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UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS

In the Matter of:	
VALDIVIEZO-GALDAMEZ, Mauricio	File No.: **A097 447 286**
In Removal Proceedings	

REQUEST TO APPEAR AS *AMICUS CURIAE* AND BRIEF OF THE NATIONAL IMMIGRANT JUSTICE CENTER AS *AMICUS CURIAE* IN SUPPORT OF THE RESPONDENT

REQUEST TO APPEAR AS *AMICUS CURIAE*

The National Immigrant Justice Center ("NIJC") hereby requests permission from the Board of Immigration Appeals ("Board" or "BIA") to appear as *amicus curiae* in the above-captioned matter. The Board may grant permission to *amicus curiae* to appear, on a case-by-case basis, if the public interest will be served thereby. 8 C. F. R. § 1292.1(d).

NIJC, a program of the Heartland Alliance for Human Needs and Human Rights, is a Chicago-based not-for-profit organization that provides legal representation and consultation to low-income immigrants, refugees and asylum-seekers. Each year, NIJC represents hundreds of asylum-seekers before the immigration courts, BIA, the Courts of Appeals and the Supreme Court of the United States through its legal staff and a network of over 1000 *pro bono* attorneys.

Because NIJC represents a large number of asylum-seekers, it has a weighty interest in rational, consistent and just decision-making by the Executive Office for Immigration Review. In particular, NIJC frequently provides representation to individuals seeking protection based on their membership in a particular social group. Agency precedent on this issue will impact many of the clients NIJC serves. Because of NIJC's work in this

area, NIJC has subject matter expertise concerning social group and nexus issues in asylum that it believes can assist the Board in its consideration of the present appeal, thereby serving the public interest.

NIJC therefore respectfully asks for leave to appear as *amicus curiae* and file the following brief.

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Amicus writes in support of Respondent's position in this case to address two points: (1) the persisting precedential value of *Matter of Acosta* as the seminal Board case defining particular social group should be honored by the Board; and (2) when analyzing asylum claims based on particular social group, the Board should focus not on the precise words defining a particular social group, but on the substance of the claim. This approach is most likely to comport with international obligations and ensure protection is extended to all *bona fide* refugees – many of whom are *pro se* – and is particularly appropriate given the shifting standards employed by the Board over the relevant time period.

ARGUMENT

I. The SEG Modification to the Particular Social Group Analysis is Not Faithful to *Matter of Acosta* in Methodology or Result.

In 1985 the Board provided useful guidance on asylum claims involving particular social groups when it issued *Matter of Acosta*, 19 I. & N. Dec. 211 (BIA 1985), *overruled on other grounds by Matter of Mogharrabi*, 19 I. & N. Dec. 201 (BIA 1985). *Acosta* holds that where a group of people share an immutable characteristic, or possess a characteristic they should not be

required to change because it is central to identity or conscience, those individuals are members of a particular social group. *Id*.

Acosta relies on the concept of *ejusdem generis*, or "of the same kind," to explain that the particular social group ground of asylum is intended to parallel the other asylum protected grounds: race, religion, nationality, and political opinion. *Id.* at 233. The Board 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.* Accordingly, to be protected, social group membership can be based either on a shared characteristic members cannot change (like gender or sexual orientation) or on a characteristic they should not be required to change (like being an uncircumcised female). *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) (the status of being an uncircumcised woman is a characteristic one should not be required to change).

Just as the other four protected asylum grounds encompass groups that are large or small and whose individual members may vary in

multiple ways, particular social groups need not be homogenous or small in order to be cognizable.

The *Acosta* method for analyzing particular social groups has been accepted by all federal circuits.[1] For decades, applicants seeking asylum based on membership in a particular social group have relied on *Acosta* and used it as a guide to articulate their claims.

In 2006 the Board introduced the concepts of "social visibility" and "particularity." *See In re C-A-*, 23 I. & N. Dec. 951 (BIA 2006), *aff'd sub nom. Castillo-Arias v. Attorney General*, 446 F.3d 1190 (11th Cir. 2006); *In re A-M-E- & J-G-U*, 24 I. & N. Dec. 69 (BIA 2007), *aff'd sub nom. Ucelo-Gomez v. Mukasey*, 509 F.3d 70 (2d Cir. 2007). Without defining these new terms, the Board grafted social visibility and particularity onto the particular social

[1] *Gebremichael v. INS*, 10 F.3d 28, 36 (1st Cir. 1993); *Koudriachova v. Gonzales*, 490 F.3d 255, 262 (2d Cir. 2007); *Fatin v. INS*, 12 F.3d 1233, 1239-40 (3d Cir. 1993); *Argueta-Rodriguez v. INS*, 129 F.3d 116 (4th Cir. 1997) (unpublished table decision), *available at* 1997 WL 693064; *Ontunez-Tursios v. Ashcroft*, 303 F.3d 341, 352 (5th Cir. 2002); *Castellano-Chacon v. INS*, 341 F.3d 533, 547 (6th Cir. 2003), *overruled in part on other grounds by Almuhtaseb v. Gonzales*, 453 F.3d 743 (6th Cir. 2006); *Lwin v. INS*, 144 F.3d 505, 512 (7th Cir. 1998); *Safaie v. INS*, 25 F.3d 636, 640 (8th Cir. 1994), *superseded by statute on other grounds as recognized by Ngengwe v. Mukasey*, 543 F.3d 1029, 1034 (8th Cir. 2008); *Hernandez-Montiel v. INS*, 225 F.3d 1084, 1092-93 (9th Cir. 2000); *Niang v. Gonzales*, 422 F.3d 1187, 1198-99 (10th Cir. 2005); *Castillo-Arias v. Att'y Gen.*, 446 F.3d 1190, 1196-97 (11th Cir. 2006).

group definition articulated in *Acosta* and fomented disorientation among applicants and the courts. *See Valdiviezo-Galdamez v. Attorney Gen. of U.S.,* 663 F.3d 582, 606 (3d Cir. 2011) (citing *Benitez Ramos v. Holder,* 589 F.3d 426 (7th Cir.2009)) ("Often it is unclear whether the Board is using the term "social visibility" in the literal sense, or in the "external criterion" sense, or even-whether it understands the difference."); *Henriquez-Rivas v. Holder*, 449 F. App'x 626, 630 (9th Cir. 2011) (Bea, J., concurring) ("[I]nstead of clarifying the "particular social group" analysis, identification of these two factors has only compounded the confusion. Neither this court's opinions, nor those of the BIA, have clearly defined the social visibility and particularity factors, nor provided reasoned applications of those factors to the facts of each case.")

The addition of these two particular social group requirements is incongruous with the concept of *ejusdem generis* and causes *bona fide* asylum claims to be erroneously rejected. When each step of the asylum analysis is properly applied to a case, the social visibility and particularity concepts are unnecessary and redundant. For instance, the "social visibility" prong is addressed through the nexus analysis, which turns in part on whether the persecutor is aware that the asylum applicant possesses the

characteristic for which the applicant claims to be persecuted. The imposition of additional requirements such as social visibility and particularity serves only to muddle the analysis, conflate the elements of asylum and detract from the critical function of the *Acosta* test.

There is no requirement in INA § 101(a)(42)(A) that a particular social group be narrowly defined.[2] *Acosta*'s reliance on the principle of *ejusdem generis* shows why the breadth of a group is not an obstacle to a social group definition. If breadth were a disqualifier, those persecuted on account of political opinion would be ineligible for asylum in situations where a dictatorial regime oppresses the majority, such as in Poland under the communist regime. Such a result would be illogical. Moreover, "fears

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[2] Nor is there anything in international treaties recognized as the basis of United States asylum law, or in the history of their negotiations that supports a requirement that a particular social group be defined narrowly. *See* 1951 Convention relating to the Status of Refugees, July 28, 1951, 10 U.S.T. 6259, 189 U.N.T.S. 150 (1951 Refugee Convention); United Nations High Commissioner for Refugees (UNHCR) *Handbook on Procedures and Criteria for Determining Refugee Status* (Geneva 1992). As the Supreme Court has noted, it is indeed appropriate to consider international law in construing the asylum statute, *INS v. Cardoza-Fonseca*, 480 U.S. 421, 439 fn. 22 (1987) (stating that the UNHCR Handbook provides instructive guidance on claims for protection in accordance with the United Nations Protocol Relating to the Status of Refugees, "which provided the motivation for the enactment of the Refugee Act of 1980.")

of 'opening the floodgates'…apply equally to other grounds – especially race and nationality, which by definition encompass numerically large groups." Deborah E. Anker, *Membership in a Particular Social Group: Developments in U.S. Law*, 1566 PLI/Corp 195 (2006); *see also* Deborah E. Anker, *Law Of Asylum In The United States*, §5:42 et seq, §5:47-55 (2011 ed.).

The Board articulated this point in *Matter of H-*, a case involving clan-based persecution in Somalia. 21 I. & N. Dec. 337, 343 – 44 (BIA 1996). In that case, the Board observed, "the fact that almost all Somalis can claim clan membership and that interclan conflict is prevalent should not create undue concern that virtually all Somalis would qualify for refugee status, as an applicant must establish he is being persecuted on account of that membership." *Id*. This guidance comports with the Supreme Court case of *Cardoza-Fonseca*, which noted, "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 Attorney General to determine which, if any, eligible

refugees should be denied asylum." *Cardoza-Fonseca*, 480 US at 444-45 (emphasis added).[3]

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 because the refugee definition and other statutory and regulatory provisions include other requirements which filter who can ultimately receive protection in the United States.[4] Most significantly, even

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[3] As noted by the Department of Homeland Security in previous briefing before the Board, in the years following Canada's recognition of gender-based asylum claims, that country did not experience an increase in gender-based asylum claims. *See* David A. Martin, *Department of Homeland Security's Supplemental Brief*, unknown A number, 13 n 10, April 13, 2009. Moreover, the United States has not experienced a significant increase in asylum claims based on FGM despite recognizing social groups based on the status of being an uncircumcised woman since 1999. See Tahirih Justice Center, *Precarious Protection: How Unsettled Policy and Current Laws Harm Women and Girls Fleeing Persecution* (2009) at 42 - 43.

[4] For example, a grant of asylum is at the discretion of the Attorney General. *See* INA § 208(b)(1)(A); *INS v. Stevic*, 467 U.S. 407, 423 (1984); *INS v. Cardoza-Fonseca*, 480 U.S. at 441; *see also Benitez-Ramos*, 589 F.3d at 431. For applicants who have not suffered persecution in the past but rather base their claims on a fear of future persecution, the regulations require that the applicant prove that it would not be reasonable for her to relocate in the country of feared persecution, unless the persecution is by the government or government-sponsored. *See* 8 C. F. R. § 208.13(b)(3)(i). Even where an applicant triggers a presumption of future persecution based on past persecution suffered, the presumption may be overcome by the government. *See* 8 C. F. R. § 208.13(b)(3)(ii). Finally, the statute bars

where a claimant is a member of a cognizable social group, the applicant must still show she would be persecuted *on account of* that membership, in addition to establishing the other asylum elements, to receive asylum. In *Niang v. Gonzales*, the Tenth Circuit explained why fears of over breadth in the gender context were misplaced in light of the requirement of a nexus showing:

> There may be understandable concern in using gender as a group-defining characteristic. One may be reluctant to permit, for example, half a nation's residents to obtain asylum on the ground that women are persecuted there. But the focus with respect to such claims should be not on whether either gender constitutes a social group (which both certainly do) but on whether the members of that group are sufficiently likely to be persecuted that one could say that they are persecuted "on account of" their membership. 8 U.S.C. § 1101(a)42(A). It may well be that only certain women-say, those who protest inequities-suffer harm severe enough to be considered persecution.

Niang v. Gonzales, 422 F.3d at 1199-1200 (citations omitted).

Likewise, recognition of other particular social groups that potentially include large numbers of individuals does not mean every member of those groups wins asylum. For example, the Seventh Circuit

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individuals from asylum and withholding of removal based on criminal and national security grounds. INA § 208(b)(2)(A); INA § 241(b)(3)(B).

has recognized former gang members as a particular social group. See, *Benitez-Ramos v. Holder*, 589 F.3d 426 (7th Cir. 2009). This recognition does not mean that every former gang member who enters the United States should win asylum. On the contrary, only those who meet the other elements of asylum can win.

Beyond establishing membership in the particular social group of former gang members, a former gang member must show the harm he experienced or fears rises to the level of persecution. INA § 101(a)(42). He must then establish through the submission of evidence that he was persecuted and/or has a well-founded fear of future persecution. *Cardoza-Fonseca*, 480 U.S. at 428. Next, he must show that at least one central reason for the persecution he experienced or fears is that fact that he is a former gang member. INA § 208(b)(1)(B)(i). If his former gang membership is not the reason for the harm, his asylum claim fails at the nexus step.

Even if he establishes these asylum elements, asylum is not a foregone conclusion. The former gang member must show that his persecutor is either the government or an entity the government of his country is unwilling or unable to control. INA § 101(a)(42)(A). Finally, to

win asylum, the former gang member mush establish that he merits a favorable exercise of discretion. INA § 208(b)(1).

On top of these affirmative requirements, the applicant must also show he is not subject to any of the asylum exceptions. He must establish that he could not relocate internally to avoid harm. 8 C. F. R. § 208.13(b)(i)(B). He must not have a safe third country in which he could reside. INA § 208(a)(2). The applicant must also timely apply within one year of arriving in the United States. INA § 208(a)(2)(B). He cannot have filed for asylum previously. INA § 208(a)(2)(C). The applicant must also demonstrate he is not subject to any of the exceptions to asylum set forth at INA § 208(b)(2) , which preclude individuals with serious criminal histories and those who pose a security threat to the United States from receiving asylum. *See Benitez Ramos,* 589 F. 3d at 431 ("[Benitez Ramos] may be barred from the relief he seeks for reasons unrelated to whether he is a member of a "particular social group…").

Given the labyrinth of asylum requirements and laundry list of asylum exceptions, concerns that recognizing particular social groups under the *Acosta* standard will open floodgates are misplaced. Establishing

social group membership is but one of many requirements an applicant must fulfill to receive asylum in the United States.

In the Ninth Circuit's consideration of *Perdomo*, the Court similarly found that "the size and breadth of a group alone does not preclude a group from qualifying as such a social group." *Perdomo v. Holder* at 669 (*citing Singh v. INS*, 94 F.3d 1353 (9th Cir. 1996)); *see also Benitez-Ramos,* 589 F.3d at 431. The Eighth Circuit has also found concerns over the potential size of a group irrelevant to the particular social group determination. *Malonga v. Mukasey*, 546 F.3d 546, 553-54 (8th Cir. 2008). This reasoning establishes that the *Acosta* test is sufficient to analyze particular social group claims and need not be modified to control for group size.

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

By focusing on the exact words an asylum applicant uses to define her proposed social group, adjudicators risk excluding from protection individuals with valid asylum claims. The Board's competing rules force asylum applicants to negotiate a definitional Scylla and Charybdis. S.H., Butcher and A. Lang, *The Odyssey of Homer* 199-200 (MacMillan & Co.1922) (1879). If the applicant defines a group broadly, she risks the Board

rejecting her proposed group as too vague. But if she creates a group that is too narrow, it may not be considered socially visible. This forces the applicant to thread a definitional needle, on pain of being deported to face persecution, torture, or death. This makes no sense.

This definitional emphasis is applied only to social group claims, notwithstanding the BIA's invocation of *ejusdem generis* in interpreting social group membership. *Acosta*, 19 I&N Dec. at 233-34. But boundary problems exist with any group of people, be they particular social groups, political parties, or members of a religion. Members of political parties or groups naturally have diverse backgrounds and hold varying political opinions, *see* John O. McGinnis, *The Condorcet Case for Supermajority Rules*, 16 Sup. Ct. Econ. Rev. 67, 78 (2008), yet the fact that an applicant seeking asylum based on political opinion cannot clearly articulate a political agenda would seem no bar to asylum if the applicant established she would be persecuted on account of political affiliation. *See e.g., Haxhiu v. Mukasey*, 519 F.3d 685, 690-91 (7th Cir. 2008)(finding that the petitioner suffered past persecution on account of his anti-corruption activities, which constituted an expression of political opinion). 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 and rightfully does not prevent practitioners of the faith from receiving asylum based on religion. *Iao v. Gonzales*, 400 F.3d 530, 533 (7th Cir. 2005). But the Board's approach in the context of particular social group is entirely different. The Board requires not only that the group be clear in "heartland" cases, but that it be clear at the boundaries precisely who would be included within the proposed group. The vague-boundaries standard could rarely, if ever, be met in any asylum case; even something so straightforward as party membership might be shown by registration, or by a record of political donations, or by membership in affiliated groups such as the Federalist Society, or by a record of public speaking on issues. Yet it would be passing strange to deny asylum for perceived Republicans merely because the definition of who-is-a-Republican can have unclear boundaries. It is likewise contrary to the intent of the statute to hold applicants with claims based on particular social group membership to this inscrutable standard.

The question which should be asked in an asylum claim based on membership in a particular social group is whether the applicant has established she will suffer harm based on her membership in a group

whose members share a characteristic which the applicant cannot change or should not be expected to change. The extent to which the group has been precisely defined is relevant only to the extent that it bears on the question of proof. After all, an applicant who proposes a poorly defined 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 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 July 23, 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 that 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. *See* Instructions, available at http://www.uscis.gov/files/form/i-589instr.pdf (last accessed July 23, 2012).

Asylum forms "are frequently filled out by poor, illiterate people who do not speak English and are unable to retain counsel." *Aguilera-Cota v. INS*, 914 F.2d 1375, 1382 (9th Cir. 1990). 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); *H.B. 2659: Notorious Notaries-How Arizona is Curbing Notario Fraud in the Immigration Community*, 32 ARIZ. ST. L.J. 287, 292 (2000). Even assuming a higher-than-average level of sophistication, "the 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. § 158(b)(1)(B)(iii).

Competent immigration practitioners and asylum experts struggle to define clear and concise social groups due to the immense confusion the BIA has created with its recent modifications to the particular social group test. Applicants and their attorneys may add complicated qualifiers out of concern that their proposed social group would otherwise be labeled too

"broad" or "vague." *See e.g.*, *S-E-G-*, 24 I&N at 585 (finding the proposed group of "family members of Salvadoran youth who have been subjected to recruitment efforts by MS-13 and who have rejected or resisted membership" too amorphous because "family members" could include "fathers, mothers, siblings, uncles, aunts, nieces, nephews, grandparents, cousins, and others"); *but cf. Acosta*, 19 I&N Dec. at 233 (noting "kinship ties" as an immutable characteristic that could form the basis of a social group). Particularly as guidance from the BIA in this area has been inconsistent, an excessive focus on alleged flaws in proposed particular social group definitions is unfair and inappropriate for both *pro se* applicants and those represented by adequate counsel.

The test for a particular social group should not focus on the exact words with which an asylum applicant attempts to define her particular social group, but on the simple question of whether the applicant belongs to a group whose members share a characteristic which the petitioner cannot change or should not be expected to change. It is a national obligation, both in statute and 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 INS v. Stevic*, 467 U.S. 407, 416-17

(1984). If an applicant demonstrates a reasonable possibility that she will suffer persecution and that such persecution will occur because of an immutable characteristic she shares with others, she merits asylum no matter what specific words she used to define her social group.

As explained above, the size of a group is irrelevant to the question of whether a group constitutes a particular social group for asylum purposes. So, too, the exact words with which a group is defined by the applicant. The Board should find that the precision with which an applicant defines a group, like the group's size and harm it has suffered, is of limited relevance. Instead, the question of whether a group constitutes a particular social group for asylum purposes depends solely on whether group members share an immutable characteristic.

CONCLUSION

Amicus respectfully urges the Board to (1) issue a precedent decision reaffirming *Acosta* and clarifying that "particularity" and "social visibility" are not required to establish a particular social group; and (2) clarify that asylum claims based on particular social group may be granted if the substance of the claim demonstrates the applicant's eligibility even if the applicant fails to explicitly define the particular social group.

Respectfully submitted,

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