir. 2012) (issue of whether duress exception to material support bar exists was reviewable question of law, but court lacked jurisdiction to review factual issue of whether Barahona's support was *de minimis*).

240. *See* I.N.S. v. Aguirre-Aguirre, 526 U.S. 415, 425 (1999).

241. *Chevron*, 467 U.S. at 842.

242. *Id.* at 842–43.

243. *Id.* at 843.

244. *Id.* at 844.

finding that the phrase "material support," as used in the statute, is not ambiguous, and therefore that it must be given its plain meaning; or alternatively, (2) by finding that if the phrase "material support" *is* indeed ambiguous, the BIA's interpretation of the term is nonetheless unreasonable, and it should therefore be overturned.

First, Courts of Appeals should find that *Chevron* deference to the BIA's definition of "material support" is not warranted because the statute is unambiguous. As discussed in Subsection II.B.1, *supra*, principles of statutory construction such as plain meaning and avoidance of surplusage and absurdity make it clear that "material support" cannot mean *de minimis* support.[245] The Supreme Court has previously employed traditional tools of statutory construction in declining to defer to the BIA's interpretation of a statute. In *I.N.S. v. Cardoza-Fonseca*, it found "these ordinary canons of statutory construction compelling, even without regard to the longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien."[246] In that case, the Court rejected the BIA's interpretation of "well-founded fear," finding that Congress's intent was clear.[247] In another case, the Court shed light on situations where *Chevron* deference is not appropriate in the asylum context, stating that a "pure question of statutory construction" is properly within the purview of the judiciary.[248]

However, given that the Second Circuit previously found in an unpublished opinion that the term "material" was ambiguous—and remanded to the BIA for clarification,[249] prompting the holding in *Matter of A-C-M-*[250]—it may continue to assert the

245. *See supra* Subsection II.B.1; Singh-Kaur v. Ashcroft, 385 F.3d 293, 303 (3d Cir. 2004) (Fisher, J., dissenting) ("Congress did not intend 'material support' to embrace [acts unimportant to terrorism]. To hold otherwise reads 'material' out of 'material support' and treats half of the statutory term as surplusage. Such a result is inconsistent with the plain language of the statute and with the normal tools of statutory construction.").

246. I.N.S. v. Cardoza-Fonseca, 480 U.S. 421, 449 (1987).

247. *Id.* at 446–48.

248. Negusie v. Holder, 555 U.S. 511, 532 (2009); *see also* Sesay v. Att'y Gen., 787 F.3d 215, 224 n.9 (3d Cir. 2015) ("[W]e have no need to await a precedential decision from the BIA when the issue is one of unambiguous statutory interpretation.").

249. Ayvaz v. Holder, 564 F. App'x 625, 628 (2d Cir. 2014); *see supra* notes 95–96 & accompanying text.

250. Matter of A-C-M-, 27 I. & N. Dec. 303, 306 n.2 (B.I.A. 2018) ("Our decision in this case responds to the court's request [in Ayvaz v. Holder].").

term's ambiguity. Yet, even if a circuit court were to find that "material support" is an ambiguous term, *Chevron* deference would remain unwarranted. The BIA's interpretation of the term as set forth in *Matter of A-C-M-* is not a reasonable construction of the statute, since it contradicts the dictionary meaning of "material" and the statutory interpretation canons discussed above. Thus, the appropriate course of action would be either for the Court of Appeals to correctly define "material support," or for it to remand to the BIA once again—this time with instructions to redefine the term in line with the proper tools of statutory construction. The Supreme Court previously set forth these two options in another asylum case, *Negusie v. Holder*, when it found that the BIA had erroneously relied on case law in applying the INA's statutory bar on applicants who actively persecuted others. The Court remanded for the BIA to properly address and interpret the statute's ambiguity.[251] However, Justice Stevens, concurring in part, presented an alternate option: the Court could "provide a definite answer to the [legal] question presented and then remand for further proceedings,"[252] as it had done in *Cardoza-Fonseca*.[253]

Thus, even if the Second Circuit finds "material" to be ambiguous, it should hold the BIA's interpretation of "material support" to be unreasonable. The BIA's interpretation arguably should not survive either step of the *Chevron* analysis.[254] The court should then either impose a clear definition of the term itself, or in the alternative, remand for the BIA to appropriately limit the meaning of "material support" and strike the correct balance called for by the *Matter of A-C-M-* dissent and other judges.[255]

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251. *Negusie*, 555 U.S. at 523–24.

252. *Id.* at 529 (Stevens, J., concurring in part and dissenting in part).

253. *Id.* at 534.

254. Matthew C. Stephenson and Adrian Vermeule argue that the inquiry at both steps of the *Chevron* analysis is fundamentally the same: whether the agency's interpretation is permissible as a question of statutory interpretation. Matthew C. Stephenson and Adrian Vermeule, Chevron *Has Only One Step*, 95 VA. L. REV. 597, 598 (2009).

255. Matter of A-C-M-, 27 I. & N. Dec. 303, 315 (B.I.A. 2018) (Wendtland, Board Member, dissenting) ("[I]t is especially important to give meaning to the statutory limit of 'material.' That term calls for immigration judges, the Board, and the courts to strike a balance written into the Act.") (quoting Jabateh v. Lynch, 845 F.3d 332, 348 (7th Cir. 2017)) (Hamilton, J., concurring in part and concurring in the judgment).

Another potential means of judicial review that would also permit remand to the BIA for clarification would be for the Court of Appeals to treat the BIA's application of the material support bar as agency action under the Administrative Procedure Act ("APA"). Given the material support bar's new overly broad reach, reviewing courts could find the immigration courts' application of the material support bar arbitrary and capricious under the APA.[256] Recently, the Supreme Court applied APA review to the BIA in *Judulang v. Holder*, holding that the BIA's "comparable-grounds" rule for applying INA § 212(c) in deportation cases was arbitrary and capricious.[257] Writing for a unanimous court, Justice Kagan quoted an opinion written by Judge Learned Hand in an early immigration case, which asserted that deportation decisions cannot be made "a sport of chance."[258] Because the APA's "arbitrary and capricious" standard is designed to thwart such haphazard action, the Court overturned the comparable-grounds rule in *Judulang*.[259]

The BIA's interpretation of "material support" in *Matter of A-C-M-* similarly makes asylum relief into such a "sport of chance." As discussed above, the type of activity that could be encompassed under the current definition of material support is nearly limitless. This overly broad definition gives no guidance to immigration judges seeking to apply it to the cases before them, and consequently, their agency action will ultimately result in arbitrary and disparate outcomes for similarly situated asylum seekers.[260]

Notably, in *Judulang*, the Court stated that although it was invalidating the BIA's ruling under arbitrary and capricious review, it would have reached the same outcome under *Chevron*, because *Chevron* second-step analysis is functionally identical to arbitrary

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256. 5 U.S.C. § 706(2)(a) (2012) ("The reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.").

257. Judulang v. Holder, 565 U.S. 42, 45–50 (2011).

258. *Id.* at 58–59 (citing Di Pasquale v. Karnuth, 158 F.2d 878, 879 (2d Cir. 1947).

259. *Id.* at 58–59.

260. One author has argued that *Judulang* "took a tangible step towards delineating the scope of immigration agencies' discretion and . . . provides immigration advocates with a meaningful defense against at least some forms of unfavorable agency action." Jeffrey D. Stein, *Delineating Discretion: How* Judulang *Limits Executive Policy-Making Authority and Opens Channels for Future Challenges*, 27 GEO. IMMIGR. L.J. 35, 38 (2012); *see id.* at 76.

and capricious review.[261] Although the lines between APA arbitrary and capricious review and *Chevron* analysis are not always clear, an appellate court should ultimately find the BIA's interpretation of the material support bar to be unreasonable regardless of which analysis it chooses to apply.

As of August 2019, only one circuit has addressed the issue of deference to the BIA's interpretation in *Matter of A-C-M-*. In January 2019, the Ninth Circuit held in *Rayamajhi v. Whitaker* that the material support bar contains no implied exception for *de minimis* aid in the form of funds, finding that under the plain text of the statute, "funds" given to a terrorist organization are "material support."[262] It held in the alternative that if the statute was ambiguous, the BIA's interpretation in *Matter of A-C-M-* was "permissible" and thus merited *Chevron* deference.[263] Yet, as in other previous appellate decisions involving the material support bar, the panel was split. The concurrence disagreed that the plain meaning of the statute was clear, instead finding that it was ambiguous.[264] It noted that "[n]ot all of these definitions [of the term 'material'] support the agency's interpretation" in *Matter of A-C-M-*, and stated that "more than 'de minimis'" would be a "permissible interpretation of 'material.'"[265] It found itself "unable to resolve the ambiguity by consulting various judicial interpretations," and warned that the "majority's reasoning will have consequences that extend beyond this case." It concluded, however, that courts "should not prevent the agency from continuing to consider the meaning of an ambiguous, context-specific term based on its expertise and experience in this area."[266]

The issue remains open to consideration by other circuits—including the Second Circuit, which has jurisdiction over Ana's case—and by the Supreme Court. However, what *Rayamajhi* illustrates is that courts continue to disagree over the meaning of the material support statute and struggle to interpret its provisions. Thus, legislative action—amending the statute to include a duress exception and provide additional clarifying examples—may be the best remedy to correct the broad sweep of the material support bar

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261. *Judulang,* 565 U.S. at 52 n.7.
262. Rayamajhi v. Whitaker, 912 F.3d 1241, 1244–45 (9th Cir. 2019).
263. *Id.* at 1245.
264. *Id.* at 1245–46 (Bennett, J., concurring in part and concurring in the judgment).
265. *Id.* at 1246, 1247.
266. *Id.* at 1247, 1248.

following *Matter of A-C-M-*, as it would provide the necessary guidance to assist courts in applying the statute and determining whether applicants have indeed given material support that should render them ineligible for asylum.

CONCLUSION

"For over ten years, people on all sides agree [the material support bar] is affecting people it shouldn't . . . This decision takes all meaning out of the term 'material support.'"[267]

The BIA's interpretation of "material support" set forth in *Matter of A-C-M-* exceeds the scope of the term's statutory meaning, and will only further operate to punish deserving asylum seekers by applying the material support bar to those who have themselves been victimized by terrorism or authoritarian regimes. As two law professors recently said in a *Lawfare* article criticizing the decision in *Matter of A-C-M-*: "Terrorists should be denied admission to our nation. But we should be able to distinguish between those that seek to do us and others harm and the victims of the very groups we oppose."[268] The current application of the material support bar fails to account for the complex political nuances that color asylum seekers' backgrounds and give rise to their persecution.

Over ten years ago, in 2006, the American Bar Association wrote to Congress, urging it to revise the material support bar:

> The sweeping application of the material support bar is denying refuge to legitimate refugees who are the victims, rather than the perpetrators, of terrorism. . . . The bar has affected thousands of refugees fleeing religious persecution in Malaysia and Sierra Leone, and political persecution in Colombia, Cuba, Liberia and Sri Lanka. The bar's language is so broad that it would have excluded people who fought for freedom from apartheid in South Africa, Jews who resisted persecution in Nazi Germany, and

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267. Krajeski, *supra* note 1.

268. Daskal & Rosenzweig, *supra* note 232. Both authors have worked for the U.S. government in the field of national security, Daskal as counsel for the Assistant Attorney General for National Security in the Department of Justice and Rosenzweig as the Deputy Assistant Secretary for Policy in the Department of Homeland Security. *Id.*

> Vietnamese and Hmong who aided United States forces during the Vietnam War.[269]

Unfortunately, over a decade later, our government has failed to curb this sweeping application. To the contrary, as *Matter of A-C-M-* painfully illustrates, it has further expanded it, denying asylum to individuals like Ana.[270] Even longtime supporters of the material support statute expressed concern following the BIA's decision.[271] Congress and the courts can and should act to limit the material support bar in order to properly allow those who are fleeing persecution to seek and obtain asylum in cases involving duress or *de minimis* support.

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269. Letter from Robert D. Evans, American Bar Association, to Arlen Specter, Chairman, Senate Judiciary Committee 1–2 (Apr. 26, 2006).

270. Ana dreams sometimes about meeting the BIA judges in her case: "I would tell them I had to escape," she said. "I would have died if I hadn't done what I did. I would tell them I'm a good person." Krajeski, *supra* note 1.

271. Krajeski, *supra* note 1 (describing, as an example, Paul Rosenzweig, a former DHS official during the George W. Bush administration who previously defended the statute in front of the Senate Judiciary Committee and is now concerned about the broad discretion given to the executive branch).