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

In the Matter of	
A-B-,	Redacted
Respondent.	In Removal Proceedings

REQUEST TO APPEAR AS AMICUS CURIAE AND SUPPLEMENTAL BRIEF OF THE IMMIGRATION REFORM LAW INSTITUTE

TABLE OF CONTENTS

INTEREST OF AMICUS CURIAE

The Immigration Reform Law Institute ("IRLI") is a not for profit 501(c)(3) public interest law firm incorporated in the District of Columbia. IRLI is dedicated to litigating immigration-related cases on behalf of United States citizens, as well as organizations and communities seeking to control illegal immigration and reduce lawful immigration to sustainable levels. IRLI has litigated or filed *amicus curiae* briefs in many immigration-related cases before federal courts and administrative bodies, including *Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080 (2017); *United States v. Texas*, 136 S. Ct. 2271 (2016); *Arizona Dream Act Coal. v. Brewer*, 818 F.3d 101 (9th Cir. 2016); *Washington All. of Tech. Workers v. U.S. Dep't of Homeland Sec.*, 74 F. Supp. 3d 247 (D.D.C. 2014); *Save Jobs USA v. U.S. Dep't of Homeland Sec.*, No. 16-5287 (D.C. Cir., filed Sept. 28, 2016); *Matter of Silva-Trevino*, 26 I. & N. Dec. 826 (B.I.A. 2016); and *Matter of C-T-L-*, 25 I. & N. Dec. 341 (B.I.A. 2010).

ISSUES PRESENTED

The Attorney General has asked for supplemental briefing on the following issue:

- Whether, and under what circumstances, being a victim of private criminal activity constitutes a cognizable "particular social group" for the purposes of an application for asylum or withholding of removal.

SUMMARY OF THE FACTS

Respondent is a citizen of El Salvador. She provided testimony and written statements, which did not coincide completely, about domestic abuse committed by her husband. She stated that her husband mentally and physically abused her over a number of years; that, in 2008, she separated and moved away from her husband; and that, in 2013, she divorced him. After the divorce, respondent claimed that he continued to threaten and abuse her, and that, in January

2014, he raped her. She also claimed that her ex-husband's brother, a local police officer, made threatening statements to her, and commented that she would always be in a relationship with her ex-husband because of the children they had together. She claimed that another friend of her ex-husband told her that if her ex-husband killed her, he would help dispose of her body. While the Immigration Judge rejected her asylum claim, the Board of Immigration Appeals (Board) sustained her appeal, finding that her proposed particular social group, "El Salvadoran women who are unable to leave their domestic relationships where they have children in common," fulfilled the asylum requirements of 8 U.S.C. § 1158(b)(1).

SUMMARY OF THE ARGUMENT

Being a victim of private criminal activity, by itself, does not place one in a particular social group for asylum purposes. Crime victims are not a distinctive social group. Even assuming, *arguendo*, that such victims could comprise a particular social group, they could not prove that the harm they suffered was on account of their membership in that group and that the government was unwilling or unable to protect them.

When the proper analysis is applied to the Board's prior decision in *Matter of A-R-C-G-*, 26 I. & N. Dec. 388, 395 (B.I.A. 2012), it becomes clear that that case was wrongly decided, and that domestic violence-based asylum claims do not fulfill the statutory requirements.

ARGUMENT

Under 8 U.S.C. § 1158(b)(1)(A), an alien making an asylum claim must fulfill the definition of "refugee" by establishing "that race, religion, nationality, membership in a particular social group, or political opinion was or will be at least one central reason for persecuting the applicant." In *Matter of Acosta*, the Board articulated the standard for a particular social group by finding that a particular social group must share a common, immutable

characteristic that its members cannot or should not be required to change. 19 I. & N. Dec. 211, 233 (B.I.A. 1985). In recent years, the BIA has clarified the *Acosta* definition, finding that the particular social group must be: (1) composed of members who share a common immutable characteristic, (2) socially distinct within the society in question and (3) defined with particularity. *Matter of M-E-V-G-*, 26 I. & N. Dec. 227, 237 (B.I.A. 2014) (determining that "Honduran youth who have been actively recruited by gangs but who have refused to join because they oppose gangs" is not a particular social group for an asylum claim). An adjudicator may use various objective and subjective sources to determine if an applicant is eligible for asylum based upon the proposed social group. *Matter of A-R-C-G-*, 26 I. & N. Dec. 388, 395 (B.I.A. 2012).

Establishing that a particular social group exists is only the first step in granting asylum under the particular social group category. The asylum applicant must also prove harm that rises to the level of persecution;[1] that a nexus exists between the particular social group and persecution; and that the government was unwilling or unable to protect the applicant from the persecution. If the applicant is found to fulfill the definition of a refugee, the applicant may still be denied asylum if future persecution can be avoided "by relocating to another part of the applicant's country of nationality . . . [if] under the circumstances, it would be reasonable to expect the applicant to do so." 8 C.F.R. § 1208.13(b)(1)(i)(B).

I. "Victims Of Private Criminal Activity" Is Not A Particular Social Group.

A. "Victims Of Private Criminal Activity" Is Defined Based Solely On The Harm Suffered.

Victims of private criminal activity do not comprise a particular social group under the *Acosta* definition because the shared characteristic defining the group cannot be merely that its

[1] *Amicus* will not be addressing this element.

members suffered a common harm. *See Matter of S-E-G-*, 24 I. & N. Dec. 579, 584 (B.I.A. 2008) (holding that "Salvadoran youth who refuse recruitment into the MS-13 criminal gang or their family members" did not constitute a particular social group); *In Re C-A-*, 23 I. & N. Dec. 951, 960 (B.I.A. 2006) (holding the group "former noncriminal drug informants working against the Cali drug cartel" did not constitute a particular social group). To define a particular social group solely by the harm suffered is circular, *Moreno v. Lynch*, 826 Fed. App'x 862, 864 (4th Cir. 2015), and would not articulate a workable standard. *Cece v. Holder*, 733 F.3d 662, 681 (7th Cir. 2013) (Easterbrook, J., dissenting) ("The BIA has held that a 'social group' cannot be identified by asking who was mistreated. For if the persecutors' acts define social groups, then again § 1101(a)(42)(A) effectively offers asylum to all mistreated persons, whether or not race, religion, politics, or some extrinsically defined characteristics (such as tribal membership) account for the persecution.") (internal citation omitted).

The problem persists even if the group is further defined by other common characteristics. *Matter of R-A-*, 22 I. & N. Dec. 906, 919 (B.I.A. 2001) ("But the social group concept would virtually swallow the entire refugee definition if common characteristics, coupled with a meaningful level of harm, were all that need be shown."). Thus, a group comprised of victims of private criminal activity who were also women, or married women, or El Salvadoran women who are unable to leave their domestic relationships where they have children in common, is still defined crucially by the harm suffered. A common harm suffered does not qualify as an immutable characteristic and cannot form the basis for an asylum claim.

B. "Victims Of Private Criminal Activity" Is Not Particular.

In addition to having an immutable characteristic, the proposed social group must also be defined with particularity. That is, the group cannot be "too amorphous . . . [and must] create a

benchmark for determining group membership." *Matter of M-E-V-G-*, 26 I. & N. Dec. at 239 (citing *Matter of A-M-E- & J-G-U-*, 24 I. & N. Dec. 69, 76 (B.I.A. 2007)). A proposed social group must not be "overbroad, diffused, or subjective." *Id.* (citing *Ochoa v. Gonzales*, 406 F.3d 1166, 1170-71 (9th Cir. 2005)).

"Victims of private criminal activity" is obviously overbroad. *See Kante v. Holder*, 634 F.3d 321, 327 (6th Cir. 2011) (holding that the social group "women subject to rape as a method of government control" was too "generalized and far-reaching [since] . . . it has not previously served as a definable limitation."). Private criminal activity includes every type of crime from violent felonies to financial persecution, and victimizes a wide variety of people. As the Ninth Circuit has explained:

> Individuals falling within the parameters of this sweeping demographic division naturally manifest a plethora of different lifestyles, carrying interests, diverse cultures, and contrary political leanings and it is so broad and encompasses so many variables that to recognize any person who might conceivably establish membership would render the definition of refugee meaningless.

Sanchez-Trujillo v. INS, 801 F.2d 1571, 1576 (9th Cir. 1986) (holding that "young, working class males who have not served in the military of El Salvador" is not a particular social group) (internal quotation marks, brackets, and ellipses omitted).

C. "Victims Of Private Criminal Activity" Is Not Socially Distinct.

The final consideration in whether the proposed group is a particular social group is social visibility. It is not the persecutor's perception of the victim that determines whether a particular social group exists; rather, it is society's viewpoint of the group that matters. The persecutor's perception carries analytical weight when it comes to establishing the nexus requirement, but not in establishing whether the group is socially distinct. The society in question must "perceive" the proposed group as distinct from the greater society because of the

shared characteristic being asserted by the proposed social group. *Matter of S-E-G-*, 24 I. & N. Dec. at 586. Evidence that others have suffered the same or similar harm is not enough to establish that the group is "perceived as a cohesive group by society." *Cano v. Lynch*, 809 F.3d 1056, 1059 (9th Cir. 2016) (determining that "escapee Mexican child laborers" are not socially distinct) (citation omitted).

Because the proposed group "victims of private criminal behavior" is so broad, there is no country report that could possibly support its social distinctiveness. Private criminal activity occurs in all countries. Regardless of the levels of crime, there is no indication that victims of private criminal activity are perceived any differently than other citizens in any country, including El Salvador. As the Department of State's Bureau of Diplomatic Security stated: "[c]rimes of every type routinely occur, and crime is unpredictable, gang-centric, and characterized by violence directed against both known victims and targets of opportunity. According to a Central American University (UCA) poll from January 6, 2016, 24.5% of Salvadorans were victims of crime in 2015." *El Salvador 2017 Crime & Safety Report*, Department of State's Bureau of Diplomatic Security (Feb. 22, 2018), https://www.osac.gov/pages/ContentReportDetails.aspx?cid=21308; *see also El Salvador 2016 Human Rights Report*, Department of State 1 (April 12, 2017) (reporting "widespread extortion and other crimes in poor communities throughout the country.").

Instead of these numbers weighing in favor of granting asylum to victims of private criminal activity in El Salvador, they show that the private criminal activity that occurs in El Salvador is not treatment meted out to a perceived social group but a pervasive problem that afflicts all ethnicities, genders, religions, and so on. Thus, there is no social distinction between those who have been a victim of private criminal activity and those who have not. Rampant

private criminal activity or generalized civil unrest do not show that society views victims as a group distinct from society. *See Konan v. Att'y Gen. of the U.S.*, 432 F.3d 497, 506 (3d. Cir. 2005) ("[G]eneral conditions of civil unrest or chronic violence and lawlessness do not support asylum.").

II. Victims of Private Criminal Activity Cannot Prove That The Harm They Suffered Was "On Account Of" Membership In The Proposed Particular Social Group.

After establishing a particular social group and the applicant's membership in the group, an applicant for asylum must then link the particular social group to the harm suffered by demonstrating that the harm was perpetrated "on account of" that membership. 8 U.S.C. § 1101(a)(42)(A). The REAL ID Act clarified this nexus requirement by providing that the protected ground must be "at least one central reason" for the harm suffered. Pub. L. No. 109-13, div B, 119 Stat. 231 (2005); *see also Matter of Fuentes*, 19 I. & N. Dec. 658, 662 (B.I.A.1988) (holding that the asylum applicant "bear[s] the burden of establish facts on which a reasonable person would fear that the danger rises on account of" their membership in the specific social group). The Board has stated that the persecutor's group-related motives must not be "incidental, tangential, superficial, or subordinate to another reason for harm." *Matter of J-B-N- & S-M-*, 24 I. & N. Dec. 208, 214 (B.I.A. 2008)).

The applicant must prove that the harm was suffered "'*because of*' a protected ground[,]" and therefore the persecutor's motives must be assessed. *Parussimova v. Mukasey*, 555 F.3d 734, 739 (9th Cir. 2009) (citing *Elias-Zacarias*, 502 U.S. at 483 (emphasis in the original)) (holding that the protected ground must be "essential" to the decision to persecute the applicant). While related to establishing a particular social group, the nexus analysis is its own separate requirement. "[I]t is not enough to simply identify the common characteristics of a statistical grouping of a portion of the population at risk. Rather, . . . there must be a showing that the

claimed persecution is on account of the group's identifying characteristics." *Matter of E-A-G-*, 24 I. & N. Dec. 591, 595 (B.I.A. 2008) (internal citations and quotation marks omitted). "As the Supreme Court has held: 'since the statute makes motive critical, [an asylum applicant] must provide some evidence of it, direct or circumstantial.' *INS v. Elias-Zacarias*, 502 U.S. 478, 483 (1982)." H. Rep. No. 109-72, at 162. Conjecture about the link between the harm and a protected ground will not suffice for establishing the nexus requirement. *Singh v. Mukasey*, 543 F.3d 1, 6 (1st Cir. 2008) (determining that proposed persecutors were economically motivated rather than motivated by a protected ground when they assaulted respondent and eventually occupied part of his home after he left India).

Victims of private criminal activity cannot establish a nexus between their particular social group and the crime that occurred because of two flaws that cannot be remedied regardless of the harm perpetrated against the victim. "[A]liens fearing retribution over purely personal matters, or aliens fleeing general conditions of violence and upheaval . . . would not qualify for asylum." *Matter of Magharrabi*, 19 I. & N. Dec. at 439, 447 (B.I.A. 1987).

First, as previously stated, general civil unrest or economic hardships facing the country as a whole, rather than just the victim, do not sufficiently link the harm to membership in the particular social group. *Ochave v. INS*, 254 F.3d 859, 865 (9th Cir. 2001). Private criminal activity, even activity that rises to the level of persecution, such as rape, is often the by-product of general civil unrest or economic hardships rather than persecution "on account" of protected grounds. *Gormley v. Ashcroft*, 364 F.3d 1172, 1177 (9th Cir. 2004).

Just as civil unrest is a hurdle in defining a particular social group, it can also prevent an applicant from proving a true nexus between the harm suffered and the protected ground. Victims of private criminal activity are being harmed against a backdrop of unrest or rampant

private criminal activity where the violent acts committed against them are easily attributed to general country conditions. *See Konan*, 432 F.3d at 506 (3d. Cir. 2005). In countries that have pervasive criminal activity, it is difficult to establish the required nexus between a social group and the abuse suffered because victims can be fungible to persecutors. This is especially true where victims do not know who their persecutors are. Without knowing the motivations of their persecutors, asylum claimants cannot establish that their membership in a particular social group is at least one central reason why the acts of persecution were committed. If this were not the rule, whole nations would be eligible for asylum because of civil war, gang activity, or in this instance, private criminal activity.

An example of a "civil unrest" hurdle that prevents an asylum applicant from establishing a particular social group is generalize gang recruitment and associated criminal acts. In recent years, people have fled countries where gangs are powerful and target civilians for varying reasons. Some courts, however, have been hesitant to find that different proposed particular social groups meet the asylum requirements when they are based on gang activity. *See, e.g.*, *Matter of E-A-G-*, 24 I. & N. Dec. at 595 (finding that "persons resistant to gang membership" was not a particular social group); *Zentino v. Holder*, 622 F.3d 1007, 2016 (9th Cir. 2010) ("An alien's desire to be free from harassment by criminals motivated by theft or random violence by gang members bears no nexus to a protected ground."). Gangs may target individuals for various reasons, including attempting to gain more gang territory, extortion, or simply because the person is an easy target. *Alvizures-Gomes v. Lunch*, 830 F.3d 49, 53 (1st Cir. 2016) (listing various motivations a gang may have for targeting an individual); *Gjura v. Holder*, 502 Fed. App'x 91, 92 (2d Cir. 2012) (holding that the nexus requirement is not established when individuals outside of the proposed social group are equally as likely to become victims of

harm). That one was a victim of such activity does not mean that it was motivated by one's membership in a particular social group.

The second obstacle to the nexus requirement is the complete opposite of generalize civil unrest, but is just as fatal to an asylum application. This second impediment occurs when the perpetrator specifically targeted only one victim because of personal conflict, not on account of one of the five protected grounds for asylum. Mixed motives asylum cases can provide a viable asylum claim, *Martinez-Galarza v. Holder*, 782 F.3d 990, 993-94 (8th Cir. 2015), but "[p]urely personal retribution is, of course, not persecution . . . ." *Grava v. INS*, 205 F.3d 1177, 1181 n.3 (9th Cir. 2000); *Matter of G-Y-*, 20 I. & N. Dec. 794, 799 (B.I.A. 1994).

Where the victim knows the persecutor personally, the natural conclusion is that the harm was perpetrated for private reasons, separate and apart from any protected ground. Thus, establishing persecution based on a protected ground can be extremely difficult where the persecutor is a friend or family member, whether or not she previously had a good or cordial relationship with the applicant. Of course, "a retributory motive [may] exist[] alongside a protected motive," but the applicant must show that membership in the proposed social group was one central reason for the persecution committed. *Madrigal v. Holder*, 716 F.3d 499, 506 (9th Cir. 2013). The applicant would have to provide evidence that it was not personal retribution or feelings of personal ill will towards the victim that motivated the harm.

III. That Private Crime Occurs Is Not Proof That The Government Is Unable Or Unwilling To Control It.

The final requirement an applicant must establish is either that harm is inflicted by the government or that the government is unable or unwilling to control the persecutors. *Matter of Acosta*, 19 I. & N. Dec. at 222. An applicant must show more than just a "difficulty controlling behavior" or ineffectiveness in enforcement of protective laws. *See Salman v. Holder*, 687 F.3d

991, 995 (8th Cir. 2012) (citation omitted); *Galina v. INS*, 213 F.3d 955, 958 (7th Cir. 2000) (stating that the applicant must show that the government "condoned it or at least demonstrated a complete helplessness to protect the victims"); *In re McMullen*, 17 I. & N. Dec. 542, 546 (B.I.A. 1980) (finding difficulty authorities had in controlling private behavior insufficient). The applicant "must demonstrate that the government condoned the private behavior 'or at least demonstrated a complete helplessness to protect the victims. In particular, 'the fact that police take no action on a particular report does not necessarily mean that the government is unwilling or unable to control criminal activity, because there may be reasonable basis for inaction.'" *Salman*, 687 F.3d at 995 (citations omitted). If the government is actively striving to stop the violence that is occurring, this final element of the asylum analysis is unfulfilled. *Lemus v. Lynch*, 611 Fed. App'x 813, 815-16 (citing 8 C.F.R. § 1208.13(b)(2)(iii)); *Gjura*, 502 Fed. App'x at 92 (same).

Perfect protection from harm is not the standard by which this requirement is judged. *See, e.g.*, *Burbiene v. Holder*, 568 F.3d 251, 255 (1st Cir. 2009). The fact that private criminal actions occur and the government cannot completely "eradicate" them does not negate the government's efforts to curb criminal behavior. *See id.* Random, private criminal acts do not establish persecution on account of a protected ground. *See Gormley v. Ashcroft*, 364 F.3d at 1177 (citing *Rostomian v. INS*, 210 F.3d 1088, 1089 (9th Cir. 2000)). Country reports may reflect efforts by the government to address different types of private criminal behavior or criminal behavior generally. That efforts are not as effective as hoped does not mean that the government is helpless or unwilling to control the criminal activity. *Burbiene*, 568 F.3d at 255-56 (finding that while a country may experience setbacks in combating crime, such setbacks are

not indicative of persecution occurring on account of a protected ground). Change takes time, and a country's initiatives should be acknowledged and respected in asylum proceedings.

IV. Relocation To Another Region In Asylum Claims Based On Private Criminal Activity Is Likely Reasonable.

While past persecution creates the presumption of future persecution, 8 C.F.R. § 1208.13(b)(1), the government can rebut this presumption by showing that the alien can avoid future persecution by relocating and, under all of the circumstances, relocation would be reasonable. *Id.* at 1208.13(b)(1)(i)(B). When considering whether relocation would be reasonable, the adjudicator should take into account numerous considerations, such as whether the applicant would face serious harm in the suggested new location, civil strife, infrastructure, and social and cultural restraints. *Id.* at 1208.13(b)(3). This creates a two-step relocation analysis: (1) the Board must determine if there is a safe area within the country; and then (2) if there is a safe area, whether it would be reasonable to relocate. *Matter of M-Z-M-R-*, 26 I. & N. Dec. 28, 32 (B.I.A. 2012).

While the relocation analysis will be fact-based, an adjudicator analyzing a victim of criminal activity asylum claim will likely find that there is another region in the country where relocation is safe and reasonable. Where the victim does not know the persecutor and the motives are likely based on economic or personal gain, relocation becomes very possible. For example, if the victim was, at random, beaten and robbed at gunpoint for his personal belongings because he was an easy target, it is unlikely that the criminal would travel elsewhere in the country in order to target that particular victim again.

V. The Proposed Particular Social Groups Defined By Domestic Violence Do Not Fulfill The Asylum Requirements.

The Board wrongly decided *Matter of A-R-C-G-*, 26 I. & N. Dec. 388 (B.I.A. 2014), because victims of domestic violence do not qualify for asylum regardless of their gender, nationality, or marital status. Applying the above requirements to *Matter of A-R-C-G* would reveal that the proposed social group found in that case, "married women in Guatemala who are unable to leave their relationship," was not a particular social group based on an immutable characteristic, and that the applicant's membership in the group was not a central reason that the harm occurred. Also, respondent in *Matter of A-R-C-G-* was able to relocate within the country, but chose rather to return to live with her husband.

First, the group "married women in Guatemala who cannot leave a relationship" is not based on an immutable characteristic. The Board initially attempted define the group by gender. *Id.* at 392-393. While gender-based particular social groups are possible, gender alone does not necessarily justify asylum because rarely do all women, without any other factor to consider, suffer persecution in a society. *See Gomez v. INS*, 947 F.2d 660, 664 (2d Cir. 1991). Even if respondent argued that the particular social group was Guatemalan women (nationality and gender), her claim could still not survive because the abuse suffered was not motivated by her status as a Guatemalan woman. Rather, the abuse arose from the personal connection she had with her partner.

The Board then attempted to state that inability to leave a relationship was the immutable characteristic of the proposed social group because such inability may be based on "religion, cultural or legal restraints." *Matter of A-R-C-G*, 26 I. & N. Dec at 393. But these were not the reasons why the respondent could not leave her relationship. The respondent could not leave her relationship because of abuse, not because the government refused to grant a divorce. Indeed,

the Board's determination that respondent could not leave her relationship—and thus was even a member of the proposed social group—is questionable. The Board also recognized that respondent had left and moved away from her abuser for three months but voluntarily moved back and resumed her relationship when he promised the abuse would end. *Id.* at 389. Not only does this show that she was not in the proposed social group because she was able to leave her relationship and the government did not force her to return, it also shows that relocation was reasonable because respondent could move to another part of the country and not suffer harm.

Most crucially, there was no evidence that Guatemalan women who could not leave their relationships was a social group recognized as distinct by Guatemalan society, only broad statements concerning sexual offenses and family violence. *Id.* at 393-94. That societal or economic pressures might force some women in that country, to remain married and unseparated from their husbands, despite the availability of divorce—a point that was never established in the case—does not mean that Guatemalan society recognizes such women as a distinct group. And even if a group defined as women trapped in abusive relationships would be more distinct, it would be defined based solely on the harm suffered by its members, and harm suffered cannot form the sole basis of a particular social group. *Kante v. Holder*, 634 F.3d at 327 (6th Cir. 2011) (finding that "women subjected to rape as a method of government control" was not a particular social group as its definition was circular and based on harm).

For all of these reasons, *Matter of A-R-G-C-* was wrongly decided.

CONCLUSION

For the foregoing reasons, the Attorney General should determine that a group consisting of victims of private criminal behavior does not fulfill the statutory requirements of asylum.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on April 27, 2018, I electronically submitted the foregoing *amicus curiae* brief to the United States Department of Justice via email, and, via first class mail, sent three copies to the Office of the Attorney General at the United States Department of Justice for distribution to the parties.

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