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

In the matter of:

In removal proceedings

REQUEST TO APPEAR AS *AMICI CURIAE* AND TO PRESENT ORAL ARGUMENT BY NON-PROFIT ORGANIZATIONS AND LAW SCHOOL CLINICS

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1. Pursuant to 8 C.F.R. § 1292.1(d) and section 2.10 of the Practice Manual of the Board of Immigration Appeals ("Board"), non-profit organizations and law school clinics that represent asylum-seekers respectfully seek leave to file an *amici curiae* brief in this matter. Pursuant to sections 2.10 and 8.7(e)(xiii) of the Practice Manual, these organizations also seek leave to present oral argument in this case.

2. On January 11, 2016, the Board issued Amicus Invitation No. 16-01-11, which invites interested members of the public to file *amicus curiae* briefs discussing the following:

> (1) 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 protected ground?
>
> (2) The parties should address the circuit split on the issue. *Compare Hernandez-Avalos v. Lynch*, 784 F.3d 944 (4th Cir. 2015), and *Flores Rios v. Lynch*, 807 F.3d 1123 (9th Cir. 2015), *with Ramirez-Mejia v. Lynch*, 794 F.3d 485 (5th Cir. 2015), *Lin v. Holder*, 411 F. App'x 901 (7th Cir. 2011), and *Malonga v. Holder*, 621 F.3d 757 (8th Cir. 2010).

3. *Amici curiae* are non-profit organizations and law school clinics that represent individuals seeking asylum and other humanitarian protections. *Amici* include authors of scholarly works regarding asylum, practicing attorneys who represent asylum-seekers, and experts who advise other attorneys representing the same. *Amici* include recognized experts in the field with a long-standing focus on the development of U.S. jurisprudence that accords with domestic and international refugee and human rights law. *Amici* have an interest in the questions under consideration in this appeal as they implicate fundamental principles of jurisprudence and statutory construction related to the definition of a "refugee," a subject of *amici*'s research and practice and

matter of great consequence for those served by *amici*. The issues involved have broad implications for the equitable and just administration of refugee law.

4. In particular, *amicus curiae* Center for Gender & Refugee Studies ("CGRS"), which has coordinated the preparation of this brief among the *amici*, has played a central role in the development of law and policy related to particular social group-based asylum claims through its litigation, expert consultations, scholarship, and development of policy recommendations. In addition, CGRS has assisted attorneys representing victims of family-related violence—including in-depth research on country conditions in Mexico and Central America and other regions—in hundreds of asylum proceedings across the country. CGRS has filed briefs, both as *amicus* and as counsel of record, regarding asylum claims before the Board and in nearly every federal Court of Appeals.

5. The American Immigration Council ("Immigration Council") is a national non-profit organization established to increase public understanding of immigration law and policy, advocate for the fair and just administration of U.S. immigration laws, protect the legal rights of noncitizens, and educate the public about the enduring contributions of America's immigrants. The Immigration Council is one of four partners in the CARA Family Detention Pro Bono Project, which provides direct representation and undertakes advocacy and impact litigation on behalf of mothers and children held in the federal family detention centers in Dilley and Karnes City, Texas. The Immigration Council also advocated and litigated to protect the due process rights of women and children detained in the now-closed federal family detention center in Artesia, New Mexico.

6. The American Immigration Lawyers Association ("AILA") is a professional trade association dedicated to promotion of justice for immigrants and refugees, with 13,000 members throughout the United States and abroad, including lawyers and law school professors who practice

and teach in the field of immigration and nationality law. AILA seeks to advance the administration of law pertaining to immigration, nationality, and naturalization; to cultivate the jurisprudence of the immigration laws; and to facilitate the administration of justice and elevate the standard of integrity, honor, and courtesy of those appearing in a representative capacity in immigration and naturalization matters. AILA's members practice regularly before the Department of Homeland Security and the Executive Office for Immigration Review, as well as before the U.S. District Courts, Courts of Appeals, and Supreme Court. AILA attorneys have extensive expertise in asylum law, and the Board has accepted and acknowledged *amicus* briefs from AILA in numerous cases resulting in precedential decisions, including *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).

7. Asian Americans Advancing Justice – Los Angeles ("Advancing Justice – LA"), is the nation's largest legal and civil rights organization for Asian Americans, Native Hawaiians, and Pacific Islanders. Advancing Justice – LA serves more than 15,000 individuals every year, including immigrant youth, victims of human trafficking, refugees, and their families. Since its founding in 1983, Advancing Justice – LA has worked on numerous cases and policy initiatives to promote and protect immigrants' rights.

8. The Boston College Law School Immigration Clinic ("Boston Clinic") is a non-profit provider of legal services to indigent clients within the Boston area. As part of the law school, the Boston Clinic provides an opportunity to second and third-year law students to gain experience and develop skills in the field of immigration law. The Boston Clinic represents clients in their applications for asylum and withholding of removal, among other relief from removal. A large number of these asylum seekers are women and youth, including many fleeing family-related violence.

9. Catholic Charities of the East Bay ("CCEB") works with youth, children and families to promote self-sufficiency, strengthen families, and pursue safety and justice. The Legal Program at CCEB provides low-fee and *pro bono* direct immigration legal services to vulnerable and low-income immigrants throughout the San Francisco Bay Area. CCEB has represented dozens of unaccompanied minors in asylum proceedings, in addition to its focus in family-based immigration and visas for victims of crime.

10. The Civil Litigation Clinic at Cleveland-Marshall College of Law has been representing asylees and other immigration clients before the Board for the past four years. In particular, the Civil Litigation Clinic works in conjunction with the *BIA Pro Bono Appeals Project* of the Catholic Legal Immigration Network, Inc. to provide free legal representation to individuals who appeared *pro se* before Immigration Judges.

11. The Columbia Law School Immigrants' Rights Clinic ("Immigrants' Rights Clinic") is a nonprofit legal services clinic dedicated to representing indigent immigrants and advocating for the civil and constitutional rights of immigrants. Since its inception, the Immigrants' Rights Clinic has offered *pro bono* legal services to hundreds of mothers and children detained in family detention centers, as well as immigrant families who are not detained.

12. Dolores Street Community Services ("DSCS") provides *pro bono* removal defense to low-income immigrants in San Francisco, California, specializing in representing particularly vulnerable individuals. Many of DSCS's clients fear persecution in their countries of origin on the basis of their family membership, including long-time San Francisco residents with mental health issues, unaccompanied minors, and recently arrived women with children.

13. The East Bay Community Law Center ("EBCLC"), a non-profit located in Berkeley, California, is a nationally-recognized clinical program of the law school at U.C.

Berkeley. Its dual mission is to provide free legal services to low-income individuals and hands-on clinical training to law students. Through its Immigration Clinic, the EBCLC regularly represents asylum seekers. A large number of these asylum seekers are women and youth, including many fleeing family related violence.

14. The Florence Immigrant and Refugee Rights Project ("Florence Project") is a Legal Orientation Program site of the Executive Office for Immigration Review, providing free legal information to thousands of detained citizens and non-citizens in removal proceedings. In addition, Florence Project attorneys and non-attorney advocates provide individualized *pro se* support services to and direct representation of thousands of detained adults and children before the Immigration Courts and the Board.

15. The Harvard Immigration and Refugee Clinical Program ("Harvard Clinic") at Harvard Law School has worked with hundreds of immigrants and refugees since its founding in 1984. It combines representation of individual applicants for asylum and related relief with the development of theories and policy relating to asylum law. The U.S. Department of Justice has engaged the Harvard Clinic in the training of immigration judges, asylum officers, and supervisors on a variety of issues related to asylum law. In addition, the Harvard Clinic provides advice, support, and supplemental services to immigration advocates throughout the United States. The Harvard Clinic has filed briefs as *amicus curiae* in many cases before the U.S. Supreme Court, the federal Courts of Appeals, the Board, and various international tribunals.

16. The Immigrant Defenders Law Center ("Immigrant Defenders") is an independent, non-profit law firm dedicated to advancing social justice for Southern California's most marginalized immigrant and refugee communities through legal services, community empowerment, and advocacy for adults and children in federal immigration custody and their

families. The Immigrant Defenders' objective is to preserve families and communities by empowering individuals to know their rights in the immigration system, providing access to legal representation, and advocating for social change. Immigrant Defenders provides legal representation in removal proceedings and "Know Your Rights" classes to hundreds of individuals.

17. The Immigrant Rights Project at the University of Tulsa College of Law ("Immigrant Rights Project") is a clinical legal education program through which law faculty and students provide *pro-bono* immigration legal services to non-citizens, and engage more broadly in community education and advocacy on immigration matters. Since 2006, the Immigrant Rights Project has regularly advocated on behalf of asylum seekers in proceedings before the Asylum Office, the Immigration Courts, the Board, and the Courts of Appeals.

18. The Immigration Clinic at the University of Houston Law Center ("Houston Clinic") advocates on behalf of immigrants in a broad range of complex legal proceedings before the immigration and federal courts and the Department of Homeland Security and collaborates with other immigrant and human rights groups on projects that advance the cause of social justice for immigrants. Under the direction of law school professors who practice and teach in the field of immigration and nationality law, the Houston Clinic provides legal training to law students and representation in asylum cases on behalf of victims of torture and persecution, victims of domestic violence, human trafficking and crime, children and those fleeing civil war, genocide and political repression including representation of detained and non-detained individuals in removal proceedings.

19. The Immigration Law Clinic at the University of Arizona's James E. Rogers College of Law ("Arizona Clinic") provides free direct representation as well as legal advice and assistance, including referrals to *pro-bono* counsel, to low income individuals confronting

immigration problems. Many of the Arizona Clinic's clients are asylum seekers. Among those the Arizona Clinic has advised and represented are people who fled violence directed at them because of their kinship ties.

20. The Judge Elmo B. Hunter Legal Center for Victims of Crimes Against Women ("Hunter Legal Center") at Southern Methodist University (SMU), Dedman School of Law provides direct representation to survivors of gender-based harms in a broad range of legal areas, including humanitarian immigration claims. The Hunter Legal Center includes scholars with expertise on asylum and refugee law, and in particular the intersection of gender and asylum law.

21. Kids in Need of Defense ("KIND") is a non-profit organization founded in 2008 to assist children who enter the United States without a parent or guardian, and are placed in immigration removal proceedings, so that they do not have to face immigration proceedings alone. KIND has provided *pro bono* representation to thousands of children from dozens of countries and trained *pro bono* attorneys in representing the same. KIND also advocates for changes in U.S. law to protect the rights of unaccompanied children and promotes the adjudication of children's asylum claims through a child-friendly lens. Many of these children have been targeted for violence and threats because of familial ties.

22. The Refugee and Immigrant Center for Education and Legal Services ("RAICES") is a non-profit, legal services agency with seven offices throughout Texas. RAICES seeks justice for immigrants through a combination of legal and social services, advocacy, policy, and litigation. RAICES regularly provides legal services to thousands of unaccompanied minors and detained mothers and children who are fleeing violence in their home countries and seeking refuge in the United States. RAICES represents hundreds of asylum seekers on an annual basis, many of whom are fleeing persecution related to kinship.

23. The Social Justice Collaborative ("SJC") is a non-profit with a mission to protect and advance the rights of immigrants and their families through legal representation in immigration and criminal court. SJC provides representation to hundreds of asylum seekers who are in the process of being deported from the United States.

24. The U.C. Davis School of Law Immigration Law Clinic ("Davis Clinic") is an academic institution dedicated to defending the rights of detained noncitizens in the United States. The Davis Clinic provides direct representation to detained immigrants who are placed in removal proceedings. In addition, the Davis Clinic screens unrepresented individuals in order to facilitate placement with *pro bono* attorneys and presents legal orientation programs for detained individuals in removal proceedings who are unable to obtain direct representation, including asylum seekers.

25. The University of Connecticut School of Law Asylum and Human Rights Clinic ("Asylum and Human Rights Clinic") is an intensive law school clinical program dedicated to providing high-quality legal representation to asylum-seekers and other forced migrants, and safeguarding the legal rights of persons seeking asylum in the United States. The Asylum and Human Rights Clinic has represented many asylum applicants who have been targeted for persecution because of their family affiliations, including women and children who suffered rape, torture, and other egregious harm simply because they belonged to a particular family. The cases it has litigated include *Vumi v. Gonzales*, 502 F.3d 150, 154–55 (2d Cir. 2007), in which the Second Circuit held that it followed unambiguously from the Board's holdings that "membership in a nuclear family may substantiate a social-group basis of persecution."

26. The Washington and Lee University School of Law Immigrant Rights Clinic ("W&L IRC") is the only *pro bono* legal services provider for immigrants in removal proceedings in the Shenandoah Valley, Virginia. Refugee and asylum law are key to the educational and

service missions of the W&L IRC, where at least half of the cases that the clinic handles involve claims for asylum or withholding of removal.

27. The Willamette College of Law Human Rights and Immigration Clinic ("Willamette Clinic") regularly takes cases of those seeking asylum. The Willamette Clinic represents such individuals before the Asylum Office, the Immigration Courts, the Board, and the Ninth Circuit Court of Appeals.

28. Given the *amici*'s broad expertise in the application of this country's immigration laws, *amici* believe that their written submission would assist the Court in the resolution of the issues in this case. In particular, *amici*'s brief discusses the reasons why the Board's proposal to add a secondary nexus requirement, applicable only to family-based claimants, is impermissible given the plain language of the Immigration and Nationality Act, and would prove to be an insurmountable obstacle for many family-based claimants.

29. *Amici* have no monetary or proprietary interest in the above-captioned matter.

30. Counsel for *amici* has contacted counsel for the Respondent, Alicia Chen, who consents to the granting of the request for leave to file a brief as *amici curiae*. Counsel for *amici* has also contacted counsel for the government, Margaret Curry, who takes no position on whether the request for leave to file a brief as *amici curiae* should be granted.

WHEREFORE, non-profit organizations and law school clinics that represent and otherwise assist asylum-seekers and other immigrants respectfully ask the Board's leave to appear as *amici curiae*, and file an *amici curiae* brief, as well as to present oral argument, in this case.

Respectfully submitted,

By: ______________________

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Dated: March 7, 2016

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PROOF OF SERVICE

On March 7, 2016, I, Wendy Zorana Zupac, delivered by courier three copies of the Request to Appear As *Amici Curiae* and to Present Oral Argument By Non-Profit Organizations and Law School Clinics to the following address:

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Dated: March 7, 2016

Wendy Zorana Zupac

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

In the matter of:

[redacted]

In removal proceedings

BRIEF BY *AMICI CURIAE* NON-PROFIT ORGANIZATIONS AND LAW SCHOOL CLINICS

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INTRODUCTION

Amici are non-profit organizations and law school clinics that represent and otherwise provide assistance to asylum-seekers and other immigrants, including individuals who fear persecution in their countries of origin on the basis of their family membership.[1] *Amici* include authors of scholarly publications regarding asylum and country conditions at the root of refugee flight, practicing attorneys who represent asylum-seekers, and experts who advise other attorneys representing the same. *Amici* include recognized experts in the field with a long-standing focus on the development of U.S. jurisprudence that accords with domestic and international refugee and human rights law. *Amici* have an interest in the questions under consideration in this appeal as they implicate fundamental principles of jurisprudence and statutory construction related to the definition of a "refugee," a subject of *amici*'s research and practice and a matter of great consequence for those served by *amici*. The issues involved have broad implications for the equitable and just administration of refugee law.

Amici have a direct interest in the resolution of the following issue posed by the Board of Immigration Appeals ("Board"):

> (1) 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 protected ground?
>
> (2) The parties should address the circuit split on the issue. *Compare Hernandez-Avalos v. Lynch*, 784 F.3d 944 (4th Cir. 2015), and *Flores Rios v. Lynch*, 807 F.3d 1123 (9th Cir. 2015), *with Ramirez-Mejia v. Lynch*, 794 F.3d 485 (5th Cir. 2015),

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[1] A full list of *amici* appears in the Appendix and additional information regarding *amici* can be found in the accompanying Request to Appear as *Amici Curiae* in this matter.

Lin v. Holder, 411 F. App'x 901 (7th Cir. 2011), and *Malonga v. Holder*, 621 F.3d 757 (8th Cir. 2010).[2]

This issue involves interpretation of the refugee definition codified in section 101(a)(42) of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1101(a)(42). The proper interpretation of this definition, including its application to asylum seekers whose claims for relief are based on membership in their family groups, is critically important to *amici* and their clients. Accordingly, *amici* submit this brief regarding family group membership as a basis for asylum. *Amici* respectfully request that the Board issue a precedential opinion holding that where an asylum applicant has demonstrated persecution on account of his or her membership in a particular social group comprised of the applicant's family, that the applicant has satisfied the nexus requirement. The Board's opinion should emphasize that the question of whether a cognizable social group exists is a distinct inquiry from the central reasons for persecution (*i.e.*, nexus).[3]

SUMMARY OF ARGUMENT

The Board's invitation for amicus questions whether a family can be a "particular social group" only when a member of that family has suffered persecution on account of another

[2] The Board's invitation does not specify whether a "defining family member's" persecution on account of "another" protected ground means only persecution on account of race, religion, nationality, or political opinion, or whether persecution on account of the "defining family member's" membership in a non-family-based particular social group can also qualify. In any event, *amici*'s position is the same: the language of the statute does not permit defining a cognizable social group by reference to the reason why one member may have originally suffered persecution.

[3] Regardless of the ultimate outcome in this case—whether the Board grants relief to [redacted] or determines remand is more appropriate—the Board should issue a precedential decision clarifying this point to encourage consistent decision making by the immigration courts and provide sufficient guidance to asylum seekers and their representatives. *See* 8 C.F.R. § 1003.1(d)(1) (2015) ("[T]he Board, through precedent decisions, *shall* provide clear and uniform guidance to the Service, the immigration judges, and the general public on the proper interpretation and administration of the [INA] and its implementing regulations." (emphasis added)).

protected ground. The Board's question improperly conflates two distinct issues in the asylum inquiry: first, whether a protected ground exists, and second, whether the applicant has demonstrated a nexus between the persecution he has suffered and that protected ground. With respect to the first inquiry, there is no basis to add a requirement (applicable to family groups only) that a member suffer persecution on account of another protected ground to the current factors relevant to demonstrating a cognizable social group. This requirement would contravene Board and circuit court precedent recognizing the family as the prototypical "particular social group," and would impermissibly and inexplicably add a new requirement to the social group cognizability test for family groups only. As to the nexus inquiry, this requirement would add an additional nexus requirement for family group claimants in contravention of the plain language of the statute by requiring such claimants to not only demonstrate a nexus between *their* persecution and a protected ground, but also to demonstrate a nexus between the persecution suffered by a separate individual and another protected ground.

The Board should follow the Fourth and Ninth Circuit's well-reasoned decisions in *Hernandez-Avalos v. Lynch*, 784 F.3d 944 (4th Cir. 2015), and *Flores Rios v. Lynch*, 807 F.3d 1123 (9th Cir. 2015), along with the First Circuit's decision in *Aldana-Ramos v. Holder*, 757 F.3d 9, 15 (1st Cir. 2014), and issue a precedential decision holding that where an asylum applicant has demonstrated persecution on account of his or her membership in a particular social group comprised of the applicant's family, that applicant has satisfied the nexus requirement. The Board's decision should further instruct Immigration Judges to consider the question of whether a

cognizable social group exists separately from the question of whether there is a nexus between the persecution and membership in a particular social group, and not conflate the two analyses.[4]

ARGUMENT

The current law governing cognizability of a particular social group for asylum purposes requires an applicant to show that the group's characteristics are immutable, and that the group is defined with particularity and socially distinct within the society in question. *See, e.g.*, *Matter of M-E-V-G-*, 26 I. & N. Dec. 227 (BIA 2014). The Board and federal courts have consistently recognized that family groups can constitute a cognizable social group under these factors. The separate nexus inquiry (*i.e.*, whether persecution was "on account of" an individual's membership in a particular social group or one of the other protected grounds) is also well-established in our law, and examines the intent of the persecutor and the reasons he targets an individual for persecution. *See INS v. Elias-Zacarias*, 502 U.S. 478 (1992).

In its invitation for amicus, the Board questions whether it should define a particular social group—notably, in the family context only—by reference to the nexus analysis of another group member (described as the "defining family member"). Taking this approach would inappropriately conflate two separate elements of the asylum analysis: whether the applicant has demonstrated membership in a cognizable particular social group, and whether the applicant has demonstrated nexus between their persecution and a protected ground. Caselaw is clear that the question of whether an applicant has established a protected ground is separate from the question of whether the applicant has established persecution on account of that ground. *See, e.g.*, *Matter of W-G-R-*, 26 I. & N. Dec. 208, 218 (BIA 2014) ("[W]e must separate the assessment [of] whether the

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[4] *See also* Brief for *Amicus Curiae* National Immigrant Justice Center requesting that the Board instruct adjudicators to sequence their analyses of social group and nexus.

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, which should not be blurred by defining a social group based solely on the perception of the persecutor.").

The proper course of action is to analyze the cognizability of a particular social group separately from the nexus question. Conflating the two is not supported by the statutory language, or precedent applicable to each of these elements. First, conflating the two issues constitutes an unreasonable departure from the Board's prior precedent on evaluating the existence of a cognizable social group. Second, it is inconsistent with the text of the statute, which asks only whether an applicant suffered persecution "on account of" one of the protected grounds, and does not impose an additional requirement that the applicant demonstrate the reason for the persecution suffered by a different individual. 8 U.S.C. § 1101(a)(42)(A). As a matter of law, the nexus inquiry asks only why an applicant was targeted, and in cases where the persecution is for reasons of the person's membership in a family group, the nexus requirement has been satisfied, even if a so-called "defining family member" was not initially targeted on account of one of the five protected grounds. Concluding that in the family context a particular social group should be defined by reference to the nexus analysis of another group member would upend established principles as to how a social group is defined, and how nexus is analyzed.

Members of a family can constitute a cognizable particular social group, and an asylum seeker who demonstrates a nexus between his or her persecution and membership in a family group has met the statutory definition of a refugee.

I. It Is Well-Established that Families Can Constitute a "Particular Social Group"

A. The Board Has Consistently Recognized that Family Ties Alone Can Form the Basis of a Particular Social Group

Although the Board's analysis of "particular social group" claims has evolved since the passage of the INA, the Board has consistently recognized that a family—nuclear or extended, standing alone or in conjunction with other characteristics—can constitute a particular social group cognizable under the statute. In the seminal case defining particular social group, *Matter of Acosta*, the Board noted:

> A purely linguistic analysis of this ground of persecution suggests that it may encompass persecution seeking to punish either people in a certain *relation*, or having a certain degree of similarity, to one another or people of like class or kindred interests, such as shared ethnic, cultural, or linguistic origins, education, *family background*, or perhaps economic activity.

19 I. & N. Dec. 211, 232–33 (BIA 1985) (emphases added), *overruled in part on other grounds by Matter of Mogharrabi*, 19 I. & N. Dec. 439 (BIA 1987). The Board found that persecution on account of each of the other four protected grounds described persecution "aimed at an immutable characteristic: a characteristic that either is beyond the power of an individual to change or is so fundamental to individual identity or conscience that it ought not be required to be changed." *Id.* at 233. After applying the statutory interpretation maxim *ejusdem generis* (which means "of the same kind"), the Board interpreted the phrase "'persecution on account of membership in a particular social group' to mean persecution that is directed toward an individual who is a member of a group of persons all of whom share a common, immutable characteristic[, which] might be an innate one such as sex, color, *or kinship ties*." *Id.* (emphasis added).

The Board applied the *Acosta* immutability test in *Matter of H-*, in which an applicant sought relief due to persecution on account of his membership in a particular Somalian subclan, the Marehan subclan. 21 I. & N. Dec. 337 (BIA 1996). The Marehan subclan constituted less

than one percent of the population of Somalia, and was "identifiable by kinship ties and vocal inflection or accent." *Id.* at 340. Somalia was ruled by a member of the Marehan subclan for 21 years; however, following an uprising by members of other clans, members of the rebel clans sought retaliation against those who had benefited from the prior regime. *Id.* The Board held that family membership in the Marehan subclan constituted a "particular social group" in light of the fact that "clan membership is a highly recognizable, immutable characteristic that is acquired at birth and is *inextricably linked to family ties*." *Id.* at 342 (emphasis added).

In recent years, "[i]n response to the evolution of social group claims presented," the Board has announced that certain factors beyond immutability should be examined in determining whether a particular social group exists. *Matter of M-E-V-G-*, 26 I. & N. Dec. at 247. However, none of these decisions call into question the Board's consistent recognition that a family group is the prototypical "particular social group." In *Matter of C-A-*, the Board first recognized "particularity" and "social visibility" as factors in the social group analysis. 23 I. & N. Dec. 951, 957, 959–61 (BIA 2006); *see also Matter of S-E-G-*, 24 I. & N. Dec. 579 (BIA 2008); *Matter of E-A-G-*, 24 I. & N. Dec. 591 (BIA 2008) (further defining "particularity" and "social visibility"). Yet, in *Matter of C-A-*, the Board noted that "[s]ocial groups based on innate characteristics such as sex *or family relationship* are generally easily recognizable and understood by others to constitute social groups," reaffirming the family as a well-established example of the type of groups cognizable under the INA. 23 I. & N. Dec. at 959 (emphasis added).

In 2014, the Board sought to clarify the particularity and social visibility factors, holding for example that "literal or 'ocular' visibility is not required," and renaming the "social visibility" element as "social distinction." *Matter of M-E-V-G-*, 26 I. & N. Dec. at 228 (internal quotation marks omitted); *see also Matter of W-G-R-*, 26 I. & N. Dec. 208, 211 (BIA 2014). Therefore,

under the current factors, an applicant for asylum or withholding of removal seeking relief based on membership in a particular social group must establish that the group is "(1) composed of members who share a common immutable characteristic, (2) defined with particularity, and (3) socially distinct within the society in question." *Matter of M-E-V-G-*, 26 I. & N. Dec. at 237. Family groups will frequently satisfy these criteria.[5] As the Board has previously recognized, family ties are a classic immutable characteristic. *See, e.g.*, *Matter of Acosta*, 19 I. & N. Dec. at 232–33; *Matter of H-*, 21 I. & N. Dec. at 343. In addition, family groups defined by blood or marriage ties can be "defined with particularity" because, for example, the terms find definition in many societies and there is objective evidence such as birth or marriage certificates to delineate group membership. Finally, with respect to the "social distinction" factor, the Board has recognized that social groups based on family relationship are "easily recognizable and understood by others to constitute social groups." *Matter of C-A-*, 23 I. & N. Dec. at 959. The special protections and benefits afforded families under the laws and policies of many countries present one example of how societies perceive families as a distinct group.[6]

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[5] *Amici* acknowledge that there are varying kinds of family relationships. The present case, which involves a father-son relationship, does not require the Board to explore which groups based on family ties are sufficiently immutable, particular, or socially distinct to qualify as a "particular social group" under these criteria, since a nuclear family clearly qualifies.

[6] Although *amici* submit that family-based social groups will often, if not always, meet the social distinction and particularity tests, *amici* maintain that these requirements constitute a significant departure from the *Acosta* analysis and are unreasonable interpretations of the statute. The Board's attempt to clarify these requirements in *M-E-V-G-* and *W-G-R-* does not resolve confusion surrounding the terms, nor does it convincingly establish that the particularity and social distinction requirements are a natural evolution of its caselaw or were considered or applied in earlier Board precedent. The social distinction and particularity requirements are inconsistent with what is required to prove the other grounds for asylum and so violate the principle of *ejusdem generis*. The Board's focus on the precise definition of a particular social group and the evidence required to prove social distinction and particularity—as well as in the case of family related violence the imposition of yet another requirement of persecution of a "defining family member"—significantly disadvantage *pro se* litigants. *Amici* urge the Board to return to the *Acosta*

Notably, there is no mention in any of this prior precedent of a "defining family member" (a term that is not defined by the Board) whose persecution on account of another protected ground is a prerequisite to a cognizable family group. A requirement that there be a "defining family member" does not comport with the Board's current precedent for determining whether a particular social group is cognizable, nor would it make sense to add this requirement for family groups when there is no corollary requirement for particular social groups based on other immutable characteristics, such as gender or sexual orientation. In fact, it would be contrary to the Board's longstanding recognition of family groups as an exemplar "particular social group" to add a separate requirement, applicable only to family groups, that a "defining family member" must suffer persecution on account of another protected ground before that group can be a cognizable "particular social group."[7] Such a requirement risks conflating the separate nexus inquiry into the question whether a claimed family-based group is a cognizable particular social group.

B. Most Circuit Courts Agree that a Family Can Be a Cognizable Social Group

Most circuit courts to address this question have recognized that a "particular social group" can consist of members of a family.[8] In fact, courts have often described family groups as the

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immutability test.

[7] Adding a separate requirement for family-based claimants is also inconsistent with the longstanding recognition under international human rights law that "[t]he family is the natural and fundamental group unit of society and is entitled to protection by society and the State." International Covenant on Civil and Political Rights, Dec. 19, 1966, Art. 23(1), 999 U.N.T.S. 171 (entered into force for the United States Sept. 8, 1992); Universal Declaration of Human Rights, Art. 16(3), U.N.G.A. Res. 217A (III), U.N. Doc. A/810 at 71 (1948).

[8] One possible exception is the Eighth Circuit, which recently held that a proposed group consisting of members of a family that experienced gang violence lacked visibility and particularity. *See Aguinada-Lopez v. Lynch*, No. 15-1095, -- F.3d --, 2016 WL 711438, at *1 (8th Cir. Feb. 23, 2016) (citing *Antonio-Fuentes v. Holder*, 764 F.3d 902, 905 (8th Cir. 2014), and *Constanza v. Holder*, 647 F.3d 749, 754 (8th Cir. 2011) (per curiam)). This case rests on faulty Eighth Circuit precedent, which implicitly requires (incorrectly) that the family as a whole suffer persecution before the family could be a cognizable social group. *See, e.g.*, *Constanza*, 647 F.3d at 753 (rejecting for

"quintessential" or "prototypical" group to qualify under both the *Acosta* immutability test and the Board's new *Acosta* plus social distinction and particularity test. The Ninth Circuit, for example, has stated that even under the Board's "refined framework, the family remains the quintessential particular social group." *Flores Rios*, 807 F.3d at 1128. The Fourth Circuit recognized that every circuit to consider the "the question has held that family ties can provide a basis for asylum," and held that "the family provides 'a prototypical example of a "particular social group."'" *Crespin-Valladares v. Holder*, 632 F.3d 117, 125 (4th Cir. 2011) (quoting *Sanchez-Trujillo v. INS*, 801 F.2d 1571, 1576 (9th Cir. 1986)). The Fourth Circuit further noted that "[t]he family unit . . . possesses boundaries that are at least as 'particular and well-defined' as other groups [that] have qualified for asylum." *Id.* at 125.

In addition to the Fourth and Ninth Circuits, the First, Second, Sixth, and Seventh Circuits have also recognized family groups as cognizable social groups. *See Gebremichael v. INS*, 10

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want of distinction and particularity a group of "a family that experienced gang violence" reasoning that "there is no evidence in the record indicating that the gang specifically targeted Constanza's family as a group" or "that MS-13 will target Constanza's family in the future"); *Antonio-Fuentes*, 764 F.3d at 904–05 (rejecting group of "men in El Salvador who fear gang violence because of a former gang member who is also their family member" as lacking visibility because "Fuentes, like the alien in *Constanza*, did not establish that gangs specifically targeted his family as a group" (internal quotation marks omitted)). It is not necessary to show that a persecutor has targeted every member of a social group in order to establish that the harm inflicted on one group member was "on account of" membership in that group. *See, e.g.*, *Acosta*, 19 I. & N. Dec. at 233 (defining particular social group persecution "to mean persecution that is *directed toward an individual* who is a member of a group of persons all of whom share a common, immutable characteristic" (emphasis added)); *see also* U.N. High Comm'r for Refugees, Guidelines on International Protection: "Membership of a particular social group" within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees ¶ 17 (May 7, 2002) ("An applicant need not demonstrate that all members of a particular social group are at risk of persecution in order to establish the existence of a particular social group."). Therefore, the Eighth Circuit's caselaw does not provide a reasoned basis for holding that families are not a particular social group, nor does it support a requirement that a defining family member suffer persecution on another protected ground before a family can be a cognizable social group.

F.3d 28, 36 (1st Cir. 1993) (stating that "[t]here can, in fact, be no plainer example of a social group based on common, identifiable and immutable characteristics than that of the nuclear family"); *Vumi v. Gonzales*, 502 F.3d 150, 154–55 (2d Cir. 2007) (remanding to the Board to consider the applicant's claim of persecution based on membership in her husband's family and noting that "the Board has held unambiguously that membership in a nuclear family *may* substantiate a social-group basis of persecution"); *Al-Ghorbani v. Holder*, 585 F.3d 980, 995 (6th Cir. 2009) (acknowledging that "membership in the same family [] is widely recognized by the caselaw"); *Iliev v. INS*, 127 F.3d 638, 642 n.4 (7th Cir. 1997) (noting that "other circuits have found that a family is perhaps the most easily identifiable 'particular social group' that could serve as the basis for persecution").

To be sure, membership in a family group may be linked with another protected ground—such as a shared religion, race, nationality, political opinion, or other social group—but there is no indication in the plain language of the INA that these grounds *must* overlap before a family group qualifies as a cognizable particular social group. 8 U.S.C. § 1101(a)(42)(A). Accordingly, courts routinely find that family group membership alone is an independent basis for finding a cognizable social group. The Ninth Circuit's recent decision in *Flores Rios*, for example, made clear that family membership does not have to be "intertwined" with another protected ground before a family can constitute a cognizable social group. 807 F.3d at 1128. The applicant in that case, Felix Flores-Rios, had claimed that he was "a member of a social group made up of his family and that he risk[ed] persecution by the gang because of its vendetta against his family," a claim that the Board did not address. *Id.* at 1126. The Ninth Circuit noted that although persecutors may be "more likely to identify individual family members as part of a particular social group when familial ties are 'linked to race, religion, or political affiliation,'" there was no basis to hold "'that

a family can constitute a particular social group only when the alleged persecution on that ground is intertwined with' another protected ground." *Id.* at 1128 (quoting *Thomas v. Gonzales*, 409 F.3d 1177, 1188 (9th Cir. 2005) (en banc), *vacated per curiam*, 547 U.S. 183 (2006)).[9]

The First Circuit has likewise held that family group membership alone is sufficient to give rise to a cognizable particular social group. In *Aldana-Ramos v. Holder*, the court rejected the Board's apparent conclusion that family membership was insufficient to give rise to a particular social group unless a member of the family or the family itself had suffered persecution for another protected ground, and stated that the "[t]he law in this circuit and others is clear that a family may be a particular social group simply by virtue of its kinship ties, without requiring anything more." 757 F.3d 9, 15 (1st Cir. 2014). In a prior case, *Gebremichael*, the First Circuit had noted that although claims of fear of persecution on account of social group membership may overlap with claims to fear of persecution on other grounds, the court had "followed the language of the statute in recognizing that social group persecution can be an independent basis of refugee status." 10 F.3d at 35 n.20, 36. The *Gebremichael* court described the Ethiopian security forces as using the "time-honored theory of *cherchez la famille* ('look for the family'), the terrorization of one family member to extract information about the location of another family member or to force the missing family member to come forward." *Id.* at 36 (internal quotation marks omitted). The court's

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[9] In *Thomas v. Gonzales*, the en banc court held that the applicants, a South African family, had "demonstrated that the harm they suffered was solely a result of their common and immutable kinship ties with Boss Ronnie [who had committed racist acts against his employees]." 409 F.3d at 1187–88. The court held that "the reason for the animosity toward Boss Ronnie that led to the harm to the family is not relevant; what is critical is that the harm suffered by the [family] was on account of their membership in a protected group." *Id.* at 1188. The Supreme Court vacated the en banc decision on the grounds that the Ninth Circuit should have remanded for the Board to decide in the first instance whether family could constitute a social group. *Gonzales v. Thomas*, 547 U.S. 183, 186 (2006) (per curiam).

description of family members being subjected to torture based on a "*cherchez la famille*" theory is equally applicable regardless of the underlying reason why the missing family member was persecuted.

Under the Board's existing test for determining cognizable social groups and well-reasoned caselaw from the courts discussed above, it is clear that a family group can be a cognizable social group even if a member of the family (presumably, other than the applicant) had not previously suffered persecution on account of another protected ground.

II. There Is No Basis To Add a Secondary Nexus Requirement to Family-Based Claims

In addition to altering the standard for when a cognizable social group exists, the Board's question could also be read as adding a secondary nexus requirement to family-based claims. Essentially, the Board's question contemplates that even if an applicant's family group is a cognizable "particular social group" under the current applicable standard, *and* that applicant has demonstrated persecution on account of his membership in that family, he will nonetheless be subjected to the additional, unjustified requirement of demonstrating that one of his family members has previously suffered persecution on account of an additional protected ground. The addition of this requirement would contravene the plain language of the INA. *See Negusie v. Holder*, 555 U.S. 511, 542 (2009) (the construction of the INA's provisions "must begin with the plain language of the statute"). The statute requires an asylum applicant to demonstrate that he or she is "unable or unwilling to return to . . . [his or her] country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, *or* political opinion." 8 U.S.C. § 1101(a)(42)(A) (emphasis added). In other words, the INA, as amended by the REAL ID Act, requires those seeking asylum to demonstrate that at least one of the enumerated protected grounds "was or will be at least one central reason" for the

persecution. 8 U.S.C. § 1158(b)(1)(B)(i).[10] *See also Baghdasaryan v. Holder*, 592 F.3d 1018, 1023 (9th Cir. 2010) (an applicant must demonstrate "nexus" between their fear of persecution and "*one* or more of the grounds enumerated in [the statute]" (emphasis added)); *Torres v. Mukasey*, 551 F.3d 616, 625 (7th Cir. 2008) (persecution must be "on account of one of the five statutorily defined grounds"); *Castro v. Holder*, 597 F.3d 93, 100 (2d Cir. 2010) (asylum applicant must establish nexus to "*one* of the protected grounds" (emphasis added)). The plain language of the INA accordingly does not permit an interpretation that a refugee must demonstrate persecution on account of membership in a particular social group *as well as* another group member's persecution on account of another protected ground.

The existing nexus requirement permits adjudicators to assess the validity of family-based asylum claims, and courts have denied such claims for failure to show a causal link between the persecution suffered and membership in a specific family. *See, e.g.*, *Perlera-Sola v. Holder*, 699 F.3d 572, 576–77 (1st Cir. 2012) ("This 'kinship' criterion, it should be stressed, applies only where the *motivation* for persecution is *kinship* . . . ."); *Bernal-Rendon v. Gonzales*, 419 F.3d 877, 881 (8th Cir. 2005) ("While petitioners correctly contend that a nuclear family can constitute a social group, . . . petitioners fail to prove that a specific threat exists to their family as a social group."); *Iliev*, 127 F.3d at 642 ("Mr. Iliev must demonstrate that, as a member of that family, he was, or would be, subject to persecution.").[11]

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[10] In *Matter of J-B-N- & S-M-*, the Board improperly stated that the protected ground "cannot be incidental, tangential, superficial, or subordinate to another reason for harm." 24 I. & N. Dec. 208, 214 (BIA 2007). *Amici* support *amicus curiae* National Immigrant Justice Center's request that the Board revisit this language, as the "subordinate" language fails to comport with the plain text of the statute.

[11] *Amici* express no opinion on the accuracy of these particular denials.

Adding a secondary nexus requirement would present significant evidentiary challenges for many family-based claimants, who would be tasked with demonstrating the motivations of a persecutor who targeted their *relative*. Courts have recognized how difficult it can be for asylum seekers to explain and document the reasons their persecutors target them, and the standard allows for circumstantial evidence to give meaning to persecutors' often unexplained actions. *See Elias-Zacarias*, 502 U.S. at 483 (setting forth nexus standard); *see also, e.g.*, *Garcia-Martinez v. Ashcroft*, 371 F.3d 1066, 1073 (9th Cir. 2004) (noting the difficulty of "conclusively prov[ing] motive" (internal quotation omitted)); *cf. Espinosa-Cortez v. Att'y Gen. of U.S.*, 607 F.3d 101, 109 (3d Cir. 2010) (noting that "it would be patently absurd to expect an applicant to produce documentary evidence of a persecutor's motives, . . . since persecutors are hardly likely to submit declarations explaining exactly what motivated them to act" (alterations and internal quotation marks)). The Board's proposed addition could prove to be impossible in situations where a family-based claimant lacks sufficient evidence of the reasons for the persecution suffered by a relative, which would be particularly likely in common situations where the claimant never personally witnessed or otherwise had any knowledge of the persecution.

The Fourth Circuit has made clear that applicants do not have to prove a nexus between the persecution suffered by a relative and another protected ground, as long as they have shown a sufficient nexus between *their own* persecution and their membership in a family group. In *Hernandez-Avalos*, the Fourth Circuit considered a claim by Maydai Hernandez-Avalos, a native of El Salvador, who experienced threats from members of the Mara 18 gang, a "'particularly violent and aggressive gang' which 'operates openly in El Salvador.'" 784 F.3d at 947 n.3 (quoting *Orellana-Monson v. Holder*, 685 F.3d 511, 515 (5th Cir. 2012) (alteration omitted)). Members of the gang killed Hernandez-Avalos's cousin's husband because he refused to join their ranks and

threatened to kill Hernandez-Avalos if she identified the gang members as responsible for the murder, and then twice came to her home, held a gun to her head, and threatened her life if she did not allow her son to join the gang. *Id.* at 947. After the third threat against her life, Hernandez-Avalos fled El Salvador for the United States. *Id.* The Fourth Circuit noted first that the government correctly acknowledged that "membership in a nuclear family qualifies as a protected ground for asylum purposes." *Id.* at 949. The Fourth Circuit then held that "*at least one*" central reason for Hernandez-Avalos's persecution was her membership in her nuclear family. *Id.* at 950. It noted, "Hernandez's relationship to her son is why she, and not another person, was threatened with death if she did not allow him to join Mara 18, and the gang members' demands leveraged her maternal authority to control her son's activities." *Id.*[12]

The Fourth Circuit's holding in *Hernandez-Avalos* is consistent with its prior, well-reasoned caselaw holding that an individual who has suffered persecution on account of family ties has met the nexus requirement for asylum relief, even if a family member has not separately suffered persecution on account of another protected ground. In *Cordova v. Holder*, the Fourth Circuit considered a claim of a native of El Salvador, Wilson Manfredo Aquino Cordova, who had been attacked by the violent Mara Salvatrucha ("MS-13") gang on a number of occasions. 759 F.3d 332, 334 (4th Cir. 2014). Mr. Aquino's cousin was a member of Mara 18 (a rival gang to

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[12] The Board, in a recent decision, had no difficulty following the Fourth Circuit's well-reasoned analysis for establishing nexus in a family case, an analysis that it now calls into question. In that case the applicant claimed fear in returning to El Salvador based on the death threats she had experienced after assisting her daughter in reporting and pursuing a criminal case against a gang member. The Board found that "as in *Hernandez-Avalos*, the respondent's relationship in this case to her daughter is why she, and not another person, was threatened with death, and the gang members' threats toward her were an attempt to leverage her authority to control her daughter's activities and to not report or criminally pursue the kidnap and rape." *In re R-G-M-*, A[redacted]-992 (BIA Sept. 16, 2015) (unpublished).

MS-13) and certain attacks occurred after Mr. Aquino was spotted with his cousin. Mr. Aquino argued that MS-13 gang members targeted him in the past and would target him in the future because of his kinship ties to his cousin and uncle, both of whom MS-13 murdered on account of their membership in a rival gang. *Id.* at 338. The Board recognized that family membership can constitute a particular social group, but held that Mr. Aquino's kinship ties did not constitute a central reason for the attacks the applicant suffered, because Mr. Aquino "'has not established that a central reason for the attack on his *family* was related to a protected ground.'" *Id.* at 339 (citation omitted). The Fourth Circuit rejected this reasoning, finding that even though Aquino's cousin and uncle were previously targeted by the gang on account of their membership in a rival gang, that fact did "not provide a basis for concluding that MS-13 did not target [Mr. Aquino] on account of *his* kinship ties to his cousin and uncle." *Id.* In other words, even if Mr. Aquino's family members were not targeted on account of a protected ground, Mr. Aquino himself was targeted on account of the protected ground of his kinship ties to his cousin and uncle.

The Fourth Circuit's analysis is consistent with the text of the asylum statute, which equates persecution on account of membership in a particular social group, such as a family, with persecution on account of the other protected grounds. However, under the separate approach reflected in the Board's questions, a family-based claimant would be required to show (1) that one of her family members suffered persecution on account of a protected ground, and (2) that the claimant herself has experienced "persecution or a well-founded fear of persecution on account of . . . membership in a particular social group," 8 U.S.C. § 1101(a)(42)(A), *i.e.*, her family unit. This would mean that the nexus requirement would be applied differently when the protected ground at issue is a family-based social group, even though the statute itself does not differentiate between the protected grounds with respect to the nexus requirement. *Cf. Clark v. Martinez*, 543 U.S. 371,

378 (2005) (noting that where the statutory phrase "may be detained beyond the removal period" applied "without differentiation to all three categories of aliens that are its subject," giving this phrase a different meaning for each category "would be to invent a statute rather than interpret one" (internal quotation marks omitted)). There is no basis to read into the statute a secondary nexus requirement for family-group claims that does not apply to any of the other protected grounds. The Board should not depart from the plain language of the statute.

III. The Board Should Follow the Well-Reasoned Opinions of the Fourth and Ninth Circuits

The Board's invitation requests that *amici* address what it deems to be a circuit split between the Fourth and Ninth Circuits, on the one hand, and the Fifth, Seventh, and Eighth Circuits, on the other. *Amici* respectfully submit that the Fourth Circuit's analysis in *Hernandez-Avalos v. Lynch*, 784 F.3d 944 (4th Cir. 2015), and the Ninth Circuit's analysis in *Flores Rios v. Lynch*, 807 F.3d 1123 (9th Cir. 2015), which are discussed in greater detail *supra*, are more consistent with the text of the INA, as well as Board and circuit precedent on particular social groups and nexus. Insofar as the cases identified from the Fifth, Seventh, and Eighth Circuits address the question presented here, their analysis contravenes the plain text of the INA and the weight of circuit caselaw, and should therefore not be given any weight in the determination of this issue.

A. The Fourth and Ninth Circuit's Caselaw Is Well-Reasoned and Consistent with the Text of the INA

The Fourth and Ninth Circuits, as well as the First Circuit, have consistent, well-reasoned caselaw holding that an asylum applicant has satisfied the nexus requirement when she demonstrates that she has suffered persecution because of her membership in a particular social group comprised of her family, even without, what the Board has termed, a "defining family member" who has suffered persecution on another protected ground. *Hernandez-Avalos* and

Flores Rios demonstrate that the proper analysis for family-based claims is whether the applicant has shown that the persecution he or she experienced is on account of their membership in a particular social group, namely their families, as required by the language of the INA. The INA does not require the applicant to further prove that a "defining family member" had suffered persecution on another protected ground before the applicant's family is cognizable as a social group or before the applicant has satisfied the nexus requirement. Beyond contravening the statute and jettisoning years of precedent, as mentioned above, satisfying such a showing would be difficult (if not impossible) in many circumstances, denying protection to bona fide refugees.

Furthermore, such a requirement would present an unjustified barrier to an applicant whose relative initially suffered persecution on account of a non-protected ground, but was targeted by the relative's persecutors in order to pressure the relative or to exact revenge. *Cf. Gebremichael*, 10 F.3d at 36 (discussing the theory of "*cherchez la famille*," in which persecutors terrorize "one family member to extract information about the location of another family member or to force the missing family member to come forward"); U.N. High Comm'r for Refugees ("UNHCR"), *Guidance Note on Refugee Claims Relating to Victims of Organized Gangs* ¶ 17 (Mar. 2010) (noting that "families could be subjected to threats and violence [by gangs] as an act of retaliation or to exert pressure on other members of the family to succumb to recruitment attempts or extortion demands"). The analysis adopted in these cases, consistent with UNHCR's approach,[13] reflects realities on the ground, recognizing there are circumstances in which individuals are targeted—

[13] *Amici* draw the Board's attention to the arguments set forth in the brief of *amici curiae* International and Comparative Law Experts, setting forth the position of UNHCR and of sister signatories that *amici* agree should be entitled to significant weight in interpreting the U.S. statutory refugee definition, which finds its origin in the 1951 Refugee Convention and its 1967 Protocol.

often with death—solely because of membership in a particular family, such as in the case of a dynastic struggle, blood feud, or regime change that cannot be tied to differences in political opinion.

B. The Other Circuits Either Did Not Address the Question Squarely or Conflict with That Circuit's Caselaw

In contrast with the well-reasoned opinions of the Fourth and Ninth Circuits, the cases identified from the Seventh, Eighth, and Fifth Circuits do not analyze the specific question presented. These cases do not provide any reading of the plain language of the INA that would permit adopting a new requirement that a "defining family member" must also have experienced persecution on another protected ground in order for the family to be a cognizable particular social group (or to meet the nexus requirement in such cases). Nor, given the statute's plain language, could they have.

The Seventh Circuit case identified in the Board's question is an unpublished disposition that does not directly address the question presented by the Board. In *Lin v. Holder*, the asylum seeker claimed that his father had borrowed money from the local government and had defaulted on the loan, causing debt collectors to pursue him. 411 F. App'x 901, 903 (7th Cir. 2011). After his father fled, the debt collectors targeted Mr. Lin, and detained him and beat him for two months. *Id.* Mr. Lin's claim for asylum was based on his membership in a particular social group, which he identified as "family members of known Chinese debtors who fear punishment from creditors for outstanding debt." *Id.* The Seventh Circuit noted that Mr. Lin's "alleged group does not satisfy the criteria under the statute," and reiterated the immutable characteristic requirement though without further analysis. *Id.* The court then (confusingly and seemingly in tension with its previous sentence) acknowledged that "the family unit can constitute a social group," but held that Mr. Lin had not demonstrated that his family ties were the reason for the alleged persecution. *Id.*

at 905. The court went on to state that any harm the petitioner faced "arose from a personal dispute between his father and his father's creditors," and that "[d]ebtors who fear creditors do not qualify for social-group membership." *Id.* at 906. It is therefore unclear what motivated the *Lin* court's conclusion: (1) its finding that the group identified by Mr. Lin (all family members of known Chinese debtors who fear punishment from creditors) is not cognizable, (2) a lack of nexus between the persecution Mr. Lin suffered and his family ties, or (3) a finding that the persecution his father originally experienced was not "on account of" a protected ground and therefore Mr. Lin's claim based on his relationship to his father failed. The Seventh Circuit's unpublished decision cannot be read to support the third option—that family-based groups are not cognizable unless a defining family member's persecution is intertwined with another protected ground—because that reading would be inconsistent with prior published Seventh Circuit caselaw.[14]

In published cases, the Seventh Circuit has made clear that it "recognizes a family as a cognizable social group under the INA." *Ayele v. Holder*, 564 F.3d 862, 869 (7th Cir. 2009); *see also Cece v. Holder*, 733 F.3d 662, 669 (7th Cir. 2013) (en banc) (acknowledging that "membership in an extended family" is an "immutable or fundamental characteristic"). Moreover, it has made clear that persecution on account of family ties alone is sufficient to satisfy the nexus requirement under the statute, even where no other family member (including any so-called "defining family member") has experienced persecution on account of another protected ground. In *Torres v. Mukasey*, Pedro Flores Torres, a native of Honduras, claimed persecution while a

[14] In the Seventh Circuit, a panel of three judges cannot overrule a prior opinion of the Court unless it follows the procedures laid out in Seventh Circuit Rule 40(e), which provides that "[a] proposed opinion approved by a panel of this court adopting a position which would overrule a prior decision of this court . . . shall not be published unless it is first circulated among the active members of this court and a majority of them do not vote to rehear en banc the issue of whether the position should be adopted," and the panel includes a footnote so indicating. 7th Cir. R. 40(e).

soldier in the Honduran army because of his membership in his family. 551 F.3d 616, 621 (7th Cir. 2008). Mr. Flores Torres's four older brothers had all been conscripted into the Honduran navy and had endured "brutal mistreatment" by their superiors, leading three of them to desert the navy to escape those abuses. *Id.* at 622. As a result, "the Flores Torres clan [was] known as a family of deserters," and the applicant "was forced to pay for the perceived offenses of his four brothers." *Id.* at 622–23. The Seventh Circuit found that his testimony was "rife with examples that provide his family's history as the nexus for his mistreatment," including instances in which a colonel placed an unloaded pistol against his head and pulled the trigger, telling him, "[y]ou are going to pay for your brothers' desertion," and instructed him to run nude in front of his unit because "you have to pay for what your brothers did for their escape." *Id.* at 630 (internal quotation marks omitted). Under *Torres*, an applicant is eligible for asylum where that applicant faced persecution on account of family ties, regardless of the reasons for the persecution previously experienced by that applicant's family members.[15]

The other two cases identified by the Board do not provide a basis for disregarding the well-reasoned analysis of the circuits that have directly addressed this issue. *Ramirez-Mejia v. Lynch*, 794 F.3d 485 (5th Cir. 2015), does not directly address the question presented here. Fany Jackeline Ramirez-Mejia testified that her brother was killed by a gang in Honduras, and after his

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[15] The Seventh Circuit did not inquire into or rely on the initial cause of the persecution faced by Mr. Flores Torres's brothers as relevant to the analysis in his case. The oldest brother suffered a broken arm and a punctured ear before he was discharged, the second brother suffered two broken arms from a beating with a baton and a broken leg, the third brother was imprisoned and savagely beaten and made to walk through a mine field, and the fourth brother had his leg slashed with a bayonet during a training run. Only the persecution suffered by the third brother had any plausible connection to a protected ground based on the facts recited in the decision—this brother lobbied for his oldest brother to be discharged and also refused to commit war crimes, "citing his Christian faith." *Torres*, 551 F.3d at 622. However, the opinion does not explicitly find that this brother's persecution was on account of his religion, nor does it state that it would have mattered.

murder, she began receiving anonymous notes demanding that she disclose information her brother had supposedly revealed to her. *Id.* at 487. The Fifth Circuit did not address the question of whether Ms. Ramirez-Mejia's family constituted a "particular social group" because it found that, in any event, she had not demonstrated that she had been persecuted "on account of" her family ties. *Id.* at 492. The court found instead that the primary purpose of the threats Ms. Ramirez-Mejia experienced was to obtain the information that her brother had supposedly given her, and that the fact that the gang members had mentioned her and her brother by name when issuing the threats "indicate[d] little, and certainly [did] not, in and of itself, evince intent to persecute on the basis of membership within a family." *Id.* The court's conclusion that the persecution lacked nexus to a protected ground was not based on a finding that a family was a cognizable social group only when another member of that family experienced persecution on another protected ground.

Finally, in *Malonga v. Holder*, the Eighth Circuit considered the case of a man from the Republic of Congo who claimed past persecution and clear probability of future persecution on account of his ethnicity and political opinion, *not his family ties*. 621 F.3d 757, 760 (8th Cir. 2010). Noel Malonga was a member of the Lari ethnicity, a subgroup of the Kongo tribe, and had participated in various demonstrations against the regimes in power in the Congo, beginning in 1971. *Id.* at 762. He came to the United States in the 1990s, and claimed that he subsequently lost contact with his family during the conflicts of that decade, testifying that his wife and child disappeared and his father was shot in 1999. *Id.* at 763. The Eighth Circuit found first that the mistreatment Mr. Malonga had endured before leaving the Congo was "insufficiently severe, either alone or in combination, to compel a finding of persecution." *Id.* at 765. It further found that the events occurring after Mr. Malonga left the Congo had an insufficient nexus to a protected ground, as "'harm arising from general conditions such as anarchy, civil war, or mob violence will not

ordinarily support a claim of persecution.'" *Id.* at 766 (alteration omitted) (quoting *Mohamed v. Ashcroft*, 396 F.3d 999, 1003 (8th Cir. 2005)).

In that limited context, the court found that the disappearances and deaths of Mr. Malonga's family members during the conflicts of the 1990s could not be clearly connected to a protected ground. *Id.* at 767. It noted that "'[a]cts of violence against family members on account of a protected basis may demonstrate persecution if they show a pattern of persecution tied to the petitioner.'" *Id.* (quoting *Vonhm v. Gonzales*, 454 F.3d 825, 828 (8th Cir. 2006)). Notably, Mr. Malonga did *not* argue that his past persecution or fear of persecution was *on account of* his membership in his family; rather, he attempted to use the persecution of his family members as evidence of the persecution he had experienced on account of his ethnicity or political ties. The Eighth Circuit's reasoning was therefore purely dicta. Notably, the Eighth Circuit provided no analysis of the text of the INA that would support adding a secondary nexus requirement to the analysis when a family is the particular social group.[16]

CONCLUSION

For the foregoing reasons, *amici* urge the Board to follow the plain language of the INA and issue a precedential opinion holding that where an asylum applicant has demonstrated persecution on account of his or her membership in a particular social group comprised of the applicant's family, that applicant has satisfied the nexus requirement.

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[16] As noted in note 8, *supra*, there is a line of Eighth Circuit cases holding that proposed groups consisting of family ties and other characteristics such as having "experienced gang violence" lack particularity and visibility. The Eighth Circuit has essentially, and erroneously, held that the proposed groups were too "broad" because some members of the families at issue were not targeted.

Respectfully submitted,

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Dated: March 7, 2016

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PROOF OF SERVICE

On March 7, 2016, I, Wendy Zorana Zupac, delivered by courier three copies of the Brief for *Amici Curiae* Non-Profit Organizations and Law School Clinics to the following address:

Amicus Clerk
Board of Immigration Appeals
Clerk's Office
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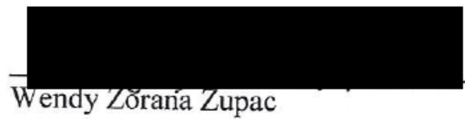
Dated: March 7, 2016



Wendy Zorana Zupac

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Appendix
List of *Amici Curiae*

1. Center for Gender & Refugee Studies
2. The American Immigration Council
3. The American Immigration Lawyers Association
4. Asian Americans Advancing Justice – Los Angeles
5. The Boston College Law School Immigration Clinic
6. Catholic Charities of the East Bay
7. The Civil Litigation Clinic at Cleveland-Marshall College of Law
8. The Columbia Law School Immigrants' Rights Clinic
9. Dolores Street Community Services
10. The East Bay Community Law Center
11. The Florence Immigrant and Refugee Rights Project
12. The Harvard Immigration and Refugee Clinical Program
13. The Immigrant Defenders Law Center
14. The Immigrant Rights Project at the University of Tulsa College of Law
15. The Immigration Clinic at the University of Houston Law Center
16. The Immigration Law Clinic at the University of Arizona's James E. Rogers College of Law
17. The Judge Elmo B. Hunter Legal Center for Victims of Crimes Against Women at Southern Methodist University (SMU), Dedman School of Law
18. Kids in Need of Defense
19. The Refugee and Immigrant Center for Education and Legal Services
20. The Social Justice Collaborative

21. The U.C. Davis School of Law Immigration Law Clinic
22. The University of Connecticut School of Law Asylum and Human Rights Clinic
23. The Washington and Lee University School of Law Immigrant Rights Clinic
24. The Willamette College of Law Human Rights and Immigration Clinic