(b)(6) per OLC
Attorney-Adviser, Office of Legal Counsel
U.S. Department of Justice, RFK 5261
O: (b) (6) | M: (b) (6)
(b) (6) |
Thanks!

Gene P. Hamilton
Counselor to the Attorney General
U.S. Department of Justice
Devin, can you circulate the backgrounder to this group?

Gene P. Hamilton
Counselor to the Attorney General
U.S. Department of Justice
Thanks so much,
Shannon

Begin forwarded message:

From: USDOJ-Office of Public Affairs <USDOJ-OfficeofPublicAffairs@public.govdelivery.com>
Date: June 11, 2018 at 8:47:07 AM EDT
To: <shannon.l.munro@usdoj.gov>
Subject: ATTORNEY GENERAL SESSIONS DELIVERS REMARKS TO THE EXECUTIVE OFFICE FOR IMMIGRATION REVIEW LEGAL TRAINING PROGRAM
Reply-To: <USDOJ-OfficeofPublicAffairs@public.govdelivery.com>

FOR IMMEDIATE RELEASE
MONDAY, JUNE 11, 2018

ATTORNEY GENERAL SESSIONS DELIVERS REMARKS TO THE EXECUTIVE OFFICE FOR IMMIGRATION REVIEW LEGAL TRAINING PROGRAM

Washington, DC

Today, exercising the responsibility given to me under the INA, I will be issuing a decision that restores sound principles of immigration law.

We have not acted hastily, but carefully. In my judgment, this is a correct interpretation of the law. It advances the purpose of the INA, and it will be your duty to carry out this ruling.

This decision will provide more clarity for you. It will help you to rule consistently and fairly.

The fact is we have a backlog of about 700,000 immigration cases, and it's still growing. That's more than triple 1999. This is not acceptable. We cannot allow it to continue.

Remarks as prepared for delivery

Thank you, James, for that introduction, and thank you for your years of superb service to the Department as an SAL and now here at EOIR. James has been doing a fabulous job. He understands these issues, knows exactly what our clinic is working steadfastly every day to meet them.

Thank you also to Katherine Reilly, Kate Sheehy, Chris Santoro, Edward So, David Neal, Chief Judge Keller, Lisa Ware, and all of the leadership team.

It is good to be with you today.

Each one of you plays an important role in the administration of our immigration laws. Immigration judges are critical to the Department of Justice because it carries out its responsibilities under the INA. You have an obligation to decide cases expeditiously and consistently. As the statutes state, immigration judges conduct design proceedings "subject to such supervision and shall perform such duties as the Attorney General shall prescribe."

This responsibility seeks to ensure that our immigration system works in a manner that is consistent with the laws Congress. As you know, the INA was established to ensure a rational system of immigration in the national interest.

Of course there are provisions in the INA, consent decrees, regulations, and court decisions where the commonsense plain intent of the INA has been made more difficult. That's what you wrestle with frequently.

President Trump is correct: Congress needs to clarify a number of these matters. Without Congressional action, clarification
for us is much more difficult.

Let's be clear: we have a firm goal, and that is to end the lawlessness that now exists in our immigration system. This is the law, and the law is clear. We cannot tolerate laws that are not enforced. If we do, we will lose the confidence of the American public. If we do, we will lose the support of the administration. We cannot allow this to happen. We cannot allow lawlessness to continue.

Last month, the Department of Homeland Security announced that it will begin to refer as close to 100 percent of illegal Border crossers as possible to the Department of Justice for prosecution. The Department of Justice will take up those cases.

I have put in place a "zero tolerance" policy for illegal entry on our Southwest border. If you cross the Southwest border, we will prosecute you. It's that simple.

If someone is smuggling illegal aliens across our Southwest border, then we will prosecute them. Period.

I have sent 35 prosecutors to the Southwest and moved 58 immigration judges to detention centers near the border, a 94,000 percent increase in the number of immigration judges who will handle cases at the border. This is the right thing to do.

All of us should agree that, by definition, we owe it to the United States to protect our borders. We owe it to the people of the United States to protect our laws. We owe it to the American public to protect our country.

And it is not just the border. It is not just the border. It is not just the border. It is not just the border. It is not just the border. It is not just the border.

This is a constitutional issue. This is a moral issue. This is a security issue.

As you all well know, one of our major difficulties today is the asylum process.

The asylum system is being abused to the detriment of the rule of law, sound public policy, and public safety — and to people with just claims. Say a few simple words — claiming a fear of return — is now transforming a straightforward entry and immediate return into a prolonged legal process, where an alien may be released from custody into the Unit possibly never show up for an immigration hearing. This is a large part of what has been accurately called, "catch and release.

Beginning in 2009, more and more aliens who passed an initial USCIS credible fear review were released from custody; States pending a full hearing. Powerful incentives were created for aliens to come here illegally and claim a fear of return spreading that by asserting this fear, they could remain in the United States one way or the other. Far too often, that was true.

The results are just what one would expect. The number of asylum claimants has surged. Credible fear claims have seen an increase of asylum claims found meritorious by our judges declined.

That's because the vast majority of the current asylum claims are not valid. For the last five years, only 20 percent of asylum claims found to be meritorious after a hearing before an Immigration Judge. In addition, some fifteen percent are found invalid at the initial screening.

Further illustrating this point, in 2009, DHS conducted more than 5,000 credible fear reviews. By 2016, only seven thousand new cases were referred to USCIS for full review. The number of asylum claims placed in immigration court proceedings went from few thousand in 2009 to nearly 10,000 in 2016—a 94 percent increase — overwhelming the system and leaving legitimate claims buried.

Now we all know that many of those crossing our border illegally are leaving difficult and dangerous situations. And we have a duty to treat them with respect and due process. But we cannot abandon legal discipline and sound legal concepts.

Under the INA, asylum is available for those who leave their home country because of persecution or fear on account of race, nationality, or membership in a particular social group or political opinion. Asylum was never meant to alleviate all problems — that people face every day all over the world.

Today, exercising the responsibility given to me under the INA, I will be issuing a decision that restores sound principles of asylum law.

We have not acted hastily, but carefully. In my judgment, this is a correct interpretation of the law. It advances the purpose of the INA, and it will be your duty to carry out this ruling.

This decision will provide more clarity for you. It will help you to rule consistently and fairly.

The fact is we have a backlog of about 700,000 immigration cases, and it's still growing. That's more than triple what it was in 2009. We cannot allow it to continue.

At this time, when our immigration system and our immigration judges are under great stress, I am calling on you to work hard and properly to enhance our effectiveness. To end the lawlessness and move to the virtuous cycle, we have to be consistent. We have to be consistent.

We ask each one of you to complete at least 700 cases a year. It's about the average. We are all accountable. Setting rational management policy to ensure consistency, accountability, and efficiency in our immigration court system. The every day to meet and exceed this goal. You can be sure that this administration and this Department of Justice support this critically important and historic effort.
That's why we are hiring more than 100 new immigration judges this calendar year. And we are actively working with DHS to ensure that we can deploy judges electronically and by video-teleconference where needed and to obtain appra facilities.

Let's be clear. These actions will not end or reduce legal immigration. These actions will be directed at reducing illegal immigration.

This is a great nation— the greatest in the history of the world. It is no surprise that people want to come here. But it is according to law.

When we lose clarity or have decisions that hold out hope where a fair reading of the law gives none, we have cruelly harmed. As we resolutely strive to consistently and fairly enforce the law, we will be doing the right thing.

The world will know what our rules are, and great numbers will no longer undertake this dangerous journey. The number and the number of baseless claims will fall. A virtuous cycle will be created, rather than a vicious cycle of expanding illegal immigration.

The American people have spoken. They have spoken in our laws and they have spoken in our elections. They want a border and a lawful system of immigration that actually works. Let's deliver it for them.

###

Do not reply to this message. If you have questions, please use the contacts in the message or call the Office of Public Affairs.
NOTE: The Attorney General’s opinion in the Matter of A-B is attached here.

Attorney General Jeff Sessions today signed his order and opinion in the Matter of A-B. Please attribute the following statement to a Justice Department spokesman:

“Our nation’s immigration laws provide for asylum to be granted to individuals who have been persecuted, or who have a well-founded fear of persecution, on account of their membership in a ‘particular social group,’ but most victims of personal crimes do not fit this definition—no matter how vile and reprehensible
the crime perpetrated against them. The Department of Justice remains committed to reducing violence against women and enforcing laws against domestic violence, both in the United States and around the world."

**Key Excerpts:**

"In reaching these conclusions, I do not minimize the vile abuse that the respondent reported she suffered at the hands of her ex-husband or the harrowing experiences of many other victims of domestic violence around the world. I understand that many victims of domestic violence may seek to flee from their home countries to extricate themselves from a dire situation or to give themselves the opportunity for a better life. But the ‘asylum statute is not a general hardship statute.’ Velasquez, 866 F.3d at 199 (Wilkinson, J., concurring). As Judge Wilkinson correctly recognized, the Board’s recent treatment of the term ‘particular social group’ is ‘at risk of lacking rigor.’ Id. at 198. Nothing in the text of the INA supports the suggestion that Congress intended ‘membership in a particular social group’ to be ‘some omnibus catch-all’ for solving every ‘heart rending situation.’ Id."

"...an applicant seeking to establish persecution on account of membership in a “particular social group” must satisfy two requirements. First, the applicant must demonstrate membership in a group, which is composed of members who share a common immutable characteristic, is defined with particularity, and is socially distinct within the society in question. And second, the applicant’s membership in that group must be a central reason for her persecution."

"When, as here, the alleged persecutor is someone unaffiliated with the government, the applicant must show that flight from her country is necessary because her home government is unwilling or unable to protect her."

"Such applicants must establish membership in a particular and socially distinct group that exists independently of the alleged underlying harm, demonstrate that their persecutors harmed them on account of their membership in that group rather than for personal reasons, and establish that the government protection from such harm in their home country is so lacking that their persecutors’ actions can be attributed to the government."

"Where the persecutor is not part of the government, the immigration judge must consider both the reason for the harm inflicted on the asylum applicant and the government’s role in sponsoring or enabling such actions. An alien may suffer threats and violence in a foreign country for any number of reasons relating to her social, economic, family, or other personal circumstances. Yet the asylum statute does not provide redress for all misfortune."

Re: the Matter of R-A-: “The Board held that the mere existence of shared circumstances would not turn those possessing such characteristics into a
particular social group.”

“A particular social group must not be ‘amorphous, overbroad, diffuse, or subjective,’ and ‘not every ‘immutable characteristic’ is sufficiently precise to define a particular social group.’ M-E-V-G-, 26 I&N Dec. at 239.”

###

Do not reply to this message. If you have questions, please use the contacts in the message or call the Office of Public Affairs at 202-514-2007.
Rothenberg, Laurence E (OLP)

From: Rothenberg, Laurence E (OLP)
Sent: Tuesday, June 12, 2018 10:12 AM
To: O'Malley, Devin (OPA); McHenry, James (EOIR); Wetmore, David H. (ODAG);
Hamilton, Gene (OAG)
Subject: RE: Press Guidance

Thanks. I’ll forward to her.

From: O'Malley, Devin (OPA)
Sent: Tuesday, June 12, 2018 7:51 AM
To: Rothenberg, Laurence E (OLP) <lrothenberg@jmd.usdoj.gov>; McHenry, James (EOIR)
<James.McHenry@EOIR.USDOJ.GOV>; Wetmore, David H. (ODAG) <dhwetmore@jmd.usdoj.gov>; Hamilton,
Gene (OAG) <ghamilton@jmd.usdoj.gov>
Subject: RE: Press Guidance

Devin M. O'Malley
Department of Justice
Office of Public Affairs
Office: (202) 353-8763
Cell: (b) (6)

From: Hornbuckle, Wyn (OPA)
Sent: Monday, June 11, 2018 2:41 PM
To: Rothenberg, Laurence E (OLP) <lrothenberg@jmd.usdoj.gov>; Hamilton, Gene (OAG)
<ghamilton@jmd.usdoj.gov>; Wetmore, David H. (ODAG) <dhwetmore@jmd.usdoj.gov>; McHenry, James
(EOIR) <James.McHenry@EOIR.USDOJ.GOV>
Cc: O'Malley, Devin (OPA) <domalley@jmd.usdoj.gov>
Subject: RE: Press Guidance

Adding Devin O’Malley who handles immigration matters for OPA

From: Rothenberg, Laurence E (OLP)
Sent: Monday, June 11, 2018 1:58 PM
To: Hamilton, Gene (OAG) <ghamilton@jmd.usdoj.gov>; Wetmore, David H. (ODAG)
<dhwetmore@jmd.usdoj.gov>; McHenry, James (EOIR) <James.McHenry@EOIR.USDOJ.GOV>; Hornbuckle,
Wyn (OPA) <whornbuckle@jmd.usdoj.gov>
Sub j ect: FW : Press G ui dance

Do we have anything to help Taryn out?

From: Frideres, Taryn F <FrideresTF@state.gov>
Sent: Monday, June 11, 2018 12:42 PM
To: Michael Dougherty (b)(6) [redacted]; (b)(6) John Zadrozny WH Email
Rothenberg, Laurence E (OLP) <lrothenberg@jmd.usdoj.gov>; (b)(6) Gary Tomasulo NSC Email
Subject: Press Guidance

All:

Can you share with me any recent migration/border-related press guidance you all may have?

Our A/S nominee for the Western Hemisphere has her hearing on Wednesday.

Thanks!

Taryn

Taryn Frideres
Special Advisor, Policy Planning Staff
Office of the Secretary
Department of State
202-647-1709 (office)
(b)(6) mobile
FrideresTF@state.gov

Official
UNCLASSIFIED
Great!

Gene P. Hamilton
Counselor to the Attorney General
U.S. Department of Justice

Catherine went all out finding clips on the Matter of A-B. Attached.

Devin M. O'Malley
Department of Justice
Office of Public Affairs
Office: (202) 353-8763
Cell: (6)
Department of Justice, Matter of A-B Press Links

As of June 12, 2018 2:30 PM

**Reuters:** U.S. attorney general curbs asylum for immigrant victims of violence (Reade Levinson and Sarah Lynch)

**The Wall Street Journal:** Sessions Rules Immigrant Victims of Domestic Violence Can’t Always Win Asylum (Alicia Caldwell)

**Time:** Jeff Sessions ‘Changes to Asylum Law Will Put Some Women in ‘Great Danger,’ Say Experts (Alix Langone)

**CNN:** Trump admin drops asylum protections for domestic violence victims (Tal Kopan)

**ABC News:** No more asylum claims based on fear of gang violence: Sessions (Luke Barr)

**NBC News:** Domestic or gang violence is not grounds for asylum, Sessions rules (Pete Williams)

**New York Times:** Sessions Says Domestic and Gang Violence Are Not Grounds for Asylum (Katie Benner and Caitlin Dickerson)

**AP:** Sessions excludes domestic, gang violence from asylum claims (Elliot Spagat)

**The Washington Post:** Sessions: Victims of domestic abuse and gang violence generally won’t qualify for asylum (Maria Sacchetti)

**U.S. News:** Attorney General Sessions Limits Asylum for Domestic Violence Victims (Sarah N. Lynch)

**The Hill:** Dems slams Sessions over asylum-seeker decision: ‘Their blood is on your hands’ (Avery Anapol)

**Washington Examiner:** Jeff Sessions didn’t end asylum for victims of domestic, gang violence. He just made their lives more complicated (Becket Adams)

**Amnesty International:** LATEST ASSAULT ON ASYLUM SEEKERS TARGETS SURVIVORS OF DOMESTIC AND GANG VIOLENCE

**Huffington Post:** Trump Administration Restricts Asylum Access For Victims Of Gang And Domestic Violence (Elise Foley)

**NPR:** Attorney General Denies Asylum To Victims Of Domestic Abuse, Gang Violence (Joel Rose)

**Vox:** Jeff Sessions just all but slammed the door on survivors of domestic violence and gang violence (Dara Lind)

**National Review:** Sessions Set to Impose Stricter Asylum Requirements (Mairead Mcardle)

**The Week:** Sessions wants to allow fewer immigrants to apply for asylum (Summer Meza)

**The Week:** Your imminent murder no longer qualifies you for asylum, Sessions announces (Summer Meza)

**Splinter:** Jeff Sessions Shuts the Door on Asylum Seekers Fleeing Domestic Violence (Rafi Schwartz)
**Business Insider:** Jeff Sessions just announced a massive shift in asylum protections for victims of gang and domestic violence (John Hatiwanger)

**The New Yorker:** The Trump Administration Is Completely Unravelling the U.S. Asylum System (Jonathan Blitzer)

**Sean Hannity:** ASYLUM CRACKDOWN: Sessions Moves to ‘BLOCK’ Asylum Seekers from Entering US

**BuzzFeed News:** In A Major Change In US Policy, Sessions Rules That Domestic Violence Is Not Grounds For Asylum (Adolfo Flores)

**USA Today:** Jeff Sessions: No asylum for victims of domestic abuse, gang violence (Kevin Johnson and Alan Gomez)

**Daily Mail:** Sessions rules asylum-seeking Salvadoran rape victim can't stay in the U.S. because domestic violence isn't the same as group-based persecution and he says 4 out of 5 claims at the border are INVALID (David Martosko)

**BBC:** US asylum: Domestic and gang violence cases 'no longer generally qualify'

**The New Republic:** Jeff Sessions shuts the door on asylum for women escaping domestic abuse (Matt Ford)

**New York Post:** US won't give asylum to victims of gangs, domestic abuse (Chris Perez)

**San Francisco Chronicle:** Sessions: Domestic violence not grounds for asylum (Bob Egelko and Hamed Aleaziz)

**Slate:** Jeff Sessions Just Barred Most Domestic Violence Victims From Applying for Asylum (Mark Stern)

**The Guardian:** Trump administration moves to end asylum for victims of domestic abuse and gangs

**KTLA 5 News:** Trump Administration Drops Asylum Protections for Victims of Domestic Violence

**Complex:** Jeff Sessions Orders Judges to Stop Granting Asylum to Victims of Gang Violence, Domestic Abuse (Sarah Montgomery)

**ELLE:** The Trump Administration Will Stop Granting Asylum to Victims of Domestic and Gang Violence (Madison Feller)

**Refinery29:** The U.S. Will Stop Granting Asylum To Domestic Violence Survivors (Andrea Gonzalez-Ramirez)

**LA Times:** Trump administration moves to block victims of gange violence and domestic abuse from claiming asylum (Evan Halper)

**Vice:** The Trump administration will no longer grant asylum to victims of domestic abuse or gang violence (Christianna Silva)

**Independent:** Trump administration blocks victims of domestic abuse and gang violence from claiming asylum (Clark Mindock)
The Texas Tribune: U.S. Attorney General: Victims of domestic or gang violence alone generally not eligible for asylum (Julian Aguilar)

Breitbart: Progressives Enraged by AG Sessions’ Reform of Asylum Law (Neil Munro)
Thanks!

Gene P. Hamilton
Counselor to the Attorney General
U.S. Department of Justice

I’m having trouble reaching the site through DOJ’s internet filter, but here is the key paragraph:

(b) (5)

- Liam
Based on the AG's decision in *Matter of A-B-*, we should have materials. I'll also note that the current version of this report doesn't have any updates based on the AG's decision.

Gene P. Hamilton
Counselor to the Attorney General
U.S. Department of Justice

Attached is the latest version from DHS of the "resources for catch-and-release" report, accurately reflecting input we sent them. It still contains placeholders for DOJ input on legislation, regulations, and other executive action. Do we think we will have some material to put in those?
Subject: Updated 6-13-2018 Report on Resources and Authorities Required to Expedite the End of “Catch-and-Release” Practices

Team,

We have collected and collated all the inputs received for this report, please review and return with your edits and recommendations by 18 June 2018 at 0900. Stakeholder second stage review.


r/s
Karl
Karl C. Rohr, PhD.
Chief, Prevention Planning Division
Strategy, Plans, Analysis, & Risk (SPAR)/Plans
DHS Office of Policy
(office#)(202) 282-8271
(mobile#)(b) (6)

Document ID: 0.7.24433.9610
Here is how I would explain it:

On Jun 14, 2018, at 10:52 AM, Stafford, Steven (OPA) <stafford@jmd.usdoj.gov> wrote:


From: Stafford, Steven (OPA)
Sent: Thursday, June 14, 2018 3:14 AM
To: O'Malley, Devin (OPA) <domalley@jmd.usdoj.gov>
Cc: Hamilton, Gene (OAG) <ghamilton@jmd.usdoj.gov>
Subject: Re: MATTER OF A-B | ATTORNEY GENERAL JEFF SESSIONS' OPINION

That is true.

On Jun 14, 2018, at 9:03 AM, Stafford, Steven (OPA) <stafford@jmd.usdoj.gov> wrote:

Well that would be a very different

On Jun 14, 2018, at 8:37 AM, Stafford, Steven (OPA) <stafford@jmd.usdoj.gov> wrote:

Okay so then

On Jun 14, 2018, at 8:34 AM, Hamilton, Gene (OAG) <ghamilton@jmd.usdoj.gov> wrote:

I think that's a great idea. And I'd be happy to meet with anyone, too.

Gene P. Hamilton
Counselor to the Attorney General
U.S. Department of Justice

From: O'Malley, Devin (OPA)
Sent: Thursday, June 14, 2018 8:20 AM
To: Stafford, Steven (GA) <stafford@md.usdoj.gov>
cc: Hamilton, Gene (CGA) <hamilton@md.usdoj.gov>

Subject: Fwd: MATTER OF A-B | ATTORNEY GENERAL JEFF SESSIONS' OPINION

Set from my/Phone

Begin forwarded message:

From: USDOJ-Office of Public Affairs <USDOJ-OfficePublicAffairs@publicsuffixlist.com>
Date: June 11, 2018 at 3:40:53 PMEDT
To: <Aviv.Omran@usdoj.gov>
Subject: MATTER OF A-B | ATTORNEY GENERAL JEFF SESSIONS' OPINION
Reply-To: <USDOJ-OfficePublicAffairs@publicsuffixlist.com>

Monday, June 11, 2018

Note: The Attorney General's opinion in the Matter of A-B is attached here.

Attorney General Jeff Sessions today signed his order and opinion in the Matter of A-B. Please attribute statement to a Justice Department spokesman:

“Today, Attorney General Jeff Sessions today signed his order and opinion in the Matter of A-B. Please attribute statement to a Justice Department spokesman. "Our nation's immigration laws provide for asylum to be granted to individuals who have been persecuted, or who have a well-founded fear of persecution, on account of their membership in a particular social group, but must victims of personal crimes do not fit this how vile and reprehensible the crime perpetrated against them. The Department of Justice remains committed to reducing and enforcing laws against domestic violence, both in the United States and around the world."

Key excerpt:

"In reaching these conclusions, I do not minimize the vile abuse that the respondent reported she suffered at the hands of her abuser. Her accounts of her experiences would be harrowing experiences of many other victims of domestic violence around the world. I understand that many victims of domestic abuse flee from their home countries to extricate themselves from a dire situation or to give themselves the opportunity for a better life. Unfortunately, the statute is not a general hardship statute. Velasquez, 866 F.3d at 199 (Wilkinson, J., concurring). As Judge Wilkinson noted, the Board’s recent treatment of the term ‘particular social group’ is in risk of being ‘abused.’ Id. at 198. Nothing in the context of the Board’s opinion suggests that Congress intended ‘membership in a particular social group’ to be ‘some omnibus catch-all’ for solving every situation.’ Id."

"...an applicant seeking to establish persecution on account of membership in a ‘particular social group’ must satisfy two requirements: the applicant must demonstrate membership in a group, which is comprised of members who share a common immutable characteristic with particularity, and is socially distinct within the society in question. And second, the applicant's membership is the central reason for her persecution."

"When, as here, the alleged persecutor is someone unaffiliated with the government, the applicant must show that flight from her home country was unwilling or unable to protect her."

"Such applicants must establish membership in a particular and socially distinct group that exists independently of the applicant, demonstrate that their persecution harmed them on account of their membership in that group rather than for establishing that the government protection from such harm in their home country is so lacking that their persecutors’ actions were government-sanctioned."

"Where the persecutor is not part of the government, the immigration judge must consider both the reason for the harm in question and the government's role in sponsoring or enabling such actions. An alien may suffer threats and violence in a few instances of this nature relating to her social, economic, family, or other personal circumstances. Yet the asylum statute does not imply that the government knew about or condoned the violence."

Re: the Matter of R-V: "The Board held that the mere existence of shared circumstances would not entitle those possessing a particular social group."

"A particular social group must not be ‘amorphous, overbroad, diffuse, or subjective,’ and not every ‘immunization’ is sufficiently precise to define a particular social group."

###

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Department of Justice | Office of Public Affairs

Document ID: 0.7.24433.8164
Duplicative records
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.
NON-DETAINED

Dimple Shah
Deputy General Counsel
U.S. Department of Homeland Security
Washington, D.C. 20528

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
MOTION ON CERTIFICATION TO THE ATTORNEY GENERAL
This case is currently pending before the Attorney General on referral from the Board of Immigration Appeals (Board or BIA) pursuant to 8 C.F.R. § 1003.l(h)(l)(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. In response to the Attorney General’s invitation, the Department of Homeland Security (Department) respectfully moves the Attorney General to suspend the briefing schedules for both the parties and amici curiae and to clarify the central briefing question or, in the alternative, to extend the briefing schedules for the parties and amici curiae.

In its December 8, 2016 decision in this case, the Board sustained the respondent’s appeal and remanded the case to the Immigration Judge to complete or update background checks and to enter an order granting or denying relief. The Immigration Judge subsequently issued an August 18, 2017 order certifying the case back to the Board. See 8 C.F.R. §§ 1003.1(c), 1003.7. Rather than granting or denying the respondent’s application for asylum, the Immigration Judge questioned, inter alia, whether Matter of A-R-C-G-, 26 I&N Dec. 388 (BIA 2014), upon which the Board had relied in its decision, was “legally valid within this jurisdiction in a case involving a purely intra-familial dispute” in light of the intervening opinion of the U.S. Court of Appeals for the Fourth Circuit in Velasquez v. Sessions, 866 F.3d 188 (4th Cir. 2017). I.J. certification order at 3-4 (Aug. 18, 2017).
As far as the Department is aware, the Board has not yet issued a decision on the Immigration Judge’s certification order. Insofar as the Board has not yet done so, this matter does not appear to be in the best posture for the Attorney General’s review. See 8 C.F.R. § 1003.1(h)(1)(i) (noting that the Board shall refer to the Attorney General for review “its decision”—as opposed to a decision of an Immigration Judge); cf. United States ex rel. Accardi v. Shaughnessy, 347 U.S. 260, 266-67 (1954) (concerning the interplay between the Attorney General’s authority to decide cases and the authority he has delegated to the Board by regulation, including the associated Board procedures); United States v. Nixon, 418 U.S. 683, 695-96 (1974) (applying Accardi). The Department therefore respectfully moves the Attorney General to suspend the briefing schedules to permit the Board to decide the pending certification matter in the first instance, and then proceed as necessary to direct the Board to refer any further decision for his review.

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PROOF OF SERVICE

On March 16, 2018, I, Frederick Gaskins, Mission Support Specialist, U.S. Immigration and Customs Enforcement, mailed a copy of this U.S. Department of Homeland Security Motion on Certification 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.

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(b)(6)
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.

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Pursuant to 8 C.F.R. § 1003.1(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.

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In the Matter of:

File No: [b](6)

In removal proceedings

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(b)(6)
Matter of A-B-, Respondent

Decided by Attorney General March 7, 2018

U.S. Department of Justice
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[Redacted]

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Document ID: 0.7.24433.5831-000001
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This case is currently pending before the Attorney General on referral from the Board of Immigration Appeals (Board or BIA) pursuant to 8 C.F.R. § 1003.l(h)(l)(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: “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. In response to the Attorney General’s invitation, the Department of Homeland Security (Department) respectfully moves the Attorney General to suspend the briefing schedules for both the parties and amici curiae and to clarify the central briefing question or, in the alternative, to extend the briefing schedules for the parties and amici curiae.

In its December 8, 2016 decision in this case, the Board sustained the respondent’s appeal and remanded the case to the Immigration Judge to complete or update background checks and to enter an order granting or denying relief. The Immigration Judge subsequently issued an August 18, 2017 order certifying the case back to the Board. See 8 C.F.R. §§ 1003.1(c), 1003.7. Rather than granting or denying the respondent’s application for asylum, the Immigration Judge questioned, inter alia, whether Matter of A-R-C-G-, 26 I&N Dec. 388 (BIA 2014), upon which the Board had relied in its decision, was “legally valid within this jurisdiction in a case involving a purely intra-familial dispute” in light of the intervening opinion of the U.S. Court of Appeals for the Fourth Circuit in Velasquez v. Sessions, 866 F.3d 188 (4th Cir. 2017). I.J. certification order at 3-4 (Aug. 18, 2017).
As far as the Department is aware, the Board has not yet issued a decision on the Immigration Judge’s certification order. Insofar as the Board has not yet done so,¹ this matter does not appear to be in the best posture for the Attorney General’s review. See 8 C.F.R. § 1003.1(h)(1)(i) (noting that the Board shall refer to the Attorney General for review “its decision”—as opposed to a decision of an Immigration Judge); cf. United States ex rel. Accardi v. Shaughnessy, 347 U.S. 260, 266-67 (1954) (concerning the interplay between the Attorney General’s authority to decide cases and the authority he has delegated to the Board by regulation, including the associated Board procedures); United States v. Nixon, 418 U.S. 683, 695-96 (1974) (applying Accardi). The Department therefore respectfully moves the Attorney General to suspend the briefing schedules to permit the Board to decide the pending certification matter in the first instance, and then proceed as necessary to direct the Board to refer any further decision for his review.

Second, the Department respectfully moves the Attorney General to clarify the briefing question, i.e., “[w]hether, and under what circumstances, being a victim of criminal activity constitutes a cognizable ‘particular social group.’” 27 I&N Dec. at 227. It appears that this question has already been answered, at least in part, by the Board in its prior precedent. For example, the Board ruled in Matter of A-M-E- & J-G-U-, 24 I&N Dec. 69, 74 (BIA 2007), that while a cognizable particular social group “cannot be defined exclusively by the fact that its members have been subjected to harm”—which presumably would include criminal activity.

¹ For instance, in deciding the case on certification, the Board would be able to bring its expertise to bear on any impact the Fourth Circuit’s Velasquez decision has on A-R-C-G.-’s continuing viability and the respondent’s application for asylum. Indeed, the Attorney General’s briefing question concerning “[w]hether, and under what circumstances, being a victim of criminal activity constitutes a cognizable ‘particular social group’” seems to be animated in part by that very issue. See, e.g., Velasquez, 866 F.3d at 194-95 (underscoring that “[e]vidence consistent with acts of private violence or that merely shows that an individual has been the victim of criminal activity does not constitute evidence of persecution on a statutorily protected ground” (quoting Sanchez v. U.S. Att’y Gen., 392 F.3d 434, 438 (11th Cir. 2004)).
victimization—"this may be a relevant factor in considering the group's [social distinction]."


Further, with respect to asylum and statutory withholding of removal claims premised on intra-partner violence, as here, the Board held in A-R-C-G- that the particular social group "married women in Guatemala who are unable to leave their relationship" was cognizable due, in part, to the significant influence of social norms and conditions on such criminal victimization. For example, with respect to the "particularity" requirement for cognizable particular social groups, the Board observed "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." 26 I&N Dec. at 393.

And with respect to the "social distinction" requirement for cognizable particular social groups, the Board noted, inter alia, that the subject society in the case had a "culture of 'machismo and family violence.'"2 Id. at 394. In Velasquez, the Fourth Circuit did not address the validity of A-R-C-G-. See 866 F.3d at 195 n.5. Accordingly, the Department respectfully requests that the Attorney General also consider clarifying the briefing question, including whether he wishes the parties and amici curiae to take a position on revisiting any particular Board precedent. Cf. Matter of Castro-Tum, 27 I&N Dec. 187 (A.G. 2018) (referring Board decision to Attorney General for review and asking parties to address whether specific prior

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2 The Board also cautioned in A-R-C-G- that:

[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.

26 I&N Dec. at 394-95.
Board precedential decisions articulated the proper framework for administrative closure).

Finally, in the alternative, should the Attorney General decline to suspend the briefing schedules pending the Board’s decision on the Immigration Judge’s certification order and to clarify the briefing question, the Department respectfully joins in the respondent’s Request for Extension of Briefing Deadline, dated March 14, 2018, insofar as it seeks an extension of the parties’ briefing schedule until May 18, 2018, with a concomitant extension for amici curiae. For the Department’s part, an extension is needed due to the complexity of the issues involved in this matter and the need for extensive intra-Departmental coordination. As the Board is aware, the Department not only litigates asylum and statutory withholding of removal cases before the Immigration Judges and the Board, but also adjudicates thousands of asylum-related matters (including affirmative asylum applications, credible fear claims, and reasonable fear claims) each year. Accordingly, the Department requests additional time to ensure that its litigation position in this matter is fully reflective of the Department’s unique legal and operational equities.3

3 Indeed, the Executive Branch has undertaken for the better part of two decades an effort to issue regulations that would be highly relevant to asylum and statutory withholding of removal claims premised on criminal activity such as domestic violence, but such regulations have not been finalized. See, e.g., Asylum and Withholding Definitions, 65 Fed. Reg. 76,588 (Dec. 7, 2000) (proposed rule); Matter of R-A-, 24 I&N Dec. 629, 629 (A.G. 2008) (recounting the history of the issue, including proposed regulatory and adjudicative attempts to resolve it); Introduction to the Unified Agenda of Federal Regulatory and Deregulatory Actions, 79 Fed. Reg. 76,456, 76,531 (Dec. 22, 2014) (listing the proposed rule). The Department respectfully submits that this regulatory history illustrates the complexity of the question presented in the Attorney General’s March 7, 2018 order.
Respectfully submitted on this 16th day of March, 2018, by:

Dimple Shah
Deputy General Counsel
U.S. Department of Homeland Security

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.
PROOF OF SERVICE

On March 16, 2018, I, Frederick Gaskins, Mission Support Specialist, U.S. Immigration and Customs Enforcement, mailed a copy of this U.S. Department of Homeland Security Motion on Certification 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.

[Signature]

(b)(6)
Alberto Manuel Benitez
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UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS

REQUEST TO APPEAR AS AMICUS CURIAE
AND
BRIEF OF THE GEORGE WASHINGTON UNIVERSITY IMMIGRATION CLINIC
AS AMICUS CURIAE IN RESPONSE TO AMICUS INVITATION MATTER OF A-B-
The George Washington University Law School Immigration Clinic respectfully requests leave to appear as amicus curiae and file the following brief.

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REQUEST TO APPEAR AS AMICUS CURIAE

The George Washington University Law School Immigration Clinic hereby requests permission from the Board of Immigration Appeals ("Board" or "BIA") to appear as amicus curiae in response to the Amicus Invitation in Matter of A-B-. The Board may grant permission to amicus curiae to appear, on a case-by-case basis, where it serves the public interest. 8 C.F.R. § 1292.1(d).

I am a professor of immigration law at The George Washington University Law School. I also direct the Immigration Clinic within the Jacob Burns Community Legal Clinics, which represents individuals pro bono in a wide variety of immigration matters, with a focus on individuals in removal proceedings and asylum applicants. Before joining the Law School faculty as Director of the Immigration Clinic in 1996, I was on the faculty of the legal clinics at Chicago Kent College of Law and Northwestern University School of Law. Prior to becoming a clinician, I was a staff attorney at the Chicago Lawyers’ Committee for Civil Rights under Law and the Legal Assistance Foundation of Chicago, as well as an intern at the Centro de Estudios Legales y Sociales in Buenos Aires, Argentina. In addition, in the summers I have taught at the law schools of the Instituto Tecnológico Autónomo de México and the Universidad Panamericana, in Mexico City. In the spring 2003 semester I was a visitor at the Boyd School of Law of the University of Nevada at Las Vegas, assisting in the development of that law school’s immigration clinic. I have devoted my entire legal career to working in the public interest, generally with aliens, and so I am familiar with immigration law in its proper context.
ISSUE PRESENTED

1. 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.
INTRODUCTION

Particular social group is a protected ground of asylum that provides protection for vulnerable groups who are not otherwise protected by statute but possess the same innate and immutable characteristics that are inherent in race, religion, political opinion, and nationality. Many of the communities that fall into particular social groups are those that have been systematically oppressed, not just by governments but by society as a whole. Because of this, it is critical that victims of private crime be allowed to present their cases to the court when they have faced harm rising to the level of persecution by actors that the government is unable or unwilling to control.

The GW Law Immigration Clinic in the spring 2018 semester alone has been able to save 29 lives, in large part, by aiding applicants who were victims of crime by non-governmental actors and therefore belonged to a particular social group. Many of the Immigration Clinic's cases concern individuals who have been harmed on account of their family membership. For example, after one client's uncle witnessed MS-13 gang members committing a crime and was murdered by MS-13 gang members, the gang members began to harass and threaten her and her children. The gang chose to persecute our client because of her close relationship with her uncle, who had been like a father to her. After attempting to relocate within the country but continuing to be persecuted by MS-13, she fled to the U.S. with her children.

An Immigration Clinic client was also recently granted asylum based on her membership in the particular social group “Married Salvadoran women unable to leave the relationship.” For years, our client’s husband raped, beat, and abused her, forcing her to marry him against her will. He would refer to her as “trash” and tell her she had to do as he said because she was his wife. He threatened to have her daughter raped if she tried to leave him or disobeyed, forced her to
return when she tried to flee, and used familial connections to the MS-13 gang to threaten her and make it clear that the authorities in El Salvador could not protect her. As a result of the years of severe physical, sexual, and emotional abuse that she endured, she was granted asylum on humanitarian grounds.

The applicant’s burden in cases involving private crime is already quite high, since they must show that they suffered persecution on the basis of a protected ground, which has its own elements and body of case law, and then further show that the government was either unable or unwilling to control it. It would be a mischaracterization to suggest that any victim of any private crime can qualify for asylum under the statute; rather, the Board of Immigration Appeals (“BIA”) and various Circuit Courts have required an applicant to show that the country of origin’s government is unable or unwilling to control the private actors that have perpetrated the persecution.

In the sections below, we first argue that it would be an impermissible agency interpretation of the statute to restrict members of particular social groups to persecution by governmental actors only, and that it would be impermissible to provide stricter persecutor requirements for individuals seeking asylum based on particular social group membership as opposed to the other four protected grounds. Furthermore, we provide a summary of case law to demonstrate how entrenched the applicability of the statute to private perpetrators is in precedent. Finally, we conclude with a discussion of the legislative history and public policy incentives to show the detrimental effect of such a restriction.
ARGUMENT

Prohibiting victims of private criminal activity from qualifying as members of a cognizable particular social group is outside of the authority of the Attorney General. While the Attorney General has the authority to interpret existing statutes, those interpretations must be permissible constructions of the statute. See Chevron, U.S.A., Inc. v. NRDC, Inc., 467 U.S. 837, 843 (1984). Congressional action would be necessary in order to conclusively bar victims of private criminal activity from seeking asylum.

I. Victims of private criminal activity can constitute a cognizable particular social group for purposes of asylum and withholding of removal.

Being a victim of private criminal activity can constitute a cognizable “particular social group” for purposes of an application for asylum or withholding of removal. The circumstances under which an individual will belong to a cognizable “particular social group” are fact-specific. Determining that a victim of private criminal activity could not qualify for asylum or withholding of removal under any circumstance would be an impermissible agency interpretation of the Immigration and Nationality Act (INA).

A. Restricting persecution of members of particular social groups to only encompass persecution committed by government actors would be an impermissible agency interpretation of the INA because it would go against the plain meaning of the statute and would improperly differentiate one protected ground from the others.

In order to qualify as refugees, individuals must demonstrate that they are unable or willing to return to, or avail themselves to the protection of, their country of nationality because of past persecution or a well-founded fear of future persecution on account of their race, religion, nationality, membership in a particular social group, or political opinion. INA § 101(a)(42)(A).
The INA is silent as to who the persecutor must be; however, to interpret "persecution" to only encompass instances in which the government was the persecutor would go against the plain meaning of the word. See generally Persecutor, Cambridge Dictionary, 2018, (accessed 04/17/2018) available at https://dictionary.cambridge.org/us/dictionary/english/persecutor (defining "persecutor" as "someone who treats a particular group of people cruelly"); see also Persecute, Merriam-Webster, 2018, (accessed 04/17/2018) available at https://www.merriam-webster.com/dictionary/persecute (defining "persecute" as "to harass or punish in a manner designed to injure, grieve, or afflict" without mention of government actors). If a statute is ambiguous or silent as to an issue, an agency interpretation will not be upheld if the agency's interpretation is not a permissible construction of the statute. See Chevron, U.S.A., Inc. v. NRDC, Inc., 467 U.S. 837, 843 (1984). Interpreting past or future persecution to only apply to persecution conducted by government actors would go against the plain meaning of the statute, which states only that an individual must be seeking protection from persecution generally, not persecution committed specifically by the government. See INA § 101(a)(42)(A).

Within the statute, "membership in a particular social group" is one of the five protected grounds on which an individual may seek asylum. Id. Within INA § 101(a)(42)(A), "membership in a particular social group" is not separated from the other five protected grounds but rather is listed along with the other four protected grounds without any additional qualifiers. To impose new requirements on who must persecute and the circumstances in which that persecution must happen only for the "particular social group" protected ground would be counter to the plain meaning of the statute. Because nothing in the statute seeks to differentiate the persecutor in particular social group cases from the other four protected grounds, imposing a government persecutor requirement on members of particular social groups would not be a permissible
interpretation of the plain language of the statute, and therefore, could not be upheld. See Chevron, 467 U.S. at 843.

On multiple occasions, the Board of Immigration Appeals, the Supreme Court, and the Circuit Courts have recognized the rights of individuals to qualify for asylum based on private criminal acts as persecution on account of their race, religion, nationality, or political opinion. See generally INS v. Elias-Zacarias, 502 U.S. 478 (1992)(denying asylum where individual was persecuted by guerilla organization because he did not demonstrate the nexus to his political opinion, but not relating the denial to the fact that he was the victim of private criminal activity); Azhgirevich v. Gonzales, 185 Fed. Appx. 72 (2nd Cir. 2006)(recognizing persecution based on nationality and religion where there were only private attacks and threats); Argueta v. INS, 759 F.2d 1395 (9th Cir. 1985)(acknowledging past persecution based on political opinion where the individual was persecuted by a guerilla group); Ivanov v. Holder, 736 F.3d 5 (1st Cir. 2013)(finding that Respondent established eligibility for asylum where he was persecuted by members of Russian society based on his Pentecostal faith); Matter of S-A-, 22 I&N Dec. 1328 (BIA 2000)(recognizing persecution based on religion where the Respondent’s father persecuted her for her liberal religious beliefs). If the Attorney General were to differentiate private criminal activity committed against members of particular social groups from private criminal activity committed against individuals falling into the other four protected grounds, this would be improper as it is not supported by the statutory text.

B. The Supreme Court has implicitly recognized that victims of private criminal activity can constitute members of cognizable particular social groups.

The Supreme Court in INS v. Elias-Zacarias and in Gonzalez v. Thomas have addressed issues on appeal for cases involving particular social group members without questioning
whether their being victims of private crime barred them from asylum relief. In *Gonzalez v. Thomas*, white South Africans were seeking asylum on account of their race and kinship to a prominent white South African. See *Gonzalez v. Thomas*, 547 U.S. 183 (2006). Although the case was primarily about appropriate remand, it bears noting that the Supreme Court found no issue with the 9th Circuit’s premise that kinship ties that resulted in persecution by private actors could create a basis for asylum. See *id.* In *Elias-Zacarias* the Supreme Court agreed with the BIA that the applicant could not show persecution based on account of political opinion but what was under review was whether resisting recruitment was a political opinion not whether a non-government actor, in this case guerillas, could be the persecutor. *I.N.S. v. Elias-Zacarias*, 502 U.S. 478 (1992).

Both of these cases suggest that the Supreme Court does not question that applicants can have a viable statutory claim to asylum even when they are victims of private crime, regardless of whether they fall into particular social group or another protected ground.

**C. Case law in all eleven circuits supports the determination that victims of private criminal activity can constitute members of a cognizable particular social group.**

In addition to case law from the Supreme Court implicitly recognizing that victims of private criminal activity can qualify for asylum based on their membership in particular social groups, all eleven circuits have case law that either explicitly or implicitly acknowledges that victims of private criminal activity can be eligible for asylum if they were persecuted based on the five protected grounds.

The First Circuit has issued several decisions that expressly or implicitly acknowledge that individuals who are victims of private crime can constitute members of cognizable particular social groups. See *e.g. Kadri v. Mukasey*, 543 F.3d 16 (1st Cir. 2008)(remanding to the BIA to
elaborate the standard for economic persecution and noting that the applicant, a gay man who was harassed and prevented from working in his field by private actors because of his sexuality, may be able to establish that his economic hardship amounted to persecution; *Burbiene v. Holder*, 568 F.3d 251, 255 (1st Cir. 2009)(denying asylum but noting that a victim of non-governmental criminal activity can demonstrate persecution if it can be shown that either 1) the criminal activity is committed by people aligned with the government, or 2) the government is unwilling or unable to control it). The First Circuit has also addressed issues of private criminal activity constituting persecution in several cases relating to other protected grounds. See *Ivanov v. Holder*, 736 F.3d 5; see also *Morales-Morales v. Sessions*, 857 F.3d 130, 135 (1st Cir. 2017)(in a case of a respondent claiming political persecution, denying asylum but noting that “to be sure, a government’s failure to act on credible reports of private abuse can constitute inaction”).

The Second Circuit has recognized the “well-settled” practice of finding persecution to victims of private criminal activity based on membership in certain particular social groups. See *Kone v. Holder*, F.3d 141 (2nd Cir. 2010)(noting that “[i]t is well-settled that a woman such as Kone who has undergone genital mutilation may have been persecuted through this experience on account of her membership in a particular social group”). The Second Circuit has also recognized persecution when it was committed by private actors on account of an individual’s nationality and religion. See *Azhgirevich v. Gonzales*, 185 Fed. Appx. 72 (finding persecution where a Christian woman of Russian nationality married a Muslim man, and her attackers were motivated by her nationality or religion).

The Third Circuit has previously found that additional agency requirements added to the particular social group category were an impermissible agency interpretation, and therefore not
entitled to *Chevron* deference. The Third Circuit has opined that, while an agency may change or adopt new policies, it “acts arbitrarily if it departs from its established precedents without announcing a principled reason for its decision.” *Valdiviezo-Galdamez v. AG of the United States*, 663 F.3d 582, 608 (3d Cir. 2011), quoting *Johnson v. Ashcroft*, 286 F.3d 696, 700 (3d Cir. 2002) (declining to uphold the additional requirements of social visibility and particularity for the particular social group analysis because the agency did not provide a principled reason for the change). In addition, the Third Circuit has opined that, when an individual is persecuted by actors other than government agents, that individual “must also establish that it was conducted "by forces the government is unable or unwilling to control." *Kibinda v. Attorney General*, 477 F.3d 113, 119 (3d Cir. 2007).

The Fourth Circuit has concluded that "‘persecution’ under the INA encompasses harm inflicted by either a government or an entity that the government cannot or will not control." *Crespin-Valladares v. Holder*, 632 F.3d 117, 128 (4th Cir. 2011). The Fourth Circuit has concluded that victims of private crime constitute members of a particular social group on multiple occasions. See e.g. *Crespin Valladares*, 632 F.3d 117 (finding that family ties could constitute a particular social group, where the Respondent was targeted by MS-13 gang members based on his family ties); *Hernandez-Avalos v. Lynch*, 784 F.3d 944 (4th Cir. 2015) (stating that death threats from a gang were because of Respondent’s relationship to her son constituted persecution and that the government of El Salvador was unwilling or unable to protect her); *Martinez v. Holder*, 740 F.3d 902 (4th Cir. 2014) (finding that former gang members could constitute a particular social group, where the fear of persecution stemmed from activities of the gang).
The Fifth Circuit has recognized that an individual may qualify for asylum when the persecution is committed by non-governmental actors that the government cannot control. In *Eduard v. Ashcroft*, 379 F.3d 182 (5th Cir. 2004), the Fifth Circuit found that a woman had established that she feared future persecution on account of her Christian religion where she stated in her application that Christians in Indonesia were persecuted by Muslims in the country, and that the Indonesian government could not control them and pardoned and released Muslims who persecuted Christians. See *Eduard*, 279 F.3d at 190.

The Sixth Circuit has stated that, when a non-governmental actor is responsible for persecution, the asylum applicant must present evidence that the government of the home country is unable or unwilling to control the persecuting actor. See *Khalili v. Holder*, 557 F.3d 429, 436 (6th Cir. 2009); see also *Gomez-Romero v. Holder*, 475 Fed. Appx. 621, 625 (6th Cir. 2012).

The Seventh Circuit has found that the applicant’s government has been unable or unwilling to control the private actors that perpetrated the persecution on a number of different occasions. See e.g. *Galimi v. Holder*, 578 F.3d 611, 616–17 (7th Cir. 2009)(finding the Kenyan government was helpless to defend applicant’s from the Mungiki sect), and *Hor v. Gonzales*, 421 F.3d 497, 501–02 (7th Cir. 2005)(finding the Algerian government helpless against radical Islamists when the military told petitioner it could not protect him from terrorists and the Algerian court advised him to “maintain a low profile”). However, the standard still remains high, and the Circuit Court has certainly found in some cases that the applicant’s attempts to alert the government or trepidation to do so was not enough to definitively show that the government was unwilling or unable to provide them with protection. See e.g. *Chatta v. Mukasey*, 523 F.3d 748, 753 (7th Cir. 2008)(finding the Pakistani government was not helpless against religious
sect), and *Garcia v. Gonzales*, 500 F.3d 615, 618–19 (7th Cir. 2007) (finding the Colombian government was not helpless against guerilla group); *see also Vahora v. Holder*, 707 F.3d 904 (7th Cir. 2013) (finding that one police officer’s dismissal of the applicant’s complaint was not enough to establish an unwillingness to control); *Rupey v. Mukasey*, 304 Fed.Appx 453 (7th Cir. 2008) (finding that the government could not be held responsible for not protecting the applicant when the applicant did not identify to the Court what information he provided to the police, whether that information was sufficient to capture his attackers, or whether the police told him they would not investigate his complaint).

The Eighth Circuit has opined that the applicant must show more than just a difficulty controlling private behavior but instead must show that the government condoned the private behavior or demonstrate that the government was helpless to protect the victim. *Menjivar v. Gonzales*, 416 F.3d 918, 921 (8th Cir. 2005). Furthermore, in order to make this determination, the applicant must present some evidence as to the identity and motives of one’s persecutors, as the statute does not cover general civil unrest, crime or societal violence. *Garcia-Colindres v. Holder*, 700 F.3d 1153, 1157–1158 (8th Cir. 2012); *see also Guillen-Hernandez v. Holder*, 592 F.3d 883 (8th Cir. 2010) (finding that the death of a father and brother by a private individual was not indicative of ineffective government control where petitioners provided no evidence to support that contention); *Al Yatim v. Mukasey*, 531 F.3d 584, 588-589 (8th Cir. 2008) (finding that the general civil unrest in Israel-Palestine did not qualify as the Israeli government being unable or unwilling to protect Palestinians).

Within the Ninth Circuit, there is a long established practice of providing asylum grants to applicants who can show that the government was unable or unwilling to control the private actors committing persecution. Since soon after the passage of the Refugee Act in 1980, the
Ninth Circuit has seen and granted asylum cases involving organized non-governmental groups. See e.g. Artega v. INS, 836 F.2d 1227, 1231 (9th Cir. 1988); Sangha v. INS, 103 F.3d 1482, 1487 (9th Cir. 1997). Later opinions allowed for grants in situations of persecution by unorganized groups and individuals. See e.g. Singh v. INS, 94 F.3d 1353, 1357-60 (9th Cir. 1996). In the former cases, the Court looked to country condition reports to determine if the group was one that held enough control within the country to render the government ineffective; in the latter, the Court looked at how the police respond to petitioner's requests for protection. See generally Bringas-Rodriguez v. Sessions, 850 F.3d 1051, 1062-1063 (9th Cir. 2017).

Furthermore, the applicant need only show that the police are unable to provide protection to their home city or area. Mashiri v. Ashcroft, 383 F.3d 1112, 1122 (9th Cir. 2004). In applying these rules, the Ninth Circuit has afforded protection to a number of marginalized communities, including, but not limited to: minority ethnic groups (Andriasian v. INS, 180 F.3d 1033, 1042, 43 (9th Cir. 1999) (finding that the government of Azerbaijan either could not or would not control Azeris who sought to threaten and harm ethnic Armenians living in the country), religious groups (Afriyie v. Holder, 613 F.3d 924 (9th Cir. 2010) (finding that a Christian petitioner who was being violently attacked by Muslims in Ghana demonstrated the government's unwillingness to control the persecutors when he filed a written report with police and requested protection but was ignored), homosexuals (Doe v. Holder, 736 F.3d 871, 879 (9th Cir. 2013) (finding that the Russian police were unwilling to protect the applicant, evidenced by their rejection and dismissal of his complaints even though he could identify his attackers and there was substantial evidence that the assaults were motivated by anti-homosexual bias).

The Tenth Circuit has implicitly accepted that individuals who fear persecution primarily by society can constitute members of a particular social group for purposes of asylum. See
Razkane v. Holder, 562 F.3d 1283 (10th Cir. 2009) (remanding where the IJ’s homosexual stereotyping resulted in a denial of asylum, where the individual had been attacked by private parties for his sexuality and feared persecution from society and the government).

The Eleventh Circuit relies primarily on BIA decisions to create its standard in this area. However, it also cites to cases in the Eighth and Ninth Circuits to say that the applicant need not report incidents to authorities if they can convincingly establish that doing so would have been futile or subjected them to further abuse. See Lopez v. U.S. Att'y Gen., 504 F.3d 1341, 1345 (11th Cir. 2007).

D. Public policy supports continuing to recognize that victims of private criminal activity can constitute members a cognizable particular social group.

A review of the above cases shows definitively that the applicants seeking asylum from private actors that the government is unable or unwilling to control consists largely of marginalized, vulnerable groups that deserve protection. Furthermore, it is clear from a review of the case law that there are few “floodgate” concerns given the high burden of proof placed on applicants to show that their country of origin’s government was truly unable or unwilling to control the private perpetrators of persecution and offer the victims meaningful protection. With that knowledge, it would be irresponsible for the standard under which particular social group cases are reviewed to become even more restrictive.
CONCLUSION

For the foregoing reasons, The George Washington University Law School Immigration Clinic respectfully requests that the Attorney General continue to find that victims of private criminal activity can constitute members of particular social groups for purposes of asylum and withholding of removal.

Respectfully submitted,

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NON-DETAIENED

UNITED STATES DEPARTMENT OF JUSTICE
OFFICE OF THE ATTORNEY GENERAL

In the Matter of:

File No: (b)(6)

In removal proceedings

U.S. DEPARTMENT OF HOMELAND SECURITY
BRIEF ON REFERRAL TO THE ATTORNEY GENERAL
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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.l(h)(l)(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. 2017).

Accordingly, the Department takes this opportunity to address the broader issue of whether, and under what circumstances, a victim of private 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, 623 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.\(^3\)

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\(^{3}\) 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, 967 (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.

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.


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.

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—t 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.
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.  

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.”  


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

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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’... [the 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

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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. 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’...”)

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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”).
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
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.” See Martinez v. Holder, 740 F.3d 902, 912
(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. Ellen v. Ashcroft, 364 F.3d 392, 396 (1st Cir. 2004) (rejecting group of

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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, 285 (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 (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).

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.
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


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.

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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.
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**

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12 Both *Marikasi* and *Fuentes-Erazo* 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.\(^\text{13}\) 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.
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.").


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.\textsuperscript{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. \textit{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

\textsuperscript{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. \textit{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."); \textit{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”).
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.”\(^\text{16}\) 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.

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\(^{16}\) 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, 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); *Nahrmani 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
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

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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**

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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

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: id. at 46. However, the Spanish language Salvadoran document id. at 48, which correctly translates as 'id. at 48, which correctly translates as ‘

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 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.
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.
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 “exercising 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.
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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
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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.l(h)(l)(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. 2017).

Accordingly, the Department takes this opportunity to address the broader issue of whether, and under what circumstances, a victim of private criminal activity may establish eligibility for asylum or statutory withholding of removal.

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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, 623 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

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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. Att’y 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, 967 (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. 

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,
Immovable 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.

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—that 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.
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

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.


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

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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

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\(^5\) 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.\textsuperscript{6} \textit{Id.} at 393. Accordingly, neither the particular social group at issue in \textit{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 \textit{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. \textit{See, e.g., Arteaga v. Mukasey, 511 F.3d 940, 946 (9th Cir. 2007)} (“[C]alling a street gang a ‘social group’

\textsuperscript{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.” \textit{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.” \textit{Id.; see generally Ceece, 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, \textit{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.” \textit{See Acosta, 19 I&N Dec. at 222-23} (discussing the concept of “persecution”).
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
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.” See Martinez v. Holder, 740 F.3d 902, 912
(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.\footnote{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 worstness 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. Ellen 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, 285 (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 societies9 (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).

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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/ipvav93 I l.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.
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.\(^\text{10}\)

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.\(^\text{11}\)


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.

\(^\text{10}\) 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).

\(^\text{11}\) 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.*
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.\(^\text{12}\)

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\(^{12}\) 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. 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.
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.").


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.\(^\text{15}\)

\(^\text{15}\) 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”).
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
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/ipav9311.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); *Nahrwani 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

[Transcript]

(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)

[Transcript]

(b)(6)

id. at 46. However, the Spanish language Salvadoran document states, in pertinent part: (b)(6)

[Transcript]

(b)(6)


[Transcript]

(b)(6)
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

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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.
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.
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INTEREST OF AMICUS CURIAE


NIJC, a program of the Heartland Alliance for Human Needs and Human Rights, is a Chicago-based not-for-profit organization that provides legal representation and consultations to low-income immigrants, refugees and asylum seekers. Each year, NIJC represents hundreds of asylum seekers before the immigration courts, Board of Immigration Appeals (“BIA” or “Board”), the federal courts, and the Supreme Court of the United States through its legal staff and a network of nearly 1500 pro bono attorneys. As such, NIJC has a weighty interest in rational, consistent and just decision-making in asylum matters. In particular, NIJC frequently provides representation to individuals seeking protection based on membership in a particular social group and many of these clients assert claims involving persecution by non-government actors. Agency precedent on this issue will impact many of the clients NIJC serves and the pro bono attorneys it counsels. NIJC has subject matter expertise concerning the proper analysis of asylum claims that it believes can assist the Attorney General in his consideration of the present matter. NIJC has previously requested and been granted leave to appear as amicus curiae in cases before the Board, including *Matter of L-E-A-*, 27 I&N Dec. 40 (BIA 2017), *Matter of M-E-V-G-*, 26 I&N Dec. 227 (BIA 2014), and *Matter of A-R-C-G-*, 26 I&N Dec. 388 (BIA 2014).
SUMMARY OF ARGUMENT

Amicus writes to address three points relevant to the matter under consideration by the Attorney General. First, Amicus asserts that the stated goals of the Attorney General in inviting amicus participation would be better served by altering the process by which amicus involvement is invited. The Attorney General does not provide potential amici with access to the case record or the identity of counsel for the respondent. Without this information, amici must offer counsel to the Attorney General in a vacuum. Amici cannot meaningfully address the framing of issues or whether other determinative questions ought to be considered in addition to – or in lieu of – the questions presented by the Attorney General. In addition, potential amici cannot coordinate with respondent’s counsel to avoid duplicative arguments or ensure that all pertinent questions are addressed. Amicus urges the Attorney General to adopt a system akin to the one used in federal courts, where amicus involvement can aid the courts because public access to case information enables amici to tailor involvement to the contours of the case in question.

Second, Amicus submits that the Attorney General’s framing of the issue presented in this matter should be modified. In this instance, Amicus was able to communicate with counsel for the respondent and conduct limited record review. Review of that record prompts Amicus to assert that it would be erroneous to decide this case based on whether being a victim of “private criminal activity” places one in a cognizable particular social group. Instead, the relevant questions to determine the viability of the claim may include whether the harm experienced by A-B- amounted to
persecution, *whether* the harm was on account of her particular social group, or *whether* the government of her country of origin was willing and/or able to protect her. Conflating these separate legal questions into an inquiry about particular social group membership misinterprets the statutory asylum scheme and undermines years of legal development at all administrative and judicial levels. This case is thus a suboptimal vehicle to explore the parameters of particular social groups.

Third and finally, a determination by the Attorney General that the persecutor’s identity as a non-state actor should have some bearing on whether an asylum seeker is connected to a protected ground (including membership in a particular social group) would conflate separate elements of the asylum analysis and could erroneously preclude groups of people commonly understood and legally recognized as refugees based on well-established principles of U.S. asylum law from receiving asylum protection. Among these would be Tutsis in Rwanda targeted by the general Hutu population during the 1994 genocide\(^1\) and Darfuri tribes targeted by the Janjaweed militia in Sudan.\(^2\)

Because the Attorney General is requesting assistance in his review of a question that is improperly posed and such assistance is hampered by lack of access to the full record by all amici, the Attorney General should decline to publish a decision in this

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matter and return the case to the immigration judge with instructions to comply with the Board’s prior order.

ARGUMENT

I. THE ATTORNEY GENERAL’S PROCESS FOR CERTIFYING CASES AND SOLICITING AMICUS BRIEFS INVITES ERRONEOUS AND INEFFECTIVE DECISION-MAKING

In 2015, the Board launched a pilot program to solicit amicus curiae briefs. U.S. Dep’t of Justice, EOIR, “EOIR’s Board of Immigration Appeals Launches Pilot Program to Solicit Amicus Briefs,” June 19, 2015, (hereinafter, “BIA Amicus Pilot Announcement”), available at

https://www.justice.gov/sites/default/files/pages/attachments/2015/06/18/notice-bia-amicus.pdf [last accessed April 19, 2018]. Since the Board publishes relatively few decisions each year, meaningful involvement by amici is critical to the development of the law. See e.g., https://www.justice.gov/ezir/precedent-decisions-volume-26 (listing only approximately 28 cases published by the Board in 2016) [last accessed April 19, 2018].

Attorney General Sessions has solicited amicus involvement in cases he has certified to himself through a mechanism similar to that used by the Board. Since the Attorney General publishes few decisions via certification, meaningful involvement by amici in this process is as equally critical to the development of the law as it is before the Board. See e.g., https://www.justice.gov/ezir/precedent-decision-alpha-a-e (listing fewer than ten decisions in the past decade in which the Attorney General certified a case to him or herself) [last accessed April 22, 2018].
While NIJC supports the solicitation of amicus briefs as part of the Agency’s\(^3\) process for issuing published decisions, it believes that the Agency’s current process should be altered.

The Board’s amicus solicitation pilot program had the stated goal of increasing the breadth and depth of expertise the Board could consider when adjudicating cases and selecting decisions for publication. BIA Amicus Pilot Announcement. The Board’s practice manual acknowledges that amicus briefs may be helpful in deciding cases. BIA Practice Manual at 2.10. In his amicus invitations, Attorney General Sessions has similarly invited interested amici to “submit briefs relevant to the disposition of the case” in order to “assist me in my review.” A-B-, 27 I&N Dec. 227 (A.G. 2018); see Matter of L-A-B-R-, 27 I&N Dec. 245 (A.G 2018) (same).

While this demonstrates a recognition of the important role amici play in the consideration of cases and the development of case law, the process employed by the Agency severely limits the utility of potential amici. This raises questions about whether the Agency truly intends to consider outside expertise when publishing these decisions, or whether it merely wants to create a perception that its decision-making process is akin to the issuance of precedent decisions by the federal courts or rulemaking after public notice and comment. The Agency’s current process deprives amici of access to case information, including the immigration judge’s decision and the identity of counsel of

\(^3\) Throughout this brief, “Agency” is intended to refer to the Department of Justice as a whole.
record. As a result, potential amici are guided only by out-of-context descriptions of issues as summarily described by the Agency.

The current process is inadequate because immigration matters, particularly protection claims, are inherently fact-specific. Amici’s ability to meaningfully contribute to the discourse is limited without reviewing the case record. The negative impact of this method is exacerbated by the Agency’s practice of posing opaque questions untethered from facts and context. This may result in precedential decisions that undermine the rule of law, particularly in the asylum context.

A. Lack of Access to Case Information Prevents Amici From Offering Expertise on Pertinent Issues.

In setting legal precedents, the Agency has consistently emphasized the importance of case-by-case analysis, particularly in asylum cases and especially those based on membership in a particular social group. See e.g., Matter of Acosta, 19 I&N Dec. 211, 232-33 (BIA 1985) (“The particular kind of group characteristic that will qualify under this construction remains to be determined on a case-by-case basis”); see also Matter of L-E-A-, 27 I&N Dec. 40, 42 (BIA 2017) (“A determination whether a social group is cognizable is a fact-based inquiry made on a case-by-case basis”); Matter of A-R-C-G-, 26 I&N Dec. 388, 395 (BIA 2014) (“In particular, the issue of nexus will depend on the facts and circumstances of an individual claim”); Matter of M-E-V-G-, 26 I&N Dec. 227, 251 (BIA 2014) (“we emphasize that our holdings in Matter of S-E-G- and Matter of E-A-G-should not be read as a blanket rejection of all factual scenarios involving gangs. . . . Social group determinations are made on a case-by-case basis”); Matter of J-S-, 24 I&N Dec. 520,
537-38 (A.G. 2008) (“the Board and Immigration Judges shall cease to apply the per se rule of spousal eligibility . . . and shall instead engage in a case-by-case assessment of whether a section 601(a) applicant . . . can demonstrate that (i) he or she qualifies as a refugee”); cf. also Matter of Monreal, 23 I&N Dec. 56, 63 (BIA 2001) (“each case must be assessed and decided on its own facts”). The Agency’s emphasis on the importance of considering context, background, and the particular facts of each individual case is appropriate: adjudicators cannot be tasked with issuing decisions in a vacuum. Likewise, amici should not be charged with opining on an issue arising in a particular matter with little or no knowledge of the facts of the case. Yet this is what they are forced to do under the Agency’s current process, which was initiated by the Board in its pilot program and adopted by the Attorney General.

In the cases in which the Board previously solicited amicus briefing, amici’s involvement was hobbled because the Board did not allow amici access to crucial facts about the case. Since the pilot program began, the Agency has solicited amicus briefs in 22 cases. https://www.justice.gov/eoir/amicus-briefs [last accessed April 19, 2018]. None of these amicus invitations included information about the case or the name of the respondent’s attorney. Id. These missing details cripple amici and diminish the value of amicus involvement. The current request states, “I invite . . . interested amici to submit briefs on points relevant to the disposition of this case.” Without context, however, amici have no real way to discern the “relevant” points. Matter of A-B-, 27 I&N Dec. 227 (A.G. 2018). Amici may address the question posed by the Attorney General, but without
context, amici must speculate about the nature of the underlying claim; this renders their input significantly less useful than full engagement with the record would allow.

Previously, potential amici could contact the Board and ask for the identity of the attorney of record.⁴ See e.g., “Amicus Invitation No. 16-01-11 (Family as a Particular Social Group)” (hereinafter “Amicus Invitation No. 16-01-11”), available at https://www.justice.gov/sites/default/files/pages/attachments/2016/02/04/amicus_invitation_resit_no. 16-01-11_family_as_a_particular_social_group_due_03-07-2016.pdf [last accessed April 19, 2018] (“Additional information about the case may be available. Please contact the Clerk’s Office . . . for this information.”). If counsel of record had agreed to share his or her identity, the Board would share this information with the inquiring amicus party, who could then contact the attorney directly to request information regarding the record. This system, while improper, allowed amicus to obtain case information in most cases (albeit often after significant delay). Under the Attorney General’s system, this feature has been eliminated. The only method for potential amici to acquire case information is by relying on word of mouth with the hope that attorneys will communicate with potential amici if their cases have been chosen for Attorney General certification. Even this method is unavailable if the respondent was unrepresented below.

Forcing amici to consider the issues identified by the Attorney General in isolation from the facts of the case invites error and confusion because it assumes that the issues

⁴ While the identity of a client may be confidential, the identity of an attorney is not. See e.g., Model Rules of Professional Conduct 1.6a.
identified are the determinative issues in the case. The genius of the common law system presupposes that facts matter, in part because every case involves multiple factual and legal issues. Where amici have access to the facts of the case, they can draw the Agency’s attention to other aspects of the case upon which the case can – or in some cases, should – be decided. This is what happens in the federal courts. Apart from relatively rare instances where an entire record is sealed, the party briefing, transcripts, and evidence are publicly available and facilitate full consideration of the case by amici as they seek to advise the court in useful ways. The Federal Rules of Appellate Procedure make amicus briefs due seven days after a party brief is due specifically to allow amici to review party briefing in advance of submitting amicus briefs. Fed. R. App. P. 29., note on subdivision (c) (“The 7-day stagger was adopted because it is long enough to permit an amicus to review the completed brief of the party being supported and avoid repetitious argument.”)

Greater access to the record of proceedings, or at least some portion of them, would permit amici to draw aspects of the case to the Agency’s attention and allow them to suggest reframing the questions presented in the case. Moreover, amicus involvement might be useful in avoiding misunderstandings by practitioners and litigants of Agency precedent because amicus could clarify certain points for the Agency prior to the issuance of a precedential decision.

The Board’s recent decision in L-E-A-, 27 I&N Dec. 40, demonstrates the utility of meaningful amicus involvement. In that case, the BIA invited amicus involvement but refused to share complete case information. As in this matter, the question posed was
difficult to decipher, as it appeared to conflate the particular social group and nexus elements of asylum. It asked:

Where an asylum applicant has demonstrated persecution because of his or her membership in a particular social group comprised of the applicant’s family, has he or she satisfied the nexus requirement without further analysis? Or does the family constitute a particular social group only if the defining family member also was targeted on account of another ground?

See Amicus Invitation No. 16-01-11.

After the Board provided amici with the name of the attorney of record and amici were able to access some case documents, amici learned the immigration judge had never analyzed the cognizability of the proposed social group, but had instead denied asylum based on the respondent’s alleged failure to demonstrate a nexus between the proposed social group and his past persecution. Thus, with the benefit of the underlying decision, amici were able to clarify for the Board that the central question in the case was nexus, as opposed to the cognizability of the particular social group. In its decision, the first line of the Board’s analysis states, “We agree with the parties that the members of an immediate family may constitute a particular social group.” L-E-A-, 27 I&N Dec. at 42. The Board goes on to say, “The key issue we must consider is whether the harm [the respondent] experienced or fears is on account of his membership in the particular social group.” Id. (emphasis added).5

5 This is not a unique issue for the Agency. In Matter of Almanza, 24 I&N Dec. 771 (BIA 2009), the Board attempted to provide guidance on when and how a respondent may overcome the finding that his crime may be classified as a crime involving moral turpitude under INA § 237(a)(2). However, the Board seemed to overlook that the statute in that case was a California “wobbler statute” – implicating substantial case law
When amici are permitted involvement with the benefit of full record review, they can address pertinent issues that adjudicators may overlook and aid in the logical development of the law. Amici are well-positioned to draw attention to “vehicle” issues as well as the actual legal issue, precisely because they are focused more on legal principles than on representing a client’s interests. Access to case information enables amici to provide this sort of critical guidance and should be promoted by the Agency.


The amicus invitation process used by the Agency would benefit from significant modification. First, Amicus recommends that the Agency adopt a policy of holding oral arguments before publishing a decision. Oral argument would build confidence that the Agency had given full consideration to the issues involved. Moreover, an oral argument schedule would facilitate amicus involvement, if the schedule was public. Charles Roth and Raia Stoicheva, “Order in the Court: Commensense Solutions to Improve Efficiency and Fairness in the Immigration Court,” at 24, Oct. 2014, available at http://immigrantjustice.org/publications/orderinthebar [last accessed April 19,

on those crimes, which could be misdemeanors or felonies at the discretion of the sentencing judge. This left the impact of the Board’s decision unclear, requiring supplemental clarification in, inter alia, Matter of Cortez, 25 I&N Dec. 301 (BIA 2010). Similarly, Matter of Lemus Losa, 24 I&N Dec. 373 (BIA 2007) seemed designed to address inadmissibility under INA § 212(a)(9)(B). But the applicability of that provision was at best doubtful, and its relevancy to that case even more so, as Lemus Losa himself appeared more clearly (and permanently) inadmissible under INA § 212(a)(9)(C). That led to Lemus-Losa v. Holder, 576 F.3d 752 (7th Cir. 2009), and Matter of Lemus Losa, 25 I&N Dec. 734 (BIA 2012), clarifying the initial decision. The point is not that Lemus Losa I was incorrect (though Amicus believes it was), but that factual aspects of the case made it a confusing vehicle for the Board to select to elucidate the statute.
2018]. Public notice of oral arguments would help bring the Agency’s adjudication processes more in line with those used by federal courts, which are traditionally considered open forums. *Gannett Co. v. DePasquale*, 443 U.S. 368, 386 n.15 (1979).

If oral argument were considered inappropriate in cases involving the Attorney General, Amicus would nonetheless urge that the Attorney General maintain a public docket of cases referred to himself. Amicus invitations have tended to play this role, but this approach should be more formalized. Insofar as the number of matters on the docket would be small, redaction of personal details, where appropriate, would impose a relatively small burden, and would substantially increase transparency.

Oral argument in cases considered for publication would foster presumptions of openness. All respondents, even asylum seekers, who request oral argument on Form E-26, Notice of Appeal from a Decision of an Immigration Judge, might be presumed to understand that argument would be open to the public and information regarding their cases would not be protected. *Detroit Free Press v. Ashcroft*, 195 F.Supp.2d 937 (E.D. Mich. 2002). This could allow the Agency to presume that individuals seeking argument would be amenable to having their facts known to the public. However, if the Agency decided to grant oral argument, the better course would be to notify the respondent that it is considering oral argument, so as to allow the respondent time to file a motion to proceed under seal or pseudonym. This mechanism, which is regularly applied in the federal courts, could afford protection where needed. See, e.g., *Sealed Petitioner v. Sealed Respondent*, 829 F.3d 379 (5th Cir. 2016) (involving the petition for review of an Ethiopian asylum seeker who proceeded under seal). In some cases, the Agency might wish to
condition leave to proceed under a pseudonym on production of a redacted transcript and record. Either way, even under pseudonym, the identity of counsel would be available, which would avoid the situation that has arisen in this case and others, where potential amici are not provided the name of counsel and thus, as described supra, are not able to coordinate amicus efforts with respondents.

Second, under this approach, it would be critical for the Agency to accept supplemental briefing, including by amici, once the case has been publically docketed for oral argument and the record made publically available (whether or not under seal or pseudonym). While the current amicus invitation process has staggered briefing between the parties and potential amici, the unavailability of the case record limits the usefulness of this schedule. Making the record publically accessible and maintaining the staggered briefing schedule would allow potential amici to fully articulate their positions before issuance of a precedent-setting opinion. In some cases, it may cause the Agency to cancel oral argument where briefing reveals that the case is a poor vehicle to address the issues the Agency finds most appropriate for resolution. These measures would promote the most efficient use of amici, which in turn will increase the quality of decisions, reduce appeals to the federal courts, and foster confidence in the Agency’s decision-making.

C. The Problems with the Agency’s Current Publication and Amicus Procedures are Evident in This Case.

In this case, as in other Agency amicus invitations, the amicus invitation was published without providing any information regarding the facts of the case or the name of the attorney of record. The wording of the amicus invitation, combined with this lack
of information, gives rise to complications. First, the invitation asserts a legal question in a vacuum without reference to precedential case law that has previously addressed the issues raised. As the Department of Homeland Security (DHS) noted in its Motion on Certification, the Board has previously addressed several issues related to non-state actor violence in precedential decisions such as Matter of A-M-E- & J-G-U-, 24 I&N Dec. 69 (BIA 2007) and A-R-C-G-, 26 I&N Dec. 388.

While the Attorney General’s “determination and ruling . . . with respect to all questions of law” may be controlling, the Attorney General does not issue decisions on a blank slate. As with all adjudicatory bodies, recognition of the tenets of stare decisis is foundational to the coherent development of the law. As noted by Chief Justice Rehnquist, “Stare decisis is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.” Payne v. Tennessee, 501 U.S. 808, 827 (1991). Writing in dissent in 1996, Judge Luttig of the U.S. Court of Appeals for the Fourth Circuit, explained:

[I]n those instances in which a later opinion impermissibly attempts to modify an earlier opinion, the earlier opinion remains the controlling law in the circuit with respect to matters as to which the two opinions unquestionably conflict. Were it otherwise, willing panels, unconstrained by any sense of obligation to the principles of stare decisis, our own internal rules, or notions of collegiality, could run roughshod over prior precedent, effectively repealing a rule whose importance to both the rule of law and to the orderly operation of a court is beyond dispute.

Harter v. Vernon, 101 F.3d 334, 343 (4th Cir. 1996) (Luttig, J., dissenting). Though not bound by the same rules to which federal court panels may be subject, the Agency would
do well to respect federal court principles intended to promote the orderly development of the law. The Attorney General’s response to the DHS motion itself references the controlling authority of Federal Article III courts, thereby according at least some deference to existing case law on this topic. Matter of A-B-, 27 I&N Dec. 247, 249 (A.G. 2018). (Notably, the decision does not cite the cases to which it refers.) While Amicus does not assert the Attorney General lacks authority to alter the interpretation of immigration statutes, his discretion is not without limits and does not exist outside of the legal constructs and principles upon which our legal system is built. See e.g., Chevron, U.S.A., Inc. v. Nat’l Res. Def. Council, Inc., 467 U.S. 837 (1984). Issuing the present amicus invitation without reference to relevant precedent creates confusion as to the particular legal question at issue and risks obfuscating – as opposed to clarifying – asylum law.

Second, the manner in which the issue is framed conflates the question of whether a cognizable particular social group exists with questions of whether acts classified as “private” and “criminal” are persecution and whether the government in the applicant’s country of citizenship is unable and/or unwilling to control the non-state persecutor. This leaves it unclear exactly which asylum element the Attorney General would like briefed, an error not without precedent. As discussed supra in part A, the Board presented a similarly convoluted question in its amicus invitation for Matter of L-E-A-. Had amici been forced to consider the issues presented by the Board in isolation in that case, its ability to assist the Board would have been constrained by error. The same risk and inefficiencies exist here. In future amicus invitations, the Agency ought to adopt procedures that promote transparency and efficiency: at a minimum, it should issue
public invitations that include case information and clarify the interplay between the question posed and prior precedent.

II. THE AMICUS INVITATION INAPPROPRIATELY CONFLATES THE PARTICULAR SOCIAL GROUP INQUIRY WITH THE STATE ACTOR INQUIRY

A. Establishing a Cognizable Particular Social Group is Only One of Many Determinative Factors in Whether an Individual is Eligible for Asylum.


Establishing a particular social group says little about which group members might ultimately qualify for asylum.7 As Justice Alito observed when he was on the Third Circuit, establishing a cognizable particular social group is only the first step towards

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6 Amicus disputes DHS’s belief that “little more than lip service is paid” to the requirements for establishing particular social group membership. U.S. Dep’t of Homeland Security Brief on Referral to the Attorney General (hereinafter “DHS brief”) at 5. In Amicus’s experience, the Board’s increased – and often inappropriate – focus on the particular social group definition has in turn led to an increase in immigration judge and Board decisions that conflate the asylum elements, misstate the definition of the proposed particular social group, and create insurmountable evidentiary barriers for pro se asylum seekers.

7 See Brief of Amici Curiae the Harvard Immigration and Refugee Clinical Program Et Al at part D.
satisfying the refugee definition. *Fatin v. INS*, 12 F.3d 1233, 1240 (3d Cir. 1993). The refugee definition and other statutory and regulatory provisions include numerous requirements that filter who can ultimately receive protection. *See Cece v. Holder*, 733 F.3d 662, 675 (7th Cir. 2013) (en banc) (“The safeguard against potentially innumerable asylum claims is found in the stringent statutory requirements for all asylum seekers”). As the en banc Seventh Circuit explained, these requirements include proof that the asylum seeker (1) suffered or has a well-founded fear of suffering harm rising to the level of persecution; (2) on account of race, religion, nationality, membership in a particular social group, or political opinion, and (3) is unable or unwilling to return to her country because of the past persecution or feared future persecution.8 *Id.*

Thus, even where an applicant is a member of a cognizable particular social group, she must still show (1) that she was or will be persecuted; (2) that such persecution was or will be on account of that social group membership; (3) that the persecutor was or will be the government or an entity the government is unable and/or unwilling to control; and (4) that it is not safe or reasonable for her to relocate within the country to avoid persecution (which is more difficult to prove when the government is not the persecutor).9 *See e.g.*, *Crespin-Valladres v. Holder*, 632 F.3d 117, 129 (4th Cir. 2011) (finding

8 Amicus’s position is consistent with DHS’s assertion in its brief that “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.” DHS Brief at 5.

9 Even if an applicant meets all of the elements, she must still show she merits asylum as a discretionary matter and that she is not subject to any of the bars to protection. *See Benitez Ramos v. Holder*, 589 F.3d 426, 429-30 (7th Cir. 2009) (describing several of the statutory bars to asylum and withholding of removal). Amicus notes that DHS
petitioner’s social group viable, but remanding for consideration of whether the petitioner’s persecution was on account of his social group and whether the Salvadoran government was unable or unwilling to control his persecutor’s activities); Haoua v. Gonzales, 472 F.3d 227 (4th Cir. 2007) (explaining that an individual is eligible for asylum if she can show persecution on account of a protected ground, but asylum “is not available, however, if the alien can avoid persecution by relocating within her country of origin.”).

The Board articulated this point in Matter of H-, which involved clan-based persecution in Somalia. 21 I&N Dec. 337 (BIA 1996). In that case, the Board noted, “[T]he fact that almost all Somalis can claim clan membership and that interclan conflict is prevalent should not create undue concern that virtually all Somalis would qualify for refugee status, as an applicant must establish he is being persecuted on account of that membership. Id. at 343-44; see Niang v. Gonzales, 422 F.3d 1187, 1199-1200 (10th Cir. 2005) (explaining that “the focus . . . should not be on whether either gender constitutes a social

misapprehends the reason behind the Seventh Circuit’s refusal in Benitez Ramos to reject certain particular social groups for policy reasons. DHS Brief at 15 n.7. The Seventh Circuit refused to follow the Ninth Circuit’s reasoning in Arteaga v. Mukasey, 511 F.3d 940 (9th Cir. 2007) not because it believed the bars to asylum would address concerns about granting asylum to “bad actors,” but because rejecting a particular social group for policy reasons not provided within the asylum statute would conflict with Congressional intent and the plain language of the statute. See Benitez Ramos, 589 F.3d at 429-30 (noting that while Arteaga implies former gang members should not be able to seek asylum on that basis, “[t]hat is not Congress’s view. It has barred . . . any person who . . . [has] been a persecutor . . . or who has committed a “serious nonpolitical crime.” . . . But it has said nothing about barring former gang members.”). If certain groups of people are to be barred from asylum and withholding as a matter of policy, Congress must create this bar through legislation.
group (which both most certainly do) but on whether the members of that group are sufficiently likely to be persecuted that one could say they are persecuted “on account” of their membership”). Similarly, where an asylum applicant has posited a particular social group based on relationship status, opposition to criminal activity, or prior employment, the fact that many people in a particular country could claim membership in a similar group should not create undue concern about the number of people who may ultimately qualify for asylum. Unless members of the asserted group establish that they have been or will be targeted for persecution because of that shared characteristic and that the persecutor was or will be the government or an entity the government is unable and/or unwilling to control (in addition to the other asylum elements), the asylum claims will fail despite the fact that the particular social group is cognizable and they have established membership therein. Membership in a cognizable particular social group merely places one on the road to asylum; it is not the end of the journey. As such, additional restrictions need not be placed on certain types of particular social group claims.

B. The Amicus Invitation Asks the Wrong Question.

In the amicus invitation, the Attorney General requests amicus briefing on the issue of “[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.” This wording conflates separate elements in the asylum definition: whether someone belongs to a particular social group, whether “private criminal acts” can be persecution, and whether the persecutor is a state actor or
an entity the government is unable or unwilling to control. It also may conflate nexus, or the question of why someone was persecuted, with these other questions. See W-G-R-, 26 I&N Dec. at 218 (“[W]e must separate the assessment of whether the applicant has established the existence of one of the enumerated grounds (religion, political opinion, race, ethnicity, and a particular social group) from the issue of nexus. The structure of the Act supports preserving this distinction.”).

Amicus encourages the Attorney General to issue guidance similar to the Board’s guidance in Matter of D-I-M-, 24 I&N Dec. 448 (BIA 2008) and Matter of L-S-, 25 I&N Dec. 705 (BIA 2012), noting that it is of “paramount importance” that asylum adjudicators issue decisions in which the protected ground is analyzed separately from the other asylum elements. See e.g., D-I-M-, 24 I&N Dec. at 451 (“Because the regulations set forth varying degrees of proof depending on whether an applicant suffered past persecution, it is of paramount importance that Immigration Judges make a specific finding that an applicant either has or has not suffered past persecution.”). To avoid a decision in which a particular social group (protected ground) is erroneously rejected for a failure to demonstrate the applicant was targeted on account of membership in that group (nexus) or a failure to demonstrate the government was unable and/or unwilling to control the persecutor (state actor), the Attorney General should instruct adjudicators to sequence their analysis of these elements by (1) first determining if there was harm rising to the level of persecution; (2) then analyzing the existence of a protected ground, (3) next asking whether there is a nexus between the protected ground and the persecution suffered, and then, (4) if the persecutor is a non-state actor, whether the government is
unable and/or unwilling to control the persecutor. This guidance will help eliminate adjudicators’ confusion surrounding the Board’s particular social group jurisprudence.

Based on the wording of this question, it appears the Attorney General is attempting to determine in which circumstances someone (1) who has been harmed by a non-state actor could (2) establish a cognizable particular social group. But the two elements have no bearing on each other. As demonstrated in the Briefs of Amici Curiae Immigration Law Professors and Tahirih Justice Center Et Al, it is well-established that violence by non-state actors can provide the basis of a viable asylum application. In fact, the statute, regulations and Refugee Protocol all contemplate this type of claim. See INA § 101(a)(42) (“The term “refugee” means (A) any person who is outside any country of such person’s nationality . . . and who is unable or unwilling to avail himself of the protection of, that country”); 8 C.F.R. § 1208.13(b)(3)(i)-(ii) (explaining how the burden for demonstrating the reasonableness of internal relocation shifts depending on whether or not the persecutor is government or government-sponsored); UN High Commissioner

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10 If a past persecution claim is established though this analysis, a rebuttable presumption of future persecution exists. 8 C.F.R. § 1208.13(b)(1). Alternatively, if an asylum seeker cannot establish past persecution, the adjudicator should examine whether a reasonable possibility of future harm exists and then follow the same elemental analysis described above. 8 C.F.R. § 1208.13(b)(2).

11 The use of the phrase “criminal activity” in the question appears to be a red herring. Whether or not the harm the applicant suffered or fears is “criminal” has no bearing on whether that harm constitutes persecution. While the term “persecution” encompasses many forms of harm that would be deemed illegal or criminal acts, it also includes harm that may be legal in some countries. See e.g., Matter of Kasinga, 21 I&N Dec. 357, 365 (BIA 1996) (holding that female genital mutilation constitutes persecution even though the practice is legal in some countries and perpetrators of the practice may not necessarily have a punitive intent).

While there should be no question that bona fide asylum claims – including those based on particular social group membership – can be based on harm by non-state actors, the cognizability of a particular social group is determined irrespective of the identity of the persecutor.\(^{12}\) Just like an applicant’s political opinion or nationality exists independent of the reason why she was persecuted or the identity of her persecutor, the identity of the persecutor has no bearing on the viability of a particular social group. To constitute a particular social group, a group need only be based on an immutable characteristic and in some jurisdictions, be both socially distinct and particularly defined.\(^ {13}\)

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\(^{12}\) See *Brief of Tahirih Justice Center Et Al as Amici Curiae*.

\(^{13}\) The Board’s additions of “social distinction” and “particularity” have not been accepted by the Seventh Circuit or the Third Circuit. See *Lozano-Zuniga v. Lynch*, 832 F.3d 822, 827 (7th Cir. 2016) (“This circuit defines social group as a group whose membership is defined by a characteristic that is either immutable or is so fundamental to individual identity or conscience that a person ought not be required to change.”); *Vaitkus v. Att’y Gen.*, 665 Fed.Appx. 118, 122-23 (3d Cir. 2016) (“Vaitkus asks us to consider whether the BIA’s recent reformulation of the ‘particular social group’ requirements . . . avoids the pitfalls outlined in Valdiviezo-Galdamez, and should be accorded Chevron deference. However, we need not decide this question.”). The Fourth Circuit has cited to these requirements without analyzing or formally deferring to them under *Chevron, U.S.A., Inc. v. Nat’l Res. Def. Council, Inc.*, 467 US. 837 (1984). See e.g., *Oliva v. Lynch*, 807 F.3d 53, 61 (4th Cir. 2015).
In some instances, an applicant’s past persecution may place a label or status on her that subjects her to persecution for a different reason in the future. Thus, in *Lukwago v. Ashcroft*, 329 F.3d 157 (3d Cir. 2003), the Court found cognizable the particular social group of “escaped child soldiers” and that escaped child soldiers are specifically targeted for harm. Similarly, if a rape survivor from a particular country feared being subjected to honor killing as a result of being raped, she could potentially present a viable “future fear” asylum claim based on the particular social group of “female rape survivors.”

But in both instances, the question when analyzing the particular social group is not whether being a victim of a type of harm or by a type of actor makes a social group viable; the question is whether the group’s members share a characteristic that is immutable (and, in some instances, socially distinct and particularly defined). Asking, as the Attorney General does, whether being a victim of harm by a certain entity can constitute a particular social group would be like asking whether being beaten by a non-state actor constitutes a political opinion. The two prongs of the question involve completely separate elements in the asylum and withholding analysis: whether the applicant is part of a protected ground, does the harm constitute persecution, was the persecution inflicted on account of the applicant’s protected ground, and is the government unable and/or

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14 While these two examples do not involve circularly defined groups because the harm feared is not the harm referenced in the group’s definition, Amicus submits that DHS’s concerns regarding circularly-defined social groups, DHS brief at 11-14, are misplaced. A particular social group’s circular definition can create problems for the nexus element, but a circularly-defined social group can still be viable so long as the group’s members share an immutable characteristic. DHS’s request for a bright-line rule against circularly-defined groups again represents an unreasonable and inappropriate focus on the particular social group ground that refuses to let each asylum element do its own work.
unwilling to control the non-state persecutor. A more appropriate way to frame the inquiry the Attorney General seems to want addressed would be to ask “whether, and under what circumstances, being a victim of harm by a non-state actor gives rise to a viable claim for asylum or withholding of removal.” It is in this fundamental question of asylum eligibility that each of the asylum elements come together.

Critically, however, both this broader question and the narrower question of whether any act, status, or characteristic can form the basis of a particular social group are not “purely legal question[s]” that can be answered in a vacuum without reference to the facts of the case at issue. A-B-, 27 I&N Dec. at 249. As noted above in part I.A., the Agency and the Courts of Appeals have long recognized that asylum claims require a case-by-case analysis. This includes an individualized examination of each asylum element that focuses on the specific facts of the claim at issue. See e.g., A-R-C-G-, 26 I&N Dec. 388 (“[W]e point out that any claim regarding the existence of a particular social group in a country must be evaluated in the context of the evidence presented regarding the particular circumstances in the country in question”); Matter of N-M-, 25 I&N Dec. 526, 528 (BIA 2011) (“We agree that, in some circumstances, opposition to state corruption may provide evidence of an alien’s political opinion”) (emphasis added); Matter of J-B-N- & S-M-, 24 I&N Dec. 208, 214 (BIA 2007) (“The motivation of the persecutors involves questions of fact”); Pirir-Boc v. Holder, 750 F.3d 1077, 1084 (9th Cir. 2014) (“The rule that thus emerges is the following: To determine whether a group is a particular social group . . . the agency must make a case-by-case determination as to whether the group is recognized by the particular society in question”).
As discussed *supra*, it is impossible to answer the literal question presented by the Attorney General because it asks amici and the parties to amalgamate multiple, independent asylum elements and address them as one when they are irreconcilably separate. It is equally inappropriate to suggest it is possible to establish a framework for when harm by non-state actors can give rise to a bona fide asylum claim when such claims depend on the specific facts surrounding each of the asylum elements and must be analyzed on a case-by-case basis. When adjudicators analyze an asylum claim involving harm by a non-state actor, they should walk through the four, independent steps noted *supra*, as well as examine questions of discretion and bars to relief. If this analysis is conducted properly, it will effectively and efficiently determine which asylum seekers have legitimate claims to protection.

III. AN ASYLUM ANALYSIS THAT SEPARATELY EXAMINES EACH ELEMENT IN THE ASYLUM DEFINITION WILL PROPERLY DETERMINE BONA FIDE REFUGEE STATUS

As demonstrated *supra*, a proper asylum or withholding analysis looks at each element separately to determine an applicant’s eligibility for protection. Examples of asylum claims involving non-state actor persecutors demonstrate that when adjudicators conduct this elemental analysis properly, legitimate asylum claims are properly separated from those claims that do not meet the asylum definition. Were the Attorney General to issue a decision purporting to preclude victims of violence by non-state actors from asylum protection, groups broadly accepted as refugees could face the erroneous denial of their asylum claims solely because their persecutors were non-state actors, thus making the violence “private.” For example, Tutsi in Rwanda and Darfuri tribes in Sudan
have both been targeted by non-state actors, but both groups have been well-recognized as refugees because they can meet each of the asylum elements. Similarly, federal courts have applied the asylum analysis and concluded other survivors of non-state persecution warrant asylum.

A. Former Police Officers Fleeing Persecution By Cartels in Mexico

R.R.D. worked as a federal police officer in Mexico where he regularly investigated and arrested drug traffickers and cartel members and testified against them at trial. *R.R.D. v. Holder*, 746 F.3d 807, 808-09 (7th Cir. 2014). Cartel members frequently tried to bribe and intimidate him into colluding with the cartel. *Id.* When he refused to accept their bribes, cartel members tried to capture or kill him. *Id.* Eventually, after his supervisors recommended he retire for his own safety, he left the police force. *Id.* at 809. But even after he retired, cartel members continued to pursue him. *Id.* R.R.D. ultimately fled to the United States to seek asylum.

Critically, in discussing R.R.D.’s particular social group of “honest former police officers,” the Seventh Circuit did not look to the identity of R.R.D.’s persecutors, focusing instead on the fact that the group is based on an immutable characteristic – R.R.D.’s inability to change his history as an honest former police officer. *Id.* at 810. Asking “under what circumstances being a victim of private criminal activity constitutes a ‘cognizable particular social group’” does nothing to further the asylum analysis in R.R.D.’s case because it fails to address the relevant questions the Board has set out for establishing particular social group membership.
However, while R.R.D’s social group was found cognizable, this did not make R.R.D. automatically eligible for asylum. In fact, issues related to the identity of his persecutors generally (and not specifically the fact that they were non-state actors) were raised within the context of other asylum elements. R.R.D. was initially denied asylum after the immigration judge and Board determined that the cartel would target him for personal reasons, not on account of his group membership, and that he had failed to show a sufficient risk of future persecution. *Id.* at 809. (The inability or willingness of the Mexican government to control his persecutors was not contested.) This analysis demonstrates the importance of examining each element separately and letting each one do its own work. The Seventh Circuit ultimately reversed on both grounds, finding that the Board had erred in its examination of the evidence and the legal standard it applied to the nexus analysis. R.R.D. was able to demonstrate asylum eligibility to the Seventh Circuit only because he provided sufficient evidence to meet all of the asylum elements in his case.

**B. Gay Men in Mexico**

Carlos Bringas-Rodriguez fled to the United States to escape physical and sexual abuse in Mexico, which began when he was only four years old, by family and community members who referred to his perceived sexual orientation while abusing him. *Bringas-Rodriguez v. Sessions*, 850 F.3d 1051, 1056 (9th Cir. 2017) (en banc). While Mr. Bringas was initially denied relief, on rehearing en banc before the Ninth Circuit, the Court conducted a comprehensive analysis of the interplay between the facts of Mr. Bringas’s case and the asylum elements. In walking through the asylum elements, the
Court noted there was “no dispute” the harm Mr. Bringas had suffered rose to the level persecution or that it was inflicted on account of a protected ground. *Id.* at 1073. Moreover, the Board itself had recognized that sexual orientation can be a basis of a particular social group. *Id.* The identity of Mr. Bringas’s persecutors as non-state actors was not relevant to the analysis of these three elements: past persecution, particular social group membership, or nexus. Instead, the identity of the persecutors as non-state actors was only relevant to the question of the “unable or unwilling to control” element.

On this point, the Court made clear that adjudicators are not lacking in guidance to determine when violence by a non-state actor can be the basis for an asylum claim per the “unable or unwilling to control” standard. After referencing the reasoning of the Board in *Matter of O-Z & I-Z*, 22 I&N Dec. 23 (BIA 1998) (finding the “unable or unwilling” element met where non-state violence was reported and the police took no action) and *Matter of S-A-*, 22 I&N Dec. 1328 (BIA 2000) (noting that reporting non-state violence was not necessary where doing so would have been futile and dangerous), as well as the Court’s own extensive precedent, the en banc Court found the record demonstrated it would have been futile and dangerous for Mr. Bringas to have reported his past persecution and thus, he met the “unable or unwilling to control” element for past persecution. *Bringas-Rodriguez*, 850 F.3d at 1063-64, 1073-74. Examining each asylum element separately in Mr. Bringas’s case allowed the Court to properly adjudicate his claim in a way that allowed each element to do its own work. It was only because Mr. Bringas was able to demonstrate his eligibility under each prong of the test that the Court found him entitled to a presumption of future persecution.

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C. Individuals Who Testify Against Gang Members

Silvia Moreno Garcia fled to the United States from Guatemala after testifying against gang members who had killed a prominent human rights activist. Garcia v. Att’y Gen., 665 F.3d 496 (3d Cir. 2011). Although the Guatemalan government placed Ms. Garcia into a witness protection program, she continued to receive threats from gang members in an attempt to force her to recant. Id. at 501. Realizing that Ms. Garcia would remain in danger if she stayed in Guatemala, the Guatemalan government relocated her to Mexico for her safety, but she continued to receive threats there and eventually fled to the United States to seek asylum. Id. at 501. The immigration judge denied Ms. Garcia asylum and the Board concurred, finding she had not shown that the Guatemalan government was unable or unwilling to protect her or that she was a member of a cognizable particular social group. Id. Here, as in Bringas, the identity of Ms. Garcia’s non-state actor persecutors was only relevant to the analysis of the “unable or unwilling to control” element; the Third Circuit determined that Guatemala’s decision to relocate Ms. Garcia to Mexico in the face of ongoing gang threats in Guatemala was “tantamount to an admission that it could not protect her in Guatemala.” Id. The identity of the persecutors as non-state actors, however, was not relevant to the particular social group analysis, which involved whether members of the proposed group shared a common immutable characteristic. In Ms. Garcia’s case, they did – the “shared past experience of assisting law enforcement against violent gangs that threaten communities in Guatemala.” Id. at 504. Nonetheless, establishing these two asylum elements (particular social group membership and the persecutor as an entity the government is unable
and/or unwilling to control) did not get Ms. Garcia to asylum or withholding of removal because she still needed to prove “whether the harm she might face in Guatemala rises to the level of persecution, whether there would be a nexus between any persecution and her membership in a particular social group, and whether she was “firmly resettled” in Mexico.” Id.15 As a result, the Third Circuit remanded Ms. Garcia’s case to the Board to address these elements.

Similar to the other two cases discussed supra, asking “under what circumstances being a victim of private criminal activity constitutes a ‘cognizable particular social group’” does nothing to further the asylum analysis in Ms. Garcia’s case. Not only does it fail to address the critical questions for determining the cognizability of a particular social group (in the Third Circuit’s case, whether the group is based on an immutable characteristic), it also does not answer the question of whether Ms. Garcia has met the other asylum elements.

* * *

In the case at issue, Amicus lacks access to the full case record and therefore it cannot examine whether the immigration judge complied with this elemental adjudication process. It is clear from the Board’s decision, however, that the Board followed this process and independently analyzed each asylum element before ultimately determining that the respondent merited asylum and remanding the case.

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15 Significantly, the Third Circuit did not grant the petition for review of Ms. García’s sister, in part because she could not establish the “unable or unwilling to control” element. Id. at 505.
solely for background checks. The Attorney General should reaffirm the decision issued by the Board in this case and remand the case back to the immigration judge for the issuance of a final decision. In addition, it should decline to publish a decision regarding the adjudication of non-state actor asylum claims that goes outside the framework already established by the statute, regulations, and existing case law.

Date: April 26, 2018

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the instructions in the Attorney General’s March 7, 2018 and March 30, 2018 orders because the brief contains 8895 words, excluding the cover page, table of contents, table of authorities, signature block, certificate of compliance, and certificate of service.

Dated: April 26, 2018

Ashley Huebner
CERTIFICATE OF SERVICE

I hereby certify that on April 26, 2018, the foregoing brief was submitted electronically to AGCertification@usdoj.gov and in triplicate via FedEx to

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Dated: April 26, 2018

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UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS

Matter of A-B-, Respondent

A#: [NOT PROVIDED]

AMICUS INVITATION No. [NOT PROVIDED]

BRIEF OF AMICUS CURIAE DAVID B. GARDNER
INTRODUCTION

In Matter of A-B, 27 I&N Dec. 247 (A.G. 2018), the Attorney General requested briefing on a purely legal question to assist his review of that 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 “social group,” under the statute, the briefs should identify such situations. If such situations do not exist, the briefs should explain why not.

Amicus presents the following argument through the lens of claims for Asylum Status based on Anti-Semitism. This example highlights the importance of preserving a framework for asylum protection which can be applied to many other vulnerable groups.

AMICUS

Amicus David B. Gardner, on behalf of Law Offices of David B Gardner, Inc., is an attorney Certified by the State Bar of California as a specialist in Immigration Law and submits this brief as a private practitioner. Amicus has more than 22 years of experience representing individuals before the Immigration Court, Board of Immigration Appeals and Circuit Courts of Appeals in matters involving Asylum and related relief.

Amicus submits this brief to support a finding that victims of criminal activity attributable to private actors may form part of a cognizable social group. Moreover, such a
finding falls well within the scope of International Treaties and Conventions governing treatment of refugees as has been adopted by the United States into domestic law.

Amicus has an interest in the outcome of the Board’s review of Matter of A-B to the extent that the subject matter and legal issues address the issues of present and prospective clients. Amicus has no direct stake in the outcome of the present litigation.

BACKGROUND-ASYLUM CLAIMS BASED ON ANTI-SEMITISM

The history of the Nazi treatment of the Jews reflected persecution on account of Jews being members of a social group viewed as socially distinct. Anti-Semitism takes on many forms and seeking protection under the particular social group ground is necessary to include those anti-Semitic attacks where Jews either self-identify or are identified by others by their social and cultural affiliation with other Jews. In many cases, attacks on Jews have been made solely because of their social identity regardless of religious commitment, political opinion, or classification as a nationality. For example, the noted Jewish Author and Historian Cecil Roth writes in his preface to “The Jewish Contribution to Civilization” that:

*Persons in whose veins there runs the blood of a single Jew as far as three great-grandparents back of one traceable Jewish great-grand-parent, that is are officially penalized on that account to-day in Nazi Germany, on the plea that their stock is alien and ipso facto harmful to German, “Nordic” and European cultural life. The Jewish people, moreover is consistently blamed for the actions of persons of Jewish origin, who not only have cut themselves off from Jewish life, but even have professed markedly anti-Jewish sentiments—My use of the term Jew etc., in the following pages hence denotes a person whose immediate ancestors professed the Jewish Religion.*
In 2016, the United States Department of State adopted the following non-legally binding working definition of antisemitism, "Antisemitism is a certain perception of Jews, which may be expressed as hatred toward Jews. Rhetorical and physical manifestations of antisemitism are directed toward Jewish or non-Jewish individuals and/or their property, toward Jewish community institutions and religious facilities."\(^1\)

The following examples of anti-Semitism are contained in the same statement:

To guide IHRA in its work, the following examples may serve as illustrations: Manifestations might include the targeting of the state of Israel, conceived as a Jewish collectivity. However, criticism of Israel similar to that leveled against any other country cannot be regarded as anti-Semitic. Antisemitism frequently charges Jews with conspiring to harm humanity, and it is often used to blame Jews for "why things go wrong." It is expressed in speech, writing, visual forms and action, and employs sinister stereotypes and negative character traits.

Contemporary examples of antisemitism in public life, the media, schools, the workplace, and in the religious sphere could, taking into account the overall context, include, but are not limited to:

- Calling for, aiding, or justifying the killing or harming of Jews in the name of a radical ideology or an extremist view of religion.
- Making mendacious, dehumanizing, demonizing, or stereotypical allegations about Jews as such or the power of Jews as collective — such as, especially but not exclusively, the myth about a world Jewish conspiracy or of Jews controlling the media, economy, government or other societal institutions.
- Accusing Jews as a people of being responsible for real or imagined wrongdoing committed by a single Jewish person or group, or even for acts committed by non-Jews.
- Denying the fact, scope, mechanisms (e.g. gas chambers) or intentionality of the genocide of the Jewish people at the hands of National Socialist Germany and its supporters and accomplices during World War II (the Holocaust[)]
- Accusing the Jews as a people, or Israel as a state, of inventing or exaggerating the Holocaust.

• Accusing Jewish citizens of being more loyal to Israel, or to the alleged priorities of Jews worldwide, than to the interests of their own nations.

• Denying the Jewish people their right to self-determination, e.g., by claiming that the existence of a State of Israel is a racist endeavor.
• Applying double standards by requiring of it a behavior not expected or demanded of any other democratic nation.

• Using the symbols and images associated with classic antisemitism (e.g., claims of Jews killing Jesus or blood libel) to characterize Israel or Israelis.

• Drawing comparisons of contemporary Israeli policy to that of the Nazis.

• Holding Jews collectively responsible for actions of the state of Israel.

Anti-Semitic acts are criminal when they are so defined by law (for example, denial of the Holocaust or distribution of anti-Semitic materials in some countries).

Criminal acts are anti-Semitic when the targets of attacks, whether they are people or property – such as buildings, schools, places of worship and cemeteries – are selected because they are, or are perceived to be, Jewish or linked to Jews.

Anti-Semitic discrimination is the denial to Jews of opportunities or services available to others and is illegal in many countries.²

The above examples include anti-Semitic criminal acts which are conducted by private actors against individuals who could be included as members of a cognizable particular social group of Jews. The legal issues in determining whether conduct by private actors included in the State Department’s definition of anti-Semitism are purely criminal or involve State action are necessarily fact driven. In the case of anti-Semitism, a legal analysis of individual criminal acts requires circumstance specific information in the context of the criminal action, the laws of the State in question and the willingness and ability of the Government to enforce such laws. For, example, a Jewish victim of a criminal attack by a private actor in Nazi Germany would most likely meet the definition of a refugee under current Asylum law. The current spate of attacks on

² Id.
Jews in Germany requires an analysis of the existence of German State laws outlawing Anti-Semitism and the German Government's ability to control anti-Semitic individuals and groups in that country.\(^3\)

The recent upsurge in anti-Semitism in Europe and worldwide reflects the actions of private actors. These crimes by private actors take place notwithstanding the existence of laws which would purport to protect Jews and other minority groups from "hate crimes." The inability or limited ability of States to counter or protect Jews as a group from such actions is a legal issue that can only be determined by fact specific and expert country condition evidence.

The historical background to contemporary Asylum law as applied to cases involving anti-Semitism can serve to highlight the importance of including claims of persecution by private actors which might otherwise be considered criminal activity against other particular social groups.

I. **History of Modern Asylum Law**

Modern Asylum law was established more than 66 years ago by the 1951 Refugee Convention\(^4\) as a response to the refugee crisis resulting from the Holocaust. However, while the genocide against Jews and other groups was perpetrated by the Nazi Germany regime, there is nothing in the language of the Convention and subsequent statutes and regulations adopted into United States law which confined the grant of Asylum to refugees fleeing persecution as a result of direct State action.


The definition of a refugee is found at Article 1A (2) of the Refugee Convention:

"[O]wing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is to return to it."


The official English version of Article 33 of the Refugee Convention provides in part:

"No Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion." 19 U.S.T. at 6276.


The Refugee Convention and the Refugee Act as incorporated into the INA do not make a specific distinction between persecution by private and Government actors.
Section 243(h) of the INA, generally known as the withholding of deportation provision, closely parallels the provisions of non-refoulement as set forth in Article 33 of the U.N. Convention. Section 243(h) provides that the Attorney General "shall not deport or return any alien . . . to a country if the Attorney General determines such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political."

The use of the language "would be threatened in such country" without limitation also supports a finding that withholding of deportation is not confined to actions by State actors but can include persecution by private actors provided that such persecution is on account of a protected ground.

In Stevic v. U.S., 467 U.S. 407, 414–21 (1984), the Supreme Court recounted the modern history of U.S. Asylum law and confirmed that in its present form, Congress intended U.S. Asylum to be consistent with International law as set forth in the U.N. Convention. The Stevic Court determined that the congressional motivation for the enactment of the Refugee Act was to revise and standardize the procedures governing the admission of refugees into the United States. The Court emphasized that the legislative history of the Act demonstrated the congressional intent to interpret the term "refugee" in conformity with the Protocol.\(^5\)

The Supreme Court has also acknowledged the significance of the United Nations High Commissioner for Refugees Handbook\(^6\) as an aid in the task of interpretation and concluded that

\(^{5}\) See id. at 436-38.

the Refugee Act framework was consistent with the U.S. obligations under the Convention and the Protocol. 7

II. Gender Based Asylum Claims and Private Activity

The Ninth Circuit has addressed the issue presented by the Attorney General in the context of gender based persecution in Mexico. See Bringas-Rodriguez v. Sessions, 850 F.3d 1051 (9th Cir. 2017) finding that:


III. Anti-Semitism and Private Criminal Activity

In Matter of O-Z and A-Z, 22 I & N Dec. 23 (BIA 1998), the Board examined a case involving anti-Semitic persecution by private actors in the Ukraine. While the applicants suffered from official acts of discrimination when Ukraine was part of the Soviet Union, this case addressed events that took place after Ukraine became an independent State in 1991. The Board found that the cumulative acts which included physical attacks and humiliation by private actors rose to the level of persecution as defined in the INA. The Board found the acts to be on account

of the Applicants' Jewish Nationality and that despite complaints to the Police, the "Ukrainian Government was unable or unwilling to control the respondent's attackers and protect him or his son from the anti-Semitic acts of violence. The Board took administrative notice of country conditions in Ukraine noting that the evidence supported the "respondent's assertion that the local police refused to investigate the instances of violence perpetrated by ultra-nationalists against him and his son, but it also supports their well-founded fear of persecution in Ukraine despite the national expansion of Jewish rights."

O-Z and A-Z is illustrative of the importance of noting facts on the ground where persecution takes place by private actors because the applicants were unable to obtain protection from persecution on account of a protected ground, notwithstanding that "anti-Semitism ceased to be a government policy" in the Ukraine.

The Ninth Circuit in Bringas supra cited to O-Z and A-Z as well as the Circuit Court's decision in Korablina v. I.N.S., 158 F.3d 1038 (9th Cir. 1998):

In Korablina, the petitioner, a Jewish native of Russia and citizen of the Ukraine, was the victim of harassment and beatings perpetrated against Jewish citizens. Id. at 1041–42. Korablina was fired from the job she had held for twenty-eight years by a new boss who was a member of an ultranationalist and anti-Semitic group. Id. at 1041. After searching for six months for a new job, she found work as a clerical secretary to a Jewish man. Id. at 1042. In that new position, she saw three men attack her boss and thereafter return monthly to the office to extort money. Id. Though she and her fellow employees reported the beating to the police, the officers never appeared, and when Korablina sought help from a friend at the municipal city hall, the friend disappeared. Id. Korablina then began receiving anti-Semitic death threats that warned of retaliation if she reported the threats to anyone. Id. Soon thereafter, two men violently attacked Korablina and left her barely breathing, telling her she "could not . . . conceal her Jewish origin."
The attacks on the Respondents in O-Z and A-Z and the Petitioner in Korablina, were attributable to the victim’s social identity as Jews. These attacks were criminal acts perpetrated by private actors in States, where anti-Semitism was no longer an official government policy. In each case, the government was either powerless or indifferent to this form of criminal conduct and was unable to provide protection to members of a vulnerable group of society.

IV. Inability or Unwillingness of the State to Control acts of Private Individuals

A comprehensive overview with citations from the Board and different Circuit Courts may be found in a 2014 Department of Justice publication, 8

Persecution “always implies some connection to government action or inaction,” generally in the form of direct government action or government supported action. See, e.g., Aldana-Ramos v. Holder, 757 F.3d 9, 17 (1st Cir. 2014) (internal quotation marks and citation omitted).

However, the Board of Immigration Appeals and the Federal circuit courts of appeals universally acknowledge that for purposes of asylum and withholding of removal under the Act “persecution” may involve a “government’s inability or unwillingness to control private conduct.” See id. (emphasis added) (citations omitted); see also Malu v. U.S. Att’y Gen., No. 13-10409, 2014 WL 4073115, at *8 (11th Cir. Aug. 19, 2014); Paloka v. Holder, 762 F.3d 91, 95 (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. of U.S., 665 F.3d 496, 503 (3d Cir. 2011); 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); Matter of Pierre, 15 I&N Dec. 461, 462 (BIA 1975) (formalizing the “unwilling or unable” to control standard for non-governmental persecution in the context of a claim made under former section 243(h) of the Act, 8 U.S.C. § 1253(h) (1970)).

---

CONCLUSION

The example of anti-Semitism is equally applicable to individuals that can form a member of a particular social group based on gender and gang-based claims. Such claims are in many, if not most cases, perpetrated by non-state actors in countries where the government is either weak or allows such conduct to be conducted with impunity. The above examples and case authority are submitted as examples of the importance of maintaining the framework of existing case law from the Circuit Courts as well as the Board’s own precedent decisions when determining under what specific circumstances Asylum may be granted on the basis of membership in a particular social group.

Date: April 26, 2018

Respectfully Submitted,

David B. Gardner, Esq.
CERTIFICATE OF SERVICE

I hereby certify that, on April 26, 2018, the foregoing brief was submitted electronically to AGCertification@usdoj.gov and in triplicate via Fedex to:

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Office of the Attorney General, Room 5114
950 Pennsylvania Avenue, NW
Washington, DC 20530

Dated: April 26, 2018

Veronica Hernandez
UNITED STATES DEPARTMENT OF JUSTICE
OFFICE OF THE ATTORNEY GENERAL

Matter of A-B-, Respondent

File No.: REDACTED

In Removal Proceedings

BRIEF FOR THE AMERICAN BAR ASSOCIATION AS AMICUS CURIAE

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Dated: April 27, 2018
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INTEREST OF AMICUS CURIAE

The American Bar Association ("ABA" or "Association") is one of the largest voluntary professional membership organizations and the leading organization of legal professionals in the United States. Its more than 400,000 members come from all fifty States, the District of Columbia, and the United States territories, and include attorneys in law firms, corporations, nonprofit organizations, and local, state, and federal governments. Members also include judges, legislators, law professors, law students, and non-lawyer associates in related fields.¹

The ABA’s Commission on Immigration ("Commission") leads the Association’s efforts to ensure fair treatment and full due process rights for immigrants, asylum-seekers, and refugees within the United States. Acting in coordination with other Association entities, as well as governmental and non-governmental bodies, the Commission advocates for statutory and regulatory modifications in law and governmental practice consistent with ABA policy; provides continuing education and timely information about trends, court decisions, and pertinent developments for members of the legal community, judges, affected individuals, and the public; and develops and assists the operation of pro bono programs that encourage volunteer lawyers to provide high quality, effective legal representation for individuals in immigration proceedings, with a special emphasis on the needs of the most vulnerable immigrant, asylum-seeking and refugee

¹ Neither this brief nor the decision to file it should be interpreted to reflect the views of any judicial member of the American Bar Association. No inference should be drawn that any member of the Judicial Division Council has participated in the adoption of or endorsement of the positions in this brief. This brief was not circulated to any member of the Judicial Division Council prior to filing.
populations.

Over the past seventy years, the ABA has devoted significant resources to the study, analysis, and practice of immigration law. In 2010, the Commission embarked on a comprehensive review of the current system for determining whether a noncitizen should be allowed to stay in the country or removed from the United States. The resulting report, *Reforming the Immigration System: Proposals to Promote Independence, Fairness, Efficiency, and Professionalism in the Adjudication of Removal Cases* (2010) (*Reforming the Immigration System*),2 identified more than two dozen proposals for reforming and improving the immigration enforcement and adjudication systems. Further, the ABA has established policy that urges that gender-based persecution be recognized as a ground for asylum and withholding from removal, and supports federal legislative and administrative action to ensure that “persecution” includes domestic violence, sexual abuse, rape, infanticide, genital mutilation, forced marriage, slavery and forced abortion.3

The ABA respectfully submits this brief to urge the Attorney General to keep intact the current Board of Immigration Appeals (“BIA”) precedents establishing that (1) victims of “private criminal activity” which their governments are unable or unwilling to control are subject to “persecution” under the Immigration and Nationality Act, and (2) victims subjected to such persecution or fear of persecution on account of a particular social group are eligible for asylum or withholding from

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2 Available at https://www.americanbar.org/content/dam/aba/publications/commission on immigration/coi complete full report.authcheckdam.pdf.
3 Available at https://www.americanbar.org/content/dam/aba/directories/policy/2001_my_110.authcheckdam.pdf.
removal.

THE CERTIFIED QUESTION

On March 7, 2018, the Attorney General directed the BIA to refer its underlying decision in this case to him for review. Matter of A-B-, 27 I&N Dec. 227 (A.G. 2018). As part of that review, the Attorney General specifically requested the parties and interested amici to submit briefing 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 of asylum or withholding of removal.

After a request for clarification of the question from the Department of Homeland Security, on March 30, 2018, the Attorney General reiterated his request for briefing on the foregoing question, but added the following:

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.


SUMMARY OF ARGUMENT

The Immigration and Nationality Act (‘‘INA”) sets forth a specific statutory framework under which an individual can seek asylum and withholding from removal. Although the burdens of proof differ, under both scenarios, the individual must establish (1) persecution or fear of persecution (2) on account of membership in one of five statutorily-defined groups, including a “particular social group.” 8 U.S.C. §§ 1101(a)(42)(A), 1158(b)(1)(A), 1231(b)(3)(A). Circuit Court and BIA
decisions uniformly hold that a particular social group cannot be defined solely by the persecution the members suffer. Indeed, the underlying BIA decision in this matter did not recognize the particular social group based on the persecution suffered by its members. Instead, the BIA recognized the social group as “El Salvadoran women who are unable to leave their domestic relationships where they have children in common.” As such, whether an individual has been persecuted must be analyzed and decided separately from whether or not the individual is a member of a “particular social group.”

Circuit Court and BIA decisions establish that private criminal activity can rise to the level of “persecution” within the meaning of the INA when governments are unable or unwilling to protect the victims of the persecutors. Further, Circuit Court and BIA decisions have repeatedly found private criminal activity on account of membership in a particular social group to be sufficient to establish asylum and withholding of removal. Such cases include fact patterns involving very serious crimes, such as female genital mutilation, severe domestic violence (including repeated beatings and rape), and incest. Setting aside the inability of the Attorney General to overrule Circuit Court precedent, a reversal of long-standing BIA precedent involving persecution by private actors would further victimize those most in need of protection.

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4 See Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 113 (1948) (“Judgments within the powers vested in courts by the Judiciary Article of the Constitution may not lawfully be revised, overturned or refused faith and credit by another Department of Government.”)
ARGUMENT

I. THE STATUTORY AND REGULATORY FRAMEWORK REQUIRE PROOF OF BOTH PERSECUTION AND MEMBERSHIP IN A PARTICULAR SOCIAL GROUP.

To establish eligibility for asylum, an individual must show that she is a “refugee,” as defined in the INA. See 8 U.S.C. § 1158(b)(1)(A). The INA, in turn, defines “refugee” in pertinent part, as follows:

[...] ny 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 or persecution on account of race, religion, nationality, membership in a particular social group, or political opinion . . . .

8 U.S.C. § 1101(a)(42)(A). Thus, in order to establish herself as a “refugee,” an individual must prove three elements:

1. She is outside the country of her nationality;
2. She is unable or unwilling to return to, and is unable or unwilling to avail herself of the protection of, that country because of persecution or a well-founded fear of persecution; and
3. The persecution is on account of race, religion, nationality, membership in a particular social group, or political opinion.

Accordingly, on the face of the statute, the “persecution” element is a separate element from the “particular social group” element.

Likewise, in order to establish a claim for withholding of removal under the INA, an individual must establish that her “life or freedom would be threatened in

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5 If the person has no nationality, she must establish she is outside any country in which she last habitually resided. See id.
that country because of the individual’s race, religion, nationality, membership in a particular social group, or political opinion.” 8 U.S.C. § 1231(b)(3)(A). In order to satisfy this burden of proof, the individual must show either that (1) she had suffered past persecution based on a protected ground, or (2) it is more likely than not she would be persecuted based on a protected ground. See 8 C.F.R. § 208.16(b)(1),(2). Thus, just as in the asylum context, in withholding of removal proceedings, the elements of persecution and membership in a particular social group are separate elements of proof.

Therefore, the plain meaning of the statutory and regulatory framework of the INA indisputably establishes that an individual is required to prove persecution, membership in a particular social group, and that the persecution was on account of said membership. Case law precedent supports this statutory interpretation. See Sisiliano-Lopez v. AG of the United States, No. 16-3695, 2017 U.S. App. LEXIS 19862, at *15 (3rd Cir. Oct. 11, 2017)(“Establishing the existence of a nexus between persecution and one of the listed grounds of protection is a separate requirement from proving that a proposed group meets the requirements for being a particular social group.”); Escobar v. Holder, 647 F.3d 537, 546 (7th Cir. 2011)(“we accept the proposition that a ‘social group’ cannot be defined solely by the fact that its members suffer persecution.”)

Thus, in analyzing whether or not an individual is eligible for asylum or withholding of removal, the first question Courts and the BIA must answer is whether the harm at issue constitutes persecution. On that issue, the Circuit
Courts and the BIA agree that private criminal activity can rise to the level of persecution.

II. CIRCUIT COURT AND BIA DECISIONS AGREE THAT PRIVATE CRIMINAL ACTIVITY CAN ESTABLISH PERSECUTION FOR BOTH ASYLUM AND WITHHOLDING OF REMOVAL.

“The statutes governing asylum and withholding of removal protect not only against persecution by government forces, but also against persecution by non-governmental groups that the government cannot control . . . “ Ruiz v. United States AG, 440 F.3d 1247, 1257 (11th Cir. 2006). Put another way, “[d]irect 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.’” Paloka v. Holder, 762 F.3d 191, 195 (2d Cir. 2014)(quoting Rizal v. Gonzales, 442 F.3d 84, 92 (2d Cir. 2006)). Indeed, as recently recognized by the Ninth Circuit, persecution by private criminal actors is embedded in the foundation of the INA:

The concept of persecution by non-state actors is ‘inherent’ in the definitions of persecution in the 1951 [Refugee] Convention and the Refugee Act of 1980 . . . . Even under U.S. statutory definitions of persecution predating the Refugee Act of 1980, a First Circuit opinion and a published, precedential BIA opinion suggested that persecution by non-state actors was cognizable as a predicate for relief.

Bringas-Rodriguez v. Sessions, 850 F.3d 1051, 1060-61 (9th Cir. 2017) (citations omitted).

Circuit Court cases are replete with examples of private criminal activity rising to the level of “persecution” under the INA. See, e.g., Cruz v. Sessions, 853 F.3d 122, 127-131 (4th Cir. 2017)(affirming threats from organized crime members
established persecution); *Alonzo-Rivera v. United States AG*, 649 F. App’x 983, 985-992 (11th Cir. 2016)(holding repeated rapes and beatings by a spouse could constitute persecution if the government was unable or unwilling to protect the victim); *R.R.D. v. Holder*, 746 F.3d 807, 809 (7th Cir. 2014)(holding that private criminal activity – attempted murder by drug traffickers – is considered persecution when the government is unable or unwilling to protect the targets of the private violence); *Sarhan v. Holder*, 658 F.3d 649, 651-61 (7th Cir. 2011)(finding fear of “honor killing” by individual’s brother due to claim of adultery was sufficient to establish fear of future persecution in withholding of removal proceedings); *Gomez-Zuluaga v. AG of the United States*, 527 F.3d 330, 335-49 (3rd Cir. 2008)(finding escape from 8-day abduction wherein individual was chained to a bed and threatened by members of a leftist guerilla group established a well-founded fear of future persecution for purposes of asylum and withholding of removal); *Hassan v. Gonzales*, 484 F.3d 513, 517 (8th Cir. 2007)(holding female genital mutilation by tribal members constituted persecution); *Ornelas-Chavez v. Gonzales*, 458 F.3d 1052, 1056-58 (9th Cir. 2006)(holding rape and beatings by family members and other private actors constitute persecution if the government was unable or unwilling to protect the victim); *Fiadjo v. AG*, 411 F.3d 135, 138-42, 160-63 (3rd Cir. 2005)(sexual abuse of daughter by father constituted persecution if evidence established that the government was unwilling or able to control the sexual abuse).6

6 Notably, the cases cited by the Immigration Judge (“IJ”) in the underlying proceeding in his August 18, 2017 Order of Certification to the BIA do not refute or undermine the well-established precedent that private criminal activity can constitute “persecution.” See *Velasquez v. Sessions*, 866 F.3d 188, 193-96 (4th Cir. 2017)(assuming death threat and kidnapping of child amounted to persecution, but

Persecution is normally related to action by the authorities of a country. It may also emanate from sections of the population that do not respect the standards established by the laws of the country concerned. . . Where serious discriminatory or other offensive acts are committed by the local populace, they 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.

(Emphasis added).

Additionally, in 1995, the United States issued guidelines for adjudicating asylum claims for women that further confirmed case and BIA precedent that “the persecutor can be either the government or a non-government entity that the government is unable or unwilling to control.” Memorandum from Phyllis Coven, U.S. Dep’t of Justice, Considerations for Asylum Officers Adjudicating Asylum Claims From Women (May 26, 1995), published in 72 No. 22 Interpreter Releases 771 (June 1995) (“Coven Memorandum”). The Coven Memorandum also noted that

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“rape . . . , sexual abuse and domestic violence, infanticide and genital mutilation are forms of mistreatment primarily directed at girls and women and they may serve as evidence of past persecution on account of one or more of the five [statutory] grounds [set forth in the INA].”

In sum, well-established precedent supports defining “persecution” to include private criminal activity when the government is unable or unwilling to protect the victims thereof.

III. CIRCUIT COURT AND BIA DECISIONS HAVE REPEATEDLY FOUND PRIVATE ACTOR PERSECUTION OF AN INDIVIDUAL ON ACCOUNT OF MEMBERSHIP IN A PARTICULAR SOCIAL GROUP CAN WARRANT ASYLUM AND WITHHOLDING OF REMOVAL.

In determining asylum and withholding of removal matters, Circuit Court and BIA decisions must analyze whether the persecution suffered by the individual was on account of membership in a particular social group. The test for defining a cognizable particular social group is a three-part test requiring that the 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.

Sisiliano-Lopez, 2017 U.S. App. LEXIS 19862, at * 13 (quoting Matter of M-E-V-G-, 26 I&N 227, 237 (BIA 2014)). Importantly, “[t]he immutable or fundamental characteristic might be membership in an extended family, sexual orientation, a former association with a controversial group, or membership in a group whose
ideas or practices run counter to the cultural or social convention of the country.” 

*Cece v. Holder*, 733 F.3d 662, 669 (7th Cir. 2013). Notably, “[m]embers of a social group need not be swimming against the stream of an embedded cultural norm.” *Id.* at 670. Rather, a “characteristic is immutable because a shared past experience or status has imparted some knowledge or labeling that cannot be undone.” *Id.*

**A. Circuit Court Decisions.**

Circuit Court decisions have repeatedly found that persecution of an individual by private actors on account of membership in a particular social group can warrant asylum and withholding of removal. *See, e.g.*, *Sarhan*, 658 F.3d at 651-61 (finding substantial evidence supported withholding of removal based upon individual’s fear of honor killing by her brother on account of her membership in a particular social group, namely, “women in Jordan who have (allegedly) flouted repressive moral norms and thus who face a high risk of honor killing.”); *Hassan*, 484 F.3d at 518 (in an asylum proceeding, holding that individual, subjected to female genital mutilation, was “persecuted on account of her membership in a particular social group, Somali females,” and that the government, on remand, faced a “significant challenge” that she no longer had a well-founded fear of future persecution); *Cruz*, 853 F.3d at 124-31 (holding murder of husband and threats to individual were persecution on account of her membership in a particular social group, namely the “nuclear family members of Johnny Martinez,” and reversing BIA denial of asylum and withholding from removal); *Bringas-Rodriguez*, 850 F.3d at 1055-57, 1073-76 (finding child rape and physical abuse by family members and
neighbors constituted persecution on account of membership in a particular social group – gay men in Mexico – and remanding for the BIA to determine if the presumption of future persecution was rebutted for purposes of asylum and withholding of removal claims).

On this issue, the following cases involving the private-actor crimes of human trafficking, female genital mutilation, rape and incest are instructive.

1. Human Trafficking.

In Cece v. Holder, the Seventh Circuit held that a woman threatened with forced prostitution by a private actor on account of membership in a particular social group could be eligible for asylum. 733 F.3d at 666-77. In that case, petitioner was a young, single Albanian woman living alone who was targeted by a well-known local criminal gang leader for the purpose of forcing her into prostitution. Id. at 666-67. During the hearing before the immigration judge, petitioner presented expert testimony that human trafficking was pervasive in Albania, that single women would be “an ideal target for a trafficker, particularly if she had been such a target in the past,” and that the “Albanian judicial system does not adequately enforce laws against traffickers.” Id. The immigration judge granted petitioner asylum, which decision the BIA then vacated. Id. at 667-68.

On appeal, the Seventh Circuit addressed whether petitioner’s particular social group, namely, young Albanian women living alone and that are vulnerable to traffickers, was cognizable under the INA. Id. at 671. Initially, the court noted that, while petitioner could get married and, therefore, arguably obtain protection
from the traffickers, being single “is the type of fundamental characteristic change that we do not ask of asylum applicants.” *Id.* Further, the court rejected the BIA’s conclusion that the proffered social group was not cognizable because it was defined “in large part” by the harm inflicted: “[J]ust because all members of a group suffer persecution, does not mean that this characteristic is the only one that links them.” *Id.* at 671-72. Instead, the court held that the women in the group are “united by the common and immutable characteristic of being (1) young, (2) Albanian, (3) women, (4) living alone,” and, therefore, represent a “protectable social group under asylum law.” *Id.* at 672-73. Accordingly, the court held that petitioner “established that she belongs to a cognizable social group,” and remanded the case. *Id.* at 677.

2. **Female genital mutilation.**

In *Uanreroro v. Gonzales*, the female petitioner was a native of Nigeria who was scheduled for genital cutting. 443 F.3d 1197, 1199-1200 (10th Cir. 2006). When her father warned her that if she were not a virgin she would be killed, petitioner confided in her mother that she was not a virgin, and her mother helped her escape from the village. *Id.* Thereafter, a “seemingly sympathetic police sergeant” took her in and physically and sexually abused her before returning petitioner to her village. *Id.* at 1200. Upon her return, and as punishment for her escape, she suffered the following atrocities: (1) she was beaten and locked in a dark room for two days; (2) she was tied to a tree, cut, black powder was inserted in her wounds, and she was forced to drink blood; and (3) she was left tied to the tree for three days without food or water. *Id.* at 1201. After the three days, the chief priest for the tribe told
petitioner that she would be subject to additional “cleansing” during the full moon, which would require the killing of a seven-day old baby, the bathing of petitioner in the baby’s blood, and the expulsion of petitioner to the “evil forest” for twenty-one days. *Id.* Before the full moon, however, petitioner learned that her father arranged for her to marry the chief priest after the “cleanse,” and that, in preparation for the marriage, she would be subjected to genital mutilation. *Id.*

In its decision, the Tenth Circuit affirmed its prior precedent that “FGM [female genital mutilation] qualifies as persecution based upon membership in a particular social group: ‘a female member of a tribe that subjects its females to FGM establishes . . . persecution on account of being a member of a social group defined by her gender and tribal membership.’” *Id.* at 1202 (internal citation omitted). Therefore, the court held that the BIA decision to deny petitioner asylum “was not supported by substantial evidence.” *Id.* at 1211.

3. Rape.

*Ali v. Ashcroft* addressed the issue of rape by private actors on account of membership in a particular social group. 394 F.3d 780 (9th Cir. 2005). In that case, Ali, the petitioner, had lived in Mogadishu, Somalia with her husband. 394 F.3d at 782. She and her husband were members of the Muuse Diriiye clan, the members of which are bound in servitude to noble Somali families “and are considered low-caste and subhuman by other Somali clans.” *Id.* In January 1991, six armed members of a militia group broke into Ali’s home and three of the members brutally gang-raped her while her husband and brother-in-law were bound and forced to watch. *Id.* at
During the rape, gang members told Ali that “she was ‘getting what [she] deserved’ because she and her family were Muuse Diriiye . . . .” Id. When Ali’s brother-in-law spit on the militia for raping her, he was shot dead. Id. The gang members then kidnapped Ali’s husband and held him for two weeks, during which time he suffered broken ribs and wrists. Id. Ultimately, Ali’s husband divorced her “as a result of the rapes and the fact that afterwards he no longer saw her as a wife.” Id.

The Ninth Circuit held, as it had many times before, that “rape rises to the level of persecution.” Id. at 787. Further, even though the militia members were “non-state actors,” the court, nevertheless held that Ali was subject to past persecution and, further, that it was “on account of,” at least in part, her membership in the Muuse Diriiye clan.8 Id. at 785-87. Further, the court found that the DHS had not rebutted the presumption of a well-founded fear of persecution because the relevant country report indicates that the persecution in the country was continuing. Id. at 789. Thus, the court held that Ali was entitled to asylum. Id. at 791.

4. Incest.

In Fiadjo v. AG, petitioner was a member of the Ewe tribe in Ghana. 411 F.3d at 136. Her father was a Trokosi priest. Id. at 139. When petitioner was seven years old, pursuant to Trokosi practices, he sought to make his daughter his slave and sexually abused her for three months. Id. Her father’s sister objected to the

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8 The court found that the persecution was also, at least in part, on account of Ali’s political opinion because he husband worked for the government. Id. at 785-87.
practices and took petitioner away to live with her family. Id. However, when her aunt died eleven years later, her uncle forced petitioner out of the house. Id. Having nowhere else to go, petitioner returned to her father's home. Id. Once there, she again became her father's slave and was subjected to beatings and rape. Id. Although her grandmother reported the beatings to police (she felt a report of the rapes would bring disgrace on the family), the police refused to intervene. Id. at 139-40. When petitioner became pregnant by a man she hoped to marry, her father beat her until she miscarried. Id. at 140. Ultimately, after her father shot and killed her fiancé, petitioner was able to flee to the United States. Id. at 140-41. As a result of Pre-Screening Interview, the Asylum Officer found that petitioner was a member of a particular social group defined as “unmarried women over 25 in Ghana.” Id. at 137.

The Third Circuit held that, in light of (1) the failure of the police to intervene upon report of petitioner's grandmother, and (2) a State Department report finding that the Ghana government “has not prosecuted any practitioners of Trokosi,” the BIA’s finding that petitioner “failed to establish that the government of Ghana was either unwilling or unable to control her father's sexual abuse” was not supported by substantial evidence. Id. at 163. Further, the court found that the BIA’s and IJ's adverse credibility determinations, which were based, in large part, on abusive questioning by the IJ in contravention of the Coven Memorandum, was also not supported by substantial evidence. Id. at 154-55, 163. In apparent recognition of the fact that petitioner's abuse could give rise to valid asylum and
withholding from removal applications, the court remanded the case for a new hearing, before a different IJ, for further evidence of the continuing Trokosi practices and the government attempts to protect the victims thereof. *Id.* at 163.

**B. BIA Decisions.**

Likewise, BIA decisions have consistently held that persecution by private actors on account of an individual’s membership in a particular social group can warrant asylum and withholding of removal. For example, in *Matter of A-R-C-G*, it was undisputed that the regular physical beatings and rape by respondent’s spouse constituted past harm rising to the level of persecution. 26 I&N Dec. at 389. It was also undisputed that the case involved mistreatment that was, for at least one central reason, on account of her membership in a cognizable social group of “married women in Guatemala who are unable to leave their relationship.” Because there was insufficient analysis to determine whether the Guatemalan government was unwilling or unable to control the “private” actor, the BIA remanded the matter to the IJ to address that sole aspect of respondent’s statutory eligibility for asylum. On remand, respondent was able to prove the government’s failure to protect, and was granted asylum.

In a factually similar matter, asylum was granted to a respondent who suffered persecution on account of her membership in a particular social group of “women in El Salvador who are unable to leave their domestic relationship.” *Matter of [Redacted]*, 2015 BIA LEXIS 36. Finding repeated beatings by a former domestic partner was harm that “rises to the level of persecution,” the BIA found the respondent to be eligible for, and deserving of, asylum based on the finding of past
persecution on account of her membership in a particular social group, the unrebutted presumption of well-founded future persecution and demonstration that the Salvadoran government is unable or unwilling to protect her.

In *Matter of Kasinga*, 21 I&N Dec. at 365-66, the BIA found that the respondent was a member of a particular social group of young women of a certain tribe who had not been subjected to female genital mutilation and opposed the practice. The record contained objective evidence regarding the prevalence of mutilation in the society and the expectation that women in the tribe would undergo the procedure. Based on those facts, the BIA found that the practice of female genital mutilation can be the basis for a claim of persecution. The BIA also found that people in the Tchamba-Kunsuntu Tribe would generally consider women who had not undergone the procedure and opposed to the practice would be a discrete and distinct group that was set apart in a significant way from the rest of society. The BIA concluded such women would clearly understand their affiliation with this grouping, as defined by common characteristics that members of the group either cannot change or should not be required to change because such characteristics are fundamental to their individual identities. Finding that a reasonable person in her circumstances would fear country-wide persecution in Togo on account of her membership in a recognized social group, the BIA held that the respondent met her burden and asylum was warranted.

Therefore, ample Circuit Court and BIA decisions establish that persecution by private criminal actors on account of membership in a particular social group can
establish eligibility for asylum and withholding from removal. As the cases
demonstrate, gender-based violence is frequently perpetrated by private criminal
actors whom governments are unable or unwilling to control. Allowing gender-based
violence as a ground for asylum and withholding of removal is critical to the
advancement of human rights principles for women and girls, who will otherwise
face life-threatening violence and abuse. The Department of Justice’s own
guidelines, in the form of the Coven Memorandum, recognize there are harms
uniquely suffered by women or a subset of women.9 These harms can be systemic,
and the Coven Memorandum publicly affirmed that asylum may be used in a fair
and consistent manner to protect women and girls from systemic life-threatening
human rights violations.

Reversing the BIA’s well-established precedent allowing asylum to be
granted when applicants are persecuted by private actors on account of membership
in a particular social group will create a direct conflict with Circuit Court precedent
on this issue, which cannot be overturned by the Department of Justice. It will also
conflict with the Department’s own guidelines, and be inconsistent with the spirit of
treaties to which the United States is a signatory, including the Convention on
Torture and Other Cruel, Inhuman or Degrading Treatment and the International
Covenant on Civil and Political Rights, both of which address the concerns raised in
gender persecution asylum claims.10

9 See supra, p. 10.
10See Convention on Torture and Other Cruel, Inhuman or Degrading Treatment, Dec. 10. 1984, 1465
95-20, 999 U.N.T.S. 171.
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

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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.
³ We refer the AG to the Brief of Amicus Curiae National Immigrant Justice Center for further explication of this argument.
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 INFicted 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

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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.
⁹ Id. at 222.
The BIA has recognized various types of harms inflicted by private actors as persecution including, but not limited to, murder, beating, threats, detention, female genital cutting, and domestic abuse.

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. 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.

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. The Immigration Judge ("IJ") denied relief, and the BIA reversed, holding that she had demonstrated persecution on account of particular social group. 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.”

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
constituted persecution where Moroccan authorities would have been unable or unwilling to protect her.\textsuperscript{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 \textit{Matter of Kasinga}, the applicant’s aunt and husband would have forced her to undergo genital cutting had she not fled Togo.\textsuperscript{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.\textsuperscript{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 \textit{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.”\textsuperscript{24} It recognized that the Provisional Irish Republican Army (“PIRA”) was a terrorist organization that the government was unable to control.\textsuperscript{25} However, it found McMullen barred from asylum because he was himself a member of PIRA and had persecuted others.\textsuperscript{26}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{21} \textit{Matter of S A}, 22 I. & N. Dec. 1328, 1335 (BIA 2000).
\item \textsuperscript{22} \textit{See, e.g., In re Kasinga}, 21 I. & N. Dec. 357, 358–59 (BIA 1996).
\item \textsuperscript{23} \textit{Id.} at 359, 368.
\item \textsuperscript{24} \textit{Matter of McMullen}, 19 I. & N. Dec. at 96.
\item \textsuperscript{25} \textit{Id.} at 94.
\item \textsuperscript{26} \textit{Id.} at 99.
\end{itemize}
\end{footnotesize}
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).


\(^{29}\) Aldana Ramos v. Holder, 757 F.3d 97, 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); Nikijuk 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.” Numerous unpublished decisions from this circuit establish the same.

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.

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. 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.” 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. As the Department of Homeland Security (“DHS”) concedes, the court in these cases did not “question[] the underlying validity of A-R-C-G-.”

31 Kadri, 543 F.3d at 20 (citing Jorgji v. Mukasey, 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. 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. 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. 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.”

The court has recognized persecution committed at the hands of various non-state actors, including, *inter alia*, domestic abusers, rebel guerilla groups, religious groups, tribe members, members of other ethnic groups, anti-Semites, and traffickers. 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, lack of resources, corruption or impunity, or societal pervasiveness of the persecution. Several unpublished decisions also demonstrate the court’s longstanding recognition of the private actors standard.

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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).
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).
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.” For example, in *Fiadjo 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. 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. Moreover, numerous unpublished decisions from the circuit also demonstrate that it is well established that harms inflicted by private actors can constitute persecution.

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

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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); *Gjicici 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); *Jasara 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).
55 Fiadjo, 411 F.3d at 161–63.
56 Garcia, 665 F.3d at 503.
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.
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.\textsuperscript{67} In \textit{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.\textsuperscript{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.\textsuperscript{69} Instead, the court found that the reason for the feared harm was a dispute over the custody of a child.\textsuperscript{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 \textit{Velasquez}, the Fourth Circuit did not overrule or even criticize \textit{A-R-C-G}.”\textsuperscript{71}

\textbf{v. \quad 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.”\textsuperscript{72} In \textit{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

\textsuperscript{67} See, e.g., \textit{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).

\textsuperscript{68} \textit{Velasquez v. Sessions}, 866 F.3d 188, 194 (4th Cir. 2017).

\textsuperscript{69} \textit{Velasquez}, 866 F.3d at 196.

\textsuperscript{70} Id. at 195–96.

\textsuperscript{71} DHS Brief on Referral to the AG at 20.

\textsuperscript{72} \textit{Tesfamichael v. Gonzalez}, 469 F.3d 109, 113 (5th Cir. 2006) (emphasis added). See also \textit{Hernandez De La Cruz v. Lynch}, 819 F.3d 784, 785 (5th Cir. 2016); \textit{Ramirez Mejia v. Lynch}, 794 F.3d 485, 488, 494 (5th Cir. 2015); \textit{Orellana Monson v. Holder}, 685 F.3d 511, 518 (5th Cir. 2012); \textit{Tamara Gomez v. Gonzales}, 447 F.3d 343, 347 (5th Cir. 2006); \textit{Eduard v. Ashcroft}, 379 F.3d 182, 187 (5th Cir. 2004); \textit{Rivas Martinez v. INS}, 997 F.2d 1143, 1148 (5th Cir. 1993); \textit{Adebisi v. INS}, 952 F.2d 910, 914 (5th Cir. 1992).
government cannot control them.”

Additionally, in *Rivas-Martinez v. INS*, the court held in favor of an applicant who feared persecution at the hands of guerillas.

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

Even when denying relief, the court has explicitly recognized that harms inflicted by private actors can constitute persecution. 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 . . . .” 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.*”

**vi. Sixth Circuit**

The Sixth Circuit Court of Appeals has consistently held that harms inflicted by private actors can constitute persecution. 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. In *Marouf v. Lynch*, the applicants, who were Christian, were repeatedly attacked by Muslim individuals. The court held that a violent attack on the

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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.
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.\(^8^2\) The court noted that a State Department report showed that the Palestinian Authority is unable or unwilling to control the Muslim persecutors.\(^8^3\)

The court also has recognized the private actors standard in several unpublished decisions.\(^8^4\)

Even when denying relief, the court has explicitly recognized the private actors standard. In both \textit{Bonilla-Morales v. Holder} and \textit{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 . . . .”\(^8^5\) Based on this standard, the court found that the applicant in \textit{Bonilla-Morales} did not present sufficient evidence to show the Honduran government was unwilling or unable to control the MS-13 gang.\(^8^6\) The court in \textit{Khalili} found that reports showed Jordanian authorities prosecuted honor killing crimes and offered potential victims protective custody.\(^8^7\)

When the court has denied relief in the domestic violence context, the court also has recognized the private actors standard. For example, in \textit{Marikas v. Lynch}, the court acknowledged \textit{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

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\(^8^2\) Id. at 189.

\(^8^3\) Id. at 189.

\(^8^4\) See, \textit{e.g.}, \textit{Alakhfash v. Holder}, 606 F. App’x 291, 299 (6th Cir. 2015) (granting petition for review because applicant was persecuted by terrorist groups); \textit{Abdraman v. Holder}, 569 F. App’x 430, 436 (6th Cir. 2014); \textit{Anyakudo v. Holder}, 375 F. App’x 559, 564 (6th Cir. 2010); \textit{El Ghorbi v. Mukasey}, 281 F. App’x 514, 517 (6th Cir. 2008); \textit{Berishaj v. Gonzales}, 238 F. App’x 57, 61 (6th Cir. 2007); \textit{Keita v. Gonzales}, 175 F. App’x 711, 713 (6th Cir. 2006).

\(^8^5\) \textit{Bonilla Morales v. Holder}, 607 F.3d 1132, 1136 (6th Cir. 2010); \textit{Khalili v. Holder}, 557 F.3d 429, 436 (6th Cir. 2009).

\(^8^6\) \textit{Bonilla Morales}, 607 F.3d at 1136.

\(^8^7\) \textit{Khalili}, 557 F.3d at 436.
her marriage to the abuser was immutable.\textsuperscript{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.”\textsuperscript{89} Thus, as the DHS concedes, the court distinguished \textit{A-R-C-G-} and did not call into question its validity.\textsuperscript{90}

\textbf{vii. Seventh Circuit}

The Seventh Circuit Court of Appeals also has repeatedly stated that harms inflicted by private actors can constitute persecution.\textsuperscript{91} For example, in \textit{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.”\textsuperscript{92} In \textit{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.”\textsuperscript{93} The court held that the record compelled the conclusion that the government was unable or unwilling to protect the applicant.\textsuperscript{94}

Several unpublished cases in the circuit also demonstrate the court’s longstanding recognition of the private actors standard.\textsuperscript{95}

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

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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. 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].” 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].” The court accordingly distinguished A-R-C-G- and, as the DHS concedes, did not “question[] the underlying validity of A-R-C-G-. In Rodriguez-Mercedo v. Lynch, the court held against the applicant in a domestic violence case due to lack of credibility and not because the perpetrator was a private individual. 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.

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.” In

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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 Smolniakov a 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. 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. 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.” Unpublished cases from the Ninth Circuit establish the same.

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.” 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

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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). Bringas Rodriguez, 850 F.3d at 1056, 1073 75. See also Faruk, 378 F.3d at 944.

Mohammed v. Gonzales, 400 F.3d 785, 789 (9th Cir. 2005).
Id. at 798.
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); Gamut 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).

Rahimzadeh v. Holder, 613 F.3d 916, 920 (9th Cir. 2010).
protect him from extremists. In *Sangha v. INS*, the court determined that a terrorist group’s actions constituted persecution because the government was unable to control the group. However, the court ultimately held against the applicant because he failed to prove that his persecution was motivated by a protected ground.

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.” 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. 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.

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

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.

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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.\textsuperscript{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.\textsuperscript{120}

\textbf{xi. Eleventh Circuit}

Finally, it is well established in the Eleventh Circuit that harms inflicted by private actors can constitute persecution. For instance, in \textit{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.”\textsuperscript{121} The court remanded the decision because the BIA and IJ failed to address this point.\textsuperscript{122}

Several unpublished decisions from the circuit have also acknowledged the private actors standard.\textsuperscript{123}

Moreover, the court acknowledges that harms inflicted by private actors can constitute persecution, even when holding against the applicant. For instance, in \textit{Ruiz v. AG}, the applicant claimed he feared persecution at the hands of the Revolutionary Armed Forces of Colombia (FARC) in Colombia.\textsuperscript{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

\textsuperscript{119} \textit{Batalova v. Ashcroft}, 355 F.3d 1246, 1253 (10th Cir. 2004).
\textsuperscript{120} \textit{Id.} at 1253, 1255.
\textsuperscript{121} \textit{Lopez v. U.S. Att'y Gen.}, 504 F.3d 1341, 1345 (11th Cir. 2007).
\textsuperscript{122} \textit{Id.} at 1345.
\textsuperscript{123} See, e.g., \textit{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); \textit{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); \textit{Jeronimo v. U.S. Att'y Gen.}, 678 F. App’x 796, 800 02 (11th Cir. 2017); \textit{Kapa v. U.S. Att'y Gen.}, 675 F. App’x 903, 906 07 (11th Cir. 2017); \textit{Hossain v. U.S. Att'y Gen.}, 630 F. App’x 914, 916 17 (11th Cir. 2015); \textit{Lewis v. U.S. Att'y Gen.}, 512 F. App’x 963, 968 (11th Cir. 2013).
\textsuperscript{124} \textit{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.”

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. 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. 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. Accordingly, the Court found against the applicant on nexus grounds. However, the court never called into question the notion that harms perpetrated by a private actor, namely the guerilla group, could constitute persecution.

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.”

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125 *Ruiz*, 440 F.3d at 1257, 1259.
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.” The UNHCR Handbook clearly recognizes that harms inflicted by private actors can constitute persecution.

II. COURTS ROUTINELY HAVE FOUND HARMS INFLECTED 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, family membership, mental illness, and clan or tribe membership among

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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. Courts also have granted cases involving domestic violence, gang violence, sex trafficking, forced marriage, involuntary servitude, and female genital cutting 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

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


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

138 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 Bhari); Fiadjoe v. Att’y Gen., 411 F.3d 135, 157 58, 162 63 (3rd 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 Hawiyi clan on account of applicant’s membership in the Marehan clan).

139 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 Ungik 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”).


141 See, e.g., Oliva v. Lynch, 807 F.3d 53, 56 57, 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).

142 See, e.g., Paloka v. Holder, 762 F.3d 191, 193 45, 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”).

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

144 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).

145 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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{147} The BIA noted that the applicants reported at least three incidents to the police, who failed to take action beyond writing a report.\textsuperscript{148} Numerous other courts have granted cases in which the applicant claimed harm by private actors on account of race or nationality.\textsuperscript{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

\textsuperscript{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).

\textsuperscript{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.”)


\textsuperscript{148} Id. at 26.

\textsuperscript{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.\footnote{See, e.g., Khatak 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).}

**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

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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

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Dated: April 27, 2018

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File No.: _______

In Removal Proceedings

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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