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NON-DETAINED

UNITED STATES DEPARTMENT OF JUSTICE
OFFICE OF THE ATTORNEY GENERAL

In the Matter of:	
A-B-	AXXX-XXX-XXX
In Removal Proceedings	27 I&N Dec. 227 (A.G. 2018)

BRIEF OF AMICUS CURIAE THE NATIONAL IMMIGRANT JUSTICE CENTER

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INTEREST OF AMICUS CURIAE

The National Immigrant Justice Center (NIJC) hereby responds to the Attorney General's invitation to appear as amicus curiae in the above-captioned matter. *Matter of A-B-*, 27 I&N Dec. 227 (A.G. 2018).

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 a 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

[1] "Rwanda genocide: 100 days of slaughter," BBC News, April 7, 2014, available at http://www.bbc.com/news/world-africa-26875506 [last accessed April 19, 2018].
[2] Glenn Kessler and Colum Lynch, "U.S. Calls Killings in Sudan Genocide," The Washington Post, Sept. 10, 2004 at A01, available at http://www.washingtonpost.com/wp-dyn/articles/A8364-2004Sep9.html [last accessed April 20, 2018].

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/eoir/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/eoir/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_reset_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.

B. The Attorney General Should Improve the Current Process for Involving Amici and Selecting Cases for Publication 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/orderinthecourt [last accessed April 19,

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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.

Since 2006, the Board has published seven asylum decisions focusing on whether a respondent had presented a viable particular social group: *Matter of C-A-*, 23 I&N Dec. 951 (BIA 2006); *A-M-E- & J-G-U-*, 24 I&N Dec. 69; *Matter of S-E-G-*, 24 I&N Dec. 579 (BIA 2008); *Matter of E-A-G-*, 24 I&N Dec. 591 (BIA 2008); *M-E-V-G-*, 26 I&N Dec. 227; *Matter of W-G-R-*, 26 I&N Dec. 208 (BIA 2014); and *A-R-C-G-*, 26 I&N Dec. 388. This extensive focus on which groups constitute "particular social groups" is misplaced and the question posed in the present matter threatens to further confuse adjudication.[6]

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.[10] 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.[11] 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

[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).

for Refugees (UNHCR), *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, December 2011, HCR/1P/4/ENG/REV.3, at ¶ 98 (explaining that the phrase "unable . . . to avail himself of the protection of that country" includes situations where a country's protection is ineffective or denied).

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."[14] 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

[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.

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

[15] Significantly, the Third Circuit did not grant the petition for review of Ms. Garcia'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.

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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.

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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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