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UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS
FALLS CHURCH, VIRGINIA

In the Matter of **Amicus Invitation No. 16-08-08**	

REQUEST TO APPEAR AS *AMICI CURIAE*

Under Board of Immigration Appeals Practice Manual Chapter 2.10, the National Immigrant Justice Center and The Advocates for Human Rights respectfully request leave to file the accompanying supplemental amicus brief in response to Amicus Invitation No. 16-08-08. Both organizations have subject-area expertise regarding asylum law and the legal issues concerning the persecutor bar and submit this brief to provide the Board with insight on the issues presented in the Amicus Invitation based on their extensive experience representing and advocating for individuals seeking asylum and other protection-based relief. Proposed *amici curiae*, along with *amici* the American Immigration Lawyers Association ("AILA") and Justice for Our Neighbors ("JFON"), previously submitted an amicus brief to the Board on November 7, 2016. On April 26, 2017, the Department of Homeland Security ("DHS") filed a substituted supplemental brief withdrawing from the position adopted in DHS's April 20, 2016, supplemental brief. The attached proposed Supplemental Brief of *Amici Curiae* addresses new arguments raised in DHS's Substituted Supplemental Brief but is not meant to supersede or replace *amici*'s November 7 brief. *Amici* respectfully request that the Board consider that November 7 brief. *Amici* also fully join in the views expressed in the amicus brief of the AILA and JFON, but write separately to address different issues raised in DHS's Substituted Supplemental Brief.

Proposed *amicus curiae* the **National Immigrant Justice Center** ("NIJC") is a Chicago-based non-profit organization that provides free legal representation to low-income refugees and asylum seekers. With collaboration from nearly 1,500 *pro bono* attorneys, NIJC represents more than 600 asylum seekers at any given time before the Asylum Office, the Immigration Courts, the Board of Immigration Appeals, the U.S. Courts of Appeals, and the U.S. Supreme Court. In addition to these cases that NIJC accepts for individual representation, it screens and provides

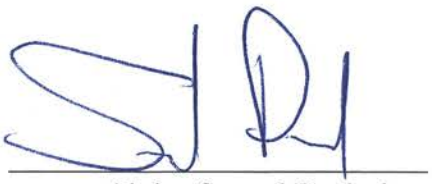
legal orientations to hundreds of other potential asylum applicants every year. NIJC also conducts "Know Your Rights" presentations at the detention facilities where asylum seekers are being held. NIJC manages a help desk to provide assistance to *pro se* respondents at immigration court and understands the challenges faced by particularly vulnerable asylum seekers. Thus, NIJC has relevant subject-matter expertise and is well-positioned to assist the Board in its consideration of the present case.

Proposed *amicus curiae* **The Advocates for Human Rights** is a non-governmental, non-profit organization dedicated to promoting and protecting human rights. Founded in 1983, the organization has more than 800 volunteers who document human rights abuses, advocate on behalf of individual victims of human rights violations, educate on human rights issues, and provide training and technical assistance to address and prevent human rights violations. The Advocates for Human Rights is a leading provider of *pro bono* representation to asylum seekers before the Department of Homeland Security, the Executive Office for Immigration Review, the Immigration Courts, the Board of Immigration Appeals, and the U.S. Courts of Appeals. The Advocates for Human Rights submitted an amicus brief to the U.S. Supreme Court during the merits stage of *Negusie v. Holder* and has remained actively involved in education and advocacy related to the persecutor bar during the years since the Supreme Court remanded the case to the Board.

NIJC and the Advocates for Human Rights therefore respectfully request leave to appear as *amici curiae* and to file the following brief to supplement their original brief dated November 7, 2016. Additionally, given the impact of the Board's decision in this matter and *amici*'s experience in providing and improving legal services to thousands of immigrant asylum seekers,

amici respectfully request that the Board permit them to present oral argument. *See* BIA Practice Manual, Ch. 8.7(e)(xiii) (Nov. 2, 2015).

Dated: June 29, 2017



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In the Matter of **Amicus Invitation No. 16-08-08**	

[PROPOSED] SUPPLEMENTAL BRIEF OF *AMICI CURIAE* NATIONAL IMMIGRANT JUSTICE CENTER AND THE ADVOCATES FOR HUMAN RIGHTS

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STATEMENT OF INTERESTS OF *AMICI CURIAE*

Amici curiae National Immigrant Justice Center ("NIJC") and the Advocates for Human Rights have subject-matter expertise in asylum law. Both organizations regularly represent and advocate on behalf of individuals seeking asylum and other immigration relief before the United States Citizenship and Immigration Services ("USCIS") and the Executive Office of Immigration Review ("EOIR"). The organizations also regularly conduct trainings for attorneys representing asylum seekers, author practice advisories, and speak nationally on asylum-related matters. Informed by their extensive experience representing and advocating for individuals seeking asylum, NIJC and the Advocates for Human Rights respectfully submit this supplemental brief to offer the Board insight on the issues presented in the Amicus Invitation. In addition, *amici* fully join in the views expressed in the Supplemental Amicus Brief filed by the American Immigration Lawyers Association ("AILA") and Justice for Our Neighbors ("JFON"). *Amici* write separately because our respective briefs address distinct issues raised in the Department of Homeland Security's ("DHS") Substituted Supplemental Brief.

STATEMENT OF ISSUES

This brief provides a supplemental response to the second issue identified in the Board's Amicus Invitation No. 16-08-08: "Assuming it is necessary to acknowledge a duress exception to the persecutor bar, what ought to be the standards (including relevant burden of proof) to determine if an application for asylum qualifies for such an exception?" *Amici* submit this supplemental brief to address certain specific points raised by DHS in its Substituted Supplemental Brief filed on April 26, 2017 ("Substituted Supplemental Brief"). *Amici* do not intend for this supplemental brief to replace or supersede their Brief of *Amici Curiae* submitted on November 7, 2016 ("Nov. 7 Amicus Br.," attached here as **Exhibit 1**). *Amici* respectfully

direct the Board's attention to that prior Brief for a full statement of *amici's* position on the issue presented.

SUMMARY OF ARGUMENT

DHS's proposal to reject a duress exception to the persecutor bar is contrary to foundational precepts of U.S. jurisprudence and basic principles of fairness and justice. At best, DHS ignores both the realities of the asylum application process and the humanitarian goals that underlie that process. At worst, DHS prioritizes expediency and negligible administrability gains over the lives of morally blameless, persecuted individuals.

First, the concern that a duress exception would overrun what is admittedly a taxed system is unfounded. In the vast majority of cases implicating a duress defense, the record will already include the facts necessary to resolve the defense by the time the immigration judge must decide the question; after all, most applicants will likely show the threat or harm that caused duress as part of their main asylum application. These judges also regularly decide questions that require the same level of analysis—and present the same difficulties—as the duress defense. The fact that asylum cases, by their very nature, turn on difficult evidentiary questions answered only by a lean record is not alone a reason to deny justice to asylum seekers—especially when the exception's burden on the system would be minimal. Moreover, DHS has not offered any evidence to show that duress cases would arise with sufficient frequency that they could overwhelm the asylum adjudication system.

Second, the notion of a duress defense is fundamental not only to a number of areas of the law, but also to our moral code. The law of duress reflects the moral belief that those who are coerced into action should not be held responsible for those actions. DHS, however, takes the opposite view and would hold victimized applicants responsible for actions—including passive

conduct—they were forced to take under threat of violence. A position so inconsistent with the law's foundational moral precepts and sense of justice cannot be allowed to win out.

ARGUMENT

The U.S. asylum process exists to enable refugees fleeing persecution to find safe harbor. By ranking the administrative convenience of a bright-line rule as more important than achieving a fair result consistent with asylum proceedings' purpose, DHS takes a position that is inconsistent with our country's core principles of justice and the goals of the immigration system. To apply the persecutor bar without a duress exception leads to harsh, inequitable results; does nothing to relieve the resource shortages and evidentiary difficulties inherent in the immigration system; and undermines the asylum process by failing to extend protection and justice to worthy applicants.

I. DHS'S ARGUMENTS ABOUT RESOURCE SHORTAGES AND AN INABILITY TO APPLY A DURESS EXCEPTION TEST ARE DISINGENUOUS AT BEST.

In its Substituted Supplemental Brief, DHS argues that the persecutor bar should not incorporate a duress exception because, among other reasons, "a bright-line rule against reading in a duress exception best minimizes the risk of error in administering the immigration cases where duress may be an issue." (DHS Subst. Supp. Br. at 2.) In other words, DHS would minimize the supposed risk of mistaken asylum grants by refusing to acknowledge duress at all.

DHS's blunt approach errs too much in the other direction. Instead of finding a way to balance the asylum system's humanitarian goals with the reality that asylum proceedings are always based on nuanced factual determinations, which often turn on a limited evidentiary record, DHS takes the heavy-handed approach of eliminating an entire factual issue from the immigration judge's purview—an issue that an outside observer would think relevant to an applicant's asylum worthiness. That result is unacceptable, as it has grave consequences for

applicants who acted under duress. Two purposes of the asylum system are at stake in this dispute, and DHS would accommodate only the first: first, to be sure, the asylum system should preclude war criminals—human-rights violators who acted volitionally—from asylum protection. But second, and at the same time, the system should extend protection to those who face credible threats of persecution, including death—even when the factual inquiry into those threats is complicated and labor-intensive. Indeed, protecting those who flee violence is the ***primary*** purpose of the asylum system. In trying to avoid one error (admitting the undeserving), DHS would systematically guarantee another (rejecting the deserving).

DHS also overemphasizes its role as the court's investigator and the entity tasked with ensuring that "justice is done." (DHS Subst. Supp. Br. at 17.) DHS represents one side in an adversarial system—it is not a neutral, objective arbiter of justice. It is DHS's role to present its best case in favor of the outcome it thinks is in the government's best interest. It is the applicant's role to present its best case in favor of asylum. And it is the immigration and federal courts' role to decide what outcome the law and justice require. Respectfully, DHS cannot invoke justice as a reason to back down from its proper role in this process. DHS *undermines* justice when it gives up that role as soon as cases become difficult.

Indeed, DHS's systemic inability to defend justice is on full display here: DHS assumes the duty of ensuring that "justice is done" in the same breath that it calls for denying justice to hundreds of deserving applicants by elevating its own speculative sense of administrability over refugees' lives. The duress-exception test *amici* advocate would only add one step to the immigration judge's inquiry into an applicant's case, and it is well within the immigration judge's purview to take that additional step. In the mine run of asylum cases, the duress test will

only require analysis of the same evidence already under consideration. Such a test can hardly be called burdensome. But it promises substantial justice for many deserving applicants.

DHS's use of administrability as an excuse to deny an implied duress exception is overly harsh and unfair to the individuals who are most vulnerable and in need of asylum. Asylum cases admittedly include many different variables—they are inherently difficult cases to decide. But a bright-line rule that refuses a duress exception leads to harsh, inequitable results. Achieving the correct, just result in a case should take priority over ease of administration—especially since the test *amici* propose minimizes any burden on the system. The Board should refuse to prioritize administrability over justice and the asylum system's goals, and it should adopt the totality-of-the-circumstances duress exception outlined by *amici* in their Nov. 7 Amicus Brief.

A. The Duress-Exception Test Requires Analysis Of The Same Facts And Evidence Already Under Consideration In An Asylum Case.

When an immigration judge assesses an asylum applicant's case, she makes countless assessments. One of these assessments is whether the applicant has a well-founded fear of persecution, which involves both objective and subjective components. *Pan v. Holder*, 777 F.3d 540, 543 (2d Cir. 2015). Immigration judges also evaluate the credibility of an applicant's claims of persecution. It stands to reason that in most cases where a duress exception would apply, the applicant's well-founded fear will be based on the same persecution that created the impending threat for duress. In a typical case, then, there would be no extra factual development or analysis to determine whether the applicant acted under duress. The immigration court would simply consider whether the record, as ***already developed***, supports a finding of duress.

Moreover, even in an atypical duress case, where it is unclear whether the fear of persecution supporting the applicant's asylum claim also compelled the applicant to persecute others (*see* Nov. 7 Amicus Br. at 30), the analysis does not call for extra judicial heavy-lifting.

The judge makes a single additional assessment: whether the applicant (after being notified that the persecutor bar may apply and given a chance to offer evidence in support of the duress exception) has credibly identified another reasonable fear that *did* create the conditions for duress. This one assessment will not cripple or overwhelm the asylum analysis.

DHS appears to believe that the duress exception presents unique evidentiary challenges, because it would require immigration judges to make difficult factual determinations based on a limited record and potentially self-serving testimony. But those evidentiary challenges are present in every asylum case, with or without the duress exception. Indeed, because of their experience accommodating these evidentiary issues, immigration judges are particularly well-suited to analyze cases involving a duress exception. Congress already considered and accepted these challenges in establishing the asylum system; in fact, Congress determined that they are not sufficiently problematic to justify denying an application: "The testimony of the applicant may be sufficient to sustain the applicant's burden without corroboration." 8 U.S.C. § 1158(b)(1)(B)(ii). That the duress exception presents the same challenges already faced in every case is no reason to deny the exception outright, as Congress has recognized.

DHS also claims that having to litigate the applicability of a duress exception would strain resources because proceedings "relate to events occurring in outside countries." (DHS Subst. Supp. Br. at 24.) But again, this is true of all asylum proceedings; by definition, refugees who flee to the United States and apply for asylum do so as a result of events occurring in other countries. The system has already considered this difficulty and determined that it does not alone justify avoiding asylum determinations altogether. Most of the facts necessary to evaluate these events' factual basis are already required by the asylum application and thus already before the immigration court in most cases. For these reasons, an argument that the duress exception would

"meaningfully strain" resources because events occurred in other countries is nonsensical and disingenuous. (DHS Subst. Supp. Br. at 23.)

Furthermore, the difficulty associated with making a legal determination is never a reason to back down from the analysis, especially when the stakes are so high. For many applicants, these decisions determine whether they will live in peace and safety or face serious physical harm—and sometimes whether they will continue to live at all. The Board cannot accept that simply because the analysis may be difficult, it is not worth doing. This is antithetical to the very idea of asylum—indeed, our country did not become the envy of the world through such a defeatist mentality. By that logic, asylum rights should not exist at all because the risk of error is simply too high. *Amici*'s proposed totality-of-the-circumstances test minimizes the difficulties associated with analyzing an asylum case involving the persecutor bar without forfeiting the possibility of a just result. It offers a balanced and logical alternative to giving up entirely on worthy applicants.

B. Though The Number Of Cases Raising A Duress Question Is Small, The Stakes Are High—For Both The Applicant And The Immigration System.

The duress exception is a critical safeguard for the small number of cases that implicate it. DHS dramatically asserts that an exception for individuals who have fallen under the persecutor bar because they suffered the threat of serious harm will swallow up the asylum system, speculatively declaring that "continuances *would likely be* substantial in number in many cases," that "delays *could* lead to the spoliation of evidence," and that delays "*may also* provide human rights abusers in ICE custody the opportunity to become eligible for bond hearings in certain jurisdictions." (DHS Subst. Supp. Br. at 24–25 (emphasis added).) DHS makes these arguments without producing any statistics to support them—let alone any reason, beyond DHS's bare speculation, to think that this hypothetical parade of horribles will actually come to

pass. The system already incorporates checks to prevent the abuses DHS fears: for example, the immigration courts and the Board always have discretion to deny inappropriate continuances, particularly if evidence might spoil, and immigration officials have sufficient opportunity at bond hearings to present evidence of a detainee's past human rights abuses to ensure that the judge makes an informed decision on the amount or existence of any bond. The Board need not deny a duress exception to deserving applicants to prevent these speculative problems.

Perhaps more critically, DHS contends that a duress exception imposes an unmanageable burden on an already over-taxed system, but it offers no data to support this claim. (DHS Subst. Supp. Br. at 23.) Bereft of support, DHS's speculation carries little force. Unlike DHS, *amici* lack access to the sort of data that could verify or refute DHS's speculation, but *amici's* own extensive experience with asylum applications suggests that only a small number of cases even raise the persecutor bar—let alone warrant a duress-exception analysis. Of course, the small number of cases is also no reason to refuse a duress exception. If the exception saves even a few hundred lives from torture or death, the minimal burden the exception might impose will be more than justified.

Indeed, DHS appears to assume that every case implicating the duress exception will have to address it, but this assumption is critically flawed. *Amici*'s proposed procedure makes the duress exception the last analytical and evidentiary step in an asylum case. Under that approach, cases would never reach the duress exception if, for example, the applicant fails to show a credible fear of ongoing persecution—a threshold question addressed in every case. In cases that can determine life or death for applicants, one ***potential*** additional step in the analysis can hardly be said to overburden the system.

1. *DHS's Claim That The Duress Exception Introduces Uncertainty Into The Process Is Mistaken.*

DHS claims that "developing the record to help achieve fair and informed results will be highly problematic with respect to any duress exception," and points to geographic distance, remoteness in time, and the existence of active conflict zones as the grounds for this claim. (DHS Subst. Suppl. Br. at 17.) Blaming an exception to the persecutor bar for introducing uncertainty or difficulty into the asylum adjudicatory process is misguided. First, the asylum process already faces these challenges in ***every*** case, with or without the duress exception. The question is not whether the duress exception ***creates*** these challenges; it is how much the exception ***adds*** to them. As already explained, the exception adds only marginally, if at all, not least because most of the relevant evidence already must be gathered and presented as part of the main asylum determination. Second, potential uncertainty and difficulty does not warrant eliminating a duress exception. The most important goal should be to achieve the correct result, not to sacrifice justice for some sense of increased predictability. While consistency in decisions is desirable, if our main concern were only to reach consistent decisions, our entire judicial process would grind to a standstill.

The goal is to reach consistently ***right*** decisions. Decisions can be consistent but wrong. We not only risk but ensure this result if there is no duress exception to the persecutor bar: the law would consistently deny asylum to persecutors who acted under duress, but that consistency does not change the injustice of this result as a moral, legal, and policy matter. Inconsistent decisions occur all the time, but this is the precise reason we have a judicial body such as the BIA: its goal is to help set precedent and ensure consistency. This goal of consistency in asylum proceedings is secondary to the primary goal: getting each case right. For the best chance of

ensuring that cases are decided correctly as a matter of justice and asylum's humanitarian ends, there must be a duress exception to the persecutor bar.

2. *Eliminating Duress As An Exception To The Persecutor Bar Leads To Absurd Results.*

While the persecutor bar effectuates many important policy goals, removing the possibility of a duress exception would lead to absurd and draconian results. *Amici* agree with DHS that refugees should feel safe. *Amici* disagree that refugees who have been forced, upon threat of pain or death, to participate in actions that fall under the statutory definition of persecution should always be denied asylum. *Amici* believe that these refugees also deserve to feel safe. DHS's harsh position that no duress exception should be recognized has the potential to severely limit access to safety for many refugees.

Courts "have long recognized that the presence of coercion and duress vastly reduces the culpability of a person's conduct, and have therefore applied a presumption that legislators must have contemplated making allowance for conduct motivated by coercion and duress, even if such exceptions are not explicitly stated in the statutes." *Nderere v. Holder*, 467 F. App'x 56, 58–59 (2d Cir. 2012). Under DHS's analysis, a political prisoner who is ordered with a gun to his head to simply watch a fellow prisoner for five minutes to ensure that he does not escape is subject to the persecutor bar and ineligible for asylum. Even when the alternative to standing in place for five minutes is dying a violent death, he has, by merely watching, "assisted, or otherwise participated in the persecution of any person" under the statute. 8 U.S.C. § 1158(b)(2)(A). DHS's bright-line rule ignores all sense of proportionality—a duress exception is necessary to restore basic notions of balance and to avoid cruel results.

In addition to the absurd legal results of refusing to recognize a duress exception to the persecutor bar, there are severe moral ramifications. The purpose of the persecutor bar is to keep

individuals who are responsible for persecution out of the United States. Without a duress exception, however, the broad language of the persecutor bar would deny entry to deserving applicants: indeed, as DHS's original Supplemental Brief observed, duress in the criminal context is generally understood to negate the moral culpability of the actor's conduct. (*See, e.g.*, Orig. DHS Suppl. Br. at 14.) Those who committed acts of persecution because they acted of their own free volition, even if they were only motivated by economic factors, rightfully fall under the persecutor bar. But to refuse a duress exception effectively punishes those who are not deserving of punishment. Our legal system recognizes the deeply held social belief that those who act under compulsion are not truly culpable, and therefore should not be held responsible for their actions. Thus, to block a refugee's asylum application on account of something that she did not freely do is both legally and morally senseless.

C. The Workable Test *Amici* Propose Is Manageable In The Immigration Court Context.

The test *amici* propose for assessing the duress exception includes only three elements. Since it involves a "totality of the circumstances" approach, it allows for flexibility and enables the immigration judge to consider all the available facts. Indeed, this is the standard that the REAL ID Act adopts specifically for credibility determinations in asylum cases. 8 U.S.C. § 1158(b)(1)(B)(iii). Additionally, courts have used a totality-of-the-circumstances test for assessing whether an applicant should be excluded by the persecutor bar. (Nov. 7 Amicus Br. at 29.) There is no reason to depart from this test. DHS points to its predecessor's faulty positions to now justify adopting no test whatsoever. In other words, puzzlingly, it cites its own rigid and unrealistic test as the problem to avoid. *Amici* agree that the former DHS test was overly rigid, but at least that test attempted to balance the competing interests in administrability, on the one hand, and justice and safety for asylum seekers, on the other. Rather than attempt to strike that

balance better than its old test did, DHS would abandon any attempt to strike the balance at all. The test *amici* propose is far more realistic and less onerous than DHS's original test, and allows immigration judges flexibility to consider all of the facts and evidence available to come to a just conclusion.

II. DURESS IS A FUNDAMENTAL TENET OF LAW THAT APPLIES NOT ONLY IN CRIMINAL CONTEXTS, BUT ALSO IN CIVIL AND ADMINISTRATIVE CONTEXTS.

DHS misses the point regarding the applicability of criminal law to asylum proceedings. In DHS's original brief, it stuck closely to criminal jurisprudence, proposing a duress exception that drew entirely on U.S. criminal doctrines. (Orig. DHS Supp. Br. at 14–17.) As *amici* discussed in their November 7 *Amicus* Brief, that approach is deeply flawed, as it would impose undue burdens on asylum applicants. Among other things, it treats them as presumed criminals who need to prove their innocence to avoid punishment, rather than as presumed refugees who need to prove a credible fear and good behavior to avoid violence. (Nov. 7 Amicus Br. at 19–21.) But DHS has overcorrected in its Substituted Supplemental Brief: DHS now argues that criminal law concepts are so irrelevant to an asylum proceeding that any principle related to criminal law must be shunned entirely. (DHS Subst. Supp. Br. at 21.) Because duress appears in the criminal law, DHS reasons, a duress exception has no place in civil or administrative asylum proceedings. (DHS Subst. Supp. Br. at 20.)

Nonsense. Duress is a foundational tenet of the common law tradition, a principle grounded in basic notions about free will and moral culpability. It is not a uniquely criminal-law concept. It permeates the civil law as well. *See, e.g.*, *Duress*, Black's Law Dictionary (10th ed. 2014) ("Duress is a recognized defense to a crime, contractual breach, or tort."). For example, it is a well-established tenet of contract law that acceptance given under duress is invalid. *See, e.g.*, *Kindred Nursing Centers Ltd. P'ship v. Clark*, 137 S. Ct. 1421, 1428 (2017) ("[T]he doctrine of

duress, as we have elsewhere explained, involves unfair dealing at the contract formation stage.") (quotations omitted); *Pierce v. Atchison, Topeka & Santa Fe Ry. Co.*, 65 F.3d 562, 569 (7th Cir. 1995) ("Duress is a defense to an otherwise valid contract."); Restatement (Second) of Contracts § 175 ("If a party's manifestation of assent is induced by an improper threat by the other party that leaves the victim no reasonable alternative, the contract is voidable by the victim."); *see also* 28 Williston on Contracts § 71.1 (4th ed. 2003). And statutes in most states expressly declare that marriages where the consent of one party is obtained under duress are voidable. *See, e.g.*, N.Y. Dom. Rel. Law § 7 (declaring marriage void if either party "consent[ed] to such marriage by reason of force, duress or fraud"); Tex. Fam. Code Ann. § 6.107(1) (allowing courts to grant annulment where one party "used fraud, duress, or force to induce" marriage); *see also* La. Civ. Code Ann. art. 95 (declaring marriage voidable "where the consent of one of the parties to marry is not freely given"). The criminal law simply riffed on this refrain that a person should not bear legal responsibility for actions she was forced to take. The criminal law did not write the song. DHS now says the asylum system should not play the criminal law's sheet music, but that is no excuse to sit out of the chorus.

Indeed, DHS's briefs create a false dichotomy. The flaws in DHS's old approach do not mean that we must ignore criminal duress concepts entirely. *Amici* agree with DHS that the asylum system's humanitarian goals would be poorly served if the system ***transplanted*** criminal law concepts wholesale, as DHS advocated the first time around. But the mere fact that duress appears in the criminal law is no reason to wholesale ***reject*** duress in the persecutor-bar context, as DHS advocates now. Criminal law concepts can still inform an asylum duress defense. *Amici* demonstrated this middle approach when they crafted a test that borrows some criminal concepts, but adapts them to the asylum context. This version of the defense that is more flexible, more

focused on the totality of the circumstances, and thus more compatible with asylum laws generally is a logical and just fit for the persecutor bar, just as it is for so many other areas of the law. The primary question the Board faces is not whether it makes sense to transplant, verbatim, ill-fitting criminal concepts into asylum law. The question is whether to extend refugees a measure of justice found across legal disciplines. *Amici* believe the answer to that question is plainly yes, and they have proposed a reasonable way to do so.

CONCLUSION

The duress defense is a needed part of the asylum application adjudication process. *Amici* request that the Board reject the notion that the defense is not necessary and adopt the flexible, totality-of-the-circumstances test proposed in *amici*'s previous brief.

Dated: June 29, 2017

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PROOF OF SERVICE

I, Abdus Samad Pardesi, certify that on June 28, 2017, I caused three copies of the foregoing brief to be delivered to the Board of Immigration Appeals at the following address:

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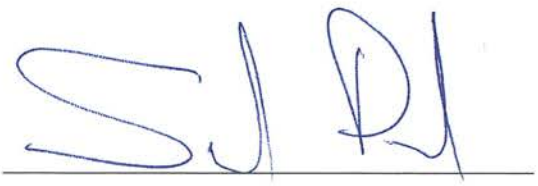
Dated: June 29, 2017



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UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS
FALLS CHURCH, VIRGINIA

In the Matter of **Amicus Invitation No. 16-08-08**	

REQUEST TO APPEAR AS *AMICI CURIAE*

Under Board of Immigration Appeals Practice Manual Chapter 2.10, the National Immigrant Justice Center, the American Immigration Lawyers Association, Justice for Our Neighbors, and The Advocates for Human Rights respectfully request leave to file the accompanying amicus brief in response to Amicus Invitation No. 16-08-08.[1] All four organizations have subject-area expertise regarding asylum law and the legal issues concerning the persecutor bar and submit this brief to provide the Board perspective on the issues presented in the Amicus Invitation based on their extensive experience representing and advocating for individuals seeking asylum and other protection-based relief.

Proposed *amicus curiae* the **National Immigrant Justice Center** ("NIJC") is a Chicago-based non-profit organization that provides free legal representation to low-income refugees and asylum seekers. With collaboration from more than 1,000 *pro bono* attorneys, NIJC represents approximately 250 asylum seekers at any given time before the Asylum Office, the Immigration Courts, the Board of Immigration Appeals, the Federal Courts of Appeals, and the U.S. Supreme Court. In addition to the cases that NIJC accepts for individual representation, it also screens and provides legal orientations to hundreds of additional potential asylum applicants every year. In addition, NIJC conducts "Know Your Rights" presentations at the detention facilities where asylum seekers are being held. NIJC also manages a help desk to provide assistance to *pro se* respondents at immigration court and understands the challenges faced by particularly vulnerable asylum seekers. Thus, NIJC has relevant subject-matter expertise and is well positioned to assist the Board in its consideration of the present case.

Proposed *amicus curiae* the **American Immigration Lawyers Association** ("AILA") is a national association with more than 14,000 members throughout the United States, including lawyers and law school professors who practice and teach in the field of immigration and

[1] The Board extended the deadline to submit amicus briefs to November 7, 2016.

nationality law. AILA seeks to advance the administration of law pertaining to the jurisprudence of immigration laws, and to facilitate the administration of justice and elevate the standard of integrity, honor, and courtesy of those appearing in a representative capacity in immigration and naturalization matters. AILA's members practice regularly before the Department of Homeland Security, the Executive Office for Immigration Review, the Immigration Courts, the Board of Immigration Appeals, U.S. District Courts, the Federal Courts of Appeals, and the U.S. Supreme Court.

Proposed *amicus curiae* **Justice for Our Neighbors** ("JFON") was established by the United Methodist Committee On Relief in 1999 to serve its longstanding commitment and ministry to refugees and immigrants in the United States. JFON's goal is to provide hospitality and compassion to low-income immigrants through immigration legal services, advocacy, and education. JFON employs a small staff at its headquarters in Springfield, Virginia, which supports 15 sites nationwide. Those 15 sites collectively operate in 11 states and Washington, D.C., and include approximately 40 clinics. Last year, JFON served clients in more than 7,800 cases. JFON advocates for interpretations of federal immigration law that protect vulnerable asylum-seekers.

Proposed *amicus curiae* **The Advocates for Human Rights** is a non-governmental, non-profit organization dedicated to the promotion and protection of human rights. Founded in 1983, the organization has more than 800 volunteers who document human rights abuses, advocate on behalf of individual victims of human rights violations, educate on human rights issues, and provide training and technical assistance to address and prevent human rights violations. The Advocates for Human Rights is a leading provider of *pro bono* representation to asylum seekers before the Department of Homeland Security, the Executive Office for Immigration Review, the

Immigration Courts, the Board of Immigration Appeals, and the Federal Courts of Appeals. The Advocates for Human Rights submitted an amicus brief to the U.S. Supreme Court during the merits stage of *Negusie v. Holder* and has remained actively involved in education and advocacy related to the persecutor bar during the years since the Supreme Court remanded the case to the Board.

NIJC, AILA, JFON, and the Advocates for Human Rights therefore respectfully request leave to appear as *amici curiae* and file the following brief. Additionally, given the impact of the Board's decision in this matter and *amici*'s experience in providing and improving legal services to thousands of immigrant asylum seekers, *amici* respectfully request that the Board permit them to present oral argument. *See* BIA Practice Manual, Chapter 8.7(e)(xiii) (Nov. 2, 2015).

Dated: November 7, 2016

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In the Matter of **Amicus Invitation No. 16-08-08**	

PROPOSED BRIEF OF *AMICI CURIAE* NATIONAL IMMIGRANT JUSTICE CENTER AND AMERICAN IMMIGRATION LAWYERS ASSOCIATION

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STATEMENT OF INTERESTS OF *AMICI CURIAE*

Amici curiae National Immigrant Justice Center ("NIJC"), American Immigration Lawyers Association ("AILA"), Justice for Our Neighbors ("JFON"), and the Advocates for Human Rights have subject-matter expertise in the areas of immigration law surrounding asylum. All four organizations regularly represent and advocate on behalf of individuals seeking asylum and other immigration relief before the United States Citizenship and Immigration Services ("USCIS") and the Executive Office of Immigration Review ("EOIR"). The organizations also regularly conduct trainings for attorneys representing asylum seekers, author practice advisories, and speak nationally regarding asylum-related matters. Informed by their extensive experience representing and advocating on behalf of individuals seeking asylum, NIJC, AILA, JFON, and the Advocates for Human Rights respectfully submit this brief to provide the Board perspective on the issues presented in the Amicus Invitation.

STATEMENT OF ISSUES

This brief addresses the second issue identified in the Board's Amicus Invitation No. 16-08-08: "Assuming it is necessary to acknowledge a duress exception to the persecutor bar, what ought to be the standards (including relevant burden of proof) to determine if an application for asylum qualifies for such an exception?"

SUMMARY OF ARGUMENT

The persecutor bar presents challenging moral and legal issues, and the duress defense only adds to the complexity. *Amici* appreciate these nuances, including the views expressed by the Department of Homeland Security ("DHS") that a duress defense to the persecutor bar should apply in limited circumstances and should not become a protective blanket for *bona fide* human rights violators to escape to the United States. But the limitations should be reasonable, and the

odds should not be stacked against applicants, particularly those who themselves have been persecuted and are in need of protection.

Amici respectfully submit that an analysis of the duress defense should begin with a fulsome evaluation by the fact-finder regarding whether the persecutor bar comes into play at all. This initial showing is DHS's burden. Consistent with the case law that has been developed on this subject, *amici* recommend that the Board require that adjudicators conduct a clearly defined inquiry to determine whether the persecutor bar has been triggered. This inquiry should examine whether: (1) an identifiable act occurred sufficiently severe to constitute persecution; (2) a nexus exists between the identified act of persecution and a protected characteristic of the victim; (3) the applicant's conduct constituted genuine assistance or participation in that identified persecution and involved more than mere membership in a group that engages in persecution generally; and (4) the applicant had the requisite scienter or culpable knowledge.

Once the adjudicator has reached a clear finding that the applicant is subject to the persecutor bar, it is only then that the analysis should turn to the duress defense. While *amici* and DHS agree that a duress defense is appropriate, DHS's proposed standard—which requires proof of five separate elements for each act of alleged persecution—is not a feasible model. Specifically, *amici* have several disagreements with DHS's proposed standard, including: (1) it is based on criminal law principles, which are fundamentally different from refugee law; (2) the test is far too rigid and burdensome to be workable under the current system governing asylum and withholding of removal claims; and (3) the DHS test ignores the nuances and complex realities of asylum claims and is therefore out of step with international legal standards for evaluating such claims.

Amici instead suggest that an assessment of the applicability of the duress defense should be based on the totality of the circumstances, which is more in tune with the rest of withholding and asylum law, and is less likely to improperly bar *bona fide* refugees, particularly those with limited resources. *Amici* respectfully contend that the operative test should include an evaluation of the following: (1) the act charged was done to avoid a serious and irreparable danger; (2) there was no other adequate means of escape; and (3) the applicant did not believe she was causing greater harm than that she sought to avoid.

Once an applicant has had a fair opportunity to present a duress defense or otherwise challenge the finding that she may be subject to the persecutor bar, the fact-finder can make an appropriate determination as to whether the bar should in fact apply.

ARGUMENT

I. PRIOR TO ASSESSING THE APPLICABILITY OF A DURESS DEFENSE, IMMIGRATION JUDGES SHOULD FIRST ANALYZE WHETHER THE APPLICANT ASSISTED OR OTHERWISE PARTICPATED IN "PERSECUTION," SUCH THAT THE PERSECUTOR BAR MAY APPLY.

DHS has filed a supplemental brief advocating a limited duress exception. Notably, DHS asks the Board to require that Immigration Judges make certain preliminary findings before reaching the question of duress, including findings that specific acts of persecution occurred. *See id.* This is only logical since without an identified act of persecution there is never occasion to reach questions of assistance and participation, let alone defenses such as duress. While *amici* agree with DHS as a general matter that such initial findings are a necessary "procedural safeguard" in the overall application of the persecutor bar, we argue here that far more specific procedural guidance is essential.

Specifically, there are two key components relating to the application of the persecutor bar: (1) the substantive elements of a finding of assistance or participation in persecution such

that the persecutor bar may apply; and (2) the procedural framework (*e.g.*, burdens of proof) relating to applying the bar.

A. The Procedural Framework For Making Persecutor Bar Determinations Must Be Considered Within The Context Of The Bar's Grave Consequences.

In *Negusie v. Holder*, 555 U.S. 511 (2009), the Supreme Court called for the Board to explain the persecutor bar and any duress exception in the course of a more comprehensive explanation of the term "persecution" that anchors the refugee definition in the withholding of removal and asylum provisions of the Immigration and Nationality Act. *Id.* Because a single concept of "persecution" triggers both withholding of removal (the core duty of non-refoulment)[2] and a permanent bar to all relief and protection under the Act including withholding (*see* 8 U.S.C. § 1158(b)(2)(A)(i) and 8 U.S.C. § 1231(b)(3)(B)(i)), any permissible agency guidance that is responsive to the Supreme Court's call and grounded in the statute needs to elaborate the persecutor bar in the paradigmatic context of an application for withholding of removal and asylum.

Amici believe the task *Negusie* set would have been best accomplished through formal rulemaking. This rulemaking would help explain the persecutor bar, its sequential application, and the standards for exceptions—including duress—in a comprehensive way applicable to a "wide range of potential conduct." *See Negusie*, 555 U.S. at 524. Because the Board is poised to proceed with a precedent decision instead, *amici* urge the Board to provide Immigration Judges with a detailed procedural framework and instructions. This includes explanations from the Board of the proper application of regulations implementing statutory bars to protection, most of which have consequences less grave than permanent disqualification from even withholding of removal. *See, e.g.*, *Matter of Y-L-*, 24 I&N Dec. 151 (BIA 2007) (noting that "in

[2] *See I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 440 (1987).

light of the serious consequences stemming from a frivolousness [asylum application] finding, 'concrete and conclusive evidence ...' should be required to support a finding of frivolousness"); *Matter of A-G-G-*, 25 I&N Dec. 486, 501-03 (BIA 2011) (setting forth a four-step analysis for the BIA's "framework for making firm resettlement" bar determinations).

In the absence of systematic agency rules, courts have adopted standards that in their combination point to a set of minimal procedural and substantive requirements that *amici* contend should provide a floor for the Board's guidance here. In addition, *amici* argue that the generic procedural regulation (8 C.F.R. § 1240.8(d)), if applied here, must be read and understood consistent with the minimal procedural and substantive protections this framework provides, not in a way that is inconsistent or evasive of those protections.

Any permissible persecutor bar analysis will be grounded in protections commensurate with those the statute and case law contemplate in the context of a full hearing on an application for withholding and asylum, which would start with presentment of evidence and a determination regarding eligibility for relief.[3] Then, before an Immigration Judge may apply the bar, he or she must at a minimum find: (1) an identifiable act sufficiently severe to constitute persecution; (2) a nexus between the identified act of persecution and a protected characteristic of the victim; (3) the applicant's conduct constituted genuine assistance or participation in that identified persecution and involved more than mere membership in a group that engages in persecution generally; and (4) the applicant had the requisite scienter or culpable knowledge.

Only where the record contains a preponderance of evidence to support the above findings do the statute and case law allow that an IJ *may apply* the persecutor bar. In all cases, the applicant must have fair notice and opportunity to demonstrate with evidence that the bar

[3] This is the first part of the analysis and cannot be overlooked. Before a fact-finder makes any determination regarding the applicability of the persecutor bar (or the duress defense), the fact-finder must make a threshold determination as to whether the applicant is eligible for asylum, withholding of removal, or other relief.

does not apply, or that there is a defense to the bar, such as duress. If the applicant cannot demonstrate by a preponderance of the evidence that he did not assist or otherwise participate in persecution, or otherwise establish a defense, then and only then can the IJ *actually determine that the bar applies.*

B. The Immigration Judge Must Make Certain Preliminary Findings Regarding Whether The Applicant Assisted Or Participated In Persecution.

The Immigration and Nationality Act (INA) bars withholding of removal and asylum for those who "the Attorney General **decide[s]**" or "**determines**" have "assisted, or otherwise participated in the persecution of an individual because of the individual's race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. §§ 1231(b)(3)(B)(i), 1158(b)(2)(A)(i) (emphases added). Before reaching the levels of inquiry and burdens of proof in administering the persecutor bar analysis, it is important to first examine what constitutes assistance or participation in persecution under the bar—separate and apart from a defense such as duress. While there has been much written on this subject, a close review of the leading authorities suggests there is agreement on the key requirements for establishing persecution.

As mentioned above, in determining whether the persecutor bar may apply, an Immigration Judge must find the following: (1) an identifiable act sufficiently severe to constitute persecution has occurred; (2) there is a nexus between the identified act of persecution and a protected characteristic of the victim; (3) the applicant's conduct constituted genuine assistance or participation in that identified persecution and involved more than mere

membership in a group that engages in persecution generally; and (4) the applicant had the requisite scienter or culpable knowledge.[4]

1. An Act Sufficiently Severe To Constitute Persecution.

A determination that persecution occurred necessarily involves factual findings related to the severity of harm. *See Lim v. INS*, 224 F.3d 929, 936 (9th Cir. 2000) ("We have defined persecution as an 'extreme concept' that includes the 'infliction of suffering or harm.'") (internal citations omitted); *Butt v. Keisler*, 506 F.3d 86, 90 (1st Cir. 2007) (explaining that the harm must have reached a "fairly high threshold of seriousness, as well as some regularity and frequency") (citations and internal quotations marks omitted)). Absent such a showing, there is no need to conduct a further analysis.

2. Nexus To A Protected Characteristic Of The Victim.

Likewise, consistent with the statutory language of the persecutor bar itself, the act of harm must have been inflicted on account of the victim's protected characteristic. *See* 8 U.S.C. § 1231(b)(3)(B)(i) (requiring the Attorney General to "decide that ... [the applicant] assisted or otherwise participated in the persecution of an individual because of race, religion, nationality, membership in a particular social group, or political opinion"); *see also* 8 U.S.C. § 1158(b)(1)(B)(i) (explaining that an applicant is not eligible for asylum if the Attorney General "determines that ... the alien ... assisted or otherwise participated in the persecution ... on account of" one of the protected characteristics); 8 U.S.C. § 1101(a)(42)(A) (same); 8 C.F.R. §

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[4] As discussed in greater detail herein, this four-pronged inquiry is consistent with the tests laid out by many of the federal appellate courts that have addressed this issue. *See, e.g.*, *Suzhen Meng v. Holder*, 770 F.3d 1071, 1074 (2d Cir. 2014) (stating that the four-part persecutor bar test encompasses the following: (1) "the [applicant was] ... involved in acts of persecution;" (2) a "nexus [exists]... between the persecution and the victim's" protected characteristic; (3) the applicant's conduct "assisted the persecution;" and (4) the applicant had "sufficient knowledge that ... her actions may assist in persecution to make those actions culpable."); *Quitanilla v. Holder*, 758 F.3d 570, 577 (4th Cir. 2014) (holding that there must be (1) a finding of some connection "between the alien's actions and the persecution of others, such that the alien can fairly be characterized as having actually assisted or otherwise participated in that persecution," and (2) the applicant must "have acted with scienter," or with "some level of prior or contemporaneous knowledge that the persecution was being conducted.")

1208.13(c)(2)(i)(E) (the persecutor bar applies to anyone who "[o]rdered, incited, assisted, or otherwise participated in the persecution of any person on account of" a protected characteristic); *see also Meng*, 770 F.3d at 1074 ("a nexus must be shown between the persecution and the victim's race, religion, nationality, membership in a particular social group, or political opinion") (internal citations and quotation marks omitted); *Matter of Rodriguez-Majano*, 19 I&N Dec. 811, 815-16 (BIA 1988) (explaining that harm is not persecution unless it is "directed at someone on account of one of the five categories enumerated in section [1101(a)(42)(A)]"), *overruled on other grounds by Negusie*, 555 U.S. at 522-23). If the record fails to establish a nexus between the sufficiently severe harm identified in step one above and a protected characteristic, an applicant may not be found to have assisted or participated in persecution.

3. Genuine Assistance Or Participation By The Applicant-Inconsequential Association With Persecutors Is Not Enough

Once it has been determined that an identifiable act of persecution has occurred and that it was inflicted on account of a protected characteristic, the analysis may then proceed to consider whether the applicant genuinely assisted or participated in that act of persecution. *See* 8 U.S.C. §§ 1231(b)(3)(B)(i), 1158(b)(1)(B)(i), 1101(a)(42)(A); 8 C.F.R. § 1208.13(c)(2)(i)(E). Much of the analysis in the case law turns on the degree of "assist[ance]" and/or "participat[ion]."

There is substantial support for the principle that the applicant's "assistance" or "participation" must be active, purposeful, and otherwise material to the persecutory act, and not tangential, indirect, or otherwise inconsequential. *See, e.g., Kumar v. Holder*, 728 F.3d 993, 998-99 (9th Cir. 2013) (holding that the applicant's action must rise to the level of "personal involvement and purposeful assistance" and that to determine "personal involvement," Immigration Judges should assess whether (1) the "involvement was active or passive" and (2)

the applicant's acts were "material to the persecutory end."); *Maiga v. Holder*, 345 F. App'x 634, 635-36 (2d Cir. 2009) (holding that a guard from Burkina Faso was not subject to the persecutor bar, even though the guard (1) was aware that detainees were being persecuted and (2) participated in the arrests of two political dissidents; the court concluded that the guard "played only a tangential role that had no direct consequences for the arrested individuals," because he remained in his vehicle while the suspects were being arrested and because the suspects were transported in another vehicle); *Chen v. U.S. Attorney Gen.*, 513 F.3d 1255, 1259 (11th Cir. 2008) (holding that the key inquiry is "whether the applicant's personal conduct was merely indirect, peripheral and inconsequential association or was active, direct and integral to the underlying persecution"); *Xu Sheng Gao v. U.S. Attorney Gen.*, 500 F.3d 93, 99 (2d Cir. 2007) ("Where the conduct was active and had direct consequences for the victims, we concluded that it was 'assistance in persecution.' Where the conduct was tangential to the acts of oppression and passive in nature, however, we declined to hold that it amounted to such assistance.") (internal quotations omitted); *Miranda Alvarado v. Gonzales*, 449 F.3d 915, 928 (9th Cir. 2006) (noting that key questions are "How instrumental to the persecutory end were those acts? Did the acts further the persecution, or were they tangential to it?"); *Singh v. Gonzales*, 417 F.3d 736, 740 (7th Cir. 2005) (holding that the persecutor bar applies only where "the record [] reveals that the alien **actually** assisted or otherwise participated in the persecution of another.") (emphasis in original); *In re Rodriguez-Majano*, 19 I. & N. Dec 811, 815 (BIA 1988) (concluding that an applicant is subject to the persecutor bar only if his or her "action or inaction furthers [the] persecution in some way.").

Moreover, group membership alone is insufficient to hold an applicant responsible for a persecutorial act. *See Diaz-Zanatta v. Holder*, 558 F.3d 450, 455 (6th Cir. 2009) (noting that "a

distinction must be made between genuine assistance in persecution and inconsequential association with the persecutors"); *Miranda Alvarado*, 449 F.3d at 927, 929 (noting that "mere acquiescence," membership in an organization, or simply being a bystander to persecutory conduct are insufficient to trigger the persecutor bar); *Singh*, 417 F.3d at 739–40 (finding that "simply being a member of a local [] police department during the pertinent period of persecution is not enough to trigger the statutory prohibitions on asylum"); *Xie v. INS*, 434 F.3d 136, 143 (2d Cir. 2006) ("[T]he mere fact that [the alien] may be associated with an enterprise that engages in persecution is insufficient by itself to trigger the effects of the persecutor bar"); *See Hernandez v. Reno*, 258 F.3d 806, 812, 814 (8th Cir. 2001) (explaining that evidence of an identifiable act of persecution—not just "any involvement with a persecutory group"—must be coupled with "evidence than an applicant ... has assisted or participated in [that] persecution" for the bar to apply); *Quitanilla*, 758 F.3d at 577.[5]

4. Scienter Or Culpable Knowledge.

In addition, to constitute meaningful assistance or participation, the Immigration Judge must also find that the applicant possessed the requisite level of knowledge that the consequences of the applicant's actions would assist in persecution to render applicant culpable for those actions. *See Meng*, 770 F.3d at 1074 (requiring "sufficient knowledge" that one's actions may assist the persecution in order to be found culpable); *Quitanilla*, 758 F.3d at 577 (the applicant must "have acted with scienter," or with "some level of prior or contemporaneous knowledge that the persecution was being conducted."); *Haddam v. Holder*, 547 F. App'x 306, 312 (4th Cir. 2013) (requiring examination of the "intent, knowledge, and the timing" of the

[5] *See also* United Nations High Commissioner for Refugees, UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers From Eritrea (Apr. 20, 2011), at 37, http://www.refworld.org/docid/4dafe0ec2.html (stating that "membership in the Government security forces or armed opposition groups is not a sufficient basis in itself to exclude an individual from refugee status" and emphasizing the necessity to consider whether the applicant was "personally involved in acts of violence" . . . or knowingly contributed in a substantial manner to such acts").

applicant's alleged assistance); *Castañeda-Castillo v. Gonzales*, 488 F.3d 17, 20 (1st Cir. 2007) (noting that "the term 'persecution' strongly implies both scienter and illicit motivation"); *Hernandez*, 258 F.3d at 814 (determining that it was relevant that the applicant's involvement with a guerilla group was involuntary and compelled by death threats, and "that he shared no persecutory motives with the guerillas").

* * *

Only when DHS has established these preliminary findings by a preponderance of the evidence does the burden shift to the applicant. Yet, before the bar may actually be applied, the applicant must be put on notice that the Immigration Judge has made these preliminary findings and must be given an opportunity to establish either that the applicant has not actually assisted or participated in persecution, or that if the applicant did assist or participate in persecution, that it was done under duress.

Procedurally, DHS should timely inform the applicant in advance of the merits hearing that DHS intends to raise the persecutor bar with respect to specified acts. This would afford the applicant the opportunity to present evidence at the merits hearing to rebut the persecution claim (and/or establish a defense such as duress). If DHS does not provide such advance notice—and the persecutor bar is raised for the first time at the applicant's merits hearing—the applicant should be offered a continuance to have an opportunity to develop appropriate evidence in response.

C. After The Above Preliminary Findings Have Been Made, The Applicant Must Be Put On Notice And Given An Opportunity To Establish That She Is Not Subject To The Persecutor Bar.

1. The Initial Inquiry And Burden Of Proof When Raising The Persecutor Bar.

As DHS notes in its Supplemental Brief at pp. 18-21, the threshold inquiry—prior to assessing the applicability of a duress defense—is whether the applicant is subject to the persecutor bar. In fact, DHS appropriately characterized this threshold finding as a "procedural safeguard[]." (DHS Supp. Br. at p. 11.)

The persecutor bar provides that anyone who "[o]rdered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion" cannot be granted asylum or withholding of removal. 8 U.S.C. §§ 1231(b)(3)(B)(i), 1158(b)(1)(B)(i), 1101(a)(42)(A); 8 C.F.R. § 1208.13(c)(2)(i)(E). While DHS bears the burden of establishing that the persecutor bar applies, the exact contours of that burden have not yet been settled and would benefit from the Board's guidance.

Amici respectfully submit that the Board should clarify that persecutor bar determinations should proceed as follows. First, after a full evidentiary hearing or hearings, the Immigration Judge should determine whether the applicant is eligible for asylum or withholding of removal. Second, the Immigration Judge should make a preliminary finding regarding whether DHS has shown—by a preponderance of the evidence—that the applicant has assisted or participated in persecution such that the bar may apply. Third, the Immigrant Judge should determine whether the applicant, having been given fair notice and opportunity to respond, has established—by a preponderance of the evidence—that she has not actually assisted or participated in persecution

or that if she did it was under duress. Finally, only after it is determined that the applicant failed to meet this burden at step three would the Immigration Judge actually apply the persecutor bar.

2. Statutory Support For This Framework.

The statute supports this analytical framework. While an applicant for relief bears the burden of establishing eligibility for that relief, the withholding and asylum provisions of the INA cannot be read as placing the initial burden of proof with regard to the persecutor bar on the applicant. *See* 8 U.S.C. §§ 1231(b)(3)(B),1229a(c)(4)(a), 1158(b)(1)(B); 8 C.F.R. § 1240.8(d) (stating that an applicant "shall have the burden of establishing that he or she is eligible for any requested benefit or privilege and that it should be granted in the exercise of discretion."). Rather, section 1231(b)(3)(C) provides that, in determining whether an applicant has demonstrated eligibility for withholding removal, "the trier of fact shall determine whether the [applicant] has sustained [the applicant's] burden of proof ... in the manner described in clause (ii) and (iii) of section [1158(b)(1)(B)]," which describes in detail burdens of proof relevant to asylum. Section 1158(b)(1)(B) in turn states that "the burden of proof is on the applicant to establish that the applicant is a refugee within the meaning of [1101(a)(42)(A)]." *See also* 8 U.S.C. § 1231(b)(3)(A) (explaining that the Attorney General "may not remove an alien to a country if the [Attorney General] decides that the alien's life or freedom would be threatened in that country because of' a protected characteristic). Section 1158(b)(1)(B)(i) then provides that "[t]o establish that the applicant is a refugee within the meaning of [1101(a)(42)(A)], the applicant must establish that ... [a protected characteristic] was or will be at least one central reason for persecuting the applicant." *Id.* This "burden of proof" section makes no reference at all to any affirmative duty on the applicant to prove that the persecutor bar does not apply. *Id.*

Rather, that initial burden with regard to the persecutor bar is borne by the government. *See Gao*, 500 F.3d at 103 ("[O]nce the government has satisfied its initial burden of

demonstrating that the persecutor bar applies, the burden would then shift to the applicant..."); *Castañeda–Castillo*, 488 F.3d at 21 ("[O]nce the government introduced evidence of the applicant's association with persecution, it then became Castañeda's burden to disprove that he was engaged in persecution."); *see also Matter of A-H-*, 23 I&N Dec. 774, 786 (A.G. 2005).[6]

To actually apply the persecutor bar to an applicant otherwise eligible for withholding or asylum, the INA requires the Attorney General to "decide that ... [the applicant] assisted or otherwise participated in the persecution of an individual because of" a protected characteristic. 8 U.S.C. § 1231(b)(3)(B)(i); *see also* 8 U.S.C. § 1158(b)(1)(B)(i) (explaining that an applicant is not eligible for asylum if the Attorney General "determines that ... the alien ... assisted or otherwise participated in the persecution ... on account of" a protected characteristic).

In explaining the process through which the Attorney General *decides* or *determines* that an applicant assisted or participated in persecution, some courts have looked to the second half of 8 C.F.R. § 1240.8(d) for guidance. That regulation provides that "[i]f the evidence indicates that one or more of the grounds for mandatory denial of the application for relief may apply, the alien shall have the burden of proving by a preponderance of the evidence that such grounds do not apply." *Id.*

While there is variance in how the courts use and understand 8 C.F.R. § 1240.8(d) in relation to the persecutor bar, there is general agreement that once there is sufficient evidence to permit the Immigration Judge to find that the bar *may* apply, the applicant must be given an opportunity to show that the bar does not apply. *See Gao,* 500 F.3d at 103 ("[O]nce the

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[6] The UNHCR Background notes support putting the burden of proof squarely on the government. *See* 2003 Background Note on Art 1F, paras 105-106, http://www.refworld.org/docid/3f5857d24.html ("In asylum procedures generally, the burden of proof is shared between the applicant and the State (reflecting the vulnerability of the individual in this context). As several jurisdictions have explicitly recognized, however, the burden shifts to the State to justify exclusion under Article 1F."); *see also* 1997 Note at para 4, http://www.unhcr.org/en-us/excom/standcom/3ae68cf68/note-exclusion-clauses.html ("Under the 1951 Convention, responsibility for establishing exclusion lies with States.").

government has satisfied its initial burden of demonstrating that the persecutor bar applies, the burden would then shift to the applicant to disprove knowledge."); *Castañeda–Castillo*, 488 F.3d at 21 ("[O]nce the government introduced evidence of the applicant's association with persecution, it then became Castañeda's burden to disprove that he was engaged in persecution."); *Hernandez*, 258 F.3d at 812, 814 (explaining that once there is "evidence than an applicant ... has assisted or participated in persecution," the applicant must demonstrate "that he has not been involved in such conduct."); *Matter of A-H-*, 23 I&N Dec. at 786.

The text of the withholding and asylum statutes support the notion that DHS's evidentiary burden to show that the persecutor bar applies should be based on a preponderance of the evidence. Indeed, the language of the persecutor bar—which requires the Attorney General to "**decide**" or "**determine**" that the applicant assisted or participated in persecution—stands in stark contrast with the "danger to U.S. security" bar, which merely requires the Attorney General to determine that "there are **reasonable grounds**" to believe that the applicant is "a danger to the security of the United States." *Compare* 8 U.S.C. §§ 1231(b)(3)(B)(i) and 1158(b)(2)(A)(i) *with* 1231(b)(3)(B)(iv) and 1158(b)(2)(A)(iv) (emphases added). The "reasonable grounds" standard is one "substantially less stringent ... than 'preponderance of the evidence,'" and is roughly equivalent to the "probable cause" standard. *See* Deborah Anker, *Law of Asylum in The U.S.*, 2015, at § 6:23 (citing *Matter of A-H-*, 23 I&N Dec. at 786; *Matter of U-H-*, 23 I&N Dec. 355, 356 (BIA 2002) (finding that probable cause existed where an applicant was merely a member and supporter of a group designated as a terrorist organization).

Moreover, in the withholding and asylum setting, facts are found using a preponderance of the evidence standard. *Matter of Acosta*, 19 I&N Dec. 211, 214-216 (BIA 1985) ("It is the general rule" that the truth of allegations is established "by a preponderance of the evidence");

see, e.g., Matter of C-A-L-, 21 I&N Dec. 754, 759 (BIA 1997) (utilizing the preponderance of the evidence standard in an analogous context).

As such, the textual structure of the eligibility bars, when read together, supports the conclusions that the Immigration Judge must find by a preponderance of the evidence that the applicant "assisted or participated in persecution" to actually apply the persecutor bar. Had Congress intended for the persecutor bar to apply when there were merely "*reasonable grounds*" for believing the applicant assisted or participated in persecution, it could have used that language. *Compare* 8 U.S.C. § 1158(b)(2)(A)(i) *with* 8 U.S.C. § 1158(b)(2)(A)(iv). That it did not use the "reasonable grounds" language must be given effect. *See Cardoza-Fonseca*, 480 U.S. at 432 ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)).

3. International Law Standards.

Moreover, this position is also consistent with international law standards as persuasively argued by other *amici*. *See* BIA Amici Br. Int'l Law Scholars at p. 14. *See Al-Sirri v Sec'y of State for the Home Dep't; DD (Afghanistan) v Sec'y of State for the Home Dep't* [2012] UKSC 54 ¶ 16 (UK Sup. Ct. Nov. 12, 2012) (citing Grahl-Madsen, at 283) (emphasizing that article 1F "should be interpreted restrictively and applied with caution" and that "[t]here should be a high threshold 'defined in terms of the gravity of the act in question, the manner in which the act is organized, its international impact and long-term objectives, and the implications for international peace and security'."); *see also AS (s.55 "exclusion" certificate – process) Sri Lanka* [2013 UKUT 00571 (IAC) [43] (quoting *Al-Sirri* and noting that "although a domestic standard of proof could not be imported into the Refugee Convention . . . '[t]he reality is that

there are unlikely to be sufficiently serious reasons for considering the applicant to be guilty unless the decision-maker can be satisfied **on the balance of probabilities** that he is.'") (emphasis added).

* * *

While *amici* acknowledge that this construction of the government's burden may be at odds with the generic burden-shifting scheme of 8 C.F.R. § 1240.8(d), to *amici's* knowledge, the Board has not ever held that 8 C.F.R. § 1240.8(d) must be applied to the persecutor bar. Thus, it is an open question for the Board to address.[7] Regardless of how the Board answers that specific question, *amici* do not believe that any interpretation that would allow for a person facing a clear probability of persecution in her home country to be returned to that country on some quantum of evidence less than a preponderance would be consistent with the statute or our international law obligations. *See Pastora*, 737 F.3d at 906, n.5 (noting that 8 C.F.R. § 1240.8(d)'s language "may apply" could well be "in tension with the language of the statute" and that the Sixth, Second, and Seventh Circuits appear to have read the word "may" out of the regulation) (citing *Diaz–Zanatta,* 558 F.3d at 455 ("there must be some actual connection between the actions of the alien and the persecution of others"); *Gao*, 500 F.3d at 101 (finding the evidence in that case insufficient "to trigger the persecutor bar without evidence indicating that Gao actually assisted in an identified act of persecution"); *Singh*, 417 F.3d at 740 ("for the statutory bars contained in ... [the withholding and asylum statutes] to apply, the record must reveal that the alien **actually** assisted or otherwise participated in the persecution") (emphasis in original); *see also* BIA Amici Br.

[7] Indeed, the regulations related to the grounds of mandatory denial specific to asylum applications filed after April 1, 1997, including the persecutor bar, are silent on burdens of proof. *Compare* 8 C.F.R. § 208.13(b)(1) *with* 8 C.F.R. § 208.13(b)(2). While some courts rely upon the generic regulatory provision of 8 C.F.R. § 1240.8(d) to fill that gap, other courts have at least questioned whether full use of 1240.8(d) is consistent with the statute. *See Pastora v. Holder*, 737 F.3d 902, 906, n.5 (4th Cir. 2013) (citing *Diaz–Zanatta,* 558 F.3d at 455; *Gao,* 500 F.3d at 103; *Singh,* 417 F.3d at 740.

Int'l Law Scholars at p. 14.[8] It is also worth noting that the Asylum Officer Basic Training Manual states that "only when USCIS has presented sufficient evidence" that a "ground for mandatory denial... exists," not just that a bar may exist, does the burden shift to the applicant.[9]

In sum, in cases involving the persecutor bar, *amici* submit that the inquiry should proceed as follows: (1) the Immigration Judge should determine whether the applicant has established eligibility for asylum or withholding of removal; (2) DHS must show by a preponderance of the evidence—and the Immigration Judge must find—that the persecutor bar criteria are met such that the bar *may* apply to the applicant; (3) the applicant should be given fair notice and an opportunity (*i.e.*, including through a continued hearing) to demonstrate that a preponderance of the evidence does not show that the applicant assisted or otherwise participated in persecution or otherwise establish a defense to the bar, such as duress; and (4) the Immigration Judge can then determine whether the bar should actually apply to the applicant. This structured inquiry ensures a disciplined approach to evaluating the evidence with appropriate burdens of proof, and sufficient procedural safeguards for due process. It also avoids the scenario where an applicant is forced to prove a negative or otherwise explain in the first instance (*i.e.*, before the Immigration Judge has made an initial determination that the persecutor bar may apply) why his or her conduct should be excused due to duress.

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[8] In *Matter of A-H-*, while the Attorney General provided some support in dicta for a *prima facie* burden, the AG ultimately resolved the question on other grounds. *See Matter of A-H-*, 23 I&N Dec. at 786 (explaining in dicta that "[a]ssuming INS ... offer[ed] sufficient ***prima facie* evidence** to indicate that respondent '...assisted, or otherwise participated in' the persecution of persons ..., the burden fell on respondent to disprove that he did so by a preponderance of the evidence.") (emphasis added).

[9] Asylum Officer Basic Training Course, *Bars to Asylum*, at 33 (March 2009), available at: https://www.uscis.gov/sites/default/files/USCIS/Humanitarian/Refugees%20% 26%20Asylum/Asylum/Bars-to-Asylum-Discretion -31aug10.pdf .

II. DHS'S PROPOSED FIVE-PRONGED TEST SHOULD NOT BE ADOPTED.

In its Supplemental Brief, DHS states that it has created a "narrowly tailored duress exception" in the form of a five-pronged test, requiring the applicant to prove each element of the test—with respect to each act of alleged persecution—by a preponderance of the evidence.

While DHS correctly identifies the need for a duress exception that breaks free from the *Fedorenko v. United States* paradigm, DHS's proposed test misses the mark by a long shot. Specifically, *amici* submit that DHS's proposed test should not be adopted for three primary reasons: (1) it is based on criminal law principles, which are fundamentally different from asylum/refugee law; (2) the test is far too rigid and burdensome to be workable; and (3) DHS's test ignores the nuances and complexities present in protection-based claims, which is inconsistent with the treatment of such claims under international law.

A. DHS's Reliance On Criminal Law Principles Is Misplaced.

In describing its five-pronged test, DHS made clear that its proposed standard is based on criminal law principles. (*See* DHS Supp. Br. at pp. 14-17.) That reliance is misguided.

1. There Are Fundamental Differences Between Criminal Law And Refugee Law.

Through the Refugee Act of 1980, Pub. L. No. 96-212, ("1980 Refugee Act"), the U.S. Congress first introduced the prohibition against granting asylum to any individual who persecuted another by excluding a "refugee" who "ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion." 1980 Refugee Act, Section 201(a). One of the primary purposes of the Refugee Act was to implement the obligations the United States agreed to carry out under the 1967 United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267, and the 1951 United Nations

Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 150. *See also Cardoza-Fonseca*, 480 U.S. at 436-38 (confirming that the purpose of the Refugee Act was to ensure that the United States would carry out its obligations under the 1967 UN Protocol and 1951 UN Convention). Indeed, the Refugee Act was drafted to "respond to the urgent needs of persons subject to persecution in their homelands, including... humanitarian assistance for their care and maintenance in asylum areas..." 1980 Refugee Act, Section 101(a). Standards for reviewing and adjudicating asylum applications should be consistent with these humanitarian goals.

The criminal justice system, however, serves entirely different purposes: controlling crimes and imposing penalties on those who violate laws. "The purposes of criminal proceedings are primarily penal—the indictment, conviction and sentence are charges against and punishment of the defendant." *United States v. Parsons*, 367 F.3d 409, 414 (5th Cir. 2004) (internal citations omitted). Unlike asylum cases, which are rooted in humanitarian assistance and are presented before an Immigration Judge, criminal prosecutions involve juries deciding whether to punish an individual for specific conduct. Given the stakes, criminal prosecutors and defendants are subject to stringent standards in proving each element of the crimes and defenses (*e.g.*, crimes are to be proven beyond a reasonable doubt).

DHS's proposed test requires refugees—who are fleeing persecution in a foreign country—to be reviewed and treated under the guidelines adopted by the criminal system. Refugees are not criminal defendants. The bar for asylum applicants to prove a duress defense should be much lower than an affirmative defense in a criminal matter. To act otherwise would be a great injustice to the refugees and the treaties that underlie our treatment of them.

2. Unlike Criminal Defendants, Asylum Applicants Are Not Guaranteed Access To Counsel.

Not only are the statutory purposes and burdens of proof different with respect to criminal and refugee law, but there is another fundamental difference that undercuts the usefulness of a criminal law standard in the refugee context: criminal defendants are afforded a right to counsel, while asylum applicants are not.

This difference is crucial. DHS has wholesale borrowed the legal regime for duress defenses and attempted to transplant that regime into refugee law. That will not work. Indeed, criminal law standards (including with respect to duress defenses) were developed through common and statutory law with this advocacy framework in mind. Criminal laws standards were simply not designed for matters involving *pro se* individuals from foreign countries who do not speak English, do not have familiarity with our legal system (let alone DHS's five-pronged test), and who are often detained and with no ability to develop evidence.[10]

B. DHS's Proposed Test Is Unworkable, Unfairly Rigid, And Unduly Burdensome.

DHS's proposed test suffers from a number of logistical and procedural flaws, rendering the test unworkable in the current legal regime. First, the evidentiary burden imposed is unrealistic given the significant limitations on developing evidence, including the fact that in many asylum cases, corroborating witnesses and evidence does not exist or is not reasonably obtainable by the applicant. *See* 8 U.S.C. § 1158(b)(1)(B)(ii) (stating that an asylum applicant need not provide corroborating evidence demanded by the adjudicator if the evidence cannot be reasonably obtained). Second, placing such significant evidentiary burdens on asylum applicants

[10] Indeed, "[w]ith the pace of their work accelerating, immigration judges often feel asylum hearings are 'like holding death penalty cases in traffic court,' said Dana L. Marks, an immigration judge in San Francisco and the president of the National Association of Immigration Judges." *See* Lawyers Back Creating New Immigration Courts (last visited November 4, 2016) http://www.nytimes.com/2010/02/09/us/09immig.html.

are inconsistent with basic due process norms, given that many asylum applicants are detained, do not have access to counsel, and have no English skills or familiarity with the U.S. legal system. As such, DHS's proposed test is so strict that many, if not all, asylum applicants have no way of meeting the required standard. This is particularly significant given that these cases involve life-or-death dispositions for the applicants.

1. Imposing An Onerous Evidentiary Burden On Asylum Applicants Is Not Appropriate Given The Inherent Limitations In Presenting Evidence In Such Proceedings.

It is well accepted that asylum and withholding of removal proceedings suffer from significant evidentiary limitations. DHS acknowledged this limitation in its Supplemental Brief, citing to Justice Scalia's notable quote in his concurring opinion in *Negusie*:

> Immigration judges already face the overwhelming task of attempting to recreate, by a limited number of witnesses speaking through (often poor-quality) translation, events that took place years ago in foreign, usually impoverished countries. Adding on top of that the burden of adjudicating claims of duress and coercion, which are extremely difficult to corroborate and necessarily pose questions of degree that require intensely fact-bound line-drawing, would increase the already inherently high risk of error.

Negusie, 555 U.S. at 527 (Scalia, J., concurring). We agree with this assessment. But rather than proposing a solution that embraces these challenges, DHS simply doubles-down and proposes a framework that may sound appealing in the abstract, but is unworkable in reality. By failing to provide a framework that acknowledges the challenges inherent in the asylum and withholding system is to ask applicants—and Asylum Officers and Immigration Judges—to do the impossible: develop, present, and adjudicate evidence that is simply not available or reasonably obtainable.

Relatedly, asylum and withholding of removal matters are often set up such that Asylum Officers and Immigration Judges must evaluate testimony that primarily comes from the applicant itself. Corroborating witnesses, documents, and even qualified experts are frequently

unavailable. Thus, these dispositions can often turn on the applicant's credibility: "witness demeanor and conflicting testimony are crucial factors in assessing credibility." *Affiul v. Ashcroft*, 380 F.3d 1, at 5 (1st Cir. 2004). DHS also recognized the significance of the testimony of an asylum applicant and its weight in assessing an applicant's credibility, stating that "the applicant's testimony alone can sustain a request for protection." (DHS Supp. Br., p. 23; citing INA §§ 208(b)(1)(B)(ii) and 240(c)(4)).

But evidence from the applicants is also subject to significant limitations. If the trier-of-fact has reached the question of the applicability of the persecutor bar (and the duress defense), that means that the she has already determined that the applicant has or will be subjected to persecution. This past trauma can cause memory loss, memory subjectivity, confusion caused by trauma, change of events, psychiatric diseases, and cultural gaps. Jessica Chaudhary, M.D., "Memory and Its Implications for Asylum Decisions," *Journal of Health & Biomedical Law*, Vol. VI, 2010, pp. 37-63. "[A]n immigration attorney handling refugee cases should be familiar with certain symptoms that can be indicative of an underlying psychiatric disorder. These include, but are not limited to, flashbacks, nightmares, hyper vigilance, thought intrusions or thought blocking, lack of sleep or increased sleep, " *Id.*, p.57. Nevertheless, this individual is expected to testify with detail and precision about horrific experiences in their lives to prove—by a preponderance of the evidence—each of the five elements in DHS's proposed test, with respect to every alleged act of persecution. Failure to establish sufficient evidence with respect to only one of the five elements dooms the applicant's duress defense. And while applicants bear the burden of demonstrating their eligibility for asylum or withholding of removal—subject to the same evidentiary restrictions discussed here—DHS's test is far more demanding than the applicant's initial showing, given the number of factors that need to be shown, and the

requirement to do so for each act of persecution. This unfairly disadvantages the countless numbers of applicants who unavoidably suffered psychiatric disorders or trauma as a result of the persecution they are escaping.[11]

2. Many Applicants Appear *Pro Se* Or Are Otherwise Unable To Mount An Adequate Defense.

DHS's five-pronged test is difficult enough for an applicant to satisfy when that applicant has legal representation. It is virtually impossible to satisfy without the assistance of counsel.

Unfortunately, that includes a significant number of applicants. According to a report by the American Bar Association, in 2010, **over half of all applicants** (57% to be exact) in immigration court were appearing *pro se*, and in 2009, 60% of applicants were appearing *pro se*. *See* Chad R. Doobay, Transactional Attorneys and Pro Bono Asylum Work.[12] A recent national study found that fewer than forty percent of immigrants facing removal were represented by an attorney in cases decided on the merits. Sabrineh Ardalan, *Access to Justice for Asylum Seekers: Developing an Effective Model of Holistic Asylum Representation*, 48 U. Mich. J. L. Reform 1001 (2015)[13] (citing Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. Penn. L. Rev. 1, 6 (2016) (forthcoming) ("By looking at individual removal cases decided on the merits, we find that only 37% of immigrants had counsel during our study period."))

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[11] We note that DHS states in its Supplemental Brief (at pp. 22-24) that, in assessing the applicant's credibility, adjudicators should consider whether the applicant "fully disclosed . . . the nature and circumstances of each persecutory act and the material facts pertaining to any claim of duress or lack of knowledge." As other *amici* discuss in greater detail, this only compounds DHS's erroneous standard. Applicants' interviews with U.S. government representatives are flawed and unreliable. Applicants—who are often escaping torture at the hands of government authorities—are often speaking with a government representative for the first time, and are naturally terrified of what might happen to them, leading to forgetfulness, incomplete answers, and inaccurate recollections. This is not to mention the fact that many of the applicants do not have effective—or any—translation.

[12] Available at: http://www.americanbar.org/publications/blt/2011/10/pro_bono.html.

[13] Available at: http://repository.law.umich.edu/mjlr/vol48/iss4/4.

Indeed, studies have found that having representation in these proceedings is the single most important factor affecting the outcome of an asylum applicant's case. *See* Transactional Attorneys and Pro Bono Asylum Work, *supra*. One study found that, from January 2000 through August 2004, asylum applicants with representation were granted asylum at a rate of 45%, compared with only 16% for *pro se* asylum-seekers over the same period. *Id.*

And of course, many of these applicants that are appearing *pro se* do not speak English and are not familiar with the U.S. legal system (*e.g.*, burdens of proof, use of experts, need for corroborating documentation, etc.), let alone the precise contours of the persecutor bar and the duress defense.

To make matters worse, many asylum applicants are detained. In 2010, U.S. Immigration and Customs Enforcement reported that "9,041 of the 18,332 [49.3%] aliens found to have met the credible fear screening standard were detained," and "6,642 of the 16,194 [41.0%] defensive asylum applicants were detained." *See* U.S. Immigration and Customs Enforcement, *Detained Asylum Seekers Fiscal Year 2009 and 2010 Report to Congress* (August 20, 2012). Of these detainees, an overwhelming 86% of them are not represented by counsel, which means that they essentially have no ability to prepare a legal defense, let alone speak with anyone who can inform them of what is required in an asylum proceeding. *See* Ardalan, *supra*.

Thus, in summary, asylum applicants face some combination of: faulty memories due to persecution and torture, inherent unavailability of corroborating evidence, lack of representation, language barriers, and detention. These same individuals are required to meet a strict, do-or-die five-pronged legal standard by a preponderance of the evidence, with respect to each alleged act of persecution. It is both tragic and ironic that these same individuals likely would not even

understand that they face such a monumental burden. In any event, this is such a significant departure from basic due process norms that it cannot be accepted as a viable standard.

3. DHS's Five-Pronged Standard Would Require Additional Time For A Hearing, Which Is Not Workable In An Already-Backlogged System.

Adjudication of an asylum claim through the various administrative and judicial levels requires several months and often consumes years. *See* ACUS, Asylum Adjudication Procedures (June 16, 1989).[14] A delay in adjudication significantly consumes public resources and disadvantages refugees who have already suffered greatly and are stuck in limbo, praying for a favorable result. A healthy and efficient asylum adjudication system serves the purpose of justice and humanitarian assistance.

If asylum applicants are to fully and credibly defend themselves as to each alleged act of persecution (and for each of the five elements for each act of persecution), asylum hearings would take much longer. Indeed, DHS's proposed test could require days, if not weeks, of hearings, as well as additional witnesses, experts, and forensic reports, to the extent they are available.

This is not workable within the current system. The current format for presentment of a case—along with the backlogs that exist within that same system—are not equipped to accommodate the evidentiary exercise that DHS contemplates. Many courts allot a maximum of only three hours to present an asylum/withholding case, which is plainly not enough time to present five different sets of evidence for multiple acts of alleged persecution, in addition to evidence that establishes eligibility for asylum in the first instance. This requires additional time for such hearings, which results in even longer waiting times for applicants. For affirmative asylum applications, applicants are already forced to wait five years or more for an interview

[14] Available at: https://www.acus.gov/recommendation/asylum-adjudication-procedures.

with an Asylum Officer. DHS's proposed standard would required the Officers to ask additional questions, prolonging the hearings and forcing even further delays in the interview process.

C. DHS's Emphasis On An Objective Standard Is Out Of Step With International Legal Obligations.

As discussed earlier, U.S. asylum law was developed to enable the United States to honor its international obligations, including the Statute of the United Nations High Commissioner for Refugees (the "UNHCR Statute") and the 1951 Convention Relating to the Status of Refugees (the "1951 Convention"). The UNHCR Statute and the 1951 Convention contain "exclusion clauses" that exclude from refugee protections certain individuals who would otherwise qualify. These "exclusion clauses" include the persecutor bar and other bars to asylum. The UNHCR has provided guidelines on the application of the "exclusion clauses," which notes that the exclusion clauses were established because "certain acts are so grave as to render the perpetrators undeserving of international protection as refugees... [which] must be borne in mind in interpreting the applicability of the exclusion clauses." UNHCR, *The Exclusion Clauses: Guidelines on their Application*, at P.2 (1996). The UNHCR further noted that the exclusion clauses "need to be interpreted restrictively" and should be "used with utmost caution." *Id.* In fact, when assessing the applicability of an exclusion clause, the UNHCR recommends a "proportionality test," which includes an evaluation of "the nature of the crime and the applicant's role in it (including any mitigating factors)" and "the gravity of the persecution feared." *Id.*, at P.3. That is, the UNHCR's proposed test is closer to a totality-of-the-circumstances evaluation, rather than a strict five-part test such as the one DHS proposed.

Thus, as other *amici* discuss in greater detail, U.S. jurisprudence on the duress defense should be consistent with international law and guidance, which provide for a far more nuanced and holistic evaluation of the relevant facts affecting the imposition of the persecutor bar. *See*

BIA Amici Br. Int'l Law Scholars at pp. 3-4; Kate Evans, *Drawing Lines Among the Persecuted*, 101 Minn. L. Rev. 453, 519 (2016).[15] Rather, a fulsome, totality-of-the-circumstances analysis is consistent with related statutes and courts' interpretation of refugee law. *See, e.g.*, 8 U.S.C. § 1158(b)(1)(B)(iii) (requiring that an IJ "consider the circumstances under which [prior] statements were made" and "consider[ ] the totality of the circumstances" and "all relevant factors" in making credibility determinations); *Matter of A-H-*, 23 I.&N. at 785 ("It is appropriate to look at the totality of the relevant conduct in determining whether the bar to eligibility applies."); *Chen*, 513 F.3d at 1259 ("The standard for determining whether an asylum applicant is ineligible for asylum and withholding of removal due to assistance or participation in persecution is a particularized, fact-specific inquiry."). *Hernandez*, 258 F.3d at 814 ("a court must evaluate the entire record in order to determine whether the individual should be held personally culpable for his conduct"). Indeed, DHS's proposed five-pronged test requiring proof of each and every act or omission undermines the very purpose of the United States adopting the Refugee Act and raises the standard much higher than it is supposed to be.

III. ALTERNATIVE TEST FOR EVALUATING THE DURESS DEFENSE.

A. The Test For Determining The Defense Of Duress To The Persecutor Bar Should Be Based On The Totality Of The Circumstances.

A totality-of-the-circumstances test, as opposed to the bright-line rule DHS proposed, is more consistent with the principles and realities of refugee law. Indeed, totality-of-the-circumstances tests are no stranger to refugee law. The REAL ID Act explicitly adopts a totality-of-the-circumstances test for credibility determinations in asylum cases. 8 U.S.C. § 1158(b)(1)(B)(iii) (2009). Specifically, a trier of fact will consider factors such as an individual's "demeanor, candor, or responsiveness," plausibility and consistency of the person's

[15] Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2861608

statements, and any "inaccuracies or falsehoods." *Id.* And when assessing whether an applicant should be excluded by the persecutor bar, courts have used a totality-of-the-circumstances test. *See Kumar*, 728 F.3d at 998–1000 (considering multiple aspects of the applicant's involvement in the alleged persecution in deciding whether his acts were material to the persecutory end); *Miranda Alvarado*, 449 F.3d at 926 (examining the "surrounding circumstances" in order to determine whether assistance or participation in persecution had occurred); *Hernandez*, 258 F.3d at 813 (stating that a "particularized evaluation" should be used to determine individual culpability for persecution).

There is no reason to depart from the totality-of-the-circumstances analytical framework when evaluating the applicability of the duress defense, as that defense goes hand-in-hand with an analysis of the persecutor bar. Indeed, asylum matters are born out of complicated facts that are unique to each case, which is precisely why courts have refrained from imposing the type of bright-line rules that DHS would have the Board adopt. A totality-of-the-circumstances test enables the analysis of the applicant's plight to remain rooted in fundamental fairness and moral culpability, and not rigid legal criteria that disproportionately affects applicants without representation or access to evidence.

B. The Test For Assessing The Duress Defense Should Involve Consideration Of A Number Of Criteria.

While DHS's test is procedurally too rigid, it raises a number of valid criteria that fact-finders may consider when deciding whether duress excuses persecution. In considering DHS's proposed standard, U.S. law, and international law, *amici* respectfully submit that fact-finders should consider the following criteria when deciding whether an applicant's persecution is excused by duress: (1) the act charged was done to avoid a serious and irreparable danger; (2)

there was no other adequate means of escape; and (3) the applicant did not believe she was causing greater harm than she sought to avoid.

Additionally, a finding of duress in one instance should be sufficient to establish a presumption that the applicant was continually in a state of duress.

1. The Applicant Reasonably Believed She Had To Perform The Persecutory Act To Avoid Serious And Irreparable Harm.

The first criteria when examining a duress defense is whether the applicant reasonably believed that she had to perform the persecutory act to avoid serious and irreparable harm. This is similar to the first and second parts of DHS's five-part test: "there was an imminent threat of death or serious bodily harm to the applicant or another person" and "he or she reasonably believed that he or she had to act, or not act, in order to directly avoid the threatened harm." (DHS Supp. Br., at p. 25.) But there is one notable difference between *amici*'s proposed standard and DHS's: *amici* believe that the applicant's assessment of harm turns on the applicant's "reasonable belief" regarding the harm the applicant faced (*i.e.*, a subjective analysis of the harm). On the other hand, despite the fact that DHS's standard includes the phrase "reasonable belie[f]," DHS believes the question can be resolved through an objective analysis. (DHS Supp. Br. at p. 27.)

As an initial matter, the use of subjective criteria is consistent with basic norms in refugee law. A refugee is any person who is unable or unwilling to return to his/her own country "because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1101(a)(42). The U.S. Supreme Court has held that the term "fear of persecution" requires examination of the alien's "subjective mental state" and that the word "'well-founded' does not alter the obvious focus on the individual's subjective beliefs." *Cardoza-Fonseca*, 480 U.S. at

430–31. Similarly, the UNHCR concluded that the determination of refugee status should primarily focus on a subjective analysis of the applicant's state of mind, instead of the situation prevailing in the applicant's home country, because "fear is subjective." Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees (Dec. 2011), at 11.[16]

Additionally, an analysis of subjective criteria allows the fact-finder to evaluate the mental state of the applicant, focusing on excluding individuals from asylum or withholding of removal who are truly morally culpable. On the flip side, the criteria also ensure that the fact-finder does not exclude from asylum or withholding of removal an applicant that acted reasonably under the circumstances, even if the results are objectively difficult to reconcile.

Duress, which can often stem from past persecution or fear for future persecution, is also an inherently subjective concept. Different individuals may have different reactions to the same environment. To determine whether the applicant's fear was reasonable and acted accordingly to avoid the threatened harm, an element the DHS also considers relevant, (DHS Supp. Br., at p. 25), fact-finders should consider the following:

- What was the applicant's basis for believing that it was necessary to assist or participate in the persecution? What is the track record of the party compelling the act for punishing individuals who disobey orders?
- Was the applicant a victim of past persecution or abuse, including for refusing to obey orders? What about her family members or close friends?
- Did the applicant refuse to join the persecutory group in the first instance?
- Did the applicant receive direct threats of death or serious bodily injury?

[16] Available at: http://www.unhcr.org/3d58e13b4.pdf.

- What happened to others who refused to assist or participate in the persecution? Did the applicant witness retaliatory action? If so, how frequently?
- Was the applicant a member of a particularly vulnerable group, such as children or the mentally ill?
- Did the applicant try to help the victims of the persecution in any way?

By examining these issues, the fact-finder will have a more realistic and reasonable standard to determine whether the applicant acted under the threat of serious and irreparable harm. This subjective approach will also address DHS's concern of whether the applicant placed herself in a situation that compelled her to perform a persecutory act. (DHS Supp. Br., at p. 26.)

2. The Applicant Did Not Have An Adequate Means Of Escape.

As DHS acknowledges, a key step in the assessment of duress is whether the applicant had an adequate or reasonable opportunity to escape his or her circumstances. (*See* DHS Supp. Br. at p. 26: "he or she did not have a reasonable opportunity to escape or to otherwise avoid engaging in the act or omission" and "he or she did not place himself or herself in a situation in which he or she knew or reasonably should have known that he or she would likely be forced to act or refrain from acting.")

Again, DHS argues that this element should be assessed "objectively." (DHS Supp. Br. at p. 31.) Thus, DHS suggests that the "reasonable[ness]" of the "opportunity to escape" should be assessed through the eyes of an impartial observer, and not the applicant.

This not only runs counter to refugee jurisprudence (as discussed in the preceding section), but it also could exclude numerous qualified refugees. For example, an individual may have been persecuted to such an extent that they are rendered traumatized and paranoid. *See, e.g., Qu v. Gonzales*, 399 F.3d 1195, 1202 (9th Cir. 2005) (stating that "physical and

psychological trauma . . . is common to many forms of persecution"). That same individual might objectively have an opportunity to escape because of a lack of constant surveillance, but such a requirement would be a gross injustice as it would not account for the individual's state of mind. Similarly, an individual held against their will (and forced to engage in persecutory acts) may suffer from Stockholm Syndrome, "a psychological phenomenon whereby a hostage develops positive feelings for [the] captor." *United States v. Chancey*, 715 F.2d 543, 547 (11th Cir. 1983). Stockholm Syndrome may cause the victim to behave in a way that is objectively irrational, but may be justifiable given the individual's trauma.

3. The Applicant Did Not Believe She Was Causing Greater Harm Than That Sought To Be Avoided.

The third element *amici* recommend for determining whether the applicant acted under duress is to assess the alleged harm the applicant believed she was causing and compare that with the harm the applicant faced. (*See* DHS Br. at p. 26: "the harm the applicant knew or reasonably should have known would result from his or her act or omission is not greater than the threatened harm that the applicant sought to avoid.")

As DHS acknowledges in its citation of the UNHCR Guidelines on International Protection No. 5 (cited at page 35 of DHS's Supplemental Brief), the key questions here are subjective (*i.e.*, the level of harm the applicant believed she was causing and the harm sought to be avoided: "As for duress, this applies where . . . the person does not intend to cause greater harm than the one sought to be avoided. Action in self-defence or in defence of others or of property must be both reasonable and proportionate in relation to the threat." UNHCR Guidelines on International Protection No. 5, ¶ 22. Thus, as DHS agrees, this criterion requires an analysis of the applicant's mental state. It cannot be reduced to a dry equation that assesses the harm actually caused against the harm actually avoided.

4. Duress Should Be Presumptively Continuous Unless Fundamental Changes Took Place In The Applicant's Environment.

Once an Immigration Judge, upon examining the three elements above, finds that the applicant was under duress when he/she performed the persecutory act, that finding should be sufficient to establish a presumption of a continuous state of duress, particularly where the individual is conscripted or otherwise forced to join the group carrying out the allegedly persecutorial acts. Such presumptions exist elsewhere in asylum law. *See* 8 C.F.R. § 208.13(b)(1) (establishing a presumption of well-founded fear of persecution if an applicant has been found to have proved past persecution).

Asylum applicants should not be required to prove duress for each alleged persecutory act when there were no fundamental changes in the circumstances that addressed the applicant's subjective fear. *See Tchemkou v. Gonzales*, 495 F.3d 785, 790–91 (7th Cir. 2007) (cautioning against "addressing the severity or each event in isolation, without considering its cumulative significance"). This element is especially important in cases that involve child soldiers, who are more vulnerable to threats of severe harm and more reluctant to discuss past experiences to avoid reliving traumatic events. *See* Guidelines for Children's Asylum Claims (Sept. 1, 2009), at 19.[17]

[17] Available at: https://www.uscis.gov/sites/default/files/USCIS/Humanitarian/Refugees%20%26%20Asylum/Asylum/AOBTC%20Lesson%20Plans/Guidelines-for-Childrens-Asylum-Claims-31aug10.pdf.

CONCLUSION

Persecutor bar determinations are complex undertakings, which means that they deserve a nuanced, holistic analysis, not rigid legal criteria. *Amici* agree that the analysis regarding the duress exception should begin with a determination that the persecutor bar may apply to the applicant. While *amici* agree with DHS that a duress exception is necessary, we respectfully submit that DHS's proposed test is too rigid and unworkable. *Amici* request that the Board adopt a more flexible, totality-of-the-circumstances test, as that test is more consistent with U.S. and international jurisprudence on this subject, and is also easier for: (1) applicants to understand and (2) fact-finders to adjudicate.

Dated: November 7, 2016

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PROOF OF SERVICE

On November 7, 2016, I, Abdus Samad Pardesi, certify that I caused three copies of the foregoing to be delivered to the Board of Immigration Appeals at the following address:

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