

**UNITED STATES DEPARTMENT OF JUSTICE  
OFFICE OF THE ATTORNEY GENERAL  
WASHINGTON, D.C.**

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<b>In the Matter of:</b>	§	
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<b>B -, A -</b>	§	<b>File No. [Redacted]</b>
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<b>Respondent</b>	§	
	§	

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***AMICI CURIAE* BRIEF OF GONZALEZ OLIVIERI, LLC, IMMIGRATION  
COUNSELING CENTER, INC., AND FIEL HOUSTON, INC.**

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## INTEREST OF AMICI CURIAE

*Amici curiae* Gonzalez Olivieri, LLC, immigration law firm, as well as the Immigration Counseling Center, Inc. and FIEL Houston, Inc., legal non-profit organizations, are all involved in assisting, counseling, representing immigrants and advocating for their rights and privileges under the laws of the United States.

In this matter, the Attorney General has issued an invitation for the submission of additional briefs from interested parties to assist him in assessing “[w]hether, 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.” *Matter of A-B-*, 27 I&N Dec. 227 (A.G. 2018).

The above-referenced firm and organizations provide assistance to immigrants in removal proceedings who flee their native lands for fear of being killed in their respective countries and seek asylum and withholding of removal as relief from removal.

Proposed *amici curiae*, hereby move the Attorney General for leave to submit the enclosed brief in response to the Attorney General’s invitation. The questions posed by the Attorney General in *Matter of A-B-*, *supra* are of great import to the undersigned *amici curiae* who represent and assist countless immigrants in seeking asylum and withholding of removal before the immigration courts and the Board of Immigration Appeals. The expertise and familiarity of the undersigned *amici curiae* with the situations of various immigrants will assist the Attorney General in resolving the question presented in this matter.

For the aforementioned reasons, proposed *amici* respectfully request leave of the Attorney General to file the accompanying brief.

## INTRODUCTION AND ISSUES PRESENTED

On March 7, 2018, the Attorney General issued an invitation to interested members of the public to file *amicus curiae* briefs addressing a single question in order to assist him in rendering a final decision in *Matter of A-B-*: 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.

*Amici curiae* respectfully submit this brief to assist the Attorney General in adjudicating this issue, which may dramatically affect the administration of the immigration laws of the United States and the nation’s humanitarian legal obligation to assist refugees.

## ARGUMENT

### **I. The scope and structure of asylum and withholding of removal under federal law**

An alien seeking asylum must show by a preponderance of the evidence she is a “refugee,” as defined in 8 U.S.C. § 1101(a)(42)(A), and merits a grant of asylum in the exercise of discretion. *Zhao v. Gonzales*, 404 F.3d 295, 306 (5th Cir. 2005). A “refugee” includes any person unable or unwilling to return to her native country because of persecution or a well-founded fear of future persecution on account of her race, religion, nationality, membership in a particular social group, or political opinion. *See Milat v. Holder*, 755 F.3d 354, 360 (5th Cir. 2014); *see also*, 8 C.F.R. § 208.13(b).

Stated differently, to qualify for asylum, an alien must meet the multi-pronged definition of a “refugee.” *See* 8 U.S.C. § 1101(a)(42)(A); *see also*, *Matter of Acosta*, 19 I&N Dec. 211, 236 (BIA 1985) (noting the Immigration and Nationality Act creates four elements that should be satisfied before an alien qualifies as a “refugee.”). In general, an alien must show: (1) harm rising to the level of persecution; (2) persecution or a well-founded fear of persecution; (3) at least one

or more of five protected grounds for asylum; and (4) a nexus exists between the feared persecution and a protected ground. *Efe v. Ashcroft*, 293 F.3d 899, 904 (5th Cir. 2002).

In the same way, an alien seeking withholding of removal must establish that, if returned to her country, her life or freedom would be threatened on account of her race, religion, nationality, membership in a particular social group, or political opinion. *See* 8 U.S.C. § 1231(b)(3). However, withholding of removal has a higher burden of proof than asylum. *Morgan v. Holder*, 634 F.3d 53 (1st Cir. 2011). An alien must show that it is “more likely than not” that her life or freedom “would be threatened” if deported to her country. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 439-41 (1987); *see also, INS v. Stevic*, 467 U.S. 407 (1984).

In cases where persecution occurs because of membership in a particular social group, the Board of Immigration Appeals (“BIA” or “the Board”) has outlined a standard to determine whether an asserted social group is cognizable under the Immigration and Nationality Act (“INA”).

For a particular social group to be cognizable, the group must be (1) composed of members who share a common and immutable characteristic, (2) socially distinct in the relevant society, and (3) also defined with particularity. *Matter of M-E-V-G-*, 26 I&N Dec. 227, 237 (BIA 2014).

Separately and distinctly from establishing a protected ground, in instances, where a private non-state actor commits the conduct that rises to the level for the “persecution,” for the harm to be considered “persecution” within the meaning of the INA, the asylum seeker must also prove that the government in their native country is unable or unwilling to protect them from private actor(s). *De Leon-Saj v. Holder*, 583 F. App’x 429, 429 (5th Cir. 2014).

Even where an alien seeking asylum is able to establish a protected ground for asylum, or alternatively, withholding of removal, as well as harm rising to the level of persecution, she must also establish that a nexus exists between the harm suffered and the protected ground. *Melgar de*

*Torres v. Reno*, 191 F.3d 307, 309 (2d Cir. 1999).

The standards for asylum and withholding of removal carry a heavy evidentiary burden. In general, the aforementioned framework has been utilized since the United States Congress adopted the Refugee Act in 1980. *See* Refugee Act, Pub. L. No. 96-212, 94 Stat. 102 (1980).

## **II. Whether “private criminal activity” can constitute a particular social group for asylum and withholding of removal purposes**

Respectfully, the question, as posed by the Attorney General, appears to conflate distinct and separate questions into a single inquiry, namely the requirement that persecution can occur.

As a preliminary matter, it is already an established rule in asylum jurisprudence that any asserted particular social group cannot be defined exclusively by the claimed persecution, but any proffered group must be “recognizable” as a discrete group by others in the society in question and must have well-defined, particularized boundaries. *See Matter of A-M-E- & J-G-U-*, 24 I&N Dec. 69, 74-76 (BIA 2007). Therefore, victims of private criminal activity standing alone as an asserted social group cannot constitute a particular social group for asylum and withholding of removal.

However, the case of *Matter of A-B-* is a case involving an alien seeking asylum, having suffered domestic violence. In the landmark decision, *Matter of A-R-C-G-*, 26 I&N Dec. 388 (BIA 2014), the Board held that domestic violence can be a basis for asylum and women fleeing such persecution may establish membership in a particular social group.

The BIA’s decision on this question is correct and *amicus curiae* would strongly urge the Attorney General to maintain this positive development in asylum jurisprudence. It is not the fact that women who are domestic violence victims suffer mere “private criminal activity” that serves as the basis of their particular social group. On the contrary, where a cognizable social group is established, the social group — as was the case in *Matter of A-R-C-G-*, *supra* — is based on several characteristics, including gender, nationality, and culturally-approved and legally-tolerated

subordinate status of women in marital and domestic relationship that make them unable to leave violent relationships. *Id.* at 394.

Violence against women — which occurs in many countries with high frequency and often with impunity — is the most pervasive and underreported human rights violation. Many nations have exceptionally high levels of femicide, domestic violence, sexual violence, and other gender-based forms of harm.

In many places, even where certain acts are ostensibly illegal, the law is not enforced and there are pervasive cultural attitudes, informed by societal expectations regarding gender and the role of women, that accept or tolerate a climate of permissiveness regarding domestic abuse.

Domestic violence cannot be reasonably characterized as mere “private criminal activity” without any social dimensions.<sup>1</sup> But, even not considering this point, the illegality of the harm that constitutes persecution in the country in question is not material or dispositive to an asylum claim.

The INA does not define “persecution” and therefore does not indicate with any specificity the kind of harm or degree of harm a person must suffer for asylum eligibility. *Zhao v. Gonzales*, 404 F.3d 295, 307 (5th Cir. 2005). While a single incident in some instances may not rise to the level of persecution, the cumulative effect of several incidents may constitute persecution. *Singh v. INS*, 94 F.3d 1353, 1358 (9th Cir. 1996).

The criminality of the conduct that is alleged to be persecution is irrelevant, if only because most conduct that would be agreed to constitute “persecution,” such as attempted murder, is illegal, at least ostensibly, in the majority of countries.

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<sup>1</sup> Jessica Marsden, *Domestic Violence Asylum After Matter of L-R-*, 123 YALE L.J. ONLINE 2512, 2519 (2014) (defining domestic violence as a “systematic and structural, a mechanism of patriarchal control. . . built upon male superiority and female inferiority, sex-stereotyped roles and expectations, and economic, social, and political dominance of men and dependency of women.”).

Many courts have found that domestic violence meets the definition of persecution. As is typical of domestic violence, a victim is likely to have suffered harm perpetuated over a long period of time through a series of acts, rather than a single incident.<sup>2</sup> Such violence often encompasses physical violence, such as rape, which a majority of courts have found to constitute persecution. *Balachova v. Mukasey*, 547 F.3d 374, 386-87 (2d Cir. 2008); *Lopez-Galarza v. INS*, 99 F.3d 954, 959 (9th Cir. 1996) (holding that rape and sexual assault constitute persecution).

This is important because the question of whether the nature and degree of harm constitutes persecution is separate and distinct from whether an alien can establish a cognizable social group and show, where the persecutor is a private actor or group, that the relevant government is unable or unwilling to offer protection. In order to obtain asylum or withholding of removal, an alien must show each of these requirements. *See* 8 U.S.C. § 1101(a)(42)(A); 8 U.S.C. § 1231(b)(3).

*Amicus curiae* wish to emphasize that because most acts of persecution are also criminal, to question whether an alien can obtain asylum or withholding of removal, based on such conduct, or eliminating that possibility would be contrary to asylum jurisprudence and deeply problematic.

Unavoidably, narrow interpretations of the protected grounds for asylum and withholding of removal unduly restrict humanitarian relief for those facing persecution. Such interpretations, without question, sacrifice the protective ethic at the root of asylum and is equally contrary to spirit and purpose of American asylum law.

Because the United States acceded to the United Nations Protocol Relating to the Status of Refugees, Congress amended American immigration law to reflect the Protocol's directives. *See*

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<sup>2</sup> *See generally* U.S. Department of Justice, Office on Violence Against Women: *About Domestic Violence*, available at <https://www.justice.gov/ovw/domestic-violence> (last visited April 12, 2018) (defining “domestic violence” as a “pattern of abusive behavior in any relationship that is used by one partner to gain or maintain power and control over another intimate partner.”); *see also*, Jessica Marsden, *Domestic Violence Asylum After Matter of L-R-*, 123 YALE L.J. ONLINE 2512, 2519 (2014) (defining domestic violence to encompass “physical, sexual, emotional, economic, or psychological actions or threats of actions” directed . . . to “intimidate, manipulate, humiliate, isolate, frighten, terrorize, coerce, threaten, blame, hurt, injure, or wound” a spouse or domestic partner.”).

Refugee Act, Pub. L. No. 96-212, 94 Stat. 102 (1980); *see also*, *INS v. Cardoza-Fonseca*, 480 U.S. 421, 436-37 (1987) (stating “[i]f one thing is clear from the legislative history of the new definition of ‘refugee,’ and indeed the entire 1980 Act, it is that one of Congress’ primary purposes was to bring United States refugee law into conformance with the [Protocol].”).

In enacting the Refugee Act of 1980, Congress sought to provide a law for the adjudicating claims with a reliable framework, but with sufficient flexibility to respond to evolving geopolitical situations, which includes new concepts of “failed states” and persecution by non-state actors such as transnational criminal gangs and terrorist organizations.

A contrary holding would render American asylum law needlessly anachronistic. Indeed, at the height of international concerns for refugees and asylum seekers following the Second World War, a critical concern at the time, due to ideologies such as Nazism, fascism, and totalitarianism, was the behavior of governments towards persons geographically within its authority. But to limit, or question the validity of asylum or withholding of removal claim where the State is not the cause of the persecution would limit the application of asylum laws to a geopolitically outdated situation.

Following this logic, Christians fleeing persecution in the Middle East may face significant hurdles seeking asylum or withholding of removal because groups such as ISIS are private actors engaged in what is technically “private criminal activity.” However, such an outcome is in contradiction to the purpose and intent of Congress in codifying the Refugee Act.

The same outcome would occur in the context of asylum and withholding of removal cases involving female genital mutilation (“FGM”). The majority of courts recognize FGM as a form of persecution. *See, e.g., Matter of Kasinga*, 21 I.&N. Dec. at 365 (BIA 1996); *Abay v. Ashcroft*, 368 F.3d 634, 638 (6th Cir. 2004). However, FGM is likely to be performed by private actors, even in places where the practice is ostensibly illegal, because it is a widespread practice rooted in social



custom and tradition. *Abay*, 368 F.3d at 638-39. Because “private criminal activity” is vague and broad, FGM claims would not be valid if asylum and withholding of removal claims are deemed to lack viability if the alien is a victim of a “private criminal activity.”

In sum, the undersigned *amicus curiae* urges the Attorney General to affirm the decision of the BIA to grant the respondent in *Matter of A-B-* asylum on the basis of her cognizable social group as a victim of domestic violence and the significant harm she endured, which rises to the level of persecution. Any modification or substantial change to asylum jurisprudence to limit the volume of asylum and withholding of removals applications by barring aliens who are the victims of “private criminal activity” from seeking such humanitarian relief would have unconscionable, disastrous consequences for countless aliens seeking refuge from death and other violent harm.

Furthermore, such a determination would be fundamentally contrary to the letter and spirit of the law of asylum and withholding of removal as outlined in the INA, as well as the decisions of the BIA and federal courts of appeals in implementing the provisions of the law.

Therefore, the Attorney General should not modify or alter the test for stating a valid claim for asylum or withholding of removal, particularly on the basis of whether the persecuting party is a private actor or group.

## **CONCLUSION**

*Amici curiae* prays the Honorable Attorney General finds that the BIA reached the correct conclusion in *Matter of A-B-* and that victims of persecution, even if metered out by private persons or groups, can state a claim for asylum and withholding of removal provided they establish — as is already required — that the government in their native country is unable or unwilling to provide any protection from the suffered or feared persecution.

Respectfully submitted,

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Date: April 27, 2018

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## **CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and complete copy of the foregoing Amicus Curiae Brief was duly served upon the U.S. Department of Justice by delivering or mailing same on April 27, 2018 to:

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