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UNITED STATES DEPARTMENT OF JUSTICE
OFFICE OF THE ATTORNEY GENERAL

In the Matter of:	
L. E. A.	AXXX-XXX-[redacted]
In Removal Proceedings	27 I&N Dec. 494 (A.G. 2018)

REQUEST TO APPEAR AS AMICI CURIAE AND BRIEF OF AMICI CURIAE THE NATIONAL IMMIGRANT JUSTICE CENTER (NIJC); CENTRO LEGAL DE LA RAZA (CENTRO LEGAL); THE FLORENCE IMMIGRANT AND REFUGEE RIGHTS PROJECT (FLORENCE PROJECT); HIAS AND COUNCIL MIGRATION SERVICES, INC. OF PHILADELPHIA (HIAS PENNSYLVANIA); THE REFUGEE AND IMMIGRANT CENTER FOR EDUCATION AND LEGAL SERVICES (RAICES)

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REQUEST TO APPEAR AS AMICI CURIAE

The following organizations hereby request permission from the Attorney General to appear as amici curiae in the above-captioned matter. In this case, the Attorney General has requested amicus curiae briefs from members of the public in *Matter of L-E-A-*, 27 I&N Dec. 494 (A.G. 2018).[1]

The National Immigrant Justice Center (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, the Board, the federal courts, and the Supreme Court of the United States through its legal staff and a network of nearly 1500 pro bono attorneys.

[1] Amici was not able to review a copy of the Department of Homeland Security's brief until the afternoon of February 27, 2019, the same day Respondent's counsel received the brief, and eight days after the Department was required to serve a copy of their brief on Respondent's counsel. Amici's brief does not opine directly on the underlying facts of this case and thus is less prejudiced by the delayed service than Respondent. The delay has, however, limited Amici's ability to coordinate with Respondent's counsel regarding this brief and Respondent's reply brief. Amici thus encourage the Attorney General to grant Respondent's request for an extension of the reply brief deadline and reaffirm the arguments made by Respondent in their motion to extend the filing deadline for the reply and amicus briefs.

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") and the Attorney General. 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. NIJC has subject matter expertise concerning particular social group and nexus issues in asylum that it believes can assist the Attorney General in his consideration of the present appeal. 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 L-E-A-*, 27 I&N Dec. 40 (BIA 2017); *Matter of M-E-V-G*, 26 I&N Dec. 227, 251 (BIA 2014); *Matter of A-R-C-G-*, 26 I&N Dec. 388, 393 (BIA 2014).

Centro Legal de la Raza (Centro Legal) was founded in 1969 to provide culturally and linguistically appropriate legal aid services to low-income residents of the East Bay and the Central Valley. Centro Legal's Immigration Project provides legal representation and consultations to detained and non-detained immigrants, refugees and asylum seekers throughout Northern California. Annually, Centro Legal de la Raza advises and/or represents thousands of asylum seekers before the asylum office, immigration courts, Board of Immigration Appeals and the Court of Appeals. As Centro Legal works with such a high volume of asylum-seekers, it has a substantial interest in the present case.

The Florence Immigrant and Refugee Rights Project (Florence Project) provides free legal and social services to immigrant men, women, and children detained in immigration custody in Arizona. The Florence Project provides free legal information and education services to detained individuals facing removal who do not have attorneys and also directly represents individuals facing removal in Arizona. In 2018, approximately 10,000 detained people facing removal charges received a Florence Project orientation on immigration law and procedure. The Florence Project works with hundreds if not thousands of people annually who are seeking asylum in the United States, and frequently represents individuals seeking protection based on membership in a family-based particular social group.

HIAS and Council Migration Services, Inc. of Philadelphia: HIAS and Council Migration Services, Inc. of Philadelphia d/b/a HIAS Pennsylvania (HIAS Pennsylvania) is a non-profit 501(c)(3) organization that was founded in 1882 to assist Jewish immigrants fleeing persecution in Europe. Today it provides legal and supportive services to immigrants, refugees and asylum seekers from all backgrounds in order to assure their fair treatment and full integration into American society.

The Refugee and Immigrant Center for Education and Legal Services (RAICES) is a BIA-recognized, non-profit legal services agency with offices throughout Texas. RAICES seeks justice for immigrants through a combination of legal and social services, advocacy, policy, and litigation. In 2018, RAICES provided legal services to over 20,000 individuals, including an extensive number of asylum seekers, many of whom fear

persecution due to their family membership. The outcome of this case will have a significant impact on our clients, and the communities that we serve.

NIJC, Centro Legal, the Florence Project, HIAS Pennsylvania, and RAICES therefore respectfully ask for leave to appear as amici curiae and file the following brief.

SUMMARY OF ARGUMENT

Amici write to urge the Attorney General to withdraw certification of this matter because it is unnecessary and improper in this instance. In the alternative, Amici urge the Attorney General to affirm that categories of asylum matters may not be wholesale dismissed as nonviable; but rather that the separate asylum elements must be applied independently in each case and each case must be assessed on a case-by-case basis. Amici assert that the Attorney General's framing of the question in his invitation for amicus briefing is nonsensical and misapprehends asylum law. By conflating three separate asylum elements – persecution, identification of a protected ground, and nexus – and then superimposing the question of family-based particular social groups on the elements, the question seems to contain the foregone conclusion that family-based particular social groups must be categorically limited in some way. This is wrong. The elements themselves, when properly applied, serve to filter out asylum claims that fall short of meeting the legal requirements. A decision from the Attorney General that conflates the elements and attempts to foreclose categorically any class of cases would be counterproductive. It would confuse asylum seekers and adjudicators alike, giving rise to more appeals and lengthier waits for final adjudication. And it would run afoul of Supreme Court and Board of Immigration Appeals ("Board") precedent that requires the individualized and independent assessment of each asylum claim.

This ill-conceived question follows a line of similarly confusing questions posed by the Board and the Attorney General in which all asylum elements are presented in one question, making efforts to meaningfully respond next to impossible. The

transparent aim of these questions is not to elucidate the law, but rather to limit access to asylum. These results-driven exercises seek to give the illusion of community engagement while eviscerating long-standing legal precedents and seeking an end-run around black letter law. Properly framed questions, issued with the necessary context and background, would better allow lawyers engaged on these issues to perform the useful function of fostering meaningful debate that could allow the Attorney General and the Board to refine and improve the law.

The Attorney General should withdraw certification of this matter. If he issues a decision, he should resolve this case by reaffirming the importance of applying each legal element separately while conducting independent case-by-case assessments of each asylum matter. To the extent the Attorney General elects to issue guidance on family-based particular social group claims, he should affirm that the nexus analysis turns on the facts present in an individual case and the specific context in which that claim arises. The Attorney General should observe that decisions in which adjudicators reference general violence often fail to analyze the specific harm experienced by an asylum seeker and the reasons for that harm. Summarily dismissing a claim because many people in a given country experience violence is an erroneous application of the law and ignores the significant line of precedent decision that demand a fulsome, individualized assessment of nexus. Similarly, the Attorney General should clarify that dismissing an asylum seeker's harm as a mere "means to an end" and therefore not on account of a protected ground is often wrong. The Attorney General should affirm both that an excessively narrow reading of nexus is improper and that the law recognizes

there often are multiple central reasons a persecutor harms or seeks to harm an asylum seeker. By following these established principles of asylum law, the Attorney General must necessarily conclude that one's membership in a family-based particular social group may give rise to a viable asylum claim and relief based on such a claim cannot be summarily foreclosed

ARGUMENT

I. THE ATTORNEY GENERAL'S CERTIFICATION INAPPROPRIATELY REQUESTS BRIEFING ON ASYLUM ELEMENTS REQUIRING INDIVIDUAL CASE ANALYSIS

In the Attorney General's certification, he asks "[w]hether, and under what circumstances, an alien may establish persecution on account of membership in a "particular social group" under 8 U.S.C. § 1101(a)(42)(A) based on the alien's membership in a family unit." This question involves three different elements within the asylum test: (1) harm rising to the level of persecution; (2) membership in a cognizable particular social group; and (3) the "nexus" between the persecution and particular social group.[2] These elements are separate and must be analyzed separately. *See Matter of W-G-R-*, 26 I&N Dec. 208, 218 (BIA 2014) ("[W]e must separate the assessment of whether the applicant has established the existence of one of the enumerated grounds (religion, political opinion, race, ethnicity, and a particular social group) from the issue of nexus. The structure of the Act supports preserving this distinction.").

[2] The other key asylum element is whether the persecution was inflicted by the government or an entity the government is unable or unwilling to control.

By asking whether and when an asylum seeker can establish these three asylum elements, the Attorney General asks a question that is both too broad and too narrow. The Attorney General's first question (*whether* someone can establish persecution based on a family-based particular social group) can be broken into three asylum elements-based sub-questions: (1) whether an asylum seeker can establish persecution in a claim involving family membership; (2) whether a family unit can constitute a cognizable particular social group; and (3) whether an asylum seeker can establish persecution on account of that family-based particular social group. The answer to all three questions is definitively yes.

The persecution element is met whenever an asylum seeker establishes past harm or a reasonable possibility of future harm that is sufficiently serious to rise to the level of persecution. *See e.g.*, *Stanojkova v. Holder*, 645 F.3d 943, 948 (7th Cir. 2011); *Ivanishvili v. U.S. Dep't of Justice*, 433 F.3d 332, 340-41 (2d Cir. 2006); *Fatin v. INS*, 12 F.3d 1233, 1240 (3d Cir. 1993). Likewise, an asylum seeker can establish membership in a family-based particular social group so long as her family-based social group meets the particular social group test as set out in the specific circuit where the asylum seeker's claim is adjudicated. Generally, this element should not be difficult to establish as nearly every circuit has recognized that family-based particular social groups meet both the *Matter of Acosta* immutable characteristics test and the social visibility/distinction and particularity tests for establishing particular social group membership. *See e.g.*, *W.G.A. v. Sessions*¸ 900 F.3d 957, 965 (7th Cir. 2018); *Rios v. Lynch*, 807 F.3d 1123, 1128 (9th Cir. 2015); *Crespin-Valladares v. Holder*, 632 F.3d 117, 125-26 (4th Cir. 2011); *Al-*

Ghorbani v. Holder, 585 F.3d 980, 995 (6th Cir. 2009); *Vumi v. Gonzales*, 502 F.3d 150, 154-55 (2d Cir. 2007); *Gebremichael v. INS*, 10 F.3d 28, 36 (1st Cir. 1993); *see also Matter of C-A-*, 23 I&N Dec. 951, 959 (BIA 2006) ("[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"); *Matter of H-*, 21 I&N Dec. 337 (BIA 1996); *Matter of Acosta*, 19 I&N Dec. 211, 232-33 (BIA 1985).

And if an asylum seeker can establish persecution and membership in a family-based particular social group, there will frequently be situations where that asylum seeker is also able to establish that her family-based social group was or is at least one central reason for the persecution she suffered or fears. *See e.g.*, *Parada v. Sessions*, 902 F.3d 901, 910 (9th Cir. 2018); *W.G.A.*, 900 F.3d at 966; *Salgado-Sosa v. Sessions*, 882 F.3d 451, 459 (4th Cir. 2018); *Hernandez-Avalos v. Lynch*, 784 F.3d 944, 950 (4th Cir. 2015); *Torres v. Mukasey*, 551 F.3d 616, 630-32 (7th Cir. 2008). Asking "whether" an asylum seeker may establish these three elements is not a complex question and the simple answer is yes. The analysis only becomes muddled and unwieldy when the elements are conflated or otherwise misconstrued.

The "when" question also yields no useful guidance for asylum seekers, but for different reasons. The Attorney General's certification order appears to request a list of "circumstances" for when an asylum seeker could establish asylum eligibility in a family-based particular social group claim. But as the Board has repeatedly reaffirmed, adjudicators must evaluate asylum claims on a case-by-case basis, paying close

attention to the particular facts and evidence of the individual case.[3] *See e.g., Acosta*, 19 I&N Dec. at 233 ("The particular kind of group characteristic that will qualify under this construction remains to be determined on a case-by-case basis"); *Matter of A-R-C-G-*, 26 I&N Dec. 388, 395 (BIA 2014), *vacated on other grounds by Matter of A-B-*, 27 I&N Dec. 316 (A.G. 2018) ("In particular, the issue of nexus will depend on the facts and circumstances of an individual claim"); *Matter of M-E-V-G-*, 26 I&N Dec. 227, 251 ("[W]e 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"); *see also Pirir-Boc v. Holder*, 750 F.3d 1077, 1084 (9th Cir. 2014) (remanding proceedings to the Board because the Board failed to make a case-by-case determination regarding the claim, in violation of its own precedent). Requesting a list or description of the "circumstances" that can support a viable asylum claim assumes a discrete number of viable asylum claims with similar facts that can be discerned in isolation from the full record in an individual case. Issuing a precedential decision that lists these "circumstances" would also create the troubling perception that asylum claims can be adjudicated based on a check-list rather than a comprehensive analysis of each asylum seeker's individual case. Amici strongly

[3] The Department of Homeland Security appears to agree with this position in its brief. Brief of the U.S. Dep't of Homeland Sec. at 13, *Matter of L-E-A-*, 27 I&N Dec. at 494 (A.G. 2018). Confusingly, however, despite asserting that social groups must be determined on case-by-case basis, the Department also claims that if a specific grouping of people are not explicitly referenced in INA § 101(a)(42), this demonstrates that Congress did not intend for such groups to constitute particular social groups. But, of course, that is not how our legal system is structured (nor how any of the other protected grounds are defined).

discourage the Attorney General from increasing confusion among adjudicators and asylum seekers by issuing a decision of sweeping generalities rather than following the common law adjudication method, the genius of our legal system, to decide the case actually before the agency.

Additionally, if the Attorney General were to issue a precedential decision purporting to describe limited "circumstances" in which asylum can be granted based on family membership, the decision would likely violate the Supreme Court's decision in *U.S. ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954). The asylum statute grants immigration judges the responsibility to "determine" whether an asylum applicant has met her burden. INA § 240(c)(4)(B). By regulation, the Board members "shall exercise their independent judgment and discretion" in deciding cases, subject to the Attorney General's legal rulings. 8 C.F.R. § 1003.1(d)(1)(ii). The Attorney General has no power to decide asylum eligibility for asylum seekers whose cases are not certified to himself. Thus, if the Attorney General issued a precedential decision in *L-E-A-* intending to tell the Board and immigration judges what to do, the Attorney General would be attempting "precisely what the regulations forbid him to do: dictating the Board's decision." *Accardi*, 347 U.S. at 267.[4] For these reasons, attempting to distill out precisely "when" a certain type of asylum claim may be viable is necessarily an exercise in futility and an inappropriate exercise of authority.

[4] It is not required that an explicit order be given for the Attorney General to violate the *Accardi* principle: "[i]t would be naïve to expect such a heavy-handed way of doing things." *Accardi*, 347 U.S. at 267.

II. BROAD AND GENERALIZED AMICUS SOLICITATION QUESTIONS AND DECISIONS CREATE CONVOLUTED CASE LAW AND CAUSE INCONSISTENT ADJUDICATION

In recent years, the Board and Attorney General have engaged in a practice of soliciting amicus briefs, leading to the publication of precedential decisions, by presenting a question that encompasses the entire asylum definition related to a specific type of claim. For example, in Amicus Invitation No. 16-01-11 (which led to the precedential decision in *Matter of L-E-A-*, 27 I&N Dec. 40 (BIA 2017)), the Board asked:

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

In the certification and amicus solicitation for *Matter of A-B-*, 27 I&N Dec. 227 (A.G. 2018) (which lead to the precedential decision *Matter of A-B-*, 27 I&N Dec. 316 (A.G. 2018)), the Attorney General asked:

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

And in the current certification and amicus solicitation, the Attorney General asks:

> Whether, and under what circumstances, an alien may establish persecution on account of membership in a "particular social group" under 8 U.S.C. § 1101(a)(42)(A) based on the alien's membership in a family unit.

The commonality between these three amicus solicitations is the general nature of the request, which seeks an answer on the asylum eligibility of a category of asylum

seekers who claim asylum based on the same protected ground, but whose facts and evidence will differ tremendously from case to case. This type of request is problematic because adjudicators are required to conduct a case-by-case analysis of each asylum claim and neither the Attorney General nor the Board can decide the individual eligibility of asylum seekers whose cases are not before them. Questions such as the one posited in this matter are inappropriate and an ineffective way to clarify the asylum statute and regulations.

Just as problematic as the question itself, however, are the decisions that have resulted from these requests. In *Matter of L-E-A-*, the Board ultimately concluded (as it must), that family can constitute a particular social group "depending on the facts and circumstances in the case." 27 I&N Dec. at 42. But the decision then went beyond the contours of the amicus invitation question to focus on the nexus element and assert a number of blanket statements regarding nexus in family-based asylum claims, which are merely dicta, but have served to confuse the adjudication of family-based asylum claims. For example, the Board states that "the fact that a persecutor targets a family member simply as a means to an end is not, by itself, sufficient to establish a claim, especially if the end is not connected to another protected ground." *Id*. at 45. This statement does not assert anything new regarding the nexus element in the asylum definition, but it does confuse asylum adjudications in family-based claims by seeming to articulate a nexus standard without any real meaning.

This problem was even more evident in the Attorney General's decision in *Matter of A-B-*. Here, the amicus solicitation question asked the extremely broad and

convoluted question of whether and when being a victim of private criminal activity could form a cognizable particular social group. *A-B-*, 27 I&N Dec. 227. The holding of *A-B-* is simply that (1) *Matter of A-R-C-G-* was overruled because it was the product of concessions by DHS and not the application of Board case law, and (2) *Matter of A-B-* itself must be remanded for a new analysis because the Board's review of the immigration judge's decision was improper. *A-B-*, 27 I&N Dec. 316. The decision, however, goes on for 31 full pages to opine generally about asylum claims based on non-state actor violence without explicitly making any legitimate legal conclusions. For example, the Attorney General states that domestic violence and gang-based violence "generally" cannot be the basis for asylum, 27 I&N Dec. at 320, and that "few such claims would satisfy the legal standard to determine whether an alien has a credible fear of persecution," but provides no legal basis for these statements. 27 I&N Dec. at 320 n.1. Similarly, while the Attorney General initially asserts that asylum claims involving non-state actors must show that "government protection from such harm is so lacking that their persecutors' actions can be attributed to the government," he provides no citation for this assertion and also never states, at any point in the decision, that he is re-interpreting the "unable or unwilling to control" standard or even overruling the "unable or unwilling to control" standard utilized in the particular circuit at issue. *Id*. at 317.

It is clear in the decision that these statements are only dicta. (In fact, in subsequent litigation, the government asserted, "the only change to the law in *Matter of A-B-* is that *Matter of A-R-C-G-* was overruled" and that the rest of the *A-B-* decision is

simply "comment[ary]," *Grace v. Whitaker*, 344 F.Supp 3d 96, 125 (D.C.C. 2018) (internal citations omitted)). But the fact that the Attorney General issued a lengthy decision consisting almost entirely of dicta, in which he provides extensive "commentary" on the various asylum elements can only lead to confusion and inconsistent decision-making among adjudicators.

For the reasons noted above, the question posed in this amicus solicitation is at best suboptimal, and at worst noxious. The Attorney General cannot decide the asylum eligibility of asylum seekers whose cases are not before him, but asking the parties and amici to identify "the circumstances" for when an individual can establish asylum eligibility based on a family-based particular social group will almost certainly lead to a decision that attempts to do just that. *Accardi*, 347 U.S. at 267. The Attorney General would be wise to rescind the certification of *Matter of L-E-A-* and to proceed, if at all, after a second certification decision which poses a question which amici could legitimately seek to answer.

III. CONTEXT AND A MIXED MOTIVES ANALYSIS ARE CRITICAL TO ENSURING BONA FIDE ASYLUM SEEKERS ARE NOT DENIED ASYLUM BASED ON AN ERRONEOUS NEXUS DETERMINATION

To the extent the Attorney General finds it necessary to issue "guidelines" for family-based asylum claims, as the certification seems to envision, any guidelines should focus on the proper way to analyze the nexus element under asylum law.

A. A Nexus Analysis Must Focus on the Reasons the Applicant Was or Will Be Targeted

As explained in NIJC's prior amicus brief in this matter when it was before the Board,[5] Board decisions over the past decade – 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.

[5] By reference, this brief fully incorporates the arguments asserted in NIJC's prior amicus brief filed in response to Amicus Invitation 16-01-11, which should be included in the record of proceedings for this case and is available online at https://bit.ly/2H6HHGF.

B. The Personal Nature of a Relationship Between a Persecutor and an Applicant is Irrelevant to a Nexus Analysis

The fact that family relationships are inherently personal does not mean that a different legal standard applies for determining nexus. In *L-E-A-*, the Board explained that a "persecution claim cannot be established if there is no proof that the applicant or other members of the family were targeted because of the family relationship. 27 I&N Dec. at 43. Further, the Board reasoned that if the "persecutor would have treated the applicant the same if the protected characteristic of the family did not exist, then the applicant has not established a claim on this ground." *Id*. at 43-44. But that simply states the obvious: the identity of the victim is not, in itself, generally sufficient to establish the reason for the harm.[6]

When considering whether an asylum applicant has established the requisite nexus, violence that might have a personal connection must be viewed within the larger context in which the violence occurs. In *Sarhan v. Holder*, for example, the Board had concluded that a brother's threat to kill his sister as retribution for alleged adultery constituted a mere personal dispute. 658 F.3d 649, 656 (7th Cir. 2011). The Seventh Circuit disagreed, reasoning that although "[t]he man who does the killing may have a personal motivation in the sense that he is angry that his sister has dishonored the family," such killings have "broader social significance" and are "on account of the

[6] The Seventh Circuit recognized this in *W.G.A.*, 900 F.3d at 963, another asylum case involving family membership, noting that "*L-E-A-* did not establish a new rule" regarding the one central reason standard. Rather, "[a]s the government agreed at oral argument, *L-E-A-* applied the same analysis that the Board has followed since at least 2007." *Id*. (citation omitted).

woman's membership in the particular social group to which she has been assigned." *Id*. at 656-57.[7] Likewise, in *W.G.A*., the Court criticized the Agency for failing to properly consider record evidence corroborating the petitioner's testimony that a gang targeted him on account of his family membership, noting that country condition evidence demonstrated "widespread recognition that the Salvadoran gangs target nuclear family units to enforce their orders and to discourage defection." 900 F.3d at 966.

Other circuits have similarly chastised adjudicators for analyzing nexus in isolation from the evidence and broader social context. *See e.g.*, *Al-Ghorbani*, 585 F.3d at 997-98 (finding that the "personal" motives of a Yemeni general who targeted the lower class man who secretly married his daughter "cannot be unraveled from his motives based on [the petitioners'] social class and their opposition to Yemeni paternalistic rights"); *De Brenner v. Ashcroft*, 388 F.3d 629, 637-38 (8th Cir. 2004) (criticizing the Board's "failure to acknowledge the relationship between the Shining Path's economic and political agenda" and asserting it to be "an oversimplification to label the threats as simple extortion without carefully examining the record for particularized evidence of imputed political opinion"); *Osorio v. INS*, 18 F.3d 1017, 1029-30 (2d Cir. 1994) ("[B]y drawing the conclusion that the dispute between Osorio and Guatemala was economic

[7] The Court also rejected the idea that the failure of the petitioner's brother to target other woman had anything to say about whether his persecution of her would be on account of her social group membership, noting, "[i]magine the neo-Nazi who burns down the house of an African-American family. We would never say that this was a personal dispute because the neo-Nazi did not burn down all of the houses belonging to African-Americans in the town." *Sarhan*, 658 F.3d at 656-57.

and not political, the BIA ignored the political context of the dispute. In particular, in a country where the standard of living is low, and where the government suppresses civil liberties and commits widespread human rights violations, unions (and student organizations) are often the only vehicles for political expression.").

The Attorney General does not need to set new standards for establishing asylum eligibility (nor would it be appropriate to do so) simply because the claim involves a personal relationship. However, making sure to examine the context in which the persecution occurred – which is important in all asylum claims – is particularly critical in cases involving a personal relationship to ensure that the nexus determination is not the result of an oversimplification of the evidence.

C. Asserting That an Applicant was Targeted as a Means to an End is Not Responsive to the Nexus Analysis

In *L-E-A-*, 27 I&N Dec. at 45, the Board asserted in dicta that "the fact that a persecutor targets a family member simply as a means to an end is not, by itself, sufficient to establish a claim, especially if the end is not connected to another protected ground." But the fact that persecution might be inflicted in furtherance of some other goal, or as a part of a broader scheme, in no way detracts from the fact that it is *also* inflicted on account of a protected ground.

Indeed, even if this reasoning held more weight than mere dicta, it is not responsive to the underlying question of whether the applicant's family membership was or will be at least one central reason for his persecution. In stating the "means to an end" dicta, the Board only makes the obvious point that if a persecutor targets an

individual *solely* as a means to achieve another end, and a protected ground is not at least "one central reason" for the persecution, then no nexus has been established. In *L-E-A-*, the Board concluded both that the cartel had targeted the applicant as a way to gain access to his father's store *and* that the applicant's membership in his family was not "one central reason" for the persecution. 27 I&N Dec. at 46-47. In other words, according to the Board, the cartel's motives were purely economic and based on the applicant's connection to the store, not his membership in his family.

Any other interpretation of the Board's *L-E-A-* decision would be nonsensical and would turn asylum law on its head. Some of the most famous persecutions in history have been motivated by ends beyond simply targeting the particular population at issue. Tacitus recounts how Nero mounted a persecution of Christians in order to redirect ire away from himself after the Great Fire in Rome. Alfred John Church and William Jackson Brodribb, The Annals of Tacitus 304-305 § 44 (Macmillan & Co. 1876). King Edward's Edict of Expulsion against the Jewish population was motivated largely by a desire for economic gain. Michael Prestwich, *Edward I* 343 (Yale U Press 1997). It would be absurd to say that sending a religious population to be eaten by lions, or expelling and expropriating the property of an entire ethnic or religious group is not at the heart of asylum protections. But the "means to an end" analysis would mean just that. It must therefore be incorrect.

Other circuits have similarly understood that the fact that violence might be perpetrated as a "means to an end" does not bear on the question of whether a protected ground is at least one central reason for the persecution. In the Seventh

Circuit's decision in *Sarhan*, the threat of an "honor killing" that gave rise to the petitioner's claim was unquestionably motivated by a desire to obtain a goal beyond the killing itself: "Sarhan's parents told Disi during their visit that Besam planned to kill her when she returned to Jordan *in order to restore the family's honor*." 658 F.3d at 651 (emphasis added). Nonetheless, the Court held that if "Besem killed Disi it would be on account of her membership in the particular social group to which she has been assigned." *Id*. at 657.

In *Hernandez-Avalos*, members of the Mara 18 gang asserted their desire to recruit Hernandez-Avalos's son into the gang. When she told the gang members she would not allow her son to join, they repeatedly threatened to kill her, including aiming a gun at her head and telling her "they were going to force her son to join." 784 F.3d at 947. The Board determined that Hernandez-Avalos was not threatened because of her family membership, "but rather because she would not consent to her son engaging in a criminal activity" – in other words, Hernandez-Avalos was a means for the gang to achieve its end of recruiting her son. *Id*. at 949. But the Fourth Circuit rejected this "excessively narrow reading" of the one central reason standard, finding that the Board's distinction was meaningless and that it was "unreasonable to assert that the fact that Hernandez is her son's mother is not *at least one* central reason for her persecution." *Id*. at 949-50.

Likewise, in *Sharma v. Holder*, 729 F.3d 407, 410-11 (5th Cir. 2013), the Board had denied the asylum claim of a Nepalese man who had been kidnapped by Maoists who attempted to force him to join their political party and coach their volleyball team,

subjected him to forced labor, and tortured him. Although Sharma asserted that he had been persecuted on account of his political opinion, the Board disagreed, finding that the Maoists had targeted him because they wanted to recruit him for their party and wanted him to train their volleyball team. *Id*. at 410-11. The Fifth Circuit vacated the Board's decision, however, finding that while the Maoists may have kidnapped Sharma because they wanted to recruit him, they treated him more severely because of his support for a political group that opposed the Maoists. *Id*. at 412-13.

Should the Attorney General issue a decision providing guidelines for the nexus analysis, the decision should clarify that the "means to an end" language in *Matter of L-E-A-* is merely dicta and should be avoided as confusing and non-responsive to the nexus question.

D. Adjudicators 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 Feb. 27, 2019]. 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

individual applicants can establish that they themselves have suffered past persecution, or have a well-founded of future persecution, on account of a protected ground.[8] 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.

For instance, the Khmer Rouge targeted numerous groups for persecution and genocide in Cambodia. *See* Trial Chamber: Case File/Dossier No. 002/19-09-2007/ECC/TC at 95-96, https://www.eccc.gov.kh/sites/default/files/documents/courtdoc/2014-08-07%2017%3A04/E313_Trial%20Chamber%20Judgement%20Case%20002_01_ENG.pdf. [last accessed Feb. 27, 2019] (describing how "[t]he Party identified the 'New People', including former government officials, intellectuals, landowners, capitalists, feudalists and the petty bourgeoisie, as key enemies of the revolution and collectivisation"). The fact that the Khmer Rouge targeted many groups would thus not preclude an individual in only one of the targeted groups from establishing asylum eligibility.

Likewise, in *Orejuela v. Gonzales*, 423 F.3d 666 (7th Cir. 2005), the Seventh Circuit explained why the nexus determination must focus on the reason(s) why the persecutor harmed the specific applicant and not whether the persecutor also targeted other

[8] An exception to this 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).

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 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*.

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, Amici urges the Attorney General to withdraw certification of this matter. Should a decision in this matter issue, Amici urges the Attorney General to reconsider the 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 must analyze the nexus element in asylum cases on a case-by-case basis, separately from other elements of the claim, and focusing specifically on the reason(s) why the individual applicant was targeted for persecution.

March 1, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

On March 1, 2019, I, Ashley Huebner, emailed a copy of the Brief of Amici Curiae to AGCertification@usdoj.gov and mailed three copies to

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Dated: March 1, 2019

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