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NON-DETAINED

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

In the Matters of:	)	**File Nos.:**
M.J.V.;	)	**A089 697 034**
R.D.C.P-G; and	)	**A094 793 472**
A.R.C-G et. al.	)	**A099 528 680**
In Removal Proceedings	)	

REQUEST TO APPEAR AS *AMICUS CURIAE*
AND
BRIEF OF THE NATIONAL IMMIGRANT JUSTICE CENTER
AS *AMICUS CURIAE* IN SUPPORT OF THE RESPONDENTS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Regulations

Other Authorities

REQUEST TO APPEAR AS *AMICUS CURIAE*

The National Immigrant Justice Center ("NIJC") hereby requests permission from the Board of Immigration Appeals ("Board" or "BIA") to appear as *amicus curiae* in the above-captioned matters. The Board may grant permission to *amicus curiae* to appear, on a case-by-case basis, if that appearance will serve the public interest. 8 C. F. R. § 1292.1(d).

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 to low-income asylum-seekers. Each year, NIJC represents hundreds of asylum-seekers before the immigration courts, BIA, the Courts of Appeals and the Supreme Court of the United States through its legal staff and a network of over 1000 *pro bono* attorneys.

Many of the asylum-seekers NIJC represents present claims involving gender-based violence, including domestic violence. Agency precedent on this issue will impact many of the clients NIJC serves. NIJC therefore holds a weighty interest in rational, consistent decision-making by the Executive Office for Immigration Review. Moreover, NIJC has subject matter expertise in asylum cases involving gender-based violence and, more generally, particular social groups. NIJC believes it can assist the Board in its consideration of the present appeals, thereby serving the public interest.

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

INTRODUCTION AND SUMMARY OF THE ARGUMENT

NIJC writes in support of the argument that domestic violence can, in some instances, form the basis of an asylum or withholding of removal claim. Domestic violence is one form of gender-based violence. Other forms of gender-based violence include rape, female genital mutilation, forced marriage, honor killings and sex trafficking. These and related forms of violence occur against women and girls because they are female. Gender is an immutable characteristic and, as such, should be recognized as a particular social group for purposes of asylum. Where gender is the reason for the harm inflicted, a grant of asylum may be appropriate.

The amicus brief filed by the American Immigration Lawyers Association ("AILA") aptly sets forth the argument that the accepted doctrine of *ejusdem generis* supports the recognition of gender as a particular social group. The AILA brief further explains that concerns about floodgates opening and allowing for the mass approval of asylum for all women is misplaced since the other elements of the asylum analysis serve to ensure that only *bona fide* refugees receive asylum protection. The AILA brief also explains that the analysis of the reasons for persecution should take into the account the type of harm inflicted. In some circumstances, the type of harm inflicted will signal the reason for it. Where gender-based violence has occurred, it is often possible to deduce that the victim's gender was the reason for the harm, satisfying the nexus element of asylum. NIJC adopts and affirms these arguments.

With this brief, NIJC urges the Board to adopt the position that the precise wording of a proposed particular social group should not be used to reject an asylum

claim where the underlying claim is *bona fide*. An asylum seeker must establish that she satisfies each asylum element in order to prevail. However, just as no magic words are required to establish one's race, religion, nationality or political opinion, an asylum seeker claiming membership in a particular social group should not be prejudiced by the failure to use specific words to define her group.

Relatedly, NIJC raises the point that though gender-based asylum claims may, on occasion, reference the form of abuse feared in the proposed particular social group, the inclusion of reference to the harm does not invalidate the particular social group. Though groups defined by the harm feared by their members face the challenge of establishing that persecution will occur on account of that shared characteristic, the members nonetheless constitute a particular social group.

The aim of the Board should be to ensure that asylum seekers who meet the definition of a refugee receive protection by allowing each asylum element to do its work. To that end, the Board should adopt an approach to particular social group analysis that identifies *bona fide* asylum claims and avoids rejecting asylum claims based on semantics rather than substance.

ARGUMENT

I. The Exaggerated Focus on How Proposed Social Groups Are Defined Is Unfair to *Pro Se* and Represented Applicants Alike.

By focusing on the exact words an asylum applicant uses to define her proposed social group, adjudicators risk excluding from protection individuals with valid asylum claims. The Board's competing rules force asylum applicants to negotiate a definitional

Scylla and Charybdis. S.H., Butcher and A. Lang, *The Odyssey of Homer* 199-200 (MacMillan & Co.1922) (1879). If the applicant defines a group broadly, she risks the Board rejecting her proposed group as too vague. But if she creates a group that is too narrow, it may not be considered socially visible. This forces the applicant to thread a definitional needle, on pain of being deported to face persecution, torture, or death. This makes no sense.

This definitional emphasis is applied only to social group claims, notwithstanding the BIA's invocation of *ejusdem generis* in interpreting social group membership. *Matter of Acosta*, 19 I&N Dec. 211, 233-34 (BIA 1985). But boundary problems exist with any group of people, be they particular social groups, political parties, or members of a religion. Members of political parties or groups naturally have diverse backgrounds and hold varying political opinions, *see* John O. McGinnis, *The Condorcet Case for Supermajority Rules*, 16 Sup. Ct. Econ. Rev. 67, 78 (2008), yet the fact that an applicant seeking asylum based on political opinion cannot clearly articulate a political agenda would seem no bar to asylum if the applicant established she would be persecuted on account of political affiliation. *See e.g., Haxhiu v. Mukasey*, 519 F.3d 685, 690-91 (7th Cir. 2008) (finding that the petitioner suffered past persecution on account of his anti-corruption activities, which constituted an expression of political opinion). So, too, with religion; the fact that a religious movement like Falun Gong has no "formal requirements for membership; indeed, it has no membership," is no protection against vicious persecution and rightfully does not prevent practitioners of the faith from receiving asylum based on religion. *Iao v. Gonzales*, 400 F.3d 530, 533 (7th Cir. 2005).

But the Board's approach in the context of particular social group is entirely different. The Board requires not only that the group be clear in "heartland" cases, but that it be clear at the boundaries precisely who would be included within the proposed group. The vague-boundaries standard could rarely, if ever, be met in any asylum case; even something so straightforward as party membership might be shown by registration, or by a record of political donations, or by membership in affiliated groups such as the Federalist Society, or by a record of public speaking on issues. Yet it would be passing strange to deny asylum to perceived Republicans merely because the definition of who-is-a-Republican can have unclear boundaries. It is likewise contrary to the intent of the statute to hold applicants with claims based on particular social group membership to this inscrutable standard.

The question which should be asked in an asylum claim based on membership in a particular social group is whether the applicant has established she will suffer harm based on her membership in a group whose members share a characteristic which the applicant cannot change or should not be expected to change. The extent to which the group has been precisely defined is relevant only to the extent that it bears on the question of proof.[1] After all, an applicant who proposes a poorly defined particular social group gains no benefit thereby, unless the applicant can show (a) that she is in

[1] The Board and Attorney General have previously noted that it is important that the applicant identify the particular social group on which her claim is based, but has only emphasized this point in the context of a case in which the applicant had not clearly identified *any* group on which her claim was based. *See Matter of A-T-* 25 I&N Dec. 4, 10 (BIA 2009); *Matter of A-T-* 24 I&N Dec. 617, 623 n.7 (AG 2008).

fact a member of the proposed group, and (b) that she has been or would be persecuted on account of that membership.

The focus on technical definitions is particularly egregious when it comes to *pro se* applicants. The asylum application form, form I-589, available at http://www.uscis.gov/files/form/i-589.pdf (last accessed July 23, 2012), invites the applicant to select membership in a particular social group as the basis for her fear, but never asks the applicant to define that group. The closest the form gets to that question is to ask the applicant to explain "why you believe you could or would be persecuted," *id*. at 5, in a space that suggests a narrative. The form does not prompt the applicant to name a social group, nor to offer potential other social group definitions in the alternative. *See* Instructions, available at http://www.uscis.gov/files/form/i-589instr.pdf (last accessed July 23, 2012).

Asylum forms "are frequently filled out by poor, illiterate people who do not speak English and are unable to retain counsel." *Aguilera-Cota v. INS*, 914 F.2d 1375, 1382 (9th Cir. 1990). Many obtain assistance from community organizations, churches, unlicensed notaries, or well-intentioned but ill-informed community members. *See Morales Apolinar v. Mukasey*, 514 F.3d 893, 897 n.6 (9th Cir. 2008); *H.B. 2659: Notorious Notaries-How Arizona is Curbing Notario Fraud in the Immigration Community*, 32 ARIZ. ST. L.J. 287, 292 (2000). Even assuming a higher-than-average level of sophistication, "the circumstances surrounding the [asylum] process do not often lend themselves to a . . . comprehensive recitation of an applicant's claim to asylum or withholding, and . . .

holding applicants to such a standard is not only unrealistic but also unfair." *Secaida-Rosales v. INS*, 331 F.3d 297, 308 (2d Cir. 2003), *abrogated in part by* INA § 208(b)(1)(B)(iii).

Competent immigration practitioners and asylum experts struggle to define clear and concise social groups due to the immense confusion the BIA has created with its recent modifications to the particular social group test. Applicants and their attorneys may add complicated qualifiers out of concern that their proposed social group would otherwise be labeled too "broad" or "vague." *See e.g.*, *Matter of S-E-G-*, 24 I&N Dec. 579, 585 (BIA 2008) (finding the proposed group of "family members of Salvadoran youth who have been subjected to recruitment efforts by MS-13 and who have rejected or resisted membership" too amorphous because "family members" could include "fathers, mothers, siblings, uncles, aunts, nieces, nephews, grandparents, cousins, and others"); *but cf. Acosta*, 19 I&N Dec. at 233 (noting "kinship ties" as an immutable characteristic that could form the basis of a social group). Particularly as guidance from the BIA in this area has been inconsistent, an excessive focus on alleged flaws in proposed particular social group definitions is unfair and inappropriate for both *pro se* applicants and those represented by adequate counsel.

The test for a particular social group should not focus on the exact words with which an asylum applicant attempts to define her particular social group, but on the simple question of whether the applicant belongs to a group whose members share a characteristic which they cannot change or should not be expected to change. It is a national obligation, both in statute and treaty, not to return individuals to a country where they face persecution. *See* INA § 241(b)(3); 19 U.S.T. 6223, 6259-6276, T.I.A.S. No.

6577 (1968); *see generally INS v. Stevic*, 467 U.S. 407, 416-17 (1984). If an applicant demonstrates a reasonable possibility that she will suffer persecution and that such persecution will occur because of an immutable characteristic she shares with others, she merits asylum no matter what specific words she used to define her social group.

As explained above, the size of a group is irrelevant to the question of whether a group constitutes a particular social group for asylum purposes. So, too, the exact words with which a group is defined by the applicant. The Board should find that the precision with which an applicant defines a group, like the group's size and harm it has suffered, is of limited relevance. Instead, the question of whether a group constitutes a particular social group for asylum purposes depends solely on whether group members share an immutable characteristic.

II. There Is No Principled Reason Why Particular Social Groups Cannot Be Defined in Part by the Harm Feared.

The Board should decline to adopt the position that social groups can never be defined by the harm feared or suffered for purposes of asylum. Where a victim of gender-based violence includes the harm she fears in the formulation of her particular social group, the group may be viable despite the reference to harm. For example, an asylum applicant who asserts a fear of persecution based on membership in the group of "Honduran women abused by their husbands who the government will not protect" could still be granted asylum based on particular social group. That group is not defined merely by the persecution group members fear. Gender and nationality are shared, immutable characteristics that form the basis of a viable social group without

reference to the fear of gender-based violence. Even when the group members' fear is included in the group definition, the law does not render that characteristic fatal to the particular social group.

The immutable characteristic that unifies the particular social groups proposed in respondents' cases is not the fact that the groups' members fear persecution, but the fact that they are women of a particular nationality. Like members of other groups recognized by the federal courts and the Board, such as "family members of those who actively oppose gangs in El Salvador by agreeing to be prosecutorial witnesses" *Crespin-Valladares v. Holder*, 632 F.3d 117 (4th Cir. 2011); "Christian women in Iran who do not wish to adhere to the Islamic female dress code," *Yadegar-Sargis v. INS*, 297 F.3d 596, 603 (7th Cir. 2002); "young women of the Tchamba-Kunsuntu Tribe who have not had FGM, as practiced by that tribe, and who oppose the practice," *Matter of Kasinga*, 21 I&N Dec. 357, 365 (BIA 1996), members of the groups proposed in respondents' cases share a risk of harm – that is why the group members have a fear of persecution. Just as the above recognized groups - which do not explicitly reference harm - are viable, social groups referencing harm remain valid because members share at least one immutable characteristic. The reference to harm may be excised from the group definition, leaving it more similar to the other group and no less viable. So long as members of a proposed group share another immutable characteristic besides their fear of harm, this shared fear is irrelevant to the social group analysis. *See Matter of C-A-*, 23 I&N Dec. 951, 956 (BIA 2006) (citing to the UNHCR Guidelines on International Protection: "Membership of a particular social group" for the point that a particular social group

must simply share a common characteristic "other than their risk of being persecuted") (internal citation omitted); *see also Zelaya v. Holder*, 668 F.3d 159, (4th Cir. 2012) (stating that a particular social group cannot be defined "exclusively by the fact that its members have been targeted for persecution") (citing *Scatambuli v. Holder*, 558 F.3d 53, 59 (1st Cir. 2009); *Escobar v. Holder*, 657 F.3d 537, 545 (7th Cir. 2011) (noting that a social group "cannot be defined solely by the fact that its members suffer persecution," but that the BIA "has never demanded an utter absence of any link to the persecutor").

The groups raised in these cases are not "people who fear gender violence." Such groups would exist exclusively because of the members' fear or risk of harm and would not share any immutable characteristics. The groups raised in these cases are different because it is the members' status as women from a particular country – not their risk of harm – that unites them.

III. Concerns Regarding the Circular Definition of a Social Group Are Relevant to the Nexus Analysis, Not the Social Group Analysis.

If an asylum applicant includes the harm feared within her proposed social group, the group's definition becomes somewhat circular. Although the courts of appeals have expressed concerns regarding circularly-defined particular social groups, *see e.g.*, *Escobar*, 657 F.3d at 551 (Easterbrook, J., concurring); *Rreshpja v. Gonzales*, 420 F.3d 551, 556 (6th Cir. 2005), *Amicus* submits that those concerns are misplaced. A particular social group's circular definition can create problems for the nexus or "on account of" asylum element, but a circularly-defined group can still be viable so long as the group's members share an immutable characteristic.

To establish asylum eligibility based on a well-founded fear of future persecution, an applicant must demonstrate a reasonable possibility that she will be persecuted *on account of* a protected ground. INA § 101(a)(42)(A); *Martinez-Buendia v. Holder*, 616 F.3d 711, 715 (7th Cir. 2010). Since individuals are rarely targeted for persecution *because* they fear persecution or *because* they are at risk of persecution, claims based on membership in a social group that reference the harm feared may have difficulty establishing the nexus element.

In some instances, however, nexus can be established between the persecution feared and a social group defined in part by past harm. In *Lukwago v. Ashcroft*, 329 F.3d 157, 172, 178 (3d Cir. 2003), the Third Circuit recognized the social group of "former child soldiers who have escaped LRA captivity" because the group was based on immutable, shared, past experiences. Moreover, the Court found that record evidence supported the claim that Lukwago would be persecuted in the *future* on account of his membership in the social group of "former child soldiers who have escaped LRA captivity" because former child soldiers are subjected to "retaliatory conduct" by the LRA. *Id*. at 179-80. Similarly, if female rape victims were frequently stoned to death in a particular country because they were perceived as promiscuous, a female asylum applicant who had suffered rape in that country could assert a well-founded fear of being stoned to death in the future on account of her membership in the particular social group of "female rape victims in [ ] country." A survivor of the Rwandan genocide who testified against genocide perpetrators in a Gacaca court and was subsequently targeted for persecution as a result could assert a future persecution claim

based on membership in the social group of "Rwandan genocide survivors who have testified in the Gacaca courts."

Courts have found that groups defined, in part, by the harm feared, constitute particular social groups. *See e.g.*, *Sarhan v. Holder*, 658 F.3d 649 (7th Cir. 2011); *Agbor v. Gonzales*, 487 F.3d 499 (7th Cir. 2007); *see also Bi Xia Qu v. Holder*, 618 F.3d 602 (6th Cir. 2010). In these cases, the reference to the harm feared adds little substance to the groups' definitions since the groups already constitute particular social groups independent of this additional component. In *Sarhan*, the Seventh Circuit concluded that the asylum seeker belonged to the social group of "women in Jordan who have (allegedly) flouted repressive moral norms, and thus who face a high risk of honor killing." 658 F.3d at 655. This group constitutes a particular social group because it is based on the immutable characteristics of gender, nationality, and the immutable past act of having flouted social norms. The group's reference to the harm feared does not change these underlying characteristics that define the group. Thus, *Amicus* submits that the group would also be viable if it were defined simply as "Jordanian women" or "women in Jordan who have (allegedly) flouted repressive moral norms."

In *Agbor*, although the viability of the social group was not at issue, the Court noted "[t]he case law is quite clear that women who fear being circumcised should they return to [Cameroon] are members of a discrete social group for purposes of the statute." 487 F.3d at 502. Women in a particular country who fear circumcision constitutes a particular social group because group members share the common, immutable characteristics of gender, nationality, and being uncircumcised. *Amicus*

therefore asserts the social group in *Agbor* is also viable if merely defined as "uncircumcised women" or "uncircumcised Cameroonian women."

Including the "fear of harm" as part of the social group definition is often superfluous and innocuous. It neither makes viable a group that contains no immutable characteristic nor invalidates a group that is otherwise legally sound. As the Board reexamines the viability of particular social groups whose definitions may reference the harm feared, *Amicus* urges the Board to find that a social group is viable so long as it is based on one, immutable characteristic, regardless of any other ancillary language in the group's definition.

CONCLUSION

For all these reasons, the Board should reaffirm that a particular social group is viable so long as its members share at least one immutable characteristic and adopt the position that the precise wording of a proposed particular social group ought not be used to reject an asylum claim where the underlying claim is *bona fide*.

November 21, 2012

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Lisa Koop, hereby certify that on November 21, 2012, I served the foregoing Brief for *Amicus Curiae* in Support of the Respondent by mailing copies of the brief by Federal Express to the following:

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