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UNITED STATES DEPARTMENT OF JUSTICE
OFFICE OF THE ATTORNEY GENERAL

In The Matter Of:	)	
[redacted]	)	**File No.: A**[redacted]
In Removal Proceedings	)	

RESPONDENT'S REPLY BRIEF

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INTRODUCTION

Respondent [redacted] ("Respondent" or "Ms. [redacted]") submits this reply to the opening brief of the Department of Homeland Security (DHS). DHS devotes most of its brief to issues that are not relevant to the disposition of this case. Instead of addressing whether Ms. [redacted] herself qualifies for asylum, DHS asks the Attorney General to adopt a series of requirements for claims involving particular social groups in general and victims of domestic violence in particular. DHS does not address Ms. [redacted] s own case until the end of its brief and argues only that the Board of Immigration Appeals (Board) engaged in improper factfinding by taking a different view of the evidence than Immigration Judge V. Stuart Couch.

In light of the arguments raised in DHS's brief, the Attorney General has no choice but to affirm the Board's decision. DHS's assertion that the Board engaged in improper factfinding is foreclosed by Fourth Circuit precedent, and it has offered no other reason to vacate the Board's decision. If the Attorney General reaches the issue, he should recognize that gender alone (or in combination with nationality) may form the basis of a particular social group. The Attorney General should refuse DHS's request to require asylum applicants fleeing domestic violence to provide answers to seventeen specific questions. Finally, the Attorney General should decline to address the many issues raised in DHS's brief that have no bearing on the resolution of Ms. [redacted]'s claim.

ARGUMENT

I. The Attorney General Should Affirm the Board's Decision if He Reaches the Merits of Ms. [redacted] s Case

For the reasons set forth in her opening brief, Respondent continues to maintain that her case is not properly before the Attorney General because the Board never reacquired jurisdiction following the remand to Judge Couch.[1] If the Attorney General reaches the merits of Respondent's case, he should affirm the Board's determination that she qualifies for asylum. The Board did not engage in improper factfinding in reversing various portions of Judge Couch's decision, and DHS has waived any arguments that Ms. [redacted] is ineligible for asylum by failing to raise them in its opening brief to the Attorney General.

A. The Board Did Not Engage in Improper Factfinding in Granting Ms. [redacted] s Asylum Application

In the final pages of its brief, DHS argues that the Board's decision should be vacated because it purportedly engaged in improper factfinding in violation of 8 C.F.R. 1003.1(d)(3)(iv). DHS Br. at 35-37. The Attorney General should reject this contention for three independent reasons. First, DHS's reading of the regulation in question has been repeatedly rejected by the Fourth Circuit. Second, DHS's reading of the regulation is otherwise wholly impractical. Third, DHS waived the argument

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[1] Alternatively, Respondent concurs with DHS's position that the Attorney General should permit the Board to address the concerns raised in Judge Couch's certification order in the first instance. *See Matter of A-B-*, 27 I&N Dec. 247, 247 (A.G. 2018). *See also* Br. of Amici Curiae Sixteen Former Immigration Judges and Board of Immigration Appeals Members supporting Respondent's argument regarding the Attorney General's lack of jurisdiction and expressing concern regarding the due process implications of bypassing Board review.

by failing to file a timely motion to reconsider with the Board.

DHS asserts that the Board engaged in improper "factfinding" under 8 C.F.R. 1003.1(d)(3)(iv) by concluding that Ms. [redacted] testified credibly, that she was a member of a cognizable particular social group, that she established a nexus between the persecution she suffered and her membership in the group, and that Salvadoran authorities were unable or unwilling to control her persecutor. DHS Br. at 36-37. According to DHS, the Board's conclusions involved "factfinding" because these issues involved underlying factual determinations that were contested on appeal. *Id.*

DHS's reading of 8 C.F.R. 1003.1(d)(3)(iv) has been rejected by the Fourth Circuit. The Fourth Circuit has held that "this regulation restricts the BIA's ability to add new evidence to the record, but does not prohibit the BIA from making a factual determination upon *de novo* review of the record before it." *Hui Pan v. Holder*, 737 F.3d 921, 931 n.3 (4th Cir. 2013) (internal quotation marks omitted). That is because "the regulation, rather than restricting the reevaluation of evidence obtained by the [immigration judge], was intended to 'prohibit the introduction and consideration of new evidence in proceedings before the [Board],' thereby codifying existing [Board] precedent holding that new facts will not be considered on appeal." *Lin v. Mukasey*, 517 F.3d 685, 692 n.10 (4th Cir. 2008) (quoting *Board of Immigration Appeals: Procedural Reforms to Improve Case Management*, 67 Fed. Reg. 54,891-92 (Aug. 26, 2002)). Because the Board simply took a different view of the evidence submitted before Judge Couch, applying its appropriate standard of review under 8 C.F.R. 1003.1(d)(3)(i)-(ii), rather than rely on evidence submitted on appeal, it did not engage

in "factfinding" under 8 C.F.R. 1003.1(d)(3)(iv).

Even if DHS's reading of 8 C.F.R. 1003.1(d)(3)(iv) was not foreclosed by Fourth Circuit precedent, it would be wholly impractical. Taking DHS's argument to its logical conclusion, the Board could *never* issue a final order in any case involving a factual or credibility determination it deemed clearly erroneous. Instead, the Board would be required to remand the case for the immigration judge to engage in a new round of "factfinding." If the new decision was again appealed, and the Board again found the immigration judge's finding(s) to be clearly erroneous, the Board would be required to remand the case to the immigration judge once again. And so the case would proceed until the party that lost before the immigration judge elected not to appeal. DHS's reading of 8 C.F.R. 1003.1(d)(3)(iv) would thus do nothing more than add to the growing backlog of cases before immigration courts nationwide.

Finally, assuming *arguendo* that the Board did engage in improper factfinding, DHS waived the argument by failing to present it in a timely motion to reconsider to the Board. While immigration judges reacquire jurisdiction over proceedings following a remand from the Board, *Matter of Patel*, 16 I&N Dec. 600, 601 (BIA 1978), the Board has held that parties may file a timely motion to reconsider following a decision to remand. *Matter of Perez Vargas,* 23 I&N Dec. 829, 829-30 at n.1 (BIA 2005) (citing BIA Practice Manual 5.2(a)(iii)(B)). If DHS believed that the Board engaged in improper factfinding, it should have raised the argument in a motion to reconsider filed within 30 days of the Board's decision. *Cf. Meng Hua Wan v. Holder*, 776 F.3d 52, 57 (1st Cir. 2015) (holding that petitioner failed to exhaust claim of improper

Board factfinding by failing to file motion to reconsider); *Omari v. Holder*, 562 F.3d 314, 320 (5th Cir. 2009) (same); *Sidabutar v. Gonzales*, 503 F.3d 1116, 1122 (10th Cir. 2007) (same).

B. DHS Waived Any Arguments Relating to Ms. [redacted] s Eligibility for Asylum

In addition to waiving its argument that the Board engaged in improper factfinding, DHS has also waived any argument relating to whether Ms. [redacted] qualifies for asylum. At no point in its brief does DHS argue that Ms. [redacted] is ineligible for asylum. Instead, DHS purports to reserve the right to contest her eligibility for asylum if the Attorney General remands the record for further proceedings. DHS Br. at 37 n.21. Yet, other than its erroneous assertion that the Board engaged in improper factfinding, DHS has offered no argument that Ms. [redacted] herself is ineligible for asylum. If the Attorney General finds that the Board did not engage in improper factfinding (as he must), he will have no choice but to uphold the Board's prior decision. *See Grayson O Co. v. Agadir Int'l LLC*, 856 F.3d 307, 316 (4th Cir. 2017) (holding "[a] party waives an argument by failing to present it in its opening brief"); *Matter of G-G-S-*, 26 I&N Dec. 339, 340 n.2 (BIA 2014) (finding issue not raised in brief to be waived).

II. The Attorney General Should Recognize the Cognizability of a Particular Social Group Defined by Gender Alone if He Reaches the Issue

In her opening brief, Ms. [redacted] argued that the Board correctly found she was persecuted on account of her membership in a particular social group defined by her gender, nationality, and relationship status—"Salvadoran women in domestic

relationships they are unable to leave." Resp't Br. at 31-32. This social group closely tracks the group recognized in *Matter of A-R-C-G-*, 26 I&N Dec. 388, 392 (BIA 2014), a decision the parties agree the Attorney General should not disturb. Resp't Br. at 33; DHS Br. at 17, 20. In the alternative, Ms. [redacted] argued that she has established eligibility based on her membership in social groups defined by a similar constellation of immutable characteristics, such as "Salvadoran women." Resp't Br. at 32. However, DHS argues that if the Attorney General were to abrogate *A-R-C-G-*, it would be inappropriate for the Attorney General to consider a "distilled" social group defined by gender alone because evaluating the viability of such a group "would more directly implicate significant policy considerations" that would be "probably best left to rulemaking." DHS Br. at 21 & 21 n.13. DHS does not expound on the "policy considerations" to which it refers; Ms. [redacted] assumes that a concern about opening the "floodgates" through recognition of a broad group undergirds DHS's position.

The Attorney General need not reach this issue for reasons provided by Ms. [redacted] in her opening brief. But if he determines the issue necessary to the resolution of this case, he should bring needed clarity to this area of the law and come to the unremarkable conclusion that a social group of "Salvadoran women" is cognizable under the Immigration and Nationality Act (INA). The Board and courts of appeals have consistently recognized gender-defined groups, employing their duty to evaluate the existence of a particular social group on a case-by-case basis by looking to existing legal standards, with no disruption to the asylum system. This is unsurprising given that recognition of a potentially large social group does not by itself enlarge the pool

of individuals who may qualify for asylum. Like individuals claiming asylum based on other protected grounds that apply to nearly every person worldwide—including race, religion, and nationality—asylum applicants seeking protection based on their social group membership must satisfy all of the other (onerous) statutory requirements—including a harm grave enough to constitute persecution, nexus between the harm and the protected ground, state inability or unwillingness to protect, and impossibility of safe or reasonable internal relocation.

Social groups defined by gender alone (or gender plus nationality) have been recognized for decades in the United States.[2] In *Matter of Acosta*, the Board firmly established that "sex" may be an immutable characteristic that binds group members. 19 I&N Dec. 211, 233 (BIA 1985). Approving of that reasoning, in *Fatin v. INS*, then-Judge Alito found that an Iranian woman who argued that "she would be persecuted in Iran simply because she is a woman" was the member of a cognizable social group defined by her gender (though ultimately upheld denial of her claim for failure to meet the other asylum elements). 12 F.3d 1233, 1240 (3d Cir. 1993). Many other courts have followed suit. *See, e.g.*, *Ngengwe v. Mukasey*, 543 F.3d 1029, 1034 (8th Cir. 2009) (recognizing group of "Cameroonian widows"); *Hassan v. Gonzales*, 484 F.3d 513, 518 (8th Cir. 2007) ("Somali females"); *Niang v. Gonzales*, 422 F.3d 1187, 1199 (10th Cir. 2005) ("female members of a tribe"); *Mohammed v. Gonzales*, 400 F.3d

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[2] For additional background on the development of the law and cogent arguments for why group membership may be shown by gender alone, *see* Br. of Amici Curiae the Harvard Immigration and Refugee Clinical Program et al., incorporated by reference. *See also* Br. of Amicus Curiae National Immigrant Justice Center at 16-19.

785, 797 (9th Cir. 2005) ("Somalian females").

That previous cases recognizing gender-defined groups arose in the context of other forms of gender-related persecution does not alter the analysis in the domestic violence context. Gender is most often "at least one central reason," 8 U.S.C. 1158 (b)(1)(B)(i), why male batterers abuse their female partners. *See, e.g.*, Appendix[3] ("App.")-J, Expert Declaration of Nancy Lemon ¶¶ 2, 81 (opining that "gender is one of the main motivating factors, if not the primary factor, for domestic violence" and that the specific facts in this case establish that "gender was the primary motivating factor of [Ms. [redacted]s] batterer's abuse"). It is no answer to say—as Judge Couch did below—that domestic abuse is caused by the "violent and criminal tendencies" of the abusive spouse. I.J. at 13. By definition, individuals who persecute other persons exhibit "violent and criminal tendencies." The question in domestic violence cases is why the persecutor brings those tendencies to bear on his spouse or partner.[4]

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[3] Appendices refer to Ms. [redacted]s supplemental submission to the Attorney General.

[4] The Immigration Reform Law Institute concedes that "gender-based particular social groups are possible." *See* Br. for Amicus Curiae at 15. However, the Institute baldly claims that women like the applicant in *A-R-C-G-* cannot show their persecution was on account of that ground because "[w]here 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." *Id*. at 12. There is no basis for the Institute's assertion. If true, many *bona fide* refugees would no longer qualify for asylum, including victims of female genital mutilation and women fleeing honor killings by their family members. During the genocide in Rwanda, thousands of Tutsis were killed by their own neighbors. Whether an individual has a personal connection with her abuser says nothing of a persecutor's motives. *See Faruk v. Ashcroft*, 378 F.3d 940, 943 (9th Cir. 2004) ("There is no exception to the asylum statute for violence from family members; if the government is unable or unwilling to control persecution, it matters not who inflicts it."). As importantly, the Institute's assertion ignores that nexus determinations must necessarily be made on a case-by-case basis in light of the evidence in the record. *See Crespin-Valladares*, 632 F.3d 117,

Courts have emphasized that the size of a social group should not operate as a limiting factor. *See, e.g.*, *N.L.A. v. Holder*, 744 F.3d 425, 438 (7th Cir. 2014) (noting "it would be antithetical to asylum law to deny refuge to a group of persecuted individuals who have valid claims merely because too many have valid claims"); *Perdomo v. Holder*, 611 F.3d 662, 669 (9th Cir. 2010) (recognizing "size and breadth of a group alone does not preclude a group from qualifying as such a social group"); *Niang*, 422 F.3d at 1199-1200. Nor could size dictate a group's cognizability. Placing arbitrary limits on social group size would be inconsistent with the *ejusdem generis* canon, which guides interpretation of the social group ground consistent with the other categories of race, religion, nationality, and political opinion that have correspondingly expansive reach. *Acosta*, 19 I&N Dec. at 233.[5] Indeed, as DHS explained in its opening brief, "simply being a member of a cognizable group [does not] automatically qualif[y] one for asylum or statutory withholding of removal without the necessity of satisfying the plethora of other requirements." DHS Br. at 16.[6] Any concern about the size of the group—and thereby any potential strain on the asylum system—would be misplaced.

127-28 (4th Cir. 2011). Applying the one central reason standard to the facts presented by Ms. [redacted] a finding is compelled that nexus to a gender defined group has been established.

[5] For example, no one would dispute Catholicism is a religion, although when applied to countries such as Italy or Ireland it would encompass most of the population.

[6] DHS assuaged any floodgates concerns of recognizing asylum for domestic violence survivors in its *Matter of L-R-* briefing by looking to data on asylum adjudications from Canada as well as the United States, which both showed no notable change following acceptance of such claims as viable. *See* App.-U, DHS Supplemental Brief, *Matter of L-R-* at 566-67 (BIA April 13, 2009). DHS presents no new evidence to suggest circumstances have changed following the Board's decision in *A-R-C-G-*.

If the Attorney General reaches the issue, he should recognize the existence of a social group defined by Ms. [redacted]s gender.

III. The Attorney General Should Not Impose Unique Evidentiary Requirements on Domestic Violence Survivors Seeking Asylum

DHS urges the Attorney General to require that asylum applicants fleeing domestic violence provide specific information about their persecutors and their own personal circumstances not required of other asylum seekers. DHS Br. at 23-24. This evidence, DHS asserts, would establish the credibility of domestic violence survivors and be relevant to meeting their burden of proof on various elements of their claim, including the reasonableness of relocation. *Id*. The seventeen requirements proposed by DHS, applicable only to this particular group of individuals, appear to have been invented out of thin air.[7] Adopting them would conflict with the central purpose of

[7] In full, the requirements would be as follows: First, as to their abusers, survivors would need to provide: (1) full name, date of birth, and place of birth; (2) full names of parents and siblings; (3) last known address; (4) last known telephone number, if any; (5) physical characteristics (*e.g.*, race, height, weight, hair color, eye color, prominent scars or tattoos); (6) copies of photographs, if any; (7) name and location of last known employer or, if self-employed, name and location of business; (8) any known criminal record, with approximate dates; (9) any known military service, with approximate dates; (10) any known violent or otherwise abusive behavior towards other persons and the identity of such victims; (11) any known visits to the United States, with approximate dates; (12) the most recent information as to health; (13) the most recent information as to any additional domestic or intimate relationships; and (14) any and all direct or indirect contact the applicant may have had with, or any information received about, the putative persecutor following the applicant's arrival in the United States. DHS Br. at 24. As to themselves, survivors would need to provide: (15) the applicant's own current domestic or intimate relationships, if any; (16) any children born in the United States, along with pertinent birth certificates; and (17) whether the applicant or the applicant's children, if any, have traveled abroad to a place where the putative persecutor could contact them since their arrival in the United States. *Id*.

the statutes governing the legal standards and burden of proof in asylum (and withholding) proceedings.

Congress enacted the Refugee Act of 1980, the foundation for the modern asylum system, to create a uniform procedure "to evaluate asylum applications on a systematic and equitable basis." Deborah Anker and Michael Posner, *The Forty Year Crisis: A Legislative History of the Refugee Act of 1980*, 19 SAN DIEGO L. REV. 9, 12 (1981); *see also* S. Rep. No. 96-256, at 1 (1980). Unlike predecessor legislation that focused on individuals fleeing Nazi or Fascist regimes during World War II, the Refugee Act "was designed to provide a general rule for the ongoing treatment of *all* refugees and displaced persons," regardless of the basis of the underlying persecution claim. *Negusie v. Holder*, 555 U.S. 511, 520 (2009) (emphasis added). To adopt different evidentiary standards for different claims would therefore violate the purpose of the statutory regime, which Congress intended to apply uniformly and without discrimination. *See Selgeka v. Carroll*, 184 F.3d 337, 343 (4th Cir. 1999) (looking to Congressional purpose, holding that the proper interpretation of 8 U.S.C. 1158 "places upon the Attorney General the obligation to establish a *single procedure* for asylum claims that apply to all applicants without distinction").[8] In short, imposing evidentiary requirements on a single group of asylum seekers is completely

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[8] The statutes defining a refugee and permitting asylum applications make no distinctions as to the evidentiary burden placed on certain classes of asylum seekers, with only one exception. In 1996, Congress legislated the existence of nexus to the political opinion ground for claims based on coercive population control measures such as forced abortion or involuntary sterilization. 8 U.S.C. 1101(a)(42)(B). Notably, whereas Congress (and not the Executive) *reduced* the burden on the applicants in those cases, DHS invites the Attorney General to *raise* the burden in this case.

unmoored from the statute's raison d'être.

From a practical standpoint, adjudicators already have ample leeway to evaluate applicants' asylum claims under existing law. For example, with respect to credibility assessments, the Act provides that to satisfy her burden of proof through testimony alone, an applicant's testimony must be "credible," "persuasive," and "refer[] to specific facts sufficient to demonstrate that the applicant is a refugee." 8 U.S.C. 1158(b)(1)(B)(ii). When determining whether an applicant is credible, the trier of fact should consider "the totality of the circumstances" taking into account any relevant factors such as "the demeanor, candor, or responsiveness of the applicant," "the inherent plausibility of the applicant's … account," and "the consistency between the applicant's … written and oral statements." 8 U.S.C. 1158(b)(1)(B)(iii), *accord Ilunga v. Holder*, 777 F.3d 199, 206-07 (4th Cir. 2015). And the trier of fact may require an applicant to produce corroborating evidence unless it is not available or she "cannot reasonably obtain the evidence." 8 U.S.C. 1158(b)(1)(B)(ii). Moreover, as to the reasonableness of relocation, the regulations specify that adjudicators should consider a variety of factors, including "whether the applicant would face other serious harm in the place of suggested relocation; any ongoing civil strife within the country; administrative, economic, or judicial infrastructure; geographical limitations; and social and cultural constraints, such as age, gender, health, and social and familial ties." 8 C.F.R. 1208.13(b)(3).[9]

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[9] DHS asserts that the information provided about the abuser would help "better identify persecutors should they ever attempt to enter the United States or otherwise gain immigration benefits while present here." DHS Br. at 23. In essence, DHS

Through legislation and rulemaking, U.S. law has standardized a set of evidentiary requirements and guidelines that all asylum applicants must follow to establish eligibility for protection. By design, this framework does not permit a heightened burden to be placed on asylum seekers raising particular kinds of claims. DHS's proposal to impose a set of requirements on a single group—domestic violence survivors—is thus both unnecessary and ungrounded in current asylum law.[10]

IV. The Attorney General Should Not Consider Issues Raised by DHS That Are Not Relevant to the Disposition of Ms. [redacted]'s Case

The Attorney General's original order invited the parties to address points "relevant" to the disposition of Ms. [redacted] s case. 27 I&N Dec. 227 (A.G. 2018). Yet much of DHS's brief addresses issues that have no bearing on Ms. [redacted] s eligibility for asylum. The Attorney General should decline to reach these issues, which, while potentially proper subjects of a future case, are not the proper subject of *this* case.

First, DHS asks the Attorney General to hold that a single individual can never

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appears to hinge a survivor's eligibility on her ability to provide evidence to help the government in its enforcement efforts. DHS cites no statutory support for this proposition and Respondent can find none. Where Congress intended for forms of immigration relief to facilitate the identification of perpetrators of harm for federal or other enforcement purposes, it did so explicitly. *See* 8 U.S.C. 1101(a)(15)(U)(i).

[10] Adoption of these requirements, divorced from the statutory text and only applying to domestic violence survivors, would also constitute arbitrary and capricious decisionmaking. *See, e.g.*, *Judulang v. Holder*, 565 U.S. 42, 52 n.7, 53 (2011) (applying arbitrary or capricious review of agency policy). It would further violate equal protection of the laws. *See, e.g.*, *Francis v. INS*, 532 F.2d 268, 272 (2d Cir. 1976) (applying equal protection principles to non-citizens); *see also* Dale Carpenter, *Windsor Products: Equal Protection from Animus*, 2013 SUP. CT. REV. 183 (describing how courts subject actions rooted in animus to more scrutiny than traditional rational basis review); Br. of Amicus Curiae Innovation Law Lab (discussing animus underlying the Attorney General's policies on immigration).

constitute a particular social group because a "group" by its nature requires multiple individuals. DHS Br. at 10-11. The Attorney General need not reach this issue because Ms. [redacted] s proposed groups, like the group recognized in *A-R-C-G-*, consist of multiple individuals. If the Attorney General does reach the issue, however, a number of hypotheticals demonstrate why he should decline to impose such a requirement. For example, it is well-established that persons of the same sexual orientation may qualify as a particular social group. *See, e.g.*, *Matter of Toboso-Alfonso*, 20 I&N Dec. 819, 822 (BIA 1990). Under DHS's argument, an asylum applicant who escaped a tyrannical regime that killed all other persons of the same sexual orientation would not be a member of a particular social group simply because all other members of the group had been killed. Similarly, the Fourth Circuit has held that individuals with an immutable physical or mental illness may qualify as a particular social group. *See, e.g.*, *Temu v. Holder*, 740 F.3d 887, 892-97 (4th Cir. 2014) (recognizing group of individuals with bipolar disorder). According to DHS, an asylum applicant could be a member of a particular social group if multiple people suffered from the same illness or condition, but not if he was the only person in his society who suffered from the illness or condition. As these hypotheticals demonstrate, holding that a single individual can never constitute a particular social group could lead to absurd results that Congress plainly did not intend.[11]

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[11] Conversely, nor is it relevant that an asylum applicant be the only member of a social group targeted by the persecutor. *See* DHS Br. at 10 n.4 (recognizing that persecutors "need not have personally victimized multiple people within the society"). Just as slave owners typically whipped only their own slaves, so too do abusive husbands typically beat only their own spouses. *See Asylum and Withholding*

Second, DHS asks the Attorney General to hold that so-called "hybrid" particular social groups—*i.e.*, those defined in part by the harm that applicants fear—are never cognizable. DHS Br. at 13. If the Attorney General adopts this suggestion, it would throw into doubt the availability of asylum to applicants who suffered or fear female genital mutilation. *See Matter of Kasinga*, 21 I&N Dec. 357, 365 (BIA 1996) (recognizing as a particular social group young women of a certain tribe in Togo "who have not [been subjected to female genital mutilation], as practiced by that tribe, and who oppose the practice"). It is particularly unnecessary for the Attorney General to reach this issue given that, as DHS concedes, Ms. [redacted] s proposed social group *does* exist independently of the persecution suffered. DHS Br. at 14.

Third, DHS asks the Attorney General to hold that former members of criminal or terrorist organizations may *never* qualify as a particular social group because deeming such groups cognizable would be "antithetical to the object and purpose of the Act." DHS Br. at 14-16. In truth, the Act contains multiple provisions that prevent bad actors from obtaining protection asylum or withholding of removal. Both forms of protection are unavailable if there is even probable cause to believe the applicant committed a "serious nonpolitical crime" outside the United States. 8 U.S.C. 1158(b)(2)(A)(iii), 8 U.S.C. 1231(b)(3)(B)(iii). *See also Matter of E-A-*, 26 I&N Dec. 1, 3 & 5 n.3 (BIA 2012). Likewise, both forms of protection are unavailable to applicants who provided "material support" to any terrorist organization, 8 U.S.C.

Definitions, 65 Fed. Reg. 76588, 76593 (Dec. 7, 2000). In both cases, however, the victim's protected characteristic would have been one central reason for the persecution in question.

1158(b)(2)(A)(v), 8 U.S.C. 1231(b)(3)(B)(iv), or who themselves have persecuted another person on account of a protected ground. 8 U.S.C. 1158(b)(2)(A)(i), 8 U.S.C. 1231(b)(3)(B)(i). Finally, asylum can always be denied in the exercise of discretion, 8 U.S.C. 1158(b)(1)(A), and recipients of withholding can be removed to third countries. 8 C.F.R. 1208.16(f). Again, however, there is no reason to reach this issue since Ms. [redacted] herself never belonged to such an organization.

Fourth, the Attorney General spends more than five pages of its brief criticizing various Fourth Circuit decisions involving family-based asylum claims. DHS Br. at 26-31. DHS takes particular aim at *Hernandez-Avalos v. Lynch,* 784 F.3d 944 (4th Cir. 2015), and *Cruz v. Sessions,* 853 F.3d 122 (4th Cir. 2017), which recognized that persons who are targeted on account of their relationship to a current or slain family member can establish persecution "on account of" family membership. It is not clear why DHS addresses this issue at such length, as Ms. [redacted] has not sought asylum based on her family membership and DHS does not ask the Attorney General to render any specific holding regarding family-based asylum claims.[12] It bears noting, however, that every circuit to address the question has held that individuals who are persecuted in retaliation for the actions of a family member can

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[12] DHS's only request is that the Attorney General consider Judge Wilkinson's concurrence in *Velasquez v. Sessions*, 866 F.3d 188 (4th Cir. 2017). DHS Br. at 30-31. Respondent notes that less than a week before *Velasquez* was decided, Judge Wilkinson joined Chief Judge Gregory's opinion in *Zavaleta-Policiano v. Sessions*, 873 F.3d 241 (4th Cir. 2017), which reversed the Board's denial of a family-based asylum claim and favorably cited both *Hernandez-Avalos* and *Cruz*. Judge Wilkinson evidently did not view his concurring opinion in *Velasquez* to conflict with the majority decision in *Zavaleta-Policiano*.

establish persecution "on account of" family membership.[13] *Torres v. Mukasey*, 551 F.3d 616, 630 (7th Cir. 2008); *Vumi v. Gonzales*, 502 F.3d 150, 154-55 (2d Cir. 2007); *Jie Lin v. Ashcroft*, 377 F.3d 1014, 1029 (9th Cir. 2004); *Gebremichael v. INS*, 10 F.3d 28, 36 (1st Cir. 1993). *See also Torres-Vaquerano v. Holder*, 529 F.App'x 444, 449 (6th Cir. 2013); *Kanchaveli v. Gonzales*, 133 F.App'x 852, 856 (3d Cir. 2005). To hold otherwise would place the Attorney General in conflict with numerous circuits.

Finally, DHS asks the Attorney General to "clarify" the concept of persecution by holding that it consists of three separate concepts: (1) an "intent to target a belief or characteristic," (2) a "severe" level of harm, and (3) harm that is "inflicted either by the government of a country or by persons or an organization that the government was unable or unwilling to control." DHS Br. at 31-32. While courts occasionally refer to all three concepts, only the second requirement—*i.e.*, the level of harm—is relevant to whether maltreatment qualifies as "persecution." *See*, *e.g.*, *Mirisawo v. Holder*, 599 F.3d 391, 396 (4th Cir. 2010) ("While 'persecution' is often manifested in physical violence, 'the harm or suffering [amounting to persecution] need not be physical, but may take other forms,' so long as the harm is of sufficient severity." (quoting H.R. Rep. No. 95-1452, at 5 (1978), reprinted in 1978 U.S.C.C.A.N. 4700, 4704)). By contrast, the first requirement relates to the motive(s) of the persecutors—*i.e.*, whether there is a nexus to a protected ground[14]—while the third requirement relates

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[13] The only circuit decision to hold otherwise was vacated by agreement of the parties after the filing of a petition for certiorari. *Demiraj v. Holder*, 631 F.3d 194 (5th Cir. 2011), *vacated by* 2012 U.S. App. LEXIS 12012 (5th Cir. May 31, 2012).

[14] As DHS properly concedes, asylum applicants need not demonstrate that persecutors were motivated by a desire to punish or inflict harm. DHS Br. at 31-32

to whether the government is directly or indirectly responsible for the actions of the persecutors. Conflating the first and third requirements with the concept of "persecution" would only create confusion among advocates and adjudicators.

With respect to the third requirement, DHS further asserts a foreign government should be deemed willing and able to control private persecutors so long as there is a "reasonably effective" system to prevent, investigate, prosecute, and punish them. DHS Br. at 32. DHS cites no authority for this proposition and makes no attempt to explain what "reasonably effective" means in practice. DHS's proposed test would also transform a fact-specific inquiry involving the applicant's own claim into a general inquiry into the effectiveness of a foreign government's legal system. If a circuit court were to find that a specific country lacked a "reasonably effective" system, that finding could then bind adjudicators in all other asylum cases arising within that circuit. The Attorney General need not reach this issue, however, given that the Fourth Circuit has held that "[w]hether a government is unable or unwilling to control private actors is a factual question that must be resolved based on the record in each case." *Crespin-Valladares v. Holder*, 632 F.3d 117, 128 (4th Cir. 2011) (internal quotation marks omitted).[15]

(citing *Kasinga,* 21 I&N Dec. at 365). *See also Matter of L-E-A-*, 27 I&N Dec. 40, 44 n.2 (BIA 2017) (citing *Pitcherskaia v. INS*, 118 F.3d 641, 646 (9th Cir. 1997)).

[15] DHS further asks the Attorney General to hold that actions by "low-level, corrupt officials" do not necessarily qualify as persecution by "the government." DHS Br. at 32 n.18. DHS asserts that rogue government employees should be regarded as private actors unless they are "exercising authority [they have] or [are] perceived to have by virtue of [their] official position." *Id*. The Attorney General need not address this issue given that Ms. [redacted] has never disputed that her ex-husband is a private actor. Resp't Br. at 40-42.

While Respondent has not addressed every item on DHS's wish list, she requests that the Attorney General refrain from addressing any issue that is not "relevant" to the disposition of her own case. 27 I&N Dec. at 227. Addressing such issues would not only exceed the scope of the briefing order but raise broader concerns about notice to the public at large. *See Chocolate Mfrs. Ass'n v. Block*, 755 F.2d 1098 (4th Cir. 1985) (striking down regulation for adopting position suggested for first time in comments submitted to agency).

CONCLUSION

For the foregoing reasons, as well as those in the opening brief, the Attorney General should instruct Judge Couch to issue an order granting or denying Ms. [redacted]'s asylum application before taking any further action on this case. If the Attorney General reaches the merits, he should decline to address the specific briefing question or, at minimum, reaffirm well-settled U.S. law holding that persecution by private actors may present a valid asylum claim, whether or not those acts are also crimes. The Attorney General should also uphold the Board's finding that Ms. [redacted] qualifies for asylum because she was subject to—and continues to reasonably fear—persecution in the form of brutal domestic violence on account of her membership in a particular social group that the Salvadoran government was unable and unwilling to control.

Dated: May 4, 2018

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the instructions of the Attorney General's referral order dated May 4, 2018 because the brief contains 5,784 words per the Word Count feature of Microsoft Word, excluding the cover page, Table of Contents, Table of Authorities, signature block, Certificate of Compliance, and Certificates of Filing and Service.

Dated: May 4, 2018

Blaine Bookey

CERTIFICATE OF FILING

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