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

Amicus Invitation No. 16-01-11:	)
(Family as a Particular Social Group)	)

REQUEST TO APPEAR AS AMICUS CURIAE

BRIEF OF AMERICAN GATEWAYS AS AMICUS CURIAE

REQUEST TO APPEAR AS AMICUS CURIAE

American Gateways hereby requests permission from the Board of Immigration Appeals ("Board" or "BIA") to appear as *amicus curiae* in response to the Board's Amicus Invitation No. 16-01-11.[1] The Board may grant permission to amicus curiae to appear, on a case-by-case basis, if doing so will serve the public interest. 8 C.F.R. § 1292.1(d). American Gateways submits that granting it permission to appear as *amicus curiae* in this matter will serve the public interest.

American Gateways is a nonprofit based in Austin, Texas, with additional offices in San Antonio, Texas, that provides the legal and educational services immigrants need to navigate the immigration system and begin a new life free of torture and abuse. Its clients are victims of family violence, asylum seekers, and victims of human trafficking. American Gateways annually represents hundreds of asylum-seekers before the immigration courts, the BIA, and federal courts through its legal staff and network of over 174 pro bono attorneys.

Allowing American Gateways to appear as amicus curiae will serve the public interest because the organization has a significant interest in advocating for consistent and just decision-making by the Executive Office for Immigration Review. American Gateways regularly provides representation to individuals seeking protection based on their membership in a particular social group comprised of the applicant's family. Accordingly, American Gateways has developed subject matter expertise regarding social group and nexus issues and believes that it can assist the BIA in its analysis of the questions asked in Amicus Invitation No. 16-01-11.

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

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[1] The Board originally issued Amicus Invitation No. 16-01-11 on January 11, 2016. Although the original deadline for submitting amicus briefs was February 10, 2016, the Board subsequently extended the deadline to March 7, 2016. American Gateways has not appeared as amicus curiae in other cases before the Board, though it has joined briefs filed by other organizations.

TABLE OF CONTENTS

I. Summary of Argument

American Gateways writes to argue that a family can constitute a "particular social group" under 8 U.S.C. § 1101(a)(42)(A), even when the persecution against an asylum applicant is not linked with one of the other four protected grounds for asylum. The opposing, minority position contends that applicants facing persecution "on account of" their membership in a family are only entitled to protection if the family ties or resulting persecution are intertwined with race, religion, nationality, or political opinion. Both views would hold that an asylum applicant is entitled to protection if she has been persecuted because the political opinions of her family have been "imputed" to her by government actors. But the minority position would improperly refuse to grant asylum to an applicant facing persecution as a means of coercing or punishing the applicant's relative if that "defining family member" was not being targeted on account of another protected ground. As discussed below, American Gateways believes the minority position should not be adopted for several reasons.

Specifically, by holding that families can be "particular social groups" only if the family is ultimately being targeted on account of another protected ground, the Board would ignore (1) the plain text of section 1101 of the Immigration and Nationality Act (the "INA" or the "Act"), (2) long-standing precedent recognizing that kinship ties are the paradigmatic example of an immutable characteristic, and (3) the safeguards in other parts of the asylum analysis that can address any concerns that ineligible applicants will be able to take advantage of family relationships to obtain refugee status.

The resolution of this issue is particularly important to the clients served by American Gateways given the rise of powerful gangs in Central America that have increasing political influence and regularly kill the family members of individuals who they have targeted as a

coercive tool and public relations strategy. As multiple courts of appeals and the Board have recognized, family membership is plainly "an immutable characteristic," and individual families typically have "particularity" and are recognized by society as "socially distinct." Accordingly, when an individual is being persecuted because she is related to the target of a gang—*i.e.*, when her membership in a family unit is "a central reason" of the persecution—she is entitled to protection, regardless of whether she is being targeted (1) as a means to punish her relative for testifying against the gang or (2) to coerce her relative from engaging in political activities. Both forms of persecution equally satisfy the nexus requirement because the applicants are being arbitrarily persecuted "on account of" their membership in a particular social group with immutable characteristics—their family.

Requiring applicants who have been persecuted based on a family relationship to also show that their "defining family member" is being targeted based on another protected ground would improperly constrict and complicate the analysis called for by the plain text of the Act. Moreover, the complex reasoning required by such a "dual nexus" rule would place an undue burden on pro se applicants. American Gateways works with hundreds of such women in the Pearsall, Hutto, Dilley, and Karnes County, Texas detention facilities who suffer from language barriers, lack of education, and detention conditions that make them ill-equipped to articulate the sophisticated arguments called for by the complex analysis contemplated by the minority position. The Board should take this opportunity to enforce the plain terms of the Act and issue clear, centralized guidance that will not force applicants to meet a complex, judicially-created standard animated by improper policy considerations.

II. Argument

A. Persecution On Account of Family Membership Satisfies the Nexus Requirement And No Relationship With Another Protected Ground is Contemplated By The Statute

The question asked by the Board is whether family units can constitute a "particular social group" only when the alleged persecution on that ground is "intertwined with one of the other four grounds enumerated in 8 U.S.C. §§ 1101(a)(42)(A), 1231(b)(3)(A)." *Thomas v. Gonzales*, 409 F.3d 1177, 1184-87 (9th Cir. 2005) (en banc), *vacated on other grounds*, 547 U.S. 183 (2006) (per curiam). For the following reasons, American Gateways contends that applicants satisfy the Act's "nexus" requirement when they are persecuted "on account of" a family relationship, even when the persecution does not ultimately relate to one of the other protected grounds in the Act.

First, the statutory language does not contain any indication that the protection afforded to members in "particular social groups" somehow derives from the protection provided under the other four protected grounds. The INA defines a refugee as:

> any person who is outside any country of such person's nationality . . . and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear 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). That definition makes clear that "membership in a particular social group" is an equal and independent ground for protection, not a subordinate category that only includes "social groups" facing persecution because they share a characteristic addressed by the other four protected grounds. Indeed, the Board has long-recognized that the "particular social group" category is "of broader application" than the other four statutory groups. *In re Acosta*, 19 I. & N. Dec. 211, 232, 1985 WL 56042 (BIA 1985). Although

persecution based on membership in a particular social group often overlaps "with persecution on other grounds such as race, religion, or nationality," *id.* at 233, the statute does not require that "particular social groups" be linked to another protected ground. *See Thomas*, 409 F.3d at 1188 ("[T]here is nothing in the statute itself, nor in the BIA's interpretation of the relevant provisions, to suggest that membership in a family is insufficient, standing alone, to constitute a particular social group in the context of establishing eligibility for asylum or withholding of removal."). Congress could have opted to impose such a requirement, but it did not do so. Instead, it codified the "notion of a 'social group' [which] was considered to be of broader application than the combined notions of racial, ethnic, and religious groups . . . in order to stop a possible gap in the coverage of the U.N. Convention." *Acosta*, 19 I. & N. Dec. at 232; *Gebremichael v. INS*, 10 F.3d 28, 35 n.20 (1st Cir. 1993) ("[W]e have followed the language of the statute in recognizing that social group persecution can be an independent basis of refugee status.").

Second, the bulk of federal authority has consistently held that families are the paradigmatic example of "a particular social group." To constitute a "particular social group," a group of persons must (1) share a common, immutable characteristic, (2) be defined with particularity, and (3) possess social distinction within the society in question. *Rodas-Orellana v. Holder*, 780 F.3d 982, 990-91 (10th Cir. 2015). Familial relationships can satisfy all three requirements. For one, "kinship ties" are a prototypical example of an immutable characteristic that is innate and unchangeable. *See In re C-A*, 23 I. & N. Dec. 951, 959 (BIA 2006); *In re H-*, 21 I. & N. Dec. 337, 342 (BIA 1996) (accepting "clan membership" as a particular social group because it was "inextricably linked to family ties"); *Gebremichael*, 10 F.3d at 36 (holding 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"). Further, family units typically have "particular and well-defined boundaries" such that they constitute a "discrete class of persons." *See Crespin-Valladares v. Holder*, 632 F.3d 117, 125 (4th Cir. 2011) ("The family unit — centered here around the relationship between an uncle and his nephew — possesses boundaries that are at least as 'particular and well-defined' as other groups whose members have qualified for asylum."); *Sanchez-Trujillo v. INS*, 801 F.2d 1571, 1576 (9th Cir. 1986) (holding that "evidence of persecution directed against a family unit [is] relevant in determining refugee status, [because] a family was "a small, readily identifiable group") (citation omitted). Likewise, family units almost always have social distinction within a society because "few groups are more readily identifiable than the family." *Crespin-Valladares*, 632 F.3d at 126 (citing *Sanchez-Trujillo*, 801 F.2d at 1576); *see also In re C-A*, 23 I. & N. Dec. 951, 959 (BIA 2006) (reasoning that "[s]ocial groups based on innate characteristics such as . . . family relationship are generally easily recognizable and understood by others to constitute social groups"); *Rios v. Lynch*, 807 F.3d 1123, 1128 (9th Cir. 2015) ("Even under this refined framework, the family remains the quintessential particular social group."). For these reasons, most courts who have addressed the issue, as well as the Board, have recognized that families are a prototypical example of a "particular social group." *See, e.g.*, *Crespin-Valladares*, 632 F.3d at 126 (collecting cases); *Thomas*, 409 F.3d at 1186 (collecting cases); *Al-Ghorbani v. Holder*, 585 F.3d 980, 995 (6th Cir. 2009) ("[M]embership in the same family [] is widely recognized by the caselaw."); *In re V-T-S-*, 21 I. & N. Dec. 792, 798 (BIA 1997) (recognizing shared ties of kinship as warranting characterization as a social group).

Because family units can satisfy the elements for constituting a "particular social group," there is no basis in the language or logic of the Act for creating an additional hurdle in the nexus

analysis that only applies to applicants seeking protection from persecution on account of kinship ties. In order to satisfy the nexus requirement, an applicant must demonstrate that she has faced persecution "on account of" her membership in her family unit. *See* 8 U.S.C. § 1101(a)(42)(A). "Persecution occurs 'on account of' a protected ground if that ground serves as 'at least one central reason for' the feared persecution." *Crespin-Valladares*, 632 F.3d at 127 (quoting 8 U.S.C. § 1158(b)(1)(B)(i)). To satisfy the "central reason" standard, an applicant does not need to show that a protected ground was "'*the* central reason or even a dominant central reason' for his persecution, [but] he must demonstrate that these ties are more than 'an incidental, tangential, superficial, or subordinate reason' for his persecution." *Hernandez-Avalos v. Lynch*, 784 F.3d 944, 949 (4th Cir. 2015).

Accordingly, under the governing standard, an applicant seeking protection from persecution on account of family group membership satisfies the nexus requirement by establishing that her membership in a family unit was a meaningful, non-incidental cause of the persecution. *Id.* When applicants can demonstrate a causal nexus between their membership in a family group and resulting persecution, they are entitled to protection without further analysis because persecution based on family membership is just as arbitrary and capricious as persecution based on the immutable characteristics covered by the other four protected grounds. *Gebremichael*, 10 F.3d at 36; *see* James C. Hathaway & Michelle Foster, THE LAW OF REFUGEE STATUS 448 (2d ed. 2014).

For that reason, applicants facing persecution on account of a family relationship can obtain protection regardless of whether the persecution is motivated by (1) a desire to punish or coerce an applicant's family member who has testified against or otherwise crossed a gang in Central America, *Hernandez-Avalos*, 784 F.3d at 949-50 (holding that an applicant had satisfied

the nexus requirement when her "relationship to her son [wa]s 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"); *see also Chen v. Ashcroft*, 289 F.3d 1113, 1116 (9th Cir. 2002) (holding that applicant was entitled to protection when he faced persecution on account of his membership in a family stemming from his mother's inability to pay a money judgment against her), or (2) animus against the applicant's family (or her defining family member) that is linked with one of the other four protected grounds. *See Mema v. Gonzales*, 474 F.3d 412, 416 (7th Cir. 2007) ("[A]sylum is available to persons who have been persecuted based on imputed political opinion, including situations where a persecutor attributes the political opinion of one or more family members to the asylum applicant."). In either scenario, the applicant's family ties—the immutable characteristics that set the family unit apart from the rest of society—are a meaningful cause for the persecution and the reason why the applicant was the individual persecuted rather than someone else. *Hernandez-Avalos*, 784 F.3d at 949-50. Thus, applicants who have established a causal nexus between their membership in a family and the threatened persecution are eligible for protection under the Act; nothing in the Act forces such applicants to separately satisfy an additional nexus element requiring that threatened persecution be linked to another protected ground.

B. The Minority View Is Motivated By Policy Concerns Addressed Elsewhere in the Asylum Analysis

In recent years, a few circuit courts have rejected the majority position and held that family ties can be a basis for asylum only when there is a protected ground tying the family membership to the basis of the persecution. *See Yin Guan Lin v. Holder*, 411 F. App'x 901, 905 (7th Cir. 2011) (family membership could not constitute a protected social group where the defining family member was being targeted on account of a "personal dispute"); *Malonga v.*

Holder, 621 F.3d 757, 767 (8th Cir. 2010) ("Acts 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."); *Ramirez-Mejia v. Lynch*, 794 F.3d 485, 493 (5th Cir. 2015) (holding that the nexus requirement was not satisfied when the "primary purpose of threats was to obtain information" given to an applicant by her brother, and there was no evidence that the alleged persecution was done "out of hatred for a family"). However, American Gateways contends that the reasoning of those opinions is unpersuasive as it does not apply the plain language of the statute and injects misguided policy concerns into the analysis.

As an initial matter, the minority position improperly fails to apply the applicable statutory language. Specifically, nothing in the statute indicates that persecution based on membership in a "particular social group" merits protection only if the group or one of its members is being targeted due to her race, religion, nationality, or political opinion. *See Thomas*, 409 F.3d at 1188 ("[T]here is nothing in the statute itself, nor in the BIA's interpretation of the relevant provisions, to suggest that membership in a family is insufficient, standing alone, to constitute a particular social group in the context of establishing eligibility for asylum or withholding of removal."). Nor does the statute require applicants facing persecution on account of membership in a family unit to prove that the "primary purpose" of the threatened persecution was done "out of hatred for a family." *Cf. Ramirez-Mejia*, 794 F.3d at 493. To the contrary, the Act only requires applicants to show that their membership in a family group was "*at least one central* reason for the feared persecution," meaning that the family membership was more than "an incidental, tangential, superficial, or subordinate reason" for the persecution. *Crespin-Valladares*, 632 F.3d at 126-27 (emphasis added). Because the statute expressly contemplates the possibility of multiple "central reasons" behind threatened persecution, the minority position

fails to recognize that an applicant can face persecution "on account of" her family ties even when a persecutor's "primary motivation" was to punish the applicant's relative for defying a gang, as opposed to "hatred" of the family itself. *Hernandez-Avalos v. Lynch*, 784 F.3d at 950 (holding that an applicant was eligible for protection when a gang (1) "threatened [her] in order to recruit her son into their ranks" and (2) "also threatened [her], rather than another person, because of her family connection to her son").

Rather than apply the plain text of the statute, the minority position appears to be animated by policy concerns. Namely, the minority position seems to reflect reluctance to grant refugee status to applicants who are the "secondary target" of persecution stemming from a familial relationship to the "primary target" of the persecution in situations where the primary target would not be eligible for protection. Hathaway & Foster, THE LAW OF REFUGEE STATUS 447; *Lin*, 411 F. App'x at 905-06 (denying relief to an applicant facing persecution from his father's creditors and local officials because the dispute "arose from a personal dispute between his father and his father's creditors" and "[d]ebtors who fear creditors do not qualify for social-group membership"). In essence, the minority position believes that "recognizing a family as a particular social group will confer refugee status on all victims of vendettas or feuds that have swept in the family of the initial target, and all victims of 'street wars' between rival criminal families." *See Thomas*, 409 F.3d at 1189 (rejecting that concern as "unfounded").

However, the Board should reject that policy argument because it ignores the limiting principles in other parts of the asylum analysis that can ensure refugee status is reserved for those who face persecution "on account of" their membership in a particular social group comprised of their family. For instance, the applicant has to show that she has suffered mistreatment that is severe enough to constitute persecution. *See Mikhailevitch v. INS*, 146 F.3d 384, 390 (6th Cir.

1998) (explaining that persecution entails "more than a few isolated incidents of verbal harassment or intimidation, unaccompanied by any physical punishment, infliction of harm, or significant deprivation of liberty"). Further, an applicant must show that there is an actual causal connection between her membership in a family and the threatened persecution. *See Bonilla-Morales v. Holder*, 607 F.3d 1132, 1137 (6th Cir. 2010) (finding that persecution was not on "account of" family relationship, in part, because the alleged persecution pre-dated a gang's efforts to recruit the applicant's son). Moreover, "[o]nce an asylum applicant demonstrates persecution on account of kinship ties, she must still show that the persecution is at the hands of the government or persons or organizations that the government is unable or unwilling to control." *Thomas*, 409 F.3d at 1189. Likewise, "any presumption of a well-founded fear of future persecution may be rebutted by showing that the alleged persecution may be avoided by relocation within the country or by a showing of changed circumstances." *Id.* (citing 8 C.F.R. § 1208.13(b)(1)(i)).

Because successful asylum applicants must satisfy multiple elements in order to establish that they face persecution on account of their membership in a family group, it is not necessary to create an additional nexus requirement that only applies to such applicants. *Id.* ("[W]e see no reason to erect artificial barriers to asylum eligibility merely to address a concern that is more properly resolved elsewhere in the analysis of a particular claim of asylum."). Accordingly, the minority position is not supported by either the plain language of the statute nor a valid policy rationale.

C. By Improperly Creating A New Nexus Requirement, The Board Will Cause Improper Denials Of Relief To Applicants Seeking Protection From Central American Gangs

American Gateways assists hundreds of women held in Texas detention facilities who have fled persecution on account of their family relationships. Many of these women are seeking protection from Central American gangs who regularly kill the family members of individuals they have targeted as a coercive tool and public relations strategy. These gangs often apply 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[,] to force the missing family member to come forward[,]" or to otherwise coerce another family member to comply with the gang's wishes. *See Gebremichael*, 10 F.3d at 36. Women facing these tactics are a prototypical example of individuals facing persecution on account of their membership in a social group comprised of their family. *Hernandez-Avalos*, 784 F.3d at 949-50.

If the Board adopts the additional nexus requirement and forces applicants to show that the threatened persecution is also intertwined with another protected ground, it will (1) greatly complicate the evidentiary burden placed on pro se respondents and (2) cause many women fleeing persecution from Central American gangs to be denied the protection they are entitled to under the plain terms of the Act. American Gateways works with many women who are ill-equipped to make the needlessly complicated arguments that would be required under the contemplated "dual nexus" requirement. *See, e.g.*, *Ramirez-Mejia*, 794 F.3d at 492-93 (showing the complicated analysis called for by the "dual nexus" requirement). The complexity of such a rule would not only lead to the denial of meritorious claims, but it would also undermine the Board's desire to provide clear, centralized guidance on this issue, which is sorely needed.

As the nature of persecution has evolved, both the Board and the courts have struggled to reconcile existing asylum frameworks with the situation faced by women fleeing persecution from Central American gangs based on their kinship ties. Currently, the burden of addressing this disconnect falls on pro se respondents by requiring them to not only articulate a complex "dual nexus" argument, but to understand which arguments are effective in various jurisdictions. Accordingly, the Board should take this opportunity to articulate centralized guidance, enforce the plain terms of the statute, and reject the improper and overly complicated dual nexus requirement that has been adopted by the courts who have embraced the minority position.

III. CONCLUSION

For the foregoing reasons, Amicus Curiae, American Gateways asks the Board to rule that where an asylum applicant has demonstrated persecution because of her membership in a particular social group comprised of the applicant's family, she has satisfied the nexus requirement without further analysis.

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Respectfully submitted,

[redacted]

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