Charles Roth
Lisa Koop
Ashley Huebner
National Immigrant Justice Center
208 S. La Salle Street, Suite 1300
Chicago, IL 60604
312.660.1303
312.660.1505 (fax)
Attorneys for Amicus Curiae

NON-DETAINED

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

In the Matter of:	
L. E. A.	AXXX-XXX-090
In Removal Proceedings	Amicus Invitation No. 16-01-11

REQUEST TO APPEAR AS AMICUS CURIAE AND BRIEF OF THE NATIONAL IMMIGRANT JUSTICE CENTER AS AMICUS CURIAE

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REQUEST TO APPEAR AS AMICUS CURIAE

The National Immigrant Justice Center ("NIJC") hereby requests permission from the Board of Immigration Appeals ("Board" or "BIA") to appear as amicus curiae in the above-captioned matter. The Board may grant permission to amicus curiae to appear, on a case-by-case basis, if the public interest will be served thereby. 8 C.F.R. § 1292.1(d). In this case, the Board has requested amicus curiae briefs from members of the public in Amicus Invitation No. 16-01-11.

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 consultation to low-income immigrants, refugees and asylum-seekers. Each year, NIJC represents hundreds of asylum-seekers before the immigration courts, BIA, the federal courts, and the Supreme Court of the United States through its legal staff and a network of nearly 1500 pro bono attorneys.

Because NIJC represents a large number of asylum-seekers, it has a weighty interest in rational, consistent and just decision-making by the Executive Office for Immigration Review ("EOIR"). 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 on account of family membership. 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 particular social group and nexus issues in asylum that it believes can assist

the Board in its consideration of the present appeal. Also, because of NIJC's federal litigation practice, NIJC is well-positioned to comment upon the Board's procedures for selecting cases for publication and soliciting amici in issues of importance to the Board. As such, NIJC's involvement in this matter serves the public interest. NIJC has previously requested and been granted leave to appear as amicus curiae in cases before the Board, including *Matter of M-E-V-G*, 26 I&N Dec 227, 251 (BIA 2014) and *Matter of A-R-C-G-*, 26 I&N Dec 388, 393 (BIA 2014).

NIJC therefore respectfully asks for leave to appear as amicus curiae and file the following brief.

SUMMARY OF ARGUMENT

Amicus writes to address two points relevant to the matter under consideration by the Board. First, NIJC asserts that the stated goals of the Board in inviting amicus participation would be better served by altering the process by which the Board solicits amicus involvement. The Board does not provide potential amici with access to the case record or the identity of counsel for the respondent. Without this information, amici seek to offer counsel to the Board 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 Board. Amici are also unable to coordinate with respondent's counsel to avoid duplicative arguments or ensure that all pertinent questions are addressed. Amicus urges the Board to a adopt a system akin to the federal courts where amicus involvement can aid the courts because public access to case information enables amici to tailor involvement to the specific contours of the case in question. Amicus further urges the Board to adopt the practice of holding oral argument in advance of issuing precedent decisions to foster deeper exploration of issues before publishing decisions that set national precedent.

Second, Amicus submits that the Board's framing of the issues presented in this matter would benefit from modification. In this instance, Amicus was able to communicate with counsel for the respondent and conduct record review. Review of that record prompts Amicus to assert that it would be erroneous to decide this case based on whether the particular social group posited is viable. This case raises

questions of nexus; whether the persecution experienced or feared by the respondent was *on account of* his family membership. Whether his family is a particular social group was not part of the decision of the Immigration Judge ("IJ") or a determinative factor in this case. As such, this case is a suboptimal vehicle to explore the parameters of family-based particular social groups. The Board should resolve this case by considering whether the nexus and other asylum elements have been met. In focusing on the nexus question, the Board should clarify that an appropriate nexus analysis is separate from the question of whether a protected ground exists.

ARGUMENT

I. THE BOARD'S CURRENT PROCESS FOR SELECTING CASES FOR PUBLICATION AND INVITING AMICUS BRIEFS SHOULD BE IMPROVED

In June 2015, the Board launched a one-year pilot program to solicit amicus curiae briefs "in an effort to reach a broader range of the knowledgeable public and, through their contributions, gain greater perspective on more nuanced topics." U.S. Dep't of Justice, EOIR, "EOIR's Board of Immigration Appeals Launches Pilot Program to Solicit ***Amicus Curiae*** Briefs," June 19, 2015, available at http://www.justice.gov/eoir/notice-bia-amicus [last accessed Feb. 1, 2016]. Through this pilot program, EOIR indicated it would post public amicus invitations describing the issue in question. *Id.* Since the Board publishes relatively few decisions each year, meaningful involvement by amici is critical to the development of the law. *See e.g.*, http://www.justice.gov/eoir/precedent-decisions-volume-26 (listing only

approximately 35 cases published by the Board in 2015) [last accessed February 20, 2016]. NIJC supports the pilot program, but sees a need to alter the manner in which amici are invited to contribute to matters before the Board.

Despite the stated goals of increasing the breadth and depth of expertise the Board could consider in adjudicating cases and selecting decisions for publication, the process used by the Board to solicit amicus briefs limits the utility of potential amici. Specifically, the Board's process prevents access to case information, including the immigration judge's decision and the identity of the counsel of record. As a result, potential amici are guided only by out-of-context descriptions of issues as perceived and described by the Board. In many cases, amici are unable to meaningfully contribute to the discourse without reviewing the case record and, as such, are limited in their ability to offer useful perspectives to the Board.

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

The Board has consistently emphasized the importance of case-by-case analysis, particularly in asylum cases. *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"); *M-E-V-G-*, 26 I&N Dec at 251 ("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"); *A-R-C-G-*, 26 I&N Dec at 393 ("In particular, the issue of nexus will depend on the facts and circumstances of an

individual claim."); *cf. also Matter of Monreal*, 23 I&N Dec. 56 (BIA 2001) ("each case must be assessed and decided on its own facts"). The Board'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 staking an opinion on an issue arising in a particular matter with little or no knowledge of the facts of the case.

In the cases in which the Board has solicited amicus briefing, amici's involvement has been hobbled because the Board has not allowed access to crucial facts about the case. Since the pilot program was initiated, the Board has solicited amicus briefs in five cases, including this one. U.S. Dep't of Justice, EOIR, "Board of Immigration Appeals – Invitation to File Amicus Briefs," available at http://www.justice.gov/eoir/amicus-briefs [last accessed Feb. 2, 2016]. None of these amicus invitations included information about the case that prompted that amicus request, nor the name of the attorney representing the respondent in the case. *Id.* These missing details cripple amici and diminish the value of amicus involvement.

Notably, in each invitation, the Board cited its Practice Manual and asserted that "[a]n amicus curiae brief is helpful to the Board if it presents relevant legal arguments that the parties have not already addressed." *See e.g.*, Amicus Invitation No. 15-09-28, available at http://www.justice.gov/sites/default/files/pages/attachments/2015/09/28/amicus-invitation-no-15-09-28-due-10-28-2015.pdf [last accessed Feb. 1, 2016]. But without information about the underlying case, it is impossible for potential amici to do as the Board asks because amici have no idea what has already been addressed.

Considering the issues identified by the Board in isolation from the facts of the case invites error and confusion because it presupposes that the issues identified by the Board ought to in fact be the determinative issues in the case. Where amici have access to the facts of the case, they can draw the Board'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 briefing. FED. R. APP. P. 29., note on subdivision (e) ("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 would permit amici to draw aspects of the case to the Board's attention and may alter the Board's understanding of the claim in question. Moreover, amicus involvement might be useful to the Board in avoiding misunderstanding by practitioners and litigants of Board precedent.

For example, 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 crime involving moral turpitude under INA § 237(a)(2). However, the statute in question in that case was a California "wobbler statute" - implicating substantial case law on those crimes, which could be

misdemeanors or felonies at the discretion of the sentencing judge – a fact never noted in the Board decision. 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, the Board's decision in *Matter of Lemus Losa*, 24 I&N Dec. 734 (BIA 2012), 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 appeared more clearly (and permanently) inadmissible under INA § 212(a)(9)(C). That led to *Lemus-Losa v. Holder*, 576 F.3d 752, 761 (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, but that the factual aspects of the case made it at best a confusing vehicle for the Board to employ to elucidate the statute.

These are the kinds of points that amici could address if permitted involvement with the benefit of full record review. Amici are well-positioned to draw attention to "vehicle" issues as well as the actual legal issues, precisely because they would be focused more on the legal principles than on representing a client's interests. Access to case information would enable amici to provide this sort of commentary.

B. The Board Should Improve Its Current Process of Involving Amici and Selecting Cases For Publication.

NIJC's 2014 report, "Order in the Court," suggests various models for how the Board could improve the quality of its decision-making.[1] The solicitation of amicus briefing on a regular basis through the Board's pilot program fits squarely into the

[1] Charles Roth and Raia Stoicheva, "Order in the Court: Commonsense Solutions to Improve Efficiency and Fairness in the Immigration Court," Oct. 2014, [hereinafter, "Order in the Court"] available at http://immigrantjustice.org/publications/orderinthecourt [last accessed Feb. 1, 2016].

report's suggestion that expanded amicus involvement would be helpful to the Board. That said, as noted above, NIJC submits that the Board's amicus invitation process would benefit from further refinement.

First, NIJC suggests that the Board adopt a policy of generally holding oral argument before publishing a decision. Oral argument by its nature would build confidence that the Board has given full consideration to the issues involved in the case. Moreover, an oral argument schedule would facilitate amicus involvement if the Board made that schedule public, e.g., on the Board's website. Order in the Court at 24. Notifying the public of upcoming oral argument would also bring the Board more in line with the federal courts, which are traditionally considered open forums. *See Gannett Co. v. DePasquale*, 443 U.S. 368, 386 n. 15 (1979); *Press–Enterprise Co. v. Superior Court*, 464 U.S. 501, 505–508 (1984).

The use of oral argument in cases considered for publication would also invoke presumptions of openness. Respondents, even asylum respondents, who request oral argument in Form E-26, Notice of Appeal from a Decision of an Immigration Judge, might be presumed to understand that argument will be open to the public and information regarding their cases will not be protected. *See Detroit Free Press v. Ashcroft*, 195 F. Supp.2d 937 (E.D. Mich. 2002). That could allow the Board to presume that individuals seeking argument would be amenable to having their facts known to the public.

That said, Amicus submits that if the Board decides to grant oral argument in a particular case, especially a protection case, 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., N.L.A. v. Holder*, 744 F.3d 425, 428 n.1 (7th Cir. 2014) (petitioner granted permission to proceed under pseudonym where if removed, identifying information would place her and her family in danger of retaliation). In some cases, the Board might wish to condition leave to proceed under a pseudonym on production of a redacted transcript and record. Either way, even under a pseudonym, the identity of counsel would be available.

Second, under this approach, it would be optimal for the Board to accept supplemental briefing, including by amicus, once the case has been publically docketed for oral argument. This would allow interested parties to fully articulate their positions in advance of issuance of a precedent-setting opinion. Indeed, oral argument itself might be less useful to the Board than the expanded briefing process. For instance, the Board might wish to cancel oral argument where briefing reveals that the case is a poor vehicle to address the issues which the Board finds most appropriate for resolution. These measures would promote the most efficient and effective use of amicus, which in turn will increase the quality of decisions, reduce appeals to the federal courts, and foster confidence in the Board's decision-making.

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

In the present case, as in all other amicus invitations that have been part of the pilot program, the Board published an amicus invitation without providing any

information regarding the facts of the underlying case or the name of the attorney of record. The wording of the amicus invitation, combined with the lack of case information, gave rise to complications. First, the invitation asserted the existence of a circuit split on the question of whether a family, without more, could form the basis of a particular social group and asked potential amici to address this alleged split. As explained in the brief of amicus curiae Non-Profit Organizations and Law School Clinics and Professors, however, the conclusion that a circuit split exists is faulty. Second, the manner in which the issues are framed conflates the question of whether a cognizable particular social group exists with the question of whether an asylum applicant was persecuted on account of membership in a particular social group (the nexus element) and, as explained *infra*, asks the wrong question.

Without access to case information, potential amici might reasonably assume that the determinative issue in the case is whether the respondent's family-based particular social group was viable under asylum law. Only after advocacy by interested amici did the Board release the name of the respondent's attorney to those particular amici, which allowed some record review by those amici. Only then did amici learn that the IJ never analyzed whether the respondent's particular social group was cognizable, but rather denied asylum based on the respondent's alleged failure to demonstrate he had been persecuted *on account of* his proposed particular social group. (IJ Decision at 8.) Had amici considered the issues presented by the Board in isolation, amici's ability to assist the Board would have been constrained by error. In future amicus invitations, the Board ought to adopt procedures that promote transparency and efficiency: at a

minimum, issuing public invitations that include case information, and ideally, public docketing cases set for oral argument.

II. THE AMICUS INVITATION INAPPROPRIATELY FOCUSES ON A PARTICULAR SOCIAL GROUP INQUIRY, RATHER THAN A NEXUS INQUIRY

A. Establishing a Cognizable Particular Social Group Is Not the Only Determinative Factor in Whether an Individual is Eligible for Asylum.

Since 2006, the Board has published seven asylum decisions that have focused on whether or not the respondent had presented a viable particular social group: *Matter of C-A-*, 23 I&N Dec. 951 (BIA 2006); *Matter of A-M-E- & J-G-U-*, 24 I&N Dec. 69 (BIA 2007); *Matter of S-E-G-*, 24 I&N Dec. 579 (BIA 2009); *Matter of E-A-G-*, 24 I&N Dec. 591 (BIA 2009); *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 because establishing a particular social group says little about which group members might ultimately qualify for asylum. As Justice Alito observed when he was on the Third Circuit, establishing that a particular social group is cognizable is only the first step towards satisfying the refugee definition. *Fatin v. INS*, 12 F.3d 1233, 1240 (3rd Cir. 1993). The refugee definition and other statutory and regulatory asylum provisions include numerous requirements that filter who can ultimately receive protection in the United States. *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 which require that the applicant prove (1) that she has suffered or has a well-founded fear of suffering

harm that rises 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 persecution or a well-founded fear of persecution"); *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). Thus, even where an applicant is a member of a cognizable particular social group, she must still show she would be persecuted on account of that membership, in addition to establishing the other elements, to receive asylum. For many asylum cases, "it is the nexus requirement where the rubber meets the road." *Cece*, 733 F.3d at 673.

The Board articulated this point in *Matter of H-*, which involved clan-based persecution in Somalia. 21 I&N Dec 337, 343-44 (BIA 1996). In that case, the Board observed, "[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.*; *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 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"); *see also Cece*, 733 F.3d at 673 ("The breadth of a social group says nothing about the requirements for asylum"). Similarly, where an asylum applicant has posited a family-based particular social group claim, the fact that nearly every would-be asylum applicant could claim membership in their own

family should not create undue concern about the number of people who may ultimately qualify for asylum. Unless members of the asserted family group establish they have been targeted for persecution because they are members of that family, the asylum claims will fail despite that fact that the particular social is cognizable and they have established membership therein. Membership in a cognizable particular social group merely places one on the road towards asylum; it is not the end of the journey. As such, additional restrictions need not be placed on family-based particular social group claims.

B. The Amicus Invitation Asks the Wrong Question

In the amicus invitation, the Board describes the first issue in two parts: (1) Whether an applicant has established the nexus or "on account of" requirement if she demonstrates persecution on account of membership in a particular social group comprising family, *or* (2) whether family is a particular social group only if the defining family member also was targeted on account of another protected ground. This wording conflates two separate elements in the asylum definition: the question of why someone was persecuted with the question of whether someone belongs to a protected category.[2] *See W-G-R-*, 26 I&N Dec. at 218 ("[W]e must separate the assessment of

[2] The conflation of the protected ground with the nexus is a common error made by adjudicators in asylum cases. Amicus encourages the Board to issue guidance similar to its 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 and nexus elements are analyzed separately. *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 rejected for a failure to demonstrate the applicant was targeted on account of membership in that particular social group (nexus), Amicus recommends that the Board instruct adjudicators to sequence their analysis 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."); *see also* brief of amicus curiae Non-Profit Organizations and Law School Clinics and Professors.

Based on this wording, it appears the Board's primary inquiry is whether a family can be a particular social group on its own or only if the defining family member was also targeted on account of a protected ground. As demonstrated in the brief of amicus curiae Non-Profit Organizations and Law School Clinics and Professors, the answer to this question is the former; a family can constitute a particular social group on its own. Whether analyzed under the *Acosta* immutable characteristics test or examined under the social visibility/distinction and particularity rubric, as the Fourth Circuit did in *Crespin Valladares v. Holder*, 632 F.3d 117 (4th Cir. 2011), a family meets the requirements for establishing a particular social group. *See* brief of amicus curiae Non-Profit Organizations and Law School Clinics and Professors (explaining that most circuits agree that a family can be a particular social group).

Despite the Board's focus on the viability of a family-based particular social group, the court of appeals decisions cited in the amicus invitation and the IJ's decision in the case at issue demonstrate that the appropriate focus should be on the nexus or "on account of" element of the refugee definition. In other words, in an asylum case

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these two elements by first analyzing the existence of a protected ground and then analyzing whether there is a nexus between the protected ground and the persecution suffered or feared. This guidance will help eliminate adjudicators' confusion surrounding the Board's particular social group jurisprudence. *See* brief of amicus curiae Non-Profit Organizations and Law School Clinics and Professors.

involving a family-based particular social group, the primary inquiry should be whether that family membership or some other protected characteristic (such as an imputed political opinion due to family membership) was one central reason for the respondent's persecution. *Id.*

In some cases, a family may have a "defining family member," as envisioned by the Board's amicus invitation, whose persecution on account of a protected ground may lead to the persecution of the whole family. In many other cases, however, the identity of the "defining family member" may be unclear or the initial reason for the persecution of the defining family member – if one exists – may no longer be known. For example, an applicant may be part of a clan – a very large family that is well-established as a particular social group under the Board's reasoning in *Matter of H-*, 21 I&N Dec. 337 – that has been persecuted for years by another clan. At one point in history, there may have been a "defining" clan member and that individual may have been persecuted on account of another protected ground, but decades later, there may be no recollection of the initial reasons for the persecution, or even the identity of the individual who triggered it. At that point, the evidence simply shows that one central reason for the persecution of all members of this clan is their immutable clan membership, which is enough to demonstrate persecution on account of membership in particular social group. *See e.g.*, "Major Clan War Feared in Kismayo, Somalia," Voice of America, Oct. 27, 2009, available at http://www.voanews.com/content/a-13-2007-06-22-voa43-66779347/565003.html [last accessed Feb. 2, 2016] (explaining that the Marehan and

Majerteen sub-clans are both pro-government, but are bitterly divided along clan lines and heavy fighting has erupted between them).

III. THE BOARD SHOULD CLARIFY THE PROPER WAY TO ANALYZE THE NEXUS ELEMENT UNDER ASYLUM LAW

Recent Board decisions – particularly in cases involving asylum-seekers from Latin America – have failed to conduct a proper nexus analysis because they have looked at general conditions in the country at issue and required the respondent to prove that he was more likely to be targeted for persecution than others in his country. *See e.g.*, *M-E-V-G-*, 26 I&N Dec. at 250 ("Against the backdrop of widespread gang violence affecting vast segments of the country's population, the applicant . . . could not establish that he had been targeted on a protected basis."). An appropriate nexus analysis focuses on the specific reasons *the applicant* was or will be persecuted – not why others in the country have been or will be harmed – and whether one of the central reasons for persecution, possibly among others, was a protected ground. Because harm experienced by or threatened against the general populace is largely irrelevant to the question of whether an individual applicant faces harm on account of a protected ground, this measuring of an applicant's harm against the prevalence of generalized harm is misplaced.

A. The Board Should Examine the Nexus Element By First Asking Why the Persecutor Chose the Applicant For Persecution

In many refugee-producing countries, large segments of the population may be subject to violence and civil strife. *See e.g.*, Anne Barnard, "Syrians Desperate to Escape What U.N. Calls 'Extermination' By Government," N.Y. Times, Feb. 8, 2016, available at

http://www.nytimes.com/2016/02/09/world/middleeast/syria-united-nations-report.html [last accessed March 1, 2016]. Large-scale violence within a country, however, does not prevent individual citizens of that country from establishing their eligibility for asylum. Just because many people in a region may be experiencing harm does not mean that some of them are not experiencing – or have not been threatened with – harm that is on account of a protected ground. Asylum law asks whether particular applicants can establish that they themselves have suffered past persecution, or have a well-founded of future persecution, on account of a protected ground.[3] 8 C.F.R. § 1208.13(b)(2); *Capric v. Ashcroft*, 355 F.3d 1075, 1085 (7th Cir. 2004). It is the asylum applicant's individual risk of harm that is relevant to the inquiry; the risks facing other citizens within the country at most inform that inquiry.

In *Orejuela v. Gonzales*, 423 F.3d 666 (7th Cir. 2005), the Seventh Circuit explained why it is crucial that the nexus determination focus on the reason(s) why the persecutor harmed the specific applicant and not whether the persecutor also targeted other individuals for other reasons. The applicants in *Orejuela* were a family of landowning cattle farmers in Colombia that had been targeted by FARC guerillas. In finding the Orejuelas eligible for asylum, the Court noted that many other Colombians are victims of FARC violence, but "[t]he existence of other persecuted social groups . . . does not mean that any one group does not qualify under the statute." *Id.* at 673. The Court

[3] An exception to rule is a "pattern or practice" case, where an applicant can obtain asylum without showing an individualized risk of harm if she establishes "a pattern or practice" in her country of nationality "of persecution of a group of persons similarly situated to the applicant" on account of one of the five protected grounds, and, if she establishes "her own inclusion in, and identification with, such group of persons." 8 C.F.R. § 1208.13(b)(2)(iii).

further noted that "[w]hile we are sure that FARC would be happy to take the opportunity to rob any Colombian . . . it is those who can be identified and targeted as the wealthy landowners that are at continued risk once they have been approached and refused to cooperate with FARC's demands." *Id.* Because the Orejuelas had shown that the FARC targeted them because of their particular social group membership, the threats against them were properly recognized as connected to a protected ground and not dismissed as another instance of indiscriminate violence. *Id.*

Furthermore, when examining the nexus element, the fact that a persecutor may have had a personal reason for persecuting the applicant does not answer the question of whether the persecutor harmed the applicant on account of a protected ground. In many asylum claims, the persecutor is, in part, motivated by some personal reason, such as financial gain, political power, or retaliation. In examining nexus, however, the key question is why the persecutor chose to harm that particular applicant. *See e.g., Sanchez Jimenez v. Att'y Gen.*, 492 F.3d 1223, 1235-36 (11th Cir. 2007) (finding the petitioner eligible for asylum where the FARC had demanded money from the petitioner, but the evidence also compelled the conclusion that the FARC targeted him because of his political activities); *Hasan v. Ashcroft*, 380 F.3d 1114 (9th Cir. 2004) (rejecting the IJ's determination that a political leader had targeted the petitioner – a journalist – for personal reasons based on critical articles she had written about him because both the criticism of the leader and his response were inherently political).

In a variety of factual contexts, courts of appeals have reversed the Board for rejecting an asylum application on the ground that the persecutor had a personal reason

for targeting the applicant, and, therefore, that the "on account of" requirement could not be satisfied. The First Circuit's decision in *Castaneda-Castillo v Holder*, 638 F.3d 354 (1st Cir. 2011) demonstrates how the Board should examine the nexus element. That case involved a former Peruvian soldier who claimed he was persecuted "on account of" his membership in a social group when he was targeted by Shining Path guerillas who held him responsible for a massacre. *Id.* at 363. The Board ruled that Castaneda-Castillo had failed to establish persecution on account of a protected ground because "it appears that revenge is the motivation behind the Shining Path's actions." *Id.* at 362-63. The court rejected that analysis: "[T]o say that the Shining Path's assaults were motivated by 'revenge' is tantamount to saying that they were motivated by the fact that he was a military officer that the group viewed as responsible for the . . . massacre." *Id.* at 363. The court concluded, "We thus fail to discern a significant distinction between the proposition that the Shining Path targeted Castaneda because they wanted revenge . . . and that the Shining Path targeted him because he was a member of the group of former military officers that they believed to have been involved in [the massacre]." *Id.* Likewise, in *Al-Ghorbani v. Holder*, 585 F.3d 980 (6th Cir. 2009), the Sixth Circuit held that a lower class man who secretly married a Yemeni general's daughter, and was then targeted by the General for death, was persecuted on the basis of his membership in the particular social group of people who opposed Yemeni cultural and religious marriage customs. The court held that "the General's personal motives cannot be unraveled from his motives based on [the man's] social class and [his] opposition to Yemeni paternalistic rights." *Id.* at 997-98. Finally, in *Hernandez-Avalos v.*

Lynch, 784 F.3d 944, 949-50 (4th Cir. 2015), which the Board cites in its amicus invitation, the Fourth Circuit reversed the Board's determination that a gang was only targeting the applicant in response to her refusal to allow her son to join the gang. The Fourth Circuit rejected that conclusion, finding that the gang targeted the applicant – and not another person – because of her relationship to her son and that the Board'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." *Id.*

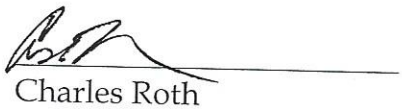
In a family-based particular social group asylum claim, a persecutor may have motives of retribution or personal gain, but those reasons typically cannot be unraveled from motives based on the applicant's family membership. *Id.* The nexus analysis must therefore focus on the reason(s) why the persecutor chose the applicant in particular for persecution.

CONCLUSION

For the foregoing reasons, Amicus NIJC suggests that the Board alter the process by which the Board issues amicus invitations, holds oral arguments, and publishes decisions. Amicus further urges the Board to reconsider its framing of the issue in this case to focus on whether a nexus exists between the particular social group posited and the persecution suffered and feared. The Board should also reaffirm the principle that adjudicators should analyze the nexus element in asylum cases separately from other elements of the claim.

March 4, 2016

Respectfully submitted,

By: 

Charles Roth
Lisa Koop
Ashley Huebner
National Immigrant Justice Center
208 S. La Salle Street, Suite 1300
Chicago, IL 60604

Attorneys for Amicus Curiae

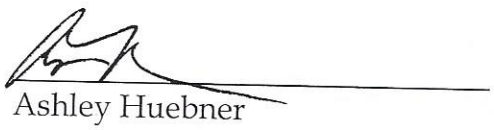
CERTIFICATE OF SERVICE

On March 4, 2016, I, Ashley Huebner, mailed a copy of the Brief for Amicus Curiae National Immigrant Justice Center to the parties' counsel at the following addresses:

Alicia Chen
Law Office of Alicia Mei F. Chen
28 N. 1st Street Suite 301
San Jose, CA 95113
Counsel for Respondent

Mark Kang
Assistant Chief Counsel
Office of the Chief Counsel
Immigration and Customs Enforcement
120 Montgomery Street, Suite 200
San Francisco, CA 94104

Dated: March 4, 2016



Ashley Huebner