NON-DETAINED

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UNITED STATES DEPARTMENT OF JUSTICE
OFFICE OF THE ATTORNEY GENERAL

In the Matter of:	)	
[redacted]	)	File No: [redacted]
In removal proceedings	)	

U.S. DEPARTMENT OF HOMELAND SECURITY
REPLY TO AMICUS CURIAE BRIEFS

The Department of Homeland Security ("Department" or "DHS") timely submits this reply to the amicus curiae briefs of the Harvard Immigration and Refugee Clinical Program, the American Immigration Lawyers Association, Human Rights First, and Kids in Need of Defense (hereinafter "HIRC Brief"), and the Tahirih Justice Center, the Asian Pacific Institute on Gender-Based Violence, Asista Immigration Assistance, and Casa de Esperanza (hereinafter "Corrected Tahirih Brief"). For purposes of efficiency, the Department provides a consolidated response focusing on two salient issues.[1]

A. HIRC Brief.

The primary argument of the HIRC Brief is that gender alone may constitute a cognizable particular social group for purposes of applications for asylum and statutory withholding of removal. The brief alleges that "DHS offers no rebuttal to the arguments outlined herein that gender alone may define a particular social group," and that, contrary to a point made by the Department in its own brief, "whether gender alone can establish membership in a particular social group under the refugee definition is [a] question of law, not policy." HIRC Brief at 17 n.5.

The Department wishes to re-emphasize that adequately addressing the legal and policy aspects of the "gender alone" issue was beyond the limitations of the Attorney General's briefing request.[2] Whether to interpret "membership in a particular social group" as including membership

[1] The lack of a DHS response to other aspects of the HIRC or Corrected Tahirih Briefs, or any of the remaining ten amicus curiae briefs, should not be taken as agreement with any or all the points raised therein. Rather, the Department continues to adhere to the arguments set forth in its own brief.

[2] As noted in the Department's brief, even a minimal assessment of the issue likely would require closer examination of the Refugee Act of 1980, Pub. L. No. 96–212, 94 Stat. 197; the 1967 Protocol Relating to the Status of Refugees, Jan. 31, 1967, [1968] 19 U.S.T. 6223; and the 1951 Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6259, likely including any relevant legislative, ratification, and negotiation history. *See* DHS Brief on Referral to the Attorney General at 21 n.13. Such material, along with the statutory text and scheme of the Immigration and Nationality Act ("INA"), subsequent amendments to the immigration laws relating to gender-based harm (e.g., INA § 204(a)(1)(A)(iii), (B)(ii)), and the pre-existence and emergence of international human rights instruments specifically addressing

in a particular gender is suffused with unique, weighty, and complex policy implications in addition to the difficult statutory interpretation questions. *See, e.g.*, DHS Brief on Referral to the Attorney General at 21-22 (discussing implications with respect to the persecutor bar of a significant expansion of the concept of "persecution" and the scope of the protected grounds). If the Attorney General would like further briefing on that question or others, the Department would be pleased to address such issues.

B. Corrected Tahirih Brief.

The Corrected Tahirih Brief argues, in pertinent part, that the Department "seeks to impose extensive documentation requirements in asylum claims raising domestic violence issues, requirements that do not apply in other asylum cases," and that "extend beyond the statutory requirements." Corrected Tahirih Brief at 30. Respectfully, the brief fundamentally mischaracterizes the Department's position.

The Department does not seek any heightened evidentiary standards or requirements for asylum and statutory withholding of removal applications premised upon domestic violence. Instead, the Department offers potential lines of inquiry that the Attorney General may wish to adopt to assist adjudicators in assessing such claims. *See* DHS Brief on Referral to the Attorney General at 23-25. As the Department argues in its brief, *all* asylum and statutory withholding of removal applicants should be held to their statutory burden of proof, including providing corroborative evidence when necessary, *see id.* at 23 (citing Immigration and Nationality Act ("INA") §§ 208(b)(1)(B)(ii) (asylum), 241(b)(3)(C) (statutory withholding of removal)), but immigration judges sometimes have failed to hold applicants to their burden of proof in particular

gender-related issues (e.g., Convention on the Political Rights of Women, Mar. 31, 1953, 27 U.S.T. 1909), and relevant case law would have to be carefully considered were the Attorney General to request further briefing on that question.

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social group-based claims. Paying mere lip service to the particular social group requirements often involved with such claims is too frequently the norm. *See* DHS Brief on Referral to the Attorney General at 7. The Department's brief accordingly asks the Attorney General to clarify those substantive and evidentiary requirements and to re-emphasize that applicants should be held to their proper burden of proof. The Department is *not* arguing that the Attorney General should create new evidentiary standards specific to domestic violence-based claims.[3] To be clear, however, an application for asylum or statutory withholding of removal is not fatally deficient simply because a persecutor may not have elaborated in detail on his or her motive(s) for inflicting harm. *See INS v. Elias-Zacarias*, 502 U.S. 478, 483 (1992) (holding that while the "statute makes motive critical," direct evidence of motive is not required, and that "circumstantial" evidence may suffice).

The Corrected Tahirih Brief contends that the Department's suggested lines of inquiry create an "undue hardship," and that requiring domestic violence victims to remember facts about their purported abuser shows a fundamental lack of understanding of the dynamics of domestic violence. *See* Corrected Tahirih Brief at 30-32. To the contrary, remembering and knowing basic biographic information about the person with whom a victim is engaged in an intimate relationship is not an undue hardship. Rather, it can provide significant relevant evidence establishing that the alleged persecutor and relationship actually existed. The Department recognizes that an applicant may have legitimate reasons for not knowing or remembering certain

[3] That said, such applicants should be held to their burden of proof. For example, much as a member of a particular political party claiming persecution on account of her political opinion should generally be able to explain the party's basic platform and answer questions about how and why she joined, an applicant credibly claiming persecution in a domestic relationship should generally be able to answer questions about her domestic partner and the relationship itself. Of course, such an applicant also should be able to provide basic information about other elements of her claim, including the identification and delineation of her particular social group, why such individuals are perceived as a distinct group by her society, internal flight alternatives, and the ability and willingness of the authorities to afford reasonable protection.

information, but this does not mean that one should not attempt to elicit the information in the first instance. As the Department explained: "The applicant's knowledge in this regard, *or failure to reasonably explain the lack thereof*, is relevant as to whether the applicant's testimony is credible, persuasive, and sufficiently detailed to satisfy the applicant's burden of proof under the Act." *See* DHS Brief on Referral to the Attorney General at 23 (emphasis added). Excusing such details in blanket fashion from what is, in part, a highly individualized fact-based claim, would render the burden of proof meaningless and serve as a clear invitation for fabricated protection claims that cannot be meaningfully probed by adjudicators. *See generally* INA § § 208(b)(1)(B)(iii) (mandating, inter alia, that "[c]onsidering the totality of the circumstances, and all relevant factors, a trier of fact may base a credibility determination on the demeanor, candor, or responsiveness of the applicant"), 241(b)(3)(C) (same).

Accordingly, the Attorney General should decline the Corrected Tahirih Brief's invitation to create an effectively lower burden of proof for one type of persecution claim, i.e., those based upon domestic violence.

Respectfully submitted on this 4th day of May, 2018, by:

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[4] The Department respectfully requests that all correspondence to it in this matter continue to be directed, in the first instance, to the local U.S. Immigration and Customs Enforcement (ICE) Office of the Chief Counsel in Charlotte, North Carolina, with copies to Christopher S. Kelly, Chief of the Immigration Law and Practice Division within ICE's Office of the Principal Legal Advisor.

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PROOF OF SERVICE

On May 4, 2018, I, Frederick Gaskins, mailed a copy of this U.S. Department of Homeland Security Reply to Amicus Curiae Briefs and any attached pages to the respondent's co-counsel, Benjamin Winograd, Esq., Immigrant & Refugee Appellate Center, LLC, 3602 Forest Drive, Alexandria, VA 22302, by placing such copy in my office's outgoing mail system in an envelope duly addressed.