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

REQUEST TO APPEAR AS AMICUS CURIAE AND BRIEF OF THE GEORGE WASHINGTON UNIVERSITY IMMIGRATION CLINIC AS AMICUS CURIAE IN RESPONSE TO AMICUS INVITATION *MATTER OF A-B-*

The George Washington University Law School Immigration Clinic respectfully requests leave to appear as *amicus curiae* and file the following brief.

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REQUEST TO APPEAR AS AMICUS CURIAE

The George Washington University Law School Immigration Clinic hereby requests permission from the Board of Immigration Appeals ("Board" or "BIA") to appear as *amicus curiae* in response to the Amicus Invitation in *Matter of A-B-*. The Board may grant permission to amicus curiae to appear, on a case-by-case basis, where it serves the public interest. 8 C.F.R. § 1292.1(d).

I am a professor of immigration law at The George Washington University Law School. I also direct the Immigration Clinic within the Jacob Burns Community Legal Clinics, which represents individuals *pro bono* in a wide variety of immigration matters, with a focus on individuals in removal proceedings and asylum applicants. Before joining the Law School faculty as Director of the Immigration Clinic in 1996, I was on the faculty of the legal clinics at Chicago Kent College of Law and Northwestern University School of Law. Prior to becoming a clinician, I was a staff attorney at the Chicago Lawyers' Committee for Civil Rights under Law and the Legal Assistance Foundation of Chicago, as well as an intern at the Centro de Estudios Legales y Sociales in Buenos Aires, Argentina. In addition, in the summers I have taught at the law schools of the Instituto Tecnológico Autónomo de México and the Universidad Panamericana, in Mexico City. In the spring 2003 semester I was a visitor at the Boyd School of Law of the University of Nevada at Las Vegas, assisting in the development of that law school's immigration clinic. I have devoted my entire legal career to working in the public interest, generally with aliens, and so I am familiar with immigration law in its proper context.

ISSUE PRESENTED

1. 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.

INTRODUCTION

Particular social group is a protected ground of asylum that provides protection for vulnerable groups who are not otherwise protected by statute but possess the same innate and immutable characteristics that are inherent in race, religion, political opinion, and nationality. Many of the communities that fall into particular social groups are those that have been systematically oppressed, not just by governments but by society as a whole. Because of this, it is critical that victims of private crime be allowed to present their cases to the court when they have faced harm rising to the level of persecution by actors that the government is unable or unwilling to control.

The GW Law Immigration Clinic in the spring 2018 semester alone has been able to save 29 lives, in large part, by aiding applicants who were victims of crime by non-governmental actors and therefore belonged to a particular social group. Many of the Immigration Clinic's cases concern individuals who have been harmed on account of their family membership. For example, after one client's uncle witnessed MS-13 gang members committing a crime and was murdered by MS-13 gang members, the gang members began to harass and threaten her and her children. The gang chose to persecute our client because of her close relationship with her uncle, who had been like a father to her. After attempting to relocate within the country but continuing to be persecuted by MS-13, she fled to the U.S. with her children.

An Immigration Clinic client was also recently granted asylum based on her membership in the particular social group "Married Salvadoran women unable to leave the relationship." For years, our client's husband raped, beat, and abused her, forcing her to marry him against her will. He would refer to her as "trash" and tell her she had to do as he said because she was his wife. He threatened to have her daughter raped if she tried to leave him or disobeyed, forced her to

return when she tried to flee, and used familial connections to the MS-13 gang to threaten her and make it clear that the authorities in El Salvador could not protect her. As a result of the years of severe physical, sexual, and emotional abuse that she endured, she was granted asylum on humanitarian grounds.

The applicant's burden in cases involving private crime is already quite high, since they must show that they suffered persecution on the basis of a protected ground, which has its own elements and body of case law, and then further show that the government was either unable or unwilling to control it. It would be a mischaracterization to suggest that any victim of any private crime can qualify for asylum under the statute; rather, the Board of Immigration Appeals ("BIA") and various Circuit Courts have required an applicant to show that the country of origin's government is unable or unwilling to control the private actors that have perpetrated the persecution.

In the sections below, we first argue that it would be an impermissible agency interpretation of the statute to restrict members of particular social groups to persecution by governmental actors only, and that it would be impermissible to provide stricter persecutor requirements for individuals seeking asylum based on particular social group membership as opposed to the other four protected grounds. Furthermore, we provide a summary of case law to demonstrate how entrenched the applicability of the statute to private perpetrators is in precedent. Finally, we conclude with a discussion of the legislative history and public policy incentives to show the detrimental effect of such a restriction.

ARGUMENT

Prohibiting victims of private criminal activity from qualifying as members of a cognizable particular social group is outside of the authority of the Attorney General. While the Attorney General has the authority to interpret existing statutes, those interpretations must be permissible constructions of the statute. *See Chevron, U.S.A., Inc. v.* NRDC, Inc., 467 U.S. 837, 843 (1984). Congressional action would be necessary in order to conclusively bar victims of private criminal activity from seeking asylum.

I. Victims of private criminal activity can constitute a cognizable particular social group for purposes of asylum and withholding of removal.

Being a victim of private criminal activity can constitute a cognizable "particular social group" for purposes of an application for asylum or withholding of removal. The circumstances under which an individual will belong to a cognizable "particular social group" are fact-specific. Determining that a victim of private criminal activity could not qualify for asylum or withholding of removal under any circumstance would be an impermissible agency interpretation of the Immigration and Nationality Act (INA).

A. Restricting persecution of members of particular social groups to only encompass persecution committed by government actors would be an impermissible agency interpretation of the INA because it would go against the plain meaning of the statute and would improperly differentiate one protected ground from the others.

In order to qualify as refugees, individuals must demonstrate that they are unable or willing to return to, or avail themselves to the protection of, their country of nationality because of past persecution or a well-founded fear of future persecution on account of their race, religion, nationality, membership in a particular social group, or political opinion. INA § 101(a)(42)(A).

The INA is silent as to who the persecutor must be; however, to interpret "persecution" to only encompass instances in which the government was the persecutor would go against the plain meaning of the word. *See generally Persecutor*, Cambridge Dictionary, 2018, (accessed 04/17/2018) *available at* https://dictionary.cambridge.org/us/dictionary/english/persecutor (defining "persecutor" as "someone who treats a particular group of people cruelly"); *see also Persecute*, Merriam-Webster, 2018, (accessed 04/17/2018) *available at* https://www.merriam-webster.com/dictionary/persecute (defining "persecute" as "to harass or punish in a manner designed to injure, grieve, or afflict" without mention of government actors). If a statute is ambiguous or silent as to an issue, an agency interpretation will not be upheld if the agency's interpretation is not a permissible construction of the statute. *See Chevron, U.S.A., Inc. v.* NRDC, Inc., 467 U.S. 837, 843 (1984). Interpreting past or future persecution to only apply to persecution conducted by government actors would go against the plain meaning of the statute, which states only that an individual must be seeking protection from persecution generally, not persecution committed specifically by the government. *See* INA § 101(a)(42)(A).

Within the statute, "membership in a particular social group" is one of the five protected grounds on which an individual may seek asylum. *Id.* Within INA § 101(a)(42)(A), "membership in a particular social group" is not separated from the other five protected grounds but rather is listed along with the other four protected grounds without any additional qualifiers. To impose new requirements on who must persecute and the circumstances in which that persecution must happen only for the "particular social group" protected ground would be counter to the plain meaning of the statute. Because nothing in the statute seeks to differentiate the persecutor in particular social group cases from the other four protected grounds, imposing a government persecutor requirement on members of particular social groups would not be a permissible

interpretation of the plain language of the statute, and therefore, could not be upheld. *See Chevron,* 467 U.S. at 843.

On multiple occasions, the Board of Immigration Appeals, the Supreme Court, and the Circuit Courts have recognized the rights of individuals to qualify for asylum based on private criminal acts as persecution on account of their race, religion, nationality, or political opinion. *See generally INS v. Elias-Zacarias*, 502 U.S. 478 (1992)(denying asylum where individual was persecuted by guerilla organization because he did not demonstrate the nexus to his political opinion, but not relating the denial to the fact that he was the victim of private criminal activity); *Azhgirevich v. Gonzales*, 185 Fed. Appx. 72 (2nd Cir. 2006)(recognizing persecution based on nationality and religion where there were only private attacks and threats); *Argueta v. INS*, 759 F.2d 1395 (9th Cir. 1985)(acknowledging past persecution based on political opinion where the individual was persecuted by a guerilla group); *Ivanov v. Holder*, 736 F.3d 5 (1st Cir. 2013)(finding that Respondent established eligibility for asylum where he was persecuted by members of Russian society based on his Pentecostal faith); *Matter of S-A-*, 22 I&N Dec. 1328 (BIA 2000)(recognizing persecution based on religion where the Respondent's father persecuted her for her liberal religious beliefs). If the Attorney General were to differentiate private criminal activity committed against members of particular social groups from private criminal activity committed against individuals falling into the other four protected grounds, this would be improper as it is not supported by the statutory text.

B. The Supreme Court has implicitly recognized that victims of private criminal activity can constitute members of cognizable particular social groups.

The Supreme Court in *INS v. Elias-Zacarias* and in *Gonzalez v. Thomas* have addressed issues on appeal for cases involving particular social group members without questioning

whether their being victims of private crime barred them from asylum relief. In *Gonzalez v. Thomas*, white South Africans were seeking asylum on account of their race and kinship to a prominent white South African. *See Gonzalez v. Thomas*, 547 U.S. 183 (2006). Although the case was primarily about appropriate remand, it bears noting that the Supreme Court found no issue with the 9th Circuit's premise that kinship ties that resulted in persecution by private actors could create a basis for asylum. *See id.* In *Elias-Zacarias* the Supreme Court agreed with the BIA that the applicant could not show persecution based on account of political opinion but what was under review was whether resisting recruitment was a political opinion *not* whether a non-government actor, in this case guerillas, could be the persecutor. *I.N.S. v. Elias-Zacarias*, 502 U.S. 478 (1992).

Both of these cases suggest that the Supreme Court does not question that applicants can have a viable statutory claim to asylum even when they are victims of private crime, regardless of whether they fall into particular social group or another protected ground.

C. Case law in all eleven circuits supports the determination that victims of private criminal activity can constitute members of a cognizable particular social group.

In addition to case law from the Supreme Court implicitly recognizing that victims of private criminal activity can qualify for asylum based on their membership in particular social groups, all eleven circuits have case law that either explicitly or implicitly acknowledges that victims of private criminal activity can be eligible for asylum if they were persecuted based on the five protected grounds.

The First Circuit has issued several decisions that expressly or implicitly acknowledge that individuals who are victims of private crime can constitute members of cognizable particular social groups. *See e.g. Kadri v. Mukasey*, 543 F.3d 16 (1st Cir. 2008)(remanding to the BIA to

elaborate the standard for economic persecution and noting that the applicant, a gay man who was harassed and prevented from working in his field by private actors because of his sexuality, may be able to establish that his economic hardship amounted to persecution); *Burbiene v. Holder*, 568 F.3d 251, 255 (1st Cir. 2009)(denying asylum but noting that a victim of non-governmental criminal activity can demonstrate persecution if it can be shown that either 1) the criminal activity is committed by people aligned with the government, or 2) the government is unwilling or unable to control it). The First Circuit has also addressed issues of private criminal activity constituting persecution in several cases relating to other protected grounds. *See Ivanov v. Holder*, 736 F.3d 5*; see also Morales-Morales v. Sessions*, 857 F.3d 130, 135 (1st Cir. 2017)(in a case of a respondent claiming political persecution, denying asylum but noting that "to be sure, a government's failure to act on credible reports of private abuse can constitute inaction").

The Second Circuit has recognized the "well-settled" practice of finding persecution to victims of private criminal activity based on membership in certain particular social groups. *See Kone v. Holder*, F.3d 141 (2nd Cir. 2010)(noting that "[i]t is well-settled that a woman such as Kone who has undergone genital mutilation may have been persecuted through this experience on account of her membership in a particular social group"). The Second Circuit has also recognized persecution when it was committed by private actors on account of an individual's nationality and religion. *See Azhgirevich v. Gonzales*, 185 Fed. Appx. 72 (finding persecution where a Christian woman of Russian nationality married a Muslim man, and her attackers were motivated by her nationality or religion).

The Third Circuit has previously found that additional agency requirements added to the particular social group category were an impermissible agency interpretation, and therefore not

entitled to *Chevron* deference. The Third Circuit has opined that, while an agency may change or adopt new policies, it "acts arbitrarily if it departs from its established precedents without announcing a principled reason for its decision." *Valdiviezo-Galdamez v. AG of the United States*, 663 F.3d 582, 608 (3d Cir. 2011), *quoting Johnson v. Ashcroft*, 286 F.3d 696, 700 (3d Cir. 2002)(declining to uphold the additional requirements of social visibility and particularity for the particular social group analysis because the agency did not provide a principled reason for the change). In addition, the Third Circuit has opined that, when an individual is persecuted by actors other than government agents, that individual "must also establish that it was conducted "by forces the government is unable or unwilling to control." *Kibinda v. Attorney General*, 477 F.3d 113, 119 (3d Cir. 2007).

The Fourth Circuit has concluded that "'persecution' under the INA encompasses harm inflicted by either a government or an entity that the government cannot or will not control." *Crespin-Valladares v. Holder*, 632 F.3d 117, 128 (4th Cir. 2011). The Fourth Circuit has concluded that victims of private crime constitute members of a particular social group on multiple occasions. *See e.g. Crespin Valladares*, 632 F.3d 117 (finding that family ties could constitute a particular social group, where the Respondent was targeted by MS-13 gang members based on his family ties); *Hernandez-Avalos v. Lynch*, 784 F.3d 944 (4th Cir. 2015)(stating that death threats from a gang were because of Respondent's relationship to her son constituted persecution and that the government of El Salvador was unwilling or unable to protect her); *Martinez v. Holder*, 740 F.3d 902 (4th Cir. 2014)(finding that former gang members could constitute a particular social group, where the fear of persecution stemmed from activities of the gang).

The Fifth Circuit has recognized that an individual may qualify for asylum when the persecution is committed by non-governmental actors that the government cannot control. In *Eduard v. Ashcroft*, 379 F.3d 182 (5th Cir. 2004), the Fifth Circuit found that a woman had established that she feared future persecution on account of her Christian religion where she stated in her application that Christians in Indonesia were persecuted by Muslims in the country, and that the Indonesian government could not control them and pardoned and released Muslims who persecuted Christians. *See Eduard*, 279 F.3d at 190.

The Sixth Circuit has stated that, when a non-governmental actor is responsible for persecution, the asylum applicant must present evidence that the government of the home country is unable or unwilling to control the persecuting actor. *See Khalili v. Holder*, 557 F.3d 429, 436 (6th Cir. 2009); *see also Gomez-Romero v. Holder*, 475 Fed. Appx. 621, 625 (6th Cir. 2012).

The Seventh Circuit has found that the applicant's government has been unable or unwilling to control the private actors that perpetrated the persecution on a number of different occasions. *See e.g. Gatimi v. Holder*, 578 F.3d 611, 616–17 (7th Cir. 2009)(finding the Kenyan government was helpless to defend applicant's from the Mungiki sect), and *Hor v. Gonzales*, 421 F.3d 497, 501–02 (7th Cir.2005)(finding the Algerian government helpless against radical Islamists when the military told petitioner it could not protect him from terrorists and the Algerian court advised him to "maintain a low profile"). However, the standard still remains high, and the Circuit Court has certainly found in some cases that the applicant's attempts to alert the government or trepidation to do so was not enough to definitively show that the government was unwilling or unable to provide them with protection. *See e.g. Chatta v. Mukasey*, 523 F.3d 748, 753 (7th Cir. 2008)(finding the Pakistani government was not helpless against religious

sect), and *Garcia v. Gonzales*, 500 F.3d 615, 618–19 (7th Cir. 2007)(finding the Colombian government was not helpless against guerilla group); *see also Vahora v. Holder*, 707 F. 3d 904 (7th Cir. 2013)(finding that one police officer's dismissal of the applicant's complaint was not enough to establish an unwillingness to control); *Rupey v. Mukasey*, 304 Fed.Appx 453 (7th Cir. 2008)(finding that the government could not be held responsible for not protecting the applicant when the applicant did not identify to the Court what information he provided to the police, whether that information was sufficient to capture his attackers, or whether the police told him they would not investigate his complaint).

The Eighth Circuit has opined that the applicant must show more than just a difficulty controlling private behavior but instead must show that the government condoned the private behavior or demonstrate that the government was helpless to protect the victim. *Menjivar v. Gonzales,* 416 F.3d 918, 921 (8th Cir. 2005). Furthermore, in order to make this determination, the applicant must present some evidence as to the identity and motives of one's persecutors, as the statute does not cover general civil unrest, crime or societal violence. *Garcia-Colindres v. Holder*, 700 F.3d 1153, 1157-1158 (8th Cir. 2012); *see also Guillen-Hernandez v. Holder*, 592 F.3d 883 (8th Cir. 2010)(finding that the death of a father and brother by a private individual was not indicative of ineffective government control where petitioners provided no evidence to support that contention); *Al Yatim v. Mukasey*, 531 F.3d 584, 588-589 (8th Cir. 2008)(finding that the general civil unrest in Israel-Palestine did not qualify as the Israeli government being unable or unwilling to protect Palestinians).

Within the Ninth Circuit, there is a long established practice of providing asylum grants to applicants who can show that the government was unable or unwilling to control the private actors committing persecution. Since soon after the passage of the Refugee Act in 1980, the

Ninth Circuit has seen and granted asylum cases involving organized non-governmental groups. *See e.g. Artega v. INS*, 836 F.2d 1227, 1231 (9th Cir. 1988); *Sangha v. I.N.S.*, 103 F.3d 1482, 1487 (9th Cir. 1997). Later opinions allowed for grants in situations of persecution by unorganized groups and individuals. *See e.g. Singh v. INS*, 94 F.3d 1353, 1357-60 (9th Cir. 1996). In the former cases, the Court looked to country condition reports to determine if the group was one that held enough control within the country to render the government ineffective; in the latter, the Court looked at how the police respond to petitioner's requests for protection. *See generally Bringas-Rodriguez v. Sessions*, 850 F.3d 1051, 1062-1063 (9th Cir. 2017). Furthermore, the applicant need only show that the police are unable to provide protection to their home city or area. *Mashiri v. Ashcroft,* 383 F.3d 1112, 1122 (9th Cir. 2004). In applying these rules, the Ninth Circuit has afforded protection to a number of marginalized communities, including, but not limited to: minority ethnic groups (*Andriasian v. INS,* 180 F3d 1033, 1042, 43 (9th Cir. 1999)(finding that the government of Azerbaijan either could not or would not control Azeris who sought to threaten and harm ethnic Armenians living in the country), religious groups (*Afriyie v. Holder*, 613 F.3d 924 (9th Cir. 2010)(finding that a Christian petitioner who was being violently attacked by Muslims in Ghana demonstrated the government's unwillingness to control the persecutors when he filed a written report with police and requested protection but was ignored), homosexuals (*Doe v. Holder*, 736 F.3d 871, 879 (9th Cir. 2013)(finding that the Russian police were unwilling to protect the applicant, evidenced by their rejection and dismissal of his complaints even though he could identify his attackers and there was substantial evidence that the assaults were motivated by anti-homosexual bias).

The Tenth Circuit has implicitly accepted that individuals who fear persecution primarily by society can constitute members of a particular social group for purposes of asylum. *See*

Razkane v. Holder, 562 F.3d 1283 (10th Cir. 2009)(remanding where the IJ's homosexual stereotyping resulted in a denial of asylum, where the individual had been attacked by private parties for his sexuality and feared persecution from society and the government).

The Eleventh Circuit relies primarily on BIA decisions to create its standard in this area. However, it also cites to cases in the Eighth and Ninth Circuits to say that the applicant need not report incidents to authorities if they can convincingly establish that doing so would have been futile or subjected them to further abuse. *See Lopez v. U.S. Att'y Gen.*, 504 F.3d 1341, 1345 (11th Cir. 2007).

D. Public policy supports continuing to recognize that victims of private criminal activity can constitute members a cognizable particular social group.

A review of the above cases shows definitively that the applicants seeking asylum from private actors that the government is unable or unwilling to control consists largely of marginalized, vulnerable groups that deserve protection. Furthermore, it is clear from a review of the case law that there are few "floodgate" concerns given the high burden of proof placed on applicants to show that their country of origin's government was truly unable or unwilling to control the private perpetrators of persecution and offer the victims meaningful protection. With that knowledge, it would be irresponsible for the standard under which particular social group cases are reviewed to become even more restrictive.

CONCLUSION

For the foregoing reasons, The George Washington University Law School Immigration Clinic respectfully requests that the Attorney General continue to find that victims of private criminal activity can constitute members of particular social groups for purposes of asylum and withholding of removal.

Respectfully submitted,

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PROOF OF SERVICE

On 04/17/2018 (date of mailing or delivery), I, Alberto Manuel Benitez (printed name of person signing below),

mailed or delivered a copy of this Amicus Curiae GW Law Immigration Clinic Brief (name of document being served)

and any attached pages to Attorney General (name of party served)

at the following address: United States Department of Justice, Office of the Attorney General Room 5114, 950 Pennsylvania Avenue, NW, Washington, D.C. 20530 (address of party served)

by: Federal Express (method of delivery, for example: overnight courier, hand-deliver, first-class mail)

Alberto Benitez (signature) 4/17/18 (date)