operates one of the largest pro bono asylum representation programs in the country. Through the assistance of volunteer attorneys, Human Rights First provides legal representation without charge to hundreds of asylum applicants unable to afford counsel, many of whom stand to be affected by the outcome of this case.

Kids In Need of Defense ("KIND") is a national non-profit organization whose ten field offices provide free legal services to immigrant children who reach the United States unaccompanied by a parent or legal guardian, and face removal proceedings in Immigration Court. Since 2009, KIND has received referrals for over 15,800 children from 70 countries, and has partnered with pro bono counsel at over 500 law firms, corporations, law schools, and bar associations. KIND also advocates for changes in law, policy, and practice to enhance protections for unaccompanied children. Many children served through KIND have endured serious harm, including through domestic violence and its consequences, and many request and receive protection under United States law. KIND has a compelling interest in ensuring their access to the full measure of protection that the law affords.

INTRODUCTION AND SUMMARY OF ARGUMENT

In his Interim Decision of March 7, 2018, the Attorney General sought argument on the following question: "Whether, and under what circumstances, being a victim of private criminal activity constitutes a cognizable 'particular

social group' for purposes of an application for asylum or withholding of removal." 27 I. & N. Dec. 227 (A.G. 2018). Embedded in this question is the proper interpretation of "particular social group" under the Immigration and Nationality Act ("INA").

The Board of Immigration Appeals answered that question over 30 years ago in its seminal decision in *Matter of Acosta*. There, the Board determined that a particular social group may be comprised of individuals sharing a common immutable characteristic, including gender. *See* 19 I. & N. Dec. 211, 233 (BIA 1985). *Acosta*'s holding is faithful to the INA as illuminated through the *ejusdem generis* canon. It has been accepted by U.S. Courts of Appeals and adopted by other state signatories to the United Nations Convention relating to the Status of Refugees. *Acosta*'s reasoning has also been endorsed by the United Nations High Commissioner for Refugees ("UNHCR") and scholars in the field.

Despite the widespread acceptance of *Acosta* in the U.S. and the world, gender alone as a defining characteristic of a particular social group has been met with misplaced criticism that the category is overbroad. But other status categories in the refugee definition namely, race, nationality, and religion are equally broad. Because, under the *ejusdem generis* canon, particular social group is to be interpreted consistently with those categories, it makes no sense to shun gender as a qualifying characteristic because it sweeps too broadly when other categories that

indisputably fit the refugee definition have the same expansive reach. These unfounded "floodgates" concerns also fail to account for the fact that particular social group is only one element of the refugee definition. As with claims involving race, religion, or nationality, a woman claiming refugee status based on gender is required to satisfy *all* elements of that definition. Among other requirements, she must show that she suffered past persecution, or has a well-founded fear future of persecution, *because she is a woman*.

As the many national and international bodies that have embraced *Acosta* have recognized, such persecution is an indisputable reality for many women and girls in societies around the world (including El Salvador, the homeland of the applicant here). If he reaches the merits of this case,[1] the Attorney General should take the opportunity to recognize that undeniable truth and to acknowledge what the world has come to understand: Gender alone may define a particular social group under the refugee definition.

[1] *Amici* share respondent and other *amici*'s concern about the limitations of the procedural posture of this case, the deficiencies in the question presented, and the danger that issuing an adverse decision on the merits will violate respondent's due process rights. Respondent's Br. 16-21; National Immigrant Law Center Br. 4-16, 19-25. *Amici* accordingly urge the Attorney General to heed respondent's request that he not take action in this case. Despite these concerns, *amici* provide their view on the proper interpretation of particular social group to aid the Attorney General should he decide to consider the merits of these issues.

ARGUMENT

MEMBERSHIP IN A PARTICULAR SOCIAL GROUP MAY BE SHOWN BY GENDER ALONE

A. The Conclusion That Gender Is Sufficient To Establish Membership In A Particular Social Group Is Faithful To The INA, As Recognized In *Acosta*

The INA defines the term "refugee." 8 U.S.C. § 1101(a)(42). Pursuant to the statute, in order to qualify as a refugee, an applicant must demonstrate "a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." *Id.* § 1101(a)(42)(A).

According to the Board's own analysis, the meaning of particular social group is discerned by resort to commonly used canons of statutory construction specifically *ejusdem generis*. That doctrine, the Board explained in *Acosta*, "holds that general words used in an enumeration with specific words should be construed in a manner consistent with the specific words." *Acosta*, 19 I. & N. Dec. at 233. Looking to the surrounding words in the list of grounds for persecution, the Board found that each "describes persecution aimed at an immutable characteristic . . . that either is beyond the power of an individual to change or is so fundamental to individual identity or conscience that it ought not be required to be changed." *Id.* Based on that understanding, the Board determined that "membership in a particular social group" should be read to encompass "persecution that is directed

toward an individual who is a member of a group of persons all of whom share *a common, immutable characteristic*." *Id.* (emphasis added).

Gender is an immutable characteristic. Like race or religion, gender is entrenched, innate, and central to identity. Indeed, the Board recognized that fact in *Acosta*, listing gender among those traits that would satisfy its definition of particular social group. "The shared characteristic" that could identify a persecuted group for purposes of establishing refugee status, the Board declared, "might be sex, color, or kinship ties." *Id.*

B. *Acosta*'s Framework And Conclusion That Gender May Define A Particular Social Group Has Been Accepted By Courts And International Bodies

1. Acosta *forms the basis of established precedent in U.S. Circuit Courts of Appeals*

Acosta's framework has been accepted by numerous federal courts of appeals. In 1993, the Third Circuit, per then-Judge Alito, cited *Acosta* approvingly in *Fatin v. INS*, 12 F.3d 1233, 1240 (3d Cir.). Because *Acosta* "specifically mentioned 'sex' as an innate characteristic that could link the members of a 'particular social group,'" Judge Alito found that Fatin had satisfied that requirement "to the extent that . . . [she] suggest[ed] that she would be persecuted . . . simply because she is a woman." *Id.* Similarly, in *Niang v. Gonzales*, the Tenth Circuit "[a]ppl[ied] the *Acosta* definition" to find that "the female members of a tribe" qualified as a particular social group, observing that

"[b]oth gender and tribal membership are immutable characteristics." 422 F.3d 1187, 1199 (10th Cir. 2005).

Also reasoning from *Acosta*, the Ninth Circuit observed in *Mohammed v. Gonzales* that "the recognition that girls or women of a particular clan or nationality (or even in some circumstances females in general) may constitute a social group is simply a logical application . . . [of the conclusion that] a 'particular social group' is one united by . . . an innate characteristic." 400 F.3d 785, 797 (9th Cir. 2005); *accord Perdomo v. Holder*, 611 F.3d 662, 669 (9th Cir. 2010) (remanding BIA's decision that "women in Guatemala" could not constitute particular social group because it was "inconsistent with . . . *Acosta*"). Likewise, in *Cece v. Holder*, the Seventh Circuit found that, "in light of . . . *Acosta*," the applicant "established that she belongs to a cognizable social group" consisting of "young woman living alone in Albania" because "the attributes are immutable or fundamental." 733 F.3d 662, 677 (7th Cir. 2013). And, in *Hassan v. Gonzales*, the Eighth Circuit recognized the particular social group "Somali women" based on the applicant's "possession of the immutable trait of being female." 484 F.3d 513, 513 (8th Cir. 2007); *see also Ahmed v. Holder*, 611 F.3d 90, 96 (1st Cir. 2010) ("Gender a common, immutable characteristic can be a component of a viable 'social group' definition.").

2. *Other state signatories to the U.N. Convention have also adopted* Acosta*'s framework*

The INA follows the articulation of the five enumerated grounds for persecution found in the 1951 United Nations Convention relating to the Status of Refugees. *See* Convention relating to the Status of Refugees, adopted Jul. 28, 1951, entered into force Apr. 22, 1954, 189 UNTS 137; *see also INS v. Cardoza-Fonseca*, 480 U.S. 421, 437 (1987) (noting that "one of Congress' primary purposes [in passing the Refugee Act of 1980] was to bring United States refugee law into conformance with the [1967 Protocol relating to the Status of Refugees]" (internal quotation marks omitted)).[2] Given that "the definition of 'refugee' that Congress adopted is virtually identical to the one prescribed by Article 1(2) of the Convention," *Cardoza-Fonseca*, 480 U.S. at 437, the views of other state signatories to the Convention are relevant to the proper interpretation of the INA. *See Negusie v. Holder*, 555 U.S. 511, 537 (2009) ("When we interpret treaties, we consider the interpretations of the courts of other nations, and we should do the same when Congress asks us to interpret a statute in light of a treaty's language.") (Stevens, J., concurring and dissenting).

[2] The 1967 Protocol relating to the Status of Refugees removed certain temporal and geographical limitations in the 1951 Convention. *See* Protocol relating to the Status of Refugees, adopted Jan. 31, 1967, entered into force Oct. 4, 1967, 606 UNTS 267. The United States is a signatory to the 1967 Protocol, but not the 1951 Treaty.

Among other signatories, the *Acosta* framework and the consequent conclusion that gender may establish membership in a particular social group is well established in law. Eight years after the Board decided *Acosta*, the Supreme Court of Canada cited the decision in *Canada (Attorney General) v. Ward*, finding that particular social group "would embrace individuals fearing persecution on such bases as gender," an "immutable characteristic." [1993] 2 S.C.R. 689, 75, 79 (Can., S.C.C.). Following *Ward*, the Canadian courts have recognized particular social groups comprised of "Haitian women," *Josile v. Canada (Minister of Citizenship & Immigration)*, [2011] 382 FTR 188 (Can. FC, Jan. 17, 2011), at [10], [28]-[30], and "women in the [Democratic Republic of the Congo]," *Kn v. Canada (Minister of Citizenship & Immigration)*, (2011) 391 FTR 108 (Can. FC, June 13, 2011), at [30], among others similar categories. *See* JAMES C. HATHAWAY & MICHELLE FOSTER, THE LAW OF REFUGEE STATUS § 5.9.1 (2d ed. 2014) (collecting these and other cases).

In 1999, the United Kingdom House of Lords relied on the Board's decision to recognize "women in Pakistan" as a particular social group, observing that its conclusion was "neither novel nor heterodox," but "simply logical application of the seminal reasoning in *Acosta*." *Islam & Shah v. Sec'y of State Home Dep't*, [1999] 2 AC 629, 644-45 (U.K.). In 2006, the House of Lords affirmed its conclusion that gender alone may fall within the definition of a particular social

group when considering the case of a woman fleeing the threat of female genital mutilation ("FGM"). "[W]omen in Sierra Leone," Lord Cornhill wrote, "are a group of persons sharing a common characteristic which, without a fundamental change in social mores is unchangeable, namely a position of social inferiority compared with men." *Fornah (FC) v. Sec'y of State for Home Dep't*, [2006] UKHL 46, para. 31. Baroness Hale opined that the question whether the applicant had established her membership in a particular social group was "blindingly obvious," *id.* para. 83, and observed that "the world has woken up to the fact that women as a sex may be persecuted in ways which are different from the ways in which men are persecuted and that they may be persecuted because of the inferior status accorded to their gender in their home society," *id.* para. 86.

Echoing that sentiment (and relying on *Fornah*), the tribunals of New Zealand have noted that "it is indisputable that sex and gender can be the defining characteristic of a social group and that 'women' may be a particular social group." *Refugee Appeal No. 76044* para. 92 (NZ RSAA, 2008); *see also Minister for Immigration & Multicultural Affairs v. Khawar* (2002) 76 A.L.J.R. 667 (Aust.) (tribunal could find that "women in Pakistan" constitute particular social group).

3. Guidelines issued by the UNHCR and parties to the U.N. Convention acknowledge that gender may establish membership in a particular social group

Further support for the view that gender alone may establish membership in a particular social group comes from the United Nations High Commissioner for Refugees ("UNHCR"). As part of its supervisory responsibilities, the UNHCR provides interpretive guidance on the provisions of the 1951 Convention and 1967 Protocol relating to the Status of Refugees. U.S. courts have recognized that materials issued by the UNHCR constitute "persuasive authority in interpreting the scope of refugee status under domestic asylum law." *Miguel-Miguel v. Gonzales*, 500 F.3d 941, 949 (9th Cir. 2007); *see also Cardoza-Fonseca*, 480 U.S. at 439 n.22 (noting that UNHCR material "provides significant guidance" in the interpretation of the Convention, upon which U.S. asylum law is based); *Mohammed*, 400 F.3d at 798 (UNHCR "provides significant guidance for issues of refugee law").

In 2002, the UNHCR issued guidelines on "Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees." U.N. Doc. HCR/GIP/02/01 (May 7, 2002) ("UNHCR Gender-Related Persecution Guidelines"). Following *Acosta*'s *ejusdem generis* analysis, the UNHCR explained:

> [A] particular social group is a group of persons who share a common characteristic other than their risk of being persecuted, or who are perceived as a group by society. The characteristic will often be one which is innate, unchangeable, or which is

> otherwise fundamental to identity, conscience or the exercise of one's human rights.

Id.

"It follows," the UNHCR continued, "that sex can properly be within the ambit of the social group category, with women being a clear example of a social subset defined by innate and immutable characteristics." *Id.* The "characteristics" of women "also identify them as a group in society, subjecting them to different treatment and standards in some countries." *Id.* In other guidelines specifically considering membership in a particular social group, the UNHCR explained that "women may constitute a particular social group under certain circumstances based on the common characteristic of sex, whether or not they associate with one another based on that shared characteristic." Guidelines on International Protection: Membership of a Particular Social Group within the context of Article 1(A)(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, U.N. Doc. HCR/GIP/02/02 at 4 (May 7, 2002); *see also Mohammed*, 400 F.3d at 798 (quoting guidelines).

Even before the UNHCR issued these interpretive aids, several signatories to the U.N. Convention and Protocol produced their own guidelines on gender-related claims. In 1995, the United States issued guidelines regarding "asylum claims by women." *See generally* Memorandum from Phyllis Coven, INS Office of International Affairs, to All INS Asylum Officers and HQASM Coordinators 9

(May 26, 1995). Citing *Fatin*, in which the "court regarded gender, either alone or as part of a combination, as a characteristic that could define a particular social group within the meaning of the INA," the U.S. guidelines described that decision as consistent "with the statement of the Board in *Acosta* that 'sex' might be the sort of shared characteristic that could define a particular social group." *Id.* (citing *Fatin*, 12 F.3d at 1240); *see also In re Matter of Fauyiza Kasinga*, 21 I. & N. Dec. 357, 377 (BIA 1996) (Rosenberg, concurring) ("Our recognition of a particular social group based upon tribal affiliation and gender is also in harmony with the guidelines for adjudicating women's asylum claims issued by [INS].").

Canada issued gender-related guidelines in 1993. *See Immigration & Refugee Board of Canada*, Women Refugee Claimants Fearing Gender-Related Persecution: Guidelines Issued by the Chairperson Pursuant to Section 65(3) of the Immigration Act (Mar. 9, 1993). The Canadian guidelines (subsequently updated) explain that gender is the type of innate characteristic that may define a particular social group. *See Immigration & Refugee Board of Canada*, Women Refugee Claimants Fearing Gender-Related Persecution: Guidelines Issued by the Chairperson Pursuant to Section 65(3) of the Immigration Act (Nov. 13, 1996). Australia was also among the first to issue gender guidelines, producing a version in 1996 that included the statement: "[G]ender . . . may be a significant factor in recognising a particular social group. . . . [W]hilst being a broad category, women

nonetheless have both immutable characteristics and shared common social characteristics which may make them cognizable as a group and which may attract persecution." *Australian Department of Immigration and Multicultural Affairs*, Refugee and Humanitarian Visa Applicants: Guidelines on Gender Issues for Decision Makers § 4.33 (July 1996). The United Kingdom followed in 2000, issuing guidelines providing that "[p]articular social groups can be identified by reference to innate or unchangeable characteristics or characteristics that a woman should not be expected to change," including "gender." *Immigration Appellate Authority of the United Kingdom*, Asylum Gender Guidelines 41 (Nov. 2000).[3]

C. Gender Meets The Criteria The Board Has Added To Define A Particular Social Group Since *Acosta*

Despite the fact that courts in countries around the world have aligned themselves with *Acosta*, in recent years, the Board has "expanded the [particular social group] analysis beyond the *Acosta* test," identifying additional criteria required to establish a cognizable group. *Matter of M-E-V-G-*, 26 I. & N. Dec. 227, 232 (BIA 2014). Specifically, the Board has opined that the group must be "particular" and "socially distinct." *Id.* at 228. With respect to particularity, the Board has stressed that the group "must be defined by characteristics that provide a

[3] Scholars agree that gender can be the basis for membership in a particular social group. *See, e.g.*, DEBORAH ANKER, LAW OF ASYLUM IN THE UNITED STATES § 5.45 (2017 ed.); HATHAWAY & FOSTER, *supra*, § 5.9.1; Michelle Foster, *Why Are We Not There Yet: The Particular Challenge of Particular Social Group*, GENDER AND REFUGEE LAW 35 (2014).

clear benchmark for determining who falls within [it]." *Id.* at 229. With respect to social distinction, the Board has held that the applicant must offer evidence that "society in general perceives, considers, or recognizes persons sharing the particular characteristic to be a group." *Matter of W-G-R-*, 26 I. & N. Dec. 208, 217 (BIA 2014).[4]

It should be obvious that women as a group meet the Board's new requirements. There are clear "benchmarks" determining who is a woman and who is not. Indeed, in most countries, the sex of a newborn is listed on a birth certificate. And censuses and other calculations of a country's population often segregate men and women, providing population estimates for both categories. *See, e.g.*, U.S. Census, Quick Facts, *available at* https://www.census.gov/quickfacts/fact/table/US/PST045217.

For those reasons, women as a group are not "amorphous, overbroad, diffuse, or subjective." *Matter of M-E-V-G-*, 26 I. & N. Dec. at 239. They are also clearly identifiable in society, both by perception and by sight (although the latter is not necessary for purposes of the social group definition), *id.* at 240, and are

[4] Courts have criticized the particularity and social distinction requirements. *See, e.g.*, *Valdiviezo-Galdamez v. Attorney Gen.*, 663 F.3d 582, 607 (3d Cir. 2011); *Gatimi v. Holder*, 578 F.3d 611, 615-16 (7th Cir. 2009). *Amici* agree that those requirements are misguided insofar as they are inconsistent with the text of the INA as illuminated by *ejusdem generis*, and with the interpretation of the Convention and Protocol by sister signatories. *See* Respondent's Br. 38-39. As described above, however, the requirements of particularity and distinction do not foreclose particular social groups defined by gender alone.

considered to be a group, *Matter of W-G-R-*, 26 I. & N. at 217. Moreover, the Board has observed that a country's "culture of machismo and family violence," as well as its failure to enforce laws designed to protect women, can be evidence of "social distinction." *Matter of A-R-C-G*, 26 I. & N. Dec. 388, 394 (BIA 2014). That view is in line with court decisions and guidelines recognizing the uniquely vulnerable position women occupy in cultures that turn a blind eye to gender-based violence. *See Fornah*, [2006] UKHL 46, para. 31 ("[W]omen . . . are a group of persons sharing a common characteristic . . . namely, a position of social inferiority compared with men."); UNHCR Gender-Related Persecution Guidelines (stating that women's characteristics "identify them as a group in society, subjecting them to different treatment and standards in some countries").

Based on the Board's precedent, therefore, it is apparent that women as a group satisfy the particularity and social distinction criteria, whether or not those requirements have any basis in the refugee definition.[5]

[5] In its brief in this matter, DHS offers no rebuttal to the arguments outlined herein that gender alone may define a particular social group. DHS nonetheless contends that "examination of . . . foundational issues," such as the intent of the drafters of the Refugee Act of 1980, the 1951 U.N. Convention, and the 1967 Protocol, "is an exercise probably best left to rulemaking." DHS Br. 21 n.13. As is clear from the authorities cited above, whether gender alone can establish membership in a particular social group under the refugee definition is question of law, not policy.

D. The Size And Internal Diversity Of A Particular Social Group Defined By Gender Poses No Barrier To Recognition

Over the years, perhaps driven by a misguided belief that gender alone cannot define a particular social group because it sweeps too broadly, asylum applicants have proposed particular social groups that are "overly complicated and unnecessarily detailed." HATHAWAY & FOSTER, *supra*, § 5.9.1. Typically, these groups improperly "import[] other elements of the [refugee] definition, such as . . . well-founded fear . . . nature of the harm feared . . . and inability or unwillingness of the state to protect." *Id.*[6]

Efforts to narrow particular social groups beyond gender are unnecessary. Like gender, "race, nationality, religion, and even political opinion are . . . traits which are shared by large numbers of people." *Id.* Yet claims based on these characteristics are not viewed with skepticism simply because the categories are expansive. For example, when a Christian applicant for asylum cites religion as a

[6] For example, in *In re Fauziya Kasinga*, a decision notable for its correct result a grant of asylum for a woman fleeing the threat of FGM the Board defined the particular social group of which the applicant was part as "young women of the Tchamba-Kunsuntu Tribe who have not had FGM, as practiced by that tribe, and who oppose the practice." 21 I. & N. Dec. 357, 365 (BIA 1996). Rather than layering qualifiers on her particular social group (and considering her political opinion simultaneously), the Board should have analyzed the fact that the applicant had not had FGM in the context of her well-founded fear of persecution and/or whether she would be persecuted "on account of" her status. *See* HATHAWAY & FOSTER, *supra*, § 5.9.1; *see also Kasinga*, 21 I. & N. Dec. at 375-76 (Rosenberg, concurring) (noting that applicant's opposition to FGM was not relevant to her particular social group).

protected ground, the claim is not rejected at the outset because there are over two billion adherents to Christianity in the world. Similarly, political opinion-based claims are not turned away because a large number of a country's citizens oppose its repressive government.

Gender-based claims are no different. "Neither [particular social group] nor any [other] ground performs the function of the entire refugee definition." ANKER, *supra*, § 5:45. Rather, "[particular social group] is only one element of eligibility [for refugee status]," and each of the other elements including nexus, well-founded fear, and failure of state protection has an equally critical role to play in determining whether an applicant qualifies for asylum. *Id.* No matter what protected ground is alleged race, religion, particular social group or any other "legitimate concerns about particularizing or individualizing a claim appropriately should be addressed through other definitional criteria." *Id.* As the Tenth Circuit has explained:

> There may be understandable concern in using gender as a group-defining characteristic. One may be reluctant to permit, for example, half a nation's residents to obtain asylum on the ground that women are persecuted there. But the focus with respect to such claims should be not on whether either gender constitutes a social group (which both certainly do) but on whether the members of that group are sufficiently likely to be persecuted that one could say that they are persecuted "on account of" their membership.

Niang, 422 F.3d at 1199-1200.

Apart from being unnecessary, efforts to narrow gender-based particular social groups have pernicious effects. First, overly detailed groups often "fall foul of the established principle that it is impermissible to define the group solely by reference to the threat of persecution." HATHAWAY & FOSTER, *supra*, § 5.9.1 (quotation marks omitted). As Baroness Hale put it in the House of Lords' decision in *Fornah*, this phenomenon "is a particularly cruel version of Catch 22: If not all the group are at risk, then the persecution cannot be caused by their membership of the group; if the group is reduced to those who are at risk, it is then defined by the persecution alone." [2006] UKHL 46, para. 113; *see, e.g.*, *Escobar-Batres v. Holder*, 385 F. App'x 445 (6th Cir. 2010) ("Escobar's proposed social group is simply too broad, as it consists of any female teenage citizen who refuses to join the *Maras* . . . . Although Escobar attempts to narrow her proposed group by emphasizing that its members are harassed, beaten, tortured, and even killed for not joining the *Maras*, . . . a social group may not be circularly defined by the fact that it suffers persecution." (internal quotation marks omitted)). [7]

[7] Not all particular social groups narrowed beyond gender suffer from these flaws. For example, in *Matter of A-R-C-G-*, the Board recognized the particular social group "married women in Guatemala who are unable to leave their relationship." 26 I. & N. Dec. 388 (BIA 2014). The Board followed *Acosta* in recognizing that the group was defined by immutable characteristics, citing gender, nationality, and relationship status. *Id.* at 388-89. Even though it was unnecessary to cabin the particular social group beyond gender, the group the Board recognized did not improperly subsume other elements of the refugee definition.

Second, the practice of defining and limiting particular social groups leads to the constant relitigation of claims and a lack of meaningful guidance from which applicants can establish their entitlement to protection. Rather than prolonging this chaotic approach, the Attorney General should take this opportunity to state clearly that gender is sufficient to define a particular social group. Such a statement would recognize an unfortunate but unavoidable truth: Women are vulnerable to persecution "in ways which are different from the ways in which men are persecuted[,] and . . . [are] persecuted because of the inferior status accorded to [their] gender" in societies around the world. *Fornah*, [2006] UKHL 46, para. 86.

CONCLUSION

Should he reach the merits of this case, the Attorney General should affirm the continuing validity of *Acosta*, recognize that gender is sufficient to establish membership in a particular social group, and hold that respondent qualifies for asylum and withholding of removal.

Like *Acosta*, *A-R-C-G-* has been cited approvingly in numerous courts of appeals since it was decided in 2014. *See, e.g.*, *Peres-Rabanales v. Sessions*, 881 F.3d 61 (1st Cir. 2018); *Guzman-Alvarez v. Sessions*, 701 F. App'x 54 (2d Cir. 2017); *Gaitan-Bernal v. Sessions*, 695 F. App'x 224 (9th Cir. 2017); *Marikasi v. Lynch*, 840 F.3d 281 (6th Cir. 2016). Moreover, DHS has taken the position that similar particular social groups are cognizable since at least 2004. *See* DHS Position on Respondent's Eligibility for Relief, *Matter of R-A-*, at 26-28 (2004); DHS Supplemental Brief, *Matter of L-R-*, at 14-15 (2009).

In light of *A-R-C-G-*'s fidelity to *Acosta*, its acceptance in the courts, and DHS's longstanding support for the position the Board adopted, *amici* join respondent in urging the Attorney General to affirm the holding in *A-R-C-G-*.

Dated: April 27, 2018

Respectfully submitted,

Nancy Kelly
Deborah Anker
John Willshire Carrera
Sabi Ardalan
Phil Torrey
HARVARD LAW SCHOOL
1563 Massachusetts Ave.
Cambridge, M.A. 02138
Phone: 617-584-2974
Fax: 617-495-8595

Mark R. Barr
LITCHER IMMIGRATION
1601 Vine St.
Denver, C.O. 80206
Phone: 303-554-8400

Benjamin Casper Sanchez, Director
JAMES H. BINGER CENTER FOR NEW AMERICANS
UNIVERSITY OF MINNESOTA LAW SCHOOL
190 Mondale Hall
229 19th Ave. South
Minneapolis, M.N. 55455
Phone: 612-625-6484

/s/Steven H. Schulman
Steven H. Schulman
Martine E. Cicconi
AKIN GUMP STRAUSS HAUER & FELD LLP
1333 New Hampshire Ave., NW
Washington, D.C. 20036
Phone: 202-887-4000
Fax: 202-887-4288
sschulman@akingump.com

Eleanor Acer
HUMAN RIGHTS FIRST
75 Broad St., 31st Floor
New York, N.Y. 10004
Phone: 212-845-5200
Fax: 212-845-5299

Wendy Young, President
KIDS IN NEED OF DEFENSE (KIND)
1300 L St. NW, 11th Floor
Washington, D.C. 20005
Phone: 202-824-8685

Counsel for Amici Curiae

CERTIFICATE OF COMPLIANCE

This brief complies with the instructions in the Attorney General's referral order dated March 7, 2018, because the brief contains 5,214 words, excluding the cover page, Table of Contents, Table of Authorities, signature block, Certificate of Compliance, and Certificate of Service.

DATED: April 27, 2018 /s/Steven H. Schulman

CERTIFICATE OF FILING

On April 27, 2018, I, Steven H. Schulman, hereby certify that the foregoing brief was submitted electronically to AGCertification@usdoj.gov and in triplicate via FedEx to:

United States Department of Justice
Office of the Attorney General, Room 5114
950 Pennsylvania Avenue, NW
Washington, DC 20530

DATED: April 27, 2018 /s/Steven H. Schulman

CERTIFICATE OF SERVICE

On April 27, 2018, I, Steven H. Schulman, hereby certify that I mailed a copy of this brief to the U.S. Department of Homeland Security, Office of the Chief Counsel at 5701 Executive Center Drive, Suite 300, Charlotte, NC, 28212, by U.S. Postal Service.

I further certify that on April 27, 2018, I mailed copies of this brief via FedEx to the parties at the following addresses:

Attn: Karen Musalo, Blaine Bookey and Eunice Lee
Center for Gender & Refugee Studies
University of California Hastings College of the Law
200 McAllister Street
San Francisco, CA 94102

Andrés López
The Lopez Law Firm, PLLC
5701 Executive Center Dr., Ste 102
Charlotte, NC 28211
alopez@llfimmigration.com

Ben Winograd
Immigrant & Refugee Appellate Center, LLC
3602 Forest Drive
Alexandria, VA 22302

DATED: April 27, 2018 /s/Steven H. Schulman

Christopher J. Hajec
Elizabeth A. Hohenstein
Immigration Reform Law Institute
25 Massachusetts Ave. NW, Suite 335
Washington, D.C. 20001
(202) 232-5590
chajec@irli.org
ehohenstein@irli.org

Attorneys for Amicus Curiae Immigration Reform Law Institute

UNITED STATES DEPARTMENT OF JUSTICE
OFFICE OF THE ATTORNEY GENERAL
WASHINGTON, D.C.

In the Matter of

A-B-,	Redacted
Respondent.	In Removal Proceedings

REQUEST TO APPEAR AS AMICUS CURIAE AND SUPPLEMENTAL BRIEF OF THE IMMIGRATION REFORM LAW INSTITUTE

TABLE OF CONTENTS

INTEREST OF AMICUS CURIAE

The Immigration Reform Law Institute ("IRLI") is a not for profit 501(c)(3) public interest law firm incorporated in the District of Columbia. IRLI is dedicated to litigating immigration-related cases on behalf of United States citizens, as well as organizations and communities seeking to control illegal immigration and reduce lawful immigration to sustainable levels. IRLI has litigated or filed *amicus curiae* briefs in many immigration-related cases before federal courts and administrative bodies, including *Trump v. Int'l Refugee Assistance Project,* 137 S. Ct. 2080 (2017); *United States v. Texas*, 136 S. Ct. 2271 (2016); *Arizona Dream Act Coal. v. Brewer*, 818 F.3d 101 (9th Cir. 2016); *Washington All. of Tech. Workers v. U.S. Dep't of Homeland Sec.*, 74 F. Supp. 3d 247 (D.D.C. 2014); *Save Jobs USA v. U.S. Dep't of Homeland Sec.*, No. 16-5287 (D.C. Cir., filed Sept. 28, 2016); *Matter of Silva-Trevino*, 26 I. & N. Dec. 826 (B.I.A. 2016); and *Matter of C-T-L-*, 25 I. & N. Dec. 341 (B.I.A. 2010).

ISSUES PRESENTED

The Attorney General has asked for supplemental briefing on the following issue:

- Whether, and under what circumstances, being a victim of private criminal activity constitutes a cognizable "particular social group" for the purposes of an application for asylum or withholding of removal.

SUMMARY OF THE FACTS

Respondent is a citizen of El Salvador. She provided testimony and written statements, which did not coincide completely, about domestic abuse committed by her husband. She stated that her husband mentally and physically abused her over a number of years; that, in 2008, she separated and moved away from her husband; and that, in 2013, she divorced him. After the divorce, respondent claimed that he continued to threaten and abuse her, and that, in January

2014, he raped her. She also claimed that her ex-husband's brother, a local police officer, made threatening statements to her, and commented that she would always be in a relationship with her ex-husband because of the children they had together. She claimed that another friend of her ex-husband told her that if her ex-husband killed her, he would help dispose of her body. While the Immigration Judge rejected her asylum claim, the Board of Immigration Appeals (Board) sustained her appeal, finding that her proposed particular social group, "El Salvadoran women who are unable to leave their domestic relationships where they have children in common," fulfilled the asylum requirements of 8 U.S.C. § 1158(b)(1).

SUMMARY OF THE ARGUMENT

Being a victim of private criminal activity, by itself, does not place one in a particular social group for asylum purposes. Crime victims are not a distinctive social group. Even assuming, *arguendo*, that such victims could comprise a particular social group, they could not prove that the harm they suffered was on account of their membership in that group and that the government was unwilling or unable to protect them.

When the proper analysis is applied to the Board's prior decision in *Matter of A-R-C-G-*, 26 I. & N. Dec. 388, 395 (B.I.A. 2012), it becomes clear that that case was wrongly decided, and that domestic violence-based asylum claims do not fulfill the statutory requirements.

ARGUMENT

Under 8 U.S.C. § 1158(b)(1)(A), an alien making an asylum claim must fulfill the definition of "refugee" by establishing "that race, religion, nationality, membership in a particular social group, or political opinion was or will be at least one central reason for persecuting the applicant." In *Matter of Acosta*, the Board articulated the standard for a particular social group by finding that a particular social group must share a common, immutable

characteristic that its members cannot or should not be required to change. 19 I. & N. Dec. 211, 233 (B.I.A. 1985). In recent years, the BIA has clarified the *Acosta* definition, finding that the particular social group must be: (1) composed of members who share a common immutable characteristic, (2) socially distinct within the society in question and (3) defined with particularity. *Matter of M-E-V-G-*, 26 I. & N. Dec. 227, 237 (B.I.A. 2014) (determining that "Honduran youth who have been actively recruited by gangs but who have refused to join because they oppose gangs" is not a particular social group for an asylum claim). An adjudicator may use various objective and subjective sources to determine if an applicant is eligible for asylum based upon the proposed social group. *Matter of A-R-C-G-*, 26 I. & N. Dec. 388, 395 (B.I.A. 2012).

Establishing that a particular social group exists is only the first step in granting asylum under the particular social group category. The asylum applicant must also prove harm that rises to the level of persecution;[1] that a nexus exists between the particular social group and persecution; and that the government was unwilling or unable to protect the applicant from the persecution. If the applicant is found to fulfill the definition of a refugee, the applicant may still be denied asylum if future persecution can be avoided "by relocating to another part of the applicant's country of nationality . . . [if] under the circumstances, it would be reasonable to expect the applicant to do so." 8 C.F.R. § 1208.13(b)(1)(i)(B).

I. "Victims Of Private Criminal Activity" Is Not A Particular Social Group.

A. "Victims Of Private Criminal Activity" Is Defined Based Solely On The Harm Suffered.

Victims of private criminal activity do not comprise a particular social group under the *Acosta* definition because the shared characteristic defining the group cannot be merely that its

[1] *Amicus* will not be addressing this element.

members suffered a common harm. *See Matter of S-E-G-*, 24 I. & N. Dec. 579, 584 (B.I.A. 2008) (holding that "Salvadoran youth who refuse recruitment into the MS-13 criminal gang or their family members" did not constitute a particular social group); *In Re C-A-*, 23 I. & N. Dec. 951, 960 (B.I.A. 2006) (holding the group "former noncriminal drug informants working against the Cali drug cartel" did not constitute a particular social group). To define a particular social group solely by the harm suffered is circular, *Moreno v. Lynch*, 826 Fed. App'x 862, 864 (4th Cir. 2015), and would not articulate a workable standard. *Cece v. Holder*, 733 F.3d 662, 681 (7th Cir. 2013) (Easterbrook, J., dissenting) ("The BIA has held that a 'social group' cannot be identified by asking who was mistreated. For if the persecutors' acts define social groups, then again § 1101(a)(42)(A) effectively offers asylum to all mistreated persons, whether or not race, religion, politics, or some extrinsically defined characteristics (such as tribal membership) account for the persecution.") (internal citation omitted).

The problem persists even if the group is further defined by other common characteristics. *Matter of R-A-*, 22 I. & N. Dec. 906, 919 (B.I.A. 2001) ("But the social group concept would virtually swallow the entire refugee definition if common characteristics, coupled with a meaningful level of harm, were all that need be shown."). Thus, a group comprised of victims of private criminal activity who were also women, or married women, or El Salvadoran women who are unable to leave their domestic relationships where they have children in common, is still defined crucially by the harm suffered. A common harm suffered does not qualify as an immutable characteristic and cannot form the basis for an asylum claim.

B. "Victims Of Private Criminal Activity" Is Not Particular.

In addition to having an immutable characteristic, the proposed social group must also be defined with particularity. That is, the group cannot be "too amorphous . . . [and must] create a

benchmark for determining group membership." *Matter of M-E-V-G-*, 26 I. & N. Dec. at 239 (citing *Matter of A-M-E- & J-G-U-*, 24 I. & N. Dec. 69, 76 (B.I.A. 2007)). A proposed social group must not be "overbroad, diffused, or subjective." *Id.* (citing *Ochoa v. Gonzales*, 406 F.3d 1166, 1170-71 (9th Cir. 2005)).

"Victims of private criminal activity" is obviously overbroad. *See Kante v. Holder*, 634 F.3d 321, 327 (6th Cir. 2011) (holding that the social group "women subject to rape as a method of government control" was too "generalized and far-reaching [since] . . . it has not previously served as a definable limitation."). Private criminal activity includes every type of crime from violent felonies to financial persecution, and victimizes a wide variety of people. As the Ninth Circuit has explained:

> Individuals falling within the parameters of this sweeping demographic division naturally manifest a plethora of different lifestyles, carrying interests, diverse cultures, and contrary political leanings and it is so broad and encompasses so many variables that to recognize any person who might conceivably establish membership would render the definition of refugee meaningless.

Sanchez-Trujillo v. INS, 801 F.2d 1571, 1576 (9th Cir. 1986) (holding that "young, working class males who have not served in the military of El Salvador" is not a particular social group) (internal quotation marks, brackets, and ellipses omitted).

C. "Victims Of Private Criminal Activity" Is Not Socially Distinct.

The final consideration in whether the proposed group is a particular social group is social visibility. It is not the persecutor's perception of the victim that determines whether a particular social group exists; rather, it is society's viewpoint of the group that matters. The persecutor's perception carries analytical weight when it comes to establishing the nexus requirement, but not in establishing whether the group is socially distinct. The society in question must "perceive" the proposed group as distinct from the greater society because of the

shared characteristic being asserted by the proposed social group. *Matter of S-E-G-*, 24 I. & N. Dec. at 586. Evidence that others have suffered the same or similar harm is not enough to establish that the group is "perceived as a cohesive group by society." *Cano v. Lynch*, 809 F.3d 1056, 1059 (9th Cir. 2016) (determining that "escapee Mexican child laborers" are not socially distinct) (citation omitted).

Because the proposed group "victims of private criminal behavior" is so broad, there is no country report that could possibly support its social distinctiveness. Private criminal activity occurs in all countries. Regardless of the levels of crime, there is no indication that victims of private criminal activity are perceived any differently than other citizens in any country, including El Salvador. As the Department of State's Bureau of Diplomatic Security stated: "[c]rimes of every type routinely occur, and crime is unpredictable, gang-centric, and characterized by violence directed against both known victims and targets of opportunity. According to a Central American University (UCA) poll from January 6, 2016, 24.5% of Salvadorans were victims of crime in 2015." *El Salvador 2017 Crime & Safety Report*, Department of State's Bureau of Diplomatic Security (Feb. 22, 2018), https://www.osac.gov/pages/ContentReportDetails.aspx?cid=21308; *see also El Salvador 2016 Human Rights Report*, Department of State 1 (April 12, 2017) (reporting "widespread extortion and other crimes in poor communities throughout the country.").

Instead of these numbers weighing in favor of granting asylum to victims of private criminal activity in El Salvador, they show that the private criminal activity that occurs in El Salvador is not treatment meted out to a perceived social group but a pervasive problem that afflicts all ethnicities, genders, religions, and so on. Thus, there is no social distinction between those who have been a victim of private criminal activity and those who have not. Rampant

private criminal activity or generalized civil unrest do not show that society views victims as a group distinct from society. *See Konan v. Att'y Gen. of the U.S.*, 432 F.3d 497, 506 (3d. Cir. 2005) ("[G]eneral conditions of civil unrest or chronic violence and lawlessness do not support asylum.").

II. Victims of Private Criminal Activity Cannot Prove That The Harm They Suffered Was "On Account Of" Membership In The Proposed Particular Social Group.

After establishing a particular social group and the applicant's membership in the group, an applicant for asylum must then link the particular social group to the harm suffered by demonstrating that the harm was perpetrated "on account of" that membership. 8 U.S.C. § 1101(a)(42)(A). The REAL ID Act clarified this nexus requirement by providing that the protected ground must be "at least one central reason" for the harm suffered. Pub. L. No. 109-13, div B, 119 Stat. 231 (2005); *see also Matter of Fuentes*, 19 I. & N. Dec. 658, 662 (B.I.A.1988) (holding that the asylum applicant "bear[s] the burden of establish facts on which a reasonable person would fear that the danger rises on account of" their membership in the specific social group). The Board has stated that the persecutor's group-related motives must not be "incidental, tangential, superficial, or subordinate to another reason for harm." *Matter of J-B-N- & S-M-*, 24 I. & N. Dec. 208, 214 (B.I.A. 2008)).

The applicant must prove that the harm was suffered "'*because of*' a protected ground[,]" and therefore the persecutor's motives must be assessed. *Parussimova v. Mukasey*, 555 F.3d 734, 739 (9th Cir. 2009) (citing *Elias-Zacarias*, 502 U.S. at 483 (emphasis in the original)) (holding that the protected ground must be "essential" to the decision to persecute the applicant). While related to establishing a particular social group, the nexus analysis is its own separate requirement. "[I]t is not enough to simply identify the common characteristics of a statistical grouping of a portion of the population at risk. Rather, . . . there must be a showing that the

claimed persecution is on account of the group's identifying characteristics." *Matter of E-A-G-*, 24 I. & N. Dec. 591, 595 (B.I.A. 2008) (internal citations and quotation marks omitted). "As the Supreme Court has held: 'since the statute makes motive critical, [an asylum applicant] must provide some evidence of it, direct or circumstantial.' *INS v. Elias-Zacarias*, 502 U.S. 478, 483 (1982)." H. Rep. No. 109-72, at 162. Conjecture about the link between the harm and a protected ground will not suffice for establishing the nexus requirement. *Singh v. Mukasey*, 543 F.3d 1, 6 (1st Cir. 2008) (determining that proposed persecutors were economically motivated rather than motivated by a protected ground when they assaulted respondent and eventually occupied part of his home after he left India).

Victims of private criminal activity cannot establish a nexus between their particular social group and the crime that occurred because of two flaws that cannot be remedied regardless of the harm perpetrated against the victim. "[A]liens fearing retribution over purely personal matters, or aliens fleeing general conditions of violence and upheaval . . . would not qualify for asylum." *Matter of Magharrabi*, 19 I. & N. Dec. at 439, 447 (B.I.A. 1987).

First, as previously stated, general civil unrest or economic hardships facing the country as a whole, rather than just the victim, do not sufficiently link the harm to membership in the particular social group. *Ochave v. INS*, 254 F.3d 859, 865 (9th Cir. 2001). Private criminal activity, even activity that rises to the level of persecution, such as rape, is often the by-product of general civil unrest or economic hardships rather than persecution "on account" of protected grounds. *Gormley v. Ashcroft*, 364 F.3d 1172, 1177 (9th Cir. 2004).

Just as civil unrest is a hurdle in defining a particular social group, it can also prevent an applicant from proving a true nexus between the harm suffered and the protected ground. Victims of private criminal activity are being harmed against a backdrop of unrest or rampant

private criminal activity where the violent acts committed against them are easily attributed to general country conditions. *See Konan*, 432 F.3d at 506 (3d. Cir. 2005). In countries that have pervasive criminal activity, it is difficult to establish the required nexus between a social group and the abuse suffered because victims can be fungible to persecutors. This is especially true where victims do not know who their persecutors are. Without knowing the motivations of their persecutors, asylum claimants cannot establish that their membership in a particular social group is at least one central reason why the acts of persecution were committed. If this were not the rule, whole nations would be eligible for asylum because of civil war, gang activity, or in this instance, private criminal activity.

An example of a "civil unrest" hurdle that prevents an asylum applicant from establishing a particular social group is generalize gang recruitment and associated criminal acts. In recent years, people have fled countries where gangs are powerful and target civilians for varying reasons. Some courts, however, have been hesitant to find that different proposed particular social groups meet the asylum requirements when they are based on gang activity. *See, e.g.*, *Matter of E-A-G-*, 24 I. & N. Dec. at 595 (finding that "persons resistant to gang membership" was not a particular social group); *Zentino v. Holder*, 622 F.3d 1007, 2016 (9th Cir. 2010) ("An alien's desire to be free from harassment by criminals motivated by theft or random violence by gang members bears no nexus to a protected ground."). Gangs may target individuals for various reasons, including attempting to gain more gang territory, extortion, or simply because the person is an easy target. *Alvizures-Gomes v. Lunch*, 830 F.3d 49, 53 (1st Cir. 2016) (listing various motivations a gang may have for targeting an individual); *Gjura v. Holder*, 502 Fed. App'x 91, 92 (2d Cir. 2012) (holding that the nexus requirement is not established when individuals outside of the proposed social group are equally as likely to become victims of

harm). That one was a victim of such activity does not mean that it was motivated by one's membership in a particular social group.

The second obstacle to the nexus requirement is the complete opposite of generalize civil unrest, but is just as fatal to an asylum application. This second impediment occurs when the perpetrator specifically targeted only one victim because of personal conflict, not on account of one of the five protected grounds for asylum. Mixed motives asylum cases can provide a viable asylum claim, *Martinez-Galarza v. Holder*, 782 F.3d 990, 993-94 (8th Cir. 2015), but "[p]urely personal retribution is, of course, not persecution . . . ." *Grava v. INS*, 205 F.3d 1177, 1181 n.3 (9th Cir. 2000); *Matter of G-Y-*, 20 I. & N. Dec. 794, 799 (B.I.A. 1994).

Where the victim knows the persecutor personally, the natural conclusion is that the harm was perpetrated for private reasons, separate and apart from any protected ground. Thus, establishing persecution based on a protected ground can be extremely difficult where the persecutor is a friend or family member, whether or not she previously had a good or cordial relationship with the applicant. Of course, "a retributory motive [may] exist[] alongside a protected motive," but the applicant must show that membership in the proposed social group was one central reason for the persecution committed. *Madrigal v. Holder*, 716 F.3d 499, 506 (9th Cir. 2013). The applicant would have to provide evidence that it was not personal retribution or feelings of personal ill will towards the victim that motivated the harm.

III. That Private Crime Occurs Is Not Proof That The Government Is Unable Or Unwilling To Control It.

The final requirement an applicant must establish is either that harm is inflicted by the government or that the government is unable or unwilling to control the persecutors. *Matter of Acosta*, 19 I. & N. Dec. at 222. An applicant must show more than just a "difficulty controlling behavior" or ineffectiveness in enforcement of protective laws. *See Salman v. Holder*, 687 F.3d

991, 995 (8th Cir. 2012) (citation omitted); *Galina v. INS*, 213 F.3d 955, 958 (7th Cir. 2000) (stating that the applicant must show that the government "condoned it or at least demonstrated a complete helplessness to protect the victims"); *In re McMullen*, 17 I. & N. Dec. 542, 546 (B.I.A. 1980) (finding difficulty authorities had in controlling private behavior insufficient). The applicant "must demonstrate that the government condoned the private behavior 'or at least demonstrated a complete helplessness to protect the victims. In particular, 'the fact that police take no action on a particular report does not necessarily mean that the government is unwilling or unable to control criminal activity, because there may be reasonable basis for inaction.'" *Salman*, 687 F.3d at 995 (citations omitted). If the government is actively striving to stop the violence that is occurring, this final element of the asylum analysis is unfulfilled. *Lemus v. Lynch*, 611 Fed. App'x 813, 815-16 (citing 8 C.F.R. § 1208.13(b)(2)(iii)); *Gjura*, 502 Fed. App'x at 92 (same).

Perfect protection from harm is not the standard by which this requirement is judged. *See, e.g.*, *Burbiene v. Holder*, 568 F.3d 251, 255 (1st Cir. 2009). The fact that private criminal actions occur and the government cannot completely "eradicate" them does not negate the government's efforts to curb criminal behavior. *See id.* Random, private criminal acts do not establish persecution on account of a protected ground. *See Gormley v. Ashcroft*, 364 F.3d at 1177 (citing *Rostomian v. INS*, 210 F.3d 1088, 1089 (9th Cir. 2000)). Country reports may reflect efforts by the government to address different types of private criminal behavior or criminal behavior generally. That efforts are not as effective as hoped does not mean that the government is helpless or unwilling to control the criminal activity. *Burbiene*, 568 F.3d at 255-56 (finding that while a country may experience setbacks in combating crime, such setbacks are

not indicative of persecution occurring on account of a protected ground). Change takes time, and a country's initiatives should be acknowledged and respected in asylum proceedings.

IV. Relocation To Another Region In Asylum Claims Based On Private Criminal Activity Is Likely Reasonable.

While past persecution creates the presumption of future persecution, 8 C.F.R. § 1208.13(b)(1), the government can rebut this presumption by showing that the alien can avoid future persecution by relocating and, under all of the circumstances, relocation would be reasonable. *Id.* at 1208.13(b)(1)(i)(B). When considering whether relocation would be reasonable, the adjudicator should take into account numerous considerations, such as whether the applicant would face serious harm in the suggested new location, civil strife, infrastructure, and social and cultural restraints. *Id.* at 1208.13(b)(3). This creates a two-step relocation analysis: (1) the Board must determine if there is a safe area within the country; and then (2) if there is a safe area, whether it would be reasonable to relocate. *Matter of M-Z-M-R-*, 26 I. & N. Dec. 28, 32 (B.I.A. 2012).

While the relocation analysis will be fact-based, an adjudicator analyzing a victim of criminal activity asylum claim will likely find that there is another region in the country where relocation is safe and reasonable. Where the victim does not know the persecutor and the motives are likely based on economic or personal gain, relocation becomes very possible. For example, if the victim was, at random, beaten and robbed at gunpoint for his personal belongings because he was an easy target, it is unlikely that the criminal would travel elsewhere in the country in order to target that particular victim again.

V. The Proposed Particular Social Groups Defined By Domestic Violence Do Not Fulfill The Asylum Requirements.

The Board wrongly decided *Matter of A-R-C-G-*, 26 I. & N. Dec. 388 (B.I.A. 2014), because victims of domestic violence do not qualify for asylum regardless of their gender, nationality, or marital status. Applying the above requirements to *Matter of A-R-C-G* would reveal that the proposed social group found in that case, "married women in Guatemala who are unable to leave their relationship," was not a particular social group based on an immutable characteristic, and that the applicant's membership in the group was not a central reason that the harm occurred. Also, respondent in *Matter of A-R-C-G-* was able to relocate within the country, but chose rather to return to live with her husband.

First, the group "married women in Guatemala who cannot leave a relationship" is not based on an immutable characteristic. The Board initially attempted define the group by gender. *Id.* at 392-393. While gender-based particular social groups are possible, gender alone does not necessarily justify asylum because rarely do all women, without any other factor to consider, suffer persecution in a society. *See Gomez v. INS*, 947 F.2d 660, 664 (2d Cir. 1991). Even if respondent argued that the particular social group was Guatemalan women (nationality and gender), her claim could still not survive because the abuse suffered was not motivated by her status as a Guatemalan woman. Rather, the abuse arose from the personal connection she had with her partner.

The Board then attempted to state that inability to leave a relationship was the immutable characteristic of the proposed social group because such inability may be based on "religion, cultural or legal restraints." *Matter of A-R-C-G*, 26 I. & N. Dec at 393. But these were not the reasons why the respondent could not leave her relationship. The respondent could not leave her relationship because of abuse, not because the government refused to grant a divorce. Indeed,

the Board's determination that respondent could not leave her relationship and thus was even a member of the proposed social group is questionable. The Board also recognized that respondent had left and moved away from her abuser for three months but voluntarily moved back and resumed her relationship when he promised the abuse would end. *Id.* at 389. Not only does this show that she was not in the proposed social group because she was able to leave her relationship and the government did not force her to return, it also shows that relocation was reasonable because respondent could move to another part of the country and not suffer harm.

Most crucially, there was no evidence that Guatemalan women who could not leave their relationships was a social group recognized as distinct by Guatemalan society, only broad statements concerning sexual offenses and family violence. *Id.* at 393-94. That societal or economic pressures might force some women in that country, to remain married and unseparated from their husbands, despite the availability of divorce a point that was never established in the case does not mean that Guatemalan society recognizes such women as a distinct group. And even if a group defined as women trapped in abusive relationships would be more distinct, it would be defined based solely on the harm suffered by its members, and harm suffered cannot form the sole basis of a particular social group. *Kante v. Holder*, 634 F.3d at 327 (6th Cir. 2011) (finding that "women subjected to rape as a method of government control" was not a particular social group as its definition was circular and based on harm).

For all of these reasons, *Matter of A-R-G-C-* was wrongly decided.

CONCLUSION

For the foregoing reasons, the Attorney General should determine that a group consisting of victims of private criminal behavior does not fulfill the statutory requirements of asylum.

Respectfully submitted,

/s/ Christopher J. Hajec
Christopher J. Hajec
Elizabeth A. Hohenstein
Immigration Reform Law Institute, Inc.
25 Massachusetts Ave, NW, Suite 335
Washington, DC 20001
Phone: 202-232-5590
Fax: 202-464-3590
chajec@irli.org
ehohenstein@irli.org

Attorneys for *Amicus Curiae*

CERTIFICATE OF SERVICE

I hereby certify that, on April 27, 2018, I electronically submitted the foregoing *amicus curiae* brief to the United States Department of Justice via email, and, via first class mail, sent three copies to the Office of the Attorney General at the United States Department of Justice for distribution to the parties.

/s/ Elizabeth A. Hohenstein
Elizabeth A. Hohenstein

Attorney for *Amicus Curiae*

UNITED STATES DEPARTMENT OF JUSTICE
OFFICE OF THE ATTORNEY GENERAL

MATTER OF A-B-,

Respondent

Referred from:
United States Department of Justice
Executive Office for Immigration Review
Board of Immigration Appeals

BRIEF AMICI CURIAE OF SIXTEEN FORMER IMMIGRATION JUDGES AND MEMBERS OF THE BOARD OF IMMIGRATION APPEALS URGING VACATUR OF REFERRAL ORDER AND IN SUPPORT OF RESPONDENT

Megan B. Kiernan (SBN 302091)
mkiernan@gibsondunn.com
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, DC 11101-5306
Telephone: (202) 955-8500
Facsimile: (202) 467-0539

Ronald Kirk (SBN 1022961)
rkirk@gibsondunn.com
Chelsea G. Glover (SBN 24097738)
cglover@gibsondunn.com
GIBSON, DUNN & CRUTCHER LLP
2100 McKinney Avenue, Suite 1100
Dallas, TX 75201-6912
Telephone: (214) 698-3100
Facsimile: (214) 571-2900

Lalitha D. Madduri (SBN 301236)
lmadduri@gibsondunn.com
GIBSON, DUNN & CRUTCHER LLP
333 South Grand Avenue
Los Angeles, CA 90071-3197
Telephone: (213) 229-7000
Facsimile: (213) 229-7520

Amer S. Ahmed (SBN 500630)
aahmed@gibsondunn.com
GIBSON, DUNN & CRUTCHER LLP
200 Park Avenue
New York, NY 10166-0193
Telephone: (212) 351-4000
Facsimile: (212) 351-4035

Counsel for Amici Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES
(continued)

Page(s)

Statute

Administrative Decisions

Regulations

TABLE OF AUTHORITIES
(continued)

Page(s)

Other Authorities

INTRODUCTION

Amici Curiae are sixteen former immigration judges and members of the Board of Immigration Appeals ("Board"). Out of respect for the law to which they have dedicated their careers, Amici feel compelled to file this brief in support of Respondent. Amici are deeply concerned about the procedural violations in this case in particular the Attorney General's certification of a question that was not ***properly*** considered by the Immigration Judge and was not considered ***at all*** by the Board. This complete disregard for established procedure is alarming. It plainly violates binding federal regulations governing the narrow circumstances under which Attorney General certification is permitted and it raises serious due process concerns.

Ultimately, it is within Congress's authority not the Attorney General's to define the boundaries of asylum. And Congress has already determined that a person can qualify for asylum based on persecution that independently might constitute private criminal activity.

Amici urge the Office of the Attorney General not to take any further action on a question that is not properly before it, and therefore urge that the referral order be vacated.

STATEMENT OF INTEREST OF AMICI CURIAE

Below is a list of the relevant experience of each of the sixteen former immigration judges and members of the Board submitting this brief. Some have served as trial attorneys in the Department of Justice's Office of Immigration Litigation. Some have worked in the General Counsel's Office for the Executive Office for Immigration Review. Others have assisted in the drafting of the federal regulations discussed in this brief. Each is intimately familiar with the immigration-court system and, critically, with its governing procedures. After devoting their

careers to that system, Amici have a distinct interest in ensuring that the system continues to operate in a fair, predictable manner consistent with decades-old federal regulations.

- **The Honorable Steven Abrams** served as an Immigration Judge at the New York, Varick Street, and Queens Wackenhut Immigration Courts in New York City. Prior to his appointment to the bench, he worked as a Special U.S. Attorney in the Eastern District of New York, and before that as District Counsel, Special Counsel for criminal litigation, and general attorney for the former Immigration and Naturalization Service ("INS").
- **The Honorable Sarah M. Burr** served as an Immigration Judge in New York starting in 1994 and was appointed as Assistant Chief Immigration Judge in charge of the New York, Fishkill, Ulster, Bedford Hills, and Varick Street immigration courts in 2006. She served in this capacity until January 2011, when she returned to the bench full time until her retirement in 2012. Prior to her appointment, she worked as a staff attorney for the Criminal Defense Division of the Legal Aid Society in its trial and appeals bureaus and also as the supervising attorney in its immigration unit.
- **The Honorable Jeffrey S. Chase** served as an Immigration Judge in New York City from 1995 to 2007 and was an attorney advisor and senior legal advisor at the Board from 2007 to 2017. He now works in private practice as an independent consultant on immigration law, and is of counsel to the law firm of DiRaimondo & Masi in New York City. He received the American Immigration Lawyers Association's ("AILA") annual pro bono award in 1994 and chaired AILA's Asylum Reform Task Force.
- **The Honorable George T. Chew** served as an Immigration Judge in New York from 1995 to 2017. Previously, he served as a trial attorney at the former INS.

- **The Honorable Bruce J. Einhorn** served as an Immigration Judge in Los Angeles from 1990 to 2007. He now serves as an Adjunct Professor of Law at Pepperdine University School of Law, and is a Visiting Professor of International, Immigration, and Refugee Law at the University of Oxford.
- **The Honorable Cecelia M. Espenoza** served as a Member of the Board from 2000 to 2003 and in the Executive Office for Immigration Review ("EOIR") Office of the General Counsel from 2003 to 2017 where she served as Senior Associate General Counsel, Privacy Officer, Records Officer, and Senior FOIA Counsel. She now works in private practice as an independent consultant on immigration law. Prior to her EOIR appointments, she was a law professor at St. Mary's University (1997 2000) and the University of Denver College of Law (1990 97), where she taught Immigration Law and Crimes and supervised students in the Immigration and Criminal Law Clinics. She has published several articles on immigration law. She received the Outstanding Service Award from the Colorado Chapter of AILA in 1997.
- **The Honorable Noel Ferris** served as an Immigration Judge in New York from 1994 to 2013 and as an attorney advisor to the Board from 2013 until her retirement in 2016. Previously, she served as a Special Assistant U.S. Attorney in the Southern District of New York from 1985 to 1990 and as Chief of the Immigration Unit from 1987 to 1990.
- **The Honorable John F. Gossart, Jr.** served as an Immigration Judge from 1982 until his retirement in 2013. He is the former president of the National Association of Immigration Judges. At the time of his retirement, he was the third most senior immigration judge in the United States. From 1975 to 1982, he served in various positions with the former INS, including as a general attorney, naturalization attorney, trial attorney, and deputy assistant

commissioner for naturalization. He is also the co-author of the National Immigration Court Practice Manual, which is used by all practitioners throughout the United States in immigration-court proceedings. From 1997 to 2016, Judge Gossart was an adjunct professor at the University of Baltimore School of Law teaching immigration law, and more recently was an adjunct professor at the University of Maryland School of Law, also teaching immigration law. He is also a past board member of the Immigration Law Section of the Federal Bar Association.

- **The Honorable Carol King** served as an Immigration Judge from 1995 to 2017 in San Francisco and was a temporary member of the Board for six months between 2010 and 2011. She previously worked in private practice for ten years, focusing on immigration law. She also taught immigration law for five years at Golden Gate University School of Law and is currently on the faculty of the Stanford University Law School Trial Advocacy Program. Judge King currently works as an advisor on removal proceedings.
- **The Honorable Margaret McManus** was appointed as an Immigration Judge in 1991 and retired from the bench this January after twenty-seven years. Before her time on the bench, she worked in several roles, including as a consultant to various nonprofit organizations on immigration matters (including Catholic Charities and Volunteers of Legal Services) and as a staff attorney for the Legal Aid Society, Immigration Unit, in New York.
- **The Honorable Lory D. Rosenberg** served on the Board from 1995 to 2002. She then served as Director of the Defending Immigrants Partnership of the National Legal Aid & Defender Association from 2002 until 2004. Prior to her appointment, she worked with the American Immigration Law Foundation from 1991 to 1995. She was also an adjunct Immigration Professor at American University Washington College of Law from 1997 to

2004. She is the founder of IDEAS Consulting and Coaching, LLC, a consulting service for immigration lawyers, and is the author of *Immigration Law and Crimes*. She currently works as Senior Advisor for the Immigrant Defenders Law Group.

- **The Honorable Susan Roy** started her legal career as a Staff Attorney at the Board, a position she received through the Attorney General Honors Program. She served as an Assistant Chief Counsel, National Security Attorney, and Senior Attorney for the DHS Office of Chief Counsel in Newark, NJ, and then became an Immigration Judge, also in Newark. She has been in private practice for nearly five years, and two years ago, opened her own immigration law firm. She is the New Jersey AILA Chapter Liaison to EOIR and is the Vice Chair of the Immigration Law Section of the New Jersey State Bar Association.
- **The Honorable Paul W. Schmidt** served as an Immigration Judge from 2003 to 2016 in Arlington, VA. He previously served as Chairman of the Board from 1995 to 2001, and as a Board Member from 2001 to 2003. He authored the landmark decision *Matter of Kasinga*, 21 I&N Dec. 357 (BIA 1995), extending asylum protection to victims of female genital mutilation. He served as Deputy General Counsel of the former INS from 1978 to 1987, serving as Acting General Counsel from 1979 to 1981 and 1986 to 1987. He was the managing partner of the Washington, DC office of Fragomen, DelRey & Bernsen from 1993 to 1995, and practiced business immigration law with the Washington, DC office of Jones, Day, Reavis and Pogue from 1987 to 1992, where he was a partner from 1990 to 1992. He was a founding member of the International Association of Refugee Law Judges (IARLJ), which he presently serves as Americas Vice President. He also consults, speaks, writes, and lectures at various forums throughout the country on immigration law topics.

- **The Honorable William Van Wyke** served as an Immigration Judge from 1995 until 2015 in New York City and York, PA.
- **The Honorable Gustavo D. Villageliu** served as a Member of the Board from July 1995 to April 2003. He then served as Senior Associate General Counsel for the EOIR until he retired in 2011. Before becoming a Board Member, Villageliu was an Immigration Judge in Miami, with both detained and non-detained dockets, as well as the Florida Northern Region Institutional Criminal Alien Hearing Docket from 1990 to 1995. Mr. Villageliu joined the Board as a staff attorney in January 1978, specializing in war criminal, investor, and criminal alien cases.
- **The Honorable Polly A. Webber** served as an Immigration Judge from 1995 to 2016 in San Francisco, with details to the Tacoma, Port Isabel (TX), Boise, Houston, Atlanta, Philadelphia, and Orlando immigration courts. Previously, she practiced immigration law from 1980 to 1995 in her own firm in San Jose, California. She served as National President of AILA from 1989 to 1990 and was a national AILA officer from 1985 to 1991. She also taught Immigration and Nationality Law for five years at Santa Clara University School of Law. She has spoken at seminars and has published extensively in the immigration law field.

BACKGROUND

In 2015, the Immigration Judge in this case denied Respondent's application for asylum, and Respondent appealed to the Board. *See Matter of A-B-*, at 1 (BIA Dec. 8, 2016). The Board sustained Respondent's appeal and found that (1) "the Immigration Judge's adverse credibility finding [is] clearly erroneous"; (2) Respondent "set forth a cognizable particular social group and that she is a member of that group"; (3) "the Immigration Judge's finding that [] [R]espondent was able to leave her ex-husband is clearly erroneous"; and (4) the Immigration Judge's "finding

that [] [R]espondent has not demonstrated that the government of El Salvador is unable or unwilling to protect her from her ex-husband" is incorrect. *Id.* at 2 4. Following procedural and substantive requirements, the Board did not issue a decision granting asylum at that time instead, it remanded the case to the Immigration Judge to ensure that the required background checks were completed. *Id.* at 4; *see also* 8 C.F.R. § 1003.1(d)(6) ("The Board shall not issue a decision affirming or granting to an alien an immigration status, relief or protection from removal . . . if [i]dentity, law enforcement, or security investigations or examinations have not been completed during the proceedings[.]"); *id.* § 1003.1(d)(7) (permitting the Board to "return a case to the . . . immigration judge for such further action as may be appropriate, without entering a final decision on the merits of the case").

After the Board's remand, the Immigration Judge did not make the findings required, and did not issue a decision either granting or denying asylum, as the remand required. *Matter of A-B-*, Order of Certification, at 4 (I.J. Aug. 18, 2017). Instead, the Immigration Judge held the case without taking action. Following the Fourth Circuit's decision in *Velasquez v. Sessions*, 866 F.3d 188 (4th Cir. 2017), the Immigration Judge certified the case back to the Board for consideration of what the Immigration Judge believed to be a change in the law. *Id.* at 4 5 (holding that "the above-captioned case is certified and administratively returned to the Board of Immigration Appeals" and noting that "[a]n Immigration Judge may certify to the Board of Immigration Appeals . . . any case arising from a decision rendered in removal proceedings").

On March 7, 2018, the Attorney General referred A-B's case to himself for review under 8 C.F.R. § 1003.l(h)(l)(i). *See Matter of A-B-*, 27 I&N Dec. 227 (A.G. 2018). Pending his review, the Attorney General stayed any further proceedings. *Id.* In his order, the Attorney General:

> invite[d] the parties to these proceedings and interested amici to submit briefs on points relevant to the disposition of this case, including: Whether, and under what circumstances, being a victim of private criminal activity constitutes a cognizable "particular social group" for purposes of an application for asylum or withholding of removal.

Id.

On March 14, 2018, Respondent requested an extension of the briefing schedule. Two days later, the Department of Homeland Security ("DHS") moved for a suspension of the briefing schedule and requested that the Attorney General clarify the central briefing question. In the alternative, DHS sought an extension of the briefing schedule for the parties and amici curiae. DHS argued that "this matter does not appear to be in the best posture for the Attorney General's review" and that the question presented "has already been answered, at least in part, by the Board in its prior precedent." DHS Motion, at 2 3 (Mar. 16, 2018). On March 21, 2018, Respondent filed a response to DHS's motion, agreeing with the above arguments. On March 30, 2018, the Attorney General denied DHS's motion to suspend the briefing schedule and clarify the question presented, and granted, in part, both parties' request for an extension of the briefing deadline. *See Matter of A-B-*, 27 I&N Dec. 247 (A.G. 2018).

ARGUMENT

I. This case is not properly before the Attorney General.

Contrary to the Attorney General's assertion, his review of this case now does not "compl[y] with all applicable regulations." *Matter of A-B-*, 27 I&N Dec. 247, 249 (A.G. 2018). Rather, this case is rife with procedural violations and is consequently unripe for agency-head review. This brief addresses two specific violations that ran afoul of decades-old federal regulations governing the orderly resolution of asylum cases: (1) the Immigration Judge's purported certification of the case to the Board without rendering a decision on Respondent's

asylum claim, and (2) the Attorney General's subsequent referral of the matter to himself before the Board had an opportunity to issue a decision either granting or denying relief to Respondent.

A. Federal regulations require that the Immigration Judge issue a decision on asylum before certifying a case to the Board.

When this case was first before the Board two years ago, the Board sustained Respondent's claim for relief on the grounds that she had established persecution on account of a protected characteristic, but the Board did not issue a decision granting or denying asylum. Instead, having eliminated the legal obstacle to asylum relied on by the Immigration Judge, the Board remanded the case to the Immigration Judge for the narrow purpose of determining whether the results of the requisite background checks were consistent with an order granting asylum. *Matter of A-B-*, at 4 (BIA Dec. 8, 2016); *see also* 8 C.F.R. § 1003.1(d)(6) ("The Board shall not issue a decision affirming or granting to an alien an immigration status, relief or protection from removal . . . if [i]dentity, law enforcement, or security investigations or examinations have not been completed during the proceedings[.]"); *id.* at § 1003.1(d)(7) (permitting the Board to "return a case to the . . . immigration judge for such further action as may be appropriate, without entering a final decision on the merits of the case").

Following the Board's remand of the case, the Immigration Judge did not issue a decision granting or denying asylum despite "completed and clear" background checks on Respondent. *Matter of A-B-*, Order of Certification, at 1, 4 (I.J. Aug. 18, 2017). Instead, after an unexplained and unwarranted eight-month delay, the Immigration Judge purported to certify the case for further appellate review. Shortly after the Fourth Circuit decided *Velasquez*, in which that court held that a different immigrant did not show that she was persecuted by her mother-in-law "on account of" her membership in a particular social group, but rather due to "a personal dispute" over custody of her son, the Immigration Judge certified this case back to the Board ***but***

without a final decision to consider what purportedly was an intervening change in governing Circuit law that eliminated the basis for Respondent's asylum claim. *Matter of A-B-*, Order of Certification, at 4 (I.J. Aug. 18, 2017). The Immigration Judge did so despite the fact that the Fourth Circuit explicitly said it was expressing no opinion on the continuing vitality of the particular social group identified as valid ground for asylum in *Matter of A-R-C-G-*, 26 I&N Dec. 388 (BIA 2014). *See Velasquez*, 866 F.3d at 195 n.5 ("The legal validity of the social group identified by *Velasquez* is not at issue in this case."); *see also* DHS Br., at 20 (acknowledging that *Velasquez* did not change the precedents at issue here).

This so-called certification was procedurally improper for multiple reasons. Section 1003.7 of the governing regulations permits an Immigration Judge to certify a case to the Board "***only after an initial decision*** has been made and before an appeal has been taken." 8 C.F.R. § 1003.7 (emphasis added). Here, because the Immigration Judge failed to make a decision and did not follow the limiting instructions on remand issued by the Board in December 2016, the regulations did not allow the Immigration Judge to certify the case to the Board for a second look at the legal underpinning for Respondent's asylum claim. 8 C.F.R. § 1240.12 ("The decision of the immigration judge ***shall*** include a finding as to inadmissibility or deportability.") (emphasis added). On remand of "the record for completion of background checks," the Immigration Judge was constrained to grant asylum in the form of "an order as provided by 8 C.F.R. § 1003.47(h)" if those checks were clear which they were unless "further proceedings" were necessary in the immigration court. *See Matter of A-B-*, at 4 (BIA Dec. 8, 2016); *see also id.* ("[W]e will remand the record for completion of background checks").

When "the Board 'qualifie[s] or limit[s] the remand for a specific purpose,' then the Immigration Judge [is] limited to that purpose." *Johnson v. Ashcroft*, 286 F.3d 696, 702 (3d Cir.

2002) (quoting *Matter of Patel*, 16 I&N Dec. 600 (BIA 1978)). Ignoring this longstanding rule, the Immigration Judge here took it upon himself to find a purported intervening change in law in the *Velasquez* decision. The Immigration Judge invoked 8 C.F.R. §§ 1003.1(c) and 1003.1(b)(3) as the bases for his certification ruling. *Matter of A-B-*, Order of Certification, at 4 (I.J. Aug. 18, 2017). But those regulations did not authorize the certification of the matter back to the Board in these circumstances. Section 1003.1(b)(3), the substantive provision cited by the Immigration Judge as authorizing his certification, addresses "[d]ecisions of Immigration Judges in removal proceedings, ***as provided in 8 C.F.R. § 1240***." 8 C.F.R. §§ 1003.1(b)(2), (3) (emphasis added); *see also* 8 C.F.R. § 1003.1(c) (providing authority for certification in situations listed in 8 C.F.R. § 1003.1(b)). Section 1240.12, in turn, requires that to be certified for Board review, an Immigration Judge's decision must meet specific requirements it must, for example, "include a finding as to inadmissibility or deportability," "contain reasons for granting or denying the [applicant's] request," and "conclude[] with the order of the immigration judge . . . direct[ing] the respondent's removal from the United States, or the termination of the proceedings, or other such disposition of the case as may be appropriate." 8 C.F.R. § 1240.12. None of those predicate requirements features anywhere in the Immigration Judge's order on remand, which means there was no "decision" ripe for certification to the Board under the regulations. *See* 8 C.F.R. § 1240.12(a), (c).

The Immigration Judge's perception that the Fourth Circuit's decision in *Velasquez* may have changed the applicable law a perception rejected by the *Velasquez* decision itself and DHS's brief in this case does not allow the Immigration Judge to circumvent procedure. Indeed, the regulations contemplate a mechanism to address an intervening change in law during remand and that mechanism manifestly does not include certification of incomplete

proceedings to the Board. Section 1003.47(h) specifies the actions that an Immigration Judge can take after remand by the Board. The regulation states that "[i]n any case remanded pursuant to 8 C.F.R. [§] 1003.1(d)(6), the immigration judge shall consider the results of the identity, law enforcement, or security investigations or examinations subject to the provisions of this section. . . . The immigration judge shall then enter an order granting or denying the immigration relief sought." 8 C.F.R. § 1003.47(h). Should there be "new information" presented to the immigration court such as a change in controlling Circuit law the Immigration Judge may "hold a further hearing if necessary to consider any legal or factual issues." *Id.* But the Immigration Judge may not certify the matter back to the Board without a decision granting or denying the petitioner's claim. Thus, the certification was procedurally flawed. Simply put, there was no avenue for the Immigration Judge to certify the case back to the Board without first entering an order granting or denying asylum relief.

B. The Attorney General may only review a Board decision, but there was none.

Even if the matter had properly been certified by the Immigration Judge to the Board, the Attorney General can only direct the Board to refer cases to him "for review of its ***decision***." 8 C.F.R. § 1003.1(h) (emphasis added). Here, the Board has not yet issued a "decision" granting or denying relief because the Immigration Judge did not make the necessary underlying findings on remand; therefore, the "case" cannot yet be referred to the Attorney General for review of the Board's "decision." The December 2016 Board opinion is not a "decision" because, in the absence of completed background checks, it made no finding granting Respondent relief. *See Matter of A-B-*, at 4 (BIA Dec. 8, 2016).

Most critically, the Board has not ever ruled on the question that the Immigration Judge purportedly certified to it, and which the Attorney General is now considering. That question was whether *Matter of A-R-C-G-* was still "legally valid within this jurisdiction in a case

involving a purely intra-familial dispute" after the Fourth Circuit's opinion in *Velasquez*. *See Matter of A-B-*, Order of Certification, at 3 4 (I.J. Aug. 18, 2017). In other words, the Board was asked to consider whether *Velasquez* constitutes an intervening change in controlling law and requires a rejection of Respondent's asylum claim. But the Board has not decided that question; in fact, no party has even briefed that question before the Board. Thus, there is no decision to review at all on that issue. Under the plain language of the regulations, there is nothing that can appropriately be certified here for agency-head review. *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994) (interpretation of federal regulations must be "compelled by the regulation's plain language" (citing *Gardebring v. Jenkins,* 485 U.S. 415, 430 (1988)).

II. Bypassing the Board nullifies critical procedural safeguards.

The Attorney General's certification in this case without a decision by the Board raises serious due process concerns. Depriving the Board of the opportunity to consider the certified question in the first instance erodes crucial protections designed to ensure that new rules are not issued without the opportunity for briefing by the parties and consideration by neutral decisionmakers.

A. The Board, a neutral and independent body, with deep knowledge of its own precedent, should consider the effect of new case law on that precedent in the first instance.

The Board is composed of neutral decisionmakers with particular expertise in immigration law. These decisionmakers exercise independent judgment and discretion. To be sure, as the "appellate body charged with the review of those administrative adjudications under the [Immigration and Nationality] Act that the Attorney General may by regulation assign to it," 8 C.F.R. § 1003.1(d)(1), the Attorney General has authority over the Board in certain circumstances. But federal regulations specifically direct the Board to exercise "independent judgment and discretion in considering and determining the cases" that come before it. 8 C.F.R.

§ 1003.1(d)(1)(ii). The Attorney General should not attempt to influence Board positions on matters of immigration law, particularly before the Board even announces them. *See United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 266 67 (1954). Federal regulations "delegate to the Board discretionary authority as broad as the statute confers on the Attorney General" in "unequivocal terms." *Id.* "And if the word 'discretion' means anything in a statutory or administrative grant of power, it means that the recipient must exercise his authority according to his own understanding and conscience. This applies with equal force to the Board and the Attorney General." *Id.* "In short, as long as the regulations remain operative, the Attorney General denies himself the right to sidestep the Board or dictate its decision in any manner." *Id.* The Board is thus the appropriate body to consider the effect of purportedly new and pertinent Circuit law on Board precedent before any certification to the Attorney General.

B. Bypassing the Board raises serious due process concerns.

A pre-certification decision by the Board ensures that the parties have an opportunity to brief important issues and that the Board has an opportunity to decide these issues before the announcement of a new rule. The Board's role in this ordered process is critical. Even those who advocate for an expansion of the Attorney General's power to certify Board decisions take it as a given that the Board will play a key role in the Attorney General's review. *See, e.g.*, Alberto Gonzales and Patrick Glen, *Advancing Executive Branch Immigration Policy Through the Attorney General's Review Authority*, 101 Iowa L. Rev. 841, 848 58 (2016) (describing the history and mechanics of the referral authority). Indeed, the Attorney General's power to certify decisions is viewed as comporting with due process precisely ***because*** the Board plays a key intermediate role in the development of immigration law. *See, e.g.*, *id.* at 906 ("Hearings before the immigration judge, ***appellate review by the Board***, and further consideration by the Attorney General on the record, as developed below, clearly meet this minimal threshold of due

process." (emphasis added)); *id.* at 907 (asserting that there is "little or no risk of . . . a legally or factually incorrect decision" because "[t]he decision by the Attorney General is made on the totality of the administrative record and ***with the benefit of prior decisions by the Board*** and immigration judge, which protects against an erroneous deprivation" (emphasis added)).

Ensuring that legal issues have been raised, addressed, and fully resolved in proceedings below such that a complete record is presented for review with the benefit of expertise from independent adjudicators close to the facts has long been a feature of ordered appellate review that avoids the evil of advisory opinions. *See, e.g.*, *INS v. Cardozo-Fonseca*, 480 U.S. 421, 448 (1987) (noting that certain terms in the asylum statute, like "well-founded fear," have natural ambiguity and "can only be given concrete meaning through a process of case-by-case adjudication"); *Hormel v. Helvering*, 312 U.S. 552, 556 (1940) (describing settled principle that "[o]rdinarily an appellate court does not give consideration to issues not raised below" because it is "essential . . . that litigants [] not be surprised on appeal by final decision there of issues upon which they have had no opportunity to introduce evidence"); *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 325 (1936) (courts cannot issue "an advisory decree upon a hypothetical state of facts"). There is no reason not to apply that principle equally to the Attorney General's referral authority.

Bypassing the Board before it renders a decision removes these critical procedural safeguards. It is irrelevant that immigration law is at issue here, because immigrants present in the United States are entitled to due process of law, "whether their presence is lawful, unlawful, temporary, or permanent." *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001); *see also Jean-Louis v. Att'y Gen. of U.S.*, 582 F.3d 462, 470 n.11 (3d Cir. 2009) (noting that the "unusual circumstances of [a case's] referral to, and adjudication by, the Attorney General," where "the Attorney General

certified the case to himself *sua sponte*," resulted in a "lack of transparency" that was cause for serious concern). Changes in the law in particular to principles on which individuals have relied, including those with pending asylum claims raising similar issues demand procedural due process. *See Sessions v. Dimaya*, 138 S. Ct. 1204, 1223 24 (2018) (Gorsuch, J., concurring) (condemning uncertainties in the law that invite "the exercise of arbitrary power" "leaving the people in the dark about what the law demands and allowing prosecutors and courts to make it up"). At a minimum, immigrants who have risked their lives to come to this country, with the understanding that they would qualify for asylum based on the law as applied to the facts of their case, deserve procedural safeguards to protect against arbitrary changes in the rules governing eligibility. *See id.* at 1227 ("Without an assurance that the laws supply fair notice, so much else of the Constitution risks becoming only a 'parchment barrie[r]' against arbitrary power." (quoting The Federalist No. 48, p. 308 (C. Rossiter ed. 1961) (J. Madison)). If there is to be a change in the law, it can come only after the question has been briefed by interested parties and decided by independent Board adjudicators with specialized expertise in immigration law.

III. The Attorney General cannot override Congress's judgment under the guise of a procedural mechanism.

Referral is also improper here because the Attorney General's formulation of the question purportedly underpinning this case usurps the authority of Congress to define a "refugee" for purposes of the Immigration and Nationality Act ("INA"). Congress included a robust definition of "refugee" in the INA, and expressly did ***not*** limit such definition to victims of government or government-sponsored acts. It would be improper for the executive branch to adopt a more circumscribed definition than Congress has provided.

Under 8 U.S.C. § 1101(a)(42), a "refugee" is defined as "any person . . . who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of,

that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." The statute includes no additional limitations. Critically, there is no mention of ***who*** the persecutor must be or even whether his actions must be ***lawful*** in the victim's country of origin. The relevant inquiry, as framed by Congress, is only whether the petitioner fears persecution based on membership in a "particular social group." The fact that the acts constituting persecution might independently be criminal under the laws of the host country is irrelevant to the analysis. "[T]here is no indication that Congress intended the phrase 'membership in a particular social group' to have any particular meaning," and "persecution on account of membership in a particular social group" means only "persecution that is directed toward an individual who is a member of a group of persons all of whom share a common, immutable characteristic." *Aldana-Ramos v. Holder*, 757 F.3d 9, 16 (1st Cir. 2014) (citing various Board decisions).

Unsurprisingly then, federal courts of appeals have rejected any notion that a victim of ***private*** criminal activity is *per se* ineligible for asylum. *See Bringas-Rodriguez v. Sessions*, 850 F.3d 1051, 1073 (9th Cir. 2017) (holding that "beatings and rapes" perpetrated by an "uncle, cousins, and neighbor" of a homosexual asylum-seeker constitute persecution on account of a membership in a particular social group notwithstanding Mexico's "enactment of remedial laws" prohibiting discriminatory acts against homosexuals by private parties); *see also Garcia v. Att'y Gen. of U.S.*, 665 F.3d 496, 499, 503 04 (3d Cir. 2011) (holding that threat of murder from gang members for having testified against one of them could form valid basis for fear of persecution on account of membership in a particular social group); *Crespin-Valladares v. Holder*, 632 F.3d 117, 126 27 (4th Cir. 2011) (holding that threat of violence from gang members for acting as cooperating witness "gave rise to a reasonable fear of future persecution"); *Hor v. Gonzales*, 421

F.3d 497, 501 02 (7th Cir. 2005) (holding that threat of violence from non-governmental militaristic group could constitute persecution); *Abay v. Ashcroft*, 368 F.3d 634, 638 (6th Cir. 2004) (finding "[f]orced female genital mutilation" by a woman's "relatives or future husband or her husband's relatives" constitutes "persecution on account of membership in a particular social group" even though there were "laws in place" in the host country "to prohibit harmful traditional practices" because those laws "[we]re not, as a practical matter, enforced").

Interpreting Congressional intent, federal courts have also recognized that membership in a particular social group can be based on "a shared past experience," *Valdiviezo Galdamez v. Att'y Gen. of U.S.*, 663 F.3d 582, 595 96 (3d Cir. 2011), and that "shared past experience" can include being a victim of a similar crime. For example, in *Lukwago v. Ashcroft*, the Third Circuit held that "the past experience of abduction, torture, and escape with other former child soldiers" was sufficient to constitute a "'particular social group' for purposes of asylum." 329 F.3d 157, 178 79 (3d Cir. 2003). Likewise, in *Bi Xia Qu v. Holder*, the Sixth Circuit found that being a victim of kidnapping, attempted rape, and threats of forced marriage qualified the petitioner as a member of a particular social group (defined as "women in China who have been subjected to forced marriage and involuntary servitude"), without regard to whether such actions were lawful in her country of origin. 618 F.3d 602, 607 (6th Cir. 2010).

As these decisions make clear, diverse victims of criminal activity by private actors have been deemed members of a "particular social group" entitled to asylum within the meaning of the INA. Courts have appropriately recognized that categorical rules or definitions as to who might qualify as a member of a "particular social group" are neither appropriate nor contemplated by the statute. Such determinations should be made on a case-by-case basis, precisely as the Board recommended in both *Matter of A-R-C-G-* and here in *Matter of A-B-*.

See, e.g., *Rivera-Barrientos v. Holder*, 666 F.3d 641, 648 (10th Cir. 2012) (stating that the "particular social group analysis is necessarily contextual, as the BIA gives the statutory term concrete meaning through a process of case-by-case adjudication" (internal alterations omitted)); *see also Cardoza-Fonseca*, 480 U.S. at 448. Therefore, while the question framed by the Attorney General does not, on its face, address asylum eligibility, it is settled in Article III courts that being a victim of private criminal activity can form the basis for membership in a particular social group in appropriate circumstances where, as here, the immutable characteristics of such a group can be identified with the requisite distinctiveness.

IV. "Persecution" can be carried out or threatened by private actors that the government cannot or will not control.

Although it is well-established that private criminal activity can form the basis of a persecution claim, a victim of private criminal activity does not automatically qualify for asylum. Rather, asylum decisions are highly fact-dependent, and the factfinder must still engage in an intensive analysis to determine whether the acts constitute persecution.

Furthermore, in all asylum cases, there is an entirely distinct legal requirement that persecution by private actors be of a nature that the government is unable or unwilling to control. *See Paloka v. Holder*, 762 F.3d 191, 195 (2d Cir. 2014) ("Direct governmental action is not required for a claim of persecution. Private acts can constitute persecution if the government is unable or unwilling to control it."); *Aldana-Ramos*, 757 F.3d at 17; *Madrigal v. Holder*, 716 F.3d 499, 503 (9th Cir. 2013) (persecution can be committed by "forces that the government was unable or unwilling to control"); *Gutierrez-Vidal v. Holder*, 709 F.3d 728, 732 (8th Cir. 2013) ("Whether a government is unable or unwilling to control private actors is a question of fact." (internal citations omitted)).

With regard to the alleged difficulty of proving a nexus where private criminal acts are involved, these backstop requirements consistently imposed by the Board demonstrate why such a concern is wholly illusory. In this case, there was no plausible argument that Respondent's ex-husband was a generally lawless individual who indiscriminately targeted members of the Salvadoran population. To the contrary, the reason Respondent's ex-husband and his brother persecuted her wherever she tried to relocate was ***because*** they had children in common through a prior domestic relationship. *See, e.g. Matter of A-B-*, at 4 (BIA Dec. 8, 2016) (finding that "ex-husband's brother, a local police officer, threatened Respondent in December 2013, referred to her as his sister-in-law, despite the fact that she had already divorced his brother, commented that she would always be in a relationship with her ex-husband because they have children in common, and warned her to be careful as she would never know where the bullets would land"). Thus, this case provides no basis to speculate whether other private criminal actors might target asylum claimants for reasons having nothing to do with the "particular social group" they are claiming membership in. The case-by-case analysis endorsed, and underscored, by the Board in *Matter of A-B-* provides an adequate tool to root out meritless claims where such a nexus is genuinely lacking.

There is, therefore, little danger that frivolous asylum claims will multiply based on private criminal activity in notoriously lawless countries because courts will still assess whether the circumstances of a particular case indicate that the government (i) was alerted to a particular strain of criminal activity, and (ii) did nothing to address it because of incompetence or social mores having to do with the victim's group membership. That backstop requirement serves as an important check on any unwarranted expansion of the "particular social group" analysis, and counsels against using this case as a vehicle to upend years of settled immigration law.

CONCLUSION

The Attorney General should vacate his referral order or, in the alternative, instruct the Immigration Judge to issue an order granting or denying asylum, thus allowing any potential appeal to the Board and certification to the Attorney General to proceed in the manner required by law.

April 27, 2018

Respectfully submitted,

/s/ Ronald Kirk

Megan B. Kiernan (SBN 302091)
mkiernan@gibsondunn.com
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, DC 11101-5306
Telephone: (202) 955-8500
Facsimile: (202) 467-0539

Ronald Kirk (SBN 1022961)
rkirk@gibsondunn.com
Chelsea G. Glover (SBN 24097738)
cglover@gibsondunn.com
GIBSON, DUNN & CRUTCHER LLP
2100 McKinney Avenue, Suite 1100
Dallas, TX 75201-6912
Telephone: (214) 698-3100
Facsimile: (214) 571-2900

Lalitha D. Madduri (SBN 301236)
lmadduri@gibsondunn.com
GIBSON, DUNN & CRUTCHER LLP
333 South Grand Avenue
Los Angeles, CA 90071-3197
Telephone: (213) 229-7000
Facsimile: (213) 229-7520

Amer S. Ahmed (SBN 500630)
aahmed@gibsondunn.com
GIBSON, DUNN & CRUTCHER LLP
200 Park Avenue
New York, NY 10166-0193
Telephone: (212) 351-4000
Facsimile: (212) 351-4035

Counsel for Amici Curiae

CERTIFICATE OF COMPLIANCE

I certify that the foregoing Brief Amici Curiae complies with the 9,000 word count laid out in *Matter of A-B-*, 27 I&N Dec. 247 (A.G. 2018). Exclusive of cover, captions, table of contents, table of authorities, and signature block, it contains 6,486 words, according to the word count feature of Microsoft Word, which was used to generate this brief.

Date: April 27, 2018

/s/ Megan B. Kiernan
Megan B. Kiernan

PROOF OF SERVICE

I, Megan B. Kiernan, hereby certify that I served the required copies of the **Brief Amici Curiae of Sixteen Former Immigration Judges and Members of the Board of Immigration Appeals Urging Vacatur of Referral Order and in Support of Respondent** and any attachments by U.S. first-class mail on April 27, 2018 to the following:

United States Department of Justice
Office of the Attorney General, Room 5114
950 Pennsylvania Avenue, NW
Washington, DC 20530

And by e-mail to AGCertification@usdoj.gov.

Date: April 27, 2018

/s/ Megan B. Kiernan
Megan B. Kiernan

Christopher J. Hajec
Elizabeth A. Hohenstein
Immigration Reform Law Institute
25 Massachusetts Ave. NW, Suite 335
Washington, D.C. 20001
(202) 232-5590
chajec@irli.org
ehohenstein@irli.org

Attorneys for Amicus Curiae Immigration Reform Law Institute

UNITED STATES DEPARTMENT OF JUSTICE
OFFICE OF THE ATTORNEY GENERAL
WASHINGTON, D.C.

In the Matter of

A-B-,	Redacted
Respondent.	In Removal Proceedings

REQUEST TO APPEAR AS AMICUS CURIAE AND SUPPLEMENTAL BRIEF OF THE IMMIGRATION REFORM LAW INSTITUTE

TABLE OF CONTENTS

INTEREST OF AMICUS CURIAE

The Immigration Reform Law Institute ("IRLI") is a not for profit 501(c)(3) public interest law firm incorporated in the District of Columbia. IRLI is dedicated to litigating immigration-related cases on behalf of United States citizens, as well as organizations and communities seeking to control illegal immigration and reduce lawful immigration to sustainable levels. IRLI has litigated or filed *amicus curiae* briefs in many immigration-related cases before federal courts and administrative bodies, including *Trump v. Int'l Refugee Assistance Project,* 137 S. Ct. 2080 (2017); *United States v. Texas*, 136 S. Ct. 2271 (2016); *Arizona Dream Act Coal. v. Brewer*, 818 F.3d 101 (9th Cir. 2016); *Washington All. of Tech. Workers v. U.S. Dep't of Homeland Sec.*, 74 F. Supp. 3d 247 (D.D.C. 2014); *Save Jobs USA v. U.S. Dep't of Homeland Sec.*, No. 16-5287 (D.C. Cir., filed Sept. 28, 2016); *Matter of Silva-Trevino*, 26 I. & N. Dec. 826 (B.I.A. 2016); and *Matter of C-T-L-*, 25 I. & N. Dec. 341 (B.I.A. 2010).

ISSUES PRESENTED

The Attorney General has asked for supplemental briefing on the following issue:

- Whether, and under what circumstances, being a victim of private criminal activity constitutes a cognizable "particular social group" for the purposes of an application for asylum or withholding of removal.

SUMMARY OF THE FACTS

Respondent is a citizen of El Salvador. She provided testimony and written statements, which did not coincide completely, about domestic abuse committed by her husband. She stated that her husband mentally and physically abused her over a number of years; that, in 2008, she separated and moved away from her husband; and that, in 2013, she divorced him. After the divorce, respondent claimed that he continued to threaten and abuse her, and that, in January

2014, he raped her. She also claimed that her ex-husband's brother, a local police officer, made threatening statements to her, and commented that she would always be in a relationship with her ex-husband because of the children they had together. She claimed that another friend of her ex-husband told her that if her ex-husband killed her, he would help dispose of her body. While the Immigration Judge rejected her asylum claim, the Board of Immigration Appeals (Board) sustained her appeal, finding that her proposed particular social group, "El Salvadoran women who are unable to leave their domestic relationships where they have children in common," fulfilled the asylum requirements of 8 U.S.C. § 1158(b)(1).

SUMMARY OF THE ARGUMENT

Being a victim of private criminal activity, by itself, does not place one in a particular social group for asylum purposes. Crime victims are not a distinctive social group. Even assuming, *arguendo*, that such victims could comprise a particular social group, they could not prove that the harm they suffered was on account of their membership in that group and that the government was unwilling or unable to protect them.

When the proper analysis is applied to the Board's prior decision in *Matter of A-R-C-G-*, 26 I. & N. Dec. 388, 395 (B.I.A. 2012), it becomes clear that that case was wrongly decided, and that domestic violence-based asylum claims do not fulfill the statutory requirements.

ARGUMENT

Under 8 U.S.C. § 1158(b)(1)(A), an alien making an asylum claim must fulfill the definition of "refugee" by establishing "that race, religion, nationality, membership in a particular social group, or political opinion was or will be at least one central reason for persecuting the applicant." In *Matter of Acosta*, the Board articulated the standard for a particular social group by finding that a particular social group must share a common, immutable

characteristic that its members cannot or should not be required to change. 19 I. & N. Dec. 211, 233 (B.I.A. 1985). In recent years, the BIA has clarified the *Acosta* definition, finding that the particular social group must be: (1) composed of members who share a common immutable characteristic, (2) socially distinct within the society in question and (3) defined with particularity. *Matter of M-E-V-G-*, 26 I. & N. Dec. 227, 237 (B.I.A. 2014) (determining that "Honduran youth who have been actively recruited by gangs but who have refused to join because they oppose gangs" is not a particular social group for an asylum claim). An adjudicator may use various objective and subjective sources to determine if an applicant is eligible for asylum based upon the proposed social group. *Matter of A-R-C-G-*, 26 I. & N. Dec. 388, 395 (B.I.A. 2012).

Establishing that a particular social group exists is only the first step in granting asylum under the particular social group category. The asylum applicant must also prove harm that rises to the level of persecution;[1] that a nexus exists between the particular social group and persecution; and that the government was unwilling or unable to protect the applicant from the persecution. If the applicant is found to fulfill the definition of a refugee, the applicant may still be denied asylum if future persecution can be avoided "by relocating to another part of the applicant's country of nationality . . . [if] under the circumstances, it would be reasonable to expect the applicant to do so." 8 C.F.R. § 1208.13(b)(1)(i)(B).

I. "Victims Of Private Criminal Activity" Is Not A Particular Social Group.

A. "Victims Of Private Criminal Activity" Is Defined Based Solely On The Harm Suffered.

Victims of private criminal activity do not comprise a particular social group under the *Acosta* definition because the shared characteristic defining the group cannot be merely that its

[1] *Amicus* will not be addressing this element.

members suffered a common harm. *See Matter of S-E-G-*, 24 I. & N. Dec. 579, 584 (B.I.A. 2008) (holding that "Salvadoran youth who refuse recruitment into the MS-13 criminal gang or their family members" did not constitute a particular social group); *In Re C-A-*, 23 I. & N. Dec. 951, 960 (B.I.A. 2006) (holding the group "former noncriminal drug informants working against the Cali drug cartel" did not constitute a particular social group). To define a particular social group solely by the harm suffered is circular, *Moreno v. Lynch*, 826 Fed. App'x 862, 864 (4th Cir. 2015), and would not articulate a workable standard. *Cece v. Holder*, 733 F.3d 662, 681 (7th Cir. 2013) (Easterbrook, J., dissenting) ("The BIA has held that a 'social group' cannot be identified by asking who was mistreated. For if the persecutors' acts define social groups, then again § 1101(a)(42)(A) effectively offers asylum to all mistreated persons, whether or not race, religion, politics, or some extrinsically defined characteristics (such as tribal membership) account for the persecution.") (internal citation omitted).

The problem persists even if the group is further defined by other common characteristics. *Matter of R-A-*, 22 I. & N. Dec. 906, 919 (B.I.A. 2001) ("But the social group concept would virtually swallow the entire refugee definition if common characteristics, coupled with a meaningful level of harm, were all that need be shown."). Thus, a group comprised of victims of private criminal activity who were also women, or married women, or El Salvadoran women who are unable to leave their domestic relationships where they have children in common, is still defined crucially by the harm suffered. A common harm suffered does not qualify as an immutable characteristic and cannot form the basis for an asylum claim.

B. "Victims Of Private Criminal Activity" Is Not Particular.

In addition to having an immutable characteristic, the proposed social group must also be defined with particularity. That is, the group cannot be "too amorphous . . . [and must] create a

benchmark for determining group membership." *Matter of M-E-V-G-*, 26 I. & N. Dec. at 239 (citing *Matter of A-M-E- & J-G-U-*, 24 I. & N. Dec. 69, 76 (B.I.A. 2007)). A proposed social group must not be "overbroad, diffused, or subjective." *Id.* (citing *Ochoa v. Gonzales*, 406 F.3d 1166, 1170-71 (9th Cir. 2005)).

"Victims of private criminal activity" is obviously overbroad. *See Kante v. Holder*, 634 F.3d 321, 327 (6th Cir. 2011) (holding that the social group "women subject to rape as a method of government control" was too "generalized and far-reaching [since] . . . it has not previously served as a definable limitation."). Private criminal activity includes every type of crime from violent felonies to financial persecution, and victimizes a wide variety of people. As the Ninth Circuit has explained:

> Individuals falling within the parameters of this sweeping demographic division naturally manifest a plethora of different lifestyles, carrying interests, diverse cultures, and contrary political leanings and it is so broad and encompasses so many variables that to recognize any person who might conceivably establish membership would render the definition of refugee meaningless.

Sanchez-Trujillo v. INS, 801 F.2d 1571, 1576 (9th Cir. 1986) (holding that "young, working class males who have not served in the military of El Salvador" is not a particular social group) (internal quotation marks, brackets, and ellipses omitted).

C. "Victims Of Private Criminal Activity" Is Not Socially Distinct.

The final consideration in whether the proposed group is a particular social group is social visibility. It is not the persecutor's perception of the victim that determines whether a particular social group exists; rather, it is society's viewpoint of the group that matters. The persecutor's perception carries analytical weight when it comes to establishing the nexus requirement, but not in establishing whether the group is socially distinct. The society in question must "perceive" the proposed group as distinct from the greater society because of the

shared characteristic being asserted by the proposed social group. *Matter of S-E-G-*, 24 I. & N. Dec. at 586. Evidence that others have suffered the same or similar harm is not enough to establish that the group is "perceived as a cohesive group by society." *Cano v. Lynch*, 809 F.3d 1056, 1059 (9th Cir. 2016) (determining that "escapee Mexican child laborers" are not socially distinct) (citation omitted).

Because the proposed group "victims of private criminal behavior" is so broad, there is no country report that could possibly support its social distinctiveness. Private criminal activity occurs in all countries. Regardless of the levels of crime, there is no indication that victims of private criminal activity are perceived any differently than other citizens in any country, including El Salvador. As the Department of State's Bureau of Diplomatic Security stated: "[c]rimes of every type routinely occur, and crime is unpredictable, gang-centric, and characterized by violence directed against both known victims and targets of opportunity. According to a Central American University (UCA) poll from January 6, 2016, 24.5% of Salvadorans were victims of crime in 2015." *El Salvador 2017 Crime & Safety Report*, Department of State's Bureau of Diplomatic Security (Feb. 22, 2018), https://www.osac.gov/pages/ContentReportDetails.aspx?cid=21308; *see also El Salvador 2016 Human Rights Report*, Department of State 1 (April 12, 2017) (reporting "widespread extortion and other crimes in poor communities throughout the country.").

Instead of these numbers weighing in favor of granting asylum to victims of private criminal activity in El Salvador, they show that the private criminal activity that occurs in El Salvador is not treatment meted out to a perceived social group but a pervasive problem that afflicts all ethnicities, genders, religions, and so on. Thus, there is no social distinction between those who have been a victim of private criminal activity and those who have not. Rampant

private criminal activity or generalized civil unrest do not show that society views victims as a group distinct from society. *See Konan v. Att'y Gen. of the U.S.*, 432 F.3d 497, 506 (3d. Cir. 2005) ("[G]eneral conditions of civil unrest or chronic violence and lawlessness do not support asylum.").

II. Victims of Private Criminal Activity Cannot Prove That The Harm They Suffered Was "On Account Of" Membership In The Proposed Particular Social Group.

After establishing a particular social group and the applicant's membership in the group, an applicant for asylum must then link the particular social group to the harm suffered by demonstrating that the harm was perpetrated "on account of" that membership. 8 U.S.C. § 1101(a)(42)(A). The REAL ID Act clarified this nexus requirement by providing that the protected ground must be "at least one central reason" for the harm suffered. Pub. L. No. 109-13, div B, 119 Stat. 231 (2005); *see also Matter of Fuentes*, 19 I. & N. Dec. 658, 662 (B.I.A.1988) (holding that the asylum applicant "bear[s] the burden of establish facts on which a reasonable person would fear that the danger rises on account of" their membership in the specific social group). The Board has stated that the persecutor's group-related motives must not be "incidental, tangential, superficial, or subordinate to another reason for harm." *Matter of J-B-N- & S-M-*, 24 I. & N. Dec. 208, 214 (B.I.A. 2008)).

The applicant must prove that the harm was suffered "'*because of*' a protected ground[,]" and therefore the persecutor's motives must be assessed. *Parussimova v. Mukasey*, 555 F.3d 734, 739 (9th Cir. 2009) (citing *Elias-Zacarias*, 502 U.S. at 483 (emphasis in the original)) (holding that the protected ground must be "essential" to the decision to persecute the applicant). While related to establishing a particular social group, the nexus analysis is its own separate requirement. "[I]t is not enough to simply identify the common characteristics of a statistical grouping of a portion of the population at risk. Rather, . . . there must be a showing that the

claimed persecution is on account of the group's identifying characteristics." *Matter of E-A-G-*, 24 I. & N. Dec. 591, 595 (B.I.A. 2008) (internal citations and quotation marks omitted). "As the Supreme Court has held: 'since the statute makes motive critical, [an asylum applicant] must provide some evidence of it, direct or circumstantial.' *INS v. Elias-Zacarias*, 502 U.S. 478, 483 (1982)." H. Rep. No. 109-72, at 162. Conjecture about the link between the harm and a protected ground will not suffice for establishing the nexus requirement. *Singh v. Mukasey*, 543 F.3d 1, 6 (1st Cir. 2008) (determining that proposed persecutors were economically motivated rather than motivated by a protected ground when they assaulted respondent and eventually occupied part of his home after he left India).

Victims of private criminal activity cannot establish a nexus between their particular social group and the crime that occurred because of two flaws that cannot be remedied regardless of the harm perpetrated against the victim. "[A]liens fearing retribution over purely personal matters, or aliens fleeing general conditions of violence and upheaval . . . would not qualify for asylum." *Matter of Magharrabi*, 19 I. & N. Dec. at 439, 447 (B.I.A. 1987).

First, as previously stated, general civil unrest or economic hardships facing the country as a whole, rather than just the victim, do not sufficiently link the harm to membership in the particular social group. *Ochave v. INS*, 254 F.3d 859, 865 (9th Cir. 2001). Private criminal activity, even activity that rises to the level of persecution, such as rape, is often the by-product of general civil unrest or economic hardships rather than persecution "on account" of protected grounds. *Gormley v. Ashcroft*, 364 F.3d 1172, 1177 (9th Cir. 2004).

Just as civil unrest is a hurdle in defining a particular social group, it can also prevent an applicant from proving a true nexus between the harm suffered and the protected ground. Victims of private criminal activity are being harmed against a backdrop of unrest or rampant

private criminal activity where the violent acts committed against them are easily attributed to general country conditions. *See Konan*, 432 F.3d at 506 (3d. Cir. 2005). In countries that have pervasive criminal activity, it is difficult to establish the required nexus between a social group and the abuse suffered because victims can be fungible to persecutors. This is especially true where victims do not know who their persecutors are. Without knowing the motivations of their persecutors, asylum claimants cannot establish that their membership in a particular social group is at least one central reason why the acts of persecution were committed. If this were not the rule, whole nations would be eligible for asylum because of civil war, gang activity, or in this instance, private criminal activity.

An example of a "civil unrest" hurdle that prevents an asylum applicant from establishing a particular social group is generalize gang recruitment and associated criminal acts. In recent years, people have fled countries where gangs are powerful and target civilians for varying reasons. Some courts, however, have been hesitant to find that different proposed particular social groups meet the asylum requirements when they are based on gang activity. *See, e.g.*, *Matter of E-A-G-*, 24 I. & N. Dec. at 595 (finding that "persons resistant to gang membership" was not a particular social group); *Zentino v. Holder*, 622 F.3d 1007, 2016 (9th Cir. 2010) ("An alien's desire to be free from harassment by criminals motivated by theft or random violence by gang members bears no nexus to a protected ground."). Gangs may target individuals for various reasons, including attempting to gain more gang territory, extortion, or simply because the person is an easy target. *Alvizures-Gomes v. Lunch*, 830 F.3d 49, 53 (1st Cir. 2016) (listing various motivations a gang may have for targeting an individual); *Gjura v. Holder*, 502 Fed. App'x 91, 92 (2d Cir. 2012) (holding that the nexus requirement is not established when individuals outside of the proposed social group are equally as likely to become victims of

harm). That one was a victim of such activity does not mean that it was motivated by one's membership in a particular social group.

The second obstacle to the nexus requirement is the complete opposite of generalize civil unrest, but is just as fatal to an asylum application. This second impediment occurs when the perpetrator specifically targeted only one victim because of personal conflict, not on account of one of the five protected grounds for asylum. Mixed motives asylum cases can provide a viable asylum claim, *Martinez-Galarza v. Holder*, 782 F.3d 990, 993-94 (8th Cir. 2015), but "[p]urely personal retribution is, of course, not persecution . . . ." *Grava v. INS*, 205 F.3d 1177, 1181 n.3 (9th Cir. 2000); *Matter of G-Y-*, 20 I. & N. Dec. 794, 799 (B.I.A. 1994).

Where the victim knows the persecutor personally, the natural conclusion is that the harm was perpetrated for private reasons, separate and apart from any protected ground. Thus, establishing persecution based on a protected ground can be extremely difficult where the persecutor is a friend or family member, whether or not she previously had a good or cordial relationship with the applicant. Of course, "a retributory motive [may] exist[] alongside a protected motive," but the applicant must show that membership in the proposed social group was one central reason for the persecution committed. *Madrigal v. Holder*, 716 F.3d 499, 506 (9th Cir. 2013). The applicant would have to provide evidence that it was not personal retribution or feelings of personal ill will towards the victim that motivated the harm.

III. That Private Crime Occurs Is Not Proof That The Government Is Unable Or Unwilling To Control It.

The final requirement an applicant must establish is either that harm is inflicted by the government or that the government is unable or unwilling to control the persecutors. *Matter of Acosta*, 19 I. & N. Dec. at 222. An applicant must show more than just a "difficulty controlling behavior" or ineffectiveness in enforcement of protective laws. *See Salman v. Holder*, 687 F.3d

991, 995 (8th Cir. 2012) (citation omitted); *Galina v. INS*, 213 F.3d 955, 958 (7th Cir. 2000) (stating that the applicant must show that the government "condoned it or at least demonstrated a complete helplessness to protect the victims"); *In re McMullen*, 17 I. & N. Dec. 542, 546 (B.I.A. 1980) (finding difficulty authorities had in controlling private behavior insufficient). The applicant "must demonstrate that the government condoned the private behavior 'or at least demonstrated a complete helplessness to protect the victims. In particular, 'the fact that police take no action on a particular report does not necessarily mean that the government is unwilling or unable to control criminal activity, because there may be reasonable basis for inaction.'" *Salman*, 687 F.3d at 995 (citations omitted). If the government is actively striving to stop the violence that is occurring, this final element of the asylum analysis is unfulfilled. *Lemus v. Lynch*, 611 Fed. App'x 813, 815-16 (citing 8 C.F.R. § 1208.13(b)(2)(iii)); *Gjura*, 502 Fed. App'x at 92 (same).

Perfect protection from harm is not the standard by which this requirement is judged. *See, e.g.*, *Burbiene v. Holder*, 568 F.3d 251, 255 (1st Cir. 2009). The fact that private criminal actions occur and the government cannot completely "eradicate" them does not negate the government's efforts to curb criminal behavior. *See id.* Random, private criminal acts do not establish persecution on account of a protected ground. *See Gormley v. Ashcroft*, 364 F.3d at 1177 (citing *Rostomian v. INS*, 210 F.3d 1088, 1089 (9th Cir. 2000)). Country reports may reflect efforts by the government to address different types of private criminal behavior or criminal behavior generally. That efforts are not as effective as hoped does not mean that the government is helpless or unwilling to control the criminal activity. *Burbiene*, 568 F.3d at 255-56 (finding that while a country may experience setbacks in combating crime, such setbacks are

not indicative of persecution occurring on account of a protected ground). Change takes time, and a country's initiatives should be acknowledged and respected in asylum proceedings.

IV. Relocation To Another Region In Asylum Claims Based On Private Criminal Activity Is Likely Reasonable.

While past persecution creates the presumption of future persecution, 8 C.F.R. § 1208.13(b)(1), the government can rebut this presumption by showing that the alien can avoid future persecution by relocating and, under all of the circumstances, relocation would be reasonable. *Id.* at 1208.13(b)(1)(i)(B). When considering whether relocation would be reasonable, the adjudicator should take into account numerous considerations, such as whether the applicant would face serious harm in the suggested new location, civil strife, infrastructure, and social and cultural restraints. *Id.* at 1208.13(b)(3). This creates a two-step relocation analysis: (1) the Board must determine if there is a safe area within the country; and then (2) if there is a safe area, whether it would be reasonable to relocate. *Matter of M-Z-M-R-*, 26 I. & N. Dec. 28, 32 (B.I.A. 2012).

While the relocation analysis will be fact-based, an adjudicator analyzing a victim of criminal activity asylum claim will likely find that there is another region in the country where relocation is safe and reasonable. Where the victim does not know the persecutor and the motives are likely based on economic or personal gain, relocation becomes very possible. For example, if the victim was, at random, beaten and robbed at gunpoint for his personal belongings because he was an easy target, it is unlikely that the criminal would travel elsewhere in the country in order to target that particular victim again.

V. The Proposed Particular Social Groups Defined By Domestic Violence Do Not Fulfill The Asylum Requirements.

The Board wrongly decided *Matter of A-R-C-G-*, 26 I. & N. Dec. 388 (B.I.A. 2014), because victims of domestic violence do not qualify for asylum regardless of their gender, nationality, or marital status. Applying the above requirements to *Matter of A-R-C-G* would reveal that the proposed social group found in that case, "married women in Guatemala who are unable to leave their relationship," was not a particular social group based on an immutable characteristic, and that the applicant's membership in the group was not a central reason that the harm occurred. Also, respondent in *Matter of A-R-C-G-* was able to relocate within the country, but chose rather to return to live with her husband.

First, the group "married women in Guatemala who cannot leave a relationship" is not based on an immutable characteristic. The Board initially attempted define the group by gender. *Id.* at 392-393. While gender-based particular social groups are possible, gender alone does not necessarily justify asylum because rarely do all women, without any other factor to consider, suffer persecution in a society. *See Gomez v. INS*, 947 F.2d 660, 664 (2d Cir. 1991). Even if respondent argued that the particular social group was Guatemalan women (nationality and gender), her claim could still not survive because the abuse suffered was not motivated by her status as a Guatemalan woman. Rather, the abuse arose from the personal connection she had with her partner.

The Board then attempted to state that inability to leave a relationship was the immutable characteristic of the proposed social group because such inability may be based on "religion, cultural or legal restraints." *Matter of A-R-C-G*, 26 I. & N. Dec at 393. But these were not the reasons why the respondent could not leave her relationship. The respondent could not leave her relationship because of abuse, not because the government refused to grant a divorce. Indeed,

the Board's determination that respondent could not leave her relationship and thus was even a member of the proposed social group is questionable. The Board also recognized that respondent had left and moved away from her abuser for three months but voluntarily moved back and resumed her relationship when he promised the abuse would end. *Id.* at 389. Not only does this show that she was not in the proposed social group because she was able to leave her relationship and the government did not force her to return, it also shows that relocation was reasonable because respondent could move to another part of the country and not suffer harm.

Most crucially, there was no evidence that Guatemalan women who could not leave their relationships was a social group recognized as distinct by Guatemalan society, only broad statements concerning sexual offenses and family violence. *Id.* at 393-94. That societal or economic pressures might force some women in that country, to remain married and unseparated from their husbands, despite the availability of divorce a point that was never established in the case does not mean that Guatemalan society recognizes such women as a distinct group. And even if a group defined as women trapped in abusive relationships would be more distinct, it would be defined based solely on the harm suffered by its members, and harm suffered cannot form the sole basis of a particular social group. *Kante v. Holder*, 634 F.3d at 327 (6th Cir. 2011) (finding that "women subjected to rape as a method of government control" was not a particular social group as its definition was circular and based on harm).

For all of these reasons, *Matter of A-R-G-C-* was wrongly decided.

CONCLUSION

For the foregoing reasons, the Attorney General should determine that a group consisting of victims of private criminal behavior does not fulfill the statutory requirements of asylum.

Respectfully submitted,

/s/ Christopher J. Hajec
Christopher J. Hajec
Elizabeth A. Hohenstein
Immigration Reform Law Institute, Inc.
25 Massachusetts Ave, NW, Suite 335
Washington, DC 20001
Phone: 202-232-5590
Fax: 202-464-3590
chajec@irli.org
ehohenstein@irli.org

Attorneys for *Amicus Curiae*

CERTIFICATE OF SERVICE

I hereby certify that, on April 27, 2018, I electronically submitted the foregoing *amicus curiae* brief to the United States Department of Justice via email, and, via first class mail, sent three copies to the Office of the Attorney General at the United States Department of Justice for distribution to the parties.

/s/ Elizabeth A. Hohenstein
Elizabeth A. Hohenstein

Attorney for *Amicus Curiae*

UNITED STATES DEPARTMENT OF JUSTICE
OFFICE OF THE ATTORNEY GENERAL

MATTER OF A-B-,
Respondent

Referred from:
United States Department of Justice
Executive Office for Immigration Review
Board of Immigration Appeals

BRIEF OF AMICI CURIAE IMMIGRATION LAW PROFESSORS

Anjum Gupta
Professor of Law &
Director of the Immigrant Rights Clinic
Rutgers Law School
123 Washington Street
Newark, NJ 07102
Tel. (973) 353-2518
Email: anjum.gupta@rutgers.edu

Karla McKanders
Clinical Professor of Law
Immigration Practice Clinic
Vanderbilt Law School
131 21st Ave. South
Nashville, TN 37203
Tel. (615) 322-3092
Email: karla.mckanders@vanderbilt.edu

Counsel for Amici Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Administrative Decisions

Other Authorities

INTEREST OF AMICI CURIAE

Amici are 116 immigration and refugee law scholars and clinical professors.[1] We teach immigration law, refugee law, and/or in law school clinics that provide representation to asylum seekers. As such, we have written numerous scholarly articles on immigration and refugee law and understand the practical aspects of asylum law through client representation.

SUMMARY OF THE ARGUMENT

It is well settled in the Board of Immigration Appeals, every Federal Circuit Court of Appeals, and the United States Supreme Court that harms inflicted by private actors can constitute persecution when the state is unwilling or unable to protect the applicant. It is also well established that such harms can constitute persecution with respect to every protected ground under INA §101(a)(42). Any decision by the Attorney General to the contrary would unilaterally overturn decades of precedent on a firmly established principle of law.

ARGUMENT

In referring *Matter of A-B-* to himself, the Attorney General ("AG") asked amici to submit briefs addressing the following question: "Whether, and under what circumstances, being a victim of private criminal activity constitutes a cognizable 'particular social group' for purposes of an application for asylum or withholding of removal."[2] However, the question presented conflates two distinct elements of asylum eligibility the persecution element and the protected ground element.[3] Amici also note the ambiguity in the phrases "private criminal activity,"[4] and "private violence."[5] For purposes of this brief, amici interpret the phrases to refer

[1] Appendix List of Amici Immigration Law Professors and Scholar Signatories.
[2] *Matter of A B* , 27 I. & N. Dec. 227, 227 (AG 2018).
[3] We refer the AG to the Brief of Amicus Curiae National Immigrant Justice Center for further explication of this argument.
[4] *Matter of A B* , 27 I. & N. Dec. at 227.

to harms perpetrated by private actors, or, in other words, individuals or groups not officially affiliated with the government.[6] Accordingly, in this brief, amici will address two interrelated questions: (1) whether harms inflicted by private actors can constitute persecution; and (2) whether harms inflicted by private actors on account of an applicant's membership in a particular social group can form the basis of an asylum claim. Courts have, without exception, answered both questions in the affirmative.

I. IT IS WELL SETTLED IN THE BOARD OF IMMIGRATION APPEALS, EVERY FEDERAL COURT OF APPEALS, AND THE UNITED STATES SUPREME COURT THAT HARMS INFLICTED BY PRIVATE ACTORS CAN CONSTITUTE PERSECUTION

A. Board of Immigration Appeals

The Board of Immigration Appeals ("BIA") has issued precedential decisions dating back more than forty years affirming that harms perpetrated by private actors can constitute persecution.[7] In a foundational case, *Matter of Acosta*, the BIA recognized that even before the passage of the Refugee Act of 1980, harms could constitute persecution if they were inflicted "either by the government of a country or by persons or an organization that the government was unable or unwilling to control."[8] Relying on rules of statutory construction and congressional intent, the BIA then "conclude[d] that the pre-Refugee Act construction of 'persecution' should be applied to the term as it appears in section 101(a)(42)(A) of the Act."[9]

[5] *Matter of A B* , 27 I. & N. Dec. 247, 249 (AG 2018). *See* Respondent's Opening Brief at 22 for further explication of this argument.
[6] *See* DHS Brief on Referral to the AG at 4 n.2. Moreover, amici disagree with any characterization of intimate partner violence (or the other types of harm described in the cases below) as "private violence," given, as recognized in the cases described below, that these types of harms often would not occur without the societal, even governmental, sanction they enjoy.
[7] *See, e.g.*, *Matter of Pierre*, 15 I. & N. Dec. 461, 462 (BIA 1975); *Matter of McMullen*, 19 I. & N. Dec. 90, 96 (BIA 1984).
[8] *Matter of Acosta*, 19 I. & N. Dec. 211, 222 (BIA 1985).
[9] *Id.* at 222.

The BIA has recognized various types of harms inflicted by private actors as persecution including, but not limited to, murder,[10] beatings,[11] threats,[12] detention,[13] female genital cutting,[14] and domestic abuse.[15]

For example, in *Matter of O-Z- & I-Z-*, the applicants were persecuted by an anti-Semitic, pro-Ukrainian independence movement, unconnected with the Ukrainian government.[16] The BIA affirmed the principle that non-state actors that the government is unwilling or unable to control can be persecutors, reasoning that the Ukrainian ultranationalists fostered ethnic hatred through anti-Semitic acts against which the government failed to take action.[17]

In *Matter of A-R-C-G-*, the applicant, beginning at age 17, was abused by her husband, who beat her weekly, broke her nose, burned her breast, and raped her.[18] The Immigration Judge ("IJ") denied relief, and the BIA reversed, holding that she had demonstrated persecution on account of particular social group.[19] The BIA reaffirmed a longstanding principle that harms committed by private actors constitute persecution when the applicant demonstrates that the government was "unwilling or unable to control the 'private' actor."[20]

In *Matter of S-A-*, the BIA held in favor of the applicant, holding that the physical assaults, imposed isolation, and deprivation of education perpetrated by her own father

[10] *See, e.g.*, *Matter of Villalta*, 20 I. & N. Dec. 142, 147 (BIA 1990) (finding that Salvadoran government appeared to be unable to control paramilitary death squads).
[11] *See, e.g.*, *Matter of O Z & I Z* , 22 I. & N. Dec. 23, 25 (BIA 1998).
[12] *See, e.g.*, *id.* at 25 26.
[13] *See, e.g.*, *In re H* , 21 I. & N. Dec. 337, 341 (BIA 1996) (detention as a result of interclan violence).
[14] *See, e.g.*, *In re Kasinga*, 21 I. & N. Dec. 357, 365 (BIA 1996). *See also Matter of S A K & H A H* , 24 I. & N. Dec. 464, 465 (BIA 2008).
[15] *See, e.g.*, *Matter of A R C G* , 26 I. & N. Dec. 388, 395 (BIA 2014). We further note that these acts are nearly universally criminalized in countries throughout the world. The fact that an act is a crime does not, in any way, preclude it from being persecution; many acts of persecution are, in fact, criminal.
[16] *Matter of O Z & I Z* , 22 I. & N. Dec. at 24.
[17] *Id.* at 26 27.
[18] *Matter of A R C G* , 26 I. & N. Dec. at 389.
[19] *Id.* at 389 90.
[20] *Id.* at 395.

constituted persecution where Moroccan authorities would have been unable or unwilling to protect her.[21]

In cases of female genital cutting, the BIA has found persecution where a victim's family forces her to undergo the cutting and the government is ineffective at preventing it. In *Matter of Kasinga*, the applicant's aunt and husband would have forced her to undergo genital cutting had she not fled Togo. [22] The applicant testified that the government of Togo would have taken no steps to protect her, and the BIA accordingly held that these actions constituted persecution.[23]

Even when the BIA has decided against the applicant, it has acknowledged that harms inflicted by private actors can constitute persecution. For example, in *Matter of McMullen*, the BIA stated that "the persecution contemplated under the Act is not limited to the conduct of organized governments, but may, under certain circumstances, be committed by individuals or nongovernmental organizations."[24] It recognized that the Provisional Irish Republican Army ("PIRA") was a terrorist organization that the government was unable to control.[25] However, it found McMullen barred from asylum because he was himself a member of PIRA and had persecuted others.[26]

[21] *Matter of S A* , 22 I. & N. Dec. 1328, 1335 (BIA 2000).
[22] *See, e.g.*, *In re Kasinga,* 21 I. & N. Dec. 357, 358 59 (BIA 1996).
[23] *Id.* at 359, 368.
[24] *Matter of McMullen*, 19 I. & N. Dec. at 96.
[25] *Id.* at 94.
[26] *Id.* at 99.

B. Federal Courts of Appeals

Every single federal court of appeals has held that harms inflicted by private actors can qualify as persecution.[27] Contrary to the AG's suggestion, the courts of appeals have not "questioned whether victims of private violence may qualify for asylum."[28] Quite the opposite; even when denying relief, courts acknowledge that harms inflicted by private actors can constitute persecution. These decisions demonstrate that evaluation of such claims requires an element by element, fact specific inquiry. The relevant case law from each circuit is set forth below.

i. First Circuit

The First Circuit Court of Appeals has stated that persecution "'always implies some connection to government action or inaction,' whether in the form of direct government action, 'government-supported action, or government's unwillingness or inability to control *private conduct*.'"[29] In *Kadri v. Mukasey*, for example, the IJ determined that the treatment the applicant had experienced in his workplace on account of his sexual orientation constituted persecution.[30] The court remanded the BIA's denial of asylum and reiterated the IJ's initial reliance on the established principle that harms committed by private actors can constitute persecution when there is a "showing that the persecution is due to the government's unwillingness or inability to

[27] It is worth noting that the courts of appeals have found torture committed by private actors to be sufficient for Convention Against Torture ("CAT") purposes, so long as the government acquiesces to the torture. Given that the standard for state action under CAT is even higher than for asylum and withholding, this finding is significant. *See, e.g.*, *De La Rosa v. Sessions*, 690 F. App'x 20, 23 (2d Cir. 2017); *Wanjiru v. Holder*, 705 F.3d 258, 266 67 (7th Cir. 2013); *Zelaya v. Holder*, 668 F.3d 159, 168 (4th Cir. 2012); *Pieschacon Villegas v. Att'y Gen. of the U.S.*, 671 F.3d 303, 311 (3d Cir. 2011); *Del Pilar Delgado v. Mukasey*, 508 F.3d 702, 708 09 (2d Cir. 2007).
[28] *Matter of A B* , 27 I. & N. Dec. 247, 249 (AG 2018).
[29] *Aldana Ramos v. Holder*, 757 F.3d 9, 17 (1st Cir. 2014) (emphasis added) (citing *Ivanov v. Holder*, 736 F.3d 5, 12 (1st Cir. 2013)). *See also Sok v. Mukasey*, 526 F.3d 48, 53 (1st Cir. 2008); *Nikijuluw v. Gonzales*, 427 F.3d 115, 120 21 (1st Cir. 2005).
[30] *Kadri v. Mukasey*, 543 F.3d 16, 19 (1st Cir. 2008).

control the conduct of private actors."[31] Numerous unpublished decisions from this circuit establish the same.[32]

When the court has ruled against the applicant, it has nonetheless acknowledged that harms inflicted by private actors can constitute persecution. In *Guaman-Loja v. Holder*, for example, the court set forth the private actors rule, but found that the petitioner failed to show government inability or unwillingness to control assaults by members of an indigenous tribe.[33]

Similarly, in recent domestic violence cases in which the court has ruled against the applicant, the court has nevertheless acknowledged the private actors standard. For example, in *Vega-Ayala v. Lynch*, the court found that, unlike A-R-C-G-, Vega-Ayala had not shown that her particular social group was immutable.[34] It reasoned, "Vega-Ayala's facts are a far cry from the circumstances in *A-R-C-G-*. Vega-Ayala could have left [the abuser]. She never lived with him. She saw him only twice a week and continued to attend a university. . . . Their relationship spanned only eighteen months, and he was incarcerated for twelve of those months."[35] Similarly, in *Cardona v. Sessions*, the court distinguished *A-R-C-G-* and agreed with the BIA that the applicant had not shown she was a member of her proffered social group because she was never in a "domestic relationship" with her abuser.[36] As the Department of Homeland Security ("DHS") concedes, the court in these cases did not "question[] the underlying validity of *A-R-C-G-*."[37]

[31] *Kadri*, 543 F.3d at 20 (citing *Jorgji v. Muk*asey, 514 F.3d 53, 57 (1st Cir. 2008)); *see Orelien v. Gonzales*, 467 F.3d 67, 72 (1st Cir. 2006).
[32] *See, e.g.*, *Rodriguez v. Lynch*, 654 F. App'x 498, 500 (1st Cir. 2016); *Mawa v. Holder*, 569 F. App'x 2, 4 (1st Cir. 2014); *Barzola Becerra v. Holder*, 323 F. App'x 1, 2 (1st Cir. 2009); *Kamuh v. Mukasey*, 280 F. App'x 7, 10 (1st Cir. 2008).
[33] *Guaman Loja v. Holder*, 707 F.3d 119, 123 24 (1st Cir. 2013).
[34] *Vega Ayala v. Lynch*, 833 F.3d 34, 39 (1st Cir. 2016).
[35] *Id.* at 39.
[36] *Cardona v. Sessions*, 848 F.3d 519, 523 (1st Cir. 2017).
[37] DHS Brief on Referral to the AG at 18.

ii. Second Circuit

The Second Circuit Court of Appeals also has consistently and unambiguously held that harms inflicted by private actors may constitute persecution.[38] For example, in *Pavlova v. INS*, the court found the IJ erroneously denied asylum based on the reasoning that the applicant did not suffer persecution by state actors, but rather by private Baptist groups.[39] In *Ivanishvili v. DOJ*, the court remanded the case because it found that the IJ failed to consider the applicant's testimony that authorities and unknown private parties violently attacked her and other church members.[40] The court emphasized that "even assuming the perpetrators of these assaults were not acting on orders from the Georgian government, it is well established that private acts may be persecution if the government has proved unwilling to control such actions."[41]

The court has recognized persecution committed at the hands of various non-state actors, including, *inter alia*, domestic abusers,[42] rebel guerilla groups,[43] religious groups,[44] tribe members,[45] members of other ethnic groups,[46] anti-Semites,[47] and traffickers.[48] Further, it has stated that a government's inability or unwillingness to control private persecutors can be corroborated by a showing of authorities' failure to respond,[49] lack of resources,[50] corruption or impunity,[51] or societal pervasiveness of the persecution.[52] Several unpublished decisions also demonstrate the court's longstanding recognition of the private actors standard.[53]

[38] *See, e.g.*, *Pan v. Holder*, 777 F.3d 540, 543 (2d Cir. 2015); *Rizal v. Gonzales*, 442 F.3d 84, 92 (2d Cir. 2006).
[39] *Pavlova v. INS*, 441 F.3d 82, 91 92 (2d Cir. 2006).
[40] *Ivanishvili v. U.S. Dep't. of Just.*, 433 F.3d 332, 342 43 (2d. Cir. 2006).
[41] *Id.* at 342.
[42] *See, e.g.*, *Bori v. INS*, 190 F. App'x 17, 19 (2d Cir. 2006).
[43] *See, e.g.*, *Del Pilar Delgado v. Mukasey*, 508 F.3d 702, 707 (2d Cir. 2007).
[44] *See, e.g.*, *Rizal v. Gonzales*, 442 F.3d at 92.
[45] *See, e.g.*, *Abankwah v. INS*, 185 F.3d 18, 26 (2d Cir. 1999).
[46] *See, e.g.*, *Aliyev v. Mukasey*, 549 F.3d 111, 118 (2d Cir. 2008).
[47] *See, e.g.*, *Poradisova v. Gonzales*, 420 F.3d 70, 81 (2d Cir. 2005).
[48] *See, e.g.*, *Paloka v. Holder*, 762 F.3d 191, 198 99 (2d Cir. 2014).
[49] *See, e.g.*, *Indradjaja v. Holder*, 737 F.3d 212, 216 (2d Cir. 2013).
[50] *See, e.g.*, *Sotelo Aquije v. Slattery*, 17 F.3d 33, 36 (2d Cir.1994).
[51] *See, e.g.*, *Poradisova*, 420 F.3d at 81.

iii. Third Circuit

The Third Circuit Court of Appeals has consistently recognized persecution as action "that is committed by the government or *by forces the government is unable or unwilling to control*."[54] For example, in *Fiadjoe v. AG*, the court found that the sexual abuse the applicant suffered at the hands of her father constituted persecution because the Ghanaian government was unable and unwilling to control it.[55] In *Garcia v. AG*, the court found persecution where the Guatemalan government was unable to protect the applicant, a criminal witness who testified against violent gang members.[56] Moreover, numerous unpublished decisions from the circuit also demonstrate that it is well established that harms inflicted by private actors can constitute persecution.[57]

Even where the court has ruled against the asylum applicant, it nonetheless recognized that harms inflicted by private actors can constitute persecution.[58] In neither of these cases did

[52] *See, e.g.*, *Abankwah*, 185 F.3d at 25 26.
[53] *See, e.g.*, *Singh v. Sessions*, 706 F. App'x 732, 734 (2d Cir. 2017); *Sutiono v. Lynch*, 611 F. App'x 738, 740 (2d Cir. 2015); *Farook v. Holder*, 407 F. App'x 545, 547 (2d Cir. 2011); *Cortez v. Holder*, 363 F. App'x 829, 830 31 (2d Cir. 2010); *Gjicali v. Mukasey*, 260 F. App'x 360, 362 (2d Cir. 2008); *Camara v. Dep't. of Homeland Sec.*, 218 F. App'x 61, 63 (2d Cir. 2007); *Hussain v. Gonzales*, 228 F. App'x 101, 102 03 (2d Cir. 2007); *Jasaraj Hot v. Gonzales*, 217 F. App'x 33, 35 (2d Cir. 2007); *Mikhailenko v. U.S. Citizenship & Immigration Servs.*, 228 F. App'x 41, 43 (2d Cir. 2007).
[54] *Fiadjoe v. Att'y Gen.*, 411 F.3d 135, 160 (3d Cir. 2005) (emphasis added). *See also Garcia v. Att'y Gen. of the U.S.*, 665 F.3d 496, 503 (3d Cir. 2011); *Espinosa Cortez v. Att'y Gen. of the U.S.*, 607 F.3d 101, 113 (3d Cir. 2010); *Vente v. Gonzales*, 415 F.3d 296, 300 (3d Cir. 2005).
[55] *Fiadjoe*, 411 F.3d at 161 63.
[56] *Garcia*, 665 F.3d at 503.
[57] *See, e.g.*, *Rehman v. Att'y Gen. of the U.S.*, 178 F. App'x 126, 129 (3d Cir. 2006); *Bera v. Att'y Gen. of the U.S.*, 555 F. App'x 129, 132 (3d Cir. 2014); *Ferreira v. Att'y Gen. of the U.S.*, 513 F. App'x 184, 188 (3d Cir. 2013); *Pitel v. Att'y Gen. of the U.S.*, 528 F. App'x 172, 174 (3d Cir. 2013); *Cardozo v. Att'y Gen. of the U.S.*, 505 F. App'x 135, 138 (3d Cir. 2012); *Zhuo v. Att'y Gen. of the U.S.*, 502 F. App'x 176, 179 80 (3d Cir. 2012); *Abazaj v. Att'y Gen. of the U.S.*, 443 F. App'x 725, 729 (3d Cir. 2011); *Lopez Perez v. Att'y Gen. of the U.S.*, 447 F. App'x 370, 375 (3d Cir. 2011); *Paprskarz v. Att'y Gen. of the U.S.*, 360 F. App'x 283, 286 (3d Cir. 2010); *Ngo v. Att'y Gen. of the U.S.*, 350 F. App'x 714, 717 18 (3d Cir. 2009); *Cheng v. Att'y Gen. of the U.S.*, 312 F. App'x 460, 463 (3d Cir. 2008); *Setiawan v. Att'y Gen. of the U.S.*, 237 F. App'x 728, 731 (3d Cir. 2007); *Soesilo v. Att'y Gen. of the U.S.*, 239 F. App'x 703, 704 (3d Cir. 2007); *Suherwanto v. Att'y Gen. of the U.S.*, 230 F. App'x 211, 215 (3d Cir. 2007).
[58] *See, e.g.*, *Ndayshimiye v. Att'y Gen.*, 557 F.3d 124, 132 (3d Cir. 2009) (finding that abuse applicant suffered from his aunt was the product of a land dispute and not on account of a protected ground); *Chen v. Gonzales*, 434 F.3d 212, 221 22 (3d Cir. 2005).

the court rule against the applicant on the basis that harms inflicted by private actors do not constitute persecution.[59]

iv. Fourth Circuit

The Fourth Circuit Court of Appeals has long held that harms inflicted by private actors can constitute persecution.[60] In *Crespin-Valladares v. Holder*, for example, the court remanded the case because the BIA erred in not considering the correct social group of family members of witnesses to a crime and not considering the IJ's finding that "attempts by the Salvadoran government to control gang violence have proved futile."[61] In *Hernandez-Avalos v. Lynch*, the court concluded that the Mara 18 gang persecuted a mother based on family ties.[62] The court found that a human rights report corroborating corruption within the Salvadoran judicial system showed that the Salvadoran government was unwilling or unable to protect the mother from the Mara 18.[63] In *Cruz v. Sessions*, drug traffickers targeted the applicant when she inquired about her husband's whereabouts.[64] The court held that her relationship with her husband was a central reason for the persecution at the hands of non-state actors.[65]

Unpublished cases in the Fourth Circuit also show that it is well established in the circuit that harms inflicted by private actors can constitute persecution.[66] In fact, the court's decision not to publish these cases demonstrates that this proposition is well established.

[59] *Ndayshimiye*, 557 F.3d at 133; *Chen*, 434 F.3d at 221 22.
[60] *See, e.g.*, *Salgado Sosa v. Sessions*, 882 F.3d 451, 460 (4th Cir. 2018); *Cruz v. Sessions*, 853 F.3d 122, 124 25 (4th Cir. 2017); *Zavaleta Policiano v. Sessions*, 873 F.3d 241, 246 (4th Cir. 2017); *Hernandez Avalos v. Lynch*, 784 F.3d 944, 949 (4th Cir. 2015); *Cordova v. Holder*, 759 F.3d 332, 339 40 (4th Cir. 2014); *Crespin Valladares v. Holder*, 632 F.3d 117, 128 (4th Cir. 2011).
[61] *Crespin Valladares*, 632 F.3d at 128.
[62] *Hernandez Avalos,* 784 F.3d at 949 50.
[63] *Id.* at 952 53.
[64] *Cruz*, 853 F.3d at 125.
[65] *Id.* at 129.
[66] *See, e.g.*, *Villatoro v. Sessions*, 680 F. App'x 212, 220 22 (4th Cir. 2017) (granting petition for review where applicant had a well founded fear of persecution from gang members because of her relationship with her father and brother); *Mazzi v. Lynch*, 662 F. App'x 227, 234, 236 (4th Cir. 2016) (granting petition for review because IJ erred

Fourth Circuit cases in which the court decided against the applicant do not lead to a different conclusion.[67] In *Velasquez v. Sessions*, despite denying the petition, the court explicitly recognized that harms perpetrated by "an organization that the Honduran government 'is unable or unwilling to control'" could constitute persecution.[68] It denied relief not because of a rejection of the private actors standard, but because the applicant had not shown that the harm she feared would occur on account of her membership in a particular social group, namely her nuclear family.[69] Instead, the court found that the reason for the feared harm was a dispute over the custody of a child.[70] Accordingly, the court denied relief based on a finding that the applicant had failed to prove nexus to a protected ground, and not because of any rule change on the private actors issue. Indeed, the DHS concedes that "in *Velasquez*, the Fourth Circuit did not overrule or even criticize *A-R-C-G-*."[71]

v. Fifth Circuit

It is similarly well established in the Fifth Circuit that "persecution entails harm inflicted . . . by the government *or by forces that a government is unable or unwilling to control*."[72] In *Eduard v. Ashcroft*, the court granted the petition of an applicant who was "afraid to go back to Indonesia because Christians are being persecuted there by the Moslems and the Indonesian

in only considering the fact that government prohibited female genital cutting without looking at defiance of those laws); *Banegas Rivera v. Lynch*, 664 F. App'x 296, 297 (4th Cir. 2016); *Diaz v. U.S. INS*, No. 92 2167, 1993 U.S. App. LEXIS 29530, at *6 7 (4th Cir. Nov. 15, 1993).

[67] *See, e.g.*, *Mulyani v. Holder*, 771 F.3d 190, 200 (4th Cir. 2014) (acknowledging the private actors standard, but finding that the standard was not met because the applicant did not attempt to go to the police during the four incidents in which she was attacked and noting that the government had successfully prosecuted perpetrators of religiously motivated violence).

[68] *Velasquez v. Sessions*, 866 F.3d 188, 194 (4th Cir. 2017).

[69] *Velasquez*, 866 F.3d at 196.

[70] *Id.* at 195 96.

[71] DHS Brief on Referral to the AG at 20.

[72] *Tesfamichael v. Gonzalez*, 469 F.3d 109, 113 (5th Cir. 2006) (emphasis added). *See also Hernandez De La Cruz v. Lynch*, 819 F.3d 784, 785 (5th Cir. 2016); *Ramirez Mejia v. Lynch*, 794 F.3d 485, 488, 494 (5th Cir. 2015); *Orellana Monson v. Holder*, 685 F.3d 511, 518 (5th Cir. 2012); *Tamara Gomez v. Gonzales*, 447 F.3d 343, 347 (5th Cir. 2006); *Eduard v. Ashcroft*, 379 F.3d 182, 187 (5th Cir. 2004); *Rivas Martinez v. INS*, 997 F.2d 1143, 1148 (5th Cir. 1993); *Adebisi v. INS*, 952 F.2d 910, 914 (5th Cir. 1992).

government cannot control them."[73] Additionally, in *Rivas-Martinez v. INS*, the court held in favor of an applicant who feared persecution at the hands of guerillas.[74]

Unpublished cases in the Fifth Circuit further demonstrate that it is well settled that harms inflicted by private actors can constitute persecution.[75]

Even when denying relief, the court has explicitly recognized that harms inflicted by private actors can constitute persecution.[76] For example, in *Adebisi v. INS*, the applicant feared persecution at the hands of his tribe members but never sought police protection "because of his fear of the Esubete elders and their voodoo powers . . . ."[77] In denying the petition, the court recognized that "the BIA extends the qualifying range of persecution fear to include acts by groups '*the government is unable or unwilling to control*.'"[78]

vi. Sixth Circuit

The Sixth Circuit Court of Appeals has consistently held that harms inflicted by private actors can constitute persecution.[79] For example, in *Kamar v. Sessions*, the court found that the record supported the applicant's assertion that she would be persecuted, in the form of an honor killing, by her cousins because she "shamed" her family by divorcing her husband and conceiving a child while unmarried.[80] In *Marouf v. Lynch*, the applicants, who were Christian, were repeatedly attacked by Muslim individuals.[81] The court held that a violent attack on the

[73] *Eduard*, 379 F.3d at 190.
[74] *Rivas Martinez*, 997 F.2d at 1145.
[75] *See, e.g.*, *Rawal v. Holder*, 476 F. App'x 768, 770 (5th Cir. 2012); *Aligwekwe v. Holder*, 345 F. App'x 915, 921 (5th Cir. 2009); *Garcia Garcia v. Mukasey*, 294 F. App'x 827, 829 (5th Cir. 2008); *Venturini v. Mukasey*, 272 F. App'x 397, 402 (5th Cir. 2008); *Gomez v. Gonzales*, 163 F. App'x 268, 272 (5th Cir. 2006); *Manjee v. Holder*, 544 F. App'x 571, 575 (5th Cir. 2006).
[76] *See, e.g.*, *Tesfamichael*, 469 F.3d at 113; *Adebisi*, 952 F.2d at 914.
[77] *Adebisi*, 952 F.2d at 914.
[78] *Id.* at 914.
[79] *See, e.g.*, *Trujillo Diaz v. Sessions*, 880 F.3d 244, 253 (6th Cir. 2018); *Kamar v. Sessions*, 875 F.3d 811, 818 (6th Cir. 2017); *Marouf v. Lynch*, 811 F.3d 174, 189 (6th Cir. 2016).
[80] *Kamar*, 875 F.3d at 819.
[81] *Marouf*, 811 F.3d at 178.

basis of religion amounts to past persecution, even if perpetrated by civilians.[82] The court noted that a State Department report showed that the Palestinian Authority is unable or unwilling to control the Muslim persecutors.[83]

The court also has recognized the private actors standard in several unpublished decisions.[84]

Even when denying relief, the court has explicitly recognized the private actors standard. In both *Bonilla-Morales v. Holder* and *Khalili v. Holder*, the court defined persecution as "the infliction of harm or suffering by the government, or persons the government is unwilling or unable to control . . . ." [85] Based on this standard, the court found that the applicant in *Bonilla-Morales* did not present sufficient evidence to show the Honduran government was unwilling or unable to control the MS-13 gang.[86] The court in *Khalili* found that reports showed Jordanian authorities prosecuted honor killing crimes and offered potential victims protective custody.[87]

When the court has denied relief in the domestic violence context, the court also has recognized the private actors standard. For example, in *Marikasi v. Lynch*, the court acknowledged *A-R-C-G-*; however, it denied the petition because it found that substantial evidence supported the IJ's adverse credibility determination, the applicant had not provided sufficient corroborating evidence, and the applicant (unlike A-R-C-G-) had failed to show that

[82] *Id.* at 189.
[83] *Id.* at 189.
[84] *See, e.g.*, *Alakhfash v. Holder*, 606 F. App'x 291, 299 (6th Cir. 2015) (granting petition for review because applicant was persecuted by terrorist groups); *Abdramane v. Holder*, 569 F. App'x 430, 436 (6th Cir. 2014); *Anyakudo v. Holder*, 375 F. App'x 559, 564 (6th Cir. 2010); *El Ghorbi v. Mukasey*, 281 F. App'x 514, 517 (6th Cir. 2008); *Berishaj v. Gonzales*, 238 F. App'x 57, 61 (6th Cir. 2007); *Keita v. Gonzales*, 175 F. App'x 711, 713 (6th Cir. 2006).
[85] *Bonilla Morales v. Holder*, 607 F.3d 1132, 1136 (6th Cir. 2010); *Khalili v. Holder*, 557 F.3d 429, 436 (6th Cir. 2009).
[86] *Bonilla Morales*, 607 F.3d at 1136.
[87] *Khalili*, 557 F.3d at 436.

her marriage to the abuser was immutable.[88] It cited the "substantial period of time" that had passed since she had any contact with her abuser, "her ability to freely move through the country and avoid her husband," and her failure "to substantiate any religious, cultural, or legal constraints that prevented her from separating from the relationship."[89] Thus, as the DHS concedes, the court distinguished *A-R-C-G-* and did not call into question its validity.[90]

vii. Seventh Circuit

The Seventh Circuit Court of Appeals also has repeatedly stated that harms inflicted by private actors can constitute persecution.[91] For example, in *Hor v. Gonzalez*, the court recognized that an applicant cannot claim asylum on the basis of "persecution by a private group unless the government either condones it or is helpless to prevent it, but if either of those conditions is satisfied, the claim is a good one."[92] In *Sarhan v. Holder*, a false rumor circulated that the applicant committed adultery, and a family member vowed to kill her in order to "restore the family's honor."[93] The court held that the record compelled the conclusion that the government was unable or unwilling to protect the applicant.[94]

Several unpublished cases in the circuit also demonstrate the court's longstanding recognition of the private actors standard.[95]

[88] *Marikasi v. Lynch*, 840 F.3d 281, 288 91 (6th Cir. 2016).
[89] *Id.* at 91.
[90] DHS Brief on Referral to the AG at 18.
[91] *See, e.g.*, *R.R.D. v. Holder*, 746 F.3d 807, 809 (7th Cir. 2014); *Cece v. Holder*, 733 F.3d 662, 675 (7th Cir. 2013) (en banc); *Vahora v. Holder*, 707 F.3d 904, 908 (7th Cir. 2013); *Gatimi v. Holder*, 578 F.3d 611, 616 17 (7th Cir. 2009); *Kholyavskiy v. Mukasey*, 540 F.3d 555, 575 (7th Cir. 2008); *Jiang v. Gonzalez*, 485 F.3d 992, 997 (7th Cir. 2007); *Tariq v. Keisler*, 505 F.3d 650, 656 (7th Cir. 2007); *Chakir v. Gonzalez*, 466 F.3d 563, 569 70 (7th Cir. 2006) ; *Hor v. Gonzalez*, 421 F.3d 497, 502 (7th Cir. 2005); *Mitreva v. Gonzalez*, 417 F.3d 761, 764 (7th Cir. 2005); *Guchshenkov v. Ashcroft*, 366 F.3d 554, 559 (7th Cir. 2004).
[92] *Hor*, 421 F.3d at 501.
[93] *Sarhan v. Holder*, 658 F.3d 649, 651 (7th Cir. 2011).
[94] *Id.* at 657.
[95] *See, e.g.*, *Abdelghani v. Holder*, 309 F. App'x 19, 22 (7th Cir. 2009); *Turangan v. Mukasey*, 307 F. App'x 11, 14 15 (7th Cir. 2009); *Rupey v. Mukasey*, 304 F. App'x 453, 455 56 (7th Cir. 2008); *Lopez Monterroso v. Gonzales*, 236 F. App'x 207, 211 (7th Cir. 2007); *Varghese v. Gonzalez*, 219 F. App'x 546, 550 (7th Cir. 2007); *Yaylacicegi v.*

Even when denying the petition for review, the court recognized that persecution can be inflicted by private actors. For example, in *Kaharudin v. Gonzales*, the court recognized that the applicant must prove that the government is unable or unwilling to control the persecutor, but denied the applicant's petition because the record did not demonstrate that the Indonesian government was unable or unwilling to protect ethnic Chinese Christians against acts of violence perpetrated by native Indonesians.[96]

viii. Eighth Circuit

It is also well established in the Eighth Circuit that harms inflicted by private actors can constitute persecution. For instance, in *Ngengwe v. Mukasey*, the court remanded the case because the IJ's finding that the government could protect the applicant from violence at the hands of her family members was not supported by substantial evidence.[97] Similarly, in *Nabulwala v. Gonzalez*, the court remanded the case to determine whether the government was unable or unwilling to control applicant's family, who physically abused her and forced her to have sex with a stranger, in order to change her sexual orientation.[98]

Unpublished decisions from the circuit also demonstrate the court's recognition of the private actors standard.[99]

Moreover, the court acknowledges that harms inflicted by private actors can constitute persecution even when holding against applicant. For instance, in *Fuentes-Erazo v. Sessions*, the court recognized that harm committed by a former partner could be grounds for asylum on

Gonzalez, 175 F. App'x 33, 37 (7th Cir. 2006); *Esquivel v. Ashcroft*, 105 F. App'x 99, 101 (7th Cir. 2004); *Lleshanaku v. Ashcroft*, 100 F. App'x 546, 549 (7th Cir. 2004).

[96] *Kaharudin v. Gonzales*, 500 F.3d 619, 623 25 (7th Cir. 2007).

[97] *Ngengwe v. Mukasey*, 543 F.3d 1029, 1036 (8th Cir. 2008). *See also Gathungu v. Holder*, 725 F.3d 900, 908 09 (8th Cir. 2013) (finding many reports that suggest Kenyan government was complicit in various attacks by Mungiki members and that Kenyan police force is widely corrupt).

[98] *Nabulwala v. Gonzalez*, 481 F.3d 1115, 1116 17, 1119 (8th Cir. 2007).

[99] *See, e.g.*, *De La Cruz v. Sessions*, 697 F. App'x 887, 887 88 (8th Cir. 2017); *Santacruz v. Lynch*, 666 F. App'x 576, 578 (8th Cir. 2016); *Vasquez Solorzano v. Holder*, 570 F. App'x 628, 628 29 (8th Cir. 2014).

account of membership in a particular social group.[100] However, the court found that the applicant was not a member of the social group "Honduran women in domestic relationships who are unable to leave their relationships," because "she was, in fact, able to leave her relationship with [the abuser]."[101] The court noted that she "resided in Honduras safely for approximately five years, during which time she traveled and worked in several different parts of Honduras, entered into a relationship with another man, and gave birth to a second child all without having any contact whatsoever with [the abuser]."[102] The court accordingly distinguished *A-R-C-G-* and, as the DHS concedes, did not "question[] the underlying validity of *A-R-C-G-*."[103] In *Rodriguez-Mercado v. Lynch*, the court held against the applicant in a domestic violence case due to lack of credibility and not because the persecutor was a private individual.[104] Finally, in *Guillen-Hernandez v. Holder*, the court held against the applicant because the extensive police investigation, trial, and conviction of the persecutors amply supported the finding that the Salvadoran government was willing to control the private individuals who harmed the applicant.[105]

ix. Ninth Circuit

The Ninth Circuit Court of Appeals also has consistently held that "[a]sylum is not restricted to petitioners who have suffered persecution at the hands of state actors."[106] In

[100] *Fuentes Erazo v. Sessions*, 848 F.3d 847, 852 (8th Cir. 2017).
[101] *Id.* at 853.
[102] *Id.* at 853.
[103] DHS Brief on Referral to the AG at 18.
[104] *Rodriguez Mercado v. Lynch*, 809 F.3d 415, 417, 420 (8th Cir. 2015).
[105] *Guillen Hernandez v. Holder*, 592 F.3d 883, 887 (8th Cir. 2010). *See also Salman v. Holder*, 687 F.3d 991, 995 (8th Cir. 2012) (finding against applicant because Israeli court convicted persecutors of murder and sentenced them to imprisonment).
[106] *Smolniakova v. Gonzales*, 422 F.3d 1037, 1048 (9th Cir. 2005) (citing *Singh v. INS*, 134 F.3d 962, 967 n.9 (9th Cir. 1998)). *See also Bringas Rodriguez v. Sessions*, 850 F.3d 1051, 1062 63 (9th Cir. 2017); *Doe v. Holder*, 736 F.3d 871, 877 78 (9th Cir. 2013); *Henriquez Rivas v. Holder*, 707 F.3d 1081, 1083 (9th Cir. 2013); *Madrigal v. Holder*, 716 F.3d 499, 503 (9th Cir. 2013); *Karapetyan v. Mukasey*, 543 F.3d 1118, 1128 (9th Cir. 2008); *Nehad v. Mukasey*, 535 F.3d 962, 972 (9th Cir. 2008); *Ahmed v. Keisler*, 504 F.3d 1183, 1191 (9th Cir. 2007); *Ornelas*

Bringas-Rodriguez v. Sessions, the court determined that the applicant, whose family members and neighbors sexually abused him because of his sexual orientation, sufficiently established that the Mexican government was unable or unwilling to control his persecutors and that it would have been futile for him to report the abuse.[107] The court came to the same conclusion in *Mohammed v. Gonzales*, in which the applicant feared being forcibly subjected to genital cutting if returned to Somalia.[108] The court noted that she "would almost certainly be able to demonstrate that the government of Somalia was unable or unwilling to control her persecution."[109] Unpublished cases from the Ninth Circuit establish the same.[110]

Even when the court held against the applicant, it nevertheless acknowledged that harms inflicted by private actors can constitute persecution. For instance, in *Rahimzadeh v. Holder*, the court stated that persecution may be "committed by the government or forces the government is either unable or unwilling to control."[111] However, relying on the fact that the applicant never reported the abuse and on information contained in the State Department report, the court held that the applicant had failed to show that the Dutch authorities would be unwilling or unable to

Chavez v. Gonzales, 458 F.3d 1052, 1056 (9th Cir. 2006); *Castro Perez v. Gonzales*, 409 F.3d 1069, 1072 (9th Cir. 2005); *Krotova v. Gonzales*, 416 F.3d 1080, 1087 (9th Cir. 2005); *Faruk v. Ashcroft*, 378 F.3d 940, 944 (9th Cir. 2004); *Hoque v. Ashcroft*, 367 F.3d 1190, 1198 (9th Cir. 2004); *Malty v. Ashcroft*, 381 F.3d 942, 947 (9th Cir. 2004); *Mashiri v. Ashcroft*, 383 F.3d 1112, 1121(9th Cir. 2004); *Melkonian v. Ashcroft*, 320 F.3d 1061, 1065 (9th Cir. 2003); *De La Rodas Mendoza v. INS*, 246 F.3d 1237, 1239 40 (9th Cir. 2001); *Avetova Elisseva v. INS*, 213 F.3d 1192, 1196 (9th Cir. 2000); *Mgoian v. INS*, 184 F.3d 1029, 1036 (9th Cir. 1999).

[107] *Bringas Rodriguez*, 850 F.3d at 1056, 1073 75. *See also Faruk*, 378 F.3d at 944.

[108] *Mohammed v. Gonzales*, 400 F.3d 785, 789 (9th Cir. 2005).

[109] *Id.* at 798.

[110] *See, e.g.*, *Garces v. Mukasey*, 312 F. App'x 12, 17 (9th Cir. 2009) (finding persecution when government could not control the guerrilla group persecuting the applicants); *Ebeid v. Mukasey*, 274 F. App'x 508, 510 11 (9th Cir. 2008) (finding that government was unable or unwilling to control persecution when authorities dissuaded applicants from filing reports of their mistreatment); *Sablina v. Gonzales*, 217 F. App'x 671, 672 (9th Cir. 2007) (finding persecution when applicant was beaten and threatened by private individuals police were unwilling or unable to control); *Papazyan v. Gonzales*, 179 F. App'x 428, 431 32 (9th Cir. 2006) (finding persecution when government was unable or unwilling to help applicant after suffering from physical attacks from Armenian ultranationalists); *Ganut v. Ashcroft*, 85 F. App'x 38, 43 44 (9th Cir. 2003) (finding persecution when applicant was attacked by forces government was unable to control); *Velasquez v. Ashcroft*, 81 F. App'x 673, 676 (9th Cir. 2003) (holding that BIA erred in failing to consider whether applicant's beatings were from private actors government was unable or unwilling to control).

[111] *Rahimzadeh v. Holder*, 613 F.3d 916, 920 (9th Cir. 2010).

protect him from extremists.[112] In *Sangha v. INS*, the court determined that a terrorist group's actions constituted persecution because the government was unable to control the group.[113] However, the court ultimately held against the applicant because he failed to prove that his persecution was motivated by a protected ground.[114]

x. Tenth Circuit

Similarly, the Tenth Circuit Court of Appeals has long held that persecution "may come from a non-government agency which the government is unwilling or unable to control."[115] In *de la Llana-Castellon v. INS*, the court found that the BIA erred in failing to consider whether the applicant's persecutors, members of an opposition political party, were forces that the government was unable or unwilling to control.[116] Similarly, in *Niang v. Gonzales*, the court determined that the applicant, who was forced to undergo genital cutting by her own family, would be eligible for asylum if, on remand, the BIA determined that the government was unwilling or unable to control her persecutors.[117]

The court also has issued several unpublished decisions recognizing the private actors standard.[118]

Furthermore, the court has upheld the principle that harms inflicted by private actors can constitute persecution even when it held against the applicant. For instance, in *Batalova v. Ashcroft*, the court acknowledged that harm from private individuals could constitute persecution

[112] *Id.* at 920.
[113] *Sangha v. INS*, 103 F.3d 1482, 1487 (9th Cir. 1997).
[114] *Id.* at 1491.
[115] *de la Llana Castellon v. INS*, 16 F.3d 1093, 1097 (10th Cir. 1994). *See also Hayrapetyan v. Mukasey*, 534 F.3d 1330, 1336 37 (10th Cir. 2008); *Krastev v. INS*, 292 F.3d 1268, 1275 76 (10th Cir. 2002); *Bartesaghi Lay v. INS*, 9 F.3d 819, 822 (10th Cir. 1993).
[116] *de la Llana Castellon*, 16 F.3d at 1097.
[117] *Niang v. Gonzales*, 422 F.3d 1187, 1191 92, 1201 02 (10th Cir. 2005).
[118] *See, e.g.*, *Sagala v. Mukasey*, 295 F. App'x 932, 936 (10th Cir. 2008); *Gichema v. Gonzales*, 139 F. App'x 90, 94 (10th Cir. 2005); *Sauveur v. Ashcroft*, 108 F. App'x 557, 559 (10th Cir. 2004); *Nasir v. INS*, 30 F. App'x 812, 814 (10th Cir. 2002).

if the government made no attempts to control those individuals.[119] However, because the court upheld the IJ's adverse credibility finding, it declined to address whether the government was unable or unwilling to control the private persecutors.[120]

xi. Eleventh Circuit

Finally, it is well established in the Eleventh Circuit that harms inflicted by private actors can constitute persecution. For instance, in *Lopez v. AG*, the court stated that the failure to report private persecution to government authorities is "excused where the petitioner convincingly demonstrates that those authorities would have been unable or unwilling to protect her, and for that reason she could not rely on them."[121] The court remanded the decision because the BIA and IJ failed to address this point.[122]

Several unpublished decisions from the circuit have also acknowledged the private actors standard.[123]

Moreover, the court acknowledges that harms inflicted by private actors can constitute persecution, even when holding against the applicant. For instance, in *Ruiz v. AG*, the applicant claimed he feared persecution at the hands of the Revolutionary Armed Forces of Colombia (FARC) in Colombia.[124] Despite denying the petition for review based on an adverse credibility finding, the court explicitly stated, "[t]he statutes governing asylum and withholding of removal

[119] *Batalova v. Ashcroft*, 355 F.3d 1246, 1253 (10th Cir. 2004).
[120] *Id.* at 1253, 1255.
[121] *Lopez v. U.S. Att'y Gen.*, 504 F.3d 1341, 1345 (11th Cir. 2007).
[122] *Id.* at 1345.
[123] *See, e.g.*, *Alonzo Rivera v. U.S. Att'y Gen.*, 649 F. App'x 983, 991 92 (11th Cir. 2016) (granting petition for review because evidence showed that Honduran government was ineffective at addressing domestic violence); *Morehodov v. U.S. Att'y Gen.*, 270 F. App'x 775, 779 81 (11th Cir. 2008) (stating that persecution can come from actors that government is unable or unwilling to control and remanding); *Jeronimo v. U.S. Att'y Gen.*, 678 F. App'x 796, 800 02 (11th Cir. 2017); *Kapa v. U.S. Att'y Gen.*, 675 F. App'x 903, 906 07 (11th Cir. 2017); *Hossain v. U.S. Att'y Gen.*, 630 F. App'x 914, 916 17 (11th Cir. 2015); *Lewis v. U.S. Att'y Gen.*, 512 F. App'x 963, 968 (11th Cir. 2013).
[124] *Ruiz v. U.S. Att'y. Gen.*, 440 F.3d 1247, 1251 (11th Cir. 2006).

protect not only against persecution by government forces, but also against persecution by non-governmental groups that the government cannot control, such as the FARC."[125]

C. Supreme Court of the United States

Likely because of the unanimous agreement among the lower courts that harms inflicted by private actors can constitute persecution, the United States Supreme Court has not had occasion to explicitly decide the issue. However, the Court has implicitly acknowledged that harms inflicted by private actors can constitute persecution.[126] For example, in *INS v. Elias-Zacarias*, the Court evaluated the claim of a Guatemalan asylum applicant who claimed he feared persecution at the hands of a non-state guerilla group.[127] The Court found that he had failed to show that his refusal to join the guerillas was based on a political opinion or that the group was seeking to persecute him because of that opinion.[128] Accordingly, the Court found against the applicant on nexus grounds.[129] However, the court never called into question the notion that harms perpetrated by a private actor, namely the guerilla group, could constitute persecution.[130]

Similarly, in *Negusie v. Holder*, Justice Stevens in his dissent briefly discussed the difference between asylum and withholding of removal which he stated could be based on "harm inflicted by private actors" (citing the *In re Kasinga* and *In re H-* BIA decisions as examples) and the Convention Against Torture, which requires "state involvement."[131]

[125] *Ruiz*, 440 F.3d at 1257, 1259.
[126] *See Negusie v. Holder*, 555 U.S. 511, 536 n.6 (2009) (Stevens, J., dissenting) (citing *In re Kasinga*, 21 I. & N. Dec. 357, 365 (BIA 1996); *In re H* , 21 I. & N. Dec. 337, 343 44 (BIA 1996)); *cf. INS v. Elias Zacarias*, 502 U.S. 478, 483 (1992).
[127] *Elias Zacarias*, 502 U.S. at 480.
[128] *Id.* at 483.
[129] *Id.* at 483 84.
[130] *Id.* at 483.
[131] *Negusie*, 555 U.S. at 536 n.6 (Stevens, J., dissenting) (citing *In re Kasinga*, 21 I. & N. Dec. at 365; *In re H* , 21 I. & N. Dec. 337, 343 44 (BIA 1996)).

It is also worth noting that the Supreme Court has stated that the United Nations High Commissioner for Refugees ("UNHCR") Handbook "provides significant guidance in construing the Protocol [Relating to the Status of Refugees], to which Congress sought to conform. It has been widely considered useful in giving content to the obligations that the Protocol establishes."[132] The UNHCR Handbook clearly recognizes that harms inflicted by private actors can constitute persecution.[133]

II. COURTS ROUTINELY HAVE FOUND HARMS INFLICTED BY PRIVATE ACTORS TO CONSTITUTE PERSECUTION ON ACCOUNT OF ALL FIVE PROTECTED GROUNDS

It is clear from the above that harms inflicted by private actors can constitute persecution. Although the AG limited his question to the particular social group ground, the persecution and protected ground elements of an asylum claim are separate and distinct. Accordingly, this section demonstrates that it is well settled that harms inflicted by private actors on account of any of the five protected grounds, including particular social group, can constitute persecution.

A. Particular Social Group

The BIA and circuit courts routinely have held that harms inflicted by private actors on account of membership in a particular social group can constitute persecution. For example, courts have granted claims involving persecution by private actors on account of sexual orientation,[134] family membership,[135] mental illness,[136] and clan or tribe membership,[137] among

[132] *INS v. Cardoza Fonseca*, 480 U.S. 421, 439 n.22 (1987).
[133] U.N. High Comm'r for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, ¶ 65, U.N. Doc. HCR/IP/4/Eng/REV.1 (1992 ed.), http://www.unhcr.org/4d93528a9.pdf (Harms inflicted by private actors "can be considered as persecution if they are knowingly tolerated by the authorities, or if the authorities refuse, or prove unable, to offer effective protection.").
[134] *See, e.g.*, *Bringas Rodriguez v. Sessions*, 850 F.3d 1051, 1056, 1076 (9th Cir. 2017) (persecution by family members and neighbor on account of applicant's homosexuality); *Doe v. Holder*, 736 F.3d 871, 874, 879 (9th Cir. 2013) (persecution by classmates and other private individuals); *Kadri v. Mukasey*, 543 F.3d 16, 18 19, 21 22 (1st Cir. 2008) (persecution by private patients and private members of the medical community); *Nabulwala v. Gonzalez*, 481 F.3d 1115, 1117 18 (8th Cir. 2007) (persecution by applicant's family members in order to change her sexual

others.[138] Courts also have granted cases involving domestic violence,[139] gang violence,[140] sex trafficking,[141] forced marriage,[142] involuntary servitude,[143] and female genital cutting,[144] perpetrated on account of the applicant's particular social group.

B. Religion

Freedom of religion is often curtailed by family members, communities, and militia groups, not affiliated with the government, who are seeking to punish individuals who do not comply with religious, and often cultural, norms. The BIA and courts of appeals routinely have

orientation); *Ornelas Chavez v. Gonzales*, 458 F.3d 1052, 1054, 1056 58 (9th Cir. 2006) (persecution by family members and other private parties).

[135] *See, e.g.*, *Salgado Sosa v. Sessions*, 882 F.3d 451, 457 59 (4th Cir. 2018); *Cruz v. Sessions*, 853 F.3d 122, 129 30 (4th Cir. 2017); *Zavaleta Policiano v. Sessions*, 873 F.3d 241, 249 50 (4th Cir. 2017); *Hernandez Avalos v. Lynch*, 784 F.3d 944, 949 50, 953 (4th Cir. 2015); *Aldana Ramos v. Holder*, 757 F.3d 9, 15, 17 19 (1st Cir. 2014); *Cordova v. Holder*, 759 F.3d 332, 338 40 (4th Cir. 2014); *Crespin Valladares v. Holder*, 632 F.3d 117, 126 27 (4th Cir. 2011).

[136] *See, e.g.*, *Kholyavskiy v. Mukasey*, 540 F.3d 555, 572 74 (7th Cir. 2008).

[137] *See, e.g.*, *Ahmed v. Keisler*, 504 F.3d 1183, 1198 99 (9th Cir. 2007) (persecution by the Awami League on account of applicant's membership in the social group of Bihari); *Fiadjoe v. Att'y Gen.*, 411 F.3d 135, 157 58, 162 63 (3d Cir. 2005) (persecution by applicant's father on account of her social group of Trokosi slaves); *In re H* , 21 I. & N. Dec. 337, 344 46 (BIA 1996) (persecution by members of the Hawiye clan on account of applicant's membership in the Marehan clan).

[138] *See, e.g.*, *Kamar v. Sessions*, 875 F.3d 811, 818 19 (6th Cir. 2017) (persecution by family on account of membership in the social group of "women who, in accordance with social and religious norms in Jordan, are accused of being immoral criminals and, as a consequence, face the prospect of being killed or persecuted without any protection from the Jordanian government"); *R.R.D. v. Holder*, 746 F.3d 807, 808, 810 (7th Cir. 2014) (persecution by drug traffickers on account of membership in the social group of "honest police"); *Gathungu v. Holder*, 725 F.3d 900, 907 (8th Cir. 2013) (persecution by members of the Mungiki group on account of membership in the social group of "Mungiki defectors"); *Orejuela v. Gonzales*, 423 F.3d 666, 672 74 (7th Cir. 2005) (persecution by FARC on account of membership in the social group of "educated, landowning class of cattle farmers targeted by FARC").

[139] *See, e.g.*, *Ngengwe v. Mukasey*, 543 F.3d 1029, 1031 32, 1034, 1038 (8th Cir. 2008) (persecution by applicant's in laws on account of her membership in the social group of female Cameroonian widows); *Matter of A R C G* , 26 I. & N. Dec. 388, 392 94 (BIA 2014).

[140] *See, e.g.*, *Oliva v. Lynch*, 807 F.3d 53, 56 57, 59 60 (4th Cir. 2015); *Henriquez Rivas v. Holder*, 707 F.3d 1081, 1085 87, 1091 (9th Cir. 2013); *Madrigal v. Holder*, 716 F.3d 499, 503 06 (9th Cir. 2013); *Garcia v. Att'y Gen. of the U.S.*, 665 F.3d 496, 503 04 (3d Cir. 2011).

[141] *See, e.g.*, *Paloka v. Holder*, 762 F.3d 191, 193 95, 198 99 (2d Cir. 2014) (persecution by private sex traffickers on account of social group of unmarried young women in Albania between the ages of 15 and 25); *Cece v. Holder*, 733 F.3d 662, 673, 675 76 (7th Cir. 2013) (en banc) (sex trafficking on account of social group of "young, Albanian women who live alone").

[142] *See, e.g.*, *Qu v. Holder*, 618 F.3d 602, 604, 608 (6th Cir. 2010).

[143] *See, e.g.*, *id.* at 604, 608; *Gomez Zuluaga v. Att'y Gen. of the U.S.*, 527 F.3d 330, 346 48 (3d Cir. 2008).

[144] *See, e.g.*, *Gatimi v. Holder*, 578 F.3d 611, 614 15, 618 (7th Cir. 2009); *Haoua v. Gonzales*, 472 F.3d 227, 230 32 (4th Cir. 2007); *Mohammed v. Gonzales*, 400 F.3d 785, 795 98 (9th Cir. 2005); *Abay v. Ashcroft*, 368 F.3d 634, 639 40 (6th Cir. 2004); *Abankwah v. INS*, 185 F.3d 18, 21, 23 26 (2d Cir. 1999); *In re Kasinga*, 21 I. & N. Dec. 357, 368 (BIA 1996).

granted cases involving persecution by private actors on account of religion.[145] We refer the AG to the amicus brief submitted on behalf of faith based organizations for additional examples.

C. Race & Nationality

The categories of race and nationality often meld together in asylum law.[146] As set forth in greater detail above, in *Matter of O-Z- & I-Z-*, the BIA affirmed a grant of relief to asylum seekers of Jewish nationality who were persecuted by an anti-Semitic, pro-Ukrainian independence movement, unconnected with the Ukrainian government.[147] The BIA noted that the applicants reported at least three incidents to the police, who failed to take action beyond writing a report.[148] Numerous other courts have granted cases in which the applicant claimed harm by private actors on account of race or nationality.[149]

D. Political Opinion

Asylum seekers facing persecution on account of their political opinion often are subjected to the acts of non-state actors, including militias, freedom fighters, rebels, terrorists, paramilitaries, revolutionaries, guerrillas, and quasi-state bodies. Expressing opposition to these non-state actors can subject an asylum seeker to acts of persecution, torture and even death. The

[145] *See, e.g.*, *Marouf v. Lynch*, 811 F.3d 174, 189 (6th Cir. 2016); *Ivanov v. Holder*, 736 F.3d 5, 12 13 (1st Cir. 2013); *Afriyie v. Holder*, 613 F.3d 924, 932 (9th Cir. 2010); *Paul v. Gonzales*, 444 F.3d 148, 151, 157 (2d Cir. 2006); *Pavlova v. INS*, 441 F.3d 82, 91 92 (2d Cir. 2006); *Rizal v. Gonzales*, 442 F.3d 84, 92 (2d Cir. 2006); *Krotova v. Gonzales*, 416 F.3d 1080, 1087 (9th Cir. 2005); *Poradisova v. Gonzales*, 420 F.3d 70, 81 82 (2d Cir. 2005); *Eduard v. Ashcroft*, 379 F.3d 182, 187 88 (5th Cir. 2004); *Matter of O Z & I Z* , 22 I. & N. Dec. 23, 26 (BIA 1998).

[146] *See, e.g.*, *Baballah v. Ashcroft*, 367 F.3d 1067, 1077 n.10 (9th Cir. 2004) ("[E]thnicity describes a category which falls somewhere between and within the protected grounds of race and nationality.")

[147] *Matter of O Z & I Z* , 22 I. & N. Dec. at 24.

[148] *Id.* at 26.

[149] *See, e.g.*, *Pan v. Holder*, 777 F.3d 540, 545 (2d Cir. 2015); *Poradisova v. Gonzales*, 420 F.3d 70, 81 82 (2d Cir. 2005); *Eduard v. Ashcroft*, 379 F.3d 182, 190 91 (5th Cir. 2004); *Guchshenkov v. Ashcroft*, 366 F.3d 554, 559 (7th Cir. 2004); *Mashiri v. Ashcroft*, 383 F.3d 1112, 1122 (9th Cir. 2004); *Melkonian v. Ashcroft*, 320 F.3d 1061, 1069 (9th Cir. 2003); *Hengan v. INS*, 79 F.3d 60, 62 63 (7th Cir. 1996); *Singh v. INS*, 94 F.3d 1353, 1360 (9th Cir. 1996); *Surita v. INS*, 95 F.3d 814, 819 20 (9th Cir. 1996).

BIA and courts of appeals have routinely granted cases involving persecution by private actors on account of political opinion.[150]

CONCLUSION

It is well settled in the Board of Immigration Appeals, all federal courts of appeals, and the United States Supreme Court that harms inflicted by private actors can constitute persecution for purposes of asylum or withholding of removal on account of any of the five protected grounds.

Dated: April 27, 2018

Respectfully Submitted,

Anjum Gupta
Professor of Law &
Director of the Immigrant Rights Clinic
Rutgers Law School
123 Washington Street
Newark, NJ 07102

Karla McKanders
Clinical Professor of Law
Immigration Practice Clinic
Vanderbilt Law School
131 21st Ave. South
Nashville, TN 37203

Counsel for Amici Curiae

[150] *See, e.g.*, *Khattak v. Holder*, 704 F.3d 197, 203, 207 (1st Cir. 2013); *Sharma v. Holder*, 729 F.3d 407, 412 13 (5th Cir. 2013); *Escobar v. Holder*, 657 F.3d 537, 539 40 (7th Cir. 2011); *Espinosa Cortez v. Att'y Gen. of the U.S*, 607 F.3d 101, 114 (3d Cir. 2010); *Zheng v. Mukasey*, 552 F.3d 277, 287 88 (2d Cir. 2009); *Gomez Zuluaga v. Att'y Gen. of the U.S.*, 527 F.3d 330, 344 45 (3d Cir. 2008); *Sok v. Mukasey*, 526 F.3d 48, 57 58 (1st Cir. 2008); *Lopez v. U.S. Att'y Gen.*, 504 F.3d 1341, 1344 (11th Cir. 2007); *Orejuela v. Gonzales*, 423 F.3d 666, 673 74 (7th Cir. 2005); *Vente v. Gonzales*, 415 F.3d 296, 301 03 (3d Cir. 2005); *Hoque v. Ashcroft*, 367 F.3d 1190, 1198 (9th Cir. 2004); *Bace v. Ashcroft*, 352 F.3d 1133, 1138 39 (7th Cir. 2003); *de la Llana Castellon v. INS*, 16 F.3d 1093, 1097 (10th Cir. 1994); *Sotelo Aquije v. Slattery*, 17 F.3d 33, 38 (2d Cir. 1994); *Rivas Martinez v. INS*, 997 F.2d 1143, 1148 (5th Cir. 1993); *Bolanos Hernandez v. INS*, 767 F.2d 1277, 1287 88 (9th Cir. 1984); *Matter of Villalta*, 20 I. & N. Dec. 142, 147 (BIA 1990).

APPENDIX A – LIST OF SIGNATORIES*

Ana Pottratz Acosta
Assistant Teaching Professor
Mitchell Hamline School of Law

Susan M. Akram
Clinical Professor and Director, International Human Rights Law Clinic
Boston University School of Law

Raquel E. Aldana
Associate Vice Chancellor for Academic Diversity and Professor of Law
University of California Davis

Heather Axford
Adjunct Professor
New York Law School

Sabrina Balgamwalla
Director, Asylum & Immigration Law Clinic
Wayne State Law School

David Baluarte
Associate Clinical Professor of Law
Washington and Lee University School of Law

Jon Bauer
Clinical Professor of Law and Richard D. Tulisano '69 Scholar in Human Rights
University of Connecticut School of Law

Lenni B. Benson
Professor of Law and Director, Safe Passage Project Clinic
New York Law School

Kaci Bishop
Clinical Associate Professor of Law, Immigration Clinic
University of North Carolina School of Law

Linda Bosniak
Distinguished Professor of Law
Rutgers University

* Listed in individual capacity. University affiliation is listed for identification purposes only.

J. Anna Cabot
William Davis Clinical Teaching Fellow
University of Connecticut School of Law

Kristina M. Campbell
Jack and Lovell Olender Professor of Law, Co-Director, Immigration & Human Rights Clinic
UDC David A. Clarke School of Law

Michael J. Churgin
Raybourne Thompson Centennial Professor in Law
University of Texas at Austin

Marisa Cianciarulo
Professor of Law, Associate Dean for Academic Affairs
Chapman University

Dree K. Collopy
Lecturer and former Director, Immigration Litigation Clinic
The Catholic University of America Columbus School of Law

Jenny-Brooke Condon
Professor of Law and Director, Equal Justice Clinic
Seton Hall Law School

Ericka Curran
Director, Immigrant and Family Advocacy Clinic
Florida Coastal School of Law

Julie Dahlstrom
Clinical Associate Professor
Boston University School of Law

Kate Evans
Associate Professor of Law
University of Idaho College of Law

Richard Frankel
Associate Professor of Law
Drexel University Thomas R. Kline School of Law

Niels W. Frenzen
Irmas Endowed Clinical Professor of Law
University of Southern California Gould School of Law

David Funke
Adjunct Professor of Law
Louis D. Brandeis School of Law

Paula Galowitz
Clinical Professor of Law Emerita
New York University School of Law

Ayodele Gansallo
Professor of Law and Clinical Supervisor
University of Pennsylvania

Valeria E. Gomez
Adjunct Professor, Asylum Law
Lincoln Memorial University Duncan School of Law

Joanne Gottesman
Clinical Professor and Director, Immigrant Justice Clinic
Rutgers Law School

Nicole Hallett
Assistant Clinical Professor of Law and Director, Community Justice Clinic
University at Buffalo School of Law

Jean C. Han
Practitioner-in-Residence
American University, Washington College of Law

Lindsay M. Harris
Assistant Professor and Co-Director, Immigration & Human Rights Clinic
University of the District of Columbia David A. Clarke School of Law

Kayleen R. Hartman
Clinical Teaching Fellow / Supervising Attorney
Loyola Law School

Dina Francesca Haynes
Professor of law
New England law

Susan V. Hazeldean
Assistant Professor of Law, Director of the LGBT Advocacy Clinic
Brooklyn Law School

Geoffrey Heeren
Visiting Associate Professor and Director, Immigrant Justice Clinic
University of Wisconsin Law School

Barbara Hines
Clinical Professor of Law (retired), Immigration Clinic
University of Texas School of Law

Laila L. Hlass
Professor of Practice
Tulane University School of Law

Geoffrey A. Hoffman
Director, Immigration Clinic
University of Houston Law Center

Mary Holper
Director, Immigration Law Clinic
Boston College Law School

Kari Hong
Assistant Professor, Founder of Ninth Circuit Appellate Program
Boston College Law School

Alan Hyde
Distinguished Professor of Law
Rutgers Law School

Kevin R. Johnson
Dean and Mabie-Apallas Professor of Public Interest Law and Chicana/o Studies
University of California, Davis, School of Law

Michael Kagan
Professor of Law, University of Nevada, Las Vegas
Michael Kagan

Kathleen Kim
Professor of Law
Loyola Law School Los Angeles

Jennifer Lee Koh
Professor of Law
Western State College of Law

Daniel M. Kowalski
Former Adjunct Professor and
Editor-in-Chief, Bender's Immigration Bulletin (LexisNexis)

Krista Kshatriya
Lecturer
University of California San Diego

Charles H. Kuck
Adjunct Professor Law
Emory Law School

Hiroko Kusuda
Clinic Professor
Loyola University New Orleans

Romy Lerner
Associate Director, Immigration Clinic
University of Miami

Beth Lyon
Clinical Professor of Law and Assistant Director of Clinical, Advocacy and Skills Programs
Cornell Law School

Lynn Marcus
Associate Scholar and Co-Director, Immigration Law Clinic
The University of Arizona Rogers College of Law

Peter Markowitz
Professor of Law
Cardozo School of Law

Fatma Marouf
Professor of Law
Texas A&M University School of Law

Sheila Velez Martinez
Jack and Lovell Olender Professor of Asylum Refugee and Immigration Law
University of Pittsburgh School of Law

Miriam Marton
Director, Tulsa Immigrant Resource Network
University of Tulsa College of Law

Julie Marzouk
Assistant Clinical Law Professor
Chapman University, Fowler School of Law

Elizabeth McCormick
Associate Clinical Professor of Law
University of Tulsa College of Law

Amelia Steadman McGowan
Adjunct Professor, Immigration Law Clinic
Mississippi College School of Law

Maria Isabel Medina
Professor of Law
Loyola University New Orleans College of Law

Vanessa Merton
Professor of Law & Faculty Director, Immigration Justice Clinic
Elisabeth Haub School of Law at Pace University

Richard T. Middleton, IV
Adjunct Professor of Law
Saint Louis University School of Law

Nickole Miller
Immigrant Rights Clinic Teaching Fellow
University of Baltimore School of Law

Spring Miller
Lecturer in Law
Vanderbilt Law School

H. Marissa Montes
Co-Director, Immigrant Justice Clinic
Loyola Law School

Jennifer Moore
Professor of Law
University of New Mexico

Craig B. Mousin
Adjunct Faculty
DePaul University College of Law

Elora Mukherjee
Associate Clinical Professor of Law and Director, Immigrants' Rights Clinic
Columbia Law School

Natalie Nanasi
Assistant Professor and
Director, Judge Elmo B. Hunter Legal Center for Victims of Crimes Against Women
SMU Dedman School of Law

Emily Torstveit Ngara
Director, Deportation Defense Clinic
Maurice A. Deane School of Law at Hofstra University

Mariela Olivares
Associate Professor of Law
Howard University School of Law

Sarah H. Paoletti
Practice Professor of Law and Director, Transnational Legal Clinic
University of Pennsylvania School of Law

Helen Parsonage
Adjunct Professor of Law
Wake Forest University School of Law

Huyen Pham
Professor of Law
Texas A&M University School of Law

Nina Rabin
Clinical Law Professor
James E. Rogers College of Law, Univ. of Arizona

Jaya Ramji-Nogales
I. Herman Stern Research Professor
Temple Law School

Renee C. Redman
Adjunct Professor of Law
University of Connecticut School of Law

Jean Reisz
Clinical Professor
University of Southern California Gould School of Law

Maritza Reyes
Associate Professor of Law
Florida A&M University College of Law

Sabrina Rivera
Staff Attorney
Western State College of Law

Emily Robinson
Co-Director, Loyola Immigrant Justice Clinic
Loyola Law School, Los Angeles

Katherine Aschenbrenner Rodriguez
Associate Professor of Law, Immigration Clinic
Barry University School of Law

Sarah Rogerson
Clinical Professor of Law
Albany Law School

Carrie Rosenbaum
Adjunct Professor of Immigration Law
Golden Gate University School of Law

Rachel E. Rosenbloom
Professor of Law
Northeastern University School of Law

Samantha Rumsey
Fellow, Immigrant Rights Clinic
Rutgers Law School

Kevin Ruser
Richard and Margaret Larson Professor of Law, M.S. Hevelone Professor of Law, and Director of Clinical Programs
University of Nebraska College of Law

Heather Scavone
Assistant Professor of Law and Director, Humanitarian Immigration Law Clinic
Elon University School of Law

Irene Scharf
Professor of Law
UMass School of Law

Andrew I. Schoenholtz
Professor from Practice
Georgetown Law

Erica Schommer
Clinical Assistant Professor of Law
St. Mary's University School of Law

Philip G. Schrag
Delaney Family Professor of Public Interest Law
Georgetown University Law Center

Kim Thuy Seelinger
Lecturer & Director, Human Rights Center - Sexual Violence Program
University of California, Berkeley, School of Law

Rachel Settlage
Associate Professor, Director of Clinical Education
Wayne State Law School

Ragini Shah
Clinical Professor of Law
Suffolk University Law School

Michael H. Sharon
Adjunct Professor of Law
Case Western Reserve School of Law

Rebecca Sharpless
Clinical Professor of Law
University of Miami School of Law

Gemma Solimene
Clinical Associate Professor of Law
Fordham University School of Law

Jayashri Srikantiah
Professor of Law and Director, Immigrants' Rights Clinic
Stanford Law School

Elissa Steglich
Clinical Professor, Immigration Clinic
University of Texas School of Law

Maureen A. Sweeney
Law School Associate Professor
University of Maryland Carey School of Law

Claire R. Thomas
Adjunct Professor of Law and Director, Asylum Clinic
New York Law School

David B. Thronson
Professor of Law and Associate Dean for Experiential Education
Michigan State University College of Law

Veronica T. Thronson
Clinical Professor of Law
Michigan State University College of Law

Allison Brownell Tirres
Associate Professor of Law
DePaul University College of Law

Diane Uchimiya
Professor of Law and Director, Justice and Immigration Clinic
University of La Verne College of Law

Yolanda Vazquez
Associate Professor of Law
University of Cincinnati College of Law

Alexander Vernon
Director, Immigration Law Clinic
University of Detroit Mercy School of Law

Leti Volpp
Robert D. and Leslie Kay Raven Professor of Law
University of California Berkeley

Jonathan Weinberg
Professor of Law
Wayne State University Law School

Anna Welch
Director, Refugee and Human Rights Clinic
University of Maine School of Law

Virgil Wiebe
Professor of Law, Robins Kaplan Director of Clinical Education, Director of Immigration Clinic
University of St. Thomas School of Law, Minnesota

Stephen Wizner
William O. Douglas Clinical Professor Emeritus & Professorial Lecturer
Yale Law School

Lauris Wren
Clinical Professor of Law
Maurice A. Deane School of Law at Hofstra University

Stephen Yale-Loehr
Professor of Immigration Law Practice
Cornell Law School

Beth Zilberman
Teaching Fellow
Michigan State University College of Law

CERTIFICATE OF COMPLIANCE

This brief complies with the instructions in the Attorney General's referral order dated March 7, 2018, because the brief contains 8995 words, excluding the cover page, Table of Contents, Table of Authorities, signature block, Appendix, Certificate of Compliance, and Certificate of Service.

Dated: April 27, 2018

Anjum Gupta

CERTIFICATE OF SERVICE

I hereby certify that, on April 27, 2018, the foregoing brief was submitted electronically to AGCertification@usdoj.gov and in triplicate via FedEx to:

United States Department of Justice
Office of the Attorney General, Room 5114
950 Pennsylvania Avenue, NW
Washington, DC 20530

Dated: April 27, 2018

Anjum Gupta

UNITED STATES DEPARTMENT OF JUSTICE OFFICE OF THE ATTORNEY GENERAL

In the Matter of:	)	
A-B-	)	
In Removal Proceedings	)	File No.:_____

BRIEF OF *AMICI CURIAE* THE HARVARD IMMIGRATION AND REFUGEE CLINICAL PROGRAM, THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION, HUMAN RIGHTS FIRST, AND KIDS IN NEED OF DEFENSE

Nancy Kelly
Deborah Anker
John Willshire Carrera
Sabi Ardalan
Phil Torrey
HARVARD LAW SCHOOL
6 Everett St.
Cambridge, M.A. 02138
Phone: 617-584-2974
Fax: 617-495-8595

Steven H. Schulman
Martine E. Cicconi
AKIN GUMP STRAUSS HAUER & FELD LLP
1333 New Hampshire Ave., NW
Washington, D.C. 20036
Phone: 202-887-4000
Fax: 202-887-4288
sschulman@akingump.com

Counsel for Amici Curiae

(Additional Counsel listed on inside cover)

Mark R. Barr
LITCHER IMMIGRATION
1601 Vine St.
Denver, C.O. 80206
Phone: 303-554-8400

Benjamin Casper Sanchez, Director
JAMES H. BINGER CENTER FOR NEW AMERICANS
UNIVERSITY OF MINNESOTA LAW SCHOOL
190 Mondale Hall
229 19th Ave. South
Minneapolis, M.N. 55455
Phone: 612-625-6484

Eleanor Acer
HUMAN RIGHTS FIRST
75 Broad St., 31st Floor
New York, N.Y. 10004
Phone: 212-845-5200
Fax: 212-845-5299

Wendy Young, President
KIDS IN NEED OF DEFENSE (KIND)
1300 L St. NW, 11th Floor
Washington, D.C. 20005
Phone: 202-824-8685

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

STATUTES:

OTHER AUTHORITIES:

INTEREST OF *AMICI CURIAE*

The Harvard Immigration and Refugee Clinical Program ("HIRC") at Harvard Law School has been a leader in the field of refugee and asylum law for over 30 years. The Clinic has an interest in the appropriate application and development of U.S. asylum and immigration law, so that claims for asylum protection and other immigration relief receive fair and full consideration under existing standards of law.

HIRC has worked with thousands of immigrants and refugees from around the world since its founding in 1984. It combines representation of individual applicants for asylum and related relief with the development of theories, policy, and national advocacy.

HIRC has been engaged by the Justice Department in the training of immigration judges, asylum officers, and supervisors on issues related to asylum law. HIRC was central to the drafting of the historic U.S. Gender Asylum Guidelines, which were adopted by the federal government, and has played a key role in promoting appropriate and fair treatment of women in interpretation of U.S. asylum law. In addition HIRC has represented hundreds of women applying for asylum protection, and has filed briefs as *amicus curiae* in many cases before the U.S. Supreme Court, the federal Courts of Appeals, the Board of Immigration Appeals ("Board"), and various international tribunals.

The American Immigration Lawyers Association ("AILA") is a national association with more than 15,000 members throughout the United States, including lawyers and law school professors who practice and teach in the field of immigration and nationality law. AILA seeks to advance the administration of law pertaining to immigration, nationality, and naturalization; to cultivate the jurisprudence of the immigration laws; and to facilitate the administration of justice and elevate the standard of integrity, honor, and courtesy of those appearing in a representative capacity in immigration and naturalization matters. AILA's members practice regularly before the Department of Homeland Security ("DHS"), immigration courts, and the Board of Immigration Appeals, as well as before the United States District Courts, Courts of Appeals, and the Supreme Court of the United States.

Since 1978, Human Rights First has worked to protect and promote fundamental human rights and to ensure protection of the rights of refugees, including the right to seek and enjoy asylum. Human Rights First grounds its refugee protection work in the standards set forth in the 1951 Convention Relating to the Status of Refugees, the 1967 Protocol Relating to the Status of Refugees, the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, and other international human rights instruments, and advocates adherence to these standards in U.S. law and policy. Human Rights First also

operates one of the largest pro bono asylum representation programs in the country. Through the assistance of volunteer attorneys, Human Rights First provides legal representation without charge to hundreds of asylum applicants unable to afford counsel, many of whom stand to be affected by the outcome of this case.

Kids In Need of Defense ("KIND") is a national non-profit organization whose ten field offices provide free legal services to immigrant children who reach the United States unaccompanied by a parent or legal guardian, and face removal proceedings in Immigration Court. Since 2009, KIND has received referrals for over 15,800 children from 70 countries, and has partnered with pro bono counsel at over 500 law firms, corporations, law schools, and bar associations. KIND also advocates for changes in law, policy, and practice to enhance protections for unaccompanied children. Many children served through KIND have endured serious harm, including through domestic violence and its consequences, and many request and receive protection under United States law. KIND has a compelling interest in ensuring their access to the full measure of protection that the law affords.

INTRODUCTION AND SUMMARY OF ARGUMENT

In his Interim Decision of March 7, 2018, the Attorney General sought argument on the following question: "Whether, and under what circumstances, being a victim of private criminal activity constitutes a cognizable 'particular

social group' for purposes of an application for asylum or withholding of removal." 27 I. & N. Dec. 227 (A.G. 2018). Embedded in this question is the proper interpretation of "particular social group" under the Immigration and Nationality Act ("INA").

The Board of Immigration Appeals answered that question over 30 years ago in its seminal decision in *Matter of Acosta*. There, the Board determined that a particular social group may be comprised of individuals sharing a common immutable characteristic, including gender. *See* 19 I. & N. Dec. 211, 233 (BIA 1985). *Acosta*'s holding is faithful to the INA as illuminated through the *ejusdem generis* canon. It has been accepted by U.S. Courts of Appeals and adopted by other state signatories to the United Nations Convention relating to the Status of Refugees. *Acosta*'s reasoning has also been endorsed by the United Nations High Commissioner for Refugees ("UNHCR") and scholars in the field.

Despite the widespread acceptance of *Acosta* in the U.S. and the world, gender alone as a defining characteristic of a particular social group has been met with misplaced criticism that the category is overbroad. But other status categories in the refugee definition namely, race, nationality, and religion are equally broad. Because, under the *ejusdem generis* canon, particular social group is to be interpreted consistently with those categories, it makes no sense to shun gender as a qualifying characteristic because it sweeps too broadly when other categories that

indisputably fit the refugee definition have the same expansive reach. These unfounded "floodgates" concerns also fail to account for the fact that particular social group is only one element of the refugee definition. As with claims involving race, religion, or nationality, a woman claiming refugee status based on gender is required to satisfy *all* elements of that definition. Among other requirements, she must show that she suffered past persecution, or has a well-founded fear future of persecution, *because she is a woman*.

As the many national and international bodies that have embraced *Acosta* have recognized, such persecution is an indisputable reality for many women and girls in societies around the world (including El Salvador, the homeland of the applicant here). If he reaches the merits of this case,[1] the Attorney General should take the opportunity to recognize that undeniable truth and to acknowledge what the world has come to understand: Gender alone may define a particular social group under the refugee definition.

---

[1] *Amici* share respondent and other *amici*'s concern about the limitations of the procedural posture of this case, the deficiencies in the question presented, and the danger that issuing an adverse decision on the merits will violate respondent's due process rights. Respondent's Br. 16-21; National Immigrant Law Center Br. 4-16, 19-25. *Amici* accordingly urge the Attorney General to heed respondent's request that he not take action in this case. Despite these concerns, *amici* provide their view on the proper interpretation of particular social group to aid the Attorney General should he decide to consider the merits of these issues.

ARGUMENT

MEMBERSHIP IN A PARTICULAR SOCIAL GROUP MAY BE SHOWN BY GENDER ALONE

A. The Conclusion That Gender Is Sufficient To Establish Membership In A Particular Social Group Is Faithful To The INA, As Recognized In *Acosta*

The INA defines the term "refugee." 8 U.S.C. § 1101(a)(42). Pursuant to the statute, in order to qualify as a refugee, an applicant must demonstrate "a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." *Id.* § 1101(a)(42)(A).

According to the Board's own analysis, the meaning of particular social group is discerned by resort to commonly used canons of statutory construction specifically *ejusdem generis*. That doctrine, the Board explained in *Acosta*, "holds that general words used in an enumeration with specific words should be construed in a manner consistent with the specific words." *Acosta*, 19 I. & N. Dec. at 233. Looking to the surrounding words in the list of grounds for persecution, the Board found that each "describes persecution aimed at an immutable characteristic . . . that either is beyond the power of an individual to change or is so fundamental to individual identity or conscience that it ought not be required to be changed." *Id.* Based on that understanding, the Board determined that "membership in a particular social group" should be read to encompass "persecution that is directed

toward an individual who is a member of a group of persons all of whom share *a common, immutable characteristic*." *Id.* (emphasis added).

Gender is an immutable characteristic. Like race or religion, gender is entrenched, innate, and central to identity. Indeed, the Board recognized that fact in *Acosta*, listing gender among those traits that would satisfy its definition of particular social group. "The shared characteristic" that could identify a persecuted group for purposes of establishing refugee status, the Board declared, "might be sex, color, or kinship ties." *Id.*

B. *Acosta*'s Framework And Conclusion That Gender May Define A Particular Social Group Has Been Accepted By Courts And International Bodies

1. Acosta *forms the basis of established precedent in U.S. Circuit Courts of Appeals*

Acosta's framework has been accepted by numerous federal courts of appeals. In 1993, the Third Circuit, per then-Judge Alito, cited *Acosta* approvingly in *Fatin v. INS*, 12 F.3d 1233, 1240 (3d Cir.). Because *Acosta* "specifically mentioned 'sex' as an innate characteristic that could link the members of a 'particular social group,'" Judge Alito found that Fatin had satisfied that requirement "to the extent that . . . [she] suggest[ed] that she would be persecuted . . . simply because she is a woman." *Id.* Similarly, in *Niang v. Gonzales*, the Tenth Circuit "[a]ppl[ied] the *Acosta* definition" to find that "the female members of a tribe" qualified as a particular social group, observing that

"[b]oth gender and tribal membership are immutable characteristics." 422 F.3d 1187, 1199 (10th Cir. 2005).

Also reasoning from *Acosta*, the Ninth Circuit observed in *Mohammed v. Gonzales* that "the recognition that girls or women of a particular clan or nationality (or even in some circumstances females in general) may constitute a social group is simply a logical application . . . [of the conclusion that] a 'particular social group' is one united by . . . an innate characteristic." 400 F.3d 785, 797 (9th Cir. 2005); *accord Perdomo v. Holder*, 611 F.3d 662, 669 (9th Cir. 2010) (remanding BIA's decision that "women in Guatemala" could not constitute particular social group because it was "inconsistent with . . . *Acosta*"). Likewise, in *Cece v. Holder*, the Seventh Circuit found that, "in light of . . . *Acosta*," the applicant "established that she belongs to a cognizable social group" consisting of "young woman living alone in Albania" because "the attributes are immutable or fundamental." 733 F.3d 662, 677 (7th Cir. 2013). And, in *Hassan v. Gonzales*, the Eighth Circuit recognized the particular social group "Somali women" based on the applicant's "possession of the immutable trait of being female." 484 F.3d 513, 513 (8th Cir. 2007); *see also Ahmed v. Holder*, 611 F.3d 90, 96 (1st Cir. 2010) ("Gender a common, immutable characteristic can be a component of a viable 'social group' definition.").

2. *Other state signatories to the U.N. Convention have also adopted* Acosta*'s framework*

The INA follows the articulation of the five enumerated grounds for persecution found in the 1951 United Nations Convention relating to the Status of Refugees. *See* Convention relating to the Status of Refugees, adopted Jul. 28, 1951, entered into force Apr. 22, 1954, 189 UNTS 137; *see also INS v. Cardoza-Fonseca*, 480 U.S. 421, 437 (1987) (noting that "one of Congress' primary purposes [in passing the Refugee Act of 1980] was to bring United States refugee law into conformance with the [1967 Protocol relating to the Status of Refugees]" (internal quotation marks omitted)).[2] Given that "the definition of 'refugee' that Congress adopted is virtually identical to the one prescribed by Article 1(2) of the Convention," *Cardoza-Fonseca*, 480 U.S. at 437, the views of other state signatories to the Convention are relevant to the proper interpretation of the INA. *See Negusie v. Holder*, 555 U.S. 511, 537 (2009) ("When we interpret treaties, we consider the interpretations of the courts of other nations, and we should do the same when Congress asks us to interpret a statute in light of a treaty's language.") (Stevens, J., concurring and dissenting).

---

[2] The 1967 Protocol relating to the Status of Refugees removed certain temporal and geographical limitations in the 1951 Convention. *See* Protocol relating to the Status of Refugees, adopted Jan. 31, 1967, entered into force Oct. 4, 1967, 606 UNTS 267. The United States is a signatory to the 1967 Protocol, but not the 1951 Treaty.

Among other signatories, the *Acosta* framework and the consequent conclusion that gender may establish membership in a particular social group is well established in law. Eight years after the Board decided *Acosta*, the Supreme Court of Canada cited the decision in *Canada (Attorney General) v. Ward*, finding that particular social group "would embrace individuals fearing persecution on such bases as gender," an "immutable characteristic." [1993] 2 S.C.R. 689, 75, 79 (Can., S.C.C.). Following *Ward*, the Canadian courts have recognized particular social groups comprised of "Haitian women," *Josile v. Canada (Minister of Citizenship & Immigration)*, [2011] 382 FTR 188 (Can. FC, Jan. 17, 2011), at [10], [28]-[30], and "women in the [Democratic Republic of the Congo]," *Kn v. Canada (Minister of Citizenship & Immigration)*, (2011) 391 FTR 108 (Can. FC, June 13, 2011), at [30], among others similar categories. *See* JAMES C. HATHAWAY & MICHELLE FOSTER, THE LAW OF REFUGEE STATUS § 5.9.1 (2d ed. 2014) (collecting these and other cases).

In 1999, the United Kingdom House of Lords relied on the Board's decision to recognize "women in Pakistan" as a particular social group, observing that its conclusion was "neither novel nor heterodox," but "simply logical application of the seminal reasoning in *Acosta*." *Islam & Shah v. Sec'y of State Home Dep't*, [1999] 2 AC 629, 644-45 (U.K.). In 2006, the House of Lords affirmed its conclusion that gender alone may fall within the definition of a particular social

group when considering the case of a woman fleeing the threat of female genital mutilation ("FGM"). "[W]omen in Sierra Leone," Lord Cornhill wrote, "are a group of persons sharing a common characteristic which, without a fundamental change in social mores is unchangeable, namely a position of social inferiority compared with men." *Fornah (FC) v. Sec'y of State for Home Dep't*, [2006] UKHL 46, para. 31. Baroness Hale opined that the question whether the applicant had established her membership in a particular social group was "blindingly obvious," *id.* para. 83, and observed that "the world has woken up to the fact that women as a sex may be persecuted in ways which are different from the ways in which men are persecuted and that they may be persecuted because of the inferior status accorded to their gender in their home society," *id.* para. 86.

Echoing that sentiment (and relying on *Fornah*), the tribunals of New Zealand have noted that "it is indisputable that sex and gender can be the defining characteristic of a social group and that 'women' may be a particular social group." *Refugee Appeal No. 76044* para. 92 (NZ RSAA, 2008); *see also Minister for Immigration & Multicultural Affairs v. Khawar* (2002) 76 A.L.J.R. 667 (Aust.) (tribunal could find that "women in Pakistan" constitute particular social group).

3. Guidelines issued by the UNHCR and parties to the U.N. Convention acknowledge that gender may establish membership in a particular social group

Further support for the view that gender alone may establish membership in a particular social group comes from the United Nations High Commissioner for Refugees ("UNHCR"). As part of its supervisory responsibilities, the UNHCR provides interpretive guidance on the provisions of the 1951 Convention and 1967 Protocol relating to the Status of Refugees. U.S. courts have recognized that materials issued by the UNHCR constitute "persuasive authority in interpreting the scope of refugee status under domestic asylum law." *Miguel-Miguel v. Gonzales*, 500 F.3d 941, 949 (9th Cir. 2007); *see also Cardoza-Fonseca*, 480 U.S. at 439 n.22 (noting that UNHCR material "provides significant guidance" in the interpretation of the Convention, upon which U.S. asylum law is based); *Mohammed*, 400 F.3d at 798 (UNHCR "provides significant guidance for issues of refugee law").

In 2002, the UNHCR issued guidelines on "Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees." U.N. Doc. HCR/GIP/02/01 (May 7, 2002) ("UNHCR Gender-Related Persecution Guidelines"). Following *Acosta*'s *ejusdem generis* analysis, the UNHCR explained:

> [A] particular social group is a group of persons who share a common characteristic other than their risk of being persecuted, or who are perceived as a group by society. The characteristic will often be one which is innate, unchangeable, or which is

> otherwise fundamental to identity, conscience or the exercise of one's human rights.

Id.

"It follows," the UNHCR continued, "that sex can properly be within the ambit of the social group category, with women being a clear example of a social subset defined by innate and immutable characteristics." *Id.* The "characteristics" of women "also identify them as a group in society, subjecting them to different treatment and standards in some countries." *Id.* In other guidelines specifically considering membership in a particular social group, the UNHCR explained that "women may constitute a particular social group under certain circumstances based on the common characteristic of sex, whether or not they associate with one another based on that shared characteristic." Guidelines on International Protection: Membership of a Particular Social Group within the context of Article 1(A)(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, U.N. Doc. HCR/GIP/02/02 at 4 (May 7, 2002); *see also Mohammed*, 400 F.3d at 798 (quoting guidelines).

Even before the UNHCR issued these interpretive aids, several signatories to the U.N. Convention and Protocol produced their own guidelines on gender-related claims. In 1995, the United States issued guidelines regarding "asylum claims by women." *See generally* Memorandum from Phyllis Coven, INS Office of International Affairs, to All INS Asylum Officers and HQASM Coordinators 9

(May 26, 1995). Citing *Fatin*, in which the "court regarded gender, either alone or as part of a combination, as a characteristic that could define a particular social group within the meaning of the INA," the U.S. guidelines described that decision as consistent "with the statement of the Board in *Acosta* that 'sex' might be the sort of shared characteristic that could define a particular social group." *Id.* (citing *Fatin*, 12 F.3d at 1240); *see also In re Matter of Fauyiza Kasinga*, 21 I. & N. Dec. 357, 377 (BIA 1996) (Rosenberg, concurring) ("Our recognition of a particular social group based upon tribal affiliation and gender is also in harmony with the guidelines for adjudicating women's asylum claims issued by [INS].").

Canada issued gender-related guidelines in 1993. *See Immigration & Refugee Board of Canada*, Women Refugee Claimants Fearing Gender-Related Persecution: Guidelines Issued by the Chairperson Pursuant to Section 65(3) of the Immigration Act (Mar. 9, 1993). The Canadian guidelines (subsequently updated) explain that gender is the type of innate characteristic that may define a particular social group. *See Immigration & Refugee Board of Canada*, Women Refugee Claimants Fearing Gender-Related Persecution: Guidelines Issued by the Chairperson Pursuant to Section 65(3) of the Immigration Act (Nov. 13, 1996). Australia was also among the first to issue gender guidelines, producing a version in 1996 that included the statement: "[G]ender . . . may be a significant factor in recognising a particular social group. . . . [W]hilst being a broad category, women

nonetheless have both immutable characteristics and shared common social characteristics which may make them cognizable as a group and which may attract persecution." *Australian Department of Immigration and Multicultural Affairs*, Refugee and Humanitarian Visa Applicants: Guidelines on Gender Issues for Decision Makers § 4.33 (July 1996). The United Kingdom followed in 2000, issuing guidelines providing that "[p]articular social groups can be identified by reference to innate or unchangeable characteristics or characteristics that a woman should not be expected to change," including "gender." *Immigration Appellate Authority of the United Kingdom*, Asylum Gender Guidelines 41 (Nov. 2000).[3]

C. Gender Meets The Criteria The Board Has Added To Define A Particular Social Group Since *Acosta*

Despite the fact that courts in countries around the world have aligned themselves with *Acosta*, in recent years, the Board has "expanded the [particular social group] analysis beyond the *Acosta* test," identifying additional criteria required to establish a cognizable group. *Matter of M-E-V-G-*, 26 I. & N. Dec. 227, 232 (BIA 2014). Specifically, the Board has opined that the group must be "particular" and "socially distinct." *Id.* at 228. With respect to particularity, the Board has stressed that the group "must be defined by characteristics that provide a

[3] Scholars agree that gender can be the basis for membership in a particular social group. *See, e.g.*, DEBORAH ANKER, LAW OF ASYLUM IN THE UNITED STATES § 5.45 (2017 ed.); HATHAWAY & FOSTER, *supra*, § 5.9.1; Michelle Foster, *Why Are We Not There Yet: The Particular Challenge of Particular Social Group*, GENDER AND REFUGEE LAW 35 (2014).

clear benchmark for determining who falls within [it]." *Id.* at 229. With respect to social distinction, the Board has held that the applicant must offer evidence that "society in general perceives, considers, or recognizes persons sharing the particular characteristic to be a group." *Matter of W-G-R-*, 26 I. & N. Dec. 208, 217 (BIA 2014).[4]

It should be obvious that women as a group meet the Board's new requirements. There are clear "benchmarks" determining who is a woman and who is not. Indeed, in most countries, the sex of a newborn is listed on a birth certificate. And censuses and other calculations of a country's population often segregate men and women, providing population estimates for both categories. *See, e.g.*, U.S. Census, Quick Facts, *available at* https://www.census.gov/quickfacts/fact/table/US/PST045217.

For those reasons, women as a group are not "amorphous, overbroad, diffuse, or subjective." *Matter of M-E-V-G-*, 26 I. & N. Dec. at 239. They are also clearly identifiable in society, both by perception and by sight (although the latter is not necessary for purposes of the social group definition), *id.* at 240, and are

[4] Courts have criticized the particularity and social distinction requirements. *See, e.g.*, *Valdiviezo-Galdamez v. Attorney Gen.*, 663 F.3d 582, 607 (3d Cir. 2011); *Gatimi v. Holder*, 578 F.3d 611, 615-16 (7th Cir. 2009). *Amici* agree that those requirements are misguided insofar as they are inconsistent with the text of the INA as illuminated by *ejusdem generis*, and with the interpretation of the Convention and Protocol by sister signatories. *See* Respondent's Br. 38-39. As described above, however, the requirements of particularity and distinction do not foreclose particular social groups defined by gender alone.

considered to be a group, *Matter of W-G-R-*, 26 I. & N. at 217. Moreover, the Board has observed that a country's "culture of machismo and family violence," as well as its failure to enforce laws designed to protect women, can be evidence of "social distinction." *Matter of A-R-C-G*, 26 I. & N. Dec. 388, 394 (BIA 2014). That view is in line with court decisions and guidelines recognizing the uniquely vulnerable position women occupy in cultures that turn a blind eye to gender-based violence. *See Fornah*, [2006] UKHL 46, para. 31 ("[W]omen . . . are a group of persons sharing a common characteristic . . . namely, a position of social inferiority compared with men."); UNHCR Gender-Related Persecution Guidelines (stating that women's characteristics "identify them as a group in society, subjecting them to different treatment and standards in some countries").

Based on the Board's precedent, therefore, it is apparent that women as a group satisfy the particularity and social distinction criteria, whether or not those requirements have any basis in the refugee definition.[5]

[5] In its brief in this matter, DHS offers no rebuttal to the arguments outlined herein that gender alone may define a particular social group. DHS nonetheless contends that "examination of . . . foundational issues," such as the intent of the drafters of the Refugee Act of 1980, the 1951 U.N. Convention, and the 1967 Protocol, "is an exercise probably best left to rulemaking." DHS Br. 21 n.13. As is clear from the authorities cited above, whether gender alone can establish membership in a particular social group under the refugee definition is question of law, not policy.

D. The Size And Internal Diversity Of A Particular Social Group Defined By Gender Poses No Barrier To Recognition

Over the years, perhaps driven by a misguided belief that gender alone cannot define a particular social group because it sweeps too broadly, asylum applicants have proposed particular social groups that are "overly complicated and unnecessarily detailed." HATHAWAY & FOSTER, *supra*, § 5.9.1. Typically, these groups improperly "import[] other elements of the [refugee] definition, such as . . . well-founded fear . . . nature of the harm feared . . . and inability or unwillingness of the state to protect." *Id.*[6]

Efforts to narrow particular social groups beyond gender are unnecessary. Like gender, "race, nationality, religion, and even political opinion are . . . traits which are shared by large numbers of people." *Id.* Yet claims based on these characteristics are not viewed with skepticism simply because the categories are expansive. For example, when a Christian applicant for asylum cites religion as a

---

[6] For example, in *In re Fauziya Kasinga*, a decision notable for its correct result a grant of asylum for a woman fleeing the threat of FGM the Board defined the particular social group of which the applicant was part as "young women of the Tchamba-Kunsuntu Tribe who have not had FGM, as practiced by that tribe, and who oppose the practice." 21 I. & N. Dec. 357, 365 (BIA 1996). Rather than layering qualifiers on her particular social group (and considering her political opinion simultaneously), the Board should have analyzed the fact that the applicant had not had FGM in the context of her well-founded fear of persecution and/or whether she would be persecuted "on account of" her status. *See* HATHAWAY & FOSTER, *supra*, § 5.9.1; *see also Kasinga*, 21 I. & N. Dec. at 375-76 (Rosenberg, concurring) (noting that applicant's opposition to FGM was not relevant to her particular social group).

protected ground, the claim is not rejected at the outset because there are over two billion adherents to Christianity in the world. Similarly, political opinion-based claims are not turned away because a large number of a country's citizens oppose its repressive government.

Gender-based claims are no different. "Neither [particular social group] nor any [other] ground performs the function of the entire refugee definition." ANKER, *supra*, § 5:45. Rather, "[particular social group] is only one element of eligibility [for refugee status]," and each of the other elements including nexus, well-founded fear, and failure of state protection has an equally critical role to play in determining whether an applicant qualifies for asylum. *Id.* No matter what protected ground is alleged race, religion, particular social group or any other "legitimate concerns about particularizing or individualizing a claim appropriately should be addressed through other definitional criteria." *Id.* As the Tenth Circuit has explained:

> There may be understandable concern in using gender as a group-defining characteristic. One may be reluctant to permit, for example, half a nation's residents to obtain asylum on the ground that women are persecuted there. But the focus with respect to such claims should be not on whether either gender constitutes a social group (which both certainly do) but on whether the members of that group are sufficiently likely to be persecuted that one could say that they are persecuted "on account of" their membership.

Niang, 422 F.3d at 1199-1200.

Apart from being unnecessary, efforts to narrow gender-based particular social groups have pernicious effects. First, overly detailed groups often "fall foul of the established principle that it is impermissible to define the group solely by reference to the threat of persecution." HATHAWAY & FOSTER, *supra*, § 5.9.1 (quotation marks omitted). As Baroness Hale put it in the House of Lords' decision in *Fornah*, this phenomenon "is a particularly cruel version of Catch 22: If not all the group are at risk, then the persecution cannot be caused by their membership of the group; if the group is reduced to those who are at risk, it is then defined by the persecution alone." [2006] UKHL 46, para. 113; *see, e.g.*, *Escobar-Batres v. Holder*, 385 F. App'x 445 (6th Cir. 2010) ("Escobar's proposed social group is simply too broad, as it consists of any female teenage citizen who refuses to join the *Maras* . . . . Although Escobar attempts to narrow her proposed group by emphasizing that its members are harassed, beaten, tortured, and even killed for not joining the *Maras*, . . . a social group may not be circularly defined by the fact that it suffers persecution." (internal quotation marks omitted)). [7]

[7] Not all particular social groups narrowed beyond gender suffer from these flaws. For example, in *Matter of A-R-C-G-*, the Board recognized the particular social group "married women in Guatemala who are unable to leave their relationship." 26 I. & N. Dec. 388 (BIA 2014). The Board followed *Acosta* in recognizing that the group was defined by immutable characteristics, citing gender, nationality, and relationship status. *Id.* at 388-89. Even though it was unnecessary to cabin the particular social group beyond gender, the group the Board recognized did not improperly subsume other elements of the refugee definition.

Second, the practice of defining and limiting particular social groups leads to the constant relitigation of claims and a lack of meaningful guidance from which applicants can establish their entitlement to protection. Rather than prolonging this chaotic approach, the Attorney General should take this opportunity to state clearly that gender is sufficient to define a particular social group. Such a statement would recognize an unfortunate but unavoidable truth: Women are vulnerable to persecution "in ways which are different from the ways in which men are persecuted[,] and . . . [are] persecuted because of the inferior status accorded to [their] gender" in societies around the world. *Fornah*, [2006] UKHL 46, para. 86.

CONCLUSION

Should he reach the merits of this case, the Attorney General should affirm the continuing validity of *Acosta*, recognize that gender is sufficient to establish membership in a particular social group, and hold that respondent qualifies for asylum and withholding of removal.

Like *Acosta*, *A-R-C-G-* has been cited approvingly in numerous courts of appeals since it was decided in 2014. *See, e.g.*, *Peres-Rabanales v. Sessions*, 881 F.3d 61 (1st Cir. 2018); *Guzman-Alvarez v. Sessions*, 701 F. App'x 54 (2d Cir. 2017); *Gaitan-Bernal v. Sessions*, 695 F. App'x 224 (9th Cir. 2017); *Marikasi v. Lynch*, 840 F.3d 281 (6th Cir. 2016). Moreover, DHS has taken the position that similar particular social groups are cognizable since at least 2004. *See* DHS Position on Respondent's Eligibility for Relief, *Matter of R-A-*, at 26-28 (2004); DHS Supplemental Brief, *Matter of L-R-*, at 14-15 (2009).

In light of *A-R-C-G-*'s fidelity to *Acosta*, its acceptance in the courts, and DHS's longstanding support for the position the Board adopted, *amici* join respondent in urging the Attorney General to affirm the holding in *A-R-C-G-*.

Dated: April 27, 2018

Respectfully submitted,

Nancy Kelly
Deborah Anker
John Willshire Carrera
Sabi Ardalan
Phil Torrey
HARVARD LAW SCHOOL
1563 Massachusetts Ave.
Cambridge, M.A. 02138
Phone: 617-584-2974
Fax: 617-495-8595

Mark R. Barr
LITCHER IMMIGRATION
1601 Vine St.
Denver, C.O. 80206
Phone: 303-554-8400

Benjamin Casper Sanchez, Director
JAMES H. BINGER CENTER FOR NEW AMERICANS
UNIVERSITY OF MINNESOTA LAW SCHOOL
190 Mondale Hall
229 19th Ave. South
Minneapolis, M.N. 55455
Phone: 612-625-6484

/s/Steven H. Schulman
Steven H. Schulman
Martine E. Cicconi
AKIN GUMP STRAUSS HAUER & FELD LLP
1333 New Hampshire Ave., NW
Washington, D.C. 20036
Phone: 202-887-4000
Fax: 202-887-4288
sschulman@akingump.com

Eleanor Acer
HUMAN RIGHTS FIRST
75 Broad St., 31st Floor
New York, N.Y. 10004
Phone: 212-845-5200
Fax: 212-845-5299

Wendy Young, President
KIDS IN NEED OF DEFENSE (KIND)
1300 L St. NW, 11th Floor
Washington, D.C. 20005
Phone: 202-824-8685

Counsel for Amici Curiae

CERTIFICATE OF COMPLIANCE

This brief complies with the instructions in the Attorney General's referral order dated March 7, 2018, because the brief contains 5,214 words, excluding the cover page, Table of Contents, Table of Authorities, signature block, Certificate of Compliance, and Certificate of Service.

DATED: April 27, 2018 /s/Steven H. Schulman

CERTIFICATE OF FILING

On April 27, 2018, I, Steven H. Schulman, hereby certify that the foregoing brief was submitted electronically to AGCertification@usdoj.gov and in triplicate via FedEx to:

United States Department of Justice
Office of the Attorney General, Room 5114
950 Pennsylvania Avenue, NW
Washington, DC 20530

DATED: April 27, 2018 /s/Steven H. Schulman

CERTIFICATE OF SERVICE

On April 27, 2018, I, Steven H. Schulman, hereby certify that I mailed a copy of this brief to the U.S. Department of Homeland Security, Office of the Chief Counsel at 5701 Executive Center Drive, Suite 300, Charlotte, NC, 28212, by U.S. Postal Service.

I further certify that on April 27, 2018, I mailed copies of this brief via FedEx to the parties at the following addresses:

Attn: Karen Musalo, Blaine Bookey and Eunice Lee
Center for Gender & Refugee Studies
University of California Hastings College of the Law
200 McAllister Street
San Francisco, CA 94102

Andrés López
The Lopez Law Firm, PLLC
5701 Executive Center Dr., Ste 102
Charlotte, NC 28211
alopez@llfimmigration.com

Ben Winograd
Immigrant & Refugee Appellate Center, LLC
3602 Forest Drive
Alexandria, VA 22302

DATED: April 27, 2018 /s/Steven H. Schulman

UNITED STATES DEPARTMENT OF JUSTICE
OFFICE OF THE ATTORNEY GENERAL

MATTER OF A-B-,

Respondent

In Removal Proceedings.
File No. [REDACTED]

BRIEF OF AMICI CURIAE THE CATHOLIC LEGAL IMMIGRATION NETWORK, INC., BENEDICTINE SISTERS OF THE FEDERATION OF ST. SCHOLASTICA, CONFERENCE OF BENEDICTINE PRIORESSES, CONFERENCE OF MAJOR SUPERIORS OF MEN, HIAS, LUTHERAN IMMIGRATION AND REFUGEE SERVICE, NATIONAL COUNCIL OF JEWISH WOMEN, NATIONAL JUSTICE FOR OUR NEIGHBORS, UNITARIAN UNIVERSALIST SERVICE COMMITTEE, UNITED METHODIST IMMIGRATION TASK FORCE, AND WORLD RELIEF

Michael D. Celio
Simona A. Agnolucci
Bevan A. Dowd
KEKER, VAN NEST & PETERS LLP
633 Battery Street
San Francisco, CA 94111-1809
Telephone: 415 391 5400
Facsimile: 415 397 7188

Counsel for Amici Curiae

United in our commitment to the protection of free expression of religion, Amici Curiae write in support of Respondent A-B- and in response to the Attorney General's certification of this matter to himself. *See* 27 I&N Dec. 227 (A.G. 2018). As members of various faiths, we write to explain that victims of "private criminal activity" should be considered eligible for asylum and withholding of removal, as long as they meet the eligibility requirements under current law. Holding otherwise would upend decades of precedent and harm victims of religious persecution, who are frequently targeted by private actors.

AMICI CURIAE:[1]

- **Catholic Legal Immigration Network, Inc.**
- **Benedictine Sisters of the Federation of St. Scholastica**
- **Conference of Benedictine Prioresses**
- **Conference of Major Superiors of Men**
- **HIAS**
- **Lutheran Immigration and Refugee Service**
- **National Council of Jewish Women**
- **National Justice for Our Neighbors**
- **Unitarian Universalist Service Committee**
- **United Methodist Immigration Task Force**
- **World Relief**

[1] Statements of Interest for each Amicus are included in the attached appendix.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

Administrative Decisions

Federal Statutes

Other Authorities

INTRODUCTION

America is a nation founded on religious liberty and born from religious persecution. "Religious freedom is a cherished American value and a universal human right." Department of State International Religious Freedom Report 2016, Secretary's Preface. ("Preface, 2016 International Religious Freedom Report"). Every American child is raised on stories of the Puritans, Pilgrims, and others who surmounted great obstacles to journey across the Atlantic Ocean in search of religious freedom and "the opportunity to worship God in ways that were unacceptable in Europe." James H. Hutson, *Religion and the Founding of the American Republic* 3 (1998). Since our very first days, the United States has made progress towards practicing what it preaches, passing laws establishing our nation as a safe haven for victims of religious persecution. Indeed, the Refugee Act of 1980 is grounded in freedom from religious persecution—a need that is "compelling, immediate, and emotional," The Refugee Act of 1979: Hearing on S. 643 Before the S. Comm. on the Judiciary, 96th Cong. 3 (1979) (opening statement of Senator Thurmond)—and is based on the 1951 Refugee Convention, a treaty drafted in direct response to the Nazi persecution of Jewish Europeans during the Holocaust.

If the Attorney General determines that victims of "private criminal activity" cannot qualify for asylum, his decision will foreclose asylum for many victims of

religious persecution—where persecutors are often private, non-state actors. That outcome would contradict our fundamental American commitment to protect freedom of religion and those terrorized for their religious convictions. Indeed, we must"[c]ontinue to remember those in prison as if [we] were together with them in prison, and those who are mistreated as if [we] []ourselves were suffering." Hebrews 13:3 (New International Version). The Attorney General should leave current asylum law intact.

SUMMARY OF ARGUMENT

For purposes of this brief, Amici assume that the Attorney General's question presented seeks briefing on whether "private criminal activity" can constitute persecution under the Refugee Act. If the Attorney General determines that it cannot, his decision would have a devastating effect on asylum seekers who are victims of religious persecution. First, eliminating asylum for victims of "private criminal activity" would bar many religious-asylum claims. Second, blocking members of "particular social groups" from eligibility for asylum because they are victims of "private" action could exclude similarly-situated religious-asylum seekers. Third, asylum law currently requires a state-action component, so an asylum-seeker already must show either direct or indirect government participation in the persecution.

In short, excluding private criminal activity from the definition of persecution would bar religious refugees from asylum on our shores. Such a decision cannot stand.

ARGUMENT

The undersigned Amici understand that the Attorney General seeks briefing on whether persecution for purposes of asylum can include "private criminal activity" (i.e., actions by non-state actors). *See Matter of A-B-*, 27 I&N Dec. 227 (A.G. 2018). As laid out more fully in Section II of the Respondent's Opening Brief, the Attorney General's referral order is "simply unclear," in part because it "conflate[s] up to three distinct inquiries: whether criminal activity may qualify as 'persecution,' whether an asylum applicant is a member of a particular social group, and whether the government is unwilling or unable to control persecutors who are private actors." Resp. Br. at 21, 22. Amici have chosen to address the first possible inquiry: whether private actions can constitute persecution for purposes of asylum, both in the context of asylum generally and in the context of particular social groups specifically.

Persecution has always included actions taken by private individuals. If the Attorney General determines to the contrary, the impact to asylum-seekers will be devastating—especially in the realm of religious persecution.

1. Excluding Victims of Religious Persecution by Private Actors Would Foreclose Meritorious Asylum Claims.

If the Attorney General determines that private criminal activity cannot constitute persecution for any ground of asylum, his decision would foreclose the claims of countless victims who are persecuted by non-governmental actors for their religious beliefs. It also would reverse decades of case law protecting victims of religious persecution. Such a decision would run contrary to statutory text and Congressional intent of the Refugee Act and would require courts to confront this complicated legal area with a blank slate.

a. Foreclosing victims of private criminal activity from asylum on the basis of religious persecution would expose victims to further harm.

Religious persecution is often carried out by private, non-state actors.[2] The Board of Immigration Appeals ("BIA") and all Circuit Courts unanimously agree that "persecution" for purposes of asylum does not—and has never—required that the persecutors be state actors.[3] *See Korablina v. INS.*, 158 F.3d 1038, 1044 (9th

---

[2] As discussed below in Section 3, even in cases of private-actor harm, an asylum applicant must demonstrate that the government is "unable or unwilling" to control the persecutor.

[3] The Attorney General may grant asylum for an applicant who can establish that she "(1) has a well-founded fear of persecution; (2) on account of a protected ground; (3) by an organization that the [origin government] is unable or unwilling to control." *Hernandez-Avalos v. Lynch*, 784 F.3d 944, 948–49 (4th Cir. 2015). These statutorily "protected ground[s]" are "race, ***religion***, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1101(a)(42)(A) (emphasis added).

Cir. 1998) ("Non-governmental groups need not file articles of incorporation before they can be capable of persecution for purposes of asylum determination."). Instead, asylum-seekers establish persecution by showing "the infliction or threat of death, torture, or injury to one's personal freedom, on account of one of the enumerated grounds in the refugee definition."[4] *Litv. Gonzales*, 405 F.3d 171, 177 (4th Cir. 2005).

Without defining persecution this inclusively, America's asylum laws could not offer a vital protection to the religious who suffer at the hands of private actors. Case law is replete with examples of courts granting asylum or withholding of removal for private criminal activity against those of the Christian faith. *E.g.*, *Ivanov v. Holder*, 736 F.3d 5 (1st Cir. 2013) (Pentecostal Christians persecuted by Russian skinheads); *Afriyie v. Holder*, 613 F.3d 924 (9th Cir. 2010) (Ghanaian Baptist who suffered violent assaults and home invasions due to his religion); *Rizal v. Gonzales*, 442 F.3d 84 (2d Cir. 2006) (newly-converted Indonesian Christian whose friends and relatives verbally harassed and physically assaulted him and whose church was burned down by Muslims); *Paul v. Gonzales*, 444 F.3d 148 (2d Cir. 2006) (Pakistani Christian physically and verbally abused by Muslim

[4] Of course, the simple fact that a government has criminalized certain behavior (e.g., murder, torture, or honor killings) or not (e.g., spousal rape, female genital cutting, or sexual-orientation discrimination) does not bear on whether the harms constitute persecution for purposes of asylum.

fundamentalists); *Pavlova v. INS*, 441 F.3d 82 (2d Cir. 2006) (Russian Baptist physically assaulted, raped, and shot at by members of a nationalist group who also broke into her house and destroyed equipment for printing religious pamphlets).

Courts have similarly protected members of other religions who have been targeted by private actors for their religious convictions, such as:

- Jews, *e.g.*, *Poradisova v. Gonzales*, 420 F.3d 70 (2d Cir. 2005) (Jewish Belarusian family who were violently attacked, called offensive names, and forced to leave schools and apartments and whose store was burned down); *Krotova v. Gonzales*, 416 F.3d 1080 (9th Cir. 2005) (lead Jewish petitioner was sexually harassed, denied promotions and salary increases, and threatened by skinheads); *In re O-Z- & I-Z-*, 22 I&N Dec. 23 (BIA 1998) (Ukrainian Jewish father and son physically attacked and harassed on multiple occasions by members of a Russian nationalistic, anti-Semitic group); *Matter of Salama*, 11 I&N Dec. 536 (BIA 1966) (Egyptian Jew persecuted because, in part, Egyptians were boycotting Jewish doctors and expelling professional Jewish men from professional societies);

- Muslims, *Faruk v. Ashcroft*, 378 F.3d 940, 943–44 (9th Cir. 2004) (Muslim member of a mixed-race, mixed-religion marriage abducted and beaten, terminated from his job, denied a marriage certificate, and seriously and repeatedly threatened by Fijian relatives); *In re S-A-*, 22 I&N Dec. 1328 (BIA 2000) (liberal Muslim woman from Morocco whose conservative Muslim father forbade her from attending school and emotionally and physically abused her, including burning her thighs with a heated straight razor); and

- Members of other faiths, *e.g.*, *Chanda v. Gonzales*, 179 F. App'x 68 (2d Cir. 2006) (Hindu petitioner was the victim of several religion-based hate crimes by Muslims, including physical violence).

In the context of religion, as elsewhere throughout asylum law, "[p]ersecution need not be directly at the hands of the government." [5] *Singh v. INS*, 134 F.3d 962, 967 n.9 (9th Cir. 1998); *Pan v. Holder*, 777 F.3d 540, 543 (2d Cir. 2015) (same). This makes sense, given the worldwide prevalence of religious persecution by non-state actors. "Nearly all Muslims, Jews, [and] Hindus live in countries where their group [is] harassed" by private actors. Pew Research Center, *Nearly all Muslims, Jews, Hindus live in countries where their group was harassed in 2015* (Apr. 11, 2017). And in the Middle East, the Islamic State, al-Qaeda, and other private-actor terrorist groups continue to target and terrorize Christians. Daniel Williams, *Open the Door for Persecuted Iraqi Christians*, Washington Post, Dec. 4, 2015, available at https://www.washingtonpost.com/opinions/open-the-door-for-persecuted-iraqi-christians/2015/12/04/51db87c0-9969-11e5-8917-653b65c809eb_story.html?utm_term=.74053d5cacc4. Courts have never determined that these victims are less deserving of asylum than those persecuted

[5] In fact, ***every court*** has acknowledged that "persecution" may involve private conduct. *E.g.*, *Aldana-Ramos v. Holder*, 757 F.3d 9, 17 (1st Cir. 2014); *Malu v. U.S. Att'y Gen.*, 764 F.3d 1282, 1291 (11th Cir. 2014); *Paloka v. Holder*, 762 F.3d 191, 195 (2d Cir. 2014); *R.R.D. v. Holder*, 746 F.3d 807, 809 (7th Cir. 2014); *Doe v. Holder*, 736 F.3d 871, 877–78 (9th Cir. 2013); *Karki v. Holder*, 715 F.3d 792, 801 (10th Cir. 2013); *Garcia v. Att'y Gen. of United States*, 665 F.3d 496, 503 (3d Cir. 2011); *Crispin-Valladares v. Holder*, 632 F.3d 117, 128 (4th Cir. 2011); *Tesfamichael v. Gonzales*, 469 F.3d 109, 113 (5th Cir. 2006); *Matter of Pierre*, 15 I&N Dec. 461,t462 (BIA 1975). For a complete review of Supreme Court, Circuit Court, and BIA jurisprudence recognizing private-actor persecution, undersigned Amici direct the Attorney General to the Law Professors' Amicus Brief.

by official state actors. For the Attorney General to decide otherwise would expose victims targeted for their religious beliefs to more violence and terror and send eligible asylum-seekers back into the hands of their persecutors.

b. Reversing established law would confuse the asylum process and increase the administrative burden to all parties.

Given the decades of established case law including non-state activity within the scope of persecution, a decision reversing course would force immigration judges, the BIA, and the Circuit Courts to rewrite a substantial portion of asylum law. Such a decision would impose a significant burden on the already over-extended immigration courts—all without Congressional buy-in or a decision by the Supreme Court. *See* Memorandum from Attorney General Jeff Sessions, "Renewing Our Commitment to the Timely and Efficient Adjudication of Immigration Cases to Serve the National Interest," (Dec. 5, 2017), available at https://www.justice.gov/eoir/file/1041196/download (highlighting the "tremendous challenges" of the immigration court backlog).

2. A Decision Regarding Particular Social Groups Will Negatively Affect Religious-Persecution Claims.

Even if the Attorney General attempts to cabin his decision to private criminal activity related to persecution of a "particular social group," the decision would harm victims of religious persecution. Jurisprudence related to one protected ground is typically extended to other protected grounds. Moreover,

many particular social groups are premised on or intertwined with religious persecution, so excluding private criminal activity from the definition of persecution endangers these victims of religious persecution as well. Finally, given how interrelated these two protected grounds are, any decision that victims of private harm cannot be members in a particular social group risks inconsistent, arbitrary results.

a. Rulings applying to "particular social group[s]" may extend to other grounds for asylum, including those persecuted "on account of . . . religion."

Any decision by the Attorney General related to A-B-'s membership in a particular social group may apply equally to those seeking asylum under the "religion" category of 8 U.S.C. § 1101(a)(42)(A).

For years, the BIA has held that each statutorily-protected characteristic must be construed consistently with the others. *See Matter of Acosta*, 19 I&N Dec. 211, 233–34 (BIA 1985) (noting that under the "doctrine of ejusdem generis, meaning literally, 'of the same kind,'" each of the enumerated characteristics must be construed consistently) *overruled in part on other grounds by Matter of Mogharrabi*, 19 I&N Dec. 439 (BIA 1987). And the Circuit Courts agree: the interpretation of "particular social group" under 8 U.S.C. § 1101(a)(42) must align with interpretations of the other four protected grounds. *Niang v. Gonzales*, 422 F.3d 1187, 1198 (10th Cir. 2005) (limiting construction of "particular social

group" to be consistent with the construction of race, religion, nationality, and political opinion); *see also Castillo-Arias v. U.S. Attorney Gen.*, 446 F.3d 1190, 1198–99 (11th Cir. 2006); *Lopez-Soto v. Ashcroft*, 383 F.3d 228, 235 (4th Cir. 2004); *Ontunez-Tursios v. Ashcroft*, 303 F.3d 341, 352 (5th Cir. 2002); *Castellano-Chacon v. INS*, 341 F.3d 533, 546–51 (6th Cir. 2003); *Hernandez-Montiel v. INS*, 225 F.3d 1084, 1092–93 (9th Cir. 2000), *overruled on other grounds by Thomas v. Gonzales*, 409 F.3d 1177 (9th Cir. 2005) (en banc); *Lwin v. INS*, 144 F.3d 505, 512 (7th Cir. 1998); *Safaie v. INS*, 25 F.3d 636, 640 (8th Cir. 1994); *Fatin v. INS*, 12 F.3d 1233, 1240–41 (3d Cir. 1993); *Gomez v. INS*, 947 F.2d 660, 663–64 (2d Cir. 1991); *Ananeh-Firempong v. INS*, 766 F.2d 621, 626 (1st Cir. 1985).

The Attorney General's ruling on persecution related to "particular social group[s]" is therefore not independent of the other protected grounds for persecution—including protection from religious persecution. If the Attorney General determines that private criminal activity cannot as a matter of law constitute persecution of a particular social group, courts may similarly determine that private criminal activity does not constitute persecution on the religious ground, either. Because so many private "terrorist groups[] and individuals" violate the religious freedoms of "the world's most vulnerable populations," such an outcome would be catastrophic to those who endure beatings, torture, and

imprisonment, yet remain committed to their religious convictions. *See* Preface, 2016 International Religious Freedom Report.

b. Because many social groups are premised on religion, eliminating private criminal activity will restrict asylum for victims of religious persecution.

The five enumerated bases for asylum do not exist in isolation. In particular, persecution based on membership in a particular social group "may frequently overlap with persecution on other grounds such as . . . religion." *Aldana-Ramos v. Holder*, 757 F.3d 9, 16 (1st Cir. 2014) (internal quotation marks and citation omitted); United Nations High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status* ¶ 77, at 13 (1992) (same); *cf. Osorio v. INS*, 18 F.3d 1017, 1028-29 (2d Cir. 1994) (finding overlap between economic and political grounds). This overlap often arises because social groups must have a common characteristic "that the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences." *Lwin*, 144 F.3d at 512. Identification with a particular religion, such as Christianity, is a characteristic that one "should not be required to change," establishing the basis for a particular social group. *See id.*

Because religion is so fundamental to the experience of people around the globe, many particular social groups are premised on religion. Accordingly, carving out victims of particular social groups who are persecuted at the hands of

non-state actors could have a disastrous effect on victims of religious persecution. For example, the Seventh Circuit in *Yadegar-Sargis v. INS* determined that Christian women who did not wish to adhere to the Islamic female dress code constituted a particular social group. 297 F.3d 596, 603 (7th Cir. 2002). These women, committed to their Christian values and beliefs, opposed the dress code imposed by Iranian Muslims and risked "dress-code beatings, imprisonment, and being physically abused (such as having [their] lips rubbed with glass)." *Id.* at 604. The Seventh Circuit determined Yadegar-Sargis had been persecuted because of her membership in that particular social group—a social group that existed ***because of*** her faith. Like other social groups premised on religion, this case highlights how interrelated the bases for prosecution are: a different court facing identical facts could have determined that Yadegar-Sargis was persecuted on the basis of her Christian faith. *Cf. In re S-A-*, 221 I&N at 1329, 1336 (finding persecution based on religion where a less conservative Muslim woman wore skirts and had other religious differences with her father).

These close calls are not unusual. If a court determines the claim of persecution in analogous cases is based on the members' particular social group, rather than solely on the protected category of religion, those asylum cases would likely fail. *E.g.*, *Al-Ghorbani v. Holder*, 585 F.3d 980, 996 (6th Cir. 2009) (petitioners "belong to a social group that opposes the repressive and

discriminatory Yemeni . . . religious customs" because they "oppos[e] Yemen's traditional, paternalistic, Islamic marriage traditions"); *see also Bueso-Avila v. Holder*, 663 F.3d 934, 937–38 (7th Cir. 2011) (assuming that the petitioner was a member of a particular social group because of his membership in an evangelical Christian youth group) *cf. Rehman v. Attorney Gen.*, 178 F. App'x 126 (3rd Cir. 2006) (recognizing a particular social group for individuals targeted by the Taliban as a result of their positions of authority and influence because the pharmacist-petitioner had refused Taliban demands to poison Christians). If the Attorney General holds that persecution does not include private criminal activity against members of particular social groups, social groups defined by their religious beliefs may be unable to seek asylum when victimized by private actors.

Moreover, persecutors may act with multiple motives: they may persecute based on religion, on membership in a particular social group, or both. The BIA recognizes mixed-motive claims so long as the protected ground is not "incidental or tangential to the persecutor's motivation." *In re J-B-N- & S-M-*, 24 I&N Dec. 208, 213 (BIA 2007); *see also Marroquin-Ochoma v. Holder*, 574 F.3d 574, 577 (8th Cir. 2009) (persecution "need not be *solely*, or even predominantly" on account of a protected characteristic (emphasis added)). Restricting eligible social-group members would undermine and confuse mixed-motive claims where the

persecutors may have been driven by animus towards both religion and a particular social group.

Because categorization as a member of a particular social group often blurs with religion, excluding—or even slightly limiting—such groups from asylum simply because their persecutors happen to be private actors could eliminate eligible religious victims from protection.

c. Excluding harms inflicted by private actors would lead to inconsistent results.

Given how intertwined particular social groups and religion are, excluding private actors from the definition of persecution for social groups would lead to inconsistent results and generate significant confusion, resulting in arbitrary and reversible immigration-court decisions.[6]

"[I]t is a fundamental principle of justice that similarly situated individuals be treated similarly." *Zhang v. Gonzales*, 452 F.3d 167, 173 (2d Cir. 2006) (internal quotation marks and citation omitted). But if the Attorney General carves

---

[6] Reversals such as the one contemplated by the Attorney General are particularly problematic in the notoriously Byzantine area of asylum law. *See United States v. Lara*, 541 U.S. 193,t230 (2004) (Souter, J., dissenting) (noting that principles of stare decisis are compelling in areas "peculiarly susceptible to confusion"). And it goes without saying that the asylum applicants themselves would be severely disadvantaged by a complete reversal in this area. *See* Samantha Balaban, *Without a Lawyer, Asylum-Seekers Struggle with Confusing Legal Processes*, NPR, Feb. 25, 2018, available at https://www.npr.org/2018/02/25/588646667/without-a-lawyer-asylum-seekers-struggle-with-confusing-legal-processes (describing unrepresented applicants' challenges in navigating the American immigration system).

out private criminal activity from persecution for purposes of particular social groups, courts will face competing legal standards—one that includes non-state actors, and another that does not—when deciding social-group claims premised on religion. *Cf. Rios v. Lynch*, 807 F.3d 1123, 1124 (9th Cir. 2015) (describing "particular social group" as an "inherently flexible term").

Take, for example, the case of a Baptist woman in southern Iraq who refuses to wear a hijab. If an immigration court determines, like in *Yadegar-Sargis*, that her persecution is based on her membership in a particular social group of Baptist women opposed to conservative Muslim attire, that court would deny her asylum application—no matter how atrocious the persecution—if her persecutors were, for example, members of the Islamic State. But if the court determines that the applicant is persecuted because of her Baptist faith (and her refusal to wear a hijab is a manifestation of that religious conviction), the application could succeed regardless of whether she was persecuted by private or governmental actors. This arbitrary line-drawing between indistinguishable applicants violates the rule that "administrative agencies must apply the same basic rules to all similarly situated supplicants." *Henry v. INS*, 74 F.3d 1, 6 (1st Cir. 1996).

Moreover, the division between state and non-state actors is often fuzzy at best.[7] In some countries, government leaders cultivate environments that

[7] Because the Tahirih Amicus Brief gives a more fulsome explanation of the false

encourage non-state actors to persecute members of unpopular religions. *Etg.*, *Ivanov*, 736 F.3d at 13 ("Russian government officials provide tacit or active support to a view . . . that Orthodoxy is the country's so-called 'true religion'"). In others, a government such as China may have an openly hostile relationship towards religion, which emboldens non-state actors to take matters into their own hands and abuse, harass, and torture the religious. *See* Pew Research Center, *Many Countries Favor Specific Religions, Officially or Unofficially*, at 11–12 (Oct. 3, 2017) (describing the five percent of countries throughout the world with an openly hostile relationship towards religion). Under such circumstances, courts may struggle to distinguish between "private" and "governmental" action, and courts may reasonably reach opposite results. These outcomes violate the "touchstone" of due process: the "protection of the individual against arbitrary action of the government," even when the fault lies in "the exercise of power . . . in the service of a legitimate governmental objective." *Cty. of Sacramento v. Lewis*, 523 U.S. 833, 845–46 (1998).

3. Immigration Law Already Requires Asylum-Seekers to Show the Government's Role in Private-Actor Persecution.

American immigration law already mandates that applicants show that their governments are involved or complicit in the applicant's persecution—i.e., that the

---

distinction between "private" and "public" crimes, undersigned Amici will not belabor the point.

government is "unable or unwilling" to stop the applicant's persecution. A decision further narrowing this rule by excluding those who happen to be persecuted by private actors will only harm victims—without further protecting our borders.

Asylum for victims of non-state actors is limited to situations where the applicant's home government is either "unable or unwilling to control" the persecutors. *Hernandez-Avalos*, 784 F.3d at 949; *Lolong v. Gonzales*, 484 F.3d 1173, 1180 (9th Cir. 2007) (en banc) (same); *see also Crespin-Valladares v. Holder*, 632 F.3d 117, 128 (4th Cir. 2011) (noting that an applicant for asylum must be "harm[ed] . . . by either a government or an entity that the government cannot or will not control"). That is,

> [p]ersecution is something a *government* does, either directly or by abetting (and thus becoming responsible for) private discrimination by throwing in its lot with the deeds or by providing protection so ineffectual that it becomes a sensible inference that the government sponsors the misconduct.

Sarhan v. Holder, 658 F.3d 649,t657 (7th Cir. 2011) (emphasis in original). Thus, eligibility for asylum "always implies some connection to government action or inaction, whether in the form of direct government action, government-supported action, or government's unwillingness or inability to control private conduct." *Ivanov*, 736 F.3d at 12 (internal quotation marks and citations omitted); *see also* 8 U.S.C. 1101(a)(42) (A) (requiring asylum-seekers to establish that they are "unable or unwilling to avail himself or herself of the protection of, that country"). Once

an asylum-seeker establishes that her feared harms constitute "persecution" and her home government is unable or unwilling to control her persecution, "it matters not who inflicts it."[8] *Faruk*, 378 F.3d at 943.

The grant of asylum is therefore already tied to "systematic" government action (or inaction). *Burbiene v. Holder*, 568 F.3d 251,t255 (1st Cir. 2009). Conflating two queries—(1) the scope of "persecution" in the context of asylum with (2) the requirement to show nexus to government action—is a cure in search of a disease. It would provide no additional protection to our immigration laws while prejudicing victims unlucky enough to be caught in the crosshairs of non-state actors and governments who are unwilling or unable to stop the abuse.

CONCLUSION

Non-state actors have persecuted people of faith for millennia. Many of the world's great religions include stories of exodus and seeking refuge: "When a foreigner resides among you in your land, do not mistreat them. The foreigner residing among you must be treated as your native-born. Love them as yourself, for you were foreigners in Egypt. I am the Lord your God." Leviticus 19:33-34

[8] Indeed, a decision excluding private persecutors from establishing eligibility for asylum indirectly legitimizes their behavior. By granting asylum to victims of private criminal activity (on any protected ground), the United States condemns the private actors and pressures the origin government to control these bad actors. Permitting this type of persecution to go unaddressed empowers persecutors; results in more corrupt, dangerous countries throughout the world; and gives free reign to those who would harm religious minorities and other people of faith.

(New International Version). And the Christian faith is premised on the persecution of Jesus—and on his crucifixion because he would not renounce his religious beliefs.

America was founded by religious minorities seeking a home to worship according to their principled beliefs. As former Senator and current United States Ambassador-at-Large for International Religious Freedom Sam Brownback stated at a 2001 Senate hearing on asylum law:

> In his 1801 first annual message, President Thomas Jefferson asked a piercing question that is true today, 200 years later: "Shall oppressed humanity find no asylum in this globe?" The answer is, yes, they shall, and America has provided and shall always provide asylum to those escaping tyranny . . . .

An Overview of Asylum Policy: Hearing Before Sub. Comm. on Immigration of the S. Comm. on the Judiciary, 107th Cong. 1 (2001) (opening statement of Senator Brownback).

A decision that restricts asylum for people of faith fleeing persecution would run counter to all that is most noble about the United States. Those terrorized because of their faith deserve protection—no matter if they are victimized by state or non-state actors. The undersigned do not believe that this administration (to say

nothing of the Congress who passed the Refugee Act) could intend a different result. As Amici, we urge the Attorney General not to adopt it.

DATED: April 27, 2018

Bevan A. Dowd
Keker, Van Nest & Peters LLP
633 Battery Street
San Francisco, CA 941211

Counsel for Amici Curiae
Catholic Legal Immigration Network, Inc.
Benedictine Sisters of the Federation of St. Scholastica
Conference of Benedictine Prioresses
Conference of Major Superiors of Men
HIAS
Lutheran Immigration and Refugee Service
National Council of Jewish Women
National Justice for Our Neighbors
Unitarian Universalist Service Committee
United Methodist Immigration Task Force
World Relief

CERTIFICATE OF COMPLIANCE

This brief complies with the instructions in the Attorney General's referral order dated January 4, 2018, because the brief contains 4,130 words, excluding the cover page, table of contents, table of authorities, signature block, certificate of compliance, and certificate of service.

Dated: April 27, 2018

Bevan A. Dowd

CERTIFICATE OF FILING

On April 27, 2018, I, Bevan A. Dowd, submitted a copy of this request electronically to AGCertification@usdoj.gov, and in triplicate to:

United States Department of Justice
Office of the Attorney General, Room 5114
950 Pennsylvania Avenue, NW
Washington, DC 20530

Dated: April 27, 2018

Bevan A. Dowd

APPENDIX

STATEMENTS OF INTEREST OF *AMICI CURIAE*

The Catholic Legal Immigration Network, Inc. ("CLINIC"), based in Silver Spring, Maryland, embraces the core Gospel value of welcoming the stranger. CLINIC promotes the dignity and protects the rights of immigrants in partnership with a dedicated network of Catholic and community legal immigration programs. CLINIC is the largest nationwide network of nonprofit immigration programs, with almost 350 affiliates in 47 states and the District of Columbia. CLINIC is a partner in providing pro bono representation to asylum seekers and materials on asylum law and Catholic teaching on migration. As such, CLINIC is very concerned with potential restrictions on eligibility for asylum. CLINIC's work draws from Catholic social teaching to promote the dignity and protect the rights of immigrants in partnership with its network.

The **Benedictine Sisters of the Federation of St. Scholastica** are 18 monasteries from the west coast to the east coast of the United States and 2 monasteries in Mexico. The federation is led by an elected president and council of Sisters from across the federation. The Benedictine Sisters of the Federation of St. Scholastica own, teach in and administer schools, minister in Catholic parishes, serve in a variety of social services as well as lead programs of spirituality. The people who are ministered to by the Sisters include people who have immigrated to

the United States from many different countries, varying according to the region of the US in which the monasteries are located. The Sisters, like Jesus, do not ask the people whom they serve whether they are documented or undocumented. "I was hungry and you fed me, I was thirsty and you gave me to drink, I was a stranger and you invited me in . . ., I was in prison and you visited me."(Gospel of St. Matthew 25: 35-36).

The **Conference of Benedictine Prioresses ("CBP")** is an organization of approximately 50 leaders (known as a prioress) of Benedictine Sisters' monasteries, mostly in the United States (including Puerto Rico), but also a few others from Canada, Mexico, Bahamas, Taiwan and Japan. Each monastery is headed by a prioress who is elected by the members of each monastery. These monasteries across the United States and beyond do various works with both Catholic and non-Catholic people. Many of the people served by the Benedictine Sisters are immigrants to the United States (some of whom have come here seeking asylum), through religious education, human outreach to the poor, and spiritual programs.

The **Conference of Major Superiors of Men ("CMSM")** is an association of the leadership of men in religious and apostolic institutes in the United States. The Conference has formal ties with the U.S. Conference of Catholic Bishops, the Leadership Conference of Women Religious, the National Assembly of Religious

Brothers and other national agencies. CMSM represents U.S. male religious and apostolic communities before a number of national and international bodies, including the Congregation of Religious and Secular Institutes of the Holy See, which officially recognizes CMSM as the national representative body for men in religious and apostolic communities in the United States. We have religious men working in many areas of intense violent conflict. They have seen and sometimes have first-hand experience of religious persecution by private actors. As a nation committed to welcoming those in urgent need, we call on the court to continue rather than narrow such commitments.

HIAS, founded in 1881, is the world's oldest refugee resettlement agency, and the only Jewish refugee resettlement agency. HIAS assists those who are persecuted because of who they are, helping refugees find welcome, safety, and freedom around the world. While originally founded to protect Jewish people fleeing pogroms in Russia and Eastern Europe, today, most of the people HIAS serves are not Jewish. Rather, HIAS helps people fleeing persecution as an expression of Jewish values of welcoming and protecting the stranger, and committing acts of kindness to improve and repair the world (the concept known as tikkun olam).

Since HIAS's founding, it has helped more than 4.5 million refugees start new lives, through twelve offices. It is one of nine federally designated

organizations that resettles refugees, in collaboration with the Department of State and the Department of Health and Human Services. It provides direct resettlement services through affiliates in the United States, with supervision from its Silver Spring, Maryland and New York, New York offices. HIAS also provides legal services to asylum-seekers and individuals who qualify for other humanitarian visas in the United States. Through twelve international offices, HIAS also provides psycho-social, legal and employment services to refugees.

HIAS is concerned that a narrow reading of asylum law that would restrict granting of asylum for victims of persecution by private actors or narrow grounds of asylum would prevent HIAS from carrying out its mission to protect people fleeing persecution and their families. In 2016, HIAS aided 350,000 refugees, many of them from religious minorities, persecuted by state and non-state actors in their countries of origin on account of their religion. Restricting asylum for any religious minority has disturbing similarities to situations faced by the Jewish people and other former clients seeking refuge and religious freedom.

The **Lutheran Immigration and Refugee Service ("LIRS")**, started by Lutheran congregations in 1939, is a national organization aiding migrants and refugees to ensure that newcomers are not only self-sufficient, but also become connected and contributing members of their adopted communities in the United States. Working with and through partners across the country, LIRS resettles

refugees, reunites children with their families or provides foster homes for them, and conducts policy advocacy. LIRS manages a variety of service and protection programs, including refugee resettlement and programs for unaccompanied children and their families.

LIRS has an interest in this case because many of LIRS' clients are asylum seekers or family members of asylum seekers, and those individuals are best served when there is a level of predictability and consistency in US Immigration law. There is existing precedent for victims of "private criminal activity" to be considered eligible for asylum in the United States, as long as they meet other requirements under current law. Freedom from religious persecution is a basic human right. LIRS clients include victims of religious persecution, and their persecutors were in some cases, private criminal actors. In many countries, religious leaders and individual believers who speak out against private criminal actors are targeted for persecution, because they have spoken out against wrongdoing, in the name of their faith. LIRS' mission demands that we stand against efforts to dilute existing protections for victims of religious persecution.

The **National Council of Jewish Women ("NCJW")** is a grassroots organization of 90,000 volunteers and advocates who turn progressive ideals into action. Inspired by Jewish values, NCJW strives for social justice by improving the quality of life for women, children, and families and by safeguarding individual

rights and freedoms. NCJW's Resolutions state that NCJW resolves to work for "Comprehensive, humane, and equitable immigration, refugee, asylum, and naturalization laws, policies, and practices that facilitate and expedite legal status and a path to citizenship for more individuals." Consistent with our Principles and Resolutions, NCJW joins this brief.

National Justice for Our Neighbors ("JFON") was established by the United Methodist Committee on Relief in 1999 to serve its longstanding commitment and ministry to refugees and immigrants in the United States. JFON's goal is to provide hospitality and compassion to low-income immigrants through immigration legal services, advocacy, and education. JFON employs a small staff at its headquarters in Springfield, Virginia, which supports 17 sites nationwide. Those 17 sites collectively operate in 12 states and Washington, D.C., and include 40+ clinics. Last year, JFON served clients in more than 13,000 cases. JFON advocates for interpretations of federal immigration law that protect refugees fleeing violence.

The **Unitarian Universalist Service Committee ("UUSC")** is a non-sectarian human-rights organization powered by grassroots collaboration. UUSC began its work in 1939 when Rev. Waitstill and Martha Sharp took the extraordinary risk of traveling to Europe to help refugees escape Nazi persecution. A moral commitment to protecting the rights and dignity of persons,

particularly those seeking refuge from violence, discrimination, persecution, and natural disasters, has been at the center of our organization's mission for more than 75 years. Given our history, we seek to promote a just immigration system that upholds the rights of all migrants and asylum seekers. Today, a significant body of UUSC's work focuses on responding to the ongoing refugee crisis in Central America, where persecution by non-state criminal actors is a key driver of forced migration. Many of our partners and the communities they serve would be directly harmed by a decision to reverse existing case law, which has long recognized this form of persecution as legitimate grounds for asylum.

The **United Methodist Immigration Task Force ("UMITF")** is composed of representatives from United Methodist general board and agencies, racial ethnic plans and caucuses, and the Council of Bishops. It is tasked with assisting and advising The United Methodist Church in responding to the global migration crisis, including helping the church understand the deeper issues and hear the biblical call to respond. These efforts span advocacy, service and resources. We are called to provide compassionate and safe welcome to immigrants and refugees, especially those who are vulnerable and fleeing persecution.

World Relief is the international relief and development arm of the National Association of Evangelicals. Based in Baltimore, Maryland World Relief stands with the vulnerable and partners with local churches to end the cycle of suffering,

transform lives and build sustainable communities. With over 70 years of experience, World Relief works in 20 countries worldwide through disaster response, health and child development, economic development and peacebuilding and has 23 offices in the United States that specialize in refugee and immigration services. IN 17 offices across the country World Relief provides immigration legal services, including representation to asylum seekers, and technical legal support to more than 40 churches recognized by the Department of Justice. The protection of the vulnerable foreign-born is central to the mission and services of World Relief in the United States.

Interim Decision #3918

UNITED STATES DEPARTMENT OF JUSTICE

IN THE MATTER OF A-B-

BRIEF OF TAHIRIH JUSTICE CENTER, THE ASIAN PACIFIC INSTITUTE ON GENDER-BASED VIOLENCE, ASISTA IMMIGRATION ASSISTANCE, AND CASA DE ESPERANZA AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT A-B-

---

Paul M. Thompson (D.C. Bar No. 973977)
Sophia A. Luby (D.C. Bar No. 241865)
David Mlaver (D.C. Bar No. 1030609)
McDERMOTT WILL & EMERY LLP
500 North Capitol Street NW
Washington, D.C. 20001
(202) 756-8032
pthompson@mwe.com

Counsel for Amici Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes **Page(s)**

Other Authorities **Page(s)**

STATEMENT OF INTEREST

Tahirih Justice Center is the largest multi-city direct services and policy advocacy organization specializing in assisting immigrant women and girls who survive gender-based violence. In five cities across the country, Tahirih offers legal and social services to women and girls fleeing all forms of gender-based violence, including human trafficking, forced labor, domestic violence, rape and sexual assault, and female genital cutting/mutilation. Since its beginning in 1997, Tahirih has provided free legal assistance to more than 20,000 individuals, many of whom have experienced the significant psychological and neurobiological effects of that trauma. Through direct legal and social services, policy advocacy, and training and education, Tahirih protects immigrant women and girls and promotes a world where they can live in safety and dignity. Tahirih amicus briefs have been accepted in numerous federal courts across the country, and Tahirih seeks to address here questions raised by the Attorney General.

The Asian Pacific Institute on Gender-Based Violence (formerly, Asian & Pacific Islander Institute on Domestic Violence) is a national resource center on domestic violence, sexual violence, trafficking, and other forms of gender-based violence in Asian and Pacific Islander communities. The Institute serves a national network of advocates and community-based service programs that work with Asian and Pacific Islander and immigrant survivors, and is a leader on providing

analysis on critical issues facing victims of gender-based violence in the Asian and Pacific Islander and in immigrant communities. The Institute leads by: promoting culturally relevant intervention and prevention, expert consultation, technical assistance and training; conducting and disseminating critical research; and informing public policy.

ASISTA Immigration Assistance worked with Congress to create and expand routes to secure immigration status for survivors of domestic violence, sexual assault, and other crimes, which were incorporated in the 1994 Violence Against Women Act (VAWA) and its progeny. ASISTA also trains and provides technical support to local law enforcement officials, civil and criminal court judges, domestic violence and sexual assault advocates, legal services, and non-profit, pro bono, and private attorneys working with immigrant crime survivors. ASISTA has previously filed amicus briefs to the Supreme Court and to the Second, Seventh, Eighth, and Ninth Circuits.

Casa de Esperanza was founded in 1982 in Minnesota to provide emergency shelter for women and children experiencing domestic violence. In 2009, Casa de Esperanza launched the National Latin@ Network for Healthy Families and Communities, which is a national resource center focused on research, training, and technical assistance, and policy advocacy focused on preventing and addressing domestic violence in Latino and immigrant communities.

INTRODUCTION

In many corners of the world, women are treated as property: they are regarded as possessing little to no inherent value and as second-class citizens. They are trafficked, literally bought and sold for sex or labor. Their bodies are mutilated in order to perpetuate notions of female sexuality as vile and uncontrollable. They are forced into marriages, lifetimes of subordination. And they are wooed, duped, and coerced into relationships with violent men, eventually so fearful and effectively silenced that they continue to share their beds with men who use sexual, verbal, emotional, and physical abuse to establish power and control over them.

These acts of brutality occur because societies and states allow them to and, in fact, are complicit in them. In these cultures, women are viewed as subordinate to men and in turn, the state affords them few legal protections or safety nets. Even if acts of violence against women are outlawed, police and prosecutors scoff at women who try to use the law to protect themselves, refuse to believe their claims, and harass and even rape them in these moments of extreme vulnerability.

Over the course of more than two decades, the Courts of Appeals and Board of Immigration Appeals ("BIA") have held that survivors of gender-based violence, just like those fleeing religious or political persecution, are eligible for asylum if they meet the statutory criteria that establish them as refugees. This legal

precedent considers the social, economic, and legal reality that these women face. It recognizes that these women are survivors of violence brought about by a public code of conduct that allows them to be victimized because they are women. In a 1996 precedent-setting case that first established gender-based persecution as grounds for asylum, the BIA granted 17-year-old Fauziya Kassindja asylum after she fled a forced, polygamous marriage and female genital mutilation. *In re Kasinga*, 21 I. & N. Dec. 357 (BIA 1996). To escape guaranteed, life-long, physical, sexual, and psychological harm, Ms. Kassindja fled her country and found refuge in the United States. In the decades since that case, the United States has provided asylum to women and girls fleeing other forms of gender-based persecution, including human trafficking, forced marriage, severe domestic abuse, rape and sexual violence (including as a weapon of war), so-called "honor" crimes and killings, acid burnings, dowry deaths, and widow rituals.

Now, however, the Attorney General contemplates a sea change in this long-settled law. This case involves a survivor of severe domestic violence from El Salvador. As the BIA found, this victim demonstrated that the violence she endured rises to the level of persecution, that she belongs to a cognizable social group under established legal precedent, and that she meets all other statutory requirements for a grant of asylum. Ignoring the long history of asylum decisions holding that gender-based violence, including domestic violence, is motivated by

societal norms that persist with public acquiescence and complicity, the Attorney General now asks

> [w]hether, and under what circumstances, being a victim of a private criminal activity constitutes a cognizable "Particular Social Group" (PSG) for purposes of an application for asylum or withholding of removal.

Matter of A-B-, 27 I. & N. Dec. 227 (AG 2018).[1] As set forth more fully in this brief, there are multiple problems with this question.

First, the question assumes its own answer. In many countries, domestic violence is emboldened by government inaction. The Attorney General's question suggests a categorical rule that would declare all domestic violence "private criminal activity" and outside the bounds of asylum protection. But, as Section I argues, such a categorical rule is arbitrary and finds no support in current law for four reasons:

---

[1] Although asked by both parties to clarify the question, the Attorney General refused to do so. *See Matter of A-B-*, 27 I. & N. Dec. 247 (AG Mar. 7, 2018). Instead, he proposes rewriting asylum law to exclude victims of "private criminal activity" on the ground that being such a victim does not qualify one to be in a particular social group ("PSG"). This misses the point. *Amici* are unaware of any case in which applicants for asylum have claimed that victims of private criminal activity constitute a freestanding PSG. Instead, in domestic violence cases, applicants are granted asylum because they establish that they are persecuted and that the persecution is on account of their membership in another PSG.

- It ignores evidence demonstrating that in several countries, public social norms, political structures, and religious dynamics allow gender-based violence to occur without penalty or protection;
- It impermissibly carves out gender-based domestic violence from the statutory definition of persecution;
- It incorrectly prevents domestic violence survivors from showing that their persecution is "on account of" membership in a particular social group ("PSG"); and
- It flouts the basic rule that the PSG inquiry is fact-based and requires case-by-case adjudication. *See Matter of M-E-V-G-*, 26 I. & N. Dec. 227, 251 (BIA 2014) ("Social group determinations are made on a case-by-case basis." (citing *Matter of Acosta*, 19 I. & N. Dec. 211, 233 (BIA 1985))).

For these reasons, the Attorney General should not categorically bar domestic violence survivors from seeking asylum in the United States.

Second, the Attorney General's question implies that if persecution results from "private criminal activity," that fact can preclude the establishment of a PSG. As Section II argues, it cannot. Whether persecution is "private" or "public" and whether it constitutes a crime or not has no bearing on PSG validity or membership. While PSGs are not formed *because* one is a victim of domestic or gender-based violence, certain PSGs can and do logically include those victims. Thus, an applicant who suffered severe physical abuse from her husband was a member of the PSG that comprised "married women in Guatemala who are unable to leave their relationship." *Matter of A-R-C-G-*, 26 I. & N. Dec. 388, 389 (BIA 2014). Whether the abuse was private and/or criminal simply plays no logical role in determining the PSG.

For these reasons, the Attorney General should affirm the BIA's order.

ARGUMENT

To qualify for asylum, an applicant must be a "refugee" under 8 U.S.C. § 1101(a)(42). The applicant can establish herself as a "refugee" by demonstrating that "'she has suffered from past persecution or that she has a well-founded fear of future persecution' on account of . . . membership in a particular social group." *Mulyani v. Holder*, 771 F.3d 190, 198 (4th Cir. 2014) (quoting *Mirisawo v. Holder*, 599 F.3d 391, 396 (4th Cir. 2010)).

Among other things, persecution can "involve[] the infliction or threat of death, torture, or injury to one's person or freedom, on account of one of the enumerated grounds in the refugee definition." *Id.* (quoting *Li v. Gonzales*, 405 F.3d 171, 177 (4th Cir. 2005)). Persecution also includes "actions less severe than threats to life or freedom," and applicants who have been "severely physically abused" meet the persecution requirement. *Id.* (quoting *Li*, 405 F.3d at 177). "An applicant who establishes past persecution on the basis of a protected factor benefits from a rebuttable presumption that she has a well-founded fear of future persecution." *Id.* (citations omitted). Finally, the persecution need not be directly at the hands of the government. *See, e.g.*, *Oliva v. Lynch*, 807 F.3d 53, 59 (4th Cir. 2015).

The applicant's persecution must also be "on account of" her membership in a PSG. This element is met if her membership "serves as at least one central reason for" the persecution. *Pacas-Renderos v. Sessions*, 691 F. App'x 796, 802 (4th Cir. 2017) (quoting *Crespin-Valladares v. Holder*, 632 F.3d 117, 127 (4th Cir. 2011)) (internal quotation marks omitted). Her membership "need not be the central reason or even a dominant central reason for persecution," but "it must be more than an incidental, tangential, superficial, or subordinate reason." *Id.* (quoting *Cordova v. Holder*, 759 F.3d 332, 337 (4th Cir. 2014)).

As to what constitutes a PSG, the BIA and circuit courts hold that a PSG is valid if it is "(1) composed of members who share a common immutable characteristic, (2) defined with particularity, and (3) socially distinct within the society in question." *Pacas-Renderos*, 691 F. App'x at 804 (quoting *Oliva*, 807 F.3d at 61).

For decades, the BIA has held that survivors of gender-based violence *can* meet all three criteria. In other words, while domestic violence victimhood or gender-based victimhood may not itself define a freestanding PSG, survivors of gender-based and domestic violence can be members of certain PSGs. This is not to say that *every* such victim may qualify for asylum in the United States. Such a categorical rule would run afoul of congressional intent and upset decades of settled law. *See Acosta*, 19 I. & N. Dec. at 233 (establishing current asylum

framework) (subsequent history omitted). Instead, *amici* argue that just as a categorical rule admitting *every* gender-based violence survivor into the United States is overbroad, so, too, is a rule categorically *excluding* them. For the reasons set forth below, any rule excluding domestic violence victims from receiving asylum would be overbroad and arbitrary, upturning years of precedent.

I. DOMESTIC VIOLENCE CAN CONSTITUTE PERSECUTION UNDER THE INA

In some countries, women have no recourse to escape from or seek justice for rapes, beatings, and other abuse because cultural, social, and religious norms foster views that women are subservient to or even property of men. And, in many of those places, governments are unwilling or unable to control private actors who engage in domestic violence.

Recognizing this reality, based on evidence of specific country conditions, the BIA and the federal courts have long and unanimously held that survivors of domestic violence can meet the statutory requirement of persecution if they can show the harm they suffered at the hands of a non-governmental actor was sufficiently severe, and if they can show their home government's "unwillingness or inability to control private conduct." *Aldana-Ramos v. Holder*, 757 F.3d 9, 17

(1st Cir. 2014), *as amended* (Aug. 8, 2014).[2] Applicants can also satisfy this "persecution" element by showing that their home governments are unwilling or unable to protect them from private acts of persecution. *See Matter of S-A-*, 22 I. & N. Dec. 1328, 1335 (BIA 2000) (persecution found when Moroccan father had "unfettered" power over daughter, and it was futile to report criminal acts to the police); *Sarhan v. Holder*, 658 F.3d 649, 658 (7th Cir. 2011) (persecution found when home country recognized honor killing as a crime, but punished it with "little more than a slap on the wrist"); *Menjivar v. Gonzales*, 416 F.3d 918, 921 (8th Cir. 2005).

Nor does the United States stand alone in recognizing that domestic violence can, and often does, arise from social, cultural, and religious norms that allow rapes and beatings to occur without deterrence because governments are unwilling to prevent them or punish the perpetrators. Indeed, far from considering domestic and gender-based violence a "private criminal matter," international organizations

---

[2] *See also Malu v. Att'y Gen.*, 764 F.3d 1282, 1291 (11th Cir. 2014); *Paloka v. Holder*, 762 F.3d 191, 195 (2d Cir. 2014); *R.R.D. v. Holder*, 746 F.3d 807, 809 (7th Cir. 2014); *Constanza-Martinez v. Holder*, 739 F.3d 1100, 1102 (8th Cir. 2014); *Doe v. Holder*, 736 F.3d 871, 877 78 (9th Cir. 2013); *Karki v. Holder*, 715 F.3d 792, 801 (10th Cir. 2013); *Garcia v. Att'y Gen.*, 665 F.3d 496, 503 (3d Cir. 2011), *as amended* (Jan. 13, 2012); *Kante v. Holder*, 634 F.3d 321, 325 (6th Cir. 2011); *Crespin-Valladares v. Holder*, 632 F.3d 117, 128 (4th Cir. 2011); *Tesfamichael v. Gonzales*, 469 F.3d 109, 113 (5th Cir. 2006).

have regularly investigated and reported on countries where public conditions allow that conduct to flourish. As the United Nations Report on the World's Women in 2010 summarized:

> Violence against women throughout their life cycle is a manifestation of the historically unequal power relations between women and men. It is perpetuated by traditional and customary practices that accord women lower status in the family, workplace, community and society, and it is exacerbated by social pressures. These include the shame surrounding and hence difficulty of denouncing certain acts against women; women's lack of access to legal information, aid or protection; a dearth of laws that effectively prohibit violence against women; [and] inadequate efforts on the part of public authorities to promote awareness of and enforce existing laws . . . .

United Nations Secretariat Department of Economic and Social Affairs, *The World's Women 2010*, at 127.[3] These reports contain ample evidence that domestic gender-based violence is not always appropriately characterized as "private criminal conduct." Therefore, any new interpretation of "refugee" must account for this evidence.

---

[3]https://unstats.un.org/unsd/demographic/products/Worldswomen/WW2010%20Report_by%20chapter%28pdf%29/Violence%20against%20women.pdf.

A. Any rule excluding victims of domestic violence from asylum as "private criminal conduct" would ignore substantial evidence that in many places, domestic violence arises from and is allowed to continue by public cultural, social, and religious norms

Overwhelming evidence, much of it from the U.S. government, shows that domestic violence and other forms of gender-based violence permeate some countries' cultural and social landscapes. For example, evidence shows that the social and cultural conditions in places as different as Guatemala, Afghanistan, and around the world, allow domestic and other gender-based violence to occur.[4] At the same time, institutionalized acceptance of domestic violence prohibits victims from obtaining protection or recourse. Widely available research about these countries shows that violence against women is often deeply ingrained in the culture, and explicitly condoned by the state.

1. Evidence shows that cultural, religious, and economic conditions in some countries create widespread gender-based and domestic violence

As the United States itself has recognized, patriarchal cultures, attitudes of *machismo*, legacies of violence, and the economic marginalization of women allow domestic violence to permeate society. Indeed, the State Department recently acknowledged that domestic violence is a "serious problem" in Guatemala. U.S.

---

[4] Conditions in El Salvador, the country at issue in this case, are described in the Respondent's opening brief and evidentiary submissions.

Dep't of State, *Guatemala 2016 Human Rights Report* 15 (2016).[5] It is similarly a widespread concern in dozens of other countries, including Kenya, Russia, Burma, Cameroon, and Haiti. U.S. Dep't of State, *Kenya 2016 Human Rights Report* 35 (2016);[6] U.S. Dep't of State, *Russia 2016 Human Rights Report* 56 (2016);[7] U.S. Dep't of State, *Burma 2016 Human Rights Report* 38 (2016);[8] U.S. Dep't of State, *Cameroon 2017 Human Rights Report* 26 (2017);[9] U.S. Dep't of State, *Haiti 2016 Human Rights Report* 21 (2016).[10] The State Department also recognized that in Afghanistan, "hundreds of thousands of women continued to suffer abuse at the hands of their husbands, fathers, brothers, in-laws, armed individuals, parallel legal systems, and institutions of the state, such as the police and justice system." U.S. Dep't of State, *Afghanistan 2016 Human Rights Report* 35 (2016).[11] And in Saudi Arabia, domestic violence is believed to be "widespread" and "seriously underreported." U.S. Dep't of State, *Saudi Arabia 2016 Human Rights Report* 41 (2016).[12]

---

[5] https://www.state.gov/documents/organization/265802.pdf.
[6] https://www.state.gov/documents/organization/265478.pdf.
[7] https://www.state.gov/documents/organization/265678.pdf.
[8] https://www.state.gov/documents/organization/265536.pdf.
[9] https://www.state.gov/documents/organization/277223.pdf.
[10] https://www.state.gov/documents/organization/265806.pdf.
[11] https://www.state.gov/documents/organization/265742.pdf.
[12] https://www.state.gov/documents/organization/265730.pdf.

In these and other countries, the high rate of domestic violence is attributable to the social and cultural norms that render women second-class citizens. Women are subordinate to their partners and fathers and are considered "objects owned by men." Comisión Internacional Contra la Impunidad en Guatemala, *Human Trafficking for Sexual Exploitation Purposes in Guatemala* 30 (2016).[13]

In this way, some cultures and governments normalize domestic violence against women. For example, domestic violence is condoned by authorities in Afghanistan who "attribute the abuse to a woman's alleged disobedience of her husband." *Report of the Special Rapporteur on Violence Against Women, Its Causes and Consequences, Mission to Afghanistan* 5 (May 12, 2015).[14] As a result, domestic violence is often not a crime. *Id.* The same holds true in other countries like Burma, Cameroon, and Haiti, where domestic violence is not specifically criminalized. *See Burma 2016 Human Rights Report* 38; *Cameroon 2017 Human Rights Report* 26; *Haiti 2016 Human Rights Report* 21. Furthermore, last year, Russia decriminalized domestic violence for first time offenders. *See Russia 2016 Human Rights Report* 56.

---

[13]http://www.cicig.org/uploads/documents/2016/Trata_Ing_978_9929_40_829_6.pdf.
[14] http://www.un.org/ga/search/view_doc.asp?symbol A/HRC/29/27/Add.3.

2. Evidence shows that in some countries, public religious norms support and foster domestic gender-based violence

The legal regimes in some countries are intertwined with religious customs that favor the repression of women. In other countries, the formal legal regime is ignored in favor of religious and cultural custom meted out by tribal or community tribunals. This allows gender-based violence to flourish. For example, Article 130 of the Afghani constitution allows courts to apply Hanafi jurisprudence, a form of sharia law, to rule on matters not specifically covered by the constitution or other laws. *Afghanistan 2016 Human Rights Report* 9. As a result, Afghan courts have charged women with crimes of "immorality" or "running away from home" when they attempt to leave their abusers. *Id.* Many women who try to leave their home are charged with "attempted *zina*" engaging in extramarital sexual relations for being outside the home and in the presence of nonrelated men. *Id.*

3. Evidence shows that in some countries, women know that reporting domestic violence is futile

Despite its prevalence, domestic violence is still underreported around the world. Victims may not report because of familial pressure, economic dependency on the abuser, fear of retaliation, poor resources, or lack of support in the legal system. *See* United Nations High Commissioner for Refugees ("UNHCR"), *Eligibility Guidelines for Assessing the International Protection Needs of Asylum*

Seekers from Guatemala 34 (Jan. 2018);[15] *Saudi Arabia 2016 Human Rights Report* 41 (rape is underreported because of "societal and familial reprisal, including diminished marriage opportunities, criminal sanctions up to imprisonment or accusations of adultery or sexual relations outside of marriage"). For example, the State Department recognized that in Armenia, "[r]ape, spousal abuse, and domestic violence was underreported due to social stigma, the absence of female police officers and investigators, and at times police reluctance to act." U.S. Dep't of State, *Armenia 2016 Human Rights Report* 30 (2016).[16] The process of addressing violence against women also deters women from reporting it, and in some countries, police may not even bother to respond to allegations of violence because it is regarded as a "family matter." *See Kenya 2016 Human Rights Report* 37. Ultimately, women are less likely to report domestic violence knowing that society condones it and the state is unable or unwilling to protect them from it.

4. Evidence shows that some states are unable or unwilling to provide protection for victims of gender-based violence

In many countries, domestic violence is not criminal. Even where it is, those laws are often not enforced. For example, although Guatemala, Afghanistan, and

---

[15] http://www.refworld.org/docid/5a5e03e96.html.
[16] https://www.state.gov/documents/organization/265604.pdf.

Saudi Arabia have laws in place that theoretically make domestic violence illegal,[17] these laws are rarely enforced. Even those theoretical laws do not provide adequate protection. For example, in Saudi Arabia and Afghanistan, the law does not recognize spousal rape as a crime. *See Saudi Arabia 2016 Human Rights Report* 41; *Afghanistan 2016 Human Rights Report* 33. In Afghanistan, some judges and prosecutors even reported that they did not know that a law prohibiting domestic violence existed. *Afghanistan 2016 Human Rights Report* 34. Those authorities who knew of the law prohibiting domestic violence failed to enforce it. *Id.* at 33. Indeed, in Afghanistan, the law criminalizing violence against women is viewed unfavorably by some as "un-Islamic." *Id.* In these countries, as well as others, the lack of comprehensive domestic violence laws and poor enforcement of existing laws allows perpetrators to abuse with impunity.

Often, police minimize the significance of domestic violence, believing it is a personal matter that the partners should resolve themselves. Indeed, in Saudi Arabia, investigators sometimes hesitate to enter homes of domestic violence victims without the approval of the head of household, who in many cases is also

---

[17] *See e.g.*, Law Against Femicide and Other Forms of Violence Against Women, Ley Contra el Femicidio y Otras Formas de Violencia Contra la Mujer, Decreto 22-2008, Apr. 9, 2008 (Guatemala); Elimination of Violence Against Women Law, 2009 (Presidential Decree No. 91, July 20 2009) (Afghanistan); Protection from Abuse Act 2013 (Saudi Arabia).

the abuser. *Saudi Arabia 2016 Human Rights Report* 41 42. Additionally, investigators encourage victims to reconcile with their abusers to keep the family intact or simply return a woman directly to her abuser, who often is her legal guardian. *Id.* at 42. In Afghanistan, the police response to domestic violence is "limited" due in part to "sympathy towards perpetrators." *Afghanistan 2016 Human Rights Report* 35. As a result, reporting domestic violence to police forces most often does not provide any real protection to victims and even puts them into more danger.

Asylum applicants who survive rape, sexual assault, severe beatings, female genital mutilation, forced marriage, and other forms of persecution that may constitute "private criminal activity" can offer ample evidence to support their applications. This persecution occurs and festers because governments are unwilling or unable to control it. Under the INA, where governments are unwilling or unable to provide protection from persecution by a non-government actor, asylum is appropriate. *Aldana-Ramos*, 757 F.3d at 17. Any rule that seeks to exclude domestic violence survivors from asylum eligibility would disregard substantial evidence of conditions of countries in which domestic violence is not a private criminal matter.

B. A new rule that asylum applicants cannot establish "persecution" when the persecutor is a private criminal actor is contrary to long-settled law

To obtain asylum in the United States, an applicant must demonstrate a "well-founded fear of persecution." 8 U.S.C. § 1101(a)(42)(A). She must show a "genuine subjective fear of persecution" and demonstrate that "a reasonable person in like circumstances would fear persecution." *Crespin-Valladares*, 632 F.3d at 126 (quoting *Chen v. INS*, 195 F.3d 198, 201 02 (4th Cir. 1999)).

What constitutes persecution is also well-settled. For instance, the Fourth Circuit has consistently held that persecution can include physical harm and the "threat of death." *Id.* The BIA has held that persecution can include beatings and rape. *See A-R-C-G-*, 26 I. & N. Dec. at 389; *S-A-*, 22 I. & N. Dec. at 1335, 1337; *see also Kone v. Holder*, 596 F.3d 141, 149 (2d Cir. 2010) (applicant subjected to genital mutilation had well-founded fear of persecution); *Lazo-Majano v. INS*, 813 F.2d 1432, 1434 (9th Cir. 1987) (recognizing rape as persecution), *overruled on other grounds by Fisher v. INS*, 79 F.3d 955 (9th Cir. 1996).

Courts have long and unanimously held that under the INA, acts of persecution may well be carried out by private actors. *See Al-Ghorbani v. Holder*, 585 F.3d 980, 998 99 (6th Cir. 2009) (Yemeni government unwilling or unable to protect petitioners against death threats made by military officer); *Nabulwala v. Gonzales*, 481 F.3d 1115, 1116 18 (8th Cir. 2007) (family-arranged rape

constitutes persecution); *Mohammed v. Gonzales*, 400 F.3d 785, 798 n.19 (9th Cir. 2005) (mutilation by "family members or fellow clan members" constitutes persecution); *Ali v. Ashcroft*, 394 F.3d 780, 785 87 (9th Cir. 2005) (persecution "need not be directly at the hands of the government"). In short, any holding that criminal acts committed by a private actor *cannot* constitute persecution under the INA is contrary to decades of settled law. *See, e.g.*, *Hernandez-Avalos v. Lynch*, 784 F.3d 944, 950 53 (4th Cir. 2015); *S-A-*, 22 I. & N. Dec. 1328; *Acosta*, 19 I. & N. Dec. at 222 23; *see also* UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status* ¶ 65 (1979, rev. 1992); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 438 39 (1987).

C. A rule that asylum applicants cannot show that persecution from a private criminal actor was "on account of" a PSG would be contrary to the INA

Like every other asylum applicant, a gender-based violence survivor must demonstrate that her membership in a PSG (or other protected ground) "was or will be at least one central reason for" her persecution. 8 U.S.C. § 1158(b)(1)(B)(i). One way to show that nexus, for example, is to show that the home country's social norms allow and condone the conduct because of the group an applicant is in, especially where the state refuses to protect her from abuse. *See Velihaj v. Att'y Gen.*, 336 F. App'x 193, 195 (3d Cir. 2009) (upholding asylum claim because government failed to protect petitioner "on account of" a protected ground);

Ndayshimiye v. Att'y Gen., 557 F.3d at 129. The applicant "need not disprove every [other] possible motive" for the persecution. *Vata v. Gonzalez*, 243 F. App'x 930, 940 (6th Cir. 2007); *see also id.* at 940 41; *see also Marroquin-Ochoma v. Holder*, 574 F.3d 574, 579 (8th Cir. 2009).

That the abuser or the abuse is "private" (or "criminal") is irrelevant to showing nexus. "[I]f there is a nexus between the persecution and the membership in a particular social group, the simultaneous existence of a personal dispute does not eliminate that nexus." *Qu v. Holder*, 618 F.3d 602, 608 (6th Cir. 2010); *see also Sarhan*, 658 F.3d at 655 57 (although a man's honor killing of his sister "may have a personal motivation," honor killings have "broader social significance," and the killing of the applicant would be "on account of" membership in PSG comprising "women in Jordan who have (allegedly) flouted repressive moral norms, and thus who face a high risk of honor killing"); *Aldana-Ramos*, 757 F.3d at 18 19. Thus, an applicant whose husband regularly beats her for leaving home against his orders (but does not beat his son, brother, or sister for doing the same) may well be able to show that she belongs to a PSG and that the beatings are, at least in part, on account of that PSG membership. The fact that the abuse may also have involved personal or "private" anger or that it was criminal does not defeat the nexus. Thus, there is no logical basis for holding that "private criminal conduct" somehow bars the showing of nexus. Where statutory language and logic

do not exclude the category of domestic violence victims, there is no basis for the Attorney General to carve out domestic violence victims from the asylum authorized by Congress.

D. The Fourth Circuit's decision in *Velasquez v. Sessions* does not alter this result

In the present case, the IJ took the unusual step of refusing to implement the BIA's order and instead seeking to certify the decision for reconsideration in light of the Fourth Circuit's decision in *Velasquez v. Sessions*, 866 F.3d 188 (4th Cir. 2017). Likewise, in his certification, the Attorney General states that "several Federal Article III courts have recently questioned whether victims of *private violence* may qualify for asylum under section 208(b)(1)(B)(i) of the Immigration and Nationality Act based on their claim that they were persecuted because of their membership in a particular social group." *Matter of A-B-*, 27 I. & N. Dec. 247, 249 (AG Mar. 7, 2018) (emphasis added).

The BIA and the federal courts have long recognized what the statutory language requires: that in some cases, acts of private or non-State actors can certainly constitute persecution on account of a protected basis. *See Ivanov v. Holder*, 736 F.3d 5 (1st Cir. 2013) (religion); *Aliyev v. Mukasey*, 549 F.3d 111 (2d Cir. 2008) (nationality); *A-R-C-G-*, 26 I. & N. Dec. at 389 (PSG membership). To be sure, in some cases, courts have held that acts of private violence *do not* constitute persecution on account of a protected basis. But *amici* are unaware of

any case suggesting the outcome the Attorney General suggests here: that victims of private-actor violence suffered on account of PSG membership are *not* eligible for the relief that is otherwise available to victims of private-actor violence on account of race, religion, nationality, or political opinion. Indeed, such a suggestion is contrary to the INA, which applies the same test to all the listed protected groups.

Velasquez does not suggest a different outcome. In that case, the Fourth Circuit denied asylum to a Honduran applicant and her son who fled Honduras after her mother-in-law repeatedly kidnapped the son and threatened the applicant's life. 866 F.3d at 191 92. While the applicant and her son were in custody in the United States, the son's uncle murdered the applicant's sister, having mistaken her for the applicant. *Id.* at 192. The applicant claimed refugee status as a persecuted member of a PSG, which, she argued, was her nuclear family. *Id.* The IJ found that Velasquez was not eligible for asylum, and the BIA affirmed. *Id.* at 192 93. She appealed on the ground that the BIA erred in finding that she was not persecuted "on account of" her membership in a PSG.

The Fourth Circuit agreed with the IJ and BIA that while "membership in a nuclear family qualifies as a protected ground for asylum purposes," *id.* at 194 (citing *Crespin Valladares*, 632 F.3d at 125), the applicant could not show that the persecution was *on account of* her membership in the nuclear family. Instead, the

applicant's fears arose only from what the court characterized as her "purely personal" custody dispute with her mother-in-law. *Id.* at 196. The court found that the mother-in-law's threats "were not motivated by Velasquez' family status but by a personal desire to obtain custody over" the son. *Id.* at 195. Put another way, the mother-in-law harmed Velasquez not due to Velasquez's family status, but rather because the mother-in-law wanted custody of her grandson. Velasquez's status as her son's mother, based on the factual record developed in that case, was only an "incidental . . . reason for [her] persecution." *Hernandez-Avalos*, 784 F.3d at 949.

Velasquez did *not* hold that private criminal action barred the applicant from establishing a PSG. To the contrary, the Court recognized a nuclear family as a PSG. Instead, the Court there considered whether, on the factual record before it, the applicant had established nexus. That case is simply inapposite here, as the Attorney General has announced he is reviewing issues of PSG membership. Moreover, nowhere in *Velasquez* did the Court consider whether the fact that the mother-in-law was a "private criminal actor" would preclude asylum.

Likewise, the nexus at issue there did not involve gender-based social norms or evidence of state inaction. Here, in contrast, the gender-based violence arose in a *machismo* culture in which men generally regard their wives as under their control. And even when the applicant tried to leave her husband and obtained a divorce in 2013, the violence continued uncontrolled. *See Matter of A-B-*, Slip Op.

at 2 3 (BIA Aug. 18, 2017). When the applicant's ex-husband raped her in 2014, *id.* at 3, the two were not even members of the same household. Finally, the applicant presented evidence that the government was unable or unwilling to protect her when she showed that her ex-husband's brother a local police officer threatened her. *Id.*

Unlike *Velasquez*, this case offers an excellent example of how gender-based domestic violence by a private criminal actor can certainly be "on account of" membership in a particular social group. Here, the persecution was motivated by a vision of the applicant as the persecutor's property, a notion that society reinforced by treating the victim as property and doing nothing to prevent the continued abuse. In this case, the domestic violence victim met the nexus requirement, reasonably fearing future persecution as a result of her membership in a PSG.

II. THE CHARACTERIZATION OF GENDER-BASED VIOLENCE AS "PRIVATE ACTION" IS NOT RELEVANT TO WHETHER AN APPLICANT CAN ESTABLISH A PSG

Another problem with the Attorney General's question is that it creates an artificial dichotomy between "private" and "public" actors. This dichotomy is nowhere in the asylum statute. Indeed, whether the persecution is carried out by a private (non-State) actor or not simply does not affect the ultimate question: whether the applicant is a member of a PSG.

For an applicant seeking asylum, she must establish that her PSG is "(1) composed of members who share a common immutable characteristic, (2) defined with particularity, and (3) socially distinct within the society in question." *M-E-V-G-*, 26 I. & N. Dec. at 237. These requirements are referred to as (1) immutability, (2) particularity, and (3) social distinctness. The inquiry is fact-based and requires a case-by-case adjudication system. *Id.* at 251; *see also Pirir-Boc v. Holder*, 750 F.3d 1077, 1084 (9th Cir. 2014). But none of these factors turn on whether the persecutor is a public or private actor.

A. Whether persecution is carried out by a private (non-State) actor has no bearing on immutability

To satisfy the immutability requirement, an applicant must demonstrate that a proposed PSG has a characteristic that "the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences." *Acosta*, 19 I. & N. Dec. at 233; *see also Matter of W-G-R-*, 26 I. & N. Dec. 208, 213 (BIA 2014).

In the context of gender-based violence, a PSG's immutable trait is often gender. For example, the BIA has held that married women who are incapable of leaving their husbands because of societal or religious norms precluding divorce share immutable characteristics. *See A-B-*, Slip Op. at 3 (citing *A-R-C-G-*, 26 I. & N. Dec. at 390, 392 95). Similarly, in *Matter of A-R-C-G*, while the applicant was a survivor of domestic violence, her PSG's immutable characteristics were

gender and an inability to leave a marriage, not being the victim of a past crime. 26 I. & N. Dec. at 392 93. A subgroup of women can constitute a PSG defined with more particularity than simply "women" and can fulfill the immutability requirement simply by comprising only women.

B. Whether persecution is carried out by a private (non-State) actor has no bearing on particularity

"The 'particularity' requirement relates to the group's boundaries or . . . the need to put 'outer limits' on the definition of a 'particular social group.'" *M-E-V-G-*, 26 I. & N. Dec. at 238 (citation omitted). To be sufficiently particular, a PSG must have "particular and well-defined boundaries." *Matter of S-E-G-*, 24 I. & N. Dec. 579, 582 (BIA 2008). This requirement helps define the outer limits of the definition of a PSG. *See Castellano-Chacon v. I.N.S.*, 341 F.3d 533, 549 (6th Cir. 2003), *holding modified by Almuhtaseb v. Gonzales*, 453 F.3d 743 (6th Cir. 2006). This assessment must be done in the context of the applicant's home society. *Id.*[18]

Whether the persecution at issue was "private criminal activity" has no bearing on whether the group is sufficiently particular. While it is difficult for *amici* to predict what may constitute "private criminal activity," the BIA and courts

---

[18] While *amici* address these elements because it is current law, we note that many circuit courts have not decided whether these elements are valid. *Amici*'s position on these issues is that the current PSG requirements are problematic as a matter of law. We do not intend by this briefing to endorse these requirements.

have found some PSGs including victims of persecution by non-state actors sufficiently particular. For instance, in *Qu v. Holder*, the Sixth Circuit recognized a PSG comprising "women in China who have been subjected to forced marriage and involuntary servitude." 618 F.3d at 607. Cases like *Qu* reflect the fact that the purpose of the particularity inquiry to ensure that a given group's parameters are clear and definite has nothing to do with the private or public nature of the persecution or the persecutor.

C. Whether persecution is "private criminal activity" has no bearing on social distinctness[19]

The PSG inquiry's final element, "social distinctness," sometimes referred to as "social visibility," requires that the society in the particular area view the group as distinct. *M-E-V-G-*, 26 I. & N. Dec. at 243. Distinctness is evaluated from the perspective of society in a country or region of a country, not from the perspective of an assailant. *Id.* (citation omitted). Social distinctness does not require that the distinguishing characteristic be immediately recognizable to others. *See W-G-R-*, 26 I. & N. Dec. at 216; *see also Temu v. Holder*, 740 F.3d 887, 892 (4th Cir. 2014). Attempts by group members to hide the distinguishing characteristic do not negate

---

[19] Some courts have questioned the validity of the social-distinctness requirement. *See, e.g.*, *Gatimi v. Holder*, 578 F.3d 611 (7th Cir. 2009); *Valdiviezo-Galdamez v. Att'y Gen.*, 663 F.3d 582, 604 (3d Cir. 2011).

the social distinctness of the group. *Id.* at 217. The key to social distinction is that the group is perceived as a group by society. *Matter of C-A-*, 23 I. & N. Dec. 951, 956 57 (BIA 2006); *see also Temu*, 740 F.3d at 892 (citing *C-A-*, 23 I. & N. Dec. at 959).

As with the first two factors, nothing about the social-distinctness requirement invites analysis about whether the applicant was a victim of a private or public crime. Courts and the BIA have consistently found, based on evidence presented, that victims of domestic violence, forced marriage, trafficking, and female genital mutilation can be members of PSGs that are socially distinct. For instance, in *A-R-C-G-*, the BIA held that "married women in Guatemala who are unable to leave their relationship" are socially distinct. 26 I. & N. Dec. at 393 95. The BIA relied on evidence of Guatemala's "culture of 'machismo and family violence.'" *Id.* at 394 (citation omitted). This evidence showed that the relevant society "makes meaningful distinctions based on the common immutable characteristics of being a married woman in a domestic relationship that she cannot leave." *Id.*; *see also Temu*, 740 F.3d at 893. While social distinctness requires a social consensus based on a PSG's characteristics, private acts constituting persecution do not negate or otherwise affect whether the applicant can show social distinctiveness.

For these reasons, whether persecution happens through "private criminal activity" simply cannot bar an applicant from establishing a PSG or demonstrating the required nexus. Accordingly, any blanket rule that a victim of private-actor gender-based violence cannot establish a PSG is inconsistent with the INA and the existing PSG analysis.

III. THE ATTORNEY GENERAL SHOULD REJECT DHS'S ARGUMENT THAT VICTIMS OF GENDER-BASED VIOLENCE MUST SATISFY ADDITIONAL EVIDENTIARY BURDENS

In its brief, DHS strongly and properly urges the Attorney General not to abrogate *A-R-C-G-*, 26 I. & N. Dec. 388. *See A-B-*, DHS Brief on Referral to the AG, at 20. But DHS also seeks to impose extensive documentation requirements in asylum claims raising domestic violence issues, requirements that do not apply in other asylum cases. These requirements and would undermine the protections for domestic violence survivors recognized in *A-R-C-G-*. Specifically, DHS seeks to require such applicants to disclose "specific information about the putative persecutor" and specific personal information about her domestic and intimate relationships. *Id.* at 24. These requirements do not apply in non-domestic violence asylum cases, and extend beyond the statutory requirements. DHS's requirements are ill-advised for two fundamental reasons.

First, these additional requirements place an undue burden on asylum applicants in an already complex process. The DHS requirements incorrectly

assume that survivors of domestic violence will know precise details about their abusers. But many victims do not have precise information about their abusers because their perpetrators isolate them, hiding information and controlling their environment. The most effective abuser may in fact have established enough power and control over his victim that she is unaware of the number or nature of his extramarital relationships, his trips in and out of the country, or even his criminal activities. A domestic violence survivor may not know details of an abuser's life outside the home, such as his employment, military service, or his parents' and siblings' full names information DHS would require. Indeed, even trying to obtain this information could put the applicant in danger.

Additionally, many victims of domestic violence have experienced trauma that may hinder their ability to recall details about their abusers. The impact of trauma on the ability of the brain to remember details, including about the perpetrator himself, has been well-documented. *See* M. P. Koss et al., *Traumatic Memory Characteristics: A Cross-Validated Mediational Model of Response to Rape Among Employed Women, Journal of Abnormal Psychology*, 105 (3) J. of Abnormal Psychol. 421 32 (1996). Therefore, it is highly likely that a victim will either block or forget information about her abuser.

DHS's requirements would also place an undue burden on detained immigrants, who already struggle with language issues, access to legal counsel,

and understanding extraordinarily complex immigration laws. Furthermore, to the extent any information in DHS's requirements is relevant to the asylum analysis, a judge may ask for such information and consider its weight. DHS's requirements would impose an undue and unfair burden on those survivors of domestic violence who have legitimate claims to asylum.

Second, much of the information DHS wishes to compel reflects a fundamental lack of understanding of the dynamics of domestic violence. For example, DHS seeks information about the applicant's current relationships, perhaps to suggest that where a survivor is in another relationship, she should not fear continued persecution. In fact, the opposite is true: persecution often escalates when a woman leaves the abuser and especially when she tries to begin a new relationship.[20] For example, Aracely Martinez Yanez, an asylum recipient,

---

[20] *See* Jennifer L. Hardesty, *Separation Assault in the Context of Postdivorce Parenting: An Integrative Review of the Literature*, 8 Violence Against Women 597, 601 (2002) (risk of intimate femicide increases sixfold when a woman leaves an abusive partner); Jennifer L. Hardesty & Grace H. Chung, *Intimate Partner Violence, Parental Divorce, and Child Custody: Directions for Intervention and Future Research*, 55 Family Relations 200, 201 (2006) ("[S]eparation is a time of heightened risk for abused women. Studies indicate that violence often continues after women leave and sometimes escalates.")

recounts that when her abuser found out she was in a relationship with another man, he returned to El Salvador to shoot her in the head and murder her two sons.[21]

DHS's requirements would also require a victim to provide information about "direct or indirect" contact with her abuser after she arrived in the United States. However, a lack of "direct or indirect" contact after arrival in the United States cannot undermine the fear of return to persecution, given the prevalence of post-separating violence and stalking. Such a conclusion is contrary to decades of research about the nature of domestic violence.[22]

There is no basis to impose additional evidentiary requirements solely on applicants who are survivors of domestic violence. Congress has provided that persecution on account of membership in a PSG qualifies one for asylum. Excluding a class of applicants who can meet those requirements is contrary to the spirit and the letter of the law.

---

[21] Declaration on file with Tahirih Justice Center.

[22] Research shows that domestic violence flows from the abuser's need to exercise control in his relationship with the victim. *See* Mary Ann Dutton & Lisa A. Goodman, *Coercion in Intimate Partner Violence: Towards a New Conceptualization*, 52 Sex Roles 743, 743 (2005). This exercise of control necessarily prevents the victim from unilaterally ending the relationship. Peter G. Jaffee et al., *Common Misconceptions in Addressing Domestic Violence in Child Custody Disputes*, Juvenile & Family Ct. J. 57, 59 60 (2003) ("[S]eparation may be a signal to the perpetrator to escalate his behavior in an attempt to continue to control or punish his partner for leaving.").

CONCLUSION

For the foregoing reasons, the Attorney General should affirm the BIA's order.

Respectfully submitted,

/s/ Paul M. Thompson
Paul M. Thompson (D.C. Bar No. 973977)
Sophia A. Luby (D.C. Bar No. 241865)
David Mlaver (D.C. Bar No. 1030609)
McDERMOTT WILL & EMERY LLP
500 North Capitol Street NW
Washington, D.C. 20001
(202) 756-8032
pthompson@mwe.com

Counsel for Amici Curiae

April 27, 2018

APPENDIX

The following organizations, whose work focuses both nationally and internationally on domestic and gender-based violence, join the listed *amici* in this brief and urge the Attorney General to continue to recognize long-established protections for those victims of gender-based and domestic violence who meet the requirement for asylum.

National Network to End Domestic Violence (NNEDV)
1325 Massachusetts Ave. NW, 7th Floor
Washington, D.C. 20005

Futures Without Violence
100 Montgomery St., The Presidio
San Francisco, CA 94129

Jewish Women International
129 20th St. NW, Ste. 801
Washington, D.C. 20036

Her Justice
100 Broadway, 10th Floor
New York, NY 10005

National Alliance to End Sexual Violence
1875 Connecticut Ave., 10th Floor
Washington, D.C. 20009

National Domestic Violence Hotline
P.O. Box 161810
Austin, TX 78716

National Asian Pacific American Women's Forum
www.napawf.org

New York City Gay and Lesbian Anti-Violence Project
116 Nassau St., 3rd Floor
New York, NY 10038

Women's Refugee Commission
1012 14th St. NW, Ste. 1100
Washington, D.C. 20005

Michigan Immigrant Rights Center
3030 S 9th St., Ste. 1B
Kalamazoo, MI 49009

CERTIFICATE OF FILING

I certify that on April 27, 2018, a true and correct copy of this brief was served upon the following counsel electronically at AGCertification@usdoj.gov and in triplicate by Federal Express to:

United States Department of Justice
Office of the Attorney General, Room 5114
950 Pennsylvania Avenue, NW
Washington, D.C. 20530

/s/ Paul M. Thompson

CERTIFICATE OF SERVICE

I certify that on April 27, 2018, a true and correct copy of this brief was served by Federal Express to:

United States Department of Homeland Security
Office of the Chief Counsel
5701 Executive Center Drive, Suite 300
Charlotte, NC 28212

/s/ Paul M. Thompson

UNITED STATES DEPARTMENT OF JUSTICE
OFFICE OF THE ATTORNEY GENERAL

MATTER OF A-B-,

Respondent

Referred from:
United States Department of Justice
Executive Office for Immigration Review
Board of Immigration Appeals

BRIEF AMICI CURIAE OF SIXTEEN FORMER IMMIGRATION JUDGES AND MEMBERS OF THE BOARD OF IMMIGRATION APPEALS URGING VACATUR OF REFERRAL ORDER AND IN SUPPORT OF RESPONDENT

Megan B. Kiernan (SBN 302091)
mkiernan@gibsondunn.com
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, DC 11101-5306
Telephone: (202) 955-8500
Facsimile: (202) 467-0539

Ronald Kirk (SBN 1022961)
rkirk@gibsondunn.com
Chelsea G. Glover (SBN 24097738)
cglover@gibsondunn.com
GIBSON, DUNN & CRUTCHER LLP
2100 McKinney Avenue, Suite 1100
Dallas, TX 75201-6912
Telephone: (214) 698-3100
Facsimile: (214) 571-2900

Lalitha D. Madduri (SBN 301236)
lmadduri@gibsondunn.com
GIBSON, DUNN & CRUTCHER LLP
333 South Grand Avenue
Los Angeles, CA 90071-3197
Telephone: (213) 229-7000
Facsimile: (213) 229-7520

Amer S. Ahmed (SBN 500630)
aahmed@gibsondunn.com
GIBSON, DUNN & CRUTCHER LLP
200 Park Avenue
New York, NY 10166-0193
Telephone: (212) 351-4000
Facsimile: (212) 351-4035

Counsel for Amici Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES
(continued)

Page(s)

Statute

Administrative Decisions

Regulations

TABLE OF AUTHORITIES
(continued)

Other Authorities

INTRODUCTION

Amici Curiae are sixteen former immigration judges and members of the Board of Immigration Appeals ("Board"). Out of respect for the law to which they have dedicated their careers, Amici feel compelled to file this brief in support of Respondent. Amici are deeply concerned about the procedural violations in this case in particular the Attorney General's certification of a question that was not ***properly*** considered by the Immigration Judge and was not considered ***at all*** by the Board. This complete disregard for established procedure is alarming. It plainly violates binding federal regulations governing the narrow circumstances under which Attorney General certification is permitted and it raises serious due process concerns.

Ultimately, it is within Congress's authority not the Attorney General's to define the boundaries of asylum. And Congress has already determined that a person can qualify for asylum based on persecution that independently might constitute private criminal activity.

Amici urge the Office of the Attorney General not to take any further action on a question that is not properly before it, and therefore urge that the referral order be vacated.

STATEMENT OF INTEREST OF AMICI CURIAE

Below is a list of the relevant experience of each of the sixteen former immigration judges and members of the Board submitting this brief. Some have served as trial attorneys in the Department of Justice's Office of Immigration Litigation. Some have worked in the General Counsel's Office for the Executive Office for Immigration Review. Others have assisted in the drafting of the federal regulations discussed in this brief. Each is intimately familiar with the immigration-court system and, critically, with its governing procedures. After devoting their

careers to that system, Amici have a distinct interest in ensuring that the system continues to operate in a fair, predictable manner consistent with decades-old federal regulations.

- **The Honorable Steven Abrams** served as an Immigration Judge at the New York, Varick Street, and Queens Wackenhut Immigration Courts in New York City. Prior to his appointment to the bench, he worked as a Special U.S. Attorney in the Eastern District of New York, and before that as District Counsel, Special Counsel for criminal litigation, and general attorney for the former Immigration and Naturalization Service ("INS").
- **The Honorable Sarah M. Burr** served as an Immigration Judge in New York starting in 1994 and was appointed as Assistant Chief Immigration Judge in charge of the New York, Fishkill, Ulster, Bedford Hills, and Varick Street immigration courts in 2006. She served in this capacity until January 2011, when she returned to the bench full time until her retirement in 2012. Prior to her appointment, she worked as a staff attorney for the Criminal Defense Division of the Legal Aid Society in its trial and appeals bureaus and also as the supervising attorney in its immigration unit.
- **The Honorable Jeffrey S. Chase** served as an Immigration Judge in New York City from 1995 to 2007 and was an attorney advisor and senior legal advisor at the Board from 2007 to 2017. He now works in private practice as an independent consultant on immigration law, and is of counsel to the law firm of DiRaimondo & Masi in New York City. He received the American Immigration Lawyers Association's ("AILA") annual pro bono award in 1994 and chaired AILA's Asylum Reform Task Force.
- **The Honorable George T. Chew** served as an Immigration Judge in New York from 1995 to 2017. Previously, he served as a trial attorney at the former INS.

- **The Honorable Bruce J. Einhorn** served as an Immigration Judge in Los Angeles from 1990 to 2007. He now serves as an Adjunct Professor of Law at Pepperdine University School of Law, and is a Visiting Professor of International, Immigration, and Refugee Law at the University of Oxford.
- **The Honorable Cecelia M. Espenoza** served as a Member of the Board from 2000 to 2003 and in the Executive Office for Immigration Review ("EOIR") Office of the General Counsel from 2003 to 2017 where she served as Senior Associate General Counsel, Privacy Officer, Records Officer, and Senior FOIA Counsel. She now works in private practice as an independent consultant on immigration law. Prior to her EOIR appointments, she was a law professor at St. Mary's University (1997 2000) and the University of Denver College of Law (1990 97), where she taught Immigration Law and Crimes and supervised students in the Immigration and Criminal Law Clinics. She has published several articles on immigration law. She received the Outstanding Service Award from the Colorado Chapter of AILA in 1997.
- **The Honorable Noel Ferris** served as an Immigration Judge in New York from 1994 to 2013 and as an attorney advisor to the Board from 2013 until her retirement in 2016. Previously, she served as a Special Assistant U.S. Attorney in the Southern District of New York from 1985 to 1990 and as Chief of the Immigration Unit from 1987 to 1990.
- **The Honorable John F. Gossart, Jr.** served as an Immigration Judge from 1982 until his retirement in 2013. He is the former president of the National Association of Immigration Judges. At the time of his retirement, he was the third most senior immigration judge in the United States. From 1975 to 1982, he served in various positions with the former INS, including as a general attorney, naturalization attorney, trial attorney, and deputy assistant

commissioner for naturalization. He is also the co-author of the National Immigration Court Practice Manual, which is used by all practitioners throughout the United States in immigration-court proceedings. From 1997 to 2016, Judge Gossart was an adjunct professor at the University of Baltimore School of Law teaching immigration law, and more recently was an adjunct professor at the University of Maryland School of Law, also teaching immigration law. He is also a past board member of the Immigration Law Section of the Federal Bar Association.

- **The Honorable Carol King** served as an Immigration Judge from 1995 to 2017 in San Francisco and was a temporary member of the Board for six months between 2010 and 2011. She previously worked in private practice for ten years, focusing on immigration law. She also taught immigration law for five years at Golden Gate University School of Law and is currently on the faculty of the Stanford University Law School Trial Advocacy Program. Judge King currently works as an advisor on removal proceedings.
- **The Honorable Margaret McManus** was appointed as an Immigration Judge in 1991 and retired from the bench this January after twenty-seven years. Before her time on the bench, she worked in several roles, including as a consultant to various nonprofit organizations on immigration matters (including Catholic Charities and Volunteers of Legal Services) and as a staff attorney for the Legal Aid Society, Immigration Unit, in New York.
- **The Honorable Lory D. Rosenberg** served on the Board from 1995 to 2002. She then served as Director of the Defending Immigrants Partnership of the National Legal Aid & Defender Association from 2002 until 2004. Prior to her appointment, she worked with the American Immigration Law Foundation from 1991 to 1995. She was also an adjunct Immigration Professor at American University Washington College of Law from 1997 to

2004. She is the founder of IDEAS Consulting and Coaching, LLC, a consulting service for immigration lawyers, and is the author of *Immigration Law and Crimes*. She currently works as Senior Advisor for the Immigrant Defenders Law Group.

- **The Honorable Susan Roy** started her legal career as a Staff Attorney at the Board, a position she received through the Attorney General Honors Program. She served as an Assistant Chief Counsel, National Security Attorney, and Senior Attorney for the DHS Office of Chief Counsel in Newark, NJ, and then became an Immigration Judge, also in Newark. She has been in private practice for nearly five years, and two years ago, opened her own immigration law firm. She is the New Jersey AILA Chapter Liaison to EOIR and is the Vice Chair of the Immigration Law Section of the New Jersey State Bar Association.
- **The Honorable Paul W. Schmidt** served as an Immigration Judge from 2003 to 2016 in Arlington, VA. He previously served as Chairman of the Board from 1995 to 2001, and as a Board Member from 2001 to 2003. He authored the landmark decision *Matter of Kasinga*, 21 I&N Dec. 357 (BIA 1995), extending asylum protection to victims of female genital mutilation. He served as Deputy General Counsel of the former INS from 1978 to 1987, serving as Acting General Counsel from 1979 to 1981 and 1986 to 1987. He was the managing partner of the Washington, DC office of Fragomen, DelRey & Bernsen from 1993 to 1995, and practiced business immigration law with the Washington, DC office of Jones, Day, Reavis and Pogue from 1987 to 1992, where he was a partner from 1990 to 1992. He was a founding member of the International Association of Refugee Law Judges (IARLJ), which he presently serves as Americas Vice President. He also consults, speaks, writes, and lectures at various forums throughout the country on immigration law topics.

- **The Honorable William Van Wyke** served as an Immigration Judge from 1995 until 2015 in New York City and York, PA.
- **The Honorable Gustavo D. Villageliu** served as a Member of the Board from July 1995 to April 2003. He then served as Senior Associate General Counsel for the EOIR until he retired in 2011. Before becoming a Board Member, Villageliu was an Immigration Judge in Miami, with both detained and non-detained dockets, as well as the Florida Northern Region Institutional Criminal Alien Hearing Docket from 1990 to 1995. Mr. Villageliu joined the Board as a staff attorney in January 1978, specializing in war criminal, investor, and criminal alien cases.
- **The Honorable Polly A. Webber** served as an Immigration Judge from 1995 to 2016 in San Francisco, with details to the Tacoma, Port Isabel (TX), Boise, Houston, Atlanta, Philadelphia, and Orlando immigration courts. Previously, she practiced immigration law from 1980 to 1995 in her own firm in San Jose, California. She served as National President of AILA from 1989 to 1990 and was a national AILA officer from 1985 to 1991. She also taught Immigration and Nationality Law for five years at Santa Clara University School of Law. She has spoken at seminars and has published extensively in the immigration law field.

BACKGROUND

In 2015, the Immigration Judge in this case denied Respondent's application for asylum, and Respondent appealed to the Board. *See Matter of A-B-*, at 1 (BIA Dec. 8, 2016). The Board sustained Respondent's appeal and found that (1) "the Immigration Judge's adverse credibility finding [is] clearly erroneous"; (2) Respondent "set forth a cognizable particular social group and that she is a member of that group"; (3) "the Immigration Judge's finding that [] [R]espondent was able to leave her ex-husband is clearly erroneous"; and (4) the Immigration Judge's "finding

that [] [R]espondent has not demonstrated that the government of El Salvador is unable or unwilling to protect her from her ex-husband" is incorrect. *Id.* at 2 4. Following procedural and substantive requirements, the Board did not issue a decision granting asylum at that time instead, it remanded the case to the Immigration Judge to ensure that the required background checks were completed. *Id.* at 4; *see also* 8 C.F.R. § 1003.1(d)(6) ("The Board shall not issue a decision affirming or granting to an alien an immigration status, relief or protection from removal . . . if [i]dentity, law enforcement, or security investigations or examinations have not been completed during the proceedings[.]"); *id.* § 1003.1(d)(7) (permitting the Board to "return a case to the . . . immigration judge for such further action as may be appropriate, without entering a final decision on the merits of the case").

After the Board's remand, the Immigration Judge did not make the findings required, and did not issue a decision either granting or denying asylum, as the remand required. *Matter of A-B-*, Order of Certification, at 4 (I.J. Aug. 18, 2017). Instead, the Immigration Judge held the case without taking action. Following the Fourth Circuit's decision in *Velasquez v. Sessions*, 866 F.3d 188 (4th Cir. 2017), the Immigration Judge certified the case back to the Board for consideration of what the Immigration Judge believed to be a change in the law. *Id.* at 4 5 (holding that "the above-captioned case is certified and administratively returned to the Board of Immigration Appeals" and noting that "[a]n Immigration Judge may certify to the Board of Immigration Appeals . . . any case arising from a decision rendered in removal proceedings").

On March 7, 2018, the Attorney General referred A-B's case to himself for review under 8 C.F.R. § 1003.l(h)(l)(i). *See Matter of A-B-*, 27 I&N Dec. 227 (A.G. 2018). Pending his review, the Attorney General stayed any further proceedings. *Id.* In his order, the Attorney General:

> invite[d] the parties to these proceedings and interested amici to submit briefs on points relevant to the disposition of this case, including: Whether, and under what circumstances, being a victim of private criminal activity constitutes a cognizable "particular social group" for purposes of an application for asylum or withholding of removal.

Id.

On March 14, 2018, Respondent requested an extension of the briefing schedule. Two days later, the Department of Homeland Security ("DHS") moved for a suspension of the briefing schedule and requested that the Attorney General clarify the central briefing question. In the alternative, DHS sought an extension of the briefing schedule for the parties and amici curiae. DHS argued that "this matter does not appear to be in the best posture for the Attorney General's review" and that the question presented "has already been answered, at least in part, by the Board in its prior precedent." DHS Motion, at 2 3 (Mar. 16, 2018). On March 21, 2018, Respondent filed a response to DHS's motion, agreeing with the above arguments. On March 30, 2018, the Attorney General denied DHS's motion to suspend the briefing schedule and clarify the question presented, and granted, in part, both parties' request for an extension of the briefing deadline. *See Matter of A-B-*, 27 I&N Dec. 247 (A.G. 2018).

ARGUMENT

I. This case is not properly before the Attorney General.

Contrary to the Attorney General's assertion, his review of this case now does not "compl[y] with all applicable regulations." *Matter of A-B-*, 27 I&N Dec. 247, 249 (A.G. 2018). Rather, this case is rife with procedural violations and is consequently unripe for agency-head review. This brief addresses two specific violations that ran afoul of decades-old federal regulations governing the orderly resolution of asylum cases: (1) the Immigration Judge's purported certification of the case to the Board without rendering a decision on Respondent's

asylum claim, and (2) the Attorney General's subsequent referral of the matter to himself before the Board had an opportunity to issue a decision either granting or denying relief to Respondent.

A. Federal regulations require that the Immigration Judge issue a decision on asylum before certifying a case to the Board.

When this case was first before the Board two years ago, the Board sustained Respondent's claim for relief on the grounds that she had established persecution on account of a protected characteristic, but the Board did not issue a decision granting or denying asylum. Instead, having eliminated the legal obstacle to asylum relied on by the Immigration Judge, the Board remanded the case to the Immigration Judge for the narrow purpose of determining whether the results of the requisite background checks were consistent with an order granting asylum. *Matter of A-B-*, at 4 (BIA Dec. 8, 2016); *see also* 8 C.F.R. § 1003.1(d)(6) ("The Board shall not issue a decision affirming or granting to an alien an immigration status, relief or protection from removal . . . if [i]dentity, law enforcement, or security investigations or examinations have not been completed during the proceedings[.]"); *id.* at § 1003.1(d)(7) (permitting the Board to "return a case to the . . . immigration judge for such further action as may be appropriate, without entering a final decision on the merits of the case").

Following the Board's remand of the case, the Immigration Judge did not issue a decision granting or denying asylum despite "completed and clear" background checks on Respondent. *Matter of A-B-*, Order of Certification, at 1, 4 (I.J. Aug. 18, 2017). Instead, after an unexplained and unwarranted eight-month delay, the Immigration Judge purported to certify the case for further appellate review. Shortly after the Fourth Circuit decided *Velasquez*, in which that court held that a different immigrant did not show that she was persecuted by her mother-in-law "on account of" her membership in a particular social group, but rather due to "a personal dispute" over custody of her son, the Immigration Judge certified this case back to the Board ***but***

without a final decision to consider what purportedly was an intervening change in governing Circuit law that eliminated the basis for Respondent's asylum claim. *Matter of A-B-*, Order of Certification, at 4 (I.J. Aug. 18, 2017). The Immigration Judge did so despite the fact that the Fourth Circuit explicitly said it was expressing no opinion on the continuing vitality of the particular social group identified as valid ground for asylum in *Matter of A-R-C-G-*, 26 I&N Dec. 388 (BIA 2014). *See Velasquez*, 866 F.3d at 195 n.5 ("The legal validity of the social group identified by *Velasquez* is not at issue in this case."); *see also* DHS Br., at 20 (acknowledging that *Velasquez* did not change the precedents at issue here).

This so-called certification was procedurally improper for multiple reasons. Section 1003.7 of the governing regulations permits an Immigration Judge to certify a case to the Board "***only after an initial decision*** has been made and before an appeal has been taken." 8 C.F.R. § 1003.7 (emphasis added). Here, because the Immigration Judge failed to make a decision and did not follow the limiting instructions on remand issued by the Board in December 2016, the regulations did not allow the Immigration Judge to certify the case to the Board for a second look at the legal underpinning for Respondent's asylum claim. 8 C.F.R. § 1240.12 ("The decision of the immigration judge ***shall*** include a finding as to inadmissibility or deportability.") (emphasis added). On remand of "the record for completion of background checks," the Immigration Judge was constrained to grant asylum in the form of "an order as provided by 8 C.F.R. § 1003.47(h)" if those checks were clear which they were unless "further proceedings" were necessary in the immigration court. *See Matter of A-B-*, at 4 (BIA Dec. 8, 2016); *see also id.* ("[W]e will remand the record for completion of background checks").

When "the Board 'qualifie[s] or limit[s] the remand for a specific purpose,' then the Immigration Judge [is] limited to that purpose." *Johnson v. Ashcroft*, 286 F.3d 696, 702 (3d Cir.

2002) (quoting *Matter of Patel*, 16 I&N Dec. 600 (BIA 1978)). Ignoring this longstanding rule, the Immigration Judge here took it upon himself to find a purported intervening change in law in the *Velasquez* decision. The Immigration Judge invoked 8 C.F.R. §§ 1003.1(c) and 1003.1(b)(3) as the bases for his certification ruling. *Matter of A-B-*, Order of Certification, at 4 (I.J. Aug. 18, 2017). But those regulations did not authorize the certification of the matter back to the Board in these circumstances. Section 1003.1(b)(3), the substantive provision cited by the Immigration Judge as authorizing his certification, addresses "[d]ecisions of Immigration Judges in removal proceedings, ***as provided in 8 C.F.R. § 1240***." 8 C.F.R. §§ 1003.1(b)(2), (3) (emphasis added); *see also* 8 C.F.R. § 1003.1(c) (providing authority for certification in situations listed in 8 C.F.R. § 1003.1(b)). Section 1240.12, in turn, requires that to be certified for Board review, an Immigration Judge's decision must meet specific requirements it must, for example, "include a finding as to inadmissibility or deportability," "contain reasons for granting or denying the [applicant's] request," and "conclude[] with the order of the immigration judge . . . direct[ing] the respondent's removal from the United States, or the termination of the proceedings, or other such disposition of the case as may be appropriate." 8 C.F.R. § 1240.12. None of those predicate requirements features anywhere in the Immigration Judge's order on remand, which means there was no "decision" ripe for certification to the Board under the regulations. *See* 8 C.F.R. § 1240.12(a), (c).

The Immigration Judge's perception that the Fourth Circuit's decision in *Velasquez* may have changed the applicable law a perception rejected by the *Velasquez* decision itself and DHS's brief in this case does not allow the Immigration Judge to circumvent procedure. Indeed, the regulations contemplate a mechanism to address an intervening change in law during remand and that mechanism manifestly does not include certification of incomplete

proceedings to the Board. Section 1003.47(h) specifies the actions that an Immigration Judge can take after remand by the Board. The regulation states that "[i]n any case remanded pursuant to 8 C.F.R. [§] 1003.1(d)(6), the immigration judge shall consider the results of the identity, law enforcement, or security investigations or examinations subject to the provisions of this section. . . . The immigration judge shall then enter an order granting or denying the immigration relief sought." 8 C.F.R. § 1003.47(h). Should there be "new information" presented to the immigration court such as a change in controlling Circuit law the Immigration Judge may "hold a further hearing if necessary to consider any legal or factual issues." *Id.* But the Immigration Judge may not certify the matter back to the Board without a decision granting or denying the petitioner's claim. Thus, the certification was procedurally flawed. Simply put, there was no avenue for the Immigration Judge to certify the case back to the Board without first entering an order granting or denying asylum relief.

B. The Attorney General may only review a Board decision, but there was none.

Even if the matter had properly been certified by the Immigration Judge to the Board, the Attorney General can only direct the Board to refer cases to him "for review of its ***decision***." 8 C.F.R. § 1003.1(h) (emphasis added). Here, the Board has not yet issued a "decision" granting or denying relief because the Immigration Judge did not make the necessary underlying findings on remand; therefore, the "case" cannot yet be referred to the Attorney General for review of the Board's "decision." The December 2016 Board opinion is not a "decision" because, in the absence of completed background checks, it made no finding granting Respondent relief. *See Matter of A-B-*, at 4 (BIA Dec. 8, 2016).

Most critically, the Board has not ever ruled on the question that the Immigration Judge purportedly certified to it, and which the Attorney General is now considering. That question was whether *Matter of A-R-C-G-* was still "legally valid within this jurisdiction in a case

involving a purely intra-familial dispute" after the Fourth Circuit's opinion in *Velasquez*. *See Matter of A-B-*, Order of Certification, at 3 4 (I.J. Aug. 18, 2017). In other words, the Board was asked to consider whether *Velasquez* constitutes an intervening change in controlling law and requires a rejection of Respondent's asylum claim. But the Board has not decided that question; in fact, no party has even briefed that question before the Board. Thus, there is no decision to review at all on that issue. Under the plain language of the regulations, there is nothing that can appropriately be certified here for agency-head review. *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994) (interpretation of federal regulations must be "compelled by the regulation's plain language" (citing *Gardebring v. Jenkins,* 485 U.S. 415, 430 (1988)).

II. Bypassing the Board nullifies critical procedural safeguards.

The Attorney General's certification in this case without a decision by the Board raises serious due process concerns. Depriving the Board of the opportunity to consider the certified question in the first instance erodes crucial protections designed to ensure that new rules are not issued without the opportunity for briefing by the parties and consideration by neutral decisionmakers.

A. The Board, a neutral and independent body, with deep knowledge of its own precedent, should consider the effect of new case law on that precedent in the first instance.

The Board is composed of neutral decisionmakers with particular expertise in immigration law. These decisionmakers exercise independent judgment and discretion. To be sure, as the "appellate body charged with the review of those administrative adjudications under the [Immigration and Nationality] Act that the Attorney General may by regulation assign to it," 8 C.F.R. § 1003.1(d)(1), the Attorney General has authority over the Board in certain circumstances. But federal regulations specifically direct the Board to exercise "independent judgment and discretion in considering and determining the cases" that come before it. 8 C.F.R.

§ 1003.1(d)(1)(ii). The Attorney General should not attempt to influence Board positions on matters of immigration law, particularly before the Board even announces them. *See United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 266 67 (1954). Federal regulations "delegate to the Board discretionary authority as broad as the statute confers on the Attorney General" in "unequivocal terms." *Id.* "And if the word 'discretion' means anything in a statutory or administrative grant of power, it means that the recipient must exercise his authority according to his own understanding and conscience. This applies with equal force to the Board and the Attorney General." *Id.* "In short, as long as the regulations remain operative, the Attorney General denies himself the right to sidestep the Board or dictate its decision in any manner." *Id.* The Board is thus the appropriate body to consider the effect of purportedly new and pertinent Circuit law on Board precedent before any certification to the Attorney General.

B. Bypassing the Board raises serious due process concerns.

A pre-certification decision by the Board ensures that the parties have an opportunity to brief important issues and that the Board has an opportunity to decide these issues before the announcement of a new rule. The Board's role in this ordered process is critical. Even those who advocate for an expansion of the Attorney General's power to certify Board decisions take it as a given that the Board will play a key role in the Attorney General's review. *See, e.g.*, Alberto Gonzales and Patrick Glen, *Advancing Executive Branch Immigration Policy Through the Attorney General's Review Authority*, 101 Iowa L. Rev. 841, 848 58 (2016) (describing the history and mechanics of the referral authority). Indeed, the Attorney General's power to certify decisions is viewed as comporting with due process precisely ***because*** the Board plays a key intermediate role in the development of immigration law. *See, e.g.*, *id.* at 906 ("Hearings before the immigration judge, ***appellate review by the Board***, and further consideration by the Attorney General on the record, as developed below, clearly meet this minimal threshold of due

process." (emphasis added)); *id.* at 907 (asserting that there is "little or no risk of . . . a legally or factually incorrect decision" because "[t]he decision by the Attorney General is made on the totality of the administrative record and ***with the benefit of prior decisions by the Board*** and immigration judge, which protects against an erroneous deprivation" (emphasis added)).

Ensuring that legal issues have been raised, addressed, and fully resolved in proceedings below such that a complete record is presented for review with the benefit of expertise from independent adjudicators close to the facts has long been a feature of ordered appellate review that avoids the evil of advisory opinions. *See, e.g.*, *INS v. Cardozo-Fonseca*, 480 U.S. 421, 448 (1987) (noting that certain terms in the asylum statute, like "well-founded fear," have natural ambiguity and "can only be given concrete meaning through a process of case-by-case adjudication"); *Hormel v. Helvering*, 312 U.S. 552, 556 (1940) (describing settled principle that "[o]rdinarily an appellate court does not give consideration to issues not raised below" because it is "essential . . . that litigants [] not be surprised on appeal by final decision there of issues upon which they have had no opportunity to introduce evidence"); *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 325 (1936) (courts cannot issue "an advisory decree upon a hypothetical state of facts"). There is no reason not to apply that principle equally to the Attorney General's referral authority.

Bypassing the Board before it renders a decision removes these critical procedural safeguards. It is irrelevant that immigration law is at issue here, because immigrants present in the United States are entitled to due process of law, "whether their presence is lawful, unlawful, temporary, or permanent." *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001); *see also Jean-Louis v. Att'y Gen. of U.S.*, 582 F.3d 462, 470 n.11 (3d Cir. 2009) (noting that the "unusual circumstances of [a case's] referral to, and adjudication by, the Attorney General," where "the Attorney General

certified the case to himself *sua sponte*," resulted in a "lack of transparency" that was cause for serious concern). Changes in the law in particular to principles on which individuals have relied, including those with pending asylum claims raising similar issues demand procedural due process. *See Sessions v. Dimaya*, 138 S. Ct. 1204, 1223 24 (2018) (Gorsuch, J., concurring) (condemning uncertainties in the law that invite "the exercise of arbitrary power" "leaving the people in the dark about what the law demands and allowing prosecutors and courts to make it up"). At a minimum, immigrants who have risked their lives to come to this country, with the understanding that they would qualify for asylum based on the law as applied to the facts of their case, deserve procedural safeguards to protect against arbitrary changes in the rules governing eligibility. *See id.* at 1227 ("Without an assurance that the laws supply fair notice, so much else of the Constitution risks becoming only a 'parchment barrie[r]' against arbitrary power." (quoting The Federalist No. 48, p. 308 (C. Rossiter ed. 1961) (J. Madison)). If there is to be a change in the law, it can come only after the question has been briefed by interested parties and decided by independent Board adjudicators with specialized expertise in immigration law.

III. The Attorney General cannot override Congress's judgment under the guise of a procedural mechanism.

Referral is also improper here because the Attorney General's formulation of the question purportedly underpinning this case usurps the authority of Congress to define a "refugee" for purposes of the Immigration and Nationality Act ("INA"). Congress included a robust definition of "refugee" in the INA, and expressly did ***not*** limit such definition to victims of government or government-sponsored acts. It would be improper for the executive branch to adopt a more circumscribed definition than Congress has provided.

Under 8 U.S.C. § 1101(a)(42), a "refugee" is defined as "any person . . . who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of,

that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." The statute includes no additional limitations. Critically, there is no mention of ***who*** the persecutor must be or even whether his actions must be ***lawful*** in the victim's country of origin. The relevant inquiry, as framed by Congress, is only whether the petitioner fears persecution based on membership in a "particular social group." The fact that the acts constituting persecution might independently be criminal under the laws of the host country is irrelevant to the analysis. "[T]here is no indication that Congress intended the phrase 'membership in a particular social group' to have any particular meaning," and "persecution on account of membership in a particular social group" means only "persecution that is directed toward an individual who is a member of a group of persons all of whom share a common, immutable characteristic." *Aldana-Ramos v. Holder*, 757 F.3d 9, 16 (1st Cir. 2014) (citing various Board decisions).

Unsurprisingly then, federal courts of appeals have rejected any notion that a victim of ***private*** criminal activity is *per se* ineligible for asylum. *See Bringas-Rodriguez v. Sessions*, 850 F.3d 1051, 1073 (9th Cir. 2017) (holding that "beatings and rapes" perpetrated by an "uncle, cousins, and neighbor" of a homosexual asylum-seeker constitute persecution on account of a membership in a particular social group notwithstanding Mexico's "enactment of remedial laws" prohibiting discriminatory acts against homosexuals by private parties); *see also Garcia v. Att'y Gen. of U.S.*, 665 F.3d 496, 499, 503 04 (3d Cir. 2011) (holding that threat of murder from gang members for having testified against one of them could form valid basis for fear of persecution on account of membership in a particular social group); *Crespin-Valladares v. Holder*, 632 F.3d 117, 126 27 (4th Cir. 2011) (holding that threat of violence from gang members for acting as cooperating witness "gave rise to a reasonable fear of future persecution"); *Hor v. Gonzales*, 421

F.3d 497, 501 02 (7th Cir. 2005) (holding that threat of violence from non-governmental militaristic group could constitute persecution); *Abay v. Ashcroft*, 368 F.3d 634, 638 (6th Cir. 2004) (finding "[f]orced female genital mutilation" by a woman's "relatives or future husband or her husband's relatives" constitutes "persecution on account of membership in a particular social group" even though there were "laws in place" in the host country "to prohibit harmful traditional practices" because those laws "[we]re not, as a practical matter, enforced").

Interpreting Congressional intent, federal courts have also recognized that membership in a particular social group can be based on "a shared past experience," *Valdiviezo Galdamez v. Att'y Gen. of U.S.*, 663 F.3d 582, 595 96 (3d Cir. 2011), and that "shared past experience" can include being a victim of a similar crime. For example, in *Lukwago v. Ashcroft*, the Third Circuit held that "the past experience of abduction, torture, and escape with other former child soldiers" was sufficient to constitute a "'particular social group' for purposes of asylum." 329 F.3d 157, 178 79 (3d Cir. 2003). Likewise, in *Bi Xia Qu v. Holder*, the Sixth Circuit found that being a victim of kidnapping, attempted rape, and threats of forced marriage qualified the petitioner as a member of a particular social group (defined as "women in China who have been subjected to forced marriage and involuntary servitude"), without regard to whether such actions were lawful in her country of origin. 618 F.3d 602, 607 (6th Cir. 2010).

As these decisions make clear, diverse victims of criminal activity by private actors have been deemed members of a "particular social group" entitled to asylum within the meaning of the INA. Courts have appropriately recognized that categorical rules or definitions as to who might qualify as a member of a "particular social group" are neither appropriate nor contemplated by the statute. Such determinations should be made on a case-by-case basis, precisely as the Board recommended in both *Matter of A-R-C-G-* and here in *Matter of A-B-*.

See, e.g., *Rivera-Barrientos v. Holder*, 666 F.3d 641, 648 (10th Cir. 2012) (stating that the "particular social group analysis is necessarily contextual, as the BIA gives the statutory term concrete meaning through a process of case-by-case adjudication" (internal alterations omitted)); *see also Cardoza-Fonseca*, 480 U.S. at 448. Therefore, while the question framed by the Attorney General does not, on its face, address asylum eligibility, it is settled in Article III courts that being a victim of private criminal activity can form the basis for membership in a particular social group in appropriate circumstances where, as here, the immutable characteristics of such a group can be identified with the requisite distinctiveness.

IV. "Persecution" can be carried out or threatened by private actors that the government cannot or will not control.

Although it is well-established that private criminal activity can form the basis of a persecution claim, a victim of private criminal activity does not automatically qualify for asylum. Rather, asylum decisions are highly fact-dependent, and the factfinder must still engage in an intensive analysis to determine whether the acts constitute persecution.

Furthermore, in all asylum cases, there is an entirely distinct legal requirement that persecution by private actors be of a nature that the government is unable or unwilling to control. *See Paloka v. Holder*, 762 F.3d 191, 195 (2d Cir. 2014) ("Direct governmental action is not required for a claim of persecution. Private acts can constitute persecution if the government is unable or unwilling to control it."); *Aldana-Ramos*, 757 F.3d at 17; *Madrigal v. Holder*, 716 F.3d 499, 503 (9th Cir. 2013) (persecution can be committed by "forces that the government was unable or unwilling to control"); *Gutierrez-Vidal v. Holder*, 709 F.3d 728, 732 (8th Cir. 2013) ("Whether a government is unable or unwilling to control private actors is a question of fact." (internal citations omitted)).

With regard to the alleged difficulty of proving a nexus where private criminal acts are involved, these backstop requirements consistently imposed by the Board demonstrate why such a concern is wholly illusory. In this case, there was no plausible argument that Respondent's ex-husband was a generally lawless individual who indiscriminately targeted members of the Salvadoran population. To the contrary, the reason Respondent's ex-husband and his brother persecuted her wherever she tried to relocate was ***because*** they had children in common through a prior domestic relationship. *See, e.g. Matter of A-B-*, at 4 (BIA Dec. 8, 2016) (finding that "ex-husband's brother, a local police officer, threatened Respondent in December 2013, referred to her as his sister-in-law, despite the fact that she had already divorced his brother, commented that she would always be in a relationship with her ex-husband because they have children in common, and warned her to be careful as she would never know where the bullets would land"). Thus, this case provides no basis to speculate whether other private criminal actors might target asylum claimants for reasons having nothing to do with the "particular social group" they are claiming membership in. The case-by-case analysis endorsed, and underscored, by the Board in *Matter of A-B-* provides an adequate tool to root out meritless claims where such a nexus is genuinely lacking.

There is, therefore, little danger that frivolous asylum claims will multiply based on private criminal activity in notoriously lawless countries because courts will still assess whether the circumstances of a particular case indicate that the government (i) was alerted to a particular strain of criminal activity, and (ii) did nothing to address it because of incompetence or social mores having to do with the victim's group membership. That backstop requirement serves as an important check on any unwarranted expansion of the "particular social group" analysis, and counsels against using this case as a vehicle to upend years of settled immigration law.

CONCLUSION

The Attorney General should vacate his referral order or, in the alternative, instruct the Immigration Judge to issue an order granting or denying asylum, thus allowing any potential appeal to the Board and certification to the Attorney General to proceed in the manner required by law.

April 27, 2018

Respectfully submitted,

/s/ Ronald Kirk

Megan B. Kiernan (SBN 302091)
mkiernan@gibsondunn.com
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, DC 11101-5306
Telephone: (202) 955-8500
Facsimile: (202) 467-0539

Lalitha D. Madduri (SBN 301236)
lmadduri@gibsondunn.com
GIBSON, DUNN & CRUTCHER LLP
333 South Grand Avenue
Los Angeles, CA 90071-3197
Telephone: (213) 229-7000
Facsimile: (213) 229-7520

Ronald Kirk (SBN 1022961)
rkirk@gibsondunn.com
Chelsea G. Glover (SBN 24097738)
cglover@gibsondunn.com
GIBSON, DUNN & CRUTCHER LLP
2100 McKinney Avenue, Suite 1100
Dallas, TX 75201-6912
Telephone: (214) 698-3100
Facsimile: (214) 571-2900

Amer S. Ahmed (SBN 500630)
aahmed@gibsondunn.com
GIBSON, DUNN & CRUTCHER LLP
200 Park Avenue
New York, NY 10166-0193
Telephone: (212) 351-4000
Facsimile: (212) 351-4035

Counsel for Amici Curiae

CERTIFICATE OF COMPLIANCE

I certify that the foregoing Brief Amici Curiae complies with the 9,000 word count laid out in *Matter of A-B-*, 27 I&N Dec. 247 (A.G. 2018). Exclusive of cover, captions, table of contents, table of authorities, and signature block, it contains 6,486 words, according to the word count feature of Microsoft Word, which was used to generate this brief.

Date: April 27, 2018

/s/ Megan B. Kiernan
Megan B. Kiernan

PROOF OF SERVICE

I, Megan B. Kiernan, hereby certify that I served the required copies of the **Brief Amici Curiae of Sixteen Former Immigration Judges and Members of the Board of Immigration Appeals Urging Vacatur of Referral Order and in Support of Respondent** and any attachments by U.S. first-class mail on April 27, 2018 to the following:

United States Department of Justice
Office of the Attorney General, Room 5114
950 Pennsylvania Avenue, NW
Washington, DC 20530

And by e-mail to AGCertification@usdoj.gov.

Date: April 27, 2018

/s/ Megan B. Kiernan
Megan B. Kiernan

Christopher J. Hajec
Elizabeth A. Hohenstein
Immigration Reform Law Institute
25 Massachusetts Ave. NW, Suite 335
Washington, D.C. 20001
(202) 232-5590
chajec@irli.org
ehohenstein@irli.org

Attorneys for Amicus Curiae Immigration Reform Law Institute

UNITED STATES DEPARTMENT OF JUSTICE
OFFICE OF THE ATTORNEY GENERAL
WASHINGTON, D.C.

In the Matter of	
A-B-,	Redacted
Respondent.	In Removal Proceedings

REQUEST TO APPEAR AS AMICUS CURIAE AND SUPPLEMENTAL BRIEF OF THE IMMIGRATION REFORM LAW INSTITUTE

TABLE OF CONTENTS

INTEREST OF AMICUS CURIAE

The Immigration Reform Law Institute ("IRLI") is a not for profit 501(c)(3) public interest law firm incorporated in the District of Columbia. IRLI is dedicated to litigating immigration-related cases on behalf of United States citizens, as well as organizations and communities seeking to control illegal immigration and reduce lawful immigration to sustainable levels. IRLI has litigated or filed *amicus curiae* briefs in many immigration-related cases before federal courts and administrative bodies, including *Trump v. Int'l Refugee Assistance Project,* 137 S. Ct. 2080 (2017); *United States v. Texas*, 136 S. Ct. 2271 (2016); *Arizona Dream Act Coal. v. Brewer*, 818 F.3d 101 (9th Cir. 2016); *Washington All. of Tech. Workers v. U.S. Dep't of Homeland Sec.*, 74 F. Supp. 3d 247 (D.D.C. 2014); *Save Jobs USA v. U.S. Dep't of Homeland Sec.*, No. 16-5287 (D.C. Cir., filed Sept. 28, 2016); *Matter of Silva-Trevino*, 26 I. & N. Dec. 826 (B.I.A. 2016); and *Matter of C-T-L-*, 25 I. & N. Dec. 341 (B.I.A. 2010).

ISSUES PRESENTED

The Attorney General has asked for supplemental briefing on the following issue:

- Whether, and under what circumstances, being a victim of private criminal activity constitutes a cognizable "particular social group" for the purposes of an application for asylum or withholding of removal.

SUMMARY OF THE FACTS

Respondent is a citizen of El Salvador. She provided testimony and written statements, which did not coincide completely, about domestic abuse committed by her husband. She stated that her husband mentally and physically abused her over a number of years; that, in 2008, she separated and moved away from her husband; and that, in 2013, she divorced him. After the divorce, respondent claimed that he continued to threaten and abuse her, and that, in January

2014, he raped her. She also claimed that her ex-husband's brother, a local police officer, made threatening statements to her, and commented that she would always be in a relationship with her ex-husband because of the children they had together. She claimed that another friend of her ex-husband told her that if her ex-husband killed her, he would help dispose of her body. While the Immigration Judge rejected her asylum claim, the Board of Immigration Appeals (Board) sustained her appeal, finding that her proposed particular social group, "El Salvadoran women who are unable to leave their domestic relationships where they have children in common," fulfilled the asylum requirements of 8 U.S.C. § 1158(b)(1).

SUMMARY OF THE ARGUMENT

Being a victim of private criminal activity, by itself, does not place one in a particular social group for asylum purposes. Crime victims are not a distinctive social group. Even assuming, *arguendo*, that such victims could comprise a particular social group, they could not prove that the harm they suffered was on account of their membership in that group and that the government was unwilling or unable to protect them.

When the proper analysis is applied to the Board's prior decision in *Matter of A-R-C-G-*, 26 I. & N. Dec. 388, 395 (B.I.A. 2012), it becomes clear that that case was wrongly decided, and that domestic violence-based asylum claims do not fulfill the statutory requirements.

ARGUMENT

Under 8 U.S.C. § 1158(b)(1)(A), an alien making an asylum claim must fulfill the definition of "refugee" by establishing "that race, religion, nationality, membership in a particular social group, or political opinion was or will be at least one central reason for persecuting the applicant." In *Matter of Acosta*, the Board articulated the standard for a particular social group by finding that a particular social group must share a common, immutable

characteristic that its members cannot or should not be required to change. 19 I. & N. Dec. 211, 233 (B.I.A. 1985). In recent years, the BIA has clarified the *Acosta* definition, finding that the particular social group must be: (1) composed of members who share a common immutable characteristic, (2) socially distinct within the society in question and (3) defined with particularity. *Matter of M-E-V-G-*, 26 I. & N. Dec. 227, 237 (B.I.A. 2014) (determining that "Honduran youth who have been actively recruited by gangs but who have refused to join because they oppose gangs" is not a particular social group for an asylum claim). An adjudicator may use various objective and subjective sources to determine if an applicant is eligible for asylum based upon the proposed social group. *Matter of A-R-C-G-*, 26 I. & N. Dec. 388, 395 (B.I.A. 2012).

Establishing that a particular social group exists is only the first step in granting asylum under the particular social group category. The asylum applicant must also prove harm that rises to the level of persecution;[1] that a nexus exists between the particular social group and persecution; and that the government was unwilling or unable to protect the applicant from the persecution. If the applicant is found to fulfill the definition of a refugee, the applicant may still be denied asylum if future persecution can be avoided "by relocating to another part of the applicant's country of nationality . . . [if] under the circumstances, it would be reasonable to expect the applicant to do so." 8 C.F.R. § 1208.13(b)(1)(i)(B).

I. "Victims Of Private Criminal Activity" Is Not A Particular Social Group.

A. "Victims Of Private Criminal Activity" Is Defined Based Solely On The Harm Suffered.

Victims of private criminal activity do not comprise a particular social group under the *Acosta* definition because the shared characteristic defining the group cannot be merely that its

[1] *Amicus* will not be addressing this element.

members suffered a common harm. *See Matter of S-E-G-*, 24 I. & N. Dec. 579, 584 (B.I.A. 2008) (holding that "Salvadoran youth who refuse recruitment into the MS-13 criminal gang or their family members" did not constitute a particular social group); *In Re C-A-*, 23 I. & N. Dec. 951, 960 (B.I.A. 2006) (holding the group "former noncriminal drug informants working against the Cali drug cartel" did not constitute a particular social group). To define a particular social group solely by the harm suffered is circular, *Moreno v. Lynch*, 826 Fed. App'x 862, 864 (4th Cir. 2015), and would not articulate a workable standard. *Cece v. Holder*, 733 F.3d 662, 681 (7th Cir. 2013) (Easterbrook, J., dissenting) ("The BIA has held that a 'social group' cannot be identified by asking who was mistreated. For if the persecutors' acts define social groups, then again § 1101(a)(42)(A) effectively offers asylum to all mistreated persons, whether or not race, religion, politics, or some extrinsically defined characteristics (such as tribal membership) account for the persecution.") (internal citation omitted).

The problem persists even if the group is further defined by other common characteristics. *Matter of R-A-*, 22 I. & N. Dec. 906, 919 (B.I.A. 2001) ("But the social group concept would virtually swallow the entire refugee definition if common characteristics, coupled with a meaningful level of harm, were all that need be shown."). Thus, a group comprised of victims of private criminal activity who were also women, or married women, or El Salvadoran women who are unable to leave their domestic relationships where they have children in common, is still defined crucially by the harm suffered. A common harm suffered does not qualify as an immutable characteristic and cannot form the basis for an asylum claim.

B. "Victims Of Private Criminal Activity" Is Not Particular.

In addition to having an immutable characteristic, the proposed social group must also be defined with particularity. That is, the group cannot be "too amorphous . . . [and must] create a

benchmark for determining group membership." *Matter of M-E-V-G-*, 26 I. & N. Dec. at 239 (citing *Matter of A-M-E- & J-G-U-*, 24 I. & N. Dec. 69, 76 (B.I.A. 2007)). A proposed social group must not be "overbroad, diffused, or subjective." *Id.* (citing *Ochoa v. Gonzales*, 406 F.3d 1166, 1170-71 (9th Cir. 2005)).

"Victims of private criminal activity" is obviously overbroad. *See Kante v. Holder*, 634 F.3d 321, 327 (6th Cir. 2011) (holding that the social group "women subject to rape as a method of government control" was too "generalized and far-reaching [since] . . . it has not previously served as a definable limitation."). Private criminal activity includes every type of crime from violent felonies to financial persecution, and victimizes a wide variety of people. As the Ninth Circuit has explained:

> Individuals falling within the parameters of this sweeping demographic division naturally manifest a plethora of different lifestyles, carrying interests, diverse cultures, and contrary political leanings and it is so broad and encompasses so many variables that to recognize any person who might conceivably establish membership would render the definition of refugee meaningless.

Sanchez-Trujillo v. INS, 801 F.2d 1571, 1576 (9th Cir. 1986) (holding that "young, working class males who have not served in the military of El Salvador" is not a particular social group) (internal quotation marks, brackets, and ellipses omitted).

C. "Victims Of Private Criminal Activity" Is Not Socially Distinct.

The final consideration in whether the proposed group is a particular social group is social visibility. It is not the persecutor's perception of the victim that determines whether a particular social group exists; rather, it is society's viewpoint of the group that matters. The persecutor's perception carries analytical weight when it comes to establishing the nexus requirement, but not in establishing whether the group is socially distinct. The society in question must "perceive" the proposed group as distinct from the greater society because of the

shared characteristic being asserted by the proposed social group. *Matter of S-E-G-*, 24 I. & N. Dec. at 586. Evidence that others have suffered the same or similar harm is not enough to establish that the group is "perceived as a cohesive group by society." *Cano v. Lynch*, 809 F.3d 1056, 1059 (9th Cir. 2016) (determining that "escapee Mexican child laborers" are not socially distinct) (citation omitted).

Because the proposed group "victims of private criminal behavior" is so broad, there is no country report that could possibly support its social distinctiveness. Private criminal activity occurs in all countries. Regardless of the levels of crime, there is no indication that victims of private criminal activity are perceived any differently than other citizens in any country, including El Salvador. As the Department of State's Bureau of Diplomatic Security stated: "[c]rimes of every type routinely occur, and crime is unpredictable, gang-centric, and characterized by violence directed against both known victims and targets of opportunity. According to a Central American University (UCA) poll from January 6, 2016, 24.5% of Salvadorans were victims of crime in 2015." *El Salvador 2017 Crime & Safety Report*, Department of State's Bureau of Diplomatic Security (Feb. 22, 2018), https://www.osac.gov/pages/ContentReportDetails.aspx?cid=21308; *see also El Salvador 2016 Human Rights Report*, Department of State 1 (April 12, 2017) (reporting "widespread extortion and other crimes in poor communities throughout the country.").

Instead of these numbers weighing in favor of granting asylum to victims of private criminal activity in El Salvador, they show that the private criminal activity that occurs in El Salvador is not treatment meted out to a perceived social group but a pervasive problem that afflicts all ethnicities, genders, religions, and so on. Thus, there is no social distinction between those who have been a victim of private criminal activity and those who have not. Rampant

private criminal activity or generalized civil unrest do not show that society views victims as a group distinct from society. *See Konan v. Att'y Gen. of the U.S.*, 432 F.3d 497, 506 (3d. Cir. 2005) ("[G]eneral conditions of civil unrest or chronic violence and lawlessness do not support asylum.").

II. Victims of Private Criminal Activity Cannot Prove That The Harm They Suffered Was "On Account Of" Membership In The Proposed Particular Social Group.

After establishing a particular social group and the applicant's membership in the group, an applicant for asylum must then link the particular social group to the harm suffered by demonstrating that the harm was perpetrated "on account of" that membership. 8 U.S.C. § 1101(a)(42)(A). The REAL ID Act clarified this nexus requirement by providing that the protected ground must be "at least one central reason" for the harm suffered. Pub. L. No. 109-13, div B, 119 Stat. 231 (2005); *see also Matter of Fuentes*, 19 I. & N. Dec. 658, 662 (B.I.A.1988) (holding that the asylum applicant "bear[s] the burden of establish facts on which a reasonable person would fear that the danger rises on account of" their membership in the specific social group). The Board has stated that the persecutor's group-related motives must not be "incidental, tangential, superficial, or subordinate to another reason for harm." *Matter of J-B-N- & S-M-*, 24 I. & N. Dec. 208, 214 (B.I.A. 2008)).

The applicant must prove that the harm was suffered "'*because of*' a protected ground[,]" and therefore the persecutor's motives must be assessed. *Parussimova v. Mukasey*, 555 F.3d 734, 739 (9th Cir. 2009) (citing *Elias-Zacarias*, 502 U.S. at 483 (emphasis in the original)) (holding that the protected ground must be "essential" to the decision to persecute the applicant). While related to establishing a particular social group, the nexus analysis is its own separate requirement. "[I]t is not enough to simply identify the common characteristics of a statistical grouping of a portion of the population at risk. Rather, . . . there must be a showing that the

claimed persecution is on account of the group's identifying characteristics." *Matter of E-A-G-*, 24 I. & N. Dec. 591, 595 (B.I.A. 2008) (internal citations and quotation marks omitted). "As the Supreme Court has held: 'since the statute makes motive critical, [an asylum applicant] must provide some evidence of it, direct or circumstantial.' *INS v. Elias-Zacarias*, 502 U.S. 478, 483 (1982)." H. Rep. No. 109-72, at 162. Conjecture about the link between the harm and a protected ground will not suffice for establishing the nexus requirement. *Singh v. Mukasey*, 543 F.3d 1, 6 (1st Cir. 2008) (determining that proposed persecutors were economically motivated rather than motivated by a protected ground when they assaulted respondent and eventually occupied part of his home after he left India).

Victims of private criminal activity cannot establish a nexus between their particular social group and the crime that occurred because of two flaws that cannot be remedied regardless of the harm perpetrated against the victim. "[A]liens fearing retribution over purely personal matters, or aliens fleeing general conditions of violence and upheaval . . . would not qualify for asylum." *Matter of Magharrabi*, 19 I. & N. Dec. at 439, 447 (B.I.A. 1987).

First, as previously stated, general civil unrest or economic hardships facing the country as a whole, rather than just the victim, do not sufficiently link the harm to membership in the particular social group. *Ochave v. INS*, 254 F.3d 859, 865 (9th Cir. 2001). Private criminal activity, even activity that rises to the level of persecution, such as rape, is often the by-product of general civil unrest or economic hardships rather than persecution "on account" of protected grounds. *Gormley v. Ashcroft*, 364 F.3d 1172, 1177 (9th Cir. 2004).

Just as civil unrest is a hurdle in defining a particular social group, it can also prevent an applicant from proving a true nexus between the harm suffered and the protected ground. Victims of private criminal activity are being harmed against a backdrop of unrest or rampant

private criminal activity where the violent acts committed against them are easily attributed to general country conditions. *See Konan*, 432 F.3d at 506 (3d. Cir. 2005). In countries that have pervasive criminal activity, it is difficult to establish the required nexus between a social group and the abuse suffered because victims can be fungible to persecutors. This is especially true where victims do not know who their persecutors are. Without knowing the motivations of their persecutors, asylum claimants cannot establish that their membership in a particular social group is at least one central reason why the acts of persecution were committed. If this were not the rule, whole nations would be eligible for asylum because of civil war, gang activity, or in this instance, private criminal activity.

An example of a "civil unrest" hurdle that prevents an asylum applicant from establishing a particular social group is generalize gang recruitment and associated criminal acts. In recent years, people have fled countries where gangs are powerful and target civilians for varying reasons. Some courts, however, have been hesitant to find that different proposed particular social groups meet the asylum requirements when they are based on gang activity. *See, e.g.*, *Matter of E-A-G-*, 24 I. & N. Dec. at 595 (finding that "persons resistant to gang membership" was not a particular social group); *Zentino v. Holder*, 622 F.3d 1007, 2016 (9th Cir. 2010) ("An alien's desire to be free from harassment by criminals motivated by theft or random violence by gang members bears no nexus to a protected ground."). Gangs may target individuals for various reasons, including attempting to gain more gang territory, extortion, or simply because the person is an easy target. *Alvizures-Gomes v. Lunch*, 830 F.3d 49, 53 (1st Cir. 2016) (listing various motivations a gang may have for targeting an individual); *Gjura v. Holder*, 502 Fed. App'x 91, 92 (2d Cir. 2012) (holding that the nexus requirement is not established when individuals outside of the proposed social group are equally as likely to become victims of

harm). That one was a victim of such activity does not mean that it was motivated by one's membership in a particular social group.

The second obstacle to the nexus requirement is the complete opposite of generalize civil unrest, but is just as fatal to an asylum application. This second impediment occurs when the perpetrator specifically targeted only one victim because of personal conflict, not on account of one of the five protected grounds for asylum. Mixed motives asylum cases can provide a viable asylum claim, *Martinez-Galarza v. Holder*, 782 F.3d 990, 993-94 (8th Cir. 2015), but "[p]urely personal retribution is, of course, not persecution . . . ." *Grava v. INS*, 205 F.3d 1177, 1181 n.3 (9th Cir. 2000); *Matter of G-Y-*, 20 I. & N. Dec. 794, 799 (B.I.A. 1994).

Where the victim knows the persecutor personally, the natural conclusion is that the harm was perpetrated for private reasons, separate and apart from any protected ground. Thus, establishing persecution based on a protected ground can be extremely difficult where the persecutor is a friend or family member, whether or not she previously had a good or cordial relationship with the applicant. Of course, "a retributory motive [may] exist[] alongside a protected motive," but the applicant must show that membership in the proposed social group was one central reason for the persecution committed. *Madrigal v. Holder*, 716 F.3d 499, 506 (9th Cir. 2013). The applicant would have to provide evidence that it was not personal retribution or feelings of personal ill will towards the victim that motivated the harm.

III. That Private Crime Occurs Is Not Proof That The Government Is Unable Or Unwilling To Control It.

The final requirement an applicant must establish is either that harm is inflicted by the government or that the government is unable or unwilling to control the persecutors. *Matter of Acosta*, 19 I. & N. Dec. at 222. An applicant must show more than just a "difficulty controlling behavior" or ineffectiveness in enforcement of protective laws. *See Salman v. Holder*, 687 F.3d

991, 995 (8th Cir. 2012) (citation omitted); *Galina v. INS*, 213 F.3d 955, 958 (7th Cir. 2000) (stating that the applicant must show that the government "condoned it or at least demonstrated a complete helplessness to protect the victims"); *In re McMullen*, 17 I. & N. Dec. 542, 546 (B.I.A. 1980) (finding difficulty authorities had in controlling private behavior insufficient). The applicant "must demonstrate that the government condoned the private behavior 'or at least demonstrated a complete helplessness to protect the victims. In particular, 'the fact that police take no action on a particular report does not necessarily mean that the government is unwilling or unable to control criminal activity, because there may be reasonable basis for inaction.'" *Salman*, 687 F.3d at 995 (citations omitted). If the government is actively striving to stop the violence that is occurring, this final element of the asylum analysis is unfulfilled. *Lemus v. Lynch*, 611 Fed. App'x 813, 815-16 (citing 8 C.F.R. § 1208.13(b)(2)(iii)); *Gjura*, 502 Fed. App'x at 92 (same).

Perfect protection from harm is not the standard by which this requirement is judged. *See, e.g.*, *Burbiene v. Holder*, 568 F.3d 251, 255 (1st Cir. 2009). The fact that private criminal actions occur and the government cannot completely "eradicate" them does not negate the government's efforts to curb criminal behavior. *See id.* Random, private criminal acts do not establish persecution on account of a protected ground. *See Gormley v. Ashcroft*, 364 F.3d at 1177 (citing *Rostomian v. INS*, 210 F.3d 1088, 1089 (9th Cir. 2000)). Country reports may reflect efforts by the government to address different types of private criminal behavior or criminal behavior generally. That efforts are not as effective as hoped does not mean that the government is helpless or unwilling to control the criminal activity. *Burbiene*, 568 F.3d at 255-56 (finding that while a country may experience setbacks in combating crime, such setbacks are

not indicative of persecution occurring on account of a protected ground). Change takes time, and a country's initiatives should be acknowledged and respected in asylum proceedings.

IV. Relocation To Another Region In Asylum Claims Based On Private Criminal Activity Is Likely Reasonable.

While past persecution creates the presumption of future persecution, 8 C.F.R. § 1208.13(b)(1), the government can rebut this presumption by showing that the alien can avoid future persecution by relocating and, under all of the circumstances, relocation would be reasonable. *Id.* at 1208.13(b)(1)(i)(B). When considering whether relocation would be reasonable, the adjudicator should take into account numerous considerations, such as whether the applicant would face serious harm in the suggested new location, civil strife, infrastructure, and social and cultural restraints. *Id.* at 1208.13(b)(3). This creates a two-step relocation analysis: (1) the Board must determine if there is a safe area within the country; and then (2) if there is a safe area, whether it would be reasonable to relocate. *Matter of M-Z-M-R-*, 26 I. & N. Dec. 28, 32 (B.I.A. 2012).

While the relocation analysis will be fact-based, an adjudicator analyzing a victim of criminal activity asylum claim will likely find that there is another region in the country where relocation is safe and reasonable. Where the victim does not know the persecutor and the motives are likely based on economic or personal gain, relocation becomes very possible. For example, if the victim was, at random, beaten and robbed at gunpoint for his personal belongings because he was an easy target, it is unlikely that the criminal would travel elsewhere in the country in order to target that particular victim again.

V. The Proposed Particular Social Groups Defined By Domestic Violence Do Not Fulfill The Asylum Requirements.

The Board wrongly decided *Matter of A-R-C-G-*, 26 I. & N. Dec. 388 (B.I.A. 2014), because victims of domestic violence do not qualify for asylum regardless of their gender, nationality, or marital status. Applying the above requirements to *Matter of A-R-C-G* would reveal that the proposed social group found in that case, "married women in Guatemala who are unable to leave their relationship," was not a particular social group based on an immutable characteristic, and that the applicant's membership in the group was not a central reason that the harm occurred. Also, respondent in *Matter of A-R-C-G-* was able to relocate within the country, but chose rather to return to live with her husband.

First, the group "married women in Guatemala who cannot leave a relationship" is not based on an immutable characteristic. The Board initially attempted define the group by gender. *Id.* at 392-393. While gender-based particular social groups are possible, gender alone does not necessarily justify asylum because rarely do all women, without any other factor to consider, suffer persecution in a society. *See Gomez v. INS*, 947 F.2d 660, 664 (2d Cir. 1991). Even if respondent argued that the particular social group was Guatemalan women (nationality and gender), her claim could still not survive because the abuse suffered was not motivated by her status as a Guatemalan woman. Rather, the abuse arose from the personal connection she had with her partner.

The Board then attempted to state that inability to leave a relationship was the immutable characteristic of the proposed social group because such inability may be based on "religion, cultural or legal restraints." *Matter of A-R-C-G*, 26 I. & N. Dec at 393. But these were not the reasons why the respondent could not leave her relationship. The respondent could not leave her relationship because of abuse, not because the government refused to grant a divorce. Indeed,

the Board's determination that respondent could not leave her relationship and thus was even a member of the proposed social group is questionable. The Board also recognized that respondent had left and moved away from her abuser for three months but voluntarily moved back and resumed her relationship when he promised the abuse would end. *Id.* at 389. Not only does this show that she was not in the proposed social group because she was able to leave her relationship and the government did not force her to return, it also shows that relocation was reasonable because respondent could move to another part of the country and not suffer harm.

Most crucially, there was no evidence that Guatemalan women who could not leave their relationships was a social group recognized as distinct by Guatemalan society, only broad statements concerning sexual offenses and family violence. *Id.* at 393-94. That societal or economic pressures might force some women in that country, to remain married and unseparated from their husbands, despite the availability of divorce a point that was never established in the case does not mean that Guatemalan society recognizes such women as a distinct group. And even if a group defined as women trapped in abusive relationships would be more distinct, it would be defined based solely on the harm suffered by its members, and harm suffered cannot form the sole basis of a particular social group. *Kante v. Holder*, 634 F.3d at 327 (6th Cir. 2011) (finding that "women subjected to rape as a method of government control" was not a particular social group as its definition was circular and based on harm).

For all of these reasons, *Matter of A-R-G-C-* was wrongly decided.

CONCLUSION

For the foregoing reasons, the Attorney General should determine that a group consisting of victims of private criminal behavior does not fulfill the statutory requirements of asylum.

Respectfully submitted,

/s/ Christopher J. Hajec
Christopher J. Hajec
Elizabeth A. Hohenstein
Immigration Reform Law Institute, Inc.
25 Massachusetts Ave, NW, Suite 335
Washington, DC 20001
Phone: 202-232-5590
Fax: 202-464-3590
chajec@irli.org
ehohenstein@irli.org

Attorneys for *Amicus Curiae*

CERTIFICATE OF SERVICE

I hereby certify that, on April 27, 2018, I electronically submitted the foregoing *amicus curiae* brief to the United States Department of Justice via email, and, via first class mail, sent three copies to the Office of the Attorney General at the United States Department of Justice for distribution to the parties.

/s/ Elizabeth A. Hohenstein
Elizabeth A. Hohenstein

Attorney for *Amicus Curiae*

Stoll Berne
209 SW Oak St., Suite 500
Portland, OR 97204
Exceptional lawyers | Extraordinary results
(503) 227-1600 | www.stollberne.com

UNITED STATES DEPARTMENT OF JUSTICE
OFFICE OF THE ATTORNEY GENERAL

Matter of A-B-,
Respondent

Referred from:
United States Department of Justice
Executive Office for Immigration Review
Board of Immigration Appeals
A_____

BRIEF OF *AMICUS CURIAE* INNOVATION LAW LAB

Nadia H. Dahab, OSB No. 125630
Stoll Stoll Berne Lokting & Shlachter P.C.
209 SW Oak Street, Suite 500
Portland, OR 97204
(503) 227-1600
ndahab@stollberne.com

Stephen W. Manning, OSB No. 013373
Innovation Law Lab
P.O. Box 40103
Portland, OR 97204
(503) 241-0035
stephen@innovationlawlab.org

Counsel for Amicus Curiae
Innovation Law Lab

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

Other Authorities

INTRODUCTION

This case presents the question whether the Attorney General whose relationships, conduct, and statements evince strident anti-immigrant bias and racial animus is bound by the rule of law. If he is, then *this* Attorney General Jefferson B. Sessions must be disqualified pursuant to the Immigration & Nationality Act (INA) and its implementing regulations, *see* INA §§ 103, 240; 8 C.F.R. § 1003.1(d)(1), our constitutional principles of due process, and a reasoned application of the rule of law, *see Kerry v. Din*, 135 S. Ct. 2128, 2144 (2015), from exercising his authority to refer and review questions of law arising in immigration proceedings. *See* 8 C.F.R. § 1003.1(h) (conferring that authority). Because the relationships, conduct, and statements of the Attorney General and members of his staff so deeply have entrenched them in positions aligned with anti-immigrant and racist views, they effectively have prejudged the questions of law presented in this case. *See generally Cinderella Career & Finishing Sch., Inc. v. FTC*, 425 F.2d 583, 591 (D.C. Cir. 1970) (finding disqualification required where the decision maker is unable fairly and neutrally to adjudicate in administrative proceedings). The Constitution, the INA, its implementing regulations, and principles underlying the rule of law do not and cannot permit those racist views to infect this proceeding.

The Board of Immigration Appeals ("the Board") is the administrative review body with appellate jurisdiction over the decisions of the immigration judges. 8 C.F.R. § 1003.1(b). Under the immigration regulations, decisions of the Board generally are "binding on all . . . immigration judges in the administration of the immigration laws." 8 C.F.R. § 1003.1(g). But notwithstanding the Board's authority to issue binding decisions on review, the regulations further provide the Attorney General with the authority to direct the Board to refer a case to him for a de novo review of the facts and law. 8 C.F.R. § 1003.1(h)(1); *see Matter of A-H-*, 23 I&N Dec. 774, 779 n.4 (A.G. 2005) (noting that the Attorney General's review is de novo). Where the Attorney General exercises that so-called "refer and review" authority, the "determination and ruling by the Attorney General with respect to . . . questions of law [is] controlling." INA § 103(a)(1).

On March 7, 2018, U.S. Attorney General Jefferson B. Sessions directed the Board to refer to him this case "for review of its decision." *Matter of A-B-*, 27 I&N Dec. 227, 227 (A.G. 2018). In his referral order, the Attorney General invited briefing from the parties and *amici curiae* on issues "relevant to the disposition of this case, including [w]hether, and under what circumstances, being a victim of private criminal activity constitutes a cognizable 'particular social group' for purposes of an application for asylum or withholding of removal." *Id.*

But neither Attorney General Sessions, nor any member of the Attorney General's staff, may fairly adjudicate the issues presented in this case. They therefore are disqualified entirely from doing so. *See Cinderella Career & Finishing Sch., Inc.*, 425 F.2d at 591. The Attorney General, personally and through staff members in the Office of the Attorney General, maintain ongoing personal and professional relationships with anti-immigrant activists, nativists, and white nationalists. Through those relationships, and through their related conduct and statements, the Attorney General and his staff members have prejudged all of the issues that this case presents. *See id.* (holding that "[t]he test for disqualification [is] whether 'a disinterested observer may conclude that (the agency) has in some measure adjudged the facts as well as the law of a particular case in advance of hearing it'" (quoting *Gilligan, Will & Co. v. SEC*, 267 F.2d 461, 469 (2d Cir. 1959)). Their relationships, their conduct, and their statements are so clearly motivated by anti-immigrant bias and racial animus as to have the effect of "entrenching [them in those positions], making it difficult, if not impossible" for them to reach a conclusion other than one that is aligned with those anti-immigrant and racist views. *See id.* at 590 (explaining that disqualification may constitutionally be required where an agency decision maker has made statements having the effect of "entrenching [the decision maker] in a position which he has publicly stated, making it difficult, if not impossible, for him to reach a different

conclusion in the event he deems it necessary to do so after consideration of the record").

Because that is so, the law requires that this case be referred back to the Board for reinstatement of its earlier decision. To proceed otherwise would be to permit arbitrary and flagrant abuses of executive power at the expense of the rule of law. *Hawkins v. Freeman*, 195 F.3d 732, 742 (4th Cir. 1999) (explaining that "'abusing executive power, or employing it as an instrument of oppression'," is the kind of conduct that fairly can be said to "shock the conscience" and violate constitutional due process guarantees (quoting *Collins v. City of Harker Heights*, 503 U.S. 115, 126 (1992))).

INTEREST OF *AMICUS CURIAE*

The Innovation Law Lab ("the Law Lab") is a nonprofit organization established to promote and improve due process in immigration proceedings. The Law Lab uses empirical analysis, technology, and litigation to ensure the fair and just administration of our immigration laws. The Law Lab has a direct interest in promoting rule-of-law principles in immigration adjudications and protecting immigration adjudications from political influence.

ARGUMENT

I. The INA requires the Attorney General to fairly and impartially administer the immigration laws.

The Immigration & Nationality Act (INA), together with its implementing regulations, sets forth procedures for the "timely, impartial, and consistent" resolution of immigration proceedings. *See* INA §§ 103, 240; 8 C.F.R. § 1003.1(d)(1) (charging the Board with appellate review authority to "resolve the questions before it in a manner that is timely, impartial, and consistent with the [INA] and regulations"); 8 C.F.R. § 1003.10(b) (similarly requiring "immigration judges . . . to resolve the questions before them in a timely and impartial manner"). Those procedures and the requirement that they be fairly and impartially administered extends not only to the Board and the immigration courts, but also to the Attorney General in the exercise of his refer and review authority under 8 C.F.R. § 1003.1(h).

Generally speaking, the Board of Immigration Appeals acts as the administrative review body within the Executive Office for Immigration Review (EOIR) of the U.S. Department of Justice. *See* 8 C.F.R. § 1003.1(a)(1). In that role, the Board is vested with appellate jurisdiction over the decisions of the immigration judges. *Id.* § 1003.1(b). It is charged with "resolv[ing] the questions before it in a manner that is timely, impartial, and consistent with the [INA] and regulations." *Id.* § 1003.1(d)(1); *see also Islam v. Gonzales*, 469 F.3d 53, 57 (2d

Cir. 2006) (noting that the Board is "charged with stewardship over the conduct of judicial proceedings"). To that end, members of the Board must "exercise their independent judgment and discretion in considering and determining the cases coming before the Board." *Id.* § 1003.1(d)(ii).

When the Board issues a removal order, that order generally becomes final and subject either to execution or to appellate review in the U.S. Courts of Appeal. *See* INA § 101(47) (defining "order of deportation" and setting forth the point at which such an order becomes final). One exception to the finality of a Board decision exists, however: "in those cases reviewed by the Attorney General in accordance with [his refer and review authority]," the Attorney General's decision, not the Board's decision, becomes the agency's final order. 8 C.F.R. § 1003.1(d)(7). The Attorney General may exercise his "refer and review" authority in any case simply by "direct[ing] the Board to refer to him" a case "for review of its decision." 8 C.F.R. § 1003.1(h).[1]

The Attorney General is the head of the U.S. Department of Justice, and in that capacity "is not a counsel giving advice to the Government as his client, but a public officer, acting judicially, under all the solemn responsibilities of conscience and of legal obligation." Office & Duties of Att'y Gen., 6 Op. Att'y Gen. 326, 334

[1] As set forth in Respondent's Opening Brief, compelling reasons exist to conclude that the Attorney General's decision to exercise his refer and review authority in this particular matter was unlawful. *See* Respondent's Opening Br. at 16 21.

(1854); *see also Parr v. United States*, 225 F.2d 329, 338 n.12 (5th Cir. 1955) (Cameron, J., dissenting) (noting that the Attorney General's role, by design, is to advocate on behalf of justice itself).[2] In that capacity, and especially so in the exercise of his "refer and review" authority, the Attorney General acts much like an immigration judge that is, as the ultimate finder of fact in the immigration proceeding. *See* 8 C.F.R. § 1003.1(h); *Matter of A-H-*, 23 I&N Dec. at 779 n.4 (noting that the Attorney General's review under § 1003.1(h) is de novo). He therefore must also "resolve the questions before [him] in a timely and impartial manner." 8 C.F.R. § 1003.10(b) (governing judicial officers acting as the triers of fact in immigration proceedings); *see also Parcham v. INS*, 769 F.2d 1001, 1008 (4th Cir. 1985) (explaining that decisions in immigration proceedings "must be rendered by an impartial decision-maker"). If he cannot, his decision is invalid. *See Matter of Exame*, 18 I&N Dec. 303, 306 (BIA 1982) (holding that bias by the decision maker with respect to the immigration laws may deprive an individual of a fair proceeding).

---

[2] The motto of the U.S. Department of Justice, "Qui Pro Domina Justitia Sequitur," is believed to refer to the Attorney General, acting on behalf of the U.S. Department of Justice, "who prosecutes on behalf of justice." U.S. Dep't of Justice, DOJ Seal History & Motto, https://www.justice.gov/about/history/doj-seal-history-and-motto; *see also generally* Rafael Alberto Madan, *The Sign & Seal of Justice*, 7 Ave Maria L. Rev. 123 (2008) (explaining the motto's history and meaning).

II. The Constitution guarantees noncitizens an impartial decision maker in immigration proceedings.

Perhaps more fundamentally, "[a] neutral judge is one of the most basic due process protections." *Castro-Cortez v. INS*, 239 F.3d 1037, 1049 (9th Cir. 2001), *abrogated on other grounds by Fernandez-Vargas v. Gonzales*, 548 U.S. 30 (2006). "[T]he Due Process Clause applies to all 'persons' within the United States, including [noncitizens], whether their presence here is lawful, unlawful, temporary, or permanent." *Zadvyas v. Davis*, 533 U.S. 678, 693 (2001); *see also Plyler v. Doe*, 457 U.S. 202, 210 (1982) (noting that immigration proceedings, including proceedings before an immigration judge and on review before the Board, are subject to the due process protections afforded under the Fifth and Fourteenth Amendments). "[D]ue process demands impartiality on the part of those who function in judicial or quasi-judicial capacities," *Schweiker v. McClure*, 456 U.S. 188, 195 (1982), including judicial officers in immigration proceedings, *Abdulrahman v. Ashcroft*, 330 F.3d 587, 596 (3d Cir. 2003); *see also Aguilar-Solis v. INS*, 168 F.3d 565, 569 (1st Cir. 1999) (noting the obligation of immigration judges "to function as neutral and impartial arbiters [and to] assiduously refrain from becoming advocates for either party"). Where, as here, the decision of the finder of fact is "subjected to particularly narrow appellate scrutiny," the need for impartiality is at its highest. *Wang v. Att'y Gen.*, 423 F.3d 260, 268 (3d Cir. 2005) (internal quotation marks omitted).

Concerns for due process in immigration proceedings are particularly acute given the subordinate role of the EOIR as a component within the Department of Justice, which creates a "lack [of] structural protections [to] promote decisional independence from DOJ's immigration enforcement objectives." Note, *Structural Due Process in Immigration Detention*, 21 CUNY L. Rev. 35, 47 (Winter 2017). The Attorney General's refer and review authority is where rule-of-law principles easily are undermined exercising that authority, the Attorney General plays a dual role as both adjudicator of the government's enforcement decisions and an agent of law enforcement itself, and he may exercise the authority as a means to seek his own ideological ends. *See* Bijal Shah, *The Attorney General's Disruptive Immigration Power*, 102 Iowa L. Rev. Online 129, 132 33 (2017) (describing that dual role and observing that exercising the "refer and review" authority "constitutes the use of the administrative adjudication of an individual case as a means [to achieve] political ends"). That fact, compounded by the particularly vulnerable group to which the Attorney General's conduct is directed, *see INS v. St. Cyr*, 533 U.S. 289, 315 n.39 (2001) (citing Stephen H. Legomsky, *Fear & Loathing in Congress & the Courts: Immigration and Judicial Review*, 78 Tex. L. Rev. 1615, 1626 (2000)), means "prevent[ing the] government 'from abusing [its] power, or employing it as an instrument of oppression" is critical, *DeShaney v.*

Winnebago Cnty. Dep't of Social Servs., 489 U.S. 189, 196 (1989) (internal quotation marks omitted) (second alteration in original).

At bottom, "fairness [in administrative review must be] the controlling factor in practice that it seems in metaphor." *Cinderella Career and Finishing Sch., Inc.*, 425 F.2d at 589. Any absence of decisional independence in immigration proceedings defies the very archetype of fairness, resulting in "abandoning the merit in hearings of the power of persuasion for the persuasion of power." *Id.* It is that persuasion of power against which the Constitution protects "help[ing] to guarantee that government will not make a decision directly affecting an individual arbitrarily but will do so through the reasoned application of a rule of law." *Kerry*, 135 S. Ct. at 2144 ("It is that rule of law . . . which in major part the Due Process Clause seeks to protect."). Because, here, neither the Attorney General nor members of his staff are capable of preserving *any* element of fairness in this proceeding, they must be disqualified entirely from exercising their authority to review it.

III. The Attorney General personally and through his staff promote racist and white nationalist viewpoints, have prejudged the issues presented in this case, and are therefore disqualified from exercising the refer and review authority.

Neither the Attorney General, nor any member of the Attorney General's staff, can fairly or impartially adjudicate the issues presented in this case. Since assuming office, the Attorney General and members of his staff have maintained

and developed strong relationships with individuals and organizations advocating anti-immigrant, nativist, and white nationalist causes, many of whom advocate positions in favor of removing all noncitizens, at all costs, from the United States. In speeches and public statements, the Attorney General has adopted and adhered to the views of those anti-immigrant, nativist, and white nationalist groups, relying on their work to develop and implement his own immigration enforcement strategies. He and his staff members have made clear, through public statements, their intent to implement those enforcement strategies in a manner resulting in removals "in record numbers and rapidly," regardless whether a noncitizen has meritorious claims for relief.[3] And, they have stated publicly that asylum claims grounded on any basis other than "fundamental things like . . . religion or nationality" such as the asylum claim at issue in this case constitute "fake

---

[3] Michelle Ye Hee Lee, *President Trump's Claim that MS-13 Gang Members Are Being Deported 'By the Thousands,'* The Washington Post (June 26, 2017), https://www.washingtonpost.com/news/fact-checker/wp/2017/06/26/president-trumps-claim-that-ms-13-gang-members-are-being-deported-by-the-thousands/?utm_ term=.a93f93501999; Jefferson B. Sessions III, *Attorney General Sessions Delivers Remarks on the Administration's Efforts to Combat MS-13 and Carry Out Its Immigration Priorities*, U.S. Dep't of Justice (Dec. 12, 2017), https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-administrations-efforts-combat-ms-13-and-carry (informing a Department of Justice audience that the Attorney General is "looking forward to working with you to protect the American people and implement the President's ambitious agenda").

claims" that overload the immigration system and amount to "rampant abuse and fraud."[4]

Because neither the Attorney General nor any member of his staff may fairly or impartially adjudicate this case, they are disqualified entirely from doing so. "The test for disqualification [of an agency decision maker is] whether 'a disinterested observer may conclude that (the agency) has in some measure adjudged the facts as well as the law of a particular case in advance of hearing it.'" *Cinderella Career & Finishing Sch., Inc.*, 425 F.2d at 591 (quoting *Gilligan, Will & Co.*, 267 F.2d at 469). Agency adjudications "must be attended, not only with every element of fairness but with the very appearance of complete fairness." *Id.* (internal quotation marks omitted). Public statements of the kind the Attorney General and his staff have made here "have the effect of entrenching [the agency decision maker] in a position which he has publicly stated, making it difficult, if not impossible, for him to reach a different conclusion in the event he deems it necessary to do so after consideration of the record." *Id.* at 590.

---

[4] Jefferson B. Sessions III, *Attorney General Jeff Sessions Delivers Remarks to the Executive Office for Immigration Review*, U.S. Dep't of Justice (Oct. 12, 2017), https://www.justice.gov/opa/speech/attorney-general-jeff-sessions-delivers-remarks-executive-office-immigration-review.

A. The Attorney General and members of his staff have strong relationships with anti-immigrant, nativist, and white nationalist organizations, evidencing deep entrenchment in positions consistent only with anti-immigrant and racist agendas.

"[T]o perform its high function in the best way 'justice must satisfy the appearance of justice.'" *Proctor v. Warden*, 435 U.S. 559, 560 (1978) (per curiam) (quoting *Offutt v. United States*, 348 U.S. 11, 14 (1954)) (alteration in original). Justice demands, as a "basic requirement," fairness, and "[f]airness of course requires an absence of actual bias in the trial of cases. . . . To this end no man . . . is permitted to try cases where he has an interest in the outcome." *In re Murchison*, 349 U.S. 133, 136 (1955). Although "interest[s] cannot be defined with precision," "[c]ircumstances and relationships must be considered." *Id.*

Since assuming office, and for decades before, the Attorney General has developed, maintained, and cultivated relationships with anti-immigrant, nativist, and white nationalist individuals and organizations. Through and within those relationships, he has applauded and in many circumstance adopted the strident anti-immigrant agendas and nativist views of those groups. In doing so, he has been one of the most aggressive voices in the United States against immigrants, particularly immigrants from communities of color, developing an egregious record of public statements evidencing racial animus and anti-immigrant bias. Through his conduct and those statements, the Attorney General has deeply entrenched himself in positions consistent only with anti-immigrant and racist

agendas, placing his anti-immigrant and racist allies in positions of influence over his office. Under any standard of fairness, but certainly by a "disinterested observer" upon a "realistic appraisal of psychological tendencies and human weakness," the circumstances and relationships surrounding the Attorney General's office "'poses such a risk of actual bias or prejudgment'" that he cannot constitutionally decide this case. *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 883 84 (2009) (quoting *Withrow v. Larkin*, 421 U.S. 35, 47 (1975)); *Cinderella Career & Finishing Sch., Inc.*, 425 F.2d at 591 (applying a similar standard to an administrative decision maker).

1. John Tanton-funded hate groups[5]

Perhaps the most significant evidence of the Attorney General's anti-immigrant and white nationalist positions are his extensive and historic ties to white nationalist Dr. John Tanton's network of anti-immigrant organizations like the Federation for American Immigration Reform (FAIR), the Center for Immigration Studies (CIS), and NumbersUSA.[6] Tanton, in many respects,

---

[5] The Southern Poverty Law Center (SPLC) defines a "hate group" as "an organization that based on its official statements or principles, the statements of its leaders, or its activities has beliefs or practices that attack or malign an entire class of people, typically for their immutable characteristics." Southern Poverty Law Center, *Hate Map*, https://www.splcenter.org/hate-map.

[6] Southern Poverty Law Center, *John Tanton's Network*, https://www.splcenter.org/fighting-hate/intelligence-report/2015/john-tantons-network; *see also* Jason DeParle, *The Anti-Immigration Crusader*, The New York Times (Apr. 17, 2011), https://www.nytimes.com/2011/04/17/us/17immig.html

legitimately may call himself the founder of the modern-day nativist and anti-immigration movements.[7] The Attorney General, now and throughout his tenure as a Senator, repeatedly has relied on work developed through those movements to assist in his agendas and enforcement strategies to undermine the rights of noncitizens.

Currently, and throughout his political career, the Attorney General regularly has attended events hosted by the Federation for American Immigration Reform (FAIR), an organization that in 2007 was designated as a hate group by the SPLC because of its ties to white supremacist groups and eugenicists.[8] Bespeaking the views of the organization more generally, FAIR's founder, Tanton, explained in 1993 that he had "come to the point of view that for European-American society and culture to persist requires a European-American majority, and a clear one at that."[9]

(describing Tanton's network and providing historical chronology of efforts to restrict immigration).

[7] Jason DeParle, *The Anti-Immigration Crusader*, The New York Times (Apr. 17, 2011), https://www.nytimes.com/2011/04/17/us/17immig.html ("Tanton helped start all three major national groups fighting to reduce immigration, legal and illegal, and molded one of the most powerful grass-roots forces in politics.").

[8] Southern Poverty Law Center, *Federation for American Immigration Reform*, https://www.splcenter.org/fighting-hate/extremist-files/group/federation-american-immigration-reform.

[9] Southern Poverty Law Center, *John Tanton*, https://www.splcenter.org/fighting-hate/extremist-files/individual/john-tanton (quoting letter from John Tanton to Garrett Hardin, eugenicist and ecology professor (Dec. 10, 1993)).

Since its founding in 1979, FAIR essentially has had one mission: to limit immigration, with a focus on ending immigration from non-white-majority countries, into the United States. FAIR's current president, Dan Stein, explained in an oral history of the organization that he

> blame[s] ninety-eight percent of responsibility for this country's immigration crisis on Ted Kennedy and his political allies, who decided some time back in 1958, earlier perhaps, that immigration was a great way to retaliate against Anglo-Saxon dominance and hubris, and the immigration laws from the 1920s were just this symbol of that, and it's a form of revengism, or revenge, that these forces continue to push the immigration policy that they know full well are creating chaos and will continue to create chaos down the line.[10]

A few years later, Stein remarked, "Immigrants don't come all church-loving, freedom-loving, God-fearing. . . . Many of them hate America; hate everything that the United States stands for. Talk to some of these Central Americans."[11]

The Attorney General regularly attends FAIR's annual "Hold Their Feet to the Fire" event, which convenes radical anti-immigrant activists for a talk-radio and media blitz. In 2007, the Attorney General delivered a keynote speech at FAIR's advisory board meeting and accepted FAIR's "Franklin Society Award," which "honor[s] rare individuals who have made a real difference" in advancing an

---

[10] Southern Poverty Law Center, *Dan Stein*, https://www.splcenter.org/fighting-hate/extremist-files/individual/dan-stein (quoting interview of Dan Stein by John Tanton (Aug. 1994)).

[11] *Id.* (quoting interview of Dan Stein by Tucker Carlson (Oct. 2, 1997)).

agenda aligned with FAIR's extreme anti-immigrant and nativist positions.[12] In his keynote speech, the Attorney General publicly thanked FAIR for "the important role that [it plays] in educating the American public" about immigration reform.[13] In 2016, when the Attorney General was nominated for his current post, FAIR issued a public statement congratulating the Attorney General and lauding him as the "leading voice for immigration policies that serve the national interest,"[14] with "national interest" being understood, by the views of FAIR's leadership and members, to mean the preservation of a white majority.

By and large, the Attorney General has demonstrated overwhelming support for and loyalty toward FAIR and its ongoing anti-immigrant and white nationalist mission. Indeed, in a 2015 radio interview with Stephen Bannon of Breitbart,[15] the

---

[12] Federation for American Immigration Reform, Immigration Report, *FAIR Thanks Senator Jeff Sessions for His Leadership in Defeating the Bush-Kennedy Amnesty* (Nov. 2007), http://www.fairus.org/sites/default/files/2017-08/Nov07_NL.pdf?docID=6021.

[13] Notably, however, the Attorney General failed to disclose the fact that he received the award in a questionnaire submitted to the Senate Judiciary Committee upon his nomination for his current post. *See* Imagine 2050, *Jeff Sessions Fails to Disclose Award from Anti-Immigrant FAIR to Congress* (Dec. 14, 2016), http://imagine2050.newcomm.org/2016/12/14/jeff-sessions-fails-disclose-award-from-anti-immigrant-group-fair-congress/.

[14] Federation for American Immigration Reform, *FAIR Congratulates Senator Jeff Sessions for Nomination as Attorney General* (Nov. 18, 2016), https://fairus.org/press-releases/fair-congratulates-senator-jeff-sessions-nomination-attorney-general.

[15] The Attorney General has also aligned himself with the views of Breitbart News, which itself is a platform known for its white nationalist and racist agenda. *See generally* Marge Baker, *Jeff Sessions' Relationship with Breitbart, "The*

Attorney General made clear that he shared Stein's views of post-civil-era immigration laws, praising an earlier, racially discriminatory version of those laws:

> In seven years we'll have the highest percentage of Americans, non-native born, since the founding of the Republic. Some people think that we've always had these numbers, and it's not so, it's very unusual, it's a radical change. When the numbers reached about this high in 1924, the president and congress changed the policy, and it slowed down immigration significantly, we then assimilated through . . . 1965 and created really the solid middle class of America, with assimilated immigrants, and it was good for America. We passed a law that went far beyond what anybody realized in 1965, and we're on a path to surge far past what the situation was in 1924.[16]

The Center for Immigration Studies (CIS), also an organization founded and funded by Tanton, serves as the think-tank for the anti-immigrant movement. Like FAIR, CIS has a well-documented history of demonizing and disparaging immigrants and affiliating itself with white nationalist and nativist hate groups.[17]

Platform" for the White Nationalist Alt-Right, Should Be Disqualifying, HuffPost (Jan. 3, 2017, 5:13 PM), https://www.huffingtonpost.com/marge-baker/jeff-sessions-relationshi_b_13941372.html (chronicling that relationship); Matt Shuham, *Sessions Downplayed Relationship with Breitbart News in Senate Questionnaire*, TPM (Dec. 22, 2016, 5:58 PM), https://talkingpointsmemo.com/livewire/jeff-sessions-downplays-breitbart-news-senate-questionnaire.

[16] Adam Serwer, *Jeff Sessions's Unqualified Praise for a 1924 Immigration Law*, The Atlantic (Jan. 10, 2017), https://www.theatlantic.com/politics/archive/2017/01/jeff-sessions-1924-immigration/512591/.

[17] *See generally* Amy Sherman, *Is the Center for Immigrations Studies a Hate Group, as the Southern Poverty Law Center Says?*, PolitiFact Florida (Mar. 22, 2017, 10:57 AM), http://www.politifact.com/florida/article/2017/mar/22/center-immigration-studies-hate-group-southern-pov/.

CIS frequently circulates articles to its supporters penned by white nationalists,[18] and in relatively recent years has referred to immigrants as "Third-World gold-diggers."[19] Its Executive Director, Mark Krikorian, in response to the devastating earthquake in Haiti in 2010, remarked, "My guess is that Haiti's so screwed up because it wasn't colonized *long enough*."[20] In 2014, CIS staff member Stephen Steinlight publicly denounced President Barack Obama's immigration reform policies and remarked that impeachment for President Obama wasn't enough: "I would think being hung, drawn, and quartered is probably too good for [the President]."[21] And, in the most recent call for comprehensive immigration reform led by the Attorney General himself, CIS's Janice Kephart left her position at CIS to serve as Special Counsel to the Senate Judiciary Committee and, in particular, to then-Senator Sessions.[22]

---

18 *See, e.g.*, *id.*

19 Center for Immigration Studies, *Hello, I Love You, Won't You Tell Me Your Name: Inside the Green Card Marriage Phenomenon* (Dec. 2, 2008), https://cis.org/Hello-I-Love-You-Wont-You-Tell-Me-Your-Name-Inside-Green-Card-Marriage-Phenomenon-0.

20 Mark Krikorian, *What to Do About Haiti?*, National Review (Jan. 21, 2010, 3:51 PM), https://www.nationalreview.com/corner/what-do-about-haiti-mark-krikorian/.

21 Sam Levine, *Conservative Scholar Disciplined for Suggesting Obama Be 'Hung, Drawn, and Quartered,'* HuffPost (July 23, 2014, 5:29 PM), https://www.huffingtonpost.com/2014/07/23/stephen-steinlight-obama_n_5613541.html.

22 Imagine 2050, *Janice Kephart Serves as Special Counsel to the Senate Judiciary Committee* (May 16, 2013),

The Attorney General continues to espouse the views of the Center for Immigration Studies (CIS), going so far as to incorporate the organization's dubious and widely criticized research into the handbook on immigration that he drafted and circulated to Congress to outline his plan for reform.[23] In his current position, he repeatedly has relied on the work of Jessica Vaughan, CIS's Director

---

http://imagine2050.newcomm.org/2013/05/16/janice-kephart-serves-as-special-counsel-to-senate-judiciary-committee/.

[23] *See* Jefferson B. Sessions III, U.S. Senator Alabama, Immigration Handbook for the New Republican Majority ["Immigration Handbook"] (Jan. 2015), *available at* http://images.politico.com/global/2015/01/12/immigration_primer_for_the_114th_congress.pdf. In the Immigration Handbook, Sessions explains,

> Consider the illegal immigration surge from Central America. Approximately 99 percent of those who arrived in that surge whether minors or adults in family units are still in the United States, according to DHS data. Instead of removing illegal immigrants, the President has expended enormous time, energy, and resources into resettling newly arrived illegal immigrants throughout the United States. Any border security plan that leaves this resettlement operation intact is doomed to failure. Jessica Vaughan at the Center for Immigration Studies estimates that more than 100,000 illegal immigrants who showed up at the border this year have been freed into the United States.
>
> Increasing the budget for DHS in the form of additional Border Patrol agents, vehicles, etc., will not stem the tide of illegal immigration as long as catch-and-release continues and as long as interior enforcement remains gutted. No amount of additional resources will work if our law enforcement officers cannot carry out their duties. Absent such reform, we are just using those resources to facilitate the transfer of illegal immigrants from south of the border to north of the border.

Id. at 6; *see also id.* at 9 n.18, 11, 13.

of Policy Studies,[24] whose studies and reporting have been debunked on numerous accounts, including on the basis of factual inaccuracies and manipulated data.[25]

NumbersUSA is a third Tanton-financed organization aimed at achieving anti-immigrant reform in manners similar to FAIR and CIS. Its founder, Roy Beck, consistently has advocated for radically restricting immigration, and considers the Attorney General as "a man whom he has counted as an ally for decades."[26] In 2008, NumbersUSA awarded then-Senator Sessions the organization's "Defender of the Rule of Law" award for Sessions' work to obstruct and restrict immigration reform. In 2012, Sessions put into the congressional record a congratulatory mention to NumbersUSA for its fifteenth anniversary,

---

[24] *See, e.g.*, Daniel Halper, *Sessions: 'Lax Enforcement' Driving Illegal Immigration 'Surge,'* The Weekly Standard (June 14, 2014, 6:51 PM), https://www.weeklystandard.com/sessions-lax-enforcement-driving-illegal-immigration-surge/article/795699 (reporting on then-Senator Sessions' remarks on the Senate floor, in which he relied on finding from studies performed and reported by CIS's Vaughan).

[25] Southern Poverty Law Center, *Center for Immigration Studies Debunked* (Oct. 2, 2017), https://www.splcenter.org/hatewatch/2017/10/02/center-immigration-studies-debunked. As recently as last month, an ICE spokesman in San Francisco resigned citing "falsehoods being spread by . . . Attorney General Jeff Sessions" and referring to the Attorney General as a "purveyo[r] of misleading and inaccurate information." Dan Simon, *ICE Spokesman in SF Resigns and Slams Trump Administration Officials*, CNN Politics (Mar. 13, 2018, 7:35 AM), https://www.cnn.com/2018/03/12/politics/ice-spokesman-resigns-san-francisco/index.html.

[26] Matt Apuzzo & Rebecca R. Ruiz, *Trump Chooses Sessions, Longtime Foe of DACA, to Announce Its Demise*, The New York Times (Sept. 5, 2017), https://www.nytimes.com/2017/09/05/us/politics/jeff-sessions-daca-immigration.html.

"commend[ed] NumbersUSA for speaking out effectively on . . . important issues for America," and wished the organization "even greater success over its next 15 years."[27]

2. Anti-Muslim hate groups

In addition to Tanton's network of hate groups, the Attorney General has courted several anti-Muslim groups from which he has received extensive and effusive accolades. As recently as 2014, the Attorney General received the "Daring the Odds: The Annie Taylor Award" from the David Horowitz Freedom Center, an organization led by anti-Muslim extremist David Horowitz. Horowitz's organization exists primarily to promote fear of Muslims in the United States. In his acceptance speech for the award, the Attorney General remarked, "I've seen some great people receive this [award],"[28] but it was "a special treat and pleasure for me [to receive it, Mr. Horowitz] because you know how much I admire you."[29]

---

[27] 158 Cong. Rec. S2919-02 (daily ed. May 7, 2012) (statement of Sen. Sessions); NumbersUSA, *Sen. Jeff Sessions Recognizes Numbers USA in the Congressional Record* (May 8, 2012, 1:02 PM), https://www.numbersusa.com/content/news/may-8-2012/sen-jeff-sessions-recognizes-numbersusa-congressional-record.html.

[28] Among others, past recipients include Pamela Gellar, one of the most extreme anti-Muslim activists in the United States.

[29] Jay Michaelson, *Jeff Sessions Said "Secularists" Are Unfit for Government*, Daily Beast (Jan. 12, 2017, 1:00 AM), https://www.thedailybeast.com/fbi-texts-catastrophuck-trump-nearly-drove-agents-to-quit?ref=scroll.

In his 2017 Senate confirmation hearing, faced with criticism for his ties to Horowitz, the Attorney General praised Horwitz as "a most brilliant individual."[30]

And, in 2015, the Attorney General accepted the "Keeper of the Flame" award from another anti-Muslim hate group, the Center for Security Policy (CSP). CSP is operated by Frank Gaffney, who has a long history of promoting fear in and for Muslims, historically having claimed that the Muslim Brotherhood has infiltrated the U.S. government, [31] called for the reestablishment of the House Un-American Activities Committee,[32] and claimed that Hillary Clinton staff member Huma Abedin was a part of the "Muslim Brotherhood conspiracy."[33] The Attorney General, together with President Donald Trump, repeatedly have relied on the work of CSP and Gaffney to justify policies favoring categorical bans on Muslim immigration.[34]

---

30 *Hearing on the Nomination of Sen. Sessions to Be Attorney General Before the Senate Comm. on the Judiciary* (Jan. 10, 2017) (statement of Jefferson B. Sessions).

31 Frank J. Gaffney, Jr., *Anti-American Activities*, The Washington Times (July 18, 2011), https://www.washingtontimes.com/news/2011/jul/18/anti-american-activities/.

32 *Id.*

33 Frank J. Gaffney, Jr., *Hillary Clinton's Ticking Tim Bomb: Huma Abedin*, The Washington Times (Aug. 3, 2015), https://www.washingtontimes.com/news/2015/aug/3/frank-gaffney-hillary-clintons-ticking-time-bomb-h/.

34 Philip Bump, *Meet Frank Gaffney, the Anti-Muslim Gadfly Reportedly Advising Trump's Transition Team*, Chicago Tribune (Nov. 15, 2016, 11:28 PM), http://www.chicagotribune.com/news/nationworld/politics/ct-anti-muslim-frank-gaffney-trump-transition-team-20161115-story.html/.

The Attorney General has placed anti-immigrant and hate groups in positions of influence over his immigration strategies and enforcement agenda. Through his relationships with those organizations, he has both commended and adopted radical anti-immigrant and nativist views that, given the circumstances and relationships out of which those views arose, pose a substantial risk to the administration of justice in these proceedings.[35] *See Matter of Exame*, 18 I&N Dec. at 306 (requiring disqualification where the judge has a "personal, rather than judicial, bias stemming from an extrajudicial source" (internal quotation marks omitted)); *see also Caperton*, 556 U.S. at 883 84; *Cinderella Career & Finishing Sch., Inc.*, 425 F.2d at 591. As a result, neither the Attorney General, nor any member of the Attorney General's staff, constitutionally may issue a decision in this case.[36]

---

[35] For an interactive chart showing the Attorney General's network of anti-immigrant and racist connections, *see* https://innovationlawlab.org/sessions-connections.

[36] The Attorney General's staff members harbor similar anti-immigrant and racist views as does the Attorney General, and assist the Attorney General to formulate and enforce his immigration agenda. *See, e.g.*, DailyKos, *Gene Hamilton: The Ghost in the DOJ/DHS Machine* (Jan. 24, 2018, 3:23 PM), https://www.dailykos.com/stories/2018/1/24/1735669/-Gene-Hamilton-the-Ghost-in-the-DOJ-DHS-Machine.

B. The Attorney General's conduct and statements since assuming office evince racial animus, anti-immigrant and anti-asylum bias, and therefore an inability to fairly administer the immigration laws.

The Attorney General's deeply seated ties to anti-immigrant and nativist groups provide relevant context for and potentially explain more recent statements and conduct of the Attorney General and his staff since he assumed office in early 2017. The statements demonstrate, without serious doubt, that the Attorney General deeply has entrenched himself in anti-immigrant and, specifically, anti-asylum positions, "making it difficult, if not impossible, for him to reach a different conclusion in the event he deems it necessary to do so after consideration of the record" in this case. *Cinderella Career & Finishing Sch., Inc.*, 425 F.2d at 591. Because he has prejudged the issues presented here in all respects, he cannot decide this case.

The INA, by its text, provides all noncitizens physically present in the United States with the right to apply for asylum. INA § 208(a)(1). To establish eligibility for asylum, the noncitizen must show that he or she is a "refugee," which the INA defines as

> any person who is outside any country of such person's nationality . . . and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.

INA § 101(42)(A). Thus, in an immigration proceeding in which the noncitizen has applied for asylum, the noncitizen "must establish that race, religion, nationality, membership in a particular social group, or political opinion was or will be at least one central reason for persecuting the applicant." INA § 208(b)(1)(B)(i); *see also INS v. Elias-Zacarias*, 502 U.S. 478, 481 82 (1992) (recognizing those five protected grounds); *Crespin-Valladares v. Holder*, 632 F.3d 117, 126 (4th Cir. 2011) (same). The INA's five protected grounds and asylum as a form of relief for persecution on those grounds have been part of our country's immigration laws since 1980.

This case involves the scope of the asylum protections in particular, whether a "particular social group" within the meaning of INA § 101(42)(A) may include victims of private criminal acts. The Board, in a series of precedential decisions, has already held that whether a "particular social group" exists depends on the circumstances of the country in question, and has already concluded that a "particular social group" may include victims of private criminal conduct. *See generally Matter of A-R-C-G-*, 26 I&N Dec. 388, 392 94 (BIA 2014) (citing cases).

The Attorney General has stated, however, that, in his opinion, the asylum system "is meant to protect those who [face] persecution based on fundamental things like their religion or nationality," not bases such as race, political opinion, or

membership in a particular social group.[37] To the Attorney General, those other bases for asylum about which Congress, through the INA, has otherwise been explicit amount to "rampant abuse and fraud" that plague our "overloaded [immigration] system."[38] That view of course consistent with the Attorney General's established anti-immigrant and xenophobic views is unprecedented in our legal system and directly contravenes our country's immigration laws. But the Attorney General has made himself abundantly clear, and as a result, has prejudged the legal issues presented in this case.

Unsurprisingly, the Attorney General has made other public statements evincing his anti-immigrant and nativist views and his intent to implement immigration enforcement strategies that comport with those views. Each of the statements below further demonstrates that the Attorney General has prejudged the issues that this case presents specifically, issues relating to asylum eligibility on bases other than "fundamental things like . . . religion or nationality"[39] and therefore cannot exercise his refer and review authority.

- In August 2017, the Department of Justice, under the leadership of the Attorney General, issued a press release equating a substantial uptick

---

37 Jefferson B. Sessions III, *Attorney General Jeff Sessions Delivers Remarks to the Executive Office for Immigration Review*, U.S. Dep't of Justice (Oct. 12, 2017), https://www.justice.gov/opa/speech/attorney-general-jeff-sessions-delivers-remarks-executive-office-immigration-review.

38 *Id.*

39 *Id.*

in deportations with a "return to rule of law."[40] That, of course, is a concerning conflation, given that the mission of the immigration courts should be the fair adjudication of cases, whether they result in removal or a grant of relief. The statement likewise evidences either a misunderstanding of, or an outright disregard for, the nonrefoulement principle that makes essential to our immigration laws the protection of individuals against returning to a country where they fear persecution.[41]

- Between September and December 2017, the U.S. Department of Justice, under the leadership of the Attorney General, twice requested vacatur of former Maricopa County Sheriff Joe Arpaio's criminal contempt conviction. Sheriff Arpaio is notorious for his aggressive anti-immigrant positions and for "employ[ing] systemic racism in the name of immigration enforcement."[42]

- In October 2017, the Attorney General delivered remarks to EOIR staff outlining his positions with respect to closing "loopholes" in the immigration system and radically restricting the number of legal and illegal immigrants who may remain in the United States. It was here that the Attorney General stated, as noted above, that the asylum system "is meant to protect those who [face] persecution based on fundamental things like their religion or nationality." According to the Attorney General, applicants alleging persecution on some other ground even those contemplated by the INA and international law

---

[40] *See* Dep't of Justice Press Release No. 17-889, *Return to rule of law in Trump administration Marked By Increase in Key Immigration Statistics* (Aug. 8, 2017), https://www.justice.gov/opa/pr/return-rule-law-trump-administration-marked-increase-key-immigration-statistics.

[41] Convention Relating to the Status of Refugees, art. 33(1), July 28, 1951, 189 U.N.T.S. 137, 19 U.S.T. 6223. In 1968, the United States agreed to comply with the substantive provisions of Articles 2 through 34. *See id.*; *INS v. Cardoza-Fonseca*, 480 U.S. 421, 429 (1987).

[42] Michelle Ye Hee Lee, *What You Need to Know About Former Arizona Sheriff Joe Arpaio's Record on Illegal Immigration*, The Washington Post (Aug. 23, 2017), https://www.washingtonpost.com/news/fact-checker/wp/2017/08/23/what-you-need-to-know-about-former-arizona-sheriff-joe-arpaios-record-on-illegal-immigration/?utm_term=.bf645854da6f.

present "fake claims," resulting in an "overloaded" immigration system plagued by "rampant abuse and fraud."[43]

- In December 2017, the Attorney General remarked that he "look[s] forward to working with [President Trump] to protect the President's ambitious [immigration] agenda."[44] President Trump has made explicit his immigration agenda, which is "[f]or those here illegally today, who are seeking legal status, the will have one route and one route only. To return home . . . ."[45]

- In February 2018, White House staff held their second meeting with ProEnglish, a nativist group also founded and financed by John Tanton and designated by the SPLC as an anti-immigrant hate group. According to a press release issued by ProEnglish, the purpose of the meeting was to discuss with White House staff the potential for English-language-only legislation.[46] The Attorney General, through

---

[43] Jefferson B. Sessions III, *Attorney General Jeff Sessions Delivers Remarks to the Executive Office for Immigration Review*, U.S. Dep't of Justice (Oct. 12, 2017), https://www.justice.gov/opa/speech/attorney-general-jeff-sessions-delivers-remarks-executive-office-immigration-review.

[44] Jefferson B. Sessions III, *Attorney General Sessions Delivers Remarks on the Administration's Efforts to Combat MS-13 and Carry Out Its Immigration Priorities*, U.S. Dep't of Justice (Dec. 12, 2017), https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-administrations-efforts-combat-ms-13-and-carry.

[45] Transcript: Donald Trump's Full Immigration Speech, Annotated, LA Times (Aug. 31, 2016, 9:35 PM), http://www.latimes.com/politics/la-na-pol-donald-trump-immigration-speech-transcript-20160831-snap-htmlstory.html; *see also President Trump Meeting with Cabinet* (June 12, 2017), C-SPAN, https://www.cspan.org/video/?429863-1/president-touts-accomplishments-cabinet-meeting ("Great success . . . . They're being thrown out in record numbers and rapidly. And, uh, they're being depleted. They'll all be gone pretty soon. So, you're right, Jeff. Thank you very much.").

[46] Stephen Guschov, *ProEnglish Has 2nd White House Meeting to Discuss Official English Legislation*, ProEnglish (Feb. 13, 2018), https://proenglish.org/2018/02/13/proenglish-has-2nd-white-house-meeting-to-discuss-official-english-legislation/.

his ties with other Tanton hate groups, is a longtime supporter of ProEnglish and its mission.[47]

- Also in February 2018, the Attorney General demonstrated, in a nationally televised press conference, bias in his praise of the nation's sheriffs and their "Anglo-American heritage."[48]

- On April 4, 2018, the Department of Homeland Security, under the leadership of the Attorney General, issued a "Fact Sheet" identifying "the problem" with the existing immigration system as "legal loopholes" and "asylum fraud" connected with marked increases in the number of women and children arriving in the United States.[49]

- On April 11, 2018, the Attorney General reaffirmed his commitment to vigorously prosecute immigration cases in a manner consistent with the President's unprecedented and xenophobic immigration enforcement agenda. In a speech to the Southwestern Border Sheriff's Coalition in Las Cruces, New Mexico, the Attorney General emphasized that "[t]he president expects us to not just play around with this problem [of illegal immigration], but to fix it and that is my goal." He went on to proclaim, "We are determined to end catch and release zero tolerance! Our goal is to prosecute every case that is brought to us. There must be consequences to breaking the law . . . . *If you break into this country, we will prosecute you*."[50] The Attorney

---

47 ProEnglish, *Longtime English Supporter Jeff Sessions, Tapped to Be Attorney General* (Dec. 16, 2016), https://proenglish.org/2016/12/16/longtime-official-english-supporter-senator-jeff-sessions-tapped-to-be-attorney-general/.

48 Marwa Eltagouri, *Jeff Sessions Spoke of the 'Anglo-American Heritage of Law Enforcement.' Here's What That Means*, The Washington Post (Feb. 12, 2018), https://www.washingtonpost.com/news/post-nation/wp/2018/02/12/jeff-sessions-spoke-of-the-anglo-american-heritage-of-law-enforcement-heres-what-that-means/?utm_term=.d54f63903a6e.

49 Department of Homeland Security, Fact Sheet: To Secure the Border and Make America Safe Again, We Need to Deploy the National Guard (Apr. 4, 2018), https://www.dhs.gov/news/2018/04/04/secure-border-and-make-america-safe-again-we-need-deploy-national-guard.

50 Jose Villasana, *Attorney General: Constitution Doesn't Outside States. We Don't Have to Apologize*, KVIA (Apr. 11, 2018, 11:21 AM),

General's statements evidence his flagrant disregard for our country's commitment to the U.N. Convention Relating to the Status of Refugees, in which the United States agreed "not [to] impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened . . . provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence."[51]

- Finally, just this week, the Attorney General suggested in a press release issued by the Department of Justice that a group of individuals, largely women and children seeking to escape violence in Central America, were "deliberate[ly] attempt[ing] to undermine our laws and overwhelm our [immigration] system. . . . Smugglers and traffickers and those who lie or commit fraud will be prosecuted to the fullest extent of the law."[52] The Attorney General's statements on

---

http://www.kvia.com/news/new-mexico/attorney-general-constitution-doesnt-apply-outside-states-we-dont-have-to-apologize/728159275 (emphasis added).

[51] Convention Relating to the Status of Refugees, art. 31(1), July 28, 1951, 189 U.N.T.S. 137, 19 U.S.T. 6223.

[52] Jefferson B. Sessions III, *Attorney General Jeff Sessions Statement on Central American "Caravan,"* U.S. Dep't of Justice (Apr. 23, 2018), https://www.justice.gov/opa/pr/attorney-general-jeff-sessions-statement-central-american-caravan. The Attorney General's statement is another example of his anti-rule-of-law approach to immigration adjudication. It is absolutely true and completely contrary to his statement that the only way an individual can apply for asylum is to be physically present in the United States. INA § 208(a). To state that individuals who are complying with the law are seeking to undermine it suggests that the Attorney General views some laws like that of deportation as more valuable than others like that of asylum. But both are laws of this country and the Attorney General is charged with administering both fairly. The rule of law requires that all laws apply; not only those laws that the Attorney General prefers to enforce after all, that would be arbitrary and capricious.

Importantly, the caravan here was organized as a means to subvert the trafficking and smuggling networks and provide a safe, lawful mechanism for individuals to comply with § 208(a). *See* Pueblos Sin Fronteras (@puebloSF), Twitter (Apr. 25, 2018), https://twitter.com/pueblosf?lang=en (providing that "[o]ur mission is to provide shelter and safety to migrants and refugees in transit.") The Attorney General's distortion in his statement threatening prosecution does his office no credit.

> Monday evince either a blatant intent not to afford the protections that our immigration laws provide or, at the very least, prejudgment of the meritorious asylum claims that these individuals might have.

As is clear from his relationships, conduct, and statements, the Attorney General continues to be one of the most aggressive voices in the United States against immigrants, particularly those from communities of color. Through his relationships, he has both lauded and adopted radical anti-immigrant and nativist views that, given the circumstances and relationships out of which those views arose, pose a substantial risk to the administration of justice in these proceedings. By his conduct and statements both on his own and through members of his staff, he has made abundantly clear that his immigration agenda and enforcement strategies are motivated by his anti-immigrant bias and racial animus. Indeed, his conduct and his statements evince an intent to disregard entirely the powerful protections that our immigration laws provide to individuals with meritorious claims for relief from removal.

Because the Attorney General and his staff have prejudged the asylum issues presented in this case, they cannot by the standards of either the INA or the Due Process Clause permissibly exercise their refer and review authority this case. To permit them to do so would be to allow flagrant abuses of executive power as an instrument of oppression and at the expense of individual liberties and the rule

of law. That is not, and should never be, the function of the U.S. Department of Justice.

CONCLUSION

For the foregoing reasons, the Attorney General is disqualified for rendering a decision on the merits in this proceeding. The matter should therefore be returned to the Board for reinstatement of its earlier decision.

DATED: April 27, 2018

Respectfully submitted,

Nadia H. Dahab, OSB No. 125630
Stoll Stoll Berne Lokting & Shlachter P.C.
209 SW Oak Street, Suite 500
Portland, OR 97204
(503) 227-1600
ndahab@stollberne.com

Counsel for Amicus Curiae
Innovation Law Lab

CERTIFICATE OF COMPLIANCE

This brief complies with the instructions in the Attorney General's referral orders dated March 7, 2018 and March 30, 2018, because the brief contains 7844 words, excluding the cover page, Table of Contents, Table of Authorities, signature block, Certificate of Compliance, and Certificate of Service.

DATED: April 27, 2018

Nadia H. Dahab, OSB No. 125630

CERTIFICATE OF SERVICE

I, Nadia H. Dahab, hereby certify that on April 27, 2018, the foregoing brief was submitted electronically to AGCertification@usdoj.gov and in triplicate via FedEx to:

United States Department of Justice
Office of the Attorney General, Room 5114
950 Pennsylvania Avenue, NW
Washington, DC 20530

DATED: April 27, 2018

Nadia H. Dahab, OSB No. 125630

UNITED STATES DEPARTMENT OF JUSTICE
OFFICE OF THE ATTORNEY GENERAL

MATTER OF A-B-,

Respondent

In Removal Proceedings.
File No. [REDACTED]

BRIEF OF AMICI CURIAE THE CATHOLIC LEGAL IMMIGRATION NETWORK, INC., BENEDICTINE SISTERS OF THE FEDERATION OF ST. SCHOLASTICA, CONFERENCE OF BENEDICTINE PRIORESSES, CONFERENCE OF MAJOR SUPERIORS OF MEN, HIAS, LUTHERAN IMMIGRATION AND REFUGEE SERVICE, NATIONAL COUNCIL OF JEWISH WOMEN, NATIONAL JUSTICE FOR OUR NEIGHBORS, UNITARIAN UNIVERSALIST SERVICE COMMITTEE, UNITED METHODIST IMMIGRATION TASK FORCE, AND WORLD RELIEF

Michael D. Celio
Simona A. Agnolucci
Bevan A. Dowd
KEKER, VAN NEST & PETERS LLP
633 Battery Street
San Francisco, CA 94111-1809
Telephone: 415 391 5400
Facsimile: 415 397 7188

Counsel for Amici Curiae

United in our commitment to the protection of free expression of religion, Amici Curiae write in support of Respondent A-B- and in response to the Attorney General's certification of this matter to himself. *See* 27 I&N Dec. 227 (A.G. 2018). As members of various faiths, we write to explain that victims of "private criminal activity" should be considered eligible for asylum and withholding of removal, as long as they meet the eligibility requirements under current law. Holding otherwise would upend decades of precedent and harm victims of religious persecution, who are frequently targeted by private actors.

AMICI CURIAE:[1]

- **Catholic Legal Immigration Network, Inc.**
- **Benedictine Sisters of the Federation of St. Scholastica**
- **Conference of Benedictine Prioresses**
- **Conference of Major Superiors of Men**
- **HIAS**
- **Lutheran Immigration and Refugee Service**
- **National Council of Jewish Women**
- **National Justice for Our Neighbors**
- **Unitarian Universalist Service Committee**
- **United Methodist Immigration Task Force**
- **World Relief**

[1] Statements of Interest for each Amicus are included in the attached appendix.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

Administrative Decisions

Federal Statutes

Other Authorities

INTRODUCTION

America is a nation founded on religious liberty and born from religious persecution. "Religious freedom is a cherished American value and a universal human right." Department of State International Religious Freedom Report 2016, Secretary's Preface. ("Preface, 2016 International Religious Freedom Report"). Every American child is raised on stories of the Puritans, Pilgrims, and others who surmounted great obstacles to journey across the Atlantic Ocean in search of religious freedom and "the opportunity to worship God in ways that were unacceptable in Europe." James H. Hutson, *Religion and the Founding of the American Republic* 3 (1998). Since our very first days, the United States has made progress towards practicing what it preaches, passing laws establishing our nation as a safe haven for victims of religious persecution. Indeed, the Refugee Act of 1980 is grounded in freedom from religious persecution—a need that is "compelling, immediate, and emotional," The Refugee Act of 1979: Hearing on S. 643 Before the S. Comm. on the Judiciary, 96th Cong. 3 (1979) (opening statement of Senator Thurmond)—and is based on the 1951 Refugee Convention, a treaty drafted in direct response to the Nazi persecution of Jewish Europeans during the Holocaust.

If the Attorney General determines that victims of "private criminal activity" cannot qualify for asylum, his decision will foreclose asylum for many victims of

religious persecution—where persecutors are often private, non-state actors. That outcome would contradict our fundamental American commitment to protect freedom of religion and those terrorized for their religious convictions. Indeed, we must"[c]ontinue to remember those in prison as if [we] were together with them in prison, and those who are mistreated as if [we] []ourselves were suffering." Hebrews 13:3 (New International Version). The Attorney General should leave current asylum law intact.

SUMMARY OF ARGUMENT

For purposes of this brief, Amici assume that the Attorney General's question presented seeks briefing on whether "private criminal activity" can constitute persecution under the Refugee Act. If the Attorney General determines that it cannot, his decision would have a devastating effect on asylum seekers who are victims of religious persecution. First, eliminating asylum for victims of "private criminal activity" would bar many religious-asylum claims. Second, blocking members of "particular social groups" from eligibility for asylum because they are victims of "private" action could exclude similarly-situated religious-asylum seekers. Third, asylum law currently requires a state-action component, so an asylum-seeker already must show either direct or indirect government participation in the persecution.

In short, excluding private criminal activity from the definition of persecution would bar religious refugees from asylum on our shores. Such a decision cannot stand.

ARGUMENT

The undersigned Amici understand that the Attorney General seeks briefing on whether persecution for purposes of asylum can include "private criminal activity" (i.e., actions by non-state actors). *See Matter of A-B-*, 27 I&N Dec. 227 (A.G. 2018). As laid out more fully in Section II of the Respondent's Opening Brief, the Attorney General's referral order is "simply unclear," in part because it "conflate[s] up to three distinct inquiries: whether criminal activity may qualify as 'persecution,' whether an asylum applicant is a member of a particular social group, and whether the government is unwilling or unable to control persecutors who are private actors." Resp. Br. at 21, 22. Amici have chosen to address the first possible inquiry: whether private actions can constitute persecution for purposes of asylum, both in the context of asylum generally and in the context of particular social groups specifically.

Persecution has always included actions taken by private individuals. If the Attorney General determines to the contrary, the impact to asylum-seekers will be devastating—especially in the realm of religious persecution.

1. Excluding Victims of Religious Persecution by Private Actors Would Foreclose Meritorious Asylum Claims.

If the Attorney General determines that private criminal activity cannot constitute persecution for any ground of asylum, his decision would foreclose the claims of countless victims who are persecuted by non-governmental actors for their religious beliefs. It also would reverse decades of case law protecting victims of religious persecution. Such a decision would run contrary to statutory text and Congressional intent of the Refugee Act and would require courts to confront this complicated legal area with a blank slate.

a. Foreclosing victims of private criminal activity from asylum on the basis of religious persecution would expose victims to further harm.

Religious persecution is often carried out by private, non-state actors.[2] The Board of Immigration Appeals ("BIA") and all Circuit Courts unanimously agree that "persecution" for purposes of asylum does not—and has never—required that the persecutors be state actors.[3] *See Korablina v. INS.*, 158 F.3d 1038, 1044 (9th

---

[2] As discussed below in Section 3, even in cases of private-actor harm, an asylum applicant must demonstrate that the government is "unable or unwilling" to control the persecutor.

[3] The Attorney General may grant asylum for an applicant who can establish that she "(1) has a well-founded fear of persecution; (2) on account of a protected ground; (3) by an organization that the [origin government] is unable or unwilling to control." *Hernandez-Avalos v. Lynch*, 784 F.3d 944, 948–49 (4th Cir. 2015). These statutorily "protected ground[s]" are "race, ***religion***, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1101(a)(42)(A) (emphasis added).

Cir. 1998) ("Non-governmental groups need not file articles of incorporation before they can be capable of persecution for purposes of asylum determination."). Instead, asylum-seekers establish persecution by showing "the infliction or threat of death, torture, or injury to one's personal freedom, on account of one of the enumerated grounds in the refugee definition."[4] *Litv. Gonzales*, 405 F.3d 171, 177 (4th Cir. 2005).

Without defining persecution this inclusively, America's asylum laws could not offer a vital protection to the religious who suffer at the hands of private actors. Case law is replete with examples of courts granting asylum or withholding of removal for private criminal activity against those of the Christian faith. *E.g.*, *Ivanov v. Holder*, 736 F.3d 5 (1st Cir. 2013) (Pentecostal Christians persecuted by Russian skinheads); *Afriyie v. Holder*, 613 F.3d 924 (9th Cir. 2010) (Ghanaian Baptist who suffered violent assaults and home invasions due to his religion); *Rizal v. Gonzales*, 442 F.3d 84 (2d Cir. 2006) (newly-converted Indonesian Christian whose friends and relatives verbally harassed and physically assaulted him and whose church was burned down by Muslims); *Paul v. Gonzales*, 444 F.3d 148 (2d Cir. 2006) (Pakistani Christian physically and verbally abused by Muslim

[4] Of course, the simple fact that a government has criminalized certain behavior (e.g., murder, torture, or honor killings) or not (e.g., spousal rape, female genital cutting, or sexual-orientation discrimination) does not bear on whether the harms constitute persecution for purposes of asylum.

fundamentalists); *Pavlova v. INS*, 441 F.3d 82 (2d Cir. 2006) (Russian Baptist physically assaulted, raped, and shot at by members of a nationalist group who also broke into her house and destroyed equipment for printing religious pamphlets).

Courts have similarly protected members of other religions who have been targeted by private actors for their religious convictions, such as:

- Jews, *e.g.*, *Poradisova v. Gonzales*, 420 F.3d 70 (2d Cir. 2005) (Jewish Belarusian family who were violently attacked, called offensive names, and forced to leave schools and apartments and whose store was burned down); *Krotova v. Gonzales*, 416 F.3d 1080 (9th Cir. 2005) (lead Jewish petitioner was sexually harassed, denied promotions and salary increases, and threatened by skinheads); *In re O-Z- & I-Z-*, 22 I&N Dec. 23 (BIA 1998) (Ukrainian Jewish father and son physically attacked and harassed on multiple occasions by members of a Russian nationalistic, anti-Semitic group); *Matter of Salama*, 11 I&N Dec. 536 (BIA 1966) (Egyptian Jew persecuted because, in part, Egyptians were boycotting Jewish doctors and expelling professional Jewish men from professional societies);

- Muslims, *Faruk v. Ashcroft*, 378 F.3d 940, 943–44 (9th Cir. 2004) (Muslim member of a mixed-race, mixed-religion marriage abducted and beaten, terminated from his job, denied a marriage certificate, and seriously and repeatedly threatened by Fijian relatives); *In re S-A-*, 22 I&N Dec. 1328 (BIA 2000) (liberal Muslim woman from Morocco whose conservative Muslim father forbade her from attending school and emotionally and physically abused her, including burning her thighs with a heated straight razor); and

- Members of other faiths, *e.g.*, *Chanda v. Gonzales*, 179 F. App'x 68 (2d Cir. 2006) (Hindu petitioner was the victim of several religion-based hate crimes by Muslims, including physical violence).

In the context of religion, as elsewhere throughout asylum law, "[p]ersecution need not be directly at the hands of the government." [5] *Singh v. INS*, 134 F.3d 962, 967 n.9 (9th Cir. 1998); *Pan v. Holder*, 777 F.3d 540, 543 (2d Cir. 2015) (same). This makes sense, given the worldwide prevalence of religious persecution by non-state actors. "Nearly all Muslims, Jews, [and] Hindus live in countries where their group [is] harassed" by private actors. Pew Research Center, *Nearly all Muslims, Jews, Hindus live in countries where their group was harassed in 2015* (Apr. 11, 2017). And in the Middle East, the Islamic State, al-Qaeda, and other private-actor terrorist groups continue to target and terrorize Christians. Daniel Williams, *Open the Door for Persecuted Iraqi Christians*, Washington Post, Dec. 4, 2015, available at https://www.washingtonpost.com/opinions/open-the-door-for-persecuted-iraqi-christians/2015/12/04/51db87c0-9969-11e5-8917-653b65c809eb_story.html?utm_term=.74053d5cacc4. Courts have never determined that these victims are less deserving of asylum than those persecuted

[5] In fact, ***every court*** has acknowledged that "persecution" may involve private conduct. *E.g.*, *Aldana-Ramos v. Holder*, 757 F.3d 9, 17 (1st Cir. 2014); *Malu v. U.S. Att'y Gen.*, 764 F.3d 1282, 1291 (11th Cir. 2014); *Paloka v. Holder*, 762 F.3d 191, 195 (2d Cir. 2014); *R.R.D. v. Holder*, 746 F.3d 807, 809 (7th Cir. 2014); *Doe v. Holder*, 736 F.3d 871, 877–78 (9th Cir. 2013); *Karki v. Holder*, 715 F.3d 792, 801 (10th Cir. 2013); *Garcia v. Att'y Gen. of United States*, 665 F.3d 496, 503 (3d Cir. 2011); *Crispin-Valladares v. Holder*, 632 F.3d 117, 128 (4th Cir. 2011); *Tesfamichael v. Gonzales*, 469 F.3d 109, 113 (5th Cir. 2006); *Matter of Pierre*, 15 I&N Dec. 461,t462 (BIA 1975). For a complete review of Supreme Court, Circuit Court, and BIA jurisprudence recognizing private-actor persecution, undersigned Amici direct the Attorney General to the Law Professors' Amicus Brief.

by official state actors. For the Attorney General to decide otherwise would expose victims targeted for their religious beliefs to more violence and terror and send eligible asylum-seekers back into the hands of their persecutors.

b. Reversing established law would confuse the asylum process and increase the administrative burden to all parties.

Given the decades of established case law including non-state activity within the scope of persecution, a decision reversing course would force immigration judges, the BIA, and the Circuit Courts to rewrite a substantial portion of asylum law. Such a decision would impose a significant burden on the already over-extended immigration courts—all without Congressional buy-in or a decision by the Supreme Court. *See* Memorandum from Attorney General Jeff Sessions, "Renewing Our Commitment to the Timely and Efficient Adjudication of Immigration Cases to Serve the National Interest," (Dec. 5, 2017), available at https://www.justice.gov/eoir/file/1041196/download (highlighting the "tremendous challenges" of the immigration court backlog).

2. A Decision Regarding Particular Social Groups Will Negatively Affect Religious-Persecution Claims.

Even if the Attorney General attempts to cabin his decision to private criminal activity related to persecution of a "particular social group," the decision would harm victims of religious persecution. Jurisprudence related to one protected ground is typically extended to other protected grounds. Moreover,

many particular social groups are premised on or intertwined with religious persecution, so excluding private criminal activity from the definition of persecution endangers these victims of religious persecution as well. Finally, given how interrelated these two protected grounds are, any decision that victims of private harm cannot be members in a particular social group risks inconsistent, arbitrary results.

a. Rulings applying to "particular social group[s]" may extend to other grounds for asylum, including those persecuted "on account of . . . religion."

Any decision by the Attorney General related to A-B-'s membership in a particular social group may apply equally to those seeking asylum under the "religion" category of 8 U.S.C. § 1101(a)(42)(A).

For years, the BIA has held that each statutorily-protected characteristic must be construed consistently with the others. *See Matter of Acosta*, 19 I&N Dec. 211, 233–34 (BIA 1985) (noting that under the "doctrine of ejusdem generis, meaning literally, 'of the same kind,'" each of the enumerated characteristics must be construed consistently) *overruled in part on other grounds by Matter of Mogharrabi*, 19 I&N Dec. 439 (BIA 1987). And the Circuit Courts agree: the interpretation of "particular social group" under 8 U.S.C. § 1101(a)(42) must align with interpretations of the other four protected grounds. *Niang v. Gonzales*, 422 F.3d 1187, 1198 (10th Cir. 2005) (limiting construction of "particular social

group" to be consistent with the construction of race, religion, nationality, and political opinion); *see also Castillo-Arias v. U.S. Attorney Gen.*, 446 F.3d 1190, 1198–99 (11th Cir. 2006); *Lopez-Soto v. Ashcroft*, 383 F.3d 228, 235 (4th Cir. 2004); *Ontunez-Tursios v. Ashcroft*, 303 F.3d 341, 352 (5th Cir. 2002); *Castellano-Chacon v. INS*, 341 F.3d 533, 546–51 (6th Cir. 2003); *Hernandez-Montiel v. INS*, 225 F.3d 1084, 1092–93 (9th Cir. 2000), *overruled on other grounds by Thomas v. Gonzales*, 409 F.3d 1177 (9th Cir. 2005) (en banc); *Lwin v. INS*, 144 F.3d 505, 512 (7th Cir. 1998); *Safaie v. INS*, 25 F.3d 636, 640 (8th Cir. 1994); *Fatin v. INS*, 12 F.3d 1233, 1240–41 (3d Cir. 1993); *Gomez v. INS*, 947 F.2d 660, 663–64 (2d Cir. 1991); *Ananeh-Firempong v. INS*, 766 F.2d 621, 626 (1st Cir. 1985).

The Attorney General's ruling on persecution related to "particular social group[s]" is therefore not independent of the other protected grounds for persecution—including protection from religious persecution. If the Attorney General determines that private criminal activity cannot as a matter of law constitute persecution of a particular social group, courts may similarly determine that private criminal activity does not constitute persecution on the religious ground, either. Because so many private "terrorist groups[] and individuals" violate the religious freedoms of "the world's most vulnerable populations," such an outcome would be catastrophic to those who endure beatings, torture, and

imprisonment, yet remain committed to their religious convictions. *See* Preface, 2016 International Religious Freedom Report.

b. Because many social groups are premised on religion, eliminating private criminal activity will restrict asylum for victims of religious persecution.

The five enumerated bases for asylum do not exist in isolation. In particular, persecution based on membership in a particular social group "may frequently overlap with persecution on other grounds such as . . . religion." *Aldana-Ramos v. Holder*, 757 F.3d 9, 16 (1st Cir. 2014) (internal quotation marks and citation omitted); United Nations High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status* ¶ 77, at 13 (1992) (same); *cf. Osorio v. INS*, 18 F.3d 1017, 1028-29 (2d Cir. 1994) (finding overlap between economic and political grounds). This overlap often arises because social groups must have a common characteristic "that the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences." *Lwin*, 144 F.3d at 512. Identification with a particular religion, such as Christianity, is a characteristic that one "should not be required to change," establishing the basis for a particular social group. *See id.*

Because religion is so fundamental to the experience of people around the globe, many particular social groups are premised on religion. Accordingly, carving out victims of particular social groups who are persecuted at the hands of

non-state actors could have a disastrous effect on victims of religious persecution. For example, the Seventh Circuit in *Yadegar-Sargis v. INS* determined that Christian women who did not wish to adhere to the Islamic female dress code constituted a particular social group. 297 F.3d 596, 603 (7th Cir. 2002). These women, committed to their Christian values and beliefs, opposed the dress code imposed by Iranian Muslims and risked "dress-code beatings, imprisonment, and being physically abused (such as having [their] lips rubbed with glass)." *Id.* at 604. The Seventh Circuit determined Yadegar-Sargis had been persecuted because of her membership in that particular social group—a social group that existed ***because of*** her faith. Like other social groups premised on religion, this case highlights how interrelated the bases for prosecution are: a different court facing identical facts could have determined that Yadegar-Sargis was persecuted on the basis of her Christian faith. *Cf. In re S-A-*, 221 I&N at 1329, 1336 (finding persecution based on religion where a less conservative Muslim woman wore skirts and had other religious differences with her father).

These close calls are not unusual. If a court determines the claim of persecution in analogous cases is based on the members' particular social group, rather than solely on the protected category of religion, those asylum cases would likely fail. *E.g.*, *Al-Ghorbani v. Holder*, 585 F.3d 980, 996 (6th Cir. 2009) (petitioners "belong to a social group that opposes the repressive and

discriminatory Yemeni . . . religious customs" because they "oppos[e] Yemen's traditional, paternalistic, Islamic marriage traditions"); *see also Bueso-Avila v. Holder*, 663 F.3d 934, 937–38 (7th Cir. 2011) (assuming that the petitioner was a member of a particular social group because of his membership in an evangelical Christian youth group) *cf. Rehman v. Attorney Gen.*, 178 F. App'x 126 (3rd Cir. 2006) (recognizing a particular social group for individuals targeted by the Taliban as a result of their positions of authority and influence because the pharmacist-petitioner had refused Taliban demands to poison Christians). If the Attorney General holds that persecution does not include private criminal activity against members of particular social groups, social groups defined by their religious beliefs may be unable to seek asylum when victimized by private actors.

Moreover, persecutors may act with multiple motives: they may persecute based on religion, on membership in a particular social group, or both. The BIA recognizes mixed-motive claims so long as the protected ground is not "incidental or tangential to the persecutor's motivation." *In re J-B-N- & S-M-*, 24 I&N Dec. 208, 213 (BIA 2007); *see also Marroquin-Ochoma v. Holder*, 574 F.3d 574, 577 (8th Cir. 2009) (persecution "need not be *solely*, or even predominantly" on account of a protected characteristic (emphasis added)). Restricting eligible social-group members would undermine and confuse mixed-motive claims where the

persecutors may have been driven by animus towards both religion and a particular social group.

Because categorization as a member of a particular social group often blurs with religion, excluding—or even slightly limiting—such groups from asylum simply because their persecutors happen to be private actors could eliminate eligible religious victims from protection.

c. Excluding harms inflicted by private actors would lead to inconsistent results.

Given how intertwined particular social groups and religion are, excluding private actors from the definition of persecution for social groups would lead to inconsistent results and generate significant confusion, resulting in arbitrary and reversible immigration-court decisions.[6]

"[I]t is a fundamental principle of justice that similarly situated individuals be treated similarly." *Zhang v. Gonzales*, 452 F.3d 167, 173 (2d Cir. 2006) (internal quotation marks and citation omitted). But if the Attorney General carves

---

[6] Reversals such as the one contemplated by the Attorney General are particularly problematic in the notoriously Byzantine area of asylum law. *See United States v. Lara*, 541 U.S. 193,t230 (2004) (Souter, J., dissenting) (noting that principles of stare decisis are compelling in areas "peculiarly susceptible to confusion"). And it goes without saying that the asylum applicants themselves would be severely disadvantaged by a complete reversal in this area. *See* Samantha Balaban, *Without a Lawyer, Asylum-Seekers Struggle with Confusing Legal Processes*, NPR, Feb. 25, 2018, available at https://www.npr.org/2018/02/25/588646667/without-a-lawyer-asylum-seekers-struggle-with-confusing-legal-processes (describing unrepresented applicants' challenges in navigating the American immigration system).

out private criminal activity from persecution for purposes of particular social groups, courts will face competing legal standards—one that includes non-state actors, and another that does not—when deciding social-group claims premised on religion. *Cf. Rios v. Lynch*, 807 F.3d 1123, 1124 (9th Cir. 2015) (describing "particular social group" as an "inherently flexible term").

Take, for example, the case of a Baptist woman in southern Iraq who refuses to wear a hijab. If an immigration court determines, like in *Yadegar-Sargis*, that her persecution is based on her membership in a particular social group of Baptist women opposed to conservative Muslim attire, that court would deny her asylum application—no matter how atrocious the persecution—if her persecutors were, for example, members of the Islamic State. But if the court determines that the applicant is persecuted because of her Baptist faith (and her refusal to wear a hijab is a manifestation of that religious conviction), the application could succeed regardless of whether she was persecuted by private or governmental actors. This arbitrary line-drawing between indistinguishable applicants violates the rule that "administrative agencies must apply the same basic rules to all similarly situated supplicants." *Henry v. INS*, 74 F.3d 1, 6 (1st Cir. 1996).

Moreover, the division between state and non-state actors is often fuzzy at best.[7] In some countries, government leaders cultivate environments that

[7] Because the Tahirih Amicus Brief gives a more fulsome explanation of the false

encourage non-state actors to persecute members of unpopular religions. *Etg.*, *Ivanov*, 736 F.3d at 13 ("Russian government officials provide tacit or active support to a view . . . that Orthodoxy is the country's so-called 'true religion'"). In others, a government such as China may have an openly hostile relationship towards religion, which emboldens non-state actors to take matters into their own hands and abuse, harass, and torture the religious. *See* Pew Research Center, *Many Countries Favor Specific Religions, Officially or Unofficially*, at 11–12 (Oct. 3, 2017) (describing the five percent of countries throughout the world with an openly hostile relationship towards religion). Under such circumstances, courts may struggle to distinguish between "private" and "governmental" action, and courts may reasonably reach opposite results. These outcomes violate the "touchstone" of due process: the "protection of the individual against arbitrary action of the government," even when the fault lies in "the exercise of power . . . in the service of a legitimate governmental objective." *Cty. of Sacramento v. Lewis*, 523 U.S. 833, 845–46 (1998).

3. Immigration Law Already Requires Asylum-Seekers to Show the Government's Role in Private-Actor Persecution.

American immigration law already mandates that applicants show that their governments are involved or complicit in the applicant's persecution—i.e., that the

---

distinction between "private" and "public" crimes, undersigned Amici will not belabor the point.

government is "unable or unwilling" to stop the applicant's persecution. A decision further narrowing this rule by excluding those who happen to be persecuted by private actors will only harm victims—without further protecting our borders.

Asylum for victims of non-state actors is limited to situations where the applicant's home government is either "unable or unwilling to control" the persecutors. *Hernandez-Avalos*, 784 F.3d at 949; *Lolong v. Gonzales*, 484 F.3d 1173, 1180 (9th Cir. 2007) (en banc) (same); *see also Crespin-Valladares v. Holder*, 632 F.3d 117, 128 (4th Cir. 2011) (noting that an applicant for asylum must be "harm[ed] . . . by either a government or an entity that the government cannot or will not control"). That is,

> [p]ersecution is something a *government* does, either directly or by abetting (and thus becoming responsible for) private discrimination by throwing in its lot with the deeds or by providing protection so ineffectual that it becomes a sensible inference that the government sponsors the misconduct.

Sarhan v. Holder, 658 F.3d 649,t657 (7th Cir. 2011) (emphasis in original). Thus, eligibility for asylum "always implies some connection to government action or inaction, whether in the form of direct government action, government-supported action, or government's unwillingness or inability to control private conduct." *Ivanov*, 736 F.3d at 12 (internal quotation marks and citations omitted); *see also* 8 U.S.C. 1101(a)(42) (A) (requiring asylum-seekers to establish that they are "unable or unwilling to avail himself or herself of the protection of, that country"). Once

an asylum-seeker establishes that her feared harms constitute "persecution" and her home government is unable or unwilling to control her persecution, "it matters not who inflicts it."[8] *Faruk*, 378 F.3d at 943.

The grant of asylum is therefore already tied to "systematic" government action (or inaction). *Burbiene v. Holder*, 568 F.3d 251,t255 (1st Cir. 2009). Conflating two queries—(1) the scope of "persecution" in the context of asylum with (2) the requirement to show nexus to government action—is a cure in search of a disease. It would provide no additional protection to our immigration laws while prejudicing victims unlucky enough to be caught in the crosshairs of non-state actors and governments who are unwilling or unable to stop the abuse.

CONCLUSION

Non-state actors have persecuted people of faith for millennia. Many of the world's great religions include stories of exodus and seeking refuge: "When a foreigner resides among you in your land, do not mistreat them. The foreigner residing among you must be treated as your native-born. Love them as yourself, for you were foreigners in Egypt. I am the Lord your God." Leviticus 19:33-34

[8] Indeed, a decision excluding private persecutors from establishing eligibility for asylum indirectly legitimizes their behavior. By granting asylum to victims of private criminal activity (on any protected ground), the United States condemns the private actors and pressures the origin government to control these bad actors. Permitting this type of persecution to go unaddressed empowers persecutors; results in more corrupt, dangerous countries throughout the world; and gives free reign to those who would harm religious minorities and other people of faith.

(New International Version). And the Christian faith is premised on the persecution of Jesus—and on his crucifixion because he would not renounce his religious beliefs.

America was founded by religious minorities seeking a home to worship according to their principled beliefs. As former Senator and current United States Ambassador-at-Large for International Religious Freedom Sam Brownback stated at a 2001 Senate hearing on asylum law:

> In his 1801 first annual message, President Thomas Jefferson asked a piercing question that is true today, 200 years later: "Shall oppressed humanity find no asylum in this globe?" The answer is, yes, they shall, and America has provided and shall always provide asylum to those escaping tyranny . . . .

An Overview of Asylum Policy: Hearing Before Sub. Comm. on Immigration of the S. Comm. on the Judiciary, 107th Cong. 1 (2001) (opening statement of Senator Brownback).

A decision that restricts asylum for people of faith fleeing persecution would run counter to all that is most noble about the United States. Those terrorized because of their faith deserve protection—no matter if they are victimized by state or non-state actors. The undersigned do not believe that this administration (to say

nothing of the Congress who passed the Refugee Act) could intend a different result. As Amici, we urge the Attorney General not to adopt it.

DATED: April 27, 2018

Bevan A. Dowd
Keker, Van Nest & Peters LLP
633 Battery Street
San Francisco, CA 941211

Counsel for Amici Curiae
Catholic Legal Immigration Network, Inc.
Benedictine Sisters of the Federation of St. Scholastica
Conference of Benedictine Prioresses
Conference of Major Superiors of Men
HIAS
Lutheran Immigration and Refugee Service
National Council of Jewish Women
National Justice for Our Neighbors
Unitarian Universalist Service Committee
United Methodist Immigration Task Force
World Relief

CERTIFICATE OF COMPLIANCE

This brief complies with the instructions in the Attorney General's referral order dated January 4, 2018, because the brief contains 4,130 words, excluding the cover page, table of contents, table of authorities, signature block, certificate of compliance, and certificate of service.

Dated: April 27, 2018

Bevan A. Dowd

CERTIFICATE OF FILING

On April 27, 2018, I, Bevan A. Dowd, submitted a copy of this request electronically to AGCertification@usdoj.gov, and in triplicate to:

United States Department of Justice
Office of the Attorney General, Room 5114
950 Pennsylvania Avenue, NW
Washington, DC 20530

Dated: April 27, 2018

Bevan A. Dowd

APPENDIX

STATEMENTS OF INTEREST OF *AMICI CURIAE*

The Catholic Legal Immigration Network, Inc. ("CLINIC"), based in Silver Spring, Maryland, embraces the core Gospel value of welcoming the stranger. CLINIC promotes the dignity and protects the rights of immigrants in partnership with a dedicated network of Catholic and community legal immigration programs. CLINIC is the largest nationwide network of nonprofit immigration programs, with almost 350 affiliates in 47 states and the District of Columbia. CLINIC is a partner in providing pro bono representation to asylum seekers and materials on asylum law and Catholic teaching on migration. As such, CLINIC is very concerned with potential restrictions on eligibility for asylum. CLINIC's work draws from Catholic social teaching to promote the dignity and protect the rights of immigrants in partnership with its network.

The **Benedictine Sisters of the Federation of St. Scholastica** are 18 monasteries from the west coast to the east coast of the United States and 2 monasteries in Mexico. The federation is led by an elected president and council of Sisters from across the federation. The Benedictine Sisters of the Federation of St. Scholastica own, teach in and administer schools, minister in Catholic parishes, serve in a variety of social services as well as lead programs of spirituality. The people who are ministered to by the Sisters include people who have immigrated to

the United States from many different countries, varying according to the region of the US in which the monasteries are located. The Sisters, like Jesus, do not ask the people whom they serve whether they are documented or undocumented. "I was hungry and you fed me, I was thirsty and you gave me to drink, I was a stranger and you invited me in . . ., I was in prison and you visited me."(Gospel of St. Matthew 25: 35-36).

The **Conference of Benedictine Prioresses ("CBP")** is an organization of approximately 50 leaders (known as a prioress) of Benedictine Sisters' monasteries, mostly in the United States (including Puerto Rico), but also a few others from Canada, Mexico, Bahamas, Taiwan and Japan. Each monastery is headed by a prioress who is elected by the members of each monastery. These monasteries across the United States and beyond do various works with both Catholic and non-Catholic people. Many of the people served by the Benedictine Sisters are immigrants to the United States (some of whom have come here seeking asylum), through religious education, human outreach to the poor, and spiritual programs.

The **Conference of Major Superiors of Men ("CMSM")** is an association of the leadership of men in religious and apostolic institutes in the United States. The Conference has formal ties with the U.S. Conference of Catholic Bishops, the Leadership Conference of Women Religious, the National Assembly of Religious

Brothers and other national agencies. CMSM represents U.S. male religious and apostolic communities before a number of national and international bodies, including the Congregation of Religious and Secular Institutes of the Holy See, which officially recognizes CMSM as the national representative body for men in religious and apostolic communities in the United States. We have religious men working in many areas of intense violent conflict. They have seen and sometimes have first-hand experience of religious persecution by private actors. As a nation committed to welcoming those in urgent need, we call on the court to continue rather than narrow such commitments.

HIAS, founded in 1881, is the world's oldest refugee resettlement agency, and the only Jewish refugee resettlement agency. HIAS assists those who are persecuted because of who they are, helping refugees find welcome, safety, and freedom around the world. While originally founded to protect Jewish people fleeing pogroms in Russia and Eastern Europe, today, most of the people HIAS serves are not Jewish. Rather, HIAS helps people fleeing persecution as an expression of Jewish values of welcoming and protecting the stranger, and committing acts of kindness to improve and repair the world (the concept known as tikkun olam).

Since HIAS's founding, it has helped more than 4.5 million refugees start new lives, through twelve offices. It is one of nine federally designated

organizations that resettles refugees, in collaboration with the Department of State and the Department of Health and Human Services. It provides direct resettlement services through affiliates in the United States, with supervision from its Silver Spring, Maryland and New York, New York offices. HIAS also provides legal services to asylum-seekers and individuals who qualify for other humanitarian visas in the United States. Through twelve international offices, HIAS also provides psycho-social, legal and employment services to refugees.

HIAS is concerned that a narrow reading of asylum law that would restrict granting of asylum for victims of persecution by private actors or narrow grounds of asylum would prevent HIAS from carrying out its mission to protect people fleeing persecution and their families. In 2016, HIAS aided 350,000 refugees, many of them from religious minorities, persecuted by state and non-state actors in their countries of origin on account of their religion. Restricting asylum for any religious minority has disturbing similarities to situations faced by the Jewish people and other former clients seeking refuge and religious freedom.

The **Lutheran Immigration and Refugee Service ("LIRS")**, started by Lutheran congregations in 1939, is a national organization aiding migrants and refugees to ensure that newcomers are not only self-sufficient, but also become connected and contributing members of their adopted communities in the United States. Working with and through partners across the country, LIRS resettles

refugees, reunites children with their families or provides foster homes for them, and conducts policy advocacy. LIRS manages a variety of service and protection programs, including refugee resettlement and programs for unaccompanied children and their families.

LIRS has an interest in this case because many of LIRS' clients are asylum seekers or family members of asylum seekers, and those individuals are best served when there is a level of predictability and consistency in US Immigration law. There is existing precedent for victims of "private criminal activity" to be considered eligible for asylum in the United States, as long as they meet other requirements under current law. Freedom from religious persecution is a basic human right. LIRS clients include victims of religious persecution, and their persecutors were in some cases, private criminal actors. In many countries, religious leaders and individual believers who speak out against private criminal actors are targeted for persecution, because they have spoken out against wrongdoing, in the name of their faith. LIRS' mission demands that we stand against efforts to dilute existing protections for victims of religious persecution.

The **National Council of Jewish Women ("NCJW")** is a grassroots organization of 90,000 volunteers and advocates who turn progressive ideals into action. Inspired by Jewish values, NCJW strives for social justice by improving the quality of life for women, children, and families and by safeguarding individual

rights and freedoms. NCJW's Resolutions state that NCJW resolves to work for "Comprehensive, humane, and equitable immigration, refugee, asylum, and naturalization laws, policies, and practices that facilitate and expedite legal status and a path to citizenship for more individuals." Consistent with our Principles and Resolutions, NCJW joins this brief.

National Justice for Our Neighbors ("JFON") was established by the United Methodist Committee on Relief in 1999 to serve its longstanding commitment and ministry to refugees and immigrants in the United States. JFON's goal is to provide hospitality and compassion to low-income immigrants through immigration legal services, advocacy, and education. JFON employs a small staff at its headquarters in Springfield, Virginia, which supports 17 sites nationwide. Those 17 sites collectively operate in 12 states and Washington, D.C., and include 40+ clinics. Last year, JFON served clients in more than 13,000 cases. JFON advocates for interpretations of federal immigration law that protect refugees fleeing violence.

The **Unitarian Universalist Service Committee ("UUSC")** is a non-sectarian human-rights organization powered by grassroots collaboration. UUSC began its work in 1939 when Rev. Waitstill and Martha Sharp took the extraordinary risk of traveling to Europe to help refugees escape Nazi persecution. A moral commitment to protecting the rights and dignity of persons,

particularly those seeking refuge from violence, discrimination, persecution, and natural disasters, has been at the center of our organization's mission for more than 75 years. Given our history, we seek to promote a just immigration system that upholds the rights of all migrants and asylum seekers. Today, a significant body of UUSC's work focuses on responding to the ongoing refugee crisis in Central America, where persecution by non-state criminal actors is a key driver of forced migration. Many of our partners and the communities they serve would be directly harmed by a decision to reverse existing case law, which has long recognized this form of persecution as legitimate grounds for asylum.

The **United Methodist Immigration Task Force ("UMITF")** is composed of representatives from United Methodist general board and agencies, racial ethnic plans and caucuses, and the Council of Bishops. It is tasked with assisting and advising The United Methodist Church in responding to the global migration crisis, including helping the church understand the deeper issues and hear the biblical call to respond. These efforts span advocacy, service and resources. We are called to provide compassionate and safe welcome to immigrants and refugees, especially those who are vulnerable and fleeing persecution.

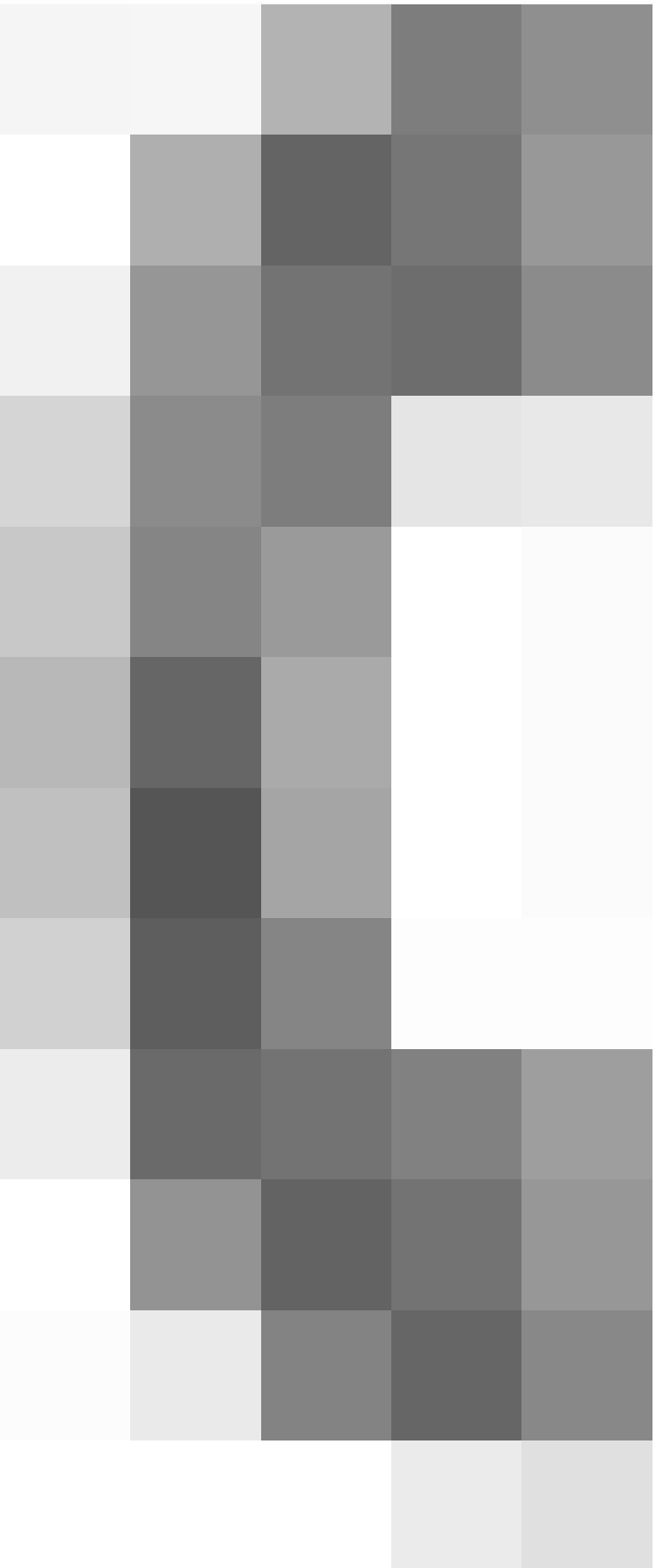
World Relief is the international relief and development arm of the National Association of Evangelicals. Based in Baltimore, Maryland World Relief stands with the vulnerable and partners with local churches to end the cycle of suffering,

transform lives and build sustainable communities. With over 70 years of experience, World Relief works in 20 countries worldwide through disaster response, health and child development, economic development and peacebuilding and has 23 offices in the United States that specialize in refugee and immigration services. IN 17 offices across the country World Relief provides immigration legal services, including representation to asylum seekers, and technical legal support to more than 40 churches recognized by the Department of Justice. The protection of the vulnerable foreign-born is central to the mission and services of World Relief in the United States.

GONZALEZ OLIVIERI LLC

IMMIGRATION LAW FIRM, HOUSTON, TEXAS

2200 Southwest Freeway
Suite 530 Houston, TX 77098-4709



: 713.481.3040 / Fax: 713.588.8683
EBrown@gonzalezolivierillc.com / www.gonzalezolivierillc.com;
www.evitaladeportacion.com


Super Lawyers
Raed Gonzalez
SuperLawyers.com

Awards for Excellence

Winner of Distinction

2017


TEXAS
HOUSTON'S
TOP LAWYERS
2017

UNITED STATES DEPARTMENT OF JUSTICE
OFFICE OF THE ATTORNEY GENERAL
WASHINGTON, D.C.

In the Matter of:	§	
B -, A -	§	**File No. [Redacted]**
Respondent	§	

Raed Gonzalez, Esq.
GONZALEZ OLIVIERI, LLC
2200 Southwest Freeway, Suite 550
Houston, TX 77098
Phone: (713) 481-3040
Fax: (713) 588-8683

Naimeh Salem, Esq.
GONZALEZ OLIVIERI, LLC
2200 Southwest Freeway, Suite 550
Houston, TX 77098
Phone: (713) 481-3040
Fax: (713) 588-8683

Hortencia Gallegos, Administrator
Immigration Counseling Services, Inc.
6430 Richmond Ave., Suite. 450
Houston, TX 77057
Phone: (713) 953-0047
Fax: (713) 953-1605

Cesar Espinosa, Executive Director
FIEL Houston, Inc.
6610 Harwin #214
Houston, TX 77036
Phone: (713) 364-3435

AMICI CURIAE BRIEF OF GONZALEZ OLIVIERI, LLC, IMMIGRATION COUNSELING CENTER, INC., AND FIEL HOUSTON, INC.

INTEREST OF *AMICI CURIAE*

Amici curiae Gonzalez Olivieri, LLC, immigration law firm, as well as the Immigration Counseling Center, Inc. and FIEL Houston, Inc., legal non-profit organizations, are all involved in assisting, counseling, representing immigrants and advocating for their rights and privileges under the laws of the United States.

In this matter, the Attorney General has issued an invitation for the submission of additional briefs from interested parties to assist him in assessing "[w]hether, and under what circumstances, being a victim of private criminal activity constitutes a cognizable 'particular social group' for purposes of an application for asylum or withholding of removal." *Matter of A-B-*, 27 I&N Dec. 227 (A.G. 2018).

The above-referenced firm and organizations provide assistance to immigrants in removal proceedings who flee their native lands for fear of being killed in their respective countries and seek asylum and withholding of removal as relief from removal.

Proposed *amici curiae*, hereby move the Attorney General for leave to submit the enclosed brief in response to the Attorney General's invitation. The questions posed by the Attorney General in *Matter of A-B-, supra* are of great import to the undersigned *amici curiae* who represent and assist countless immigrants in seeking asylum and withholding of removal before the immigration courts and the Board of Immigration Appeals. The expertise and familiarity of the undersigned *amici curiae* with the situations of various immigrants will assist the Attorney General in resolving the question presented in this matter.

For the aforementioned reasons, proposed *amici* respectfully request leave of the Attorney General to file the accompanying brief.

INTRODUCTION AND ISSUES PRESENTED

On March 7, 2018, the Attorney General issued an invitation to interested members of the public to file *amicus curiae* briefs addressing a single question in order to assist him in rendering a final decision in *Matter of A-B-*: whether, and under what circumstances, being a victim of private criminal activity constitutes a cognizable "particular social group" for purposes of an application for asylum or withholding of removal.

Amici curiae respectfully submit this brief to assist the Attorney General in adjudicating this issue, which may dramatically affect the administration of the immigration laws of the United States and the nation's humanitarian legal obligation to assist refugees.

ARGUMENT

I. The scope and structure of asylum and withholding of removal under federal law

An alien seeking asylum must show by a preponderance of the evidence she is a "refugee," as defined in 8 U.S.C. § 1101(a)(42)(A), and merits a grant of asylum in the exercise of discretion. *Zhao v. Gonzales*, 404 F.3d 295, 306 (5th Cir. 2005). A "refugee" includes any person unable or unwilling to return to her native country because of persecution or a well-founded fear of future persecution on account of her race, religion, nationality, membership in a particular social group, or political opinion. *See Milat v. Holder*, 755 F.3d 354, 360 (5th Cir. 2014); *see also*, 8 C.F.R. § 208.13(b).

Stated differently, to qualify for asylum, an alien must meet the multi-pronged definition of a "refugee." *See* 8 U.S.C. § 1101(a)(42)(A); *see also*, *Matter of Acosta*, 19 I&N Dec. 211, 236 (BIA 1985) (noting the Immigration and Nationality Act creates four elements that should be satisfied before an alien qualifies as a "refugee."). In general, an alien must show: (1) harm rising to the level of persecution; (2) persecution or a well-founded fear of persecution; (3) at least one

or more of five protected grounds for asylum; and (4) a nexus exists between the feared persecution and a protected ground. *Efe v. Ashcroft*, 293 F.3d 899, 904 (5th Cir. 2002).

In the same way, an alien seeking withholding of removal must establish that, if returned to her country, her life or freedom would be threatened on account of her race, religion, nationality, membership in a particular social group, or political opinion. *See* 8 U.S.C. § 1231(b)(3). However, withholding of removal has a higher burden of proof than asylum. *Morgan v. Holder*, 634 F.3d 53 (1st Cir. 2011). An alien must show that it is "more likely than not" that her life or freedom "would be threatened" if deported to her country. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 439-41 (1987); *see also*, *INS v. Stevic*, 467 U.S. 407 (1984).

In cases where persecution occurs because of membership in a particular social group, the Board of Immigration Appeals ("BIA" or "the Board") has outlined a standard to determine whether an asserted social group is cognizable under the Immigration and Nationality Act ("INA").

For a particular social group to be cognizable, the group must be (1) composed of members who share a common and immutable characteristic, (2) socially distinct in the relevant society, and (3) also defined with particularity. *Matter of M-E-V-G-*, 26 I&N Dec. 227, 237 (BIA 2014).

Separately and distinctly from establishing a protected ground, in instances, where a private non-state actor commits the conduct that rises to the level for the "persecution," for the harm to be considered "persecution" within the meaning of the INA, the asylum seeker must also prove that the government in their native country is unable or unwilling to protect them from private actor(s). *De Leon-Saj v. Holder*, 583 F. App'x 429, 429 (5th Cir. 2014).

Even where an alien seeking asylum is able to establish a protected ground for asylum, or alternatively, withholding of removal, as well as harm rising to the level of persecution, she must also establish that a nexus exists between the harm suffered and the protected ground. *Melgar de*

Torres v. Reno, 191 F.3d 307, 309 (2d Cir. 1999).

The standards for asylum and withholding of removal carry a heavy evidentiary burden. In general, the aforementioned framework has been utilized since the United States Congress adopted the Refuge Act in 1980. *See* Refugee Act, Pub. L. No. 96-212, 94 Stat. 102 (1980).

II. Whether "private criminal activity" can constitute a particular social group for asylum and withholding of removal purposes

Respectfully, the question, as posed by the Attorney General, appears to conflate distinct and separate questions into a single inquiry, namely the requirement that persecution can occur.

As a preliminary matter, it is already an established rule in asylum jurisprudence that any asserted particular social group cannot be defined exclusively by the claimed persecution, but any proffered group must be "recognizable" as a discrete group by others in the society in question and must have well-defined, particularized boundaries. *See Matter of A-M-E- & J-G-U-*, 24 I&N Dec. 69, 74-76 (BIA 2007). Therefore, victims of private criminal activity standing alone as an asserted social group cannot constitute a particular social group for asylum and withholding of removal.

However, the case of *Matter of A-B-* is a case involving an alien seeking asylum, having suffered domestic violence. In the landmark decision, *Matter of A-R-C-G-*, 26 I&N Dec. 388 (BIA 2014), the Board held that domestic violence can be a basis for asylum and women fleeing such persecution may establish membership in a particular social group.

The BIA's decision on this question is correct and *amicus curiae* would strongly urge the Attorney General to maintain this positive development in asylum jurisprudence. It is not the fact that women who are domestic violence victims suffer mere "private criminal activity" that serves as the basis of their particular social group. On the contrary, where a cognizable social group is established, the social group as was the case in *Matter of A-R-C-G-, supra* is based on several characteristics, including gender, nationality, and culturally-approved and legally-tolerated

subordinate status of women in marital and domestic relationship that make them unable to leave violent relationships. *Id.* at 394.

Violence against women which occurs in many countries with high frequency and often with impunity is the most pervasive and underreported human rights violation. Many nations have exceptionally high levels of femicide, domestic violence, sexual violence, and other gender-based forms of harm.

In many places, even where certain acts are ostensibly illegal, the law is not enforced and there are pervasive cultural attitudes, informed by societal expectations regarding gender and the role of women, that accept or tolerate a climate of permissiveness regarding domestic abuse.

Domestic violence cannot be reasonably characterized as mere "private criminal activity" without any social dimensions.[1] But, even not considering this point, the illegality of the harm that constitutes persecution in the country in question is not material or dispositive to an asylum claim.

The INA does not define "persecution" and therefore does not indicate with any specificity the kind of harm or degree of harm a person must suffer for asylum eligibility. *Zhao v. Gonzales*, 404 F.3d 295, 307 (5th Cir. 2005). While a single incident in some instances may not rise to the level of persecution, the cumulative effect of several incidents may constitute persecution. *Singh v. INS*, 94 F.3d 1353, 1358 (9th Cir. 1996).

The criminality of the conduct that is alleged to be persecution is irrelevant, if only because most conduct that would be agreed to constitute "persecution," such as attempted murder, is illegal, at least ostensibly, in the majority of countries.

---

[1] Jessica Marsden, *Domestic Violence Asylum After Matter of L R* , 123 YALE L.J. ONLINE 2512, 2519 (2014) (defining domestic violence as a "systematic and structural, a mechanism of patriarchal control. . . built upon male superiority and female inferiority, sex stereotyped roles and expectations, and economic, social, and political dominance of men and dependency of women.").

Many courts have found that domestic violence meets the definition of persecution. As is typical of domestic violence, a victim is likely to have suffered harm perpetuated over a long period of time through a series of acts, rather than a single incident.[2] Such violence often encompasses physical violence, such as rape, which a majority of courts have found to constitute persecution. *Balachova v. Mukasey*, 547 F.3d 374, 386-87 (2d Cir. 2008); *Lopez-Galarza v. INS*, 99 F.3d 954, 959 (9th Cir. 1996) (holding that rape and sexual assault constitute persecution).

This is important because the question of whether the nature and degree of harm constitutes persecution is separate and distinct from whether an alien can establish a cognizable social group and show, where the persecutor is a private actor or group, that the relevant government is unable or unwilling to offer protection. In order to obtain asylum or withholding of removal, an alien must show each of these requirements. *See* 8 U.S.C. § 1101(a)(42)(A); 8 U.S.C. § 1231(b)(3).

Amicus curiae wish to emphasize that because most acts of persecution are also criminal, to question whether an alien can obtain asylum or withholding of removal, based on such conduct, or eliminating that possibility would be contrary to asylum jurisprudence and deeply problematic.

Unavoidably, narrow interpretations of the protected grounds for asylum and withholding of removal unduly restrict humanitarian relief for those facing persecution. Such interpretations, without question, sacrifice the protective ethic at the root of asylum and is equally contrary to spirit and purpose of American asylum law.

Because the United States acceded to the United Nations Protocol Relating to the Status of Refugees, Congress amended American immigration law to reflect the Protocol's directives. *See*

---

[2] *See generally* U.S. Department of Justice, Office on Violence Against Women: *About Domestic Violence*, *available at* https://www.justice.gov/ovw/domestic_violence (last visited April 12, 2018) (defining "domestic violence" as a "pattern of abusive behavior in any relationship that is used by one partner to gain or maintain power and control over another intimate partner."); *see also*, Jessica Marsden, *Domestic Violence Asylum After Matter of L R* , 123 YALE L.J. ONLINE 2512, 2519 (2014) (defining domestic violence to encompasses "physical, sexual, emotional, economic, or psychological actions or threats of actions" directed . . . to "intimidate, manipulate, humiliate, isolate, frighten, terrorize, coerce, threaten, blame, hurt, injure, or wound" a spouse or domestic partner.").

Refugee Act, Pub. L. No. 96-212, 94 Stat. 102 (1980); *see also*, *INS v. Cardoza-Fonseca*, 480 U.S. 421, 436-37 (1987) (stating "[i]f one thing is clear from the legislative history of the new definition of 'refugee,' and indeed the entire 1980 Act, it is that one of Congress' primary purposes was to bring United States refugee law into conformance with the [Protocol].").

In enacting the Refugee Act of 1980, Congress sought to provide a law for the adjudicating claims with a reliable framework, but with sufficient flexibility to respond to evolving geopolitical situations, which includes new concepts of "failed states" and persecution by non-state actors such as transnational criminal gangs and terrorist organizations.

A contrary holding would render American asylum law needlessly anachronistic. Indeed, at the height of international concerns for refugees and asylum seekers following the Second World War, a critical concern at the time, due to ideologies such as Nazism, fascism, and totalitarianism, was the behavior of governments towards persons geographically within its authority. But to limit, or question the validity of asylum or withholding of removal claim where the State is not the cause of the persecution would limit the application of asylum laws to a geopolitically outdated situation.

Following this logic, Christians fleeing persecution in the Middle East may face significant hurdles seeking asylum or withholding of removal because groups such as ISIS are private actors engaged in what is technically "private criminal activity." However, such an outcome is in contradiction to the purpose and intent of Congress in codifying the Refugee Act.

The same outcome would occur in the context of asylum and withholding of removal cases involving female genital mutilation ("FGM"). The majority of courts recognize FGM as a form of persecution. *See*, *e.g.*, *Matter of Kasinga*, 21 I.&N. Dec. at 365 (BIA 1996); *Abay v. Ashcroft*, 368 F.3d 634, 638 (6th Cir. 2004). However, FGM is likely to be performed by private actors, even in places where the practice is ostensibly illegal, because it is a widespread practice rooted in social

custom and tradition. *Abay*, 368 F.3d at 638-39. Because "private criminal activity" is vague and broad, FGM claims would not be valid if asylum and withholding of removal claims are deemed to lack viability if the alien is a victim of a "private criminal activity."

In sum, the undersigned *amicus curiae* urges the Attorney General to affirm the decision of the BIA to grant the respondent in *Matter of A-B-* asylum on the basis of her cognizable social group as a victim of domestic violence and the significant harm she endured, which rises to the level of persecution. Any modification or substantial change to asylum jurisprudence to limit the volume of asylum and withholding of removals applications by barring aliens who are the victims of "private criminal activity" from seeking such humanitarian relief would have unconscionable, disastrous consequences for countless aliens seeking refuge from death and other violent harm.

Furthermore, such a determination would be fundamentally contrary to the letter and spirit of the law of asylum and withholding of removal as outlined in the INA, as well as the decisions of the BIA and federal courts of appeals in implementing the provisions of the law.

Therefore, the Attorney General should not modify or alter the test for stating a valid claim for asylum or withholding of removal, particularly on the basis of whether the persecuting party is a private actor or group.

CONCLUSION

Amici curiae prays the Honorable Attorney General finds that the BIA reached the correct conclusion in *Matter of A-B-* and that victims of persecution, even if metered out by private persons or groups, can state a claim for asylum and withholding of removal provided they establish as is already required that the government in their native country is unable or unwilling to provide any protection from the suffered or feared persecution.

Respectfully submitted,

GONZALEZ OLIVIERI, LLC

Date: April 27, 2018

Raed Gonzalez, Esq.
2200 Southwest Freeway, Suite 550
Houston, TX 77098
Phone: (713) 481-3040
Fax: (713) 588-8683

CERTIFICATE OF SERVICE

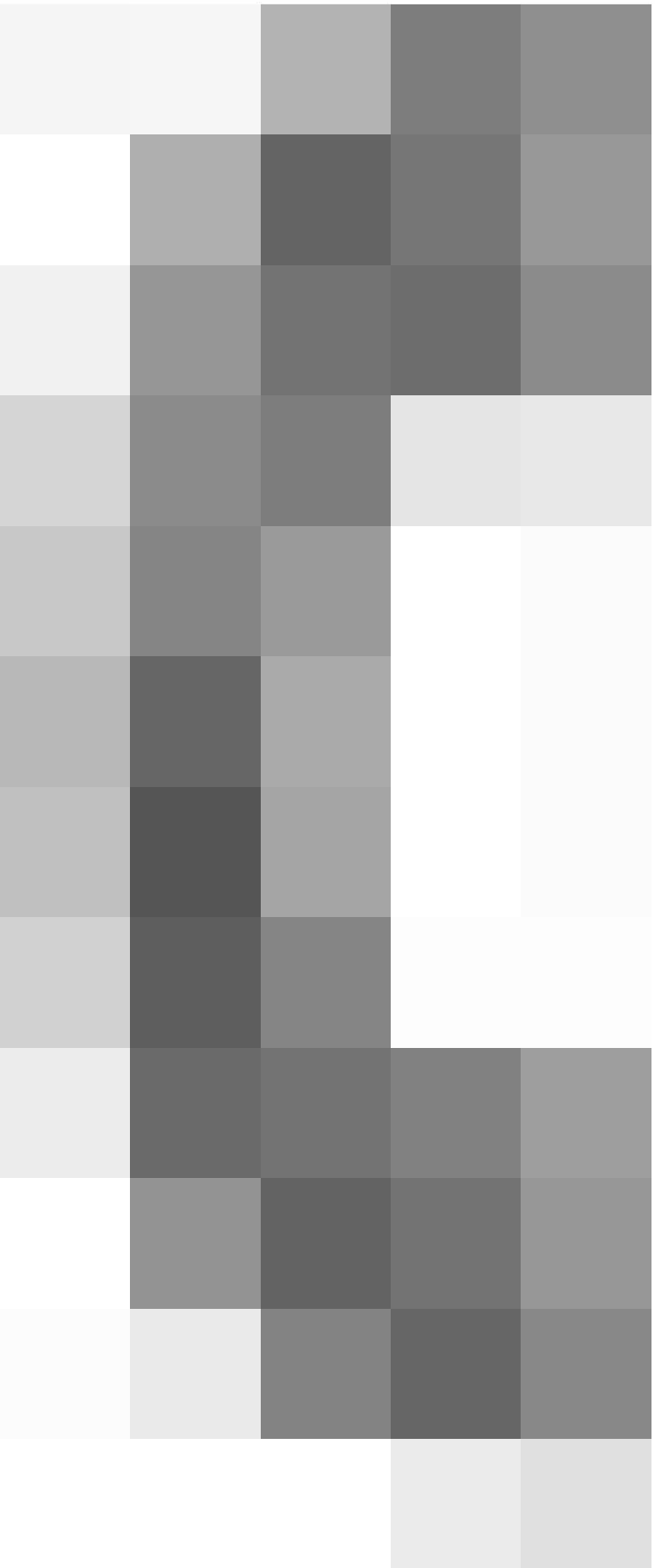
I HEREBY CERTIFY that a true and complete copy of the foregoing Amicus Curiae Brief was duly served upon the U.S. Department of Justice by delivering or mailing same on April 27, 2018 to:

United States Department of Justice
Office of the Attorney General, Room 5114
950 Pennsylvania Avenue, NW
Washington, DC 20530

Raed Gonzalez, Esq.
GONZALEZ OLIVIERI, LLC
2200 Southwest Freeway, Suite 550
Houston, TX 77098
Phone: (713) 481-3040
Fax: (713) 588-8683

GONZALEZ OLIVIERI LLC

IMMIGRATION LAW FIRM, HOUSTON, TEXAS




Super Lawyers
Raed Gonzalez
SuperLawyers.com

Awards for Excellence

Winner of Distinction

2017


TEXAS
HOUSTON'S
TOP LAWYERS
2017

UNITED STATES DEPARTMENT OF JUSTICE
OFFICE OF THE ATTORNEY GENERAL
WASHINGTON, D.C.

In the Matter of:	§	
B -, A -	§	**File No. [Redacted]**
Respondent	§	

Raed Gonzalez, Esq.
GONZALEZ OLIVIERI, LLC
2200 Southwest Freeway, Suite 550
Houston, TX 77098
Phone: (713) 481-3040
Fax: (713) 588-8683

Naimeh Salem, Esq.
GONZALEZ OLIVIERI, LLC
2200 Southwest Freeway, Suite 550
Houston, TX 77098
Phone: (713) 481-3040
Fax: (713) 588-8683

Hortencia Gallegos, Administrator
Immigration Counseling Services, Inc.
6430 Richmond Ave., Suite. 450
Houston, TX 77057
Phone: (713) 953-0047
Fax: (713) 953-1605

Cesar Espinosa, Executive Director
FIEL Houston, Inc.
6610 Harwin #214
Houston, TX 77036
Phone: (713) 364-3435

AMICI CURIAE BRIEF OF GONZALEZ OLIVIERI, LLC, IMMIGRATION COUNSELING CENTER, INC., AND FIEL HOUSTON, INC.

INTEREST OF *AMICI CURIAE*

Amici curiae Gonzalez Olivieri, LLC, immigration law firm, as well as the Immigration Counseling Center, Inc. and FIEL Houston, Inc., legal non-profit organizations, are all involved in assisting, counseling, representing immigrants and advocating for their rights and privileges under the laws of the United States.

In this matter, the Attorney General has issued an invitation for the submission of additional briefs from interested parties to assist him in assessing "[w]hether, and under what circumstances, being a victim of private criminal activity constitutes a cognizable 'particular social group' for purposes of an application for asylum or withholding of removal." *Matter of A-B-*, 27 I&N Dec. 227 (A.G. 2018).

The above-referenced firm and organizations provide assistance to immigrants in removal proceedings who flee their native lands for fear of being killed in their respective countries and seek asylum and withholding of removal as relief from removal.

Proposed *amici curiae*, hereby move the Attorney General for leave to submit the enclosed brief in response to the Attorney General's invitation. The questions posed by the Attorney General in *Matter of A-B-, supra* are of great import to the undersigned *amici curiae* who represent and assist countless immigrants in seeking asylum and withholding of removal before the immigration courts and the Board of Immigration Appeals. The expertise and familiarity of the undersigned *amici curiae* with the situations of various immigrants will assist the Attorney General in resolving the question presented in this matter.

For the aforementioned reasons, proposed *amici* respectfully request leave of the Attorney General to file the accompanying brief.

INTRODUCTION AND ISSUES PRESENTED

On March 7, 2018, the Attorney General issued an invitation to interested members of the public to file *amicus curiae* briefs addressing a single question in order to assist him in rendering a final decision in *Matter of A-B-*: whether, and under what circumstances, being a victim of private criminal activity constitutes a cognizable "particular social group" for purposes of an application for asylum or withholding of removal.

Amici curiae respectfully submit this brief to assist the Attorney General in adjudicating this issue, which may dramatically affect the administration of the immigration laws of the United States and the nation's humanitarian legal obligation to assist refugees.

ARGUMENT

I. The scope and structure of asylum and withholding of removal under federal law

An alien seeking asylum must show by a preponderance of the evidence she is a "refugee," as defined in 8 U.S.C. § 1101(a)(42)(A), and merits a grant of asylum in the exercise of discretion. *Zhao v. Gonzales*, 404 F.3d 295, 306 (5th Cir. 2005). A "refugee" includes any person unable or unwilling to return to her native country because of persecution or a well-founded fear of future persecution on account of her race, religion, nationality, membership in a particular social group, or political opinion. *See Milat v. Holder*, 755 F.3d 354, 360 (5th Cir. 2014); *see also*, 8 C.F.R. § 208.13(b).

Stated differently, to qualify for asylum, an alien must meet the multi-pronged definition of a "refugee." *See* 8 U.S.C. § 1101(a)(42)(A); *see also*, *Matter of Acosta*, 19 I&N Dec. 211, 236 (BIA 1985) (noting the Immigration and Nationality Act creates four elements that should be satisfied before an alien qualifies as a "refugee."). In general, an alien must show: (1) harm rising to the level of persecution; (2) persecution or a well-founded fear of persecution; (3) at least one

or more of five protected grounds for asylum; and (4) a nexus exists between the feared persecution and a protected ground. *Efe v. Ashcroft*, 293 F.3d 899, 904 (5th Cir. 2002).

In the same way, an alien seeking withholding of removal must establish that, if returned to her country, her life or freedom would be threatened on account of her race, religion, nationality, membership in a particular social group, or political opinion. *See* 8 U.S.C. § 1231(b)(3). However, withholding of removal has a higher burden of proof than asylum. *Morgan v. Holder*, 634 F.3d 53 (1st Cir. 2011). An alien must show that it is "more likely than not" that her life or freedom "would be threatened" if deported to her country. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 439-41 (1987); *see also*, *INS v. Stevic*, 467 U.S. 407 (1984).

In cases where persecution occurs because of membership in a particular social group, the Board of Immigration Appeals ("BIA" or "the Board") has outlined a standard to determine whether an asserted social group is cognizable under the Immigration and Nationality Act ("INA").

For a particular social group to be cognizable, the group must be (1) composed of members who share a common and immutable characteristic, (2) socially distinct in the relevant society, and (3) also defined with particularity. *Matter of M-E-V-G-*, 26 I&N Dec. 227, 237 (BIA 2014).

Separately and distinctly from establishing a protected ground, in instances, where a private non-state actor commits the conduct that rises to the level for the "persecution," for the harm to be considered "persecution" within the meaning of the INA, the asylum seeker must also prove that the government in their native country is unable or unwilling to protect them from private actor(s). *De Leon-Saj v. Holder*, 583 F. App'x 429, 429 (5th Cir. 2014).

Even where an alien seeking asylum is able to establish a protected ground for asylum, or alternatively, withholding of removal, as well as harm rising to the level of persecution, she must also establish that a nexus exists between the harm suffered and the protected ground. *Melgar de*

Torres v. Reno, 191 F.3d 307, 309 (2d Cir. 1999).

The standards for asylum and withholding of removal carry a heavy evidentiary burden. In general, the aforementioned framework has been utilized since the United States Congress adopted the Refuge Act in 1980. *See* Refugee Act, Pub. L. No. 96-212, 94 Stat. 102 (1980).

II. Whether "private criminal activity" can constitute a particular social group for asylum and withholding of removal purposes

Respectfully, the question, as posed by the Attorney General, appears to conflate distinct and separate questions into a single inquiry, namely the requirement that persecution can occur.

As a preliminary matter, it is already an established rule in asylum jurisprudence that any asserted particular social group cannot be defined exclusively by the claimed persecution, but any proffered group must be "recognizable" as a discrete group by others in the society in question and must have well-defined, particularized boundaries. *See Matter of A-M-E- & J-G-U-*, 24 I&N Dec. 69, 74-76 (BIA 2007). Therefore, victims of private criminal activity standing alone as an asserted social group cannot constitute a particular social group for asylum and withholding of removal.

However, the case of *Matter of A-B-* is a case involving an alien seeking asylum, having suffered domestic violence. In the landmark decision, *Matter of A-R-C-G-*, 26 I&N Dec. 388 (BIA 2014), the Board held that domestic violence can be a basis for asylum and women fleeing such persecution may establish membership in a particular social group.

The BIA's decision on this question is correct and *amicus curiae* would strongly urge the Attorney General to maintain this positive development in asylum jurisprudence. It is not the fact that women who are domestic violence victims suffer mere "private criminal activity" that serves as the basis of their particular social group. On the contrary, where a cognizable social group is established, the social group as was the case in *Matter of A-R-C-G-, supra* is based on several characteristics, including gender, nationality, and culturally-approved and legally-tolerated

subordinate status of women in marital and domestic relationship that make them unable to leave violent relationships. *Id.* at 394.

Violence against women which occurs in many countries with high frequency and often with impunity is the most pervasive and underreported human rights violation. Many nations have exceptionally high levels of femicide, domestic violence, sexual violence, and other gender-based forms of harm.

In many places, even where certain acts are ostensibly illegal, the law is not enforced and there are pervasive cultural attitudes, informed by societal expectations regarding gender and the role of women, that accept or tolerate a climate of permissiveness regarding domestic abuse.

Domestic violence cannot be reasonably characterized as mere "private criminal activity" without any social dimensions.[1] But, even not considering this point, the illegality of the harm that constitutes persecution in the country in question is not material or dispositive to an asylum claim.

The INA does not define "persecution" and therefore does not indicate with any specificity the kind of harm or degree of harm a person must suffer for asylum eligibility. *Zhao v. Gonzales*, 404 F.3d 295, 307 (5th Cir. 2005). While a single incident in some instances may not rise to the level of persecution, the cumulative effect of several incidents may constitute persecution. *Singh v. INS*, 94 F.3d 1353, 1358 (9th Cir. 1996).

The criminality of the conduct that is alleged to be persecution is irrelevant, if only because most conduct that would be agreed to constitute "persecution," such as attempted murder, is illegal, at least ostensibly, in the majority of countries.

---

[1] Jessica Marsden, *Domestic Violence Asylum After Matter of L R* , 123 YALE L.J. ONLINE 2512, 2519 (2014) (defining domestic violence as a "systematic and structural, a mechanism of patriarchal control. . . built upon male superiority and female inferiority, sex stereotyped roles and expectations, and economic, social, and political dominance of men and dependency of women.").

Many courts have found that domestic violence meets the definition of persecution. As is typical of domestic violence, a victim is likely to have suffered harm perpetuated over a long period of time through a series of acts, rather than a single incident.[2] Such violence often encompasses physical violence, such as rape, which a majority of courts have found to constitute persecution. *Balachova v. Mukasey*, 547 F.3d 374, 386-87 (2d Cir. 2008); *Lopez-Galarza v. INS*, 99 F.3d 954, 959 (9th Cir. 1996) (holding that rape and sexual assault constitute persecution).

This is important because the question of whether the nature and degree of harm constitutes persecution is separate and distinct from whether an alien can establish a cognizable social group and show, where the persecutor is a private actor or group, that the relevant government is unable or unwilling to offer protection. In order to obtain asylum or withholding of removal, an alien must show each of these requirements. *See* 8 U.S.C. § 1101(a)(42)(A); 8 U.S.C. § 1231(b)(3).

Amicus curiae wish to emphasize that because most acts of persecution are also criminal, to question whether an alien can obtain asylum or withholding of removal, based on such conduct, or eliminating that possibility would be contrary to asylum jurisprudence and deeply problematic.

Unavoidably, narrow interpretations of the protected grounds for asylum and withholding of removal unduly restrict humanitarian relief for those facing persecution. Such interpretations, without question, sacrifice the protective ethic at the root of asylum and is equally contrary to spirit and purpose of American asylum law.

Because the United States acceded to the United Nations Protocol Relating to the Status of Refugees, Congress amended American immigration law to reflect the Protocol's directives. *See*

---

[2] *See generally* U.S. Department of Justice, Office on Violence Against Women: *About Domestic Violence*, *available at* https://www.justice.gov/ovw/domestic_violence (last visited April 12, 2018) (defining "domestic violence" as a "pattern of abusive behavior in any relationship that is used by one partner to gain or maintain power and control over another intimate partner."); *see also*, Jessica Marsden, *Domestic Violence Asylum After Matter of L R* , 123 YALE L.J. ONLINE 2512, 2519 (2014) (defining domestic violence to encompasses "physical, sexual, emotional, economic, or psychological actions or threats of actions" directed . . . to "intimidate, manipulate, humiliate, isolate, frighten, terrorize, coerce, threaten, blame, hurt, injure, or wound" a spouse or domestic partner.").

Refugee Act, Pub. L. No. 96-212, 94 Stat. 102 (1980); *see also*, *INS v. Cardoza-Fonseca*, 480 U.S. 421, 436-37 (1987) (stating "[i]f one thing is clear from the legislative history of the new definition of 'refugee,' and indeed the entire 1980 Act, it is that one of Congress' primary purposes was to bring United States refugee law into conformance with the [Protocol].").

In enacting the Refugee Act of 1980, Congress sought to provide a law for the adjudicating claims with a reliable framework, but with sufficient flexibility to respond to evolving geopolitical situations, which includes new concepts of "failed states" and persecution by non-state actors such as transnational criminal gangs and terrorist organizations.

A contrary holding would render American asylum law needlessly anachronistic. Indeed, at the height of international concerns for refugees and asylum seekers following the Second World War, a critical concern at the time, due to ideologies such as Nazism, fascism, and totalitarianism, was the behavior of governments towards persons geographically within its authority. But to limit, or question the validity of asylum or withholding of removal claim where the State is not the cause of the persecution would limit the application of asylum laws to a geopolitically outdated situation.

Following this logic, Christians fleeing persecution in the Middle East may face significant hurdles seeking asylum or withholding of removal because groups such as ISIS are private actors engaged in what is technically "private criminal activity." However, such an outcome is in contradiction to the purpose and intent of Congress in codifying the Refugee Act.

The same outcome would occur in the context of asylum and withholding of removal cases involving female genital mutilation ("FGM"). The majority of courts recognize FGM as a form of persecution. *See*, *e.g.*, *Matter of Kasinga*, 21 I.&N. Dec. at 365 (BIA 1996); *Abay v. Ashcroft*, 368 F.3d 634, 638 (6th Cir. 2004). However, FGM is likely to be performed by private actors, even in places where the practice is ostensibly illegal, because it is a widespread practice rooted in social

custom and tradition. *Abay*, 368 F.3d at 638-39. Because "private criminal activity" is vague and broad, FGM claims would not be valid if asylum and withholding of removal claims are deemed to lack viability if the alien is a victim of a "private criminal activity."

In sum, the undersigned *amicus curiae* urges the Attorney General to affirm the decision of the BIA to grant the respondent in *Matter of A-B-* asylum on the basis of her cognizable social group as a victim of domestic violence and the significant harm she endured, which rises to the level of persecution. Any modification or substantial change to asylum jurisprudence to limit the volume of asylum and withholding of removals applications by barring aliens who are the victims of "private criminal activity" from seeking such humanitarian relief would have unconscionable, disastrous consequences for countless aliens seeking refuge from death and other violent harm.

Furthermore, such a determination would be fundamentally contrary to the letter and spirit of the law of asylum and withholding of removal as outlined in the INA, as well as the decisions of the BIA and federal courts of appeals in implementing the provisions of the law.

Therefore, the Attorney General should not modify or alter the test for stating a valid claim for asylum or withholding of removal, particularly on the basis of whether the persecuting party is a private actor or group.

CONCLUSION

Amici curiae prays the Honorable Attorney General finds that the BIA reached the correct conclusion in *Matter of A-B-* and that victims of persecution, even if metered out by private persons or groups, can state a claim for asylum and withholding of removal provided they establish as is already required that the government in their native country is unable or unwilling to provide any protection from the suffered or feared persecution.

Respectfully submitted,

GONZALEZ OLIVIERI, LLC

/s/ Raed Gonzalez

Date: April 27, 2018

Raed Gonzalez, Esq.
2200 Southwest Freeway, Suite 550
Houston, TX 77098
Phone: (713) 481-3040
Fax: (713) 588-8683

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and complete copy of the foregoing Amicus Curiae Brief was duly served upon the U.S. Department of Justice by delivering or mailing same on April 27, 2018 to:

United States Department of Justice
Office of the Attorney General, Room 5114
950 Pennsylvania Avenue, NW
Washington, DC 20530

/s/ Raed Gonzalez

Raed Gonzalez, Esq.
GONZALEZ OLIVIERI, LLC
2200 Southwest Freeway, Suite 550
Houston, TX 77098
Phone: (713) 481-3040
Fax: (713) 588-8683

Interim Decision #3918

UNITED STATES DEPARTMENT OF JUSTICE

IN THE MATTER OF A-B-

CORRECTED BRIEF OF TAHIRIH JUSTICE CENTER, THE ASIAN PACIFIC INSTITUTE ON GENDER-BASED VIOLENCE, ASISTA IMMIGRATION ASSISTANCE, AND CASA DE ESPERANZA AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT A-B-

---

Paul M. Thompson (D.C. Bar No. 973977)
Sophia A. Luby (D.C. Bar No. 241865)
David Mlaver (D.C. Bar No. 1030609)
McDERMOTT WILL & EMERY LLP
500 North Capitol Street NW
Washington, D.C. 20001
(202) 756-8032
pthompson@mwe.com

Counsel for Amici Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes **Page(s)**

Other Authorities **Page(s)**

STATEMENT OF INTEREST

Tahirih Justice Center is the largest multi-city direct services and policy advocacy organization specializing in assisting immigrant women and girls who survive gender-based violence. In five cities across the country, Tahirih offers legal and social services to women and girls fleeing all forms of gender-based violence, including human trafficking, forced labor, domestic violence, rape and sexual assault, and female genital cutting/mutilation. Since its beginning in 1997, Tahirih has provided free legal assistance to more than 20,000 individuals, many of whom have experienced the significant psychological and neurobiological effects of that trauma. Through direct legal and social services, policy advocacy, and training and education, Tahirih protects immigrant women and girls and promotes a world where they can live in safety and dignity. Tahirih amicus briefs have been accepted in numerous federal courts across the country, and Tahirih seeks to address here questions raised by the Attorney General.

The Asian Pacific Institute on Gender-Based Violence (formerly, Asian & Pacific Islander Institute on Domestic Violence) is a national resource center on domestic violence, sexual violence, trafficking, and other forms of gender-based violence in Asian and Pacific Islander communities. The Institute serves a national network of advocates and community-based service programs that work with Asian and Pacific Islander and immigrant survivors, and is a leader on providing

analysis on critical issues facing victims of gender-based violence in the Asian and Pacific Islander and in immigrant communities. The Institute leads by: promoting culturally relevant intervention and prevention, expert consultation, technical assistance and training; conducting and disseminating critical research; and informing public policy.

ASISTA Immigration Assistance worked with Congress to create and expand routes to secure immigration status for survivors of domestic violence, sexual assault, and other crimes, which were incorporated in the 1994 Violence Against Women Act (VAWA) and its progeny. ASISTA also trains and provides technical support to local law enforcement officials, civil and criminal court judges, domestic violence and sexual assault advocates, legal services, and non-profit, pro bono, and private attorneys working with immigrant crime survivors. ASISTA has previously filed amicus briefs to the Supreme Court and to the Second, Seventh, Eighth, and Ninth Circuits.

Casa de Esperanza was founded in 1982 in Minnesota to provide emergency shelter for women and children experiencing domestic violence. In 2009, Casa de Esperanza launched the National Latin@ Network for Healthy Families and Communities, which is a national resource center focused on research, training, and technical assistance, and policy advocacy focused on preventing and addressing domestic violence in Latino and immigrant communities.

INTRODUCTION

In many corners of the world, women are treated as property: they are regarded as possessing little to no inherent value and as second-class citizens. They are trafficked, literally bought and sold for sex or labor. Their bodies are mutilated in order to perpetuate notions of female sexuality as vile and uncontrollable. They are forced into marriages, lifetimes of subordination. And they are wooed, duped, and coerced into relationships with violent men, eventually so fearful and effectively silenced that they continue to share their beds with men who use sexual, verbal, emotional, and physical abuse to establish power and control over them.

These acts of brutality occur because societies and states allow them to and, in fact, are complicit in them. In these cultures, women are viewed as subordinate to men and in turn, the state affords them few legal protections or safety nets. Even if acts of violence against women are outlawed, police and prosecutors scoff at women who try to use the law to protect themselves, refuse to believe their claims, and harass and even rape them in these moments of extreme vulnerability.

Over the course of more than two decades, the Courts of Appeals and Board of Immigration Appeals ("BIA") have held that survivors of gender-based violence, just like those fleeing religious or political persecution, are eligible for asylum if they meet the statutory criteria that establish them as refugees. This legal

precedent considers the social, economic, and legal reality that these women face. It recognizes that these women are survivors of violence brought about by a public code of conduct that allows them to be victimized because they are women. In a 1996 precedent-setting case that first established gender-based persecution as grounds for asylum, the BIA granted 17-year-old Fauziya Kassindja asylum after she fled a forced, polygamous marriage and female genital mutilation. *In re Kasinga*, 21 I. & N. Dec. 357 (BIA 1996). To escape guaranteed, life-long, physical, sexual, and psychological harm, Ms. Kassindja fled her country and found refuge in the United States. In the decades since that case, the United States has provided asylum to women and girls fleeing other forms of gender-based persecution, including human trafficking, forced marriage, severe domestic abuse, rape and sexual violence (including as a weapon of war), so-called "honor" crimes and killings, acid burnings, dowry deaths, and widow rituals.

Now, however, the Attorney General contemplates a sea change in this long-settled law. This case involves a survivor of severe domestic violence from El Salvador. As the BIA found, this victim demonstrated that the violence she endured rises to the level of persecution, that she belongs to a cognizable social group under established legal precedent, and that she meets all other statutory requirements for a grant of asylum. Ignoring the long history of asylum decisions holding that gender-based violence, including domestic violence, is motivated by

societal norms that persist with public acquiescence and complicity, the Attorney General now asks

> [w]hether, and under what circumstances, being a victim of a private criminal activity constitutes a cognizable "Particular Social Group" (PSG) for purposes of an application for asylum or withholding of removal.

Matter of A-B-, 27 I. & N. Dec. 227 (AG 2018).[1] As set forth more fully in this brief, there are multiple problems with this question.

First, the question assumes its own answer. In many countries, domestic violence is emboldened by government inaction. The Attorney General's question suggests a categorical rule that would declare all domestic violence "private criminal activity" and outside the bounds of asylum protection. But, as Section I argues, such a categorical rule is arbitrary and finds no support in current law for four reasons:

---

[1] Although asked by both parties to clarify the question, the Attorney General refused to do so. *See Matter of A-B-*, 27 I. & N. Dec. 247 (AG Mar. 7, 2018). Instead, he proposes rewriting asylum law to exclude victims of "private criminal activity" on the ground that being such a victim does not qualify one to be in a particular social group ("PSG"). This misses the point. *Amici* are unaware of any case in which applicants for asylum have claimed that victims of private criminal activity constitute a freestanding PSG. Instead, in domestic violence cases, applicants are granted asylum because they establish that they are persecuted and that the persecution is on account of their membership in another PSG.

- It ignores evidence demonstrating that in several countries, public social norms, political structures, and religious dynamics allow gender-based violence to occur without penalty or protection;
- It impermissibly carves out gender-based domestic violence from the statutory definition of persecution;
- It incorrectly prevents domestic violence survivors from showing that their persecution is "on account of" membership in a particular social group ("PSG"); and
- It flouts the basic rule that the PSG inquiry is fact-based and requires case-by-case adjudication. *See Matter of M-E-V-G-*, 26 I. & N. Dec. 227, 251 (BIA 2014) ("Social group determinations are made on a case-by-case basis." (citing *Matter of Acosta*, 19 I. & N. Dec. 211, 233 (BIA 1985))).

For these reasons, the Attorney General should not categorically bar domestic violence survivors from seeking asylum in the United States.

Second, the Attorney General's question implies that if persecution results from "private criminal activity," that fact can preclude the establishment of a PSG. As Section II argues, it cannot. Whether persecution is "private" or "public" and whether it constitutes a crime or not has no bearing on PSG validity or membership. While PSGs are not formed *because* one is a victim of domestic or gender-based violence, certain PSGs can and do logically include those victims. Thus, an applicant who suffered severe physical abuse from her husband was a member of the PSG that comprised "married women in Guatemala who are unable to leave their relationship." *Matter of A-R-C-G-*, 26 I. & N. Dec. 388, 389 (BIA 2014). Whether the abuse was private and/or criminal simply plays no logical role in determining the PSG.

For these reasons, the Attorney General should affirm the BIA's order.

ARGUMENT

To qualify for asylum, an applicant must be a "refugee" under 8 U.S.C. § 1101(a)(42). The applicant can establish herself as a "refugee" by demonstrating that "'she has suffered from past persecution or that she has a well-founded fear of future persecution' on account of . . . membership in a particular social group." *Mulyani v. Holder*, 771 F.3d 190, 198 (4th Cir. 2014) (quoting *Mirisawo v. Holder*, 599 F.3d 391, 396 (4th Cir. 2010)).

Among other things, persecution can "involve[] the infliction or threat of death, torture, or injury to one's person or freedom, on account of one of the enumerated grounds in the refugee definition." *Id.* (quoting *Li v. Gonzales*, 405 F.3d 171, 177 (4th Cir. 2005)). Persecution also includes "actions less severe than threats to life or freedom," and applicants who have been "severely physically abused" meet the persecution requirement. *Id.* (quoting *Li*, 405 F.3d at 177). "An applicant who establishes past persecution on the basis of a protected factor benefits from a rebuttable presumption that she has a well-founded fear of future persecution." *Id.* (citations omitted). Finally, the persecution need not be directly at the hands of the government. *See, e.g.*, *Oliva v. Lynch*, 807 F.3d 53, 59 (4th Cir. 2015).

The applicant's persecution must also be "on account of" her membership in a PSG. This element is met if her membership "serves as at least one central reason for" the persecution. *Pacas-Renderos v. Sessions*, 691 F. App'x 796, 802 (4th Cir. 2017) (quoting *Crespin-Valladares v. Holder*, 632 F.3d 117, 127 (4th Cir. 2011)) (internal quotation marks omitted). Her membership "need not be the central reason or even a dominant central reason for persecution," but "it must be more than an incidental, tangential, superficial, or subordinate reason." *Id.* (quoting *Cordova v. Holder*, 759 F.3d 332, 337 (4th Cir. 2014)).

As to what constitutes a PSG, the BIA and circuit courts hold that a PSG is valid if it is "(1) composed of members who share a common immutable characteristic, (2) defined with particularity, and (3) socially distinct within the society in question." *Pacas-Renderos*, 691 F. App'x at 804 (quoting *Oliva*, 807 F.3d at 61).

For decades, the BIA has held that survivors of gender-based violence *can* meet all three criteria. In other words, while domestic violence victimhood or gender-based victimhood may not itself define a freestanding PSG, survivors of gender-based and domestic violence can be members of certain PSGs. This is not to say that *every* such victim may qualify for asylum in the United States. Such a categorical rule would run afoul of congressional intent and upset decades of settled law. *See Acosta*, 19 I. & N. Dec. at 233 (establishing current asylum

framework) (subsequent history omitted). Instead, *amici* argue that just as a categorical rule admitting *every* gender-based violence survivor into the United States is overbroad, so, too, is a rule categorically *excluding* them. For the reasons set forth below, any rule excluding domestic violence victims from receiving asylum would be overbroad and arbitrary, upturning years of precedent.

I. DOMESTIC VIOLENCE CAN CONSTITUTE PERSECUTION UNDER THE INA

In some countries, women have no recourse to escape from or seek justice for rapes, beatings, and other abuse because cultural, social, and religious norms foster views that women are subservient to or even property of men. And, in many of those places, governments are unwilling or unable to control private actors who engage in domestic violence.

Recognizing this reality, based on evidence of specific country conditions, the BIA and the federal courts have long and unanimously held that survivors of domestic violence can meet the statutory requirement of persecution if they can show the harm they suffered at the hands of a non-governmental actor was sufficiently severe, and if they can show their home government's "unwillingness or inability to control private conduct." *Aldana-Ramos v. Holder*, 757 F.3d 9, 17

(1st Cir. 2014), *as amended* (Aug. 8, 2014).[2] Applicants can also satisfy this "persecution" element by showing that their home governments are unwilling or unable to protect them from private acts of persecution. *See Matter of S-A-*, 22 I. & N. Dec. 1328, 1335 (BIA 2000) (persecution found when Moroccan father had "unfettered" power over daughter, and it was futile to report criminal acts to the police); *Sarhan v. Holder*, 658 F.3d 649, 658 (7th Cir. 2011) (persecution found when home country recognized honor killing as a crime, but punished it with "little more than a slap on the wrist"); *Menjivar v. Gonzales*, 416 F.3d 918, 921 (8th Cir. 2005).

Nor does the United States stand alone in recognizing that domestic violence can, and often does, arise from social, cultural, and religious norms that allow rapes and beatings to occur without deterrence because governments are unwilling to prevent them or punish the perpetrators. Indeed, far from considering domestic and gender-based violence a "private criminal matter," international organizations

---

[2] *See also Malu v. Att'y Gen.*, 764 F.3d 1282, 1291 (11th Cir. 2014); *Paloka v. Holder*, 762 F.3d 191, 195 (2d Cir. 2014); *R.R.D. v. Holder*, 746 F.3d 807, 809 (7th Cir. 2014); *Constanza-Martinez v. Holder*, 739 F.3d 1100, 1102 (8th Cir. 2014); *Doe v. Holder*, 736 F.3d 871, 877 78 (9th Cir. 2013); *Karki v. Holder*, 715 F.3d 792, 801 (10th Cir. 2013); *Garcia v. Att'y Gen.*, 665 F.3d 496, 503 (3d Cir. 2011), *as amended* (Jan. 13, 2012); *Kante v. Holder*, 634 F.3d 321, 325 (6th Cir. 2011); *Crespin-Valladares v. Holder*, 632 F.3d 117, 128 (4th Cir. 2011); *Tesfamichael v. Gonzales*, 469 F.3d 109, 113 (5th Cir. 2006).

have regularly investigated and reported on countries where public conditions allow that conduct to flourish. As the United Nations Report on the World's Women in 2010 summarized:

> Violence against women throughout their life cycle is a manifestation of the historically unequal power relations between women and men. It is perpetuated by traditional and customary practices that accord women lower status in the family, workplace, community and society, and it is exacerbated by social pressures. These include the shame surrounding and hence difficulty of denouncing certain acts against women; women's lack of access to legal information, aid or protection; a dearth of laws that effectively prohibit violence against women; [and] inadequate efforts on the part of public authorities to promote awareness of and enforce existing laws . . . .

United Nations Secretariat Department of Economic and Social Affairs, *The World's Women 2010*, at 127.[3] These reports contain ample evidence that domestic gender-based violence is not always appropriately characterized as "private criminal conduct." Therefore, any new interpretation of "refugee" must account for this evidence.

---

[3]https://unstats.un.org/unsd/demographic/products/Worldswomen/WW2010%20Report_by%20chapter%28pdf%29/Violence%20against%20women.pdf.

A. Any rule excluding victims of domestic violence from asylum as "private criminal conduct" would ignore substantial evidence that in many places, domestic violence arises from and is allowed to continue by public cultural, social, and religious norms

Overwhelming evidence, much of it from the U.S. government, shows that domestic violence and other forms of gender-based violence permeate some countries' cultural and social landscapes. For example, evidence shows that the social and cultural conditions in places as different as Guatemala, Afghanistan, and around the world, allow domestic and other gender-based violence to occur.[4] At the same time, institutionalized acceptance of domestic violence prohibits victims from obtaining protection or recourse. Widely available research about these countries shows that violence against women is often deeply ingrained in the culture, and explicitly condoned by the state.

1. Evidence shows that cultural, religious, and economic conditions in some countries create widespread gender-based and domestic violence

As the United States itself has recognized, patriarchal cultures, attitudes of *machismo*, legacies of violence, and the economic marginalization of women allow domestic violence to permeate society. Indeed, the State Department recently acknowledged that domestic violence is a "serious problem" in Guatemala. U.S.

---

[4] Conditions in El Salvador, the country at issue in this case, are described in the Respondent's opening brief and evidentiary submissions.

Dep't of State, *Guatemala 2016 Human Rights Report* 15 (2016).[5] It is similarly a widespread concern in dozens of other countries, including Kenya, Russia, Burma, Cameroon, and Haiti. U.S. Dep't of State, *Kenya 2016 Human Rights Report* 35 (2016);[6] U.S. Dep't of State, *Russia 2016 Human Rights Report* 56 (2016);[7] U.S. Dep't of State, *Burma 2016 Human Rights Report* 38 (2016);[8] U.S. Dep't of State, *Cameroon 2017 Human Rights Report* 26 (2017);[9] U.S. Dep't of State, *Haiti 2016 Human Rights Report* 21 (2016).[10] The State Department also recognized that in Afghanistan, "hundreds of thousands of women continued to suffer abuse at the hands of their husbands, fathers, brothers, in-laws, armed individuals, parallel legal systems, and institutions of the state, such as the police and justice system." U.S. Dep't of State, *Afghanistan 2016 Human Rights Report* 35 (2016).[11] And in Saudi Arabia, domestic violence is believed to be "widespread" and "seriously underreported." U.S. Dep't of State, *Saudi Arabia 2016 Human Rights Report* 41 (2016).[12]

---

[5] https://www.state.gov/documents/organization/265802.pdf.
[6] https://www.state.gov/documents/organization/265478.pdf.
[7] https://www.state.gov/documents/organization/265678.pdf.
[8] https://www.state.gov/documents/organization/265536.pdf.
[9] https://www.state.gov/documents/organization/277223.pdf.
[10] https://www.state.gov/documents/organization/265806.pdf.
[11] https://www.state.gov/documents/organization/265742.pdf.
[12] https://www.state.gov/documents/organization/265730.pdf.

In these and other countries, the high rate of domestic violence is attributable to the social and cultural norms that render women second-class citizens. Women are subordinate to their partners and fathers and are considered "objects owned by men." Comisión Internacional Contra la Impunidad en Guatemala, *Human Trafficking for Sexual Exploitation Purposes in Guatemala* 30 (2016).[13]

In this way, some cultures and governments normalize domestic violence against women. For example, domestic violence is condoned by authorities in Afghanistan who "attribute the abuse to a woman's alleged disobedience of her husband." *Report of the Special Rapporteur on Violence Against Women, Its Causes and Consequences, Mission to Afghanistan* 5 (May 12, 2015).[14] As a result, domestic violence is often not a crime. *Id.* The same holds true in other countries like Burma, Cameroon, and Haiti, where domestic violence is not specifically criminalized. *See Burma 2016 Human Rights Report* 38; *Cameroon 2017 Human Rights Report* 26; *Haiti 2016 Human Rights Report* 21. Furthermore, last year, Russia decriminalized domestic violence for first time offenders. *See Russia 2016 Human Rights Report* 56.

---

[13]http://www.cicig.org/uploads/documents/2016/Trata_Ing_978_9929_40_829_6.pdf.
[14] http://www.un.org/ga/search/view_doc.asp?symbol A/HRC/29/27/Add.3.

2. Evidence shows that in some countries, public religious norms support and foster domestic gender-based violence

The legal regimes in some countries are intertwined with religious customs that favor the repression of women. In other countries, the formal legal regime is ignored in favor of religious and cultural custom meted out by tribal or community tribunals. This allows gender-based violence to flourish. For example, Article 130 of the Afghani constitution allows courts to apply Hanafi jurisprudence, a form of sharia law, to rule on matters not specifically covered by the constitution or other laws. *Afghanistan 2016 Human Rights Report* 9. As a result, Afghan courts have charged women with crimes of "immorality" or "running away from home" when they attempt to leave their abusers. *Id.* Many women who try to leave their home are charged with "attempted *zina*" engaging in extramarital sexual relations for being outside the home and in the presence of nonrelated men. *Id.*

3. Evidence shows that in some countries, women know that reporting domestic violence is futile

Despite its prevalence, domestic violence is still underreported around the world. Victims may not report because of familial pressure, economic dependency on the abuser, fear of retaliation, poor resources, or lack of support in the legal system. *See* United Nations High Commissioner for Refugees ("UNHCR"), *Eligibility Guidelines for Assessing the International Protection Needs of Asylum*

Seekers from Guatemala 34 (Jan. 2018);[15] *Saudi Arabia 2016 Human Rights Report* 41 (rape is underreported because of "societal and familial reprisal, including diminished marriage opportunities, criminal sanctions up to imprisonment or accusations of adultery or sexual relations outside of marriage"). For example, the State Department recognized that in Armenia, "[r]ape, spousal abuse, and domestic violence was underreported due to social stigma, the absence of female police officers and investigators, and at times police reluctance to act." U.S. Dep't of State, *Armenia 2016 Human Rights Report* 30 (2016).[16] The process of addressing violence against women also deters women from reporting it, and in some countries, police may not even bother to respond to allegations of violence because it is regarded as a "family matter." *See Kenya 2016 Human Rights Report* 37. Ultimately, women are less likely to report domestic violence knowing that society condones it and the state is unable or unwilling to protect them from it.

4. Evidence shows that some states are unable or unwilling to provide protection for victims of gender-based violence

In many countries, domestic violence is not criminal. Even where it is, those laws are often not enforced. For example, although Guatemala, Afghanistan, and

---

[15] http://www.refworld.org/docid/5a5e03e96.html.
[16] https://www.state.gov/documents/organization/265604.pdf.

Saudi Arabia have laws in place that theoretically make domestic violence illegal,[17] these laws are rarely enforced. Even those theoretical laws do not provide adequate protection. For example, in Saudi Arabia and Afghanistan, the law does not recognize spousal rape as a crime. *See Saudi Arabia 2016 Human Rights Report* 41; *Afghanistan 2016 Human Rights Report* 33. In Afghanistan, some judges and prosecutors even reported that they did not know that a law prohibiting domestic violence existed. *Afghanistan 2016 Human Rights Report* 34. Those authorities who knew of the law prohibiting domestic violence failed to enforce it. *Id.* at 33. Indeed, in Afghanistan, the law criminalizing violence against women is viewed unfavorably by some as "un-Islamic." *Id.* In these countries, as well as others, the lack of comprehensive domestic violence laws and poor enforcement of existing laws allows perpetrators to abuse with impunity.

Often, police minimize the significance of domestic violence, believing it is a personal matter that the partners should resolve themselves. Indeed, in Saudi Arabia, investigators sometimes hesitate to enter homes of domestic violence victims without the approval of the head of household, who in many cases is also

---

[17] *See e.g.*, Law Against Femicide and Other Forms of Violence Against Women, Ley Contra el Femicidio y Otras Formas de Violencia Contra la Mujer, Decreto 22-2008, Apr. 9, 2008 (Guatemala); Elimination of Violence Against Women Law, 2009 (Presidential Decree No. 91, July 20 2009) (Afghanistan); Protection from Abuse Act 2013 (Saudi Arabia).

the abuser. *Saudi Arabia 2016 Human Rights Report* 41 42. Additionally, investigators encourage victims to reconcile with their abusers to keep the family intact or simply return a woman directly to her abuser, who often is her legal guardian. *Id.* at 42. In Afghanistan, the police response to domestic violence is "limited" due in part to "sympathy towards perpetrators." *Afghanistan 2016 Human Rights Report* 35. As a result, reporting domestic violence to police forces most often does not provide any real protection to victims and even puts them into more danger.

Asylum applicants who survive rape, sexual assault, severe beatings, female genital mutilation, forced marriage, and other forms of persecution that may constitute "private criminal activity" can offer ample evidence to support their applications. This persecution occurs and festers because governments are unwilling or unable to control it. Under the INA, where governments are unwilling or unable to provide protection from persecution by a non-government actor, asylum is appropriate. *Aldana-Ramos*, 757 F.3d at 17. Any rule that seeks to exclude domestic violence survivors from asylum eligibility would disregard substantial evidence of conditions of countries in which domestic violence is not a private criminal matter.

B. A new rule that asylum applicants cannot establish "persecution" when the persecutor is a private criminal actor is contrary to long-settled law

To obtain asylum in the United States, an applicant must demonstrate a "well-founded fear of persecution." 8 U.S.C. § 1101(a)(42)(A). She must show a "genuine subjective fear of persecution" and demonstrate that "a reasonable person in like circumstances would fear persecution." *Crespin-Valladares*, 632 F.3d at 126 (quoting *Chen v. INS*, 195 F.3d 198, 201 02 (4th Cir. 1999)).

What constitutes persecution is also well-settled. For instance, the Fourth Circuit has consistently held that persecution can include physical harm and the "threat of death." *Id.* The BIA has held that persecution can include beatings and rape. *See A-R-C-G-*, 26 I. & N. Dec. at 389; *S-A-*, 22 I. & N. Dec. at 1335, 1337; *see also Kone v. Holder*, 596 F.3d 141, 149 (2d Cir. 2010) (applicant subjected to genital mutilation had well-founded fear of persecution); *Lazo-Majano v. INS*, 813 F.2d 1432, 1434 (9th Cir. 1987) (recognizing rape as persecution), *overruled on other grounds by Fisher v. INS*, 79 F.3d 955 (9th Cir. 1996).

Courts have long and unanimously held that under the INA, acts of persecution may well be carried out by private actors. *See Al-Ghorbani v. Holder*, 585 F.3d 980, 998 99 (6th Cir. 2009) (Yemeni government unwilling or unable to protect petitioners against death threats made by military officer); *Nabulwala v. Gonzales*, 481 F.3d 1115, 1116 18 (8th Cir. 2007) (family-arranged rape

constitutes persecution); *Mohammed v. Gonzales*, 400 F.3d 785, 798 n.19 (9th Cir. 2005) (mutilation by "family members or fellow clan members" constitutes persecution); *Ali v. Ashcroft*, 394 F.3d 780, 785 87 (9th Cir. 2005) (persecution "need not be directly at the hands of the government"). In short, any holding that criminal acts committed by a private actor *cannot* constitute persecution under the INA is contrary to decades of settled law. *See, e.g.*, *Hernandez-Avalos v. Lynch*, 784 F.3d 944, 950 53 (4th Cir. 2015); *S-A-*, 22 I. & N. Dec. 1328; *Acosta*, 19 I. & N. Dec. at 222 23; *see also* UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status* ¶ 65 (1979, rev. 1992); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 438 39 (1987).

C. A rule that asylum applicants cannot show that persecution from a private criminal actor was "on account of" a PSG would be contrary to the INA

Like every other asylum applicant, a gender-based violence survivor must demonstrate that her membership in a PSG (or other protected ground) "was or will be at least one central reason for" her persecution. 8 U.S.C. § 1158(b)(1)(B)(i). One way to show that nexus, for example, is to show that the home country's social norms allow and condone the conduct because of the group an applicant is in, especially where the state refuses to protect her from abuse. *See Velihaj v. Att'y Gen.*, 336 F. App'x 193, 195 (3d Cir. 2009) (upholding asylum claim because government failed to protect petitioner "on account of" a protected ground);

Ndayshimiye v. Att'y Gen., 557 F.3d at 129. The applicant "need not disprove every [other] possible motive" for the persecution. *Vata v. Gonzalez*, 243 F. App'x 930, 940 (6th Cir. 2007); *see also id.* at 940 41; *see also Marroquin-Ochoma v. Holder*, 574 F.3d 574, 579 (8th Cir. 2009).

That the abuser or the abuse is "private" (or "criminal") is irrelevant to showing nexus. "[I]f there is a nexus between the persecution and the membership in a particular social group, the simultaneous existence of a personal dispute does not eliminate that nexus." *Qu v. Holder*, 618 F.3d 602, 608 (6th Cir. 2010); *see also Sarhan*, 658 F.3d at 655 57 (although a man's honor killing of his sister "may have a personal motivation," honor killings have "broader social significance," and the killing of the applicant would be "on account of" membership in PSG comprising "women in Jordan who have (allegedly) flouted repressive moral norms, and thus who face a high risk of honor killing"); *Aldana-Ramos*, 757 F.3d at 18 19. Thus, an applicant whose husband regularly beats her for leaving home against his orders (but does not beat his son, brother, or sister for doing the same) may well be able to show that she belongs to a PSG and that the beatings are, at least in part, on account of that PSG membership. The fact that the abuse may also have involved personal or "private" anger or that it was criminal does not defeat the nexus. Thus, there is no logical basis for holding that "private criminal conduct" somehow bars the showing of nexus. Where statutory language and logic

do not exclude the category of domestic violence victims, there is no basis for the Attorney General to carve out domestic violence victims from the asylum authorized by Congress.

D. The Fourth Circuit's decision in *Velasquez v. Sessions* does not alter this result

In the present case, the IJ took the unusual step of refusing to implement the BIA's order and instead seeking to certify the decision for reconsideration in light of the Fourth Circuit's decision in *Velasquez v. Sessions*, 866 F.3d 188 (4th Cir. 2017). Likewise, in his certification, the Attorney General states that "several Federal Article III courts have recently questioned whether victims of *private violence* may qualify for asylum under section 208(b)(1)(B)(i) of the Immigration and Nationality Act based on their claim that they were persecuted because of their membership in a particular social group." *Matter of A-B-*, 27 I. & N. Dec. 247, 249 (AG Mar. 7, 2018) (emphasis added).

The BIA and the federal courts have long recognized what the statutory language requires: that in some cases, acts of private or non-State actors can certainly constitute persecution on account of a protected basis. *See Ivanov v. Holder*, 736 F.3d 5 (1st Cir. 2013) (religion); *Aliyev v. Mukasey*, 549 F.3d 111 (2d Cir. 2008) (nationality); *A-R-C-G-*, 26 I. & N. Dec. at 389 (PSG membership). To be sure, in some cases, courts have held that acts of private violence *do not* constitute persecution on account of a protected basis. But *amici* are unaware of

any case suggesting the outcome the Attorney General suggests here: that victims of private-actor violence suffered on account of PSG membership are *not* eligible for the relief that is otherwise available to victims of private-actor violence on account of race, religion, nationality, or political opinion. Indeed, such a suggestion is contrary to the INA, which applies the same test to all the listed protected groups.

Velasquez does not suggest a different outcome. In that case, the Fourth Circuit denied asylum to a Honduran applicant and her son who fled Honduras after her mother-in-law repeatedly kidnapped the son and threatened the applicant's life. 866 F.3d at 191 92. While the applicant and her son were in custody in the United States, the son's uncle murdered the applicant's sister, having mistaken her for the applicant. *Id.* at 192. The applicant claimed refugee status as a persecuted member of a PSG, which, she argued, was her nuclear family. *Id.* The IJ found that Velasquez was not eligible for asylum, and the BIA affirmed. *Id.* at 192 93. She appealed on the ground that the BIA erred in finding that she was not persecuted "on account of" her membership in a PSG.

The Fourth Circuit agreed with the IJ and BIA that while "membership in a nuclear family qualifies as a protected ground for asylum purposes," *id.* at 194 (citing *Crespin Valladares*, 632 F.3d at 125), the applicant could not show that the persecution was *on account of* her membership in the nuclear family. Instead, the

applicant's fears arose only from what the court characterized as her "purely personal" custody dispute with her mother-in-law. *Id.* at 196. The court found that the mother-in-law's threats "were not motivated by Velasquez' family status but by a personal desire to obtain custody over" the son. *Id.* at 195. Put another way, the mother-in-law harmed Velasquez not due to Velasquez's family status, but rather because the mother-in-law wanted custody of her grandson. Velasquez's status as her son's mother, based on the factual record developed in that case, was only an "incidental . . . reason for [her] persecution." *Hernandez-Avalos*, 784 F.3d at 949.

Velasquez did *not* hold that private criminal action barred the applicant from establishing a PSG. To the contrary, the Court recognized a nuclear family as a PSG. Instead, the Court there considered whether, on the factual record before it, the applicant had established nexus. That case is simply inapposite here, as the Attorney General has announced he is reviewing issues of PSG membership. Moreover, nowhere in *Velasquez* did the Court consider whether the fact that the mother-in-law was a "private criminal actor" would preclude asylum.

Likewise, the nexus at issue there did not involve gender-based social norms or evidence of state inaction. Here, in contrast, the gender-based violence arose in a *machismo* culture in which men generally regard their wives as under their control. And even when the applicant tried to leave her husband and obtained a divorce in 2013, the violence continued uncontrolled. *See Matter of A-B-*, Slip Op.

at 2 3 (BIA Aug. 18, 2017). When the applicant's ex-husband raped her in 2014, *id.* at 3, the two were not even members of the same household. Finally, the applicant presented evidence that the government was unable or unwilling to protect her when she showed that her ex-husband's brother a local police officer threatened her. *Id.*

Unlike *Velasquez*, this case offers an excellent example of how gender-based domestic violence by a private criminal actor can certainly be "on account of" membership in a particular social group. Here, the persecution was motivated by a vision of the applicant as the persecutor's property, a notion that society reinforced by treating the victim as property and doing nothing to prevent the continued abuse. In this case, the domestic violence victim met the nexus requirement, reasonably fearing future persecution as a result of her membership in a PSG.

II. THE CHARACTERIZATION OF GENDER-BASED VIOLENCE AS "PRIVATE ACTION" IS NOT RELEVANT TO WHETHER AN APPLICANT CAN ESTABLISH A PSG

Another problem with the Attorney General's question is that it creates an artificial dichotomy between "private" and "public" actors. This dichotomy is nowhere in the asylum statute. Indeed, whether the persecution is carried out by a private (non-State) actor or not simply does not affect the ultimate question: whether the applicant is a member of a PSG.

For an applicant seeking asylum, she must establish that her PSG is "(1) composed of members who share a common immutable characteristic, (2) defined with particularity, and (3) socially distinct within the society in question." *M-E-V-G-*, 26 I. & N. Dec. at 237. These requirements are referred to as (1) immutability, (2) particularity, and (3) social distinctness. The inquiry is fact-based and requires a case-by-case adjudication system. *Id.* at 251; *see also Pirir-Boc v. Holder*, 750 F.3d 1077, 1084 (9th Cir. 2014). But none of these factors turn on whether the persecutor is a public or private actor.

A. Whether persecution is carried out by a private (non-State) actor has no bearing on immutability

To satisfy the immutability requirement, an applicant must demonstrate that a proposed PSG has a characteristic that "the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences." *Acosta*, 19 I. & N. Dec. at 233; *see also Matter of W-G-R-*, 26 I. & N. Dec. 208, 213 (BIA 2014).

In the context of gender-based violence, a PSG's immutable trait is often gender. For example, the BIA has held that married women who are incapable of leaving their husbands because of societal or religious norms precluding divorce share immutable characteristics. *See A-B-*, Slip Op. at 3 (citing *A-R-C-G-*, 26 I. & N. Dec. at 390, 392 95). Similarly, in *Matter of A-R-C-G*, while the applicant was a survivor of domestic violence, her PSG's immutable characteristics were

gender and an inability to leave a marriage, not being the victim of a past crime. 26 I. & N. Dec. at 392 93. A subgroup of women can constitute a PSG defined with more particularity than simply "women" and can fulfill the immutability requirement simply by comprising only women.

B. Whether persecution is carried out by a private (non-State) actor has no bearing on particularity

"The 'particularity' requirement relates to the group's boundaries or . . . the need to put 'outer limits' on the definition of a 'particular social group.'" *M-E-V-G-*, 26 I. & N. Dec. at 238 (citation omitted). To be sufficiently particular, a PSG must have "particular and well-defined boundaries." *Matter of S-E-G-*, 24 I. & N. Dec. 579, 582 (BIA 2008). This requirement helps define the outer limits of the definition of a PSG. *See Castellano-Chacon v. I.N.S.*, 341 F.3d 533, 549 (6th Cir. 2003), *holding modified by Almuhtaseb v. Gonzales*, 453 F.3d 743 (6th Cir. 2006). This assessment must be done in the context of the applicant's home society. *Id.*[18]

Whether the persecution at issue was "private criminal activity" has no bearing on whether the group is sufficiently particular. While it is difficult for *amici* to predict what may constitute "private criminal activity," the BIA and courts

---

[18] While *amici* address these elements because it is current law, we note that many circuit courts have not decided whether these elements are valid. *Amici*'s position on these issues is that the current PSG requirements are problematic as a matter of law. We do not intend by this briefing to endorse these requirements.

have found some PSGs including victims of persecution by non-state actors sufficiently particular. For instance, in *Qu v. Holder*, the Sixth Circuit recognized a PSG comprising "women in China who have been subjected to forced marriage and involuntary servitude." 618 F.3d at 607. Cases like *Qu* reflect the fact that the purpose of the particularity inquiry to ensure that a given group's parameters are clear and definite has nothing to do with the private or public nature of the persecution or the persecutor.

C. Whether persecution is "private criminal activity" has no bearing on social distinctness[19]

The PSG inquiry's final element, "social distinctness," sometimes referred to as "social visibility," requires that the society in the particular area view the group as distinct. *M-E-V-G-*, 26 I. & N. Dec. at 243. Distinctness is evaluated from the perspective of society in a country or region of a country, not from the perspective of an assailant. *Id.* (citation omitted). Social distinctness does not require that the distinguishing characteristic be immediately recognizable to others. *See W-G-R-*, 26 I. & N. Dec. at 216; *see also Temu v. Holder*, 740 F.3d 887, 892 (4th Cir. 2014). Attempts by group members to hide the distinguishing characteristic do not negate

---

[19] Some courts have questioned the validity of the social-distinctness requirement. *See, e.g.*, *Gatimi v. Holder*, 578 F.3d 611 (7th Cir. 2009); *Valdiviezo-Galdamez v. Att'y Gen.*, 663 F.3d 582, 604 (3d Cir. 2011).

the social distinctness of the group. *Id.* at 217. The key to social distinction is that the group is perceived as a group by society. *Matter of C-A-*, 23 I. & N. Dec. 951, 956 57 (BIA 2006); *see also Temu*, 740 F.3d at 892 (citing *C-A-*, 23 I. & N. Dec. at 959).

As with the first two factors, nothing about the social-distinctness requirement invites analysis about whether the applicant was a victim of a private or public crime. Courts and the BIA have consistently found, based on evidence presented, that victims of domestic violence, forced marriage, trafficking, and female genital mutilation can be members of PSGs that are socially distinct. For instance, in *A-R-C-G-*, the BIA held that "married women in Guatemala who are unable to leave their relationship" are socially distinct. 26 I. & N. Dec. at 393 95. The BIA relied on evidence of Guatemala's "culture of 'machismo and family violence.'" *Id.* at 394 (citation omitted). This evidence showed that the relevant society "makes meaningful distinctions based on the common immutable characteristics of being a married woman in a domestic relationship that she cannot leave." *Id.*; *see also Temu*, 740 F.3d at 893. While social distinctness requires a social consensus based on a PSG's characteristics, private acts constituting persecution do not negate or otherwise affect whether the applicant can show social distinctiveness.

For these reasons, whether persecution happens through "private criminal activity" simply cannot bar an applicant from establishing a PSG or demonstrating the required nexus. Accordingly, any blanket rule that a victim of private-actor gender-based violence cannot establish a PSG is inconsistent with the INA and the existing PSG analysis.

III. THE ATTORNEY GENERAL SHOULD REJECT DHS'S ARGUMENT THAT VICTIMS OF GENDER-BASED VIOLENCE MUST SATISFY ADDITIONAL EVIDENTIARY BURDENS

In its brief, DHS strongly and properly urges the Attorney General not to abrogate *A-R-C-G-*, 26 I. & N. Dec. 388. *See A-B-*, DHS Brief on Referral to the AG, at 20. But DHS also seeks to impose extensive documentation requirements in asylum claims raising domestic violence issues, requirements that do not apply in other asylum cases. These requirements and would undermine the protections for domestic violence survivors recognized in *A-R-C-G-*. Specifically, DHS seeks to require such applicants to disclose "specific information about the putative persecutor" and specific personal information about her domestic and intimate relationships. *Id.* at 24. These requirements do not apply in non-domestic violence asylum cases, and extend beyond the statutory requirements. DHS's requirements are ill-advised for two fundamental reasons.

First, these additional requirements place an undue burden on asylum applicants in an already complex process. The DHS requirements incorrectly

assume that survivors of domestic violence will know precise details about their abusers. But many victims do not have precise information about their abusers because their perpetrators isolate them, hiding information and controlling their environment. The most effective abuser may in fact have established enough power and control over his victim that she is unaware of the number or nature of his extramarital relationships, his trips in and out of the country, or even his criminal activities. A domestic violence survivor may not know details of an abuser's life outside the home, such as his employment, military service, or his parents' and siblings' full names information DHS would require. Indeed, even trying to obtain this information could put the applicant in danger.

Additionally, many victims of domestic violence have experienced trauma that may hinder their ability to recall details about their abusers. The impact of trauma on the ability of the brain to remember details, including about the perpetrator himself, has been well-documented. *See* M. P. Koss et al., *Traumatic Memory Characteristics: A Cross-Validated Mediational Model of Response to Rape Among Employed Women, Journal of Abnormal Psychology*, 105 (3) J. of Abnormal Psychol. 421 32 (1996). Therefore, it is highly likely that a victim will either block or forget information about her abuser.

DHS's requirements would also place an undue burden on detained immigrants, who already struggle with language issues, access to legal counsel,

and understanding extraordinarily complex immigration laws. Furthermore, to the extent any information in DHS's requirements is relevant to the asylum analysis, a judge may ask for such information and consider its weight. DHS's requirements would impose an undue and unfair burden on those survivors of domestic violence who have legitimate claims to asylum.

Second, much of the information DHS wishes to compel reflects a fundamental lack of understanding of the dynamics of domestic violence. For example, DHS seeks information about the applicant's current relationships, perhaps to suggest that where a survivor is in another relationship, she should not fear continued persecution. In fact, the opposite is true: persecution often escalates when a woman leaves the abuser and especially when she tries to begin a new relationship.[20] For example, Aracely, an asylum recipient, recounts that when her

---

[20] *See* Jennifer L. Hardesty, *Separation Assault in the Context of Postdivorce Parenting: An Integrative Review of the Literature*, 8 Violence Against Women 597, 601 (2002) (risk of intimate femicide increases sixfold when a woman leaves an abusive partner); Jennifer L. Hardesty & Grace H. Chung, *Intimate Partner Violence, Parental Divorce, and Child Custody: Directions for Intervention and Future Research*, 55 Family Relations 200, 201 (2006) ("[S]eparation is a time of heightened risk for abused women. Studies indicate that violence often continues after women leave and sometimes escalates.")

abuser found out she was in a relationship with another man, he returned to Honduras to shoot her in the head and murder her two sons.[21]

DHS's requirements would also require a victim to provide information about "direct or indirect" contact with her abuser after she arrived in the United States. However, a lack of "direct or indirect" contact after arrival in the United States cannot undermine the fear of return to persecution, given the prevalence of post-separating violence and stalking. Such a conclusion is contrary to decades of research about the nature of domestic violence.[22]

There is no basis to impose additional evidentiary requirements solely on applicants who are survivors of domestic violence. Congress has provided that persecution on account of membership in a PSG qualifies one for asylum. Excluding a class of applicants who can meet those requirements is contrary to the spirit and the letter of the law.

---

[21] Declaration on file with Tahirih Justice Center.

[22] Research shows that domestic violence flows from the abuser's need to exercise control in his relationship with the victim. *See* Mary Ann Dutton & Lisa A. Goodman, *Coercion in Intimate Partner Violence: Towards a New Conceptualization*, 52 Sex Roles 743, 743 (2005). This exercise of control necessarily prevents the victim from unilaterally ending the relationship. Peter G. Jaffee et al., *Common Misconceptions in Addressing Domestic Violence in Child Custody Disputes*, Juvenile & Family Ct. J. 57, 59 60 (2003) ("[S]eparation may be a signal to the perpetrator to escalate his behavior in an attempt to continue to control or punish his partner for leaving.").

CONCLUSION

For the foregoing reasons, the Attorney General should affirm the BIA's order.

Respectfully submitted,

/s/ Paul M. Thompson
Paul M. Thompson (D.C. Bar No. 973977)
Sophia A. Luby (D.C. Bar No. 241865)
David Mlaver (D.C. Bar No. 1030609)
McDERMOTT WILL & EMERY LLP
500 North Capitol Street NW
Washington, D.C. 20001
(202) 756-8032
pthompson@mwe.com

Counsel for Amici Curiae

April 30, 2018

APPENDIX

The following organizations, whose work focuses both nationally and internationally on domestic and gender-based violence, join the listed *amici* in this brief and urge the Attorney General to continue to recognize long-established protections for those victims of gender-based and domestic violence who meet the requirement for asylum.

National Network to End Domestic Violence (NNEDV)
1325 Massachusetts Ave. NW, 7th Floor
Washington, D.C. 20005

Futures Without Violence
100 Montgomery St., The Presidio
San Francisco, CA 94129

Jewish Women International
129 20th St. NW, Ste. 801
Washington, D.C. 20036

Her Justice
100 Broadway, 10th Floor
New York, NY 10005

National Alliance to End Sexual Violence
1875 Connecticut Ave., 10th Floor
Washington, D.C. 20009

National Domestic Violence Hotline
P.O. Box 161810
Austin, TX 78716

National Asian Pacific American Women's Forum
www.napawf.org

New York City Gay and Lesbian Anti-Violence Project
116 Nassau St., 3rd Floor
New York, NY 10038

Women's Refugee Commission
1012 14th St. NW, Ste. 1100
Washington, D.C. 20005

Michigan Immigrant Rights Center
3030 S 9th St., Ste. 1B
Kalamazoo, MI 49009

CERTIFICATE OF FILING

I certify that on April 30, 2018, a true and correct copy of this corrected brief was served upon the following counsel electronically at AGCertification@usdoj.gov and in triplicate by Federal Express to:

United States Department of Justice
Office of the Attorney General, Room 5114
950 Pennsylvania Avenue, NW
Washington, D.C. 20530

/s/ Paul M. Thompson

CERTIFICATE OF SERVICE

I certify that on April 30, 2018, a true and correct copy of this corrected brief was served by Federal Express to:

United States Department of Homeland Security
Office of the Chief Counsel
5701 Executive Center Drive, Suite 300
Charlotte, NC 28212

/s/ Paul M. Thompson

Matter of A-B-, Respondent

Decided by Attorney General March 7, 2018

U.S. Department of Justice
Office of the Attorney General

The Attorney General referred the decision of the Board of Immigration Appeals to himself for review of issues relating to whether being a victim of private criminal activity constitutes a cognizable "particular social group" for purposes of an application for asylum and withholding of removal, ordering that the case be stayed during the pendency of his review.

BEFORE THE ATTORNEY GENERAL

Pursuant to 8 C.F.R. § 1003.l(h)(l)(i) (2017), I direct the Board of Immigration Appeals ("Board") to refer this case to me for review of its decision. The Board's decision in this matter is automatically stayed pending my review. *See Matter of Haddam*, A.G. Order No. 2380-2001 (Jan. 19, 2001). To assist me in my review, I invite the parties to these proceedings and interested amici to submit briefs on points relevant to the disposition of this case, including:

> Whether, and under what circumstances, being a victim of private criminal activity constitutes a cognizable "particular social group" for purposes of an application for asylum or withholding of removal.

The parties' briefs shall not exceed 15,000 words and shall be filed on or before April 6, 2018. Interested amici may submit briefs not exceeding 9,000 words on or before April 13, 2018. The parties may submit reply briefs not exceeding 6,000 words on or before April 20, 2018. All filings shall be accompanied by proof of service and shall be submitted electronically to AGCertification@usdoj.gov, and in triplicate to:

United States Department of Justice
Office of the Attorney General, Room 5114
950 Pennsylvania Avenue, NW
Washington, DC 20530

All briefs must be both submitted electronically and postmarked on or before the pertinent deadlines. Requests for extensions are disfavored.

Matter of A-B-, Respondent

Decided by Attorney General March 30, 2018

U.S. Department of Justice
Office of the Attorney General

The Attorney General denied the request of the Department of Homeland Security that the Attorney General suspend the briefing schedules and clarify the question presented, and he granted, in part, both parties' request for an extension of the deadline for submitting briefs in this case.

BEFORE THE ATTORNEY GENERAL

On March 7, 2018, pursuant to 8 C.F.R. § 1003.1(h)(1)(i) (2017), I directed the Board of Immigration Appeals ("Board") to refer its decision in this case to me for review. To assist in my review, I invited the parties to submit briefs not exceeding 15,000 words in length and interested amici to submit briefs not exceeding 9,000 words in length. I directed that the parties file briefs on or before April 6, 2018, that amici file briefs on or before April 13, 2018, and that the parties file any reply briefs on or before April 20, 2018.

On March 14, 2018, the respondent filed a request for an extension of the deadline for submitting briefs from April 6, 2018, to May 18, 2018. On March 16, 2018, the Department of Homeland Security ("DHS") submitted a motion containing three requests: (1) that I suspend the briefing schedules to permit the Board to rule on the Immigration Judge's August 18, 2017, certification order; (2) that I clarify the question presented in this case; and (3) that I extend the deadline for submitting opening briefs to May 18, 2018. The respondent subsequently filed a response requesting that I grant the same relief.

This Order addresses all pending requests from the parties.

I. DHS's Request To Suspend the Briefing Schedules

DHS's request to suspend the briefing schedules until the Board acts on the Immigration Judge's certification request is denied. DHS suggests that this case "does not appear to be in the best posture for the Attorney General's review," because the Board has not yet acted on the Immigration Judge's attempt, on remand from the Board, to certify the case back to the Board. *See* DHS's Mot. on Cert. to the Att'y Gen. at 2 (citing *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954)).

The certification from the Immigration Judge pending before the Board does not require the suspension of briefing because the case is not properly pending before the Board. The Immigration Judge did not act within his authority, as delineated by the controlling regulations, when he purported to certify the matter. The Immigration Judge noted in his order that an "Immigration Judge may certify to the [Board] any case arising from a *decision* rendered in removal proceedings." Order of Certification at 4, (Aug. 18, 2017) (emphasis added) (citing 8 C.F.R. § 1003.1(b)(3), (c)). The regulations also provide that an "Immigration Judge or Service officer may certify a case only after an initial decision has been made and before an appeal has been taken." 8 C.F.R. § 1003.7 (2017).

Here, the Immigration Judge did not issue any "decision" on remand that he could certify to the Board. The Board's December 2016 decision sustained the respondent's appeal of the Immigration Judge's initial decision and remanded the case to the Immigration Judge "for the purpose of allowing [DHS] the opportunity to complete or update identity, law enforcement, or security investigations or examinations, and further proceedings, if necessary, and for the entry of an order as provided by 8 C.F.R. § 1003.47(h)." *Matter of A-B-* at 4 (BIA Dec. 8, 2016). Under 8 C.F.R. § 1003.47(h) (2017), the Immigration Judge on remand was directed to "enter an order granting or denying the immigration relief sought" after considering the "results of the identity, law enforcement, or security investigations." "If new information is presented, the immigration judge may hold a further hearing if necessary to consider any legal or factual issues . . . ." *Id.*

In this matter, DHS informed the Immigration Judge that the respondent's background checks were clear. *See* Order of Certification at 1. Given the scope of the Board's remand and the requirements of the regulations, the Immigration Judge was obliged to issue a decision granting or denying the relief sought. If the Immigration Judge thought intervening changes in the law directed a different outcome, he may have had the authority to hold a hearing, consider those legal issues, and make a decision on those issues. *Cf.* 8 C.F.R. § 1003.47(h). Instead, the Immigration Judge sought to "certify" the Board's decision back to the Board, essentially requesting that the Board reconsider its legal and factual findings. That procedural maneuver does not fall within the scope of the Immigration Judge's authority upon remand. Nor does it fall within the regulations' requirements that cases may be certified when they arise from "[d]ecisions of Immigration Judges in removal proceedings," *id.* § 1003.1(b)(3); *see also id.* § 1003.1(c), and that an Immigration Judge "may certify a case only after an initial decision has been made and before an appeal has been taken," *id.* § 1003.7. Because the Immigration Judge failed to issue a decision on remand, the Immigration Judge's attempt to certify the case back to the Board was procedurally

defective and therefore does not affect my consideration of the December 16, 2016, Board decision.

Furthermore, the present case is distinguishable from *Accardi*, because, here, the Board rendered a decision on the merits, consistent with the applicable regulations. It is that December 8, 2016, decision that I directed the Board to refer to me for my review. *See Matter of A-B-*, 27 I&N Dec. 227, 227 (A.G. 2018) (directing the Board "to refer this case to me for review of *its decision*" (emphasis added)). The Board issued that decision "exercis[ing] its own judgment" and free from any perception of interference from the Attorney General. *Accardi*, 347 U.S. at 266. My certification of that decision for review complies with all applicable regulations. *See* 8 C.F.R. § 1003.1(h)(1)(i) ("The Board shall refer to the Attorney General for review of *its decision all cases* that . . . [t]he Attorney General directs Board to refer to him." (emphasis added)). It is therefore unnecessary to suspend the briefing schedule pending a new decision of the Board.

II. DHS's Request To Clarify the Question Presented

I deny DHS's request to clarify the question presented. In my March 7, 2018, order, I requested briefing on "[w]hether, and under what circumstances, being a victim of private criminal activity constitutes a cognizable 'particular social group' for purposes of an application for asylum or withholding of removal." *Matter of A-B-*, 27 I&N Dec. at 227. Although "there is no entitlement to briefing when a matter is certified for Attorney General review," *Matter of Silva-Trevino*, A.G. Order No. 3034-2009 (Jan. 15, 2009), I nevertheless invited the parties and interested amici "to submit briefs on points relevant to the disposition of this case" to assist my review. *Matter of A-B-*, 27 I&N Dec. at 227. As the Immigration Judge observed in his effort to certify the case, several Federal Article III courts have recently questioned whether victims of private violence may qualify for asylum under section 208(b)(1)(B)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1158(b)(1)(B)(i) (2012), based on their claim that they were persecuted because of their membership in a particular social group. If being a victim of private criminal activity qualifies a petitioner as a member of a cognizable "particular social group," under the statute, the briefs should identify such situations. If such situations do not exist, the briefs should explain why not.

DHS requests clarification on the ground that "this question has already been answered, at least in part, by the Board and its prior precedent." Board precedent, however, does not bind my ultimate decision in this matter. *See* section 103(a)(1) of the Act, 8 U.S.C. § 1103(a)(1) (2012) (providing that "determination and ruling by the Attorney General with respect to all

questions of law shall be controlling"). The parties and interested amici may brief any relevant issues in this case including the interplay between any relevant Board precedent and the question presented but I encourage them to answer the legal question presented.

III. The Parties' Requests for an Extension of the Deadline for Submitting Briefs

I grant, in part, both parties' request for an extension of the deadline for submitting briefs in this case. The parties' briefs shall be filed on or before April 20, 2018. Briefs from interested amici shall be filed on or before April 27, 2018. Reply briefs from the parties shall be filed on or before May 4, 2018. No further requests for extensions of the deadlines from the parties or interested amici shall be granted.

In support of respondent's request for an extension, she asserted that "an extension of the briefing deadline is warranted because [r]espondent intends to submit additional evidence with her brief in support of her claim," including the possibility that she might obtain new evidence from El Salvador. Resp't Request for Extension of Briefing Deadline at 4 (Mar. 14, 2018). Although I retain "full decision-making authority under the immigration statutes," *Matter of A-H-*, 23 I&N Dec. 774, 779 n.4 (A.G. 2005), I requested briefing on a purely legal question to assist my review of this case, and I encourage the parties to focus their briefing on that question. Further factual development may be appropriate in the event the case is remanded, but the opportunity to gather additional factual evidence is not a basis for my decision to extend the briefing deadline.

NON-DETAINED

Michael P. Davis
Exec. Deputy Principal Legal Advisor
U.S. Immigration and Customs Enforcement
U.S. Department of Homeland Security
500 12th Street, SW, Mail Stop 5900
Washington, D.C. 20536-5900

(202) 732-5000

UNITED STATES DEPARTMENT OF JUSTICE
OFFICE OF THE ATTORNEY GENERAL

In the Matter of:	)	
(b)(6)	)	File No: (b)(6)
In removal proceedings	)	

U.S. DEPARTMENT OF HOMELAND SECURITY REPLY TO AMICUS CURIAE BRIEFS

The Department of Homeland Security ("Department" or "DHS") timely submits this reply to the amicus curiae briefs of the Harvard Immigration and Refugee Clinical Program, the American Immigration Lawyers Association, Human Rights First, and Kids in Need of Defense (hereinafter "HIRC Brief"), and the Tahirih Justice Center, the Asian Pacific Institute on Gender-Based Violence, Asista Immigration Assistance, and Casa de Esperanza (hereinafter "Corrected Tahirih Brief"). For purposes of efficiency, the Department provides a consolidated response focusing on two salient issues.[1]

A. HIRC Brief.

The primary argument of the HIRC Brief is that gender alone may constitute a cognizable particular social group for purposes of applications for asylum and statutory withholding of removal. The brief alleges that "DHS offers no rebuttal to the arguments outlined herein that gender alone may define a particular social group," and that, contrary to a point made by the Department in its own brief, "whether gender alone can establish membership in a particular social group under the refugee definition is [a] question of law, not policy." HIRC Brief at 17 n.5.

The Department wishes to re-emphasize that adequately addressing the legal and policy aspects of the "gender alone" issue was beyond the limitations of the Attorney General's briefing request.[2] Whether to interpret "membership in a particular social group" as including membership

[1] The lack of a DHS response to other aspects of the HIRC or Corrected Tahirih Briefs, or any of the remaining ten amicus curiae briefs, should not be taken as agreement with any or all the points raised therein. Rather, the Department continues to adhere to the arguments set forth in its own brief.

[2] As noted in the Department's brief, even a minimal assessment of the issue likely would require closer examination of the Refugee Act of 1980, Pub. L. No. 96–212, 94 Stat. 197; the 1967 Protocol Relating to the Status of Refugees, Jan. 31, 1967, [1968] 19 U.S.T. 6223; and the 1951 Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6259, likely including any relevant legislative, ratification, and negotiation history. *See* DHS Brief on Referral to the Attorney General at 21 n.13. Such material, along with the statutory text and scheme of the Immigration and Nationality Act ("INA"), subsequent amendments to the immigration laws relating to gender-based harm (e.g., INA § 204(a)(1)(A)(iii), (B)(ii)), and the pre-existence and emergence of international human rights instruments specifically addressing

in a particular gender is suffused with unique, weighty, and complex policy implications in addition to the difficult statutory interpretation questions. *See, e.g.*, DHS Brief on Referral to the Attorney General at 21-22 (discussing implications with respect to the persecutor bar of a significant expansion of the concept of "persecution" and the scope of the protected grounds). If the Attorney General would like further briefing on that question or others, the Department would be pleased to address such issues.

B. Corrected Tahirih Brief.

The Corrected Tahirih Brief argues, in pertinent part, that the Department "seeks to impose extensive documentation requirements in asylum claims raising domestic violence issues, requirements that do not apply in other asylum cases," and that "extend beyond the statutory requirements." Corrected Tahirih Brief at 30. Respectfully, the brief fundamentally mischaracterizes the Department's position.

The Department does not seek any heightened evidentiary standards or requirements for asylum and statutory withholding of removal applications premised upon domestic violence. Instead, the Department offers potential lines of inquiry that the Attorney General may wish to adopt to assist adjudicators in assessing such claims. *See* DHS Brief on Referral to the Attorney General at 23-25. As the Department argues in its brief, *all* asylum and statutory withholding of removal applicants should be held to their statutory burden of proof, including providing corroborative evidence when necessary, *see id.* at 23 (citing Immigration and Nationality Act ("INA") §§ 208(b)(1)(B)(ii) (asylum), 241(b)(3)(C) (statutory withholding of removal)), but immigration judges sometimes have failed to hold applicants to their burden of proof in particular

---

gender-related issues (e.g., Convention on the Political Rights of Women, Mar. 31, 1953, 27 U.S.T. 1909), and relevant case law would have to be carefully considered were the Attorney General to request further briefing on that question.

social group-based claims. Paying mere lip service to the particular social group requirements often involved with such claims is too frequently the norm. *See* DHS Brief on Referral to the Attorney General at 7. The Department's brief accordingly asks the Attorney General to clarify those substantive and evidentiary requirements and to re-emphasize that applicants should be held to their proper burden of proof. The Department is *not* arguing that the Attorney General should create new evidentiary standards specific to domestic violence-based claims.[3] To be clear, however, an application for asylum or statutory withholding of removal is not fatally deficient simply because a persecutor may not have elaborated in detail on his or her motive(s) for inflicting harm. *See INS v. Elias-Zacarias*, 502 U.S. 478, 483 (1992) (holding that while the "statute makes motive critical," direct evidence of motive is not required, and that "circumstantial" evidence may suffice).

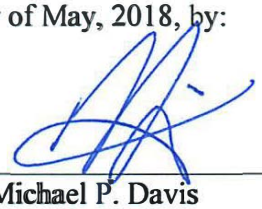
The Corrected Tahirih Brief contends that the Department's suggested lines of inquiry create an "undue hardship," and that requiring domestic violence victims to remember facts about their purported abuser shows a fundamental lack of understanding of the dynamics of domestic violence. *See* Corrected Tahirih Brief at 30-32. To the contrary, remembering and knowing basic biographic information about the person with whom a victim is engaged in an intimate relationship is not an undue hardship. Rather, it can provide significant relevant evidence establishing that the alleged persecutor and relationship actually existed. The Department recognizes that an applicant may have legitimate reasons for not knowing or remembering certain

[3] That said, such applicants should be held to their burden of proof. For example, much as a member of a particular political party claiming persecution on account of her political opinion should generally be able to explain the party's basic platform and answer questions about how and why she joined, an applicant credibly claiming persecution in a domestic relationship should generally be able to answer questions about her domestic partner and the relationship itself. Of course, such an applicant also should be able to provide basic information about other elements of her claim, including the identification and delineation of her particular social group, why such individuals are perceived as a distinct group by her society, internal flight alternatives, and the ability and willingness of the authorities to afford reasonable protection.

information, but this does not mean that one should not attempt to elicit the information in the first instance. As the Department explained: "The applicant's knowledge in this regard, *or failure to reasonably explain the lack thereof*, is relevant as to whether the applicant's testimony is credible, persuasive, and sufficiently detailed to satisfy the applicant's burden of proof under the Act." *See* DHS Brief on Referral to the Attorney General at 23 (emphasis added). Excusing such details in blanket fashion from what is, in part, a highly individualized fact-based claim, would render the burden of proof meaningless and serve as a clear invitation for fabricated protection claims that cannot be meaningfully probed by adjudicators. *See generally* INA §§ 208(b)(1)(B)(iii) (mandating, inter alia, that "[c]onsidering the totality of the circumstances, and all relevant factors, a trier of fact may base a credibility determination on the demeanor, candor, or responsiveness of the applicant"), 241(b)(3)(C) (same).

Accordingly, the Attorney General should decline the Corrected Tahirih Brief's invitation to create an effectively lower burden of proof for one type of persecution claim, i.e., those based upon domestic violence.

Respectfully submitted on this 4th day of May, 2018, by:



Michael P. Davis
Exec. Deputy Principal Legal Advisor
U.S. Immigration and Customs Enforcement
U.S. Department of Homeland Security[4]

[4] The Department respectfully requests that all correspondence to it in this matter continue to be directed, in the first instance, to the local U.S. Immigration and Customs Enforcement (ICE) Office of the Chief Counsel in Charlotte, North Carolina, with copies to Christopher S. Kelly, Chief of the Immigration Law and Practice Division within ICE's Office of the Principal Legal Advisor.

(b)(6)

(b)(6)

PROOF OF SERVICE

On May 4, 2018, I, Frederick Gaskins, mailed a copy of this U.S. Department of Homeland Security Reply to Amicus Curiae Briefs and any attached pages to the respondent's co-counsel, Benjamin Winograd, Esq., Immigrant & Refugee Appellate Center, LLC, 3602 Forest Drive, Alexandria, VA 22302, by placing such copy in my office's outgoing mail system in an envelope duly addressed.

Matter of A-B-, Respondent

Decided by Attorney General March 7, 2018

U.S. Department of Justice
Office of the Attorney General

The Attorney General referred the decision of the Board of Immigration Appeals to himself for review of issues relating to whether being a victim of private criminal activity constitutes a cognizable "particular social group" for purposes of an application for asylum and withholding of removal, ordering that the case be stayed during the pendency of his review.

BEFORE THE ATTORNEY GENERAL

Pursuant to 8 C.F.R. § 1003.l(h)(l)(i) (2017), I direct the Board of Immigration Appeals ("Board") to refer this case to me for review of its decision. The Board's decision in this matter is automatically stayed pending my review. *See Matter of Haddam*, A.G. Order No. 2380-2001 (Jan. 19, 2001). To assist me in my review, I invite the parties to these proceedings and interested amici to submit briefs on points relevant to the disposition of this case, including:

> Whether, and under what circumstances, being a victim of private criminal activity constitutes a cognizable "particular social group" for purposes of an application for asylum or withholding of removal.

The parties' briefs shall not exceed 15,000 words and shall be filed on or before April 6, 2018. Interested amici may submit briefs not exceeding 9,000 words on or before April 13, 2018. The parties may submit reply briefs not exceeding 6,000 words on or before April 20, 2018. All filings shall be accompanied by proof of service and shall be submitted electronically to AGCertification@usdoj.gov, and in triplicate to:

United States Department of Justice
Office of the Attorney General, Room 5114
950 Pennsylvania Avenue, NW
Washington, DC 20530

All briefs must be both submitted electronically and postmarked on or before the pertinent deadlines. Requests for extensions are disfavored.

Matter of A-B-, Respondent

Decided by Attorney General March 30, 2018

U.S. Department of Justice
Office of the Attorney General

The Attorney General denied the request of the Department of Homeland Security that the Attorney General suspend the briefing schedules and clarify the question presented, and he granted, in part, both parties' request for an extension of the deadline for submitting briefs in this case.

BEFORE THE ATTORNEY GENERAL

On March 7, 2018, pursuant to 8 C.F.R. § 1003.1(h)(1)(i) (2017), I directed the Board of Immigration Appeals ("Board") to refer its decision in this case to me for review. To assist in my review, I invited the parties to submit briefs not exceeding 15,000 words in length and interested amici to submit briefs not exceeding 9,000 words in length. I directed that the parties file briefs on or before April 6, 2018, that amici file briefs on or before April 13, 2018, and that the parties file any reply briefs on or before April 20, 2018.

On March 14, 2018, the respondent filed a request for an extension of the deadline for submitting briefs from April 6, 2018, to May 18, 2018. On March 16, 2018, the Department of Homeland Security ("DHS") submitted a motion containing three requests: (1) that I suspend the briefing schedules to permit the Board to rule on the Immigration Judge's August 18, 2017, certification order; (2) that I clarify the question presented in this case; and (3) that I extend the deadline for submitting opening briefs to May 18, 2018. The respondent subsequently filed a response requesting that I grant the same relief.

This Order addresses all pending requests from the parties.

I. DHS's Request To Suspend the Briefing Schedules

DHS's request to suspend the briefing schedules until the Board acts on the Immigration Judge's certification request is denied. DHS suggests that this case "does not appear to be in the best posture for the Attorney General's review," because the Board has not yet acted on the Immigration Judge's attempt, on remand from the Board, to certify the case back to the Board. *See* DHS's Mot. on Cert. to the Att'y Gen. at 2 (citing *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954)).

The certification from the Immigration Judge pending before the Board does not require the suspension of briefing because the case is not properly pending before the Board. The Immigration Judge did not act within his authority, as delineated by the controlling regulations, when he purported to certify the matter. The Immigration Judge noted in his order that an "Immigration Judge may certify to the [Board] any case arising from a *decision* rendered in removal proceedings." Order of Certification at 4, (Aug. 18, 2017) (emphasis added) (citing 8 C.F.R. § 1003.1(b)(3), (c)). The regulations also provide that an "Immigration Judge or Service officer may certify a case only after an initial decision has been made and before an appeal has been taken." 8 C.F.R. § 1003.7 (2017).

Here, the Immigration Judge did not issue any "decision" on remand that he could certify to the Board. The Board's December 2016 decision sustained the respondent's appeal of the Immigration Judge's initial decision and remanded the case to the Immigration Judge "for the purpose of allowing [DHS] the opportunity to complete or update identity, law enforcement, or security investigations or examinations, and further proceedings, if necessary, and for the entry of an order as provided by 8 C.F.R. § 1003.47(h)." *Matter of A-B-* at 4 (BIA Dec. 8, 2016). Under 8 C.F.R. § 1003.47(h) (2017), the Immigration Judge on remand was directed to "enter an order granting or denying the immigration relief sought" after considering the "results of the identity, law enforcement, or security investigations." "If new information is presented, the immigration judge may hold a further hearing if necessary to consider any legal or factual issues . . . ." *Id.*

In this matter, DHS informed the Immigration Judge that the respondent's background checks were clear. *See* Order of Certification at 1. Given the scope of the Board's remand and the requirements of the regulations, the Immigration Judge was obliged to issue a decision granting or denying the relief sought. If the Immigration Judge thought intervening changes in the law directed a different outcome, he may have had the authority to hold a hearing, consider those legal issues, and make a decision on those issues. *Cf.* 8 C.F.R. § 1003.47(h). Instead, the Immigration Judge sought to "certify" the Board's decision back to the Board, essentially requesting that the Board reconsider its legal and factual findings. That procedural maneuver does not fall within the scope of the Immigration Judge's authority upon remand. Nor does it fall within the regulations' requirements that cases may be certified when they arise from "[d]ecisions of Immigration Judges in removal proceedings," *id.* § 1003.1(b)(3); *see also id.* § 1003.1(c), and that an Immigration Judge "may certify a case only after an initial decision has been made and before an appeal has been taken," *id.* § 1003.7. Because the Immigration Judge failed to issue a decision on remand, the Immigration Judge's attempt to certify the case back to the Board was procedurally

defective and therefore does not affect my consideration of the December 16, 2016, Board decision.

Furthermore, the present case is distinguishable from *Accardi*, because, here, the Board rendered a decision on the merits, consistent with the applicable regulations. It is that December 8, 2016, decision that I directed the Board to refer to me for my review. *See Matter of A-B-*, 27 I&N Dec. 227, 227 (A.G. 2018) (directing the Board "to refer this case to me for review of *its decision*" (emphasis added)). The Board issued that decision "exercis[ing] its own judgment" and free from any perception of interference from the Attorney General. *Accardi*, 347 U.S. at 266. My certification of that decision for review complies with all applicable regulations. *See* 8 C.F.R. § 1003.1(h)(1)(i) ("The Board shall refer to the Attorney General for review of *its decision all cases* that . . . [t]he Attorney General directs Board to refer to him." (emphasis added)). It is therefore unnecessary to suspend the briefing schedule pending a new decision of the Board.

II. DHS's Request To Clarify the Question Presented

I deny DHS's request to clarify the question presented. In my March 7, 2018, order, I requested briefing on "[w]hether, and under what circumstances, being a victim of private criminal activity constitutes a cognizable 'particular social group' for purposes of an application for asylum or withholding of removal." *Matter of A-B-*, 27 I&N Dec. at 227. Although "there is no entitlement to briefing when a matter is certified for Attorney General review," *Matter of Silva-Trevino*, A.G. Order No. 3034-2009 (Jan. 15, 2009), I nevertheless invited the parties and interested amici "to submit briefs on points relevant to the disposition of this case" to assist my review. *Matter of A-B-*, 27 I&N Dec. at 227. As the Immigration Judge observed in his effort to certify the case, several Federal Article III courts have recently questioned whether victims of private violence may qualify for asylum under section 208(b)(1)(B)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1158(b)(1)(B)(i) (2012), based on their claim that they were persecuted because of their membership in a particular social group. If being a victim of private criminal activity qualifies a petitioner as a member of a cognizable "particular social group," under the statute, the briefs should identify such situations. If such situations do not exist, the briefs should explain why not.

DHS requests clarification on the ground that "this question has already been answered, at least in part, by the Board and its prior precedent." Board precedent, however, does not bind my ultimate decision in this matter. *See* section 103(a)(1) of the Act, 8 U.S.C. § 1103(a)(1) (2012) (providing that "determination and ruling by the Attorney General with respect to all

questions of law shall be controlling"). The parties and interested amici may brief any relevant issues in this case including the interplay between any relevant Board precedent and the question presented but I encourage them to answer the legal question presented.

III. The Parties' Requests for an Extension of the Deadline for Submitting Briefs

I grant, in part, both parties' request for an extension of the deadline for submitting briefs in this case. The parties' briefs shall be filed on or before April 20, 2018. Briefs from interested amici shall be filed on or before April 27, 2018. Reply briefs from the parties shall be filed on or before May 4, 2018. No further requests for extensions of the deadlines from the parties or interested amici shall be granted.

In support of respondent's request for an extension, she asserted that "an extension of the briefing deadline is warranted because [r]espondent intends to submit additional evidence with her brief in support of her claim," including the possibility that she might obtain new evidence from El Salvador. Resp't Request for Extension of Briefing Deadline at 4 (Mar. 14, 2018). Although I retain "full decision-making authority under the immigration statutes," *Matter of A-H-*, 23 I&N Dec. 774, 779 n.4 (A.G. 2005), I requested briefing on a purely legal question to assist my review of this case, and I encourage the parties to focus their briefing on that question. Further factual development may be appropriate in the event the case is remanded, but the opportunity to gather additional factual evidence is not a basis for my decision to extend the briefing deadline.

NON-DETAINED

Michael P. Davis
Exec. Deputy Principal Legal Advisor
U.S. Immigration and Customs Enforcement
U.S. Department of Homeland Security
500 12th Street, SW, Mail Stop 5900
Washington, D.C. 20536-5900

(202) 732-5000

UNITED STATES DEPARTMENT OF JUSTICE
OFFICE OF THE ATTORNEY GENERAL

In the Matter of:	)	
(b)(6)	)	File No: (b)(6)
In removal proceedings	)	

U.S. DEPARTMENT OF HOMELAND SECURITY
BRIEF ON REFERRAL TO THE ATTORNEY GENERAL

TABLE OF CONTENTS

INTRODUCTION

This case is currently pending before the Attorney General pursuant to his March 7, 2018 order directing the Board of Immigration Appeals (Board or BIA) to refer its December 8, 2016 decision for his review under 8 C.F.R. § 1003.1(h)(1)(i). *See Matter of A-B-*, 27 I&N Dec. 227 (A.G. 2018). The Attorney General invited the parties and interested amici curiae to submit briefs on points relevant to the disposition of the case, including: "[w]hether, and under what circumstances, being a victim of private criminal activity constitutes a cognizable 'particular social group' for purposes of an application for asylum or withholding of removal." *Id.*

On March 14, 2018, the respondent requested an extension of the briefing schedule. On March 16, 2018, the Department of Homeland Security (Department or DHS) moved the Attorney General to suspend the briefing schedules for both the parties and amici curiae due to potential issues pertaining to *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 266-67 (1954), and to clarify the central briefing question or, in the alternative, to extend the briefing schedules for the parties and amici curiae. On March 21, 2018, the respondent filed a response to the DHS motion, agreeing with certain aspects of that motion.

On March 30, 2018, the Attorney General denied the DHS motion to suspend the briefing schedules and clarify the question presented, but granted, in part, both parties' request for an extension of the briefing deadline to April 20, 2018. *See Matter of A-B-*, 27 I&N Dec. 247 (A.G. 2018).

ISSUES PRESENTED

To resolve this matter on referral, the Attorney General should consider:

1) Whether, and, if so, under what circumstances, a victim of private criminal activity may establish eligibility for asylum or statutory withholding of removal; and

2) Whether the Board, in determining that the respondent in this case met her burden of proof to establish eligibility for asylum, exceeded the proper scope of its review.

STANDARD OF REVIEW

The Attorney General reviews de novo all aspects of the Board's decision and retains full authority to receive additional evidence and to make de novo factual determinations. *See Matter of J-F-F-*, 23 I&N Dec. 912, 913 (A.G. 2006).

SUMMARY OF THE ARGUMENT

The Attorney General should review the Board's decision consistent with the legal framework set forth by the Department in this brief concerning asylum and statutory withholding of removal applications that are based on or related to private criminal victimization.

In this regard, and of specific relevance to the instant case, the Department generally supports the legal framework set out by the Board in *Matter of A-R-C-G-*, 26 I&N Dec. 388 (BIA 2014), for the adjudication of asylum and statutory withholding of removal applications premised on inter-partner domestic violence and the protected ground of membership in a particular social group. The Department, however, submits that the Attorney General, like the Board, should reject the cognizability of putative particular social groups defined in whole or part by the harm that an asylum or withholding applicant claims to have suffered or fears. Further, it is the Department's position that even within the context of Guatemalan domestic violence-based claims, such as at issue in *A-R-C-G-*, not all women who are married and unable to leave their relationships can qualify for asylum or statutory withholding of removal. Rather such applicants must establish all other applicable requirements, such as a nexus between the harm they suffered or fear and a protected ground, that the government is unable or unwilling to control their abuser, and the lack of reasonable internal relocation options.

Rather than adjudicate the respondent's applications for asylum and statutory withholding of removal pursuant to any clarified standards that he may enunciate, the Attorney General should simply should vacate the Board's determination that the respondent met her burden of proof to establish eligibility for asylum. Specifically, the Board exceeded the proper scope of its review by making factual findings, including with respect the respondent's credibility, the facts that were asserted as establishing her putative particular social group, her membership in such group, past persecution, and nexus.

Finally, the Attorney General should return the case to the Board and direct it to further remand the case to the Immigration Judge so that the Immigration Judge can issue a new decision assessing the respondent's asylum and statutory withholding of removal applications under any clarified standards for the adjudication of persecution claims based upon private criminal victimization.

ARGUMENT

I. PRIVATE CRIMINAL VICTIMIZATION DOES NOT PER SE ESTABLISH ELIGIBILITY FOR ASYLUM OR WITHHOLDING OF REMOVAL.

In his March 7, 2018 order, the Attorney General invited the parties and amici curiae to address the following question to assist him in his review: "Whether, and under what circumstances, being a victim of private criminal activity constitutes a cognizable 'particular social group' for purposes of an application for asylum or withholding of removal."[1] *A-B-*, 27 I&N Dec. at 227. While the Attorney General will consider "any relevant issue," he encouraged the parties to focus their briefing on the "purely legal question" that he raised. *Id.* at 250. In this regard, the Attorney General noted the Immigration Judge's observation in his certification order that "several

[1] The essential facts pertaining to the respondent's applications for relief and protection, contested or otherwise, are adequately summarized in the Immigration Judge's December 1, 2015 decision, and will not be repeated here except as may be germane to the Department's arguments.

Federal Article III courts have recently questioned whether victims of private violence may qualify for asylum . . . based on their claim that they were persecuted because of their membership in a particular social group." *A-B-*, 27 I&N Dec. at 249. The Attorney General instructed that if "being a victim of private criminal activity qualifies a petitioner as a member of a cognizable 'particular social group,' under the statute, the briefs should identify such situations. If such situations do not exist, the briefs should explain why not." *Id.*

The Department understands the Attorney General's question to relate primarily to the cognizability of particular social groups in the context of private criminal activity. Indeed, several of the key federal circuit court decisions relied upon by the Immigration Judge in his certification order dealt with particular social group status and distinguished the applicability of *A-R-C-G-*. *See* I.J. certification order at 2-3 (citing *Fuentes-Erazo v. Sessions*, 848 F.3d 847 (8th Cir. 2017); *Cardona v. Sessions*, 848 F.3d 519 (1st Cir. 2017); *Marikasi v. Lynch*, 840 F.3d 281 (6th Cir. 2016); and *Vega-Ayala v. Lynch*, 833 F.3d 34 (1st Cir. 2016)). In addition, the Immigration Judge focused on the U.S. Court of Appeals for the Fourth Circuit's decision in *Velasquez v. Sessions*, *see* I.J. certification order at 3-4, which dealt with the nexus requirement, i.e., whether the subject alien's "membership in her nuclear family 'was or will be at least one central reason for' her persecution" pursuant to section 208(b)(1)(B)(i) of the Immigration and Nationality Act (Act or INA). 866 F.3d 188, 194 (4th Cir.i2017).

Accordingly, the Department takes this opportunity to address the broader issue of whether, and under what circumstances, a victim of private[2] criminal activity may establish eligibility for asylum or statutory withholding of removal.

---

[2] The Department interprets "private" to mean when the direct perpetrator of harm is not "a government or government-sponsored" within the meaning of the standard for reasonable internal relocation. *See* 8 C.F.R. §§ 1208.13(b)(3)(ii) (asylum), 1208.16(b)(3)(ii) (statutory withholding of removal). Where the perpetrator of the harm

A. Simply Being a Victim of Private Criminal Activity Per Se Does Not Establish Eligibility for Asylum or Statutory Withholding of Removal.

The position of the Department is that private criminal victimization per se does not establish eligibility for asylum or statutory withholding of removal. As with any other type of harm, harm resulting from private criminal activity can only be a potential basis for asylum or statutory withholding of removal if the applicant establishes all of the many requirements for those forms of relief and protection, including: the existence of a protected ground; the requisite nexus between the harm suffered and/or feared and that protected ground; demonstration of past or future harm that qualifies as "persecution"; and the inability to reasonably internally relocate (absent an applicable regulatory presumption). *See* INA §§ 208(b)(1)(A), 241(b)(3)(A); 8 C.F.R. §§ 1208.13, 1208.16(a)-(b). Of course, at a minimum, to sustain his or her burden of proof, the basis of the applicant's claim must be credible, persuasive, and sufficiently detailed. *See* INA §§ 208(b)(1)(B)(ii), 241(b)(3)(C). In cases in which the applicant rests her claim on persecution on account of membership in a particular social group, it is the applicant's burden to "initially identify the particular social group or groups in which membership is claimed." *Matter of A-T-*, 24 I&N Dec. 617,t623 n.7 (A.G. 2008).

The Board has been clear that private criminal victimization per se, even when widespread in nature, is insufficient to establish eligibility for asylum or statutory withholding of removal.[3]

---

is private in this sense, the applicant also bears the burden of showing that the relevant government was unwilling or unable to control that persecutor. *See, e.g., Matter of Acosta*, 19 I&N Dec. 211 (BIA 1985), ***modified on other grounds***, *Matter of Mogharrabi*, 19 I&N Dec. 439 (BIA 1987).

[3] With specific respect to private criminal victimization by gangs, while eschewing any "blanket rejection" of all such persecution claims, the Board has opined as follows:

> The prevalence of gang violence in many countries is a large societal problem. The gangs may target one segment of the population for recruitment, another for extortion, and yet others for kidnapping, trafficking in drugs and people, and other crimes. Although certain segments of a population may be more susceptible to one type of criminal activity than another, the residents all generally suffer from the gang's criminal efforts to sustain its enterprise in the area. A national community may

See, e.g., *Matter of M-E-V-G-*, 26 I&N Dec. 227, 235 (BIA 2014) (observing that, as a general matter, "asylum and refugee laws do not protect people from general conditions of strife, such as crime and other societal afflictions"). *See generally Matter of Mogharrabi*, 19 I&N Dec. 439, 447 (BIA 1987) (noting that "aliens fearing retribution over purely personal matters, or aliens fleeing general conditions of violence and upheaval in their countries, would not qualify for asylum"). The federal circuit courts have held the same. *See, e.g.*, *Sosa-Perez v. Sessions*, 884 F.3d 74, 81 (1st Cir. 2018) (observing that the attacks on the alien were not shown to be on account of a protected ground, but, rather a "series of highly unfortunate criminal incidents occurring within a culture of widespread societal violence") (quotation marks omitted); *Zaldana Menijar v. Lynch*, 812 F.3d 491, 501 (6th Cir. 2015) ("widespread crime and violence does not itself constitute persecution on account of a protected ground"); *Kanagu v. Holder*, 781 F.3d 912, 918 (8th Cir. 2015) (noting that "the evidence primarily showed the extortionate focus of the Mungiki's interactions with Kanagu and their record of widespread and indiscriminate criminality," and that "a reasonable fact finder could infer that the Mungiki harassed and kidnapped Kanagu for extortionate purposes" as opposed to persecution on account of a protected ground); *Silva v. U.S. Atty. Gen.*, 448 F.3d 1229, 1242 (11th Cir. 2006) ("We agree that Colombia is a place where the awful is ordinary, but we must state the obvious: if four out of every ten murders are on account of a protected ground, six out of ten are not. The majority of the violence in Colombia is not related to protected activity."); *Singh v. INS*, 134 F.3d 962,i967 (9th Cir. 1998) ("Mere generalized lawlessness and violence between diverse populations, of the sort which abounds in numerous countries and inflicts misery upon millions of innocent people daily around the world, generally is

---

struggle with significant societal problems resulting from gangs, but not all societal problems are bases for asylum.

Matter of M-E-V-G-, 26 I&N Dec. 227, 250-51 (BIA 2014).

not sufficient to permit the Attorney General to grant asylum to everyone who wishes to improve his or her life by moving to the United States without an immigration visa."). *See generally Fatin v. INS*, 12 F.3d 1233, 1240 (3d Cir. 1993) ("[T]he concept of persecution does not encompass all treatment that our society regards as unfair, unjust, or even unlawful or unconstitutional. If persecution were defined that expansively, a significant percentage of the world's population would qualify for asylum in this country-and it seems most unlikely that Congress intended such a result.").

B. The Applicant's Burden to Establish the Existence of a Protected Ground, Including Membership in a Particular Social Group, Should be Strictly Enforced.

The requirements to establish a protected ground, including membership in a particular social group, must be properly enforced. As noted, to establish eligibility for asylum or statutory withholding of removal, an applicant whose claim is premised on private criminal victimization must demonstrate, *inter alia*, the existence of a protected ground, i.e., race, religion, nationality, membership in a particular social group, or political opinion. *See* INA §§ 208(b)(1)(A) (asylum, referencing the definition of "refugee" at INA § 101(a)(42)(A)), 241(b)(3)(A) (statutory withholding of removal); *Matter of R-S-H-*, 23 I&N Dec. 629, 641 (BIA 2003). Of specific relevance to the instant case, as well as many others based upon private criminal victimization, is the protected ground of membership in a particular social group.

1. The Particular Social Group Must Satisfy the Requirements of a Common, Immutable Characteristic, Particularity, and Social Distinction.

The core requirements of cognizable particular social group status must be effectively enforced. In the Department's experience, little more than lip service is paid to these critical requirements in some cases, or spurious arguments and analysis are provided purporting to explain why the requirements have been satisfied by what amount to purely "artificial" group constructs.

See generally Matter of E-A-G-, 24 I&N Dec. 591, 595 (BIA 2008) (eschewing "artificial group definitions"). The Department urges the Attorney General to make clear that each requirement must be individually and thoroughly assessed.

Of foundational importance, a cognizable particular social group must be: "(1) composed of members who share a common immutable characteristic, (2) defined with particularity, and (3) socially distinct within the society in question." *A-R-C-G-*, 26 I&N Dec. at 392 (citing *M-E-V-G-*, 26 I&N Dec. 276, and *Matter of W-G-R-*, 26 I&N Dec. 208 (BIA 2014), *aff'd in relevant part sub nom. Garay-Reyes v. Lynch*, 842 F.3d 1125 (9th Cir. 2016), *cert. denied*, 138 S. Ct. 736 (2018)).

The Board explained in *Acosta*, that a common, immutable characteristic "might be an innate one such as sex, color, or kinship ties, or in some circumstances it might be a shared past experience." 19 I&N Dec. at 233. The Board also underscored, however, that "whatever the common characteristic that defines the group, it must be one that the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences." *Id.*

With respect to the requirement of particularity, the Board considers "the question of delineation," emphasizing that "not every immutable characteristic is sufficiently precise to define a particular social group." *A-R-C-G-*, 26 I&N Dec. at 392 (citing *W-G-R-*, 26 I&N Dec. at 214, and *M-E-V-G-*, 26 I&N Dec. at 239) (internal quotation marks omitted). According to the Board, "[a] particular social group must be defined by characteristics that provide a clear benchmark for determining who falls within the group. It is critical that the terms used to describe the group have commonly accepted definitions in the society of which the group is a part. The group must also be discrete and have definable boundaries—it must not be amorphous, overbroad, diffuse, or

subjective." *W-G-R-*, 26 I&N Dec. at 214 (citations omitted). Of special relevance to asylum and statutory withholding of removal applications based on private criminal victimization, the Board has emphasized that a major segment of a country's population ordinarily will not satisfy the particularity requirement. *See Matter of S-E-G-*, 24 I&N Dec. 579, 585–86 (BIA 2008) (discussing a "potentially large and diffuse segment of society"); *see also W-G-R-*, 26 I&N Dec. at 214, 223 (citing *Ochoa v. Gonzales*, 406 F.3d 1166, 1170-71 (9th Cir. 2005), for the proposition that "a particular social group must be narrowly defined and that major segments of the population will rarely, if ever, constitute a distinct social group."); *M-E-V-G-*, 26 I&N Dec. at 239 (same); *cf.* UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees* ¶ 77 (Geneva 1979), http://www.unhcr.org/4d93528a9.pdf ("A 'particular social group' normally comprises persons of similar background, habits or social status."). At the same time, however, the Board has recognized that a "voluntary associational relationship," "cohesiveness," or "strict homogeneity" among group members is not required. *See Matter of A-M-E- & J-G-U-*, 24 I&N Dec. 69, 74 (BIA 2007) (noting that such factors are "not generally require[d]" but not dismissing their potential relevance), *aff'd sub nom. Ucelo-Gomez v. Mukasey*, 509 F.3d 70 (2d Cir. 2007).

Further, a cognizable particular social group also must possess social distinction, which involves "the importance of [societal] 'perception' or 'recognition' to the concept of the particular social group." *A-R-C-G-*, 26 I&N Dec. at 392 (citing *W-G-R-*, 26 I&N Dec. at 216). As the Board further explained:

> To have the "social distinction" necessary to establish a particular social group, there must be evidence showing that society in general perceives, considers, or recognizes persons sharing the particular characteristic to be a group. Although the society in question need not be able to easily identify who is a member of the group, it must be commonly recognized that the shared characteristic is one that defines the group.

W-G-R-, 26 I&N Dec. at 217. Consequently, the requisite social distinction cannot be met simply via the perception of the victims. Rather, there must be wide recognition that extends to the society in question. Concomitantly, although the perception of the putative persecutor—including a private criminal actor—may be relevant because it can be indicative of whether society perceives the group as distinct, whether a group is socially distinct is determined by the perception of the society in question, rather than by the perception of the persecutor.[4] *M-E-V-G-*, 26 I&N Dec. at 242. As the Board has made clear, the "'social distinction' requirement considers whether those with a common immutable characteristic are set apart, or distinct, from other persons within the society in some significant way," i.e., "if the common immutable characteristic were known, those with the characteristic in the society in question would be meaningfully distinguished from those who do not have it." *Id.* at 238.

2. A Single Individual Cannot Constitute a Particular Social Group.

A particular social group is, by definition, composed of a "group of persons." *See, e.g.*, *Acosta*, 19 I&N Dec. at 233. A "group" of persons is commonly understood to mean "a number of individuals assembled together or having some unifying relationship." Merriam Webster Online Dictionary, https://www.merriam-webster.com/dictionary/group?src=search-dict-hed (last visited Apr. 20, 2018). Consequently, a lone individual cannot constitute a particular social group. *See Fatin*, 12 F.3d at 1238 (noting that "[v]irtually any set *including more than one person* could be

[4] For an individual alleged persecutor's perception to be relevant to the society's view of the putative particular social group, the Department avers that there would need to be more than one victim in the group. An individual persecutor need not have personally victimized multiple people within the society, but the persecution itself is only relevant to broader societal perceptions if there are multiple victims, whether by one or more persecutors.

described as a 'particular social group,' and that, therefore, "the statutory language standing alone is not very instructive") (emphasis added).

3. The Particular Social Group Must Exist Independently of the Harm Asserted to be Persecution Suffered and/or Feared.

Moreover, to be cognizable, a particular social group must "exist independently" of the harm asserted in an application for asylum or statutory withholding of removal. *See, e.g., Perez-Rabanales v. Sessions,* 881 F.3d 61, 67 (1st Cir. 2018); *Lukwago v. Ashcroft*, 329 F.3d 157, 172 (3d Cir. 2003); *M-E-V-G-*, 26 I&N Dec. at 236 n.11, 243; *W-G-R-*, 26 I&N Dec. at 215. Otherwise, positing a particular social group whose membership is dependent on the persecution at issue creates a backwards and, thus, illogical causation construct, i.e., one premised on circular reasoning. *See Gonzalez-Cano v. Lynch,* 809 F.3d 1056, 1059 (8th Cir. 2016) ("Among other causation problems, the most severe harm Gonzalez Cano suffered—abduction and forced labor—are the characteristics that define his proposed social group [i.e., escapee Mexican child laborers]. As such, his membership in that group could not have been the motive, at least initially, for the persecution."); *Lukwago*, 329 F.3d at 172 ("Although the shared experience of enduring past persecution may, under some circumstances, support defining a 'particular social group' for purposes of fear of future persecution, it does not support defining a 'particular social group' for past persecution because the persecution must have been 'on account of' a protected ground.").

The Board also has observed that a particular social group not only must "exist independently" of the persecution suffered and/or feared, it also cannot be "defined exclusively" by such persecution. *Matter of C-A-*, 23 I&N Dec. 951, 960 (BIA 2006), *aff'd sub nom Castillo-Arias v. U.S. Att'y Gen.*, 446 F.3d 1190 (11th Cir. 2006); *see also M-E-V-G-*, 26 I&N Dec. at 242; *W-G-R-*, 26 I&N Dec. at 218; *S-E-G-*, 24 I&N Dec. at 584; *A-M-E- & J-G-U-*, 24 I&N Dec. at 74. While the Board spoke in terms of "exclusively" defining a particular social group by the

persecution being claimed by the applicant, the Department does not view this as an endorsement by the Board of "hybrid" particular social groups that are based, in part, on the persecution suffered and/or feared, plus additional traits. Indeed, such a hybrid formulation, "Salvadoran youth who have been subjected to recruitment efforts by MS-13 and who have rejected or resisted membership in the gang based on their own personal, moral, and religious opposition to the gang's values and activities," was rejected by the Board in *Matter of S-E-G-*, which stated that "we do not find that in this case the social group can be defined exclusively by the fact that its members have been subjected to harm in the past (i.e., forced gang recruitment and any violence associated with that recruitment) . . . ." 24 I&N Dec. at 581, 584.

The Seventh Circuit dealt with this "hybrid" issue in *Cece v. Holder*, 733 F.3d 662 (7th Cir. 2013) (en banc), which, according to the majority opinion, dealt with a putative particular social group involving a number of traits, including being "vulnerable to traffickers," *Id.* at 671. The majority disagreed with the Board's reasoning that the subject alien's particular social group was not cognizable because it was "defined in large part by the harm inflicted on the group, and does not exist independently of the traffickers." *Id.* While the majority agreed that a particular social group could not be defined "merely" or "only" by the persecution suffered and/or feared, it ruled that a group "defined in part by the fact of persecution . . . would not defeat recognition of the social group under the Act." *Id.*

The validation of such "hybrid" particular social groups, however, is problematic for the reasons set forth by Judge Easterbrook in his dissenting opinion in *Cece*. Specifically, he noted that even under such a hybrid approach, "'any person mistreated in his native country can specify a "social group" and then show in circular fashion that the mistreatment occurred because of membership in that ad hoc group.'" *Id.* at 682. When "the selection criteria used by the persecutor

. . . become the defining characteristics of the 'social group' . . . [t]he structure of [8 U.S.C.] § 1101(a)(42)(A) unravels." *Id.*

Accordingly, the Department contends that the Attorney General should rule that a cognizable particular social group must exist "independently" of the harm asserted as the persecution suffered and/or feared as the basis of an application for asylum or statutory withholding of removal, and reject the viability of so-called "hybrid" particular social groups.[5]

As directly applicable to the instant case, one certainly could fashion a colorable argument that the particular social group found cognizable by the Board in *A-R-C-G-*, and similar to the respondent's formulation here, was not fully independent of the persecution suffered and/or feared because it contained the trait of being "unable to leave their relationship." 26 I&N Dec. at 392. As a practical matter, however, in asylum and statutory withholding of removal cases premised upon domestic violence, the persecution at issue rarely, if ever, involves the simple inability to leave a relationship, such as via legal separation or divorce, as opposed to a central focus on the direct physical and mental abuse encountered. Indeed, in its decision in *A-R-C-G-*, the Board specifically noted that the group was "not defined by the fact that the applicant is subject to domestic violence." *Id.* at 393 n.14. The Board, as does the Department, understands "unable to leave" a relationship to signify an inability to do so based upon a potential range of "religious, cultural, or legal constraints," as opposed to simply harm or threats from the victim's domestic

[5] This rule, however, allows for the unique possibility, as recognized by the Board in *M-E-V-G-*, that in some situations "[u]pon their maltreatment, [victims] would experience a sense of 'group,' and society would discern that this group of individuals, who share a common immutable characteristic, is distinct in some significant way." 26 I&N Dec. at 243. For example, it is conceivable that, based upon past private criminal victimization, such as kidnapping accompanied by rape, that victims might become so stigmatized in a society, that the potential for a cognizable particular social group exists, with the stigmatization resulting in separate and distinct persecution from the original private criminal victimization.

partner.[6] *Id.* at 393. Accordingly, neither the particular social group at issue in *A-R-C-G-* nor the respondent's putative group here runs afoul of the principle that a particular social group must exist independently of the persecution suffered and/or feared. Nevertheless, the Department observes that it has encountered numerous particular social group formulations in the domestic violence context that are, in fact, defined in whole or part by the persecution suffered and/or feared forming the basis of the persecution claims. The Department does not understand *A-R-C-G-* to sanction the cognizability of such putative particular social groups, which should be rejected as legally deficient.

4. Additional Principles Regarding the "Membership in a Particular Social Group" Ground.

In addition to the foregoing limiting principles and requirements, there are other important parameters and points relevant to particular social group analysis, including in the context of private criminal victimization. For example, while some particular social group formulations ostensibly may pass muster under the requirements discussed above, they nevertheless should not be deemed cognizable because they are antithetical to the object and purpose of the Act. Examples include those formulations based on current or former criminal or terrorist associations. *See, e.g.*, *Arteaga v. Mukasey*, 511 F.3d 940, 946 (9th Cir. 2007) ("[C]alling a street gang a 'social group'

[6] The Board further explained that "a married woman's inability to leave the relationship may be informed by societal expectations about gender and subordination, as well as legal constraints regarding divorce and separation." *Id.* The Board also considered it relevant that the police had selectively withdrawn assistance that a citizen ordinarily could expect by refusing to assist the applicant "because they would not interfere in a marital relationship." *Id.*; *see generally Cece*, 733 F.3d at 681 (Easterbrook, J., dissenting) ("She does not say that the government of Albania persecutes Albanian women. Indeed, she does not contend that Albania discriminates in any way by national origin or sex. She does not maintain that police and courts protect male victims of crime but not female victims; instead she tells us that Albania's system of law enforcement is weak. Failure to achieve optimal deterrence is unfortunate but not 'persecution' by any useful understanding."). Thus, it is important to explore why assistance was refused, which may be informed by whether other victims of violence draw a different response from the authorities. Concomitantly, precisely why the authorities refuse to provide assistance in this context, informing the social distinction requirement for particular social group status, *see infra*, is a related, but separate inquiry from whether the authorities are "unable or unwilling to control" a non-state actor for purposes of assessing the existence of "persecution." *See Acosta*, 19 I&N Dec. at 222-23 (discussing the concept of "persecution").

(b)(6)

as meant by our humane and accommodating law does not make it so. In fact, the outlaw group to which the petitioner belongs is best described as an 'antisocial group,' . . . . To [recognize a criminal gang as a "particular social group"] would be to pervert the manifest humanitarian purpose of the statute."); *Matter of E-A-G-*, 24 I&N Dec. 591, 595-96 (BIA 2008). Some circuit courts would find that "former" membership in such nefarious groups may give rise to cognizable particular social groups, *see, e.g.*, *W-G-R-*, 26 I&N Dec. at 215 n.5 (citing the split among the circuit courts). For example, the Fourth Circuit eschewed a focus on "the *former* status of membership in a gang" in favor of a focus on "a distinct *current* status of membership in a group defined by gang apostasy and opposition to violence.i" *See Martinez v. Holder*, 740 F.3d 902,i912 (4th Cir. 2014). The circuit courts holding to the contrary have the better argument. As observed by the First Circuit:

> A former gang member was still a gang member, and the BIA is permitted to take that into account. That he renounced the gang does not change the fact that [he] is claiming protected status based on his prior gang membership, and he does not deny the violent criminal undertakings of that voluntary association . . . . The shared past experiences of former members of the 18th Street gang include violence and crime. The BIA's decision that this type of experience precludes recognition of the proposed social group is sound.[7]

[7] In addition, the reasoning of the courts of appeals ruling to the contrary is based in part on the faulty premise that although groups such as the mafia or other criminal gangs could be recognized as particular social groups, other provisions of the INA—such as the "exceptions" at sections 208(b)(2) and 241(b)(3)(B)—would address concerns about granting protection to bad actors. *See, e.g.*, *Benitez Ramos v. Holder*, 589 F.3d 426, 431 (7th Cir. 2009). This reasoning misses the point. The exceptions (e.g., terrorist-related activity and serious nonpolitical crime), on the one hand, and the enumerated grounds protected under the refugee definition and withholding statute (race, religion, nationality, membership in a particular social group, and political opinion), on the other hand, are different in both their purpose and their operation. The exceptions are carefully constructed to define the limited circumstances under which a particular individual, who has otherwise met all the requirements of the refugee definition, for example, does not personally need or merit protection. In keeping with the carefully limited scope of these exceptions, rigorous evidentiary requirements must be met before an otherwise eligible individual can be barred from asylum or statutory withholding of removal because of criminal activity or other bad acts. The question of whether the reason for flight is one that warrants protection under our laws is separate from the question of individual worthiness addressed by the exceptions. For instance, regardless whether there is sufficient evidence to establish that an individual member of the mafia has committed acts that would bar him from protection, actions committed against him because of current or former membership in the mafia are not motivated by a characteristic that should be recognized as a protected ground. Plus, the exceptions should not be construed as constituting the sole authority to deny protection in such a situation. And precluding protection on the basis of past criminal acts or associations would avoid the undesirable effect of rewarding persons who joined gangs. *Cf. Elien v. Ashcroft*, 364 F.3d 392, 396 (1st Cir. 2004) (rejecting group of

Cantarero v. Holder, 734 F.3d 82, 86 (1st Cir. 2013).

In addition, in assessing the cognizability of a particular social group, the Board has observed that "a purely statistical showing" of who is being harmed "is not by itself sufficient proof of the existence of a persecuted group," and that "[i]t is not enough to simply identify the common characteristics of a statistical grouping of a portion of the population at risk." *Matter of Sanchez & Escobar*, 19 I&N Dec. 276,i285 (BIA 1985), *aff'd sub nom. Sanchez-Trujillo v. INS*, 801 F.2d 1571 (9th Cir. 1986). Thus, for example, the simple fact that a large number of women may suffer from domestic abuse does not, in itself, establish the cognizability of any related particular social group.[8]

Further, particular social group analysis is a case-specific and society-specific exercise. Simply because a putative particular social group may be found cognizable in one case and as to one society, at one particular point in time, such as "married women who are unable to leave their relationship" vis-à-vis Guatemala in *A-R-C-G-*, does *not* mean that a similar particular social group formulation automatically will be cognizable in other cases and as to other societies[9] (or that simply being a member of a cognizable group automatically qualifies one for asylum or statutory withholding of removal without the necessity of satisfying the plethora of other requirements).

"deported Haitian nationals with criminal records in the United States" because recognizing such a group would create perverse incentives to commit crimes in order to avoid deportation). In some instances, courts have found particular social group membership based on past membership in criminal enterprises, but not based on resisting recruitment, thus creating a perverse incentive for individuals to engage in criminal activity rather than to resist it.

[8] *See generally* U.S. Dep't of Justice, Office of Justice Programs, Bureau of Justice Statistics, *Intimate Partner Violence: Attributes of Victimization, 1993–2011* (Nov. 2013) at App. Table 3 (noting that, that, as late as 2000, almost 1 million females over the age of 12 in the U.S. had suffered some form of intimate partner violence), https://www.bjs.gov/content/pub/pdf/ipvav9311.pdf.

[9] And, of course, the converse also is true. For example, a putative particular social group composed of the "wealthy" ordinarily will not be cognizable. *See Matter of A-M-E- & J-G-U-*, 24 I&N Dec. at 73-76. However, one cannot reject its cognizability as a per se matter, as a case-by-case and society-by-society analysis is always required. *See M-E-V-G-*, 26 I&N Dec. at 241

(b)(6)

See, e.g., *A-R-C-G-*, 26 I&N Dec. at 392; *M-E-V-G-*, 26 I&N Dec. at 241; *see also Pirir-Boc v. Holder*, 750 F.3d 1077, 1083–84 (9th Cir. 2014). Indeed, even within the same society, material conditions may change over time. Of special significance to asylum and statutory withholding applications premised on intra-partner domestic violence, as in the case at hand, the Board has emphasized:

> [C]ases arising in the context of domestic violence generally involve unique and discrete issues not present in other particular social group determinations, which extends to the matter of social distinction. However, even within the domestic violence context, the issue of social distinction will depend on the facts and evidence in each individual case, including documented country conditions; law enforcement statistics and expert witnesses, if proffered; the respondent's past experiences; and other reliable and credible sources of information.[10]

A-R-C-G-, 26 I&N Dec. at 394–95. Consequently, while retaining *A-R-C-G-*, the Attorney General should require a more rigorous focus on case- and society-specific analysis in particular social group analysis.[11]

5. *Matter of A-R-C-G-*'s Particular Social Group Analysis.

The Department generally supports the legal framework set out by the Board in *A-R-C-G-* for the adjudication of asylum and statutory withholding of removal applications premised on intra-partner domestic violence and the protected ground of membership in a particular social group. As noted, however, the Department firmly rejects the cognizability of putative particular social groups in this context when they are defined in whole or part by domestic violence, i.e., the harm alleged as the persecution suffered and/or feared forming the basis of the claim.

[10] In this regard, while the burden of proof is firmly on the applicant to establish eligibility for asylum and statutory withholding of removal, such does not eviscerate all responsibility on the Department or the Immigration Judge to help build an adequate record for adjudication. Though adversarial, a "cooperative approach" in Immigration Court should not be eschewed. *See Matter of S-M-J-*, 21 I&N Dec. 722, 724 (BIA 1997).

[11] And, of course, this principle applies, as a general matter, to all asylum and statutory withholding of removal applications. *See Mogharrabi*, 19 I&N Dec. at 442 (emphasizing the importance of "assess[ing] each case independently on its particular merits").

In his March 30, 2018 order, the Attorney General emphasized that the Immigration Judge's certification order noted that "several Federal Article III courts have recently questioned whether victims of private violence may qualify for asylum . . . based on their claim that they were persecuted because of their membership in a particular social group." *Id.* at 249; *see* I.J. certification order at 2-4. The Department agrees with the core aspects of those decisions and believes that they provide helpful guidance for assessing asylum and statutory withholding of removal applications based on intra-family violence, including domestic violence. However, none of the circuit court decisions cited by the Immigration Judge questioned the underlying validity of *A-R-C-G-*. Rather, several of the decisions upheld the Board's appropriate case-by-case, society-specific analyses in distinguishing the subject aliens' circumstances from that in *A-R-C-G-*, including by analyzing whether the applicant was in fact a member of the claimed group, a necessary step in determining whether the harm feared would be on account of said group membership.

For example, in *Vega–Ayala*, the First Circuit explained that the "facts are a far cry from the circumstances in *A-R-C-G-*" insofar as the subject alien could have left her purported persecutor, never lived with him, "saw him only twice a week and continued to attend a university," and he was incarcerated for twelve months of their eighteen-month relationship. 833 F.3d at 39. In *Cardona*, the same court agreed with the Board that the subject alien had not factually demonstrated that she fit within her own proposed particular social groups: "Guatemalan women in domestic relationships who are unable to leave or women who are viewed as property by virtue of their positions within a domestic relationship.'" 848 F.3d at 523 (internal citations and quotation marks omitted). The First Circuit upheld the Board's determination that she "'was never in a 'domestic' relationship'" with her abuser. *Id.*

(b)(6)

In *Marikasi*, the Sixth Circuit explained that the Board had properly distinguished the subject alien's case in "important respects from *Matter of A-R-C-G-*," including her ability to leave her husband and avoid further contact with him for a substantial period of time. 840 F.3d at 291. The court also noted that "because of her ability to freely move through the country and avoid her husband," she "failed to substantiate any religious, cultural, or legal constraints that prevented her from separating from the relationship . . . or moving to a different part of that country." *Id.* Finally, the court observed that the facts showed that the subject alien "had a substantial network of family, friends, and co-workers who showed willingness and ability to help her" and that she "did not credibly show any particular actions or complicity by the government which would have rendered her unable to avail herself of that country's protection." *Id.*

Finally, in *Fuentes-Erazo*, the Eighth Circuit observed that, in contrast to *A-R-C-G-*, the subject alien "was, in fact, able to leave her relationship" and reside in her country "safely for approximately five years, during which time she traveled and worked . . . entered into a relationship with another man, and gave birth to a second child—all without having any contact whatsoever with" her former partner. 848 F.3d at 853.[12]

[12] Both *Marikasi* and *Fuentes-Arazo* reinforce the point that a domestic relationship is not necessarily an immutable trait. The Department recognizes that an applicant's ability, per se, to obtain a legal divorce or separation – if legally married – and leave her country for the United States does not *automatically* mean that her domestic relationship is mutable. Her former husband may not recognize the legal termination of their relationship, the authorities may not enforce it, and the only way she may be free of the relationship is, in fact, to leave her country. However, the ability to obtain a divorce or separation and leave her country are relevant considerations as to whether that relationship is mutable, and serve as strong evidence of the viability of internal relocation. In this regard, it would be important for an adjudicator to consider whether the applicant actually sought the help of the authorities to enforce the legal termination of her relationship, and their response. In addition, an applicant's ability to marshal support and resources to travel to the United States has a weighty bearing on whether she could have availed herself of those same support networks and resources to reasonably internally relocate within her own country, *see infra*, as opposed to invoking the need for international protection. *See generally Silva v. Ashcroft*, 394 F.3d 1, 7 (1st Cir. 2005) (noting that "if a potentially troublesome state of affairs is sufficiently localized, an alien can avoid persecution by the simple expedient of relocating within his own country instead of fleeing to foreign soil"). Likewise, if the applicant can demonstrate that she needed to cross borders in order to avoid persecution, rather than relocating internally, that would support her claim.

The remaining significant circuit court decision discussed by the Immigration Judge in his certification order is *Velasquez*, 866 F.3d 188. I.J. certification order at 3-4. Specifically, the Immigration Judge opined that, "[i]n the absence of a similar concession by the DHS [as in *A-R-C-G-*] to the legal validity of the particular social group implicated in this case," and in light of the Fourth Circuit's decision in *Velasquez*, "*Matter of A-R-C-G-* may not be legally valid within this jurisdiction in a case involving a purely intra-familial dispute." I.J. certification order at 3-4. In this regard, the Department notes that while the Board in *A-R-C-G-* did acknowledge the Department's concession, it noted that such "comports with our recent precedents clarifying the meaning of the term 'particular social group'." 26 I&N Dec. at 392. The Board then proceeded to engage in a detailed, independent analysis of the particular social group formulation vis-à-vis the requirements of a common, immutable characteristic, particularity, and social distinction. *See id.* at 392-94. Moreover, in *Velasquez*, the Fourth Circuit did not overrule or even criticize *A-R-C-G-*. Rather, it simply observed that *A-R-C-G-* did not "control," given that the subject alien's particular social group, i.e., her nuclear family, was different from that in *A-R-C-G-*, and the cognizability of her particular social group was not in question. *See Velasquez*, 866 F.3d at 194, 195 n.5. The Fourth Circuit's analytical focus was on nexus in the context of an intra-family dispute involving a custody battle between the subject alien and her mother-in-law over the subject alien's child. *Id.* at 194-96.

Consequently, with respect to *A-R-C-G-* (and other Board precedent cited in the instant brief), while the Department recognizes that the Attorney General is not ultimately bound by such, *see, e.g.*, *A-B-*, 27 I&N Dec. at 249-50, the Department avers that the Attorney General should not directly or indirectly abrogate *A-R-C-G-*. Rather, as previously noted, the Attorney General should emphasize the importance of case- and society-specific analysis, as conducted by the Board in the

pertinent decision cited by the Immigration Judge in his certification order (as well as the necessity of satisfying all other requirements before establishing eligibility for asylum or statutory withholding of removal).

In addition, should the Attorney General abrogate *A-R-C-G-* and its holding that "married women in Guatemala who are unable to leave their relationship" can constitute a cognizable particular social group under appropriate circumstances, 26 I&N Dec. at 390, the focus of related protection claims before the Executive Office for Immigration Review and the Department may well shift to other particular social group formulations involving different, but no less complex cognizability (and nexus) issues. For example, claims based on more distilled gender-based particular social group formulations, such as women of a specific nationality per se, likely would need to be addressed. *See, e.g.*, *Perdomo v. Holder*, 611 F.3d 662 (9th Cir. 2010) (discussing, and ultimately remanding, the question of "women in Guatemala" as a cognizable particular social group); *see also A-R-C-G-*, 26 I&N Dec. at 395 n. 16 (noting that "[s]ince the respondent's membership in a particular social group is established under the aforementioned group, the Board "need not reach" the "gender alone" issue.).

Particular social group formulations based on gender alone, or gender and nationality alone, also would more directly implicate significant policy considerations.[13] *See generally Matter of Rodriguez-Majano*, 19 I&N Dec. 811, 816 (BIA 1988) (observing that as the concept of what constitutes persecution on account of a protected ground expands, not only does the class of victims potentially eligible for asylum and statutory withholding of removal expand, but also the class of

[13] Additional briefing would be required to adequately address such additional issues, which are as varied as they are fundamental. It would involve, at a minimum, an examination of the legislative history to the Refugee Act of 1980, Pub. L. No. 96–212, 94 Stat. 197, the ratification history to the 1967 Protocol Relating to the Status of Refugees, Jan. 31, 1967, [1968] 19 U.S.T. 6223, and the *travaux préparatoires* to the 1951 Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6259. In any event, the examination of such foundational issues with broad-reaching implications is an exercise probably best left to rulemaking.

(b)(6)

persecutors barred from most forms of relief and protection), *abrogated on other grounds*, *Negusie v. Holder*, 555 U.S. 511, 522–23 (2009); *see also* 8 C.F.R. § 1240.8(d) ("If the evidence indicates that one or more of the grounds for mandatory denial of the application for relief may apply, the alien shall have the burden of proving by a preponderance of the evidence that such grounds do not apply.").

6. Respondent's Particular Social Group Formulation.

As will be discussed, the Department's position is that the Board exceeded its proper scope of review over the Immigration Judge's original December 1, 2015 decision, in finding, *inter alia*, the respondent's particular social group to be cognizable. Consequently, the most appropriate course would be for the Attorney General to remand this matter to the Board, with instructions to remand the case to the Immigration Judge to reassess this issue in the first instance under any clarified standards the Attorney General may enunciate. Consequently, it is appropriate for the Department to withhold its own definitive analysis and argument on this issue as well, so they may be made in light of the Attorney General's decision. The Department, therefore, respectfully reserves the right to continue to contest the cognizability of the respondent's putative particular social group, as necessary.

C. Other Requirements.

Aside from establishing the existence of a protected ground, such as a cognizable particular social group, other significant requirements must be met before eligibility for asylum or statutory withholding can be established in scenarios involving private criminal victimization. The

Department urges the Attorney General to reemphasize the individual importance of each such requirement in the adjudicative process.[14]

1. Adequate Testimony and, When Required, Corroboration.

Pursuant to the Act, the testimony of the applicant alone may be sufficient to sustain the applicant's burden of proof for asylum and statutory withholding of removal, but only if the applicant satisfies the adjudicator that the testimony: (i) is "credible," (ii) is "persuasive," and (iii) "refers to specific facts sufficient to demonstrate that the applicant is a refugee." INA §§ 208(b)(1)(B)(ii) (asylum); 241(b)(3)(C) (statutory withholding of removal). Further, even when an adjudicator determines that the applicant's testimony is "otherwise credible," the adjudicator can require the applicant to produce corroborating unless the applicant establishes that he does not have the evidence and cannot reasonably obtain it. *Id.*

With respect to asylum and statutory withholding of removal applications premised on private criminal victimization due to domestic violence, as in the instant case, the applicant presumably should have detailed knowledge of the abuser. The applicant's knowledge in this regard, or failure to reasonably explain the lack thereof, is relevant as to whether the applicant's testimony is credible, persuasive, and sufficiently detailed to satisfy the applicant's burden of proof under the Act. In addition, such information could help to better identify persecutors should they ever attempt to enter the United States or otherwise gain immigration benefits while present here.

Accordingly, with respect to domestic violence-based asylum and statutory withholding of removal applications, the Attorney General should consider mandating that the applicant provide

[14] In so doing, however, the Department recognizes that any given asylum or statutory withholding of removal application may give rise to clearly dispositive issues that do not necessitate an assessment of all remaining issues. *See INS v. Bagamasbad*, 429 U.S. 24, 25 (1976) ("As a general rule courts and agencies are not required to make findings on issues the decision of which is unnecessary to the results they reach."); *Matter of S-H-*, 23 I&N Dec. 462, 465 (BIA 2002) (recognizing that in some situations, "a dispositive issue is sufficiently clear that resolving the case on that basis alone will be a sound exercise of judicial economy").

specific information about the putative persecutor (or a reasonable explanation as to why such cannot be provided), such as: (i) full name, date of birth, and place of birth; (ii) full names of parents and siblings; (iii) last known address; (iv) last known telephone number (if any); (v) physical characteristics (e.g., race, height, weight, hair color, eye color, prominent scars or tattoos); (vi) copies of photographs (if any); (vii) name and location of last known employer or, if self-employed, name and location of business; (viii) any known criminal record, with approximate dates; (ix) any known military service, with approximate dates; (x) any known violent or otherwise abusive behavior towards other persons, and the identity of such victims; (xi) any known visits to the United States, with approximate dates; (xii) the most recent information as to health; (xiii) the most recent information as to any additional domestic or intimate relationships; and (xiv) any and all direct or indirect contact the applicant may have had with, or information received about, the putative persecutor following the applicant's arrival in the United States.

In addition, the Attorney General should consider mandating that an applicant provide specific personal information that may be materially relevant to an applicant's domestic violence-based claim that, in the Department's experience, has not normally been requested to date with respect to this type of claim, such as: (i) the applicant's own current domestic or intimate relationships, if any; (ii) any children born in the United States (along with pertinent birth certificates); and (iii) whether the applicant or the applicant's children, if any, have traveled abroad to a place where the putative persecutor could contact them since their arrival in the United States. The Department recognizes that inquiry into an applicant's current domestic or intimate relationships must be done with due care and appropriate sensitivity. The legitimate purpose of such an inquiry is to develop the record with material information to better assist the adjudicator in making a fully informed decision. For example, the existence of a new domestic or intimate

relationship may be pertinent to the putative persecutor's perception of his relationship with the applicant or to the putative persecutor's inclination to harm the applicant, whether negatively or positively. Additionally, if the applicant has a current domestic or intimate relationship, especially one that is legally recognized in the country of alleged persecution, this may be pertinent to issues of internal relocation and state protection in that country.

2. Nexus.

An applicant for asylum and statutory withholding of removal, of course, also must establish the requisite nexus between the persecution at issue and a protected ground, i.e., that a protected ground was or will be "at least one central reason" for the persecution. *See* INA § 208(b)(1)(B)(i) (asylum); *Matter of C-T-L-*, 25 I&N Dec. 341, 348, 350 (BIA 2010) (applying the "one central reason" standard to statutory withholding of removal applications); ***but see Barajas-Romero v. Lynch***, 846 F.3d 351, 358-60 (9th Cir. 2017) (rejecting *C-T-L-* and applying "a reason" nexus standard to statutory withholding of removal applications).

As previously noted, the Department is in basic agreement with the decisions of the "Federal Article III courts" cited by the Immigration Judge in his certification order, including *Velasquez*, 866 F.3d 188, that specifically focuses on nexus in the private criminal victimization scenario of an intra-family dispute, i.e., a custody dispute over a child between the child's mother and paternal grandmother. The Fourth Circuit observed that the paternal grandmother "was motivated out of her antipathy toward [the mother] and desire to obtain custody over [the child], and not by [the mother's nuclear] family status," and agreed with the Board and the Immigration Judge that the situation simply involved a "personal conflict between two family members seeking custody of the same family member." *Id.* at 195-96. The Fourth Circuit noted that the scenario "necessarily invokes the type of personal dispute falling outside the scope of asylum protection."

Id. at 196. The court observed that the "'asylum statute was not intended as a panacea for the numerous personal altercations that invariably characterize economic and social relationships.'" *Id.* at 195 (quoting *Saldarriaga v. Gonzales*, 402 F.3d 461, 467 (4th Cir. 2005)); *see also Costa v. Holder*, 733 F.3d 13, 17 (1st Cir. 2013) (upholding the Board and Immigration Judge's finding that the subject alien had failed to establish the requisite nexus to particular social group status involving "informants," and that "[t]here is little to suggest that the scope of persecution extends beyond a 'personal vendetta'").

The Fourth Circuit went on to distinguish the situation in *Velasquez* from those in two of its prior decisions, where it found that family members had, in fact, been targeted on account of their familial status: "Unlike *Cruz* or *Hernandez-Avalos*, this case does not involve outside or non-familial actors engaged in persecution for non-personal reasons, such as gang recruitment or revenge." 866 F.3d at 196. The Department, however, respectfully disagrees with the Fourth Circuit's nexus analysis in those two decisions—*Cruz v. Sessions*, 853 F.3d 122 (4th Cir. 2017), and *Hernandez-Avalos v. Lynch*, 784 F.3d 944 (4th Cir. 2015)—both of which involved scenarios of private criminal victimization. The Fourth Circuit should not have found nexus to a protected ground, i.e., family-based particular social groups.

Specifically, in *Cruz*, Ms. Cantillano Cruz's husband was "disappeared" by his employer after the husband learned that the employer was a drug trafficker and sought to leave his job. 853 F.3d at 125. When Ms. Cantillano Cruz and her husband's uncle questioned the drug trafficker about the husband's whereabouts, he told them "to stop asking questions." *Id.* After the uncle stated his intent to file a police report, the drug trafficker "threatened that they would suffer the same fate as" the husband. *Id.* Ms. Cantillano Cruz and the uncle visited the husband's place of employment several more times, but the drug trafficker told them "not to come back, and further

warned 'that there were dangerous people around.'" *Id.* Subsequently, the drug trafficker separately threatened Ms. Cantillano Cruz and her children at her home. *Id.* The Fourth Circuit held that the Board and the Immigration Judge had applied "an improper and excessively narrow interpretation of the evidence relevant to the statutory nexus requirement," in that they had "shortsightedly focused on [the drug trafficker's] articulated purpose of preventing Cantillano Cruz from contacting the police, while discounting the very relationship that prompted her to search for her husband, to confront [the drug trafficker], and to express her intent to contact the police." *Id.* at 129. The court continued that "[i]n their failure to identify the nuclear family relationship as a central reason for Ms. Cantillano Cruz's persecution, the BIA and IJ further erred by giving weight to the fact that [the drug trafficker] did not threaten additional family members other than [the] uncle," and that the uncle was not a member of the domestic partner's "immediate, nuclear family, the only relevant social group." *Id.*

In the Department's view, it is the Fourth Circuit in *Cruz*, not the Board or Immigration Judge, which had an inappropriate and "excessively narrow" nexus focus. Any person who may have persisted in confronting the drug trafficker about the husband's whereabouts, such as a close friend, may well have received the same level of threats and harassment. Moreover, the drug trafficker also threatened the uncle. If familial relationship rather than an intent to thwart efforts to locate the husband were, in fact, the central reason for the trafficker's threats, the threats toward the uncle would lead to a broader focus on a more attenuated familial relationship than that of a nuclear family. Attenuated familial relationships, of course, are of questionable cognizability. *See Matter of L-E-A-*, 27 I&N Dec. 40, 42-43 (BIA 2017) ("Not all social groups that involve family members meet the requirements of particularity and social distinction . . . . [T]he inquiry in a claim based on family membership will depend on the nature and degree of the relationships

involved and how those relationships are regarded by the society in question.") (internal citations omitted).

In addition, the Fourth Circuit appears to have misapprehended a fundamental principle of nexus analysis in emphasizing "the very relationship *that prompted her* to search for her husband, to confront [the drug trafficker], and to express her intent to contact the police." *Id.* at 129 (emphasis added). Specifically, the Supreme Court has instructed that "the statute makes motive critical," but it is "the persecutors' motives" in persecuting the applicant on the basis of a protected ground that are critical. *INS v. Elias-Zacarias*, 502 U.S. 478, 483 (1992). That Ms. Cantillano Cruz's familial relationship may have motivated her actions does not mean that they also motivated the actions of the drug trafficker, which is the ultimately determinative issue when analyzing nexus.

In *Hernandez-Avalos*, the Fourth Circuit also criticized the Board for its "excessively narrow" nexus focus when it concluded that the threats to kill Ms. Hernandez unless she allowed her son to join a gang were not made on account of her membership in her nuclear family, "but rather because she would not consent to her son engaging in a criminal activity." 784 F.3d at 949 (internal quotation marks omitted). The Fourth Circuit reasoned that:

> Hernandez's relationship to her son is why she, and not another person, was threatened with death if she did not allow him to join Mara 18, and the gang members' demands leveraged her maternal authority to control her son's activities. The BIA's conclusion that these threats were directed at her not because she is his mother but because she exercises control over her son's activities draws a meaningless distinction under these facts. It is therefore unreasonable to assert that the fact that Hernandez is her son's mother is not *at least one* central reason for her persecution.[15]

[15] Even the Fourth Circuit has recognized, however, that simple opposition to gang recruitment does not give rise to eligibility for asylum or statutory withholding of removal. *See Zelaya v. Holder*, 668 F.3d 159, 166 (4th Cir. 2012) (holding, in the context of a particular social group-based claim, that opposition to gangs and resisting gang recruitment "is an amorphous characteristic providing neither an adequate benchmark for determining group membership nor embodying a concrete trait that would readily identify a person as possessing such a characteristic").

(b)(6)

Id. at 950. Respectfully, the court's reasoning is flawed. It ignores the reasonable assumption that the gang, which it described as "particularly violent and aggressive," *id.* at 947 n.3 (internal quotations and citations omitted), would have threatened almost anyone who dared to interfere with its recruitment efforts. Under the court's nexus logic, if Ms. Hernandez had stood alongside her family's minister, a local political leader, and her son's teacher, all rebuffing the gang's recruitment efforts of her son, a central reason for any resulting threats or harm from the gang would be: with respect to Ms. Hernandez, her particular social group/nuclear family status; with respect to the minister, his religion; and with respect to the local political leader, his political opinion. The teacher, presumably, would be unable to establish the requisite nexus to a protected ground. Thus, the Fourth Circuit, of necessity, would ascribe a multiplicity of "central motives" to the gang arising from the same cabined gang recruitment incident. Despite its holding to the contrary, 784 F.3d at 950, it is difficult to discern how the Fourth Circuit's reversal of the BIA's nexus determination in *Hernandez-Avalos* was based on evidence "so compelling that no reasonable factfinder could fail to find" otherwise. *Elias-Zacarias*, 502 U.S. at 483–84.

In both *Cruz* and *Hernandez-Avalos*, the Fourth Circuit places such an expansive gloss on the meaning of the INA § 208(b)(1)(B)(i) term "*central* reason," that it effectively eviscerates the corollary point, i.e., that reasons "incidental or tangential to the persecutor's motivation" will not suffice. *See Matter of J-B-N- & S-M-*, 24 I&N Dec. 208, 213 (BIA 2007) (examining the

---

See also E-A-G-, 24 I&N Dec. 591 (holding that, under the circumstances of the case, a young Honduran male applicant failed to establish that he was a member of a cognizable particular social group of "persons resistant to gang membership"); *S-E-G-*, 24 I&N Dec. 579 (holding that, under the circumstances of the case, neither Salvadoran youth subjected to gang recruitment and who have rejected or resisted such based on their own personal, moral, and religious opposition to the gang nor the family members of such Salvadoran youth constitute a cognizable particular social group); *cf. Elias-Zacarias*, 502 U.S. at 483 (rejecting a guerrilla recruitment claim where the applicant failed to establish that the guerrillas had a motive other than increasing the size of their forces).

legislative history to INA § 208(b)(1)(B)(i) to help inform the meaning of the term "central"). These Fourth Circuit decisions represent a *sub silento* return to the "at least in part" nexus construct of the Ninth Circuit in decisions such as *Borja v. INS*, 175 F.3d 732, 736 (9th Cir. 1999) (en banc), which Congress, in enacting INA § 208(b)(1)(B)(i), found to have "substantially undermined a proper analysis of mixed motive cases."[16] H.R. CONF. REP. NO. 109-72, at 163 (2005).

The *Cruz* and *Hernandez-Avalos* decisions' expansive nexus construct also effectively ignores the reality that such a construct must be applied not only when determining who is a victim of persecution on account of a protected ground, but also when determining who is a perpetrator of persecution on account of a protected ground and thus barred from most forms of relief and protection as ones "who ordered, incited, assisted, or otherwise participated in" persecution pursuant to INA §§ 101(a)(42), 208(b)(2)(A)(i), 241(b)(3)(B)(i). For example, if one were to apply the Fourth Circuit's expansive meaning of the term "central" to a civil war setting, almost all participants potentially would be subject to the "persecutor" bar.

In sum, the Department would urge the Attorney General to consider Judge Wilkinson's thoughtful concurrence in *Velasquez*, in which he raised several salient points with respect to particular social group status and nexus assessments in the context of private criminal victimization. He recognized that while many persecution claims presented highly sympathetic situations, the "protected characteristics . . . are for the most part precisely defined," and particular social group status was not intended by Congress to be "some omnibus catch-all." 866 F.3d at 198.

---

[16] Of further relevance to *Cruz* and *Hernandez-Avalos* is the Ninth Circuit's nexus analysis in *Briones v. INS*, 175 F.3d 727, 728-29 (9th Cir. 1999) (en banc), where the court rejected the Board's assessment that a guerrilla group's targeting of a former informer would have occurred regardless of what political opinion he held and, instead, determined that his "active involvement in a fiercely ideological dispute between the government . . . [and the guerrilla group] leads us inexorably to the conclusion on these facts that the [guerrilla group] surely attributed to him an adverse political point of view when they placed him on their assassination list . . . ." In enacting INA § 208(b)(1)(B)(i), Congress specifically rejected *Briones* as well. *See* H.R. CONF. REP. NO. 109-72, at 163.

Concerning private criminal victimization of families, he observed that "[v]ictims of general extortion . . . that is not unique to any family but rather that affects all segments of the population are nonetheless seizing upon the particular social group criterion in asylum applications." 866 F.3d at 199 (internal quotation marks and citations omitted) (citing *S-E-G-*, 24 I&N Dec. at 587-88). Judge Wilkinson reasoned that it is difficult "to establish the necessary causation when so many persons outside the particular social group experience identical persecution for the same overarching reasons," and that the "pervasive nature of the persecution threatened in these cases suggests that family membership is often not a central reason for the threats received, but rather is secondary to a grander pattern of criminal extortion that pervades petitioners' societies." *Id.*

3. Harm Suffered/Feared Must Amount to "Persecution."

An additional requirement, of course, to establish eligibility for asylum or statutory withholding of removal based upon private criminal victimization is that the harm suffered and/or feared must amount to "persecution." "Persecution" is a legal term of art that is not defined in the Act. Rather, it has been defined almost exclusively by case law. *See, e.g., Ivanishvili v. U.S. Dep't of Justice*, 433 F.3d 332, 340-41 (2d Cir. 2006). In this regard, case law has developed three core aspects of the term to help inform its meaning.

First, the concept of "persecution" involves an intent to target a belief or characteristic. *See, e.g., L-E-A-*, 27 I&N Dec. at 44 n.2 ("In *Matter of Acosta*, 19 I&N Dec. at 222, our original definition of persecution included 'harm or suffering . . . inflicted upon an individual in order to punish him for possessing a belief or characteristic a persecutor sought to overcome.' However, in *Matter of Kasinga*, 21 I&N Dec. 357, 365 (BIA 1996), we clarified that a punitive intent is not required and held, instead, that the focus is only whether the persecutor intended to 'overcome [the

protected] characteristic of the victim.'"). Second, the level of harm must be "severe."[17] *See Matter of T-Z-*, 24 I&N Dec. 163, 172-73 (BIA 2007); *see also Fatin*, 12 F.3d at 1243 (observing that "'persecution' is an extreme concept that does not include every sort of treatment our society regards as offensive"). Third, to constitute "persecution," the harm or suffering must be "inflicted either by the government of a country or by persons or an organization that the government was unable or unwilling to control." *Acosta*, 19 I&N Dec. at 222.

The "unable or unwilling to control" aspect of the concept of persecution is of critical importance in scenarios of private criminal victimization, which may include victimization by local officials acting in a private capacity.[18] "Perfect protection" is not the standard. Rather, the question is whether there is a reasonably effective government system in place for the prevention, investigation, prosecution, and punishment of mistreatment. In this regard, the fact that an individual may suffer severe private criminal victimization and the perpetrator is not brought to justice does not necessarily mean that the government is "unable or unwilling to control" the

[17] Of particular relevance to asylum and statutory withholding of removal applications based on domestic violence is the Eight Circuit's recent decision in *Lopez-Coronado de Lopez v. Sessions*, wherein the court concluded that Ms. Lopez had failed to establish past persecution at the hands of her husband. 886 F.3d 721 (8th Cir. 2018). The court noted that her husband had "hit her five to ten times over the course of a fourteen-year marriage," most recently assaulting her with a cell phone cord and a belt, but reasoned that "[a]lthough the two most recent assaults left temporary marks on her skin, Lopez never sought medical care and did not claim any lasting injuries," and that "[p]ersecution is an extreme concept, and minor beatings do not amount to persecution." *Id.* at 723, 724.

[18] As previously discussed, *see supra* note 2, the Department interprets "private" to mean when the direct perpetrator of harm is not "a government or . . . government-sponsored" within the meaning of the standard for reasonable internal relocation. *See* 8 C.F.R. §§ 1208.13(b)(3)(ii) (asylum),1208.16(b)(3)(ii) (statutory withholding of removal). In this regard, for example, the actions of low-level, corrupt officials ordinarily do not represent those of the "government" at large. *See Silva v. Ashcroft*, 394 F.3d 1, 7-8 (1st Cir. 2005) (holding that "an alien who asserts a fear of future persecution by local functionaries ordinarily must show that those functionaries have more than a localized reach," and determining that the putative persecutor in the case was "an individual whose sphere of influence apparently encompasses only one municipality in a large country," and there was "no evidence that the government cannot or will not protect the petitioner should he return," such that "relocation within the country is a feasible course of action"); *see generally Matter of C-T-L-*, 25 I&N Dec. 341, 349 (BIA 2010) (citing *Baghdasaryan v. Holder*, 592 F.3d 1018, 1024 (9th Cir. 2010), and noting that the "officers' scheme represents 'aberrational' conduct by individuals, not systemic government-sanctioned corruption"). Where the perpetrator is a private actor who is not exercising authority he has or is perceived to have by virtue of his official position, the applicant has the additional burden to establish that the government is unwilling or unable to control that private actor.

perpetrator such that the individual has suffered "persecution." Just as in this country, the offense might not have been brought to the attention of the authorities,[19] the perpetrator might have absconded, there may be a lack of actionable evidence, etc. Further, while a lack of resources is relevant to a government's "ability" to control private criminal victimization, such an assessment must be informed by the fact that no country in the world has unlimited law enforcement resources. Even the United States is afflicted with significant violent crime, including hate crimes and intimate partner violence. *See* U.S. Dept. of Justice, Office of Justice Programs, Bureau of Justice Statistics, *Hate Crime Victimization, 2004-2015* (June 2017) (Summary) (noting that from 2004 to 2015, U.S. residents experienced an average of 250,000 hate crime victimizations), https://www.bjs.gov/content/pub/pdf/hcv0415_sum.pdf; U.S. Dep't of Justice, Office of Justice Programs, Bureau of Justice Statistics, *Intimate Partner Violence: Attributes of Victimization, 1993–2011* (Nov. 2013) at App. Table 3 (noting that, that, as late as 2000, almost 1 million women over the age of 12 in the U.S. had suffered some form of intimate partner violence), https://www.bjs.gov/content/pub/pdf/ipvav9311.pdf. And, in the United States, a significant portion of violent crimes are never resolved. *See* Gramlich, *Most violent and property crimes in the U.S. go unsolved*, Pew Research Center (Mar. 1, 2017) (citing official U.S. Government statistics), http://www.pewresearch.org/fact-tank/2017/03/01/most-violent-and-property-crimes-in-the-u-s-go-unsolved/; *see also Burbiene v. Holder*, 568 F.3d 251, 255 (1st Cir. 2009) (rejecting

[19] The Department's position is that there is no absolute requirement that an applicant must have reported private criminal victimization to the authorities in attempting to establish that a government is "unable or unwilling to control" private criminal victimization to the authorities. However, the lack of such reporting leaves a "leaves a gap in proof about how the government would respond if asked, which the petitioner may attempt to fill by other methods," such as via persuasive evidence that such reporting would have been futile. *See Rahimzadeh v. Holder*, 613 F.3d 916, 922 (9th Cir. 2010); *see also Bringas-Rodriguez v. Sessions*, 850 F.3d 1051, 1069-70 (9th Cir. 2017) (en banc) (clarifying that the lack of reporting creates no heightened evidentiary standard or burden of proof for an applicant, and that in a situation where a class of victims could not reasonably be expected to report, e.g., young gay children, an adjudicator cannot properly expect country condition information detailing how a government responds to their specific victimization).

petitioner's argument "that Lithuania is unable or unwilling to control the problem of human trafficking," noting that "'Lithuania is making every effort to combat human trafficking, a difficult task not only for the government of Lithuania, but for any government in the world'") (internal quotation marks omitted); *Nahrvani v. Gonzales*, 399 F.3d 1148, 1154 (9th Cir. 2005) (observing that police inability to solve the crimes after some investigation does not compel a finding that the government is unwilling or unable to control the persecutors).

Accordingly, the Department asks the Attorney General to clarify the concept of "persecution" in this regard.

4. Reasonable Internal Relocation.

To establish the requisite risk of future persecution for either asylum or statutory withholding of removal when the persecution is not "by a government or . . . government-sponsored," such as in a scenario of private criminal victimization, an applicant must show that she or he could not avoid the harm via reasonable internal relocation.[20] *See* 8 C.F.R. §§ 1208.13(b)(2)(ii), 1208.16(b)(2). As a primary matter, and as previously discussed, *see supra* note 19, when local officials are the perpetrators of the harm while acting in a private capacity, such should not be deemed persecution inflicted by or sponsored by the "government." Further, based upon the pertinent regulations, the Board has set out an appropriate framework for assessing whether an applicant for asylum or statutory withholding of removal has established an inability to reasonably relocate internally. *See Matter of M-Z-M-R-*, 26 I&N Dec. 28 (BIA 2012). In this regard, mere bald assertions are insufficient to establish an applicant's inability to do so. *See Gonzalez-Medina v. Holder*, 641 F.3d 333, 338 (9th Cir. 2011) (in the context of a domestic

[20] When an applicant has established past persecution, or that the perpetrator of future persecution is a government or is government-sponsored, there is a rebuttable presumption that "internal relocation would not be reasonable." *See* 8 C.F.R. §§ 1208.13(b)(3)(ii), 1208.16(b)(3)(ii).

violence-based statutory withholding of removal application). Moreover, the more highly localized the threat, the more likely it is that reasonable internal relocation will be possible. *See generally Tendean v. Gonzales*, 503 F.3d 8, 11 (1st Cir. 2007) ("The troubling events that Tendean described occurred only in Tendean's very small home village . . . , and there is no evidence that his father's political opponent's supporters have any capacity or inclination to pursue Tendean outside of the village.").

5. Regulatory Presumption of Future Persecution Based on Past Persecution.

Finally, it is important to remember in the context of asylum and statutory withholding applications based upon private criminal victimization that even if an applicant establishes past persecution on account of a protected ground so as to trigger the regulatory presumption of future persecution, that presumption is subject to rebuttal. *See* 8 C.F.R. §§ 1208.13(b)(1), 1208.16(b)(1)(i). Specifically, the Department has the opportunity to establish by a preponderance of the evidence either that there has been "a fundamental change in circumstances," such that the applicant no longer has the requisite fear of future persecution, or that the applicant could avoid future persecution via reasonable internal relocation. *Id.*; *see M-Z-M-R-*, 26 I&N Dec. at 31; *Matter of Y-T-L-*, 23 I&N Dec. 601, 605 (BIA 2003). In addition, an applicant's ability to marshal support and resources to travel to the United States has a bearing on whether the applicant could have tapped that same support and resources to reasonably internally relocate within the country of alleged persecution. Further, an applicant's personal circumstances, or country conditions, can fundamentally change for the better, including in the context of private criminal victimization.

II. THE BOARD EXCEEDED THE PROPER SCOPE OF ITS REVIEW.

In contrast to the Attorney General, the Board does not review all issues de novo or retain full authority to receive additional evidence and to make factual determinations. Rather, the Board

reviews an Immigration Judge's findings of fact, including the determination of credibility, under the "clearly erroneous" standard, and reviews de novo questions of law, discretion, judgment, and all other issues on appeal from an Immigration Judge. *See* 8 C.F.R. § 1003.1(d)(3)(i)-(ii); *Matter of Z-Z-O-*, 26 I&N Dec. 586, 587-88 (BIA 2015). The Board is prohibited from engaging in factfinding in deciding an appeal, save for taking administrative notice of commonly known facts such as current events or the contents of official documents. *See* 8 C.F.R. § 1003.1(d)(3)(iv).

In this regard, the Department respectfully contends that the Board exceeded its scope of proper review when it determined that the respondent was eligible for asylum, because such a determination necessarily involved making determinations on factual issues which were contested below and remain contested on appeal. For example, the Board found that the respondent was credible, *see* BIA at 1-2, that her particular social group was cognizable, *id.* at 2, that she established membership in her particular social group, *id.* at 2-3, that she established the requisite nexus between the harm that she suffered and feared and her putative particular social group, *id.* at 3, and that she established "persecution" insofar as the Salvadoran Government was "unable or unwilling to control" her ex-husband, *id.* at 3-4. All of these issues involve factual determinations. *See Z-Z-O-*, 26 I&N Dec. 586, 587-88 (noting that credibility determinations involve findings of fact, citing 8 C.F.R. § 1003.1(d)(3)(i)); *Matter of W-Y-C- & H-O-B-*, 27 I&N Dec. 189, 191 (BIA 2018) (noting that while the Board reviews "the ultimate determination whether a proposed group is cognizable de novo," it reviews "an Immigration Judge's factual findings underlying that determination for clear error," and that a "determination whether a social group is cognizable is a fact-based inquiry made on a case-by-case basis, depending on whether the group is immutable and is recognized as particular and socially distinct in the relevant society") (internal quotation marks and citations omitted); *id.* (noting that the issues of membership in a particular social group

and nexus between the persecution suffered and/or feared and group membership are "inherently factual in nature") (internal citations omitted); *Hernandez-Avalos*, 784 F.3d at 951 ("Whether a government is unable or unwilling to control private actors is a factual question.") (internal quotations marks, punctuations, and citations omitted).

While the Board unquestionably had the authority to review the Immigration Judge's factual findings for clear error, it did not have the authority to make factual findings based on a contested record in the Immigration Judge's stead on appeal. The Board, as "an appellate tribunal merely has authority to reverse erroneous fact findings and no authority to correct them." *See Board of Immigration Appeals: Procedural Reforms to Improve Case Management*, 67 Fed. Reg. 54878, 54890 (2002) (citing *Dickinson v. Zurko*, 527 U.S. 150, 153 (1999)). Consequently, the Board should have remanded the case to the Immigration Judge to make new factual determinations necessary to the disposition of the case free from the errors it identified.

Accordingly, the Attorney General should vacate the Board's determination that the respondent met her burden of proof to establish eligibility for asylum, insofar as the Board exceeded the proper scope of its review authority.[21]

CONCLUSION

[21] The Department reserves the right to continue to contest all pertinent issues concerning the respondent's eligibility for asylum and statutory withholding of removal (and protection under the regulations implementing U.S. obligations under Article 3 of the Convention Against Torture) on any remand to the Board or further remand to the Immigration Judge. In this regard, however, to ensure that "justice is done," *see S-M-J-*, 21 I&N Dec. at 727, the Department notes the following: the Immigration Judge discounted part of the respondent's corroborating evidence concerning her marital relationship to her abuser because the translation of her 2001 Salvadoran protective order, which showed that (b)(6) I.J. (Dec. 1, 2015) at 6 (citing Exh. 3, Tab H); however, it appears that the Immigration Judge's finding in this regard was based on the respondent's mistranslation of the original 2001 Salvadoran protective order. Specifically, the respondent's English language translation of the protective order states, in pertinent part: (b)(6) (b)(6) Exh. 3, Tab H at 46. However, the Spanish language Salvadoran document states, in pertinent part: (b)(6) *id.* at 48, which correctly translates as "(b)(6) (b)(6) *See, e.g.*, Google Translate, https://translate.google.com/.

The Attorney General should issue a decision clarifying the standards for applications of asylum and statutory withholding of removal premised on private criminal victimization consistent with the arguments and authorities set forth by the Department, and abstain from abrogating *A-R-C-G-*. The Attorney General should vacate the Board's decision finding that the respondent established eligibility for asylum, because it exceeded the scope of its proper review authority. Finally, the Attorney General should remand the instant case to the Board and direct the Board to further remand it to the Immigration Judge for any additional factfinding that may be necessary, and an entirely new decision based on the Attorney General's clarified standards.[22]

[22] Although the Attorney General has de novo review authority, *see J-F-F-*, 23 I&N. Dec. at 913, remand to the Immigration Judge is the most appropriate course of action in this case. *See Matter of A-H-*, 23 I&N Dec. 774, 783, 785 (A.G. 2005) (concluding that the "BIA applied an incorrect legal standard," vacating its determination, and "remand[ing] for further proceedings consistent with the legal standard articulated herein," and further noting that it may be appropriate for the "BIA . . . to remand this case to an Immigration Judge for additional relevant fact-finding").

Respectfully submitted on this 20th day of April, 2018, by:

Michael P. Davis
Exec. Deputy Principal Legal Advisor
U.S. Immigration and Customs Enforcement
U.S. Department of Homeland Security[23]

[23] The Department respectfully requests that all correspondence to it in this matter continue to be directed, in the first instance, to the local U.S. Immigration and Customs Enforcement (ICE) Office of the Chief Counsel in Charlotte, North Carolina, with copies to Christopher S. Kelly, Chief of the Immigration Law and Practice Division within ICE's Office of the Principal Legal Advisor.

[redacted]

(b)(6)

PROOF OF SERVICE

On April 20, 2018, I, Christopher Kelly, Chief, Immigration Law and Practice Division, U.S. Immigration and Customs Enforcement, mailed a copy of this U.S. Department of Homeland Security Brief on Referral to the Attorney General and any attached pages to the respondent's co-counsel, Benjamin Winograd, Esq., Immigrant & Refugee Appellate Center, LLC, 3602 Forest Drive, Alexandria, VA 22302, by placing such copy in my office's outgoing mail system in an envelope duly addressed.