Case No. 09-71571

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Rocio Brenda HENRIQUEZ-Rivas,

Petitioner,

vs.

Eric Holder, Attorney General of the United States,

Respondent

BRIEF *AMICUS CURIAE* OF THE NATIONAL IMMIGRANT JUSTICE CENTER IN SUPPORT OF PETITIONER

Charles Roth
National Immigrant Justice Center
208 S. LaSalle St., Suite 1818
Chicago, Illinois 60604
Tel.: 312.660.1613
Fax: 312.660.1505

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, amicus curiae submits the following corporate disclosure statement:

The National Immigrant Justice Center states that it is a program of The Heartland Alliance for Human Needs and Human Rights, an Illinois nonprofit corporation, which has no corporate parents. It is not publicly traded.

/s Charles Roth
Charles Roth

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Statement of Interest of *Amicus Curiae*

The National Immigrant Justice Center (NIJC), a program of the Heartland Alliance for Human Needs and Human Rights, is a Chicago-based non-profit organization that provides legal representation and consultation to low-income immigrants, refugees and asylum seekers across the country. Each year, together with its network of over 1000 *pro bono* attorneys, NIJC represents hundreds of asylum seekers before the immigration courts, Board of Immigration Appeals (BIA), and the Courts of Appeals. NIJC has represented dozens of individuals fearing persecution on account of their willingness to be witnesses in prosecutions. NIJC believes its subject matter expertise can assist this Court in its consideration of the present appeal.

Summary of Argument of *Amicus Curiae*

Amicus writes in support of Petitioner's petition for review to offer four points: (1) there is no principled reason why particular social groups may not be large and diverse (so long as members share at least one immutable characteristic fundamental to members' identity), just as other protected grounds may include large segments of the population; (2) the Board's focus on opaque and evolving rules governing the definition of

particular social groups distracts focus from more significant factors, and disadvantages asylum seekers, many of whom are *pro se*; (3) the past experience of being a witness or informant can form the basis of a particular social group; and (4) the BIA's precedent decision, *Matter of C-A-*, 23 I&N Dec. 951 (BIA 2006) does not deserve deference from this Court.

First, there is no principled reason to require that a "particular social group" be defined only to include a group that is narrow and homogenous. On the contrary, a group may be viable so long as group members share an immutable characteristic that is fundamental to identity. Rejecting social group definitions due to the breadth of the group is inconsistent with the other protected grounds for asylum – race, religion, nationality, and political opinion – which are determined by a shared trait and not limited by the size or diversity of the group. Of course, the fact that a group is large would not mean that all group members would qualify for asylum; other elements of asylum, most notably the nexus requirement, would limit asylum eligibility. *See* 8 U.S.C. §§ 1101(a)(42)(A), 1158; 8 C.F.R. § 1208.

Second, the BIA's focus on how social groups are defined or proposed, particularly in light of its imprecise and illogical articulation of the definitional requirements, has rendered the concept a moving target

that simultaneously means everything and means nothing. Such a legal scheme leaves asylum applicants and their advocates without clear guidance as to what is necessary to put forth a viable legal claim for asylum. This is especially dangerous to *pro se* applicants. Asylum seekers must navigate this tricky legal landscape in order to avoid deportation to countries where their very lives are in peril. Running afoul of the currently ill-defined social group requirements can result in denial of the claim, subjecting the asylum applicant to persecution or death.

Third, a particular social group based on group members' status as former witnesses or informants can be legally viable. Being a witness or informant is a past experience no less immutable than other established fundamental traits – such as sexual orientation or a previous profession. Members of a witness-based particular social group do not simply share the characteristic of being targets for persecution. While witnesses may share a fear of persecution due to their testimony, they are unified by the characteristic of having been a witness. As such, the group is not defined by the harm its members have experienced or fear. There is no sound legal reason to reject this group; and Congressional policy, if anything would appear to favor protections for witness groups.

Finally, the Court should not defer to the BIA's decision in *Matter of C-A*, which holds that a particular social group comprised of confidential informants fails because it lacks social visibility. That decision suggests that to prevail, an applicant must show her particular social group is actually visible to society. It counter-intuitively requires that would-be asylum seekers flaunt the very characteristic that could trigger their demise. This holding is illogical, inconsistent with prior precedent, and should be rejected. But at any rate, applying that logic to this case ought to have resulted in a grant of asylum, since public witnesses are the antithesis of confidential informants.

Argument

I. The Size and Diversity of a Group is Irrelevant to the Particular Social-group analysis

The Court should find that a group whose members share the common immutable characteristic of having been a witness or informant in the past can constitute a particular social group.

To qualify for asylum, an applicant must establish a well-founded fear of persecution on account of one of five protected grounds: "race, religion, nationality, membership in a particular social group, or political

opinion." 8 U.S.C. § 1101(a)(42)(A). In *Matter of Acosta*, 19 I&N Dec. 211 (BIA 1985), the BIA established a rule for determining whether an asylum applicant has demonstrated membership in a particular social group. Relying on the doctrine of *ejusdem generis*, "of the same kind," the BIA construed the term in comparison to the other protected grounds within the refugee definition. 19 I&N Dec. at 233-34.

The BIA concluded that the commonality shared by all five protected grounds is the fact that they encompass innate characteristics (like race and nationality) or characteristics one should not be required to change (like religion or political opinion). *Id*. at 233. To be a protected ground, social group membership can be based either on a shared characteristic members cannot change (like gender or sexual orientation) or a characteristic they should not be required to change (like being an uncircumcised female). *See id*. (listing gender as an immutable characteristic); *see also Matter of Toboso-Alfonso*, 20 I&N Dec. 819 (BIA 1990) (recognizing homosexuality as an immutable characteristic); *Matter of Kasinga*, 21 I&N Dec. 357, 366 (BIA 1996) (recognizing the status of being an uncircumcised woman as a characteristic one should not be required to change).

Federal courts of appeals have endorsed the *Acosta* standard for discerning particular social groups as a valid interpretation of the statute and this standard has governed the analysis of particular social group claims for decades.[1] *See* Br. for *Amicus Curiae* CGRS at Part II.A.1. This Court's interpretation of "particular social group" initially diverged from the *Acosta* formulation. *See Sanchez-Trujillo v. I.N.S.*, 801 F.2d 1571, 1576 (9th Cir. 1986) (finding it "[o]f central concern" whether there was "a voluntary associational relationship among the purported members, which imparts some common characteristic that is fundamental to their identity as a member of that discrete social group.") The Court, however, modified this definition to harmonize its interpretation of "particular social group"

[1] The BIA has recently purported to add the requirements that a particular social group claimant must demonstrate "social visibility" and "particularity." *Matter of S-E-G-*, 24 I&N Dec. 579, 582-88 (BIA 2008). The BIA had previously incorporated these two factors into the particular social-group analysis only in instances when a proposed social group did not meet the *Acosta* formulation. *See C-A-*, 23 I&N Dec. 951. Even were the social visibility test to be viable, Petitioner's proposed social group would survive under it. *See* Petitioner's Supplemental Brief at Part II.B. However, this Court ought not uphold that interpretation. Courts have persuasively rejected the *S-E-G-* formulation, *see e.g.*, *Gatimi v. Holder*, 578 F.3d 611 (7th Cir. 2009); *Valdiviezo-Galdamez v. Att'y Gen.*, 663 F.3d 582, 605-07 (3d Cir. 2011). As argued in Petitioner's Supplemental Brief and in the brief of *amicus curiae* CGRS, the decision in *C-A-* was not reasonable and is not entitled to *Chevron* deference. *See* Petitioner's Supplemental Brief at Part II.C; Br. for *Amicus Curiae* CGRS at Part II.

with that of *Acosta* and other circuits. *See Hernandez-Montiel v. INS*, 225 F.3d 1084, 1092-93 (9th Cir. 2000) (defining a "particular social group" to include groups "united by a voluntary association, including a former association, *or* by an innate characteristic that is so fundamental to the identities or consciences of its members that members either cannot or should not be required to change it.")

There is no requirement in 8 U.S.C. § 1101(a)(42)(A) that a particular social group be homogenous or limited in size.[2] The BIA has explicitly rejected a requirement of "cohesiveness" or "homogeneity" among members of a particular social group. [3] *C-A-*, 23 I&N Dec. at 957. This Court has also recently stated that "the size and breadth of a group alone does not preclude a group from qualifying as a social group." *Perdomo*, 611 F.3d at 669.

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[2] Nor, as this Court noted in *Perdomo v. Holder*, 611 F.3d 662, 668 n.7 (9th Cir. 2010), does the drafting language of the 1951 Convention relating to the Status of Refugees, July 28, 1951, 10 U.S.T. 6259, 189 U.N.T.S. 150, or the United States High Commissioner for Refugees' ("UNHCR") *Handbook on Procedures and Criteria for Determining Refugee Status* (Geneva 1992) require that a particular social group be narrowly defined.

[3] Under the *Sanchez-Trujillo* "voluntary associational relationship" prong, the Court has required that a group must be cohesive and homogenous. 801 F.3d at 1576-77. However, no similar requirement exists for groups based on the common immutable characteristic prong. *Cf. Hernandez-Montiel*, 225 F.3d at 1092-93.

Acosta's reliance on the principle of *ejusdem generis* shows why the breadth and diversity of a group is not an obstacle to establishing a social group. Indeed, if they were, those persecuted on account of the other protected grounds – such as race and nationality, which by definition encompass numerically large and often diverse groups, or political opinion in countries where a dictatorial regime oppresses the majority – would be ineligible for asylum. Such a result would be illogical.

Although the Court expressed concern that recognizing large groups as particular social groups "would be tantamount to extending refugee status to every alien displaced by general conditions . . . in his or her home country," *Soriano v. Holder*, 569 F.3d 1162, 1166 (9th Cir. 2009), the fact that a particular social group may be broad says little about the number of people who might ultimately qualify for asylum under that definition. The refugee definition and other statutory and regulatory provisions include requirements for establishing asylum eligibility which filter who can receive protection in the United States. Most notably the law requires that

the applicant show she would be persecuted *on account of* membership in her proposed social group. 8 U.S.C. § 1158(b)(1)(B)(i).[4]

Moreover, the BIA and this Court have recognized a number of "broad and internally diverse social groups" as particular social groups because group members met the *Acosta* test by sharing an innate characteristic. *See Perdomo*, 611 F.3d at 668. For example, the BIA has recognized Somali clans, *Matter of H-*, 21 I&N Dec. 337 (BIA 1996), and Filipinos of Chinese ancestry, *Matter of V-T-S-*, 21 I&N Dec. 792 (BIA 1997), as particular social groups, despite the potential breadth of the groups' members.

This Court has found that "Gypsies," *Mihalev v. Ashcroft*, 388 F.3d 722, 726 (9th Cir. 2004), "alien homosexuals," *Karouni v. Gonzales*, 399 F.3d 1163, 1172 (9th Cir. 2005), "Mexican men with female sexual identities,"

[4] In addition, applicants who have not suffered past persecution and only fear future persecution must prove that they cannot reasonably relocate to avoid persecution, unless the persecutor is by the government or is government-sponsored. *See* 8 C.F.R. § 208.13(b)(3)(i). Even where an applicant suffered past persecution, triggering a rebuttable presumption of future persecution, the government may overcome that presumption. *See* 8 C.F.R. § 208.13(b)(3)(ii). Finally, asylum is a discretionary form of relief and the statute bars individuals from asylum based on criminal and national security grounds. *See* 8 U.S.C. § 1158(b)(1)(A), (b)(2)(A); *Cardoza-Fonseca*, 480 U.S. 421, 441 (1987); *INS v. Stevic*, 467 U.S. 407, 423 (1984).

Hernandez-Montiel, 225 F.3d at 1084, and "Somali females," *Mohammed v. Gonzales*, 400 F.3d 785, 798 (9th Cir. 2005), all constitute particular social groups for purposes of asylum, even though these groups are numerically large and/or demographically diverse. Recently, this Court has said that "women in Guatemala" may also constitute a particular social group. *Perdomo*, 611 F.3d at 669.

Amicus agrees that social groups are properly rejected where they "share[] neither a voluntary relationship nor an innate characteristic," *Perdomo*, 611 F.3d at 668 (citing *Ochoa v. Gonzales*, 406 F.3d 1166 (9th Cir. 2005); *Delgado-Ortiz v. Holder*, 600 F.3d 1148 (9th Cir. 2010)), not simply because they are broad. However, some of the Court's decisions have implied that large or diverse social groups should be rejected solely due to their size or diversity. See *Soriano*, 569 F.3d at 1166; *Velasco-Cervantes v. Holder*, 593 F.3d 975 (9th Cir. 2010). *Amicus* believes that those decisions are flawed to the extent that they fail to consider the second prong of *Hernandez-Montiel* – whether group members share a common immutable characteristic.

In *Soriano* and *Velasco-Cervantes*, both proposed groups involved individuals who had served as government informants/witnesses in the

past. This Court erroneously rejected these proposed groups based on the group's size, diversity, and the lack of voluntary association among group members, without considering whether group members shared a common immutable characteristic. *See Soriano*, 569 F.3d at 1166 (rejecting the proposed social group of "government informants" because it is not a "cohesive, homogenous group" and "anyone of any demographic description" could become a group member); *Velasco-Cervantes*, 593 F.3d at 978 (rejecting the proposed group of "former material witnesses for the United States government" because such witnesses "are often involuntarily recruited for the task" and "any person of any origin can be involuntarily placed in that role").

As described in Petitioner's Supplemental Brief and in Section III *infra*, members of groups involving former government informants or witnesses share the immutable past experience of having served as a government informant or witness. Since the group members in *Soriano* and *Velasco-Cervantes* shared this past experience, this Court should have found that the proposed groups constituted particular social groups. *See Hernandez-Montiel*, 225 F.3d at 1092-93. The fact that a proposed group is potentially large, diverse, and group members lack a voluntary

relationship is irrelevant where group members share a common immutable characteristic. *See Perdomo*, 611 F.3d at 668.

II. The BIA's Exaggerated Focus on How Proposed Social Groups Are Defined Is Unfair to *Pro Se* and Represented Applicants Alike

Recent BIA decisions have imposed two new limits on social group claims, namely, the "particularity" and "social visibility" requirements. These function as Scylla and Charybdis. S.H., Butcher and A. Lang, *The Odyssey of Homer* 199-200 (MacMillan & Co.1922) (1879). If the applicant strays too close to one side, she risks the Board finding her group as too broadly defined and "vague." But neither may the applicant define the group narrowly, lest the BIA deny it for being so narrow that the society would not "recognize" the group as such. The alien must thread a definitional needle, on pain of being deported to face persecution, torture, or death.

For instance, the BIA requires applicants to define their groups "with sufficient particularity" to provide "an adequate benchmark for determining group membership." *Matter of A-M-E- & J-G-U-*, 24 I&N Dec. 69, 74-76 (BIA 2007). Under this scheme, the BIA has rejected a group composed of "wealthy Guatemalans" because it found wealth an

amorphous and subjective criterion. *Id*. at 73, 76; *see Arteaga v. Mukasey*, 511 F.3d 940, 944 (9th Cir. 2007) (citing *A-M-E- & J-G-U-* with approval). Yet if the applicant were to define the group with greater precision – a particular income level, for instance – then the claim would be denied because society wouldn't recognize such statistical groupings. *See Sanchez-Trujillo*, 801 F.2d at 1576. ("[A] statistical group of males taller than six feet would not constitute a "particular social group" under any reasonable construction of the statutory term, even if individuals with such characteristics could be shown to be at greater risk of persecution than the general population.")

Lost in the mix is the question which ought to be asked: *i.e.*, whether the applicant would actually face persecution for being "wealthy," as has happened not uncommonly throughout history. *See, e.g.*, "Foreign News: Days of Wrath," *Time Magazine* (Nov. 26, 1928) (describing alleged resistance to the Soviet Union by "rich peasant" class); *Tapiero de Orejuela v. Gonzales*, 423 F.3d 666, 673 (7th Cir.2005) (finding cognizable social group of "educated, landowning class"). The BIA has never purported to explain how its test would treat a "rich peasant" class; but persecutors seem willing to kill millions of group members without defining with precision how much food the peasant must possess in order to be considered "rich."

This definitional emphasis is apparently applied only to social group claims, notwithstanding the BIA's earlier invocation of *ejusdem generis* in interpreting social group membership. *Acosta*, 19 I&N Dec. at 233-34. For example, members of political parties or groupings hold various political opinions, *see* John O. McGinnis, *The Condorcet Case for Supermajority Rules*, 16 Sup. Ct. Econ. Rev. 67, 78 (2008), yet the fact that a political party's agenda is "vague" would seem no bar to asylum if its members established that they were persecuted on account of their political party affiliation. *See, e.g.*, *Reyes-Guerrero v. I.N.S.*, 192 F.3d 1241 (9th Cir. 1999). Racial composition is often unclear, particularly at the boundaries. *See, People v. Dean*, 14 Mich. 406, 1866 WL 2866, *11 (Mich. 1866) ("persons are white within the meaning of our constitution, in whom white blood so far preponderates that they have less than one-fourth of African blood"). So, too, with religion; the fact that a religious movement like Falun Gong has no "formal requirements for membership; indeed, it has no membership," is no protection against vicious persecution. *Iao v. Gonzales*, 400 F.3d 530, 533 (7th Cir. 2005).

The question which the BIA ought to ask is whether the asylum claim proposed by the applicant has real substance, such that the applicant

would be persecuted due to her membership in a particular social group whose members share an immutable characteristic. The extent to which the group is susceptible to precise delimitation is relevant only to the extent that it bears on that question of proof. After all, an applicant who proposes a broad particular social group gains no benefit thereby, unless the applicant can show (a) that she is in fact a member of the proposed group, and (b) that she has been or would be persecuted on account of that membership.

The BIA's excessive focus on technical definitions is particularly egregious when it comes to *pro se* applicants. The asylum application form, form I-589, available at http://www.uscis.gov/files/form/i-589.pdf (last accessed Feb. 20, 2012), invites the applicant to select membership in a particular social group as the basis for her fear, but never asks the applicant to define that group. The closest the form gets to that question is to ask the applicant to explain "why you believe you could or would be persecuted," *id.* at 5, in a space which suggests a narrative. The form does not prompt the applicant to name a social group, nor to offer potential other social group definitions in the alternative. Neither do the form instructions explain to the applicant the delicate needle which she must thread in order

to qualify for asylum., *i.e.*, a group that has some public visibility, but with "borders" which are not blurry. See Instructions, available at http://www.uscis.gov/files/form/i-589instr.pdf (last accessed Feb. 20, 2012).

Asylum applicants are often of very limited sophistication, falling prey to shoddy or fraudulent operations that purport to provide legal representation. *Avagyan v. Holder*, 646 F.3d 672, 682 (9th Cir. 2011). Many obtain assistance from community organizations, churches, unlicensed notaries, or well-intentioned but ill-informed community members. *See Morales Apolinar v. Mukasey*, 514 F.3d 893, 897 n.6 (9th Cir. 2008). Asylum "[f]orms are frequently filled out by poor, illiterate people who do not speak English and are unable to retain counsel." *Aguilera-Cota v. U.S. INS*, 914 F.2d 1375, 1382 (9th Cir.1990). "[T]he circumstances surrounding the [asylum] process do not often lend themselves to a . . . comprehensive recitation of an applicant's claim to asylum or withholding, and . . . holding applicants to such a standard is not only unrealistic but also unfair." *Secaida-Rosales v. INS*, 331 F.3d 297, 308 (2d Cir. 2003) (abrogated in part by 8 U.S.C. § 1158(b)(1)(B)(iii)).

It is crucial that the BIA's test be one which can be understood. The BIA's current test can hardly be understood by experts and lawyers, let alone lay individuals and asylum applicants. It is a national obligation, both in statute and in treaty, not to return individuals to a country where they face persecution. *See* 8 U.S.C. 1231(b)(3); 19 U.S.T. 6223, 6259–6276, T.I.A.S. No. 6577 (1968); *see generally Stevic*, 467 U.S. at 416-17. If the BIA cannot explicate a social group theory with some semblance of logical consistency, it is unfair to expect asylum applicants – both *pro se* applicants and those represented by adequate counsel – to identify a social group that can meet the agency's shifting criteria.

Thus, this Court ought to modify its decision in *Arteaga*, 511 F.3d at 944-45, which makes one of the criteria for a particular social group "whether the group can be defined with sufficient particularity to delimit its membership." This gives *carte blanche* to the agency to focus on technical definition to the exclusion of more significant factors. *See Merriam-Webster Online Dictionary* (2012), http://www.merriam-webster.com/dictionary/delimit (last visited February 16, 2012) (defining "delimit" as "to fix or define the limits of").

As explained in Section I *supra*, the size and demographic diversity of a proposed group are irrelevant to the question of whether a group constitutes a particular social group for asylum purposes. So, too, the precision with which a group can be defined. The sum total of these efforts has not been clarification, but untold confusion among asylum seekers and adjudicators alike. *See Henriquez-Rivas v. Holder*, No. 09-17571, 2011 WL 3915529, at *3 (9th Cir., Sept. 7, 2011) (Bea, J., concurring). The Court should find that the precision with which a group can be defined, like its size and demographic diversity, is of very limited relevance.

At any rate, a group composed of members that share the common immutable characteristic of having been a witness or informant in the past is not broad, nor are its borders blurry. Any diversity in its composition is no greater than the diversity in most political parties or religious groups.

III. A Social Group Based on the Shared Past Experience of Being a Witness or Informant Can be a Cognizable Particular Social Group

Having accepted the risks that come with serving as a witness or informant against a powerful and dangerous group, the witness has committed an irretrievable act that becomes indivisible from her identity. This Court should recognized that the past act of having served as a

witness or informant can, without more, form the basis of a particular social group for purposes of asylum.

A. The Unifying Past Experience of Having Been a Witness or Informant Constitutes a Fundamental and Immutable Characteristic.

In *Acosta*, the BIA held that a shared past experience "such as former military leadership or land ownership" can constitute the kind of common immutable and fundamental characteristic that form the basis of a particular social group. 19 I&N Dec. at 233. On at least three occasions, groups defined by the characteristic of being "former" something have been recognized by this Court. *Cruz-Navarro v. INS,* 232 F.3d 1024, 1028-29 (9th Cir. 2000) (former members of the police or military); *Velarde v. INS,* 140 F.3d 1305, 1311-13 (9th Cir. 1998) (former bodyguards of the daughters of the president); *Chanco v. INS,* 82 F.3d 298, 302-03 (9th Cir.1996) (former military officers).

Having been a witness or informant is a past act that can form the basis of a particular social group. In a case recognizing the particular social group of former gang members, the Seventh Circuit noted, "being a former member of a group is a characteristic impossible to change, except perhaps

by rejoining the group." *Benitez Ramos v. Holder*, 589 F.3d 426, 429 (7th Cir. 2009). In the instant case, the notion of the petitioner divesting herself of the characteristic for which she faces persecution is even less tenable. A witness cannot un-ring the bell of her testimony. Even if she were to recant, she could not undo the act that placed her in the particular social group of witnesses. It is, without question, now an immutable characteristic fundamental to her identity that she is unable to change.

Similarly, the Third Circuit recently recognized that the act of having served as a witness constitutes a "shared past experience" that is "fundamental" and that members of the group cannot change and therefore forms the basis of a cognizable social group. *Garcia v. Att'y Gen.*, 665 F.3d 496, 504 (3d Cir. 2011). *See* Petitioner's Supplemental Brief at 3-4.

The fact that "any person of any origin can be involuntarily placed… in any type of legal proceeding," *Velasco-Cervantes*, 593 F.3d at 978, cannot bear the weight that the *Velasco-Cervantes* Court put on that point. Any person of any origin could be involuntarily forced by a totalitarian regime to choose whether to join in persecuting others, or to refuse and be persecuted oneself. *See, e.g.*, *Negusie v. Holder*, 555 U.S. 511 (2009). Any person of any origin may become a practitioner of a religion which subjects

them to persecution, *see*, *e.g.*, *Ghebrehiwot v. Att'y Gen.*, 467 F.3d 344, 354-55 (3d Cir. 2006), but the fact that religious membership can transcend socioeconomic boundaries has never been thought to preclude asylum protection from those persecuted for religious beliefs. If persecutors impute voluntariness to some witnesses who do not in fact wish to testify, that is no argument against the viability of a social group composed of those persons targeted precisely for their willingness to speak the truth at great risk to themselves.

B. A Particular Social Group Based on Being a Witness or Informant is Not Defined by the Persecution Experienced or Feared.

The immutable characteristic that unifies a particular social group comprised of witnesses is not the fact that group members are targets of persecution; it is the fact that they are witnesses. Like members of other social groups recognized by this Court, such as former members of the police, *Cruz-Navarro*, 232 F.3d at 1028-29, and Somali females, *Mohammed*, 400 F.3d 785, members of a witness or informant-based social group share a risk of harm. So long as members of a proposed group share another immutable characteristic, their shared risk of harm is irrelevant to the social-group analysis. *See C-A-*, 23 I&N Dec. at 956 (citing to the UNHCR

Guidelines on International Protection: "Membership of a particular social group" for the point that a particular social group must simply share a common characteristic "other than their risk of being persecuted") (internal citation omitted); *see also Escobar v. Holder*, 657 F.3d 537, 545 (7th Cir. 2011) (noting that the BIA "has never demanded an utter absence of any link to the persecutor").

The group at issue in this case is not "people who fear Mara 18" or "people seeking police protection from the Mara 18." Such a group would exist exclusively because of their connection to the persecutor and would share no other immutable characteristics. A group of witnesses to Mara 18 activity, however, is different because it is their status as witnesses – not victims – that unites them.[5]

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[5] *Amicus* notes that in some instances, the shared experience of having suffered past persecution can form the basis of a particular social group for a different type of future persecution. For example, if female rape victims were frequently stoned to death in a particular country because they were perceived as promiscuous, a female asylum applicant who had suffered rape in that country could assert a well-founded fear of being stoned to death in the future on account of her membership in the particular social group of "female rape victims." *See Lukwago v. Ashcroft*, 329 F.3d 157, 172 (3d Cir. 2003) (recognizing the particular social group of "former child soldiers who have escaped LRA captivity" and noting that "the shared experience of enduring past persecution may, under some circumstances, support defining a "particular social group" for purposes of fear of future

C. Policy Considerations Support, and Do Not Undercut, These Arguments.

The primary effect of the arguments put forth by *Amicus* and Petitioner would be to clarify the law in this area, or at least, to clear away legally flawed reasoning that impedes the advent of clarity.

Adopting this legal interpretation of "particular social group" would not result in a substantially greater number of successful asylum claims. Membership in a particular social group does not entitle one to asylum. As noted in Section I *supra*, the remaining asylum elements serve to limit asylum eligibility among particular social group members. *See* Deborah E. Anker, *Membership in a Particular Social Group: Developments in U.S. Law*, 1566 PLI/Corp 195 (2006). Each asylum applicant is subjected to an individualized analysis that allows the adjudicator to deny asylum as a matter of discretion. *See Cardoza-Fonseca*, 480 US at 444-45 (emphasis added) (stating "Congress has assigned to the Attorney General and his delegates the task of making these hard *individualized* decisions; although Congress could have crafted a narrower definition, it chose to authorize the

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persecution…"); *cf.* also, *Matter of Chen*, 20 I. & N. Dec. 16, 19-20 (BIA 1989) (history of family being "reeducated" during Cultural Revolution led to continued suspicion and persecution of family).

Attorney General to determine which, if any, eligible refugees should be denied asylum.")

Nor would recognizing witness or informant-based social groups allow individuals with checkered pasts to obtain asylum, as was suggested in *Soriano*, 569 F.3d at 1165. Congress has enunciated related policy concerns in the statute itself and has enacted statutory bars to protection-based relief in the United States based on certain types of criminal activity.

If an adjudicator has concerns about "antisocial" behavior being recognized as a shared past characteristic that forms the basis of a social group, there are several grounds on which the agency is required to refrain from granting protection. The INA incorporates statutory bars to relief for individuals who have engaged in the past persecution of others; who have convictions for particularly serious crimes in the United States; where there is serious reason to believe that an individual has committed a serious non-political offense outside of the United States; or where there are serious grounds for believing an individual is a danger to the security of the United States or that an individual has engaged in terrorist activity. 8 U.S.C. § 1158(b)(2)(A)(i)-(v); 8 U.S.C. § 1231(b)(3)(B)(i)-(iv).

Congress has thus already implemented policy-based exceptions to asylum eligibility, exceptions which it could broaden by statute if it wished. A separate set of agency-created exceptions would be largely superfluous. *See Benitez-Ramos*, 589 F.3d at 429030 (noting that Congress has barred from asylum persons who have been persecutors themselves or who have committed a "serious nonpolitical crime," but has said nothing about barring former gang members). Moreover, asylum is a discretionary form of relief; even if the statutory bars are not triggered, the agency can decline to grant asylum in the exercise of its discretion, 8 U.S.C. § 1158(b)(1)(A).

The BIA has placed weight on the possibility that some witnesses or informants may have chosen to serve as a witness or informant in exchange for some benefit. In *C-A-*, for example, the BIA compared such activity with accepting employment in an occupation associated with certain risks and noted that such individuals are generally unable to obtain asylum if those risks materialize. 23 I&N Dec. at 958-59 (citing *Matter of Fuentes*, 19 I&N Dec. 658, 662 (BIA 1988)). But the holding in *Fuentes* was not that the group of policemen in El Salvador was non-cognizable because they had accepted the risks inherent in their employment; but rather, that police

harmed in the normal course of their employment were not harmed on account of their membership in a particular social group. *Fuentes*, 19 I&N Dec. at 661-61. In describing *Fuentes*, the BIA in *C-A-* conflated the question of whether the applicant's proposed social group was cognizable with the question of whether the applicant was harmed on account of his membership in that group.

To the extent Congress has spoken as to its desired policy in regards to this type of claim, its legislation would tend to suggest that Congress would be solicitous of those who stand up to powerful groups such as the Mara 18. The INA contains various provisions enacted specifically to provide some protection for immigrants who have testified in criminal cases. *See* 8 U.S.C. § 1101(a)(S); 8 U.S.C. § 1101(a)(U). *Amicus* does not, of course, suggest that these provisions are directly on point here, but simply notes that to the extent that the INA would support any particular view of Congressional intent as to witnesses, there is no reason to believe that Congress would have wished for the agency to refuse to apply generally applicable asylum principles to permit witnesses to seek protection in this country.

IV. The BIA's Decision in *C-A-* Deserves No Deference; But Would In Any Event Support the Claim Here.

As has been noted by other *Amici*, *see* Br. for *Amicus Curiae* UNHCR, Br. for *Amicus Curiae* CGRS, and other Courts, *see Gatimi v. Holder*, 578 F.3d 611, 615-16 (7th Cir. 2009); *Valdiviezo-Galdamez v. Att'y Gen.*, 663 F.3d 582, 605-07 (3d Cir. 2011), the Agency seems undecided on the meaning of its social visibility test. The Agency often defends its test, treating it as a different formulation of the "social perception" test which is partially employed in Australia. *See* UNHCR, Guidelines on International Protection: "Membership of a particular social group" within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, U.N. Doc. HCR/GIP/02/02. But the precedential decision most on point in this context, *Matter of C-A-*, unmistakably treats the visibility test as requiring externally visibility. 23 I&N Dec. at 960.

The external visibility reasoning of *C-A-* makes little sense; it seems to require that would-be asylum seekers flaunt the characteristic that could trigger their demise. But whatever the power of that reasoning, a lack of external visibility would only preclude asylum for confidential informants, who are hidden from public view. That logic, applied conversely to

witnesses in the public view, would tend to support the claim of a witness like this Petitioner. *See Garcia*, 665 F.3d at 504 n.5 ("*C–A–* is distinguishable, however, in that it involved confidential informants whose aid to law enforcement was not public, whereas in this case, Silvia's identity is, and always has been, known to her alleged persecutors."). *See also* Petitioner's Supplemental Brief at Part B.

If the *C-A-* reasoning were in fact best read to refer to public perception of witnesses, it would not only render a large portion of the analysis there spurious; it would evidence a failure on the Agency's part to adequately consider the evidence presented below. Any reasoned analysis of the public perception of witnesses in El Salvador would have at least wrestled with statutes recently passed to protect witnesses; as Petitioner has noted. See *Henriquez-Rivas*, 2011 WL 3915529, at *12 (Bea, J., concurring).

Neither an external visibility analysis nor a public perception analysis support the Agency's rejection of asylum in this case. Remand to the BIA would not only permit the Agency to explain (a) how its visibility and particularity approach is consistent with earlier case law, and (b) whether the BIA meant to reject the UNHCR's disjunctive use of the visibility

approach, but it would (c) allow the BIA to reconcile its approach in *C-A-* with the facts of this case.

CONCLUSION

For all of these reasons, the Court should GRANT the Petition for Review and remand to the Agency for a proper analysis of Petitioner's asylum application.

Respectfully Submitted: February 21, 2012

/s Charles Roth
Charles Roth

Charles Roth
National Immigrant Justice Center
208 S. LaSalle St., Suite 1818
Chicago, Illinois 60604
Tel.: 312.660.1613
Fax: 312.660.1505

CERTIFICATE OF COMPLIANCE

I, Charles Roth, hereby certify that this Petition complies with Cir. R. 29-2(c)(3) because it is proportionately spaced, is produced in 14 point Book Antiqua font, and contains 5,982 words, excluding the material not counted under Fed. R. App. P. 32.

/s Charles Roth
Charles Roth

CERTIFICATE OF SERVICE

I hereby certify that I served a true and complete copy of the attached BRIEF *AMICUS CURIAE* OF THE NATIONAL IMMIGRANT JUSTICE CENTER IN SUPPORT OF REHEARING, on the following individuals, by means of the Court's ECF System:

this 21st day of February, 2012

/s Charles Roth
Charles Roth