UNITED STATES DEPARTMENT OF JUSTICE
OFFICE OF THE ATTORNEY GENERAL

MATTER OF A-B-,

Respondent

Referred from:
United States Department of Justice
Executive Office for Immigration Review
Board of Immigration Appeals

BRIEF AMICI CURIAE OF SIXTEEN FORMER IMMIGRATION JUDGES AND MEMBERS OF THE BOARD OF IMMIGRATION APPEALS URGING VACATUR OF REFERRAL ORDER AND IN SUPPORT OF RESPONDENT

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INTRODUCTION

Amici Curiae are sixteen former immigration judges and members of the Board of Immigration Appeals ("Board"). Out of respect for the law to which they have dedicated their careers, Amici feel compelled to file this brief in support of Respondent. Amici are deeply concerned about the procedural violations in this case—in particular the Attorney General's certification of a question that was not ***properly*** considered by the Immigration Judge and was not considered ***at all*** by the Board. This complete disregard for established procedure is alarming. It plainly violates binding federal regulations governing the narrow circumstances under which Attorney General certification is permitted and it raises serious due process concerns.

Ultimately, it is within Congress's authority—not the Attorney General's—to define the boundaries of asylum. And Congress has already determined that a person can qualify for asylum based on persecution that independently might constitute private criminal activity.

Amici urge the Office of the Attorney General not to take any further action on a question that is not properly before it, and therefore urge that the referral order be vacated.

STATEMENT OF INTEREST OF AMICI CURIAE

Below is a list of the relevant experience of each of the sixteen former immigration judges and members of the Board submitting this brief. Some have served as trial attorneys in the Department of Justice's Office of Immigration Litigation. Some have worked in the General Counsel's Office for the Executive Office for Immigration Review. Others have assisted in the drafting of the federal regulations discussed in this brief. Each is intimately familiar with the immigration-court system and, critically, with its governing procedures. After devoting their

careers to that system, Amici have a distinct interest in ensuring that the system continues to operate in a fair, predictable manner consistent with decades-old federal regulations.

- **The Honorable Steven Abrams** served as an Immigration Judge at the New York, Varick Street, and Queens Wackenhut Immigration Courts in New York City. Prior to his appointment to the bench, he worked as a Special U.S. Attorney in the Eastern District of New York, and before that as District Counsel, Special Counsel for criminal litigation, and general attorney for the former Immigration and Naturalization Service ("INS").
- **The Honorable Sarah M. Burr** served as an Immigration Judge in New York starting in 1994 and was appointed as Assistant Chief Immigration Judge in charge of the New York, Fishkill, Ulster, Bedford Hills, and Varick Street immigration courts in 2006. She served in this capacity until January 2011, when she returned to the bench full time until her retirement in 2012. Prior to her appointment, she worked as a staff attorney for the Criminal Defense Division of the Legal Aid Society in its trial and appeals bureaus and also as the supervising attorney in its immigration unit.
- **The Honorable Jeffrey S. Chase** served as an Immigration Judge in New York City from 1995 to 2007 and was an attorney advisor and senior legal advisor at the Board from 2007 to 2017. He now works in private practice as an independent consultant on immigration law, and is of counsel to the law firm of DiRaimondo & Masi in New York City. He received the American Immigration Lawyers Association's ("AILA") annual pro bono award in 1994 and chaired AILA's Asylum Reform Task Force.
- **The Honorable George T. Chew** served as an Immigration Judge in New York from 1995 to 2017. Previously, he served as a trial attorney at the former INS.

- **The Honorable Bruce J. Einhorn** served as an Immigration Judge in Los Angeles from 1990 to 2007. He now serves as an Adjunct Professor of Law at Pepperdine University School of Law, and is a Visiting Professor of International, Immigration, and Refugee Law at the University of Oxford.
- **The Honorable Cecelia M. Espenoza** served as a Member of the Board from 2000 to 2003 and in the Executive Office for Immigration Review ("EOIR") Office of the General Counsel from 2003 to 2017 where she served as Senior Associate General Counsel, Privacy Officer, Records Officer, and Senior FOIA Counsel. She now works in private practice as an independent consultant on immigration law. Prior to her EOIR appointments, she was a law professor at St. Mary's University (1997–2000) and the University of Denver College of Law (1990–97), where she taught Immigration Law and Crimes and supervised students in the Immigration and Criminal Law Clinics. She has published several articles on immigration law. She received the Outstanding Service Award from the Colorado Chapter of AILA in 1997.
- **The Honorable Noel Ferris** served as an Immigration Judge in New York from 1994 to 2013 and as an attorney advisor to the Board from 2013 until her retirement in 2016. Previously, she served as a Special Assistant U.S. Attorney in the Southern District of New York from 1985 to 1990 and as Chief of the Immigration Unit from 1987 to 1990.
- **The Honorable John F. Gossart, Jr.** served as an Immigration Judge from 1982 until his retirement in 2013. He is the former president of the National Association of Immigration Judges. At the time of his retirement, he was the third most senior immigration judge in the United States. From 1975 to 1982, he served in various positions with the former INS, including as a general attorney, naturalization attorney, trial attorney, and deputy assistant

commissioner for naturalization. He is also the co-author of the National Immigration Court Practice Manual, which is used by all practitioners throughout the United States in immigration-court proceedings. From 1997 to 2016, Judge Gossart was an adjunct professor at the University of Baltimore School of Law teaching immigration law, and more recently was an adjunct professor at the University of Maryland School of Law, also teaching immigration law. He is also a past board member of the Immigration Law Section of the Federal Bar Association.

- **The Honorable Carol King** served as an Immigration Judge from 1995 to 2017 in San Francisco and was a temporary member of the Board for six months between 2010 and 2011. She previously worked in private practice for ten years, focusing on immigration law. She also taught immigration law for five years at Golden Gate University School of Law and is currently on the faculty of the Stanford University Law School Trial Advocacy Program. Judge King currently works as an advisor on removal proceedings.
- **The Honorable Margaret McManus** was appointed as an Immigration Judge in 1991 and retired from the bench this January after twenty-seven years. Before her time on the bench, she worked in several roles, including as a consultant to various nonprofit organizations on immigration matters (including Catholic Charities and Volunteers of Legal Services) and as a staff attorney for the Legal Aid Society, Immigration Unit, in New York.
- **The Honorable Lory D. Rosenberg** served on the Board from 1995 to 2002. She then served as Director of the Defending Immigrants Partnership of the National Legal Aid & Defender Association from 2002 until 2004. Prior to her appointment, she worked with the American Immigration Law Foundation from 1991 to 1995. She was also an adjunct Immigration Professor at American University Washington College of Law from 1997 to

2004. She is the founder of IDEAS Consulting and Coaching, LLC, a consulting service for immigration lawyers, and is the author of *Immigration Law and Crimes*. She currently works as Senior Advisor for the Immigrant Defenders Law Group.

- **The Honorable Susan Roy** started her legal career as a Staff Attorney at the Board, a position she received through the Attorney General Honors Program. She served as an Assistant Chief Counsel, National Security Attorney, and Senior Attorney for the DHS Office of Chief Counsel in Newark, NJ, and then became an Immigration Judge, also in Newark. She has been in private practice for nearly five years, and two years ago, opened her own immigration law firm. She is the New Jersey AILA Chapter Liaison to EOIR and is the Vice Chair of the Immigration Law Section of the New Jersey State Bar Association.
- **The Honorable Paul W. Schmidt** served as an Immigration Judge from 2003 to 2016 in Arlington, VA. He previously served as Chairman of the Board from 1995 to 2001, and as a Board Member from 2001 to 2003. He authored the landmark decision *Matter of Kasinga*, 21 I&N Dec. 357 (BIA 1995), extending asylum protection to victims of female genital mutilation. He served as Deputy General Counsel of the former INS from 1978 to 1987, serving as Acting General Counsel from 1979 to 1981 and 1986 to 1987. He was the managing partner of the Washington, DC office of Fragomen, DelRey & Bernsen from 1993 to 1995, and practiced business immigration law with the Washington, DC office of Jones, Day, Reavis and Pogue from 1987 to 1992, where he was a partner from 1990 to 1992. He was a founding member of the International Association of Refugee Law Judges (IARLJ), which he presently serves as Americas Vice President. He also consults, speaks, writes, and lectures at various forums throughout the country on immigration law topics.

- **The Honorable William Van Wyke** served as an Immigration Judge from 1995 until 2015 in New York City and York, PA.
- **The Honorable Gustavo D. Villageliu** served as a Member of the Board from July 1995 to April 2003. He then served as Senior Associate General Counsel for the EOIR until he retired in 2011. Before becoming a Board Member, Villageliu was an Immigration Judge in Miami, with both detained and non-detained dockets, as well as the Florida Northern Region Institutional Criminal Alien Hearing Docket from 1990 to 1995. Mr. Villageliu joined the Board as a staff attorney in January 1978, specializing in war criminal, investor, and criminal alien cases.
- **The Honorable Polly A. Webber** served as an Immigration Judge from 1995 to 2016 in San Francisco, with details to the Tacoma, Port Isabel (TX), Boise, Houston, Atlanta, Philadelphia, and Orlando immigration courts. Previously, she practiced immigration law from 1980 to 1995 in her own firm in San Jose, California. She served as National President of AILA from 1989 to 1990 and was a national AILA officer from 1985 to 1991. She also taught Immigration and Nationality Law for five years at Santa Clara University School of Law. She has spoken at seminars and has published extensively in the immigration law field.

BACKGROUND

In 2015, the Immigration Judge in this case denied Respondent's application for asylum, and Respondent appealed to the Board. *See Matter of A-B-*, at 1 (BIA Dec. 8, 2016). The Board sustained Respondent's appeal and found that (1) "the Immigration Judge's adverse credibility finding [is] clearly erroneous"; (2) Respondent "set forth a cognizable particular social group and that she is a member of that group"; (3) "the Immigration Judge's finding that [] [R]espondent was able to leave her ex-husband is clearly erroneous"; and (4) the Immigration Judge's "finding

that [] [R]espondent has not demonstrated that the government of El Salvador is unable or unwilling to protect her from her ex-husband" is incorrect. *Id.* at 2–4. Following procedural and substantive requirements, the Board did not issue a decision granting asylum at that time—instead, it remanded the case to the Immigration Judge to ensure that the required background checks were completed. *Id.* at 4; *see also* 8 C.F.R. § 1003.1(d)(6) ("The Board shall not issue a decision affirming or granting to an alien an immigration status, relief or protection from removal . . . if [i]dentity, law enforcement, or security investigations or examinations have not been completed during the proceedings[.]"); *id.* § 1003.1(d)(7) (permitting the Board to "return a case to the . . . immigration judge for such further action as may be appropriate, without entering a final decision on the merits of the case").

After the Board's remand, the Immigration Judge did not make the findings required, and did not issue a decision either granting or denying asylum, as the remand required. *Matter of A-B-*, Order of Certification, at 4 (I.J. Aug. 18, 2017). Instead, the Immigration Judge held the case without taking action. Following the Fourth Circuit's decision in *Velasquez v. Sessions*, 866 F.3d 188 (4th Cir. 2017), the Immigration Judge certified the case back to the Board for consideration of what the Immigration Judge believed to be a change in the law. *Id.* at 4–5 (holding that "the above-captioned case is certified and administratively returned to the Board of Immigration Appeals" and noting that "[a]n Immigration Judge may certify to the Board of Immigration Appeals . . . any case arising from a decision rendered in removal proceedings").

On March 7, 2018, the Attorney General referred A-B's case to himself for review under 8 C.F.R. § 1003.l(h)(l)(i). *See Matter of A-B-*, 27 I&N Dec. 227 (A.G. 2018). Pending his review, the Attorney General stayed any further proceedings. *Id.* In his order, the Attorney General:

> invite[d] the parties to these proceedings and interested amici to submit briefs on points relevant to the disposition of this case, including: 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.

Id.

On March 14, 2018, Respondent requested an extension of the briefing schedule. Two days later, the Department of Homeland Security ("DHS") moved for a suspension of the briefing schedule and requested that the Attorney General clarify the central briefing question. In the alternative, DHS sought an extension of the briefing schedule for the parties and amici curiae. DHS argued that "this matter does not appear to be in the best posture for the Attorney General's review" and that the question presented "has already been answered, at least in part, by the Board in its prior precedent." DHS Motion, at 2–3 (Mar. 16, 2018). On March 21, 2018, Respondent filed a response to DHS's motion, agreeing with the above arguments. On March 30, 2018, the Attorney General denied DHS's motion to suspend the briefing schedule and clarify the question presented, and granted, in part, both parties' request for an extension of the briefing deadline. *See Matter of A-B-*, 27 I&N Dec. 247 (A.G. 2018).

ARGUMENT

I. This case is not properly before the Attorney General.

Contrary to the Attorney General's assertion, his review of this case now does not "compl[y] with all applicable regulations." *Matter of A-B-*, 27 I&N Dec. 247, 249 (A.G. 2018). Rather, this case is rife with procedural violations and is consequently unripe for agency-head review. This brief addresses two specific violations that ran afoul of decades-old federal regulations governing the orderly resolution of asylum cases: (1) the Immigration Judge's purported certification of the case to the Board without rendering a decision on Respondent's

asylum claim, and (2) the Attorney General's subsequent referral of the matter to himself before the Board had an opportunity to issue a decision either granting or denying relief to Respondent.

A. Federal regulations require that the Immigration Judge issue a decision on asylum before certifying a case to the Board.

When this case was first before the Board two years ago, the Board sustained Respondent's claim for relief on the grounds that she had established persecution on account of a protected characteristic, but the Board did not issue a decision granting or denying asylum. Instead, having eliminated the legal obstacle to asylum relied on by the Immigration Judge, the Board remanded the case to the Immigration Judge for the narrow purpose of determining whether the results of the requisite background checks were consistent with an order granting asylum. *Matter of A-B-*, at 4 (BIA Dec. 8, 2016); *see also* 8 C.F.R. § 1003.1(d)(6) ("The Board shall not issue a decision affirming or granting to an alien an immigration status, relief or protection from removal . . . if [i]dentity, law enforcement, or security investigations or examinations have not been completed during the proceedings[.]"); *id.* at § 1003.1(d)(7) (permitting the Board to "return a case to the . . . immigration judge for such further action as may be appropriate, without entering a final decision on the merits of the case").

Following the Board's remand of the case, the Immigration Judge did not issue a decision granting or denying asylum despite "completed and clear" background checks on Respondent. *Matter of A-B-*, Order of Certification, at 1, 4 (I.J. Aug. 18, 2017). Instead, after an unexplained and unwarranted eight-month delay, the Immigration Judge purported to certify the case for further appellate review. Shortly after the Fourth Circuit decided *Velasquez*, in which that court held that a different immigrant did not show that she was persecuted by her mother-in-law "on account of" her membership in a particular social group, but rather due to "a personal dispute" over custody of her son, the Immigration Judge certified this case back to the Board—***but***

without a final decision—to consider what purportedly was an intervening change in governing Circuit law that eliminated the basis for Respondent's asylum claim. *Matter of A-B-*, Order of Certification, at 4 (I.J. Aug. 18, 2017). The Immigration Judge did so despite the fact that the Fourth Circuit explicitly said it was expressing no opinion on the continuing vitality of the particular social group identified as valid ground for asylum in *Matter of A-R-C-G-*, 26 I&N Dec. 388 (BIA 2014). *See Velasquez*, 866 F.3d at 195 n.5 ("The legal validity of the social group identified by *Velasquez* is not at issue in this case."); *see also* DHS Br., at 20 (acknowledging that *Velasquez* did not change the precedents at issue here).

This so-called certification was procedurally improper for multiple reasons. Section 1003.7 of the governing regulations permits an Immigration Judge to certify a case to the Board "***only after an initial decision*** has been made and before an appeal has been taken." 8 C.F.R. § 1003.7 (emphasis added). Here, because the Immigration Judge failed to make a decision and did not follow the limiting instructions on remand issued by the Board in December 2016, the regulations did not allow the Immigration Judge to certify the case to the Board for a second look at the legal underpinning for Respondent's asylum claim. 8 C.F.R. § 1240.12 ("The decision of the immigration judge ***shall*** include a finding as to inadmissibility or deportability.") (emphasis added). On remand of "the record for completion of background checks," the Immigration Judge was constrained to grant asylum in the form of "an order as provided by 8 C.F.R. § 1003.47(h)" if those checks were clear—which they were—unless "further proceedings" were necessary in the immigration court. *See Matter of A-B-*, at 4 (BIA Dec. 8, 2016); *see also id.* ("[W]e will remand the record for completion of background checks").

When "the Board 'qualifie[s] or limit[s] the remand for a specific purpose,' then the Immigration Judge [is] limited to that purpose." *Johnson v. Ashcroft*, 286 F.3d 696, 702 (3d Cir.

2002) (quoting *Matter of Patel*, 16 I&N Dec. 600 (BIA 1978)). Ignoring this longstanding rule, the Immigration Judge here took it upon himself to find a purported intervening change in law in the *Velasquez* decision. The Immigration Judge invoked 8 C.F.R. §§ 1003.1(c) and 1003.1(b)(3) as the bases for his certification ruling. *Matter of A-B-*, Order of Certification, at 4 (I.J. Aug. 18, 2017). But those regulations did not authorize the certification of the matter back to the Board in these circumstances. Section 1003.1(b)(3), the substantive provision cited by the Immigration Judge as authorizing his certification, addresses "[d]ecisions of Immigration Judges in removal proceedings, ***as provided in 8 C.F.R. § 1240***." 8 C.F.R. §§ 1003.1(b)(2), (3) (emphasis added); *see also* 8 C.F.R. § 1003.1(c) (providing authority for certification in situations listed in 8 C.F.R. § 1003.1(b)). Section 1240.12, in turn, requires that to be certified for Board review, an Immigration Judge's decision must meet specific requirements—it must, for example, "include a finding as to inadmissibility or deportability," "contain reasons for granting or denying the [applicant's] request," and "conclude[] with the order of the immigration judge . . . direct[ing] the respondent's removal from the United States, or the termination of the proceedings, or other such disposition of the case as may be appropriate." 8 C.F.R. § 1240.12. None of those predicate requirements features anywhere in the Immigration Judge's order on remand, which means there was no "decision" ripe for certification to the Board under the regulations. *See* 8 C.F.R. § 1240.12(a), (c).

The Immigration Judge's perception that the Fourth Circuit's decision in *Velasquez* may have changed the applicable law—a perception rejected by the *Velasquez* decision itself and DHS's brief in this case—does not allow the Immigration Judge to circumvent procedure. Indeed, the regulations contemplate a mechanism to address an intervening change in law during remand—and that mechanism manifestly does not include certification of incomplete

proceedings to the Board. Section 1003.47(h) specifies the actions that an Immigration Judge can take after remand by the Board. The regulation states that "[i]n any case remanded pursuant to 8 C.F.R. [§] 1003.1(d)(6), the immigration judge shall consider the results of the identity, law enforcement, or security investigations or examinations subject to the provisions of this section. . . . The immigration judge shall then enter an order granting or denying the immigration relief sought." 8 C.F.R. § 1003.47(h). Should there be "new information" presented to the immigration court—such as a change in controlling Circuit law—the Immigration Judge may "hold a further hearing if necessary to consider any legal or factual issues." *Id.* But the Immigration Judge may not certify the matter back to the Board without a decision granting or denying the petitioner's claim. Thus, the certification was procedurally flawed. Simply put, there was no avenue for the Immigration Judge to certify the case back to the Board without first entering an order granting or denying asylum relief.

B. The Attorney General may only review a Board decision, but there was none.

Even if the matter had properly been certified by the Immigration Judge to the Board, the Attorney General can only direct the Board to refer cases to him "for review of its ***decision***." 8 C.F.R. § 1003.1(h) (emphasis added). Here, the Board has not yet issued a "decision" granting or denying relief because the Immigration Judge did not make the necessary underlying findings on remand; therefore, the "case" cannot yet be referred to the Attorney General for review of the Board's "decision." The December 2016 Board opinion is not a "decision" because, in the absence of completed background checks, it made no finding granting Respondent relief. *See Matter of A-B-*, at 4 (BIA Dec. 8, 2016).

Most critically, the Board has not ever ruled on the question that the Immigration Judge purportedly certified to it, and which the Attorney General is now considering. That question was whether *Matter of A-R-C-G-* was still "legally valid within this jurisdiction in a case

involving a purely intra-familial dispute" after the Fourth Circuit's opinion in *Velasquez*. *See Matter of A-B-*, Order of Certification, at 3–4 (I.J. Aug. 18, 2017). In other words, the Board was asked to consider whether *Velasquez* constitutes an intervening change in controlling law and requires a rejection of Respondent's asylum claim. But the Board has not decided that question; in fact, no party has even briefed that question before the Board. Thus, there is no decision to review at all on that issue. Under the plain language of the regulations, there is nothing that can appropriately be certified here for agency-head review. *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994) (interpretation of federal regulations must be "compelled by the regulation's plain language" (citing *Gardebring v. Jenkins,* 485 U.S. 415, 430 (1988)).

II. Bypassing the Board nullifies critical procedural safeguards.

The Attorney General's certification in this case—without a decision by the Board—raises serious due process concerns. Depriving the Board of the opportunity to consider the certified question in the first instance erodes crucial protections designed to ensure that new rules are not issued without the opportunity for briefing by the parties and consideration by neutral decisionmakers.

A. The Board, a neutral and independent body, with deep knowledge of its own precedent, should consider the effect of new case law on that precedent in the first instance.

The Board is composed of neutral decisionmakers with particular expertise in immigration law. These decisionmakers exercise independent judgment and discretion. To be sure, as the "appellate body charged with the review of those administrative adjudications under the [Immigration and Nationality] Act that the Attorney General may by regulation assign to it," 8 C.F.R. § 1003.1(d)(1), the Attorney General has authority over the Board in certain circumstances. But federal regulations specifically direct the Board to exercise "independent judgment and discretion in considering and determining the cases" that come before it. 8 C.F.R.

§ 1003.1(d)(1)(ii). The Attorney General should not attempt to influence Board positions on matters of immigration law, particularly before the Board even announces them. *See United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 266–67 (1954). Federal regulations "delegate to the Board discretionary authority as broad as the statute confers on the Attorney General" in "unequivocal terms." *Id.* "And if the word 'discretion' means anything in a statutory or administrative grant of power, it means that the recipient must exercise his authority according to his own understanding and conscience. This applies with equal force to the Board and the Attorney General." *Id.* "In short, as long as the regulations remain operative, the Attorney General denies himself the right to sidestep the Board or dictate its decision in any manner." *Id.* The Board is thus the appropriate body to consider the effect of purportedly new and pertinent Circuit law on Board precedent before any certification to the Attorney General.

B. Bypassing the Board raises serious due process concerns.

A pre-certification decision by the Board ensures that the parties have an opportunity to brief important issues—and that the Board has an opportunity to decide these issues—before the announcement of a new rule. The Board's role in this ordered process is critical. Even those who advocate for an expansion of the Attorney General's power to certify Board decisions take it as a given that the Board will play a key role in the Attorney General's review. *See, e.g.*, Alberto Gonzales and Patrick Glen, *Advancing Executive Branch Immigration Policy Through the Attorney General's Review Authority*, 101 Iowa L. Rev. 841, 848–58 (2016) (describing the history and mechanics of the referral authority). Indeed, the Attorney General's power to certify decisions is viewed as comporting with due process precisely ***because*** the Board plays a key intermediate role in the development of immigration law. *See, e.g.*, *id.* at 906 ("Hearings before the immigration judge, ***appellate review by the Board***, and further consideration by the Attorney General on the record, as developed below, clearly meet this minimal threshold of due

process." (emphasis added)); *id.* at 907 (asserting that there is "little or no risk of . . . a legally or factually incorrect decision" because "[t]he decision by the Attorney General is made on the totality of the administrative record and ***with the benefit of prior decisions by the Board*** and immigration judge, which protects against an erroneous deprivation" (emphasis added)).

Ensuring that legal issues have been raised, addressed, and fully resolved in proceedings below—such that a complete record is presented for review with the benefit of expertise from independent adjudicators close to the facts—has long been a feature of ordered appellate review that avoids the evil of advisory opinions. *See, e.g.*, *INS v. Cardozo-Fonseca*, 480 U.S. 421, 448 (1987) (noting that certain terms in the asylum statute, like "well-founded fear," have natural ambiguity and "can only be given concrete meaning through a process of case-by-case adjudication"); *Hormel v. Helvering*, 312 U.S. 552, 556 (1940) (describing settled principle that "[o]rdinarily an appellate court does not give consideration to issues not raised below" because it is "essential . . . that litigants [] not be surprised on appeal by final decision there of issues upon which they have had no opportunity to introduce evidence"); *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 325 (1936) (courts cannot issue "an advisory decree upon a hypothetical state of facts"). There is no reason not to apply that principle equally to the Attorney General's referral authority.

Bypassing the Board before it renders a decision removes these critical procedural safeguards. It is irrelevant that immigration law is at issue here, because immigrants present in the United States are entitled to due process of law, "whether their presence is lawful, unlawful, temporary, or permanent." *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001); *see also Jean-Louis v. Att'y Gen. of U.S.*, 582 F.3d 462, 470 n.11 (3d Cir. 2009) (noting that the "unusual circumstances of [a case's] referral to, and adjudication by, the Attorney General," where "the Attorney General

certified the case to himself *sua sponte*," resulted in a "lack of transparency" that was cause for serious concern). Changes in the law—in particular to principles on which individuals have relied, including those with pending asylum claims raising similar issues—demand procedural due process. *See Sessions v. Dimaya*, 138 S. Ct. 1204, 1223–24 (2018) (Gorsuch, J., concurring) (condemning uncertainties in the law that invite "the exercise of arbitrary power"—"leaving the people in the dark about what the law demands and allowing prosecutors and courts to make it up"). At a minimum, immigrants who have risked their lives to come to this country, with the understanding that they would qualify for asylum based on the law as applied to the facts of their case, deserve procedural safeguards to protect against arbitrary changes in the rules governing eligibility. *See id.* at 1227 ("Without an assurance that the laws supply fair notice, so much else of the Constitution risks becoming only a 'parchment barrie[r]' against arbitrary power." (quoting The Federalist No. 48, p. 308 (C. Rossiter ed. 1961) (J. Madison)). If there is to be a change in the law, it can come only after the question has been briefed by interested parties and decided by independent Board adjudicators with specialized expertise in immigration law.

III. The Attorney General cannot override Congress's judgment under the guise of a procedural mechanism.

Referral is also improper here because the Attorney General's formulation of the question purportedly underpinning this case usurps the authority of Congress to define a "refugee" for purposes of the Immigration and Nationality Act ("INA"). Congress included a robust definition of "refugee" in the INA, and expressly did ***not*** limit such definition to victims of government or government-sponsored acts. It would be improper for the executive branch to adopt a more circumscribed definition than Congress has provided.

Under 8 U.S.C. § 1101(a)(42), a "refugee" is defined as "any person . . . 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." The statute includes no additional limitations. Critically, there is no mention of ***who*** the persecutor must be or even whether his actions must be ***lawful*** in the victim's country of origin. The relevant inquiry, as framed by Congress, is only whether the petitioner fears persecution based on membership in a "particular social group." The fact that the acts constituting persecution might independently be criminal under the laws of the host country is irrelevant to the analysis. "[T]here is no indication that Congress intended the phrase 'membership in a particular social group' to have any particular meaning," and "persecution on account of membership in a particular social group" means only "persecution that is directed toward an individual who is a member of a group of persons all of whom share a common, immutable characteristic." *Aldana-Ramos v. Holder*, 757 F.3d 9, 16 (1st Cir. 2014) (citing various Board decisions).

Unsurprisingly then, federal courts of appeals have rejected any notion that a victim of ***private*** criminal activity is *per se* ineligible for asylum. *See Bringas-Rodriguez v. Sessions*, 850 F.3d 1051, 1073 (9th Cir. 2017) (holding that "beatings and rapes" perpetrated by an "uncle, cousins, and neighbor" of a homosexual asylum-seeker constitute persecution on account of a membership in a particular social group notwithstanding Mexico's "enactment of remedial laws" prohibiting discriminatory acts against homosexuals by private parties); *see also Garcia v. Att'y Gen. of U.S.*, 665 F.3d 496, 499, 503–04 (3d Cir. 2011) (holding that threat of murder from gang members for having testified against one of them could form valid basis for fear of persecution on account of membership in a particular social group); *Crespin-Valladares v. Holder*, 632 F.3d 117, 126–27 (4th Cir. 2011) (holding that threat of violence from gang members for acting as cooperating witness "gave rise to a reasonable fear of future persecution"); *Hor v. Gonzales*, 421

F.3d 497, 501–02 (7th Cir. 2005) (holding that threat of violence from non-governmental militaristic group could constitute persecution); *Abay v. Ashcroft*, 368 F.3d 634, 638 (6th Cir. 2004) (finding "[f]orced female genital mutilation" by a woman's "relatives or future husband or her husband's relatives" constitutes "persecution on account of membership in a particular social group" even though there were "laws in place" in the host country "to prohibit harmful traditional practices" because those laws "[we]re not, as a practical matter, enforced").

Interpreting Congressional intent, federal courts have also recognized that membership in a particular social group can be based on "a shared past experience," *Valdiviezo–Galdamez v. Att'y Gen. of U.S.*, 663 F.3d 582, 595–96 (3d Cir. 2011), and that "shared past experience" can include being a victim of a similar crime. For example, in *Lukwago v. Ashcroft*, the Third Circuit held that "the past experience of abduction, torture, and escape with other former child soldiers" was sufficient to constitute a "'particular social group' for purposes of asylum." 329 F.3d 157, 178–79 (3d Cir. 2003). Likewise, in *Bi Xia Qu v. Holder*, the Sixth Circuit found that being a victim of kidnapping, attempted rape, and threats of forced marriage qualified the petitioner as a member of a particular social group (defined as "women in China who have been subjected to forced marriage and involuntary servitude"), without regard to whether such actions were lawful in her country of origin. 618 F.3d 602, 607 (6th Cir. 2010).

As these decisions make clear, diverse victims of criminal activity by private actors have been deemed members of a "particular social group" entitled to asylum within the meaning of the INA. Courts have appropriately recognized that categorical rules or definitions as to who might qualify as a member of a "particular social group" are neither appropriate nor contemplated by the statute. Such determinations should be made on a case-by-case basis, precisely as the Board recommended in both *Matter of A-R-C-G-* and here in *Matter of A-B-*.

See, e.g., *Rivera-Barrientos v. Holder*, 666 F.3d 641, 648 (10th Cir. 2012) (stating that the "particular social group analysis is necessarily contextual, as the BIA gives the statutory term concrete meaning through a process of case-by-case adjudication" (internal alterations omitted)); *see also Cardoza-Fonseca*, 480 U.S. at 448. Therefore, while the question framed by the Attorney General does not, on its face, address asylum eligibility, it is settled in Article III courts that being a victim of private criminal activity can form the basis for membership in a particular social group in appropriate circumstances where, as here, the immutable characteristics of such a group can be identified with the requisite distinctiveness.

IV. "Persecution" can be carried out or threatened by private actors that the government cannot or will not control.

Although it is well-established that private criminal activity can form the basis of a persecution claim, a victim of private criminal activity does not automatically qualify for asylum. Rather, asylum decisions are highly fact-dependent, and the factfinder must still engage in an intensive analysis to determine whether the acts constitute persecution.

Furthermore, in all asylum cases, there is an entirely distinct legal requirement that persecution by private actors be of a nature that the government is unable or unwilling to control. *See Paloka v. Holder*, 762 F.3d 191, 195 (2d Cir. 2014) ("Direct governmental action is not required for a claim of persecution. Private acts can constitute persecution if the government is unable or unwilling to control it."); *Aldana-Ramos*, 757 F.3d at 17; *Madrigal v. Holder*, 716 F.3d 499, 503 (9th Cir. 2013) (persecution can be committed by "forces that the government was unable or unwilling to control"); *Gutierrez-Vidal v. Holder*, 709 F.3d 728, 732 (8th Cir. 2013) ("Whether a government is unable or unwilling to control private actors is a question of fact." (internal citations omitted)).

With regard to the alleged difficulty of proving a nexus where private criminal acts are involved, these backstop requirements—consistently imposed by the Board—demonstrate why such a concern is wholly illusory. In this case, there was no plausible argument that Respondent's ex-husband was a generally lawless individual who indiscriminately targeted members of the Salvadoran population. To the contrary, the reason Respondent's ex-husband—and his brother—persecuted her wherever she tried to relocate was ***because*** they had children in common through a prior domestic relationship. *See, e.g. Matter of A-B-*, at 4 (BIA Dec. 8, 2016) (finding that "ex-husband's brother, a local police officer, threatened Respondent in December 2013, referred to her as his sister-in-law, despite the fact that she had already divorced his brother, commented that she would always be in a relationship with her ex-husband because they have children in common, and warned her to be careful as she would never know where the bullets would land"). Thus, this case provides no basis to speculate whether other private criminal actors might target asylum claimants for reasons having nothing to do with the "particular social group" they are claiming membership in. The case-by-case analysis endorsed, and underscored, by the Board in *Matter of A-B-* provides an adequate tool to root out meritless claims where such a nexus is genuinely lacking.

There is, therefore, little danger that frivolous asylum claims will multiply based on private criminal activity in notoriously lawless countries because courts will still assess whether the circumstances of a particular case indicate that the government (i) was alerted to a particular strain of criminal activity, and (ii) did nothing to address it because of incompetence or social mores having to do with the victim's group membership. That backstop requirement serves as an important check on any unwarranted expansion of the "particular social group" analysis, and counsels against using this case as a vehicle to upend years of settled immigration law.

CONCLUSION

The Attorney General should vacate his referral order or, in the alternative, instruct the Immigration Judge to issue an order granting or denying asylum, thus allowing any potential appeal to the Board and certification to the Attorney General to proceed in the manner required by law.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing Brief Amici Curiae complies with the 9,000 word count laid out in *Matter of A-B-*, 27 I&N Dec. 247 (A.G. 2018). Exclusive of cover, captions, table of contents, table of authorities, and signature block, it contains 6,486 words, according to the word count feature of Microsoft Word, which was used to generate this brief.

Date: April 27, 2018

/s/ Megan B. Kiernan
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PROOF OF SERVICE

I, Megan B. Kiernan, hereby certify that I served the required copies of the **Brief Amici Curiae of Sixteen Former Immigration Judges and Members of the Board of Immigration Appeals Urging Vacatur of Referral Order and in Support of Respondent** and any attachments by U.S. first-class mail on April 27, 2018 to the following:

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And by e-mail to AGCertification@usdoj.gov.

Date: April 27, 2018

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