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United States Department of Justice
Executive Office for Immigration Review
Board of Immigration Appeals

In the matter of:

[redacted]

In asylum, withholding of removal proceedings

SUBSTITUTED AMENDED BRIEF BY *AMICI CURIAE* NON-PROFIT ORGANIZATIONS AND LAW SCHOOL CLINICS

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INTRODUCTION

Amici are non-profit organizations and law school clinics that represent and otherwise provide assistance to asylum-seekers and other immigrants, including individuals who were forced to commit acts of persecution under duress.[1] *Amici* include authors of scholarly publications regarding asylum and country conditions at the root of refugee flight, practicing attorneys who represent asylum-seekers, and experts who advise other attorneys representing asylum-seekers. *Amici* also include recognized legal experts with a long-standing focus on ensuring that the development of U.S. jurisprudence is in accord with international refugee and human rights law. *Amici* have an interest in the questions under consideration in this appeal as they implicate fundamental principles of jurisprudence and statutory construction related to the persecutor bar of the Immigration and Nationality Act ("INA"), a subject of *amici*'s research and practice and a matter of great consequence for those served by *amici*. The issues involved have broad implications for the equitable and just administration of refugee law.

Amici have a direct interest in the resolution of the following issues posed by the Board of Immigration Appeals ("Board"):

1) Whether an involuntariness or duress exception exists to limit the application of the persecutor bar in sections 208(b)(2)(A)(i) and 241(b)(3)(B)(i) of the Immigration and Nationality Act, 8 U.S.C. §§ 1158(b)(2)(A)(i), 1231(b)(3)(B)(i)? *See Negusie v. Holder*, 555 U.S. 511 (2009).

2) Assuming it is necessary to acknowledge a duress exception to the persecutor bar, what ought to be the standard (including relevant burden of proof) to determine if an applicant for asylum qualifies for such an exception?

Amici thank the Board for soliciting their views.

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[1] A full list of *amici* and additional information regarding *amici* can be found in the accompanying Motion to File Substituted Amended Briefing as *Amici Curiae* in this matter.

In this brief, *Amici* present argument and social science research regarding children, persons with intellectual disabilities, and survivors of trauma to explain why a flexible inquiry into duress *must* inform the application of the persecutor bar. Denying protection to non-culpable, vulnerable individuals in these groups would not only be cruel and unjust, it would also contravene the language and purposes of the bar itself, as well as the overarching aims of refugee protection.

With regard to the first question, *amici* respectfully submit—in agreement with the original position of the Department of Homeland Security (DHS)—that the INA provides that an applicant who committed persecution under duress is not barred from asylum or withholding of removal. As to the second question, *amici* submit that in assessing whether an individual acted under duress, adjudicators should assess as relevant factors: the nature of harm faced by the applicant; the link between the applicant's conduct and avoidance of threatened harm; and the proportionality of harms faced by the applicant compared to harms perpetrated against the non-applicant victim. The adjudicator should assess each of these factors from the perspective of the applicant, accounting for his or her characteristics and circumstances. The touchstone of this evaluation should be whether a particular applicant bears personal culpability or responsibility for the persecution that occurred.

Amici respectfully submit that the approach articulated herein best enables adjudicators to answer that core question and is best in line with both the text of the statute and the purposes of the persecutor bar. It achieves the necessary balance between excluding from asylum eligibility true human rights abusers who persecuted others of their own volition, while ensuring that *victims* of persecution who were forced to engage in harmful acts against others remain protected. This approach ensures, in particular, that the bar does not exclude those who lack individual culpability for forced acts—and in which context the coerced acts themselves are often forms of abuse against

the applicant. The proper interpretation and standard is critical for vulnerable populations such as children, intellectually disabled individuals, and trauma survivors, as well as competent adults deserving of refugee protection.

SUMMARY OF ARGUMENT

Prior to DHS's recent about-face, there was unanimity from the parties to this case—as well as numerous *amici* both before the Board and in the briefing before the Supreme Court in *Negusie*—that duress negates personal culpability for acts of persecution such that sections 208(b)(2)(A)(i) and 241(b)(3)(B)(i) of the Immigration and Nationality Act (hereinafter, "the persecutor bar") do not apply to bar an applicant from obtaining asylum or withholding of removal. DHS's switch in position does not change the conclusion that the persecutor bar should not apply to applicants who acted under duress. Nothing relevant has changed—certainly not the text of the statute—since DHS previously unambiguously joined applicant and *amici* in urging the Board to so hold. Indeed, the only thing that has changed is the Administration, but the meaning of language does not change with administrations. As DHS correctly briefed to this Board previously, the language and purposes of that statutory bar prohibit application of the bar in circumstances of duress.

Considering the special vulnerabilities of children, persons suffering from trauma, and individuals with intellectual disabilities brings into sharp relief the cruelty and unreasonableness of DHS's new position. Under circumstances where a person lacks culpability for her actions, particularly a child or an individual with compromised mental state, applying the bar would unfairly and unreasonably exclude true victims of persecution from protection. DHS's view could result in the deportation of even a mentally-compromised eight-year-old, who had acted against her will at gunpoint, back to circumstances where she suffered "unimaginable harm." *See* DHS Substituted Supplemental Brief at 39 (April 26, 2017) ("Some of these applicants have endured

unimaginable harm themselves, and the Department recognizes that a law precluding a duress exception to the persecutor bar will result in their removal from the United States.").

Nothing in the statute justifies or requires this Board to permit this horrific result for individuals who have otherwise demonstrated they are refugees. The persecutor bar does not properly apply when the applicant herself is not acting on account of a protected ground and when the motives of her coercers cannot be imputed to her because she acted under duress. Any other construction would strain the text and conflict with the purposes of the persecutor bar. That bar applies only to individuals 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," INA § 208(b)(2)(A)(i), and must exclude those who do not share persecutory motives and are not morally culpable for their acts. Indeed, commonly in these situations, the coerced acts themselves constitute forms of persecution against an applicant who is traumatized by and morally opposed to her own forced acts. International law and guidance, key to interpreting our domestic asylum laws,[2] compels the same conclusion: the purpose of a persecutor bar is to exclude *only* those individuals who bear personal responsibility or culpability for acts of persecution. *See* BIA Amicus Brief of International Refugee Scholars, Section I (2017). Individuals acting under duress, who are themselves victims of a horrific situation, simply should not fall under that bar.

Amici submit that the more difficult question before the Board is how to evaluate the existence of duress substantively. Duress presents challenging ethical questions regarding culpability that must be considered in evaluating persecutory conduct. The test must assist the

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[2] *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 439 n.22 (1987); *In re Matter of Rodriguez-Palma*, 17 I. & N. Dec. 465, 468 (B.I.A. 1980) (same).

adjudicator in distinguishing between an applicant who truly acted under duress and an applicant who freely engaged in persecutory conduct. It must be flexible enough to allow true victims of duress the opportunity to establish non-culpability, but also ensure that culpable perpetrators of persecutory conduct remain barred.

As described in Section II, *amici* propose a "totality of the circumstances" substantive test that considers multiple factors to determine whether an applicant acted under duress, with no one factor being dispositive. Additionally, as underscored by the need to fairly apply the bar in general, and in particular to vulnerable groups most in need of protection, the presence of duress must be assessed from the applicant's perspective. Such a test would allow the adjudicator to identify applicants that bear no personal culpability for forced acts and, in particular, would ensure that the persecutor bar is applied fairly to vulnerable populations, especially children, intellectually disabled individuals, and survivors of trauma.

In Section III, *amici* offer suggestions for the Board regarding procedural aspects of a duress adjudication. First, *amici* urge the Board to adopt a two-part test for assessing whether the persecutor bar applies: (1) the government, at a minimum, must show that the "evidence indicates" that persecutory conduct occurred in which the applicant knowingly participated and the adjudicator should make initial findings of the same; (2) after the initial findings, the applicant can prevail by countering the initial findings, including by showing by a preponderance of the evidence that she acted under duress. Second, *amici* ask that the Board reject overly stringent procedural approaches in applying the bar against applicants.

Finally, in Section IV *amici* provide an overview of the scientific literature and caselaw on children, persons with intellectual disabilities, and survivors of trauma to demonstrate why a flexible duress assessment must prevail and the procedural safeguards proposed by *amici* are

essential. The literature demonstrates that these groups are less aware of consequences, less in control of their actions and/or less able to exercise moral judgment. They have particular susceptibility to duress and lesser culpability for their actions. Returning these individuals to persecution for blameless acts would amount to a gross miscarriage of justice and a violation of our fundamental refugee protection obligations.

ARGUMENT

I. Acts Committed Under Duress Do Not Trigger the Persecutor Bar Under the Language, Meaning, and Purposes of that Bar.

Amici concur with the Respondent that under any reasonable construction of the statute, persecution committed under duress does not trigger the persecutor bar. This position has not only previously been fully endorsed by DHS in this very matter, it also reflects the views of the United Nations High Commissioner for Refugees and numerous scholars of immigration and refugee law. Amicus Brief for Office of the United Nations High Commissioner for Refugees, *Negusie v. Holder*, 555 U.S. 511 (2009) (No. 07-499) ("UNHCR Supreme Court Amicus Brief"); Amicus Brief for Scholars of International Refugee Law, *Negusie v. Holder*, 555 U.S. 511 (2009) (No. 07-499) ("Scholars Supreme Court Amicus Brief").

The text of the persecutor bar permits its application only to those who persecute others "on account of" a protected ground. When an individual acts under duress, she does so involuntarily in order to avoid threatened harm, not for reason of protected grounds, as required to apply the bar. *See, e.g.*, *Xu Sheng Gao v. U.S. Att'y Gen.*, 500 F.3d 93, 100 (2d Cir. 2007) ("That evidence must further show that the alleged act of persecution occurred *on account of* one of the protected grounds."); *Vukmirovic v. Ashcroft*, 362 F.3d 1247, 1252 (9th Cir. 2004) (conduct engaged in as self-defense does not trigger the persecutor bar because it was not done "on account of" the victim's race, religion, etc.). While it may be permissible in narrow circumstances to

impute the reasons of others engaged in persecution to the applicant, imputation is never proper where the applicant did not have the requisite voluntariness and culpability.

Because coercion negates voluntariness and personal culpability, the BIA must construe the bar to exclude those acting under duress. This interpretation is faithful to the text of the statute, which requires that a person "ordered, incited, assisted, or otherwise participated in persecution" "on account of" a protected ground. The purposes of the bar as well as its language exclude from protection *only* those culpable for their actions, preserving protection for victims forced to act.[3] *See* BIA Amicus Brief of International Refugee Scholars, Section I (2017); UNHCR Supreme Court Amicus Brief (explaining that the persecutor bar only applies when an applicant is found individually responsible for conduct and that duress negates individual responsibility); Scholars Supreme Court Amicus Brief (explaining that application of the persecutor bar requires that an applicant be individually culpable for persecution and that duress negates culpability); H.R. Conf. Rep. No. 781, 96th Cong., 2d Sess. 19, *reprinted in* 1980 U.S.C.C.A.N. 160, 160 (explaining legislative intent to conform domestic law to international treaty obligations); S. Rep. No. 256, 96th Cong., 1st Sess. 4 (1979), *reprinted in* 1980 U.S.C.C.A.N. 141 (same); UNHCR Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951

[3] Notably, the text and purposes distinguish the persecutor bar from the material support bar; as a result, *amici* respectfully submit that this Board's reasoning in *Matter of M-H-Z-*, 26 I. & N. 757 (BIA 2016) is also distinguishable. As an initial matter, the persecutor bar arises from wholly different statutory provisions than the material support bar, as well as different text in the Refugee Convention itself. *Compare* INA sections 212(a)(3)(B)(iv)(VI) and 208(b)(2)(A)(i), 241(b)(3)(B)(i); Convention and Protocol Relating to the Status of Refugees, G.A. Res. 429(V), U.N. Doc. A/1775/48, arts. 1, 33 (Dec. 14, 1950). Moreover, Congress has not enacted a waiver provision to the persecutor bar that ameliorates the harsh effects of that bar and speaks to its intent, in contrast to the material support bar. *See M-H-Z-*, 26 I. & N. at 762 ("Congress's enactment of the waiver similarly indicates that the omission of any duress exception was intentional.").

Convention relating to the Status of Refugees ("UNHCR Guidelines") ¶¶ 21-22 (Sept. 4, 2003) (duress is relevant in determining individual responsibility).

Not only do those who act under duress lack the personal culpability required to trigger the application of the persecutor bar, the very act of coercing an individual to commit a harmful act against another is itself a type of persecution. In particular, persecutors may take advantage of three particularly vulnerable categories of applicants: children, the intellectually disabled, and victims of past abuse (especially domestic violence). As DHS previously told this Board, "[a]n applicant's age or lack of mental capacity is likely to affect his or her perception of the situation, including the reasonableness and gravity of threats and imminence of harm, his or her ability to avoid the conduct, and the potential results of his or her conduct." DHS Original Supplemental Brief at 25 n.7 (Apr. 20, 2016). As explained in extensive social science literature and recognized in caselaw, such applicants are often less able to withstand coercion from others and to judge the proportionality of the harm they are being forced to commit. *See* Section IV, *infra*. Consequently, they oftentimes simply lack the requisite persecutory knowledge or intent. *Id.* This Board must, under any reasonable interpretation, construe the persecutor bar to ensure that vulnerable individuals are not improperly excluded from protection due to forced acts. This can only be accomplished by recognizing that the persecutor bar does not apply to individuals who act under duress.

II. The Board Should Adopt a Flexible Substantive Test for Duress.

Amici recognize that the question of duress presents a difficult moral and ethical question. *Amici* also recognize that the test must be structured in a manner that prevents true perpetrators of persecution from receiving refuge. *See* H.R. Conf. Rep. No. 96-781, at 160; S. Rep. No. 96-256, at 141. However, the interest in excluding true persecutors must be balanced against the need to create a test that victims of duress can meet.

The test should require an evaluation of the factors giving rise to duress along with the applicant's characteristics and circumstances, and her reasonable, genuine beliefs in light of those circumstances. These would include: the circumstances in the country of origin, the applicant's age, gender, any intellectual disability, physical capacity, social status, and whether the applicant was the victim of abuse. No one factor should be dispositive, nor should the absence of any factor foreclose a finding of duress. Taking all of these factors into account, the fact finder should evaluate whether, given the totality of the applicant's circumstances, he committed the act of persecution under duress. Such a test would focus on the proper legal question of whether a particular applicant bears personal culpability or responsibility for the persecution that occurred. *See Chen v. Att'y Gen.*, 513 F.3d 1255, 1259 (11th Cir. 2008) (in evaluating duress "[t]he individual's personal culpability must be assessed"); *see also* UNHCR Supreme Court Amicus Brief; Scholars Supreme Court Amicus Brief; *Matter of A-H-*, 23 I. & N. Dec. 774, 785 (Att'y Gen. 2005) (adjudicators should look at "the totality of the relevant conduct").

A. Whether an Applicant Acted Under Duress Should Be Evaluated Based on the Totality of the Circumstances.

In determining whether duress existed, an adjudicator should assess as relevant factors: (1) whether the applicant reasonably[4] believed that there was an imminent threat of death or serious bodily harm to the applicant or another person, (2) whether she reasonably believed she had to act, or not act, in order to avoid the threatened harm, (3) whether she had no reasonable opportunity to escape or otherwise avoid engaging in the act or omission, and (4) whether she reasonably believed her action or omission would cause lesser harm than the threatened harm she herself faced. These

[4] As set forth further in Section II(B), *infra*, reasonableness should be assessed from the perspective of the applicant.

factors generally align with those proposed by DHS in its original supplemental brief, and bear directly on whether the applicant has personal culpability for her actions.

These factors, however, should not be treated as a strict test and no single one should be a rigid bright-line rule. Rather, they should be considered as part of a totality of the circumstances analysis to determine whether the applicant bears personal culpability for the persecution. *See* UNHCR Guidelines ¶ 22; BIA Amicus Brief of International Refugee Scholars, Section I (2017); Scholars Supreme Court Amicus Brief at 22-31 (explaining why key question for persecutor bar is individual culpability); UNHCR Supreme Court Amicus Brief at 9-19 ("duress defense is available to negate a finding of individual responsibility").

While a strict test may be appropriate in the context of criminal law, it does not translate to the immigration context where applicants enjoy fewer procedural protections. *See, e.g.*, *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1038 (1984) ("Consistent with the civil nature of the proceeding, various protections that apply in the context of a criminal trial do not apply in a deportation hearing."); *United States v. Meza-Soria*, 935 F.2d 166, 169-70 (9th Cir. 1991) (explaining differing standards of proof in deportation proceedings and criminal trials). Relatedly, in immigration proceedings, the government does *not* first have to establish crime beyond a reasonable doubt prior to any inquiry on duress. *See id.* A strict duress test may be warranted where it parallels the rigidity of an extremely high government burden to prove each element of a crime, but the government in this context does not bear any such parallel, heightened burden.[5]

[5] Although criminal law's stringency in this respect should not be superimposed upon asylum proceedings, criminal law concepts do of course shed light on the broader issues of culpability and blameworthiness. These underscore the essential nature of a duress consideration. *See* BIA Amicus Brief of International Refugee Scholars, at Section I(A) (2017); BIA Amicus Brief of National Immigrant Justice Center and the Advocates for Human Rights, Section II (2017).

B. Duress Must Be Assessed from the Perspective of the Applicant.

An applicant should be required to establish that his beliefs about the threatened harm were reasonable from the perspective of an individual in his circumstances, including with his particular characteristics such as age, cultural background, and mental capacity. International guidance recognizes that in the context of duress, reasonableness should be determined from the perspective of the applicant. *See* UNHCR Guidelines ¶ 21 (noting that some "individual[s] may not have the mental capacity to be held responsible [for] a crime, for example, because of insanity, mental handicap, involuntary intoxication or, in the case of children, immaturity"); *id.* ¶ 28 (explaining that "great care should be exercised in considering exclusion with respect to a minor and defenses such as duress should in particular be examined carefully"); UNHCR, Guidelines on International Protection: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees ("UNHCR Child Guidelines") ¶ 59 (2009) (exclusion clause must be applied "[i]n view of the particular circumstances and vulnerabilities of children"); *id.* ¶ 61 (even when applicant is over the relevant age limit for criminal responsibility, the applicant's "emotional, mental and intellectual maturity" needs to be evaluated); *id.* ¶ 63 ("It is important to undertake a thorough and individualized analysis of all of the circumstances in each case.").

International law analyzes other aspects of refugee status under the 1951 Convention via this lens. The inquiry on whether harm rises to the level of persecution, for example, takes place from the perspective of the applicant. *See* UNHCR, Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context

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Other areas of civil law recognize the central relevance of duress in varied contexts as well. *See id.*

of Article 1A(2) of the 1951 Convention and/or the 1967 Protocol relating to the Status of Refugees at ¶ 16 (2012) ("What amounts to persecution will depend on the circumstances of the case, including the age, gender, opinions, feelings, and psychological make-up of the applicant."); UNHCR, Guidelines on International Protection No. 6: Religion-Based Refugee Claims Under Article 1A(2) of the 1951 Convention and/or the 1967 Protocol relating to the Status of Refugees at ¶ 14 (2004) (for question of religious persecution "[e]ach claim requires examination on its merits on the basis of the individual's situation"). Federal courts have determined that failure to do so amounts to legal error. In *Hernandez-Ortiz v. Gonzales*, the Ninth Circuit rightly concluded that the immigration judge "committed legal error" because she "did not look at the events from [the applicants'] perspective nor measure the degree of their injuries by their impact on children of their ages." 496 F.3d 1042, 1046 (9th Cir. 2007). Similarly, in *Jorge-Tzoc v. Gonzales*, the Second Circuit determined that the immigration judge committed legal error in failing "to address the harms Jorge-Tzoc and his family incurred cumulatively and from the perspective of a small child." 435 F.3d 146, 150 (2d Cir. 2006).

Adjudicators also assess reasonableness of internal relocation from the perspective of the applicant. The regulations require consideration of several non-exhaustive factors tied to the applicant's circumstances and characteristics, such as age, gender, health, and social and family ties. *See* 8 C.F.R. § 1208.13(b)(3); *see also* Asylum Officer Basic Training Course ("AOBTC"), Children Guidelines at 42 (Sept. 1, 2009) ("It is generally not reasonable to expect a child to internally relocate by himself or herself.").

Finally, the "perspective of the applicant" approach also aligns with how federal courts analyze duress in the criminal context. *See, e.g.*, *United States v. Nwoye*, 824 F.3d 1129, 1137 (D.C. Cir. 2016) ("Reasonableness . . . is not assessed in the abstract. Rather, any assessment of

the reasonableness of a defendant's actions must take into account the *defendant's particular circumstances*." (emphasis added) (internal quotation marks omitted)); *Dando v. Yunkins*, 461 F.3d 791, 801-2 (6th Cir. 2006) (evidence that the defendant suffered from Battered Woman Syndrome was relevant to determining whether her actions "were in fact reasonable"); *United States v. Verduzco*, 373 F.3d 1022, 1030-33 (9th Cir. 2004) (duress jury instruction stating "[t]he standard of reasonableness is to be determined by what a reasonable person would do under the *same or similar circumstances*" was a "thorough statement of the law" (emphasis added)); *United States v. Cotto*, 347 F.3d 441, 446 (2d Cir. 2003) ("Both the Guidelines and the defense require an objective showing that a reasonable person would have been coerced under the *particular circumstances of the defendant's case*." (emphasis added) (internal quotation marks omitted)). The Model Penal Code likewise provides that "[i]t is an affirmative defense that the actor engaged in the conduct charged to constitute an offense because he was coerced to do so by the use of, or a threat to use, unlawful force against his person or the person of another, that a person of reasonable firmness *in his situation* would have been unable to resist." Model Penal Code § 2.09 (emphasis added).

III. *Amici*'s Recommendations for Procedural Implementation of "Duress Exception."

Amici urge the Board to issue a decision clarifying the precise nature of the inquiry, including procedural steps. The immense stakes of improper adjudications and the absence of guiding regulations call for detailed guidance in a precedent decision. *See* 8 C.F.R. § 1003.1(d)(1). For adjudications on withholding, application of the bar will lead to the removal of individuals who otherwise meet the definition of a refugee. The U.S.'s obligation of *non-refoulement* of refugees favors both a narrow and a clear articulation of the persecutor bar.

As an initial matter, adjudicators should first assess whether the individual otherwise meets the definition of a refugee. *See* BIA Amicus Brief of American Immigration Lawyers Association and National Justice for Our Neighbors, Section I (2017). Prior to any ultimate application of the

persecutor bar, respondents must be given notice and a meaningful opportunity to respond. *See id.* *Amici* provide the additional following suggestions regarding procedural requirements for the Board's consideration.

A. Adjudicators Must Make an Initial Determination that, at a Minimum, the "Evidence Indicates" that Persecution of Others Occurred, for Which DHS Carries the Burden, After Which Respondent Can Prove Duress or Rebut Initial Findings by Preponderance of Evidence.

An adjudicator should first make a preliminary finding as to whether the applicant "ordered, incited, assisted, or otherwise participated in" conduct that constitutes persecution on account of a protected ground before considering evidence of duress.[6] The government must introduce evidence sufficient for initial preliminary findings by the immigration judge. *Amici* support the position of other *amici* that consistent with the statutory language of the persecutor bar, the government should carry this burden by a preponderance of the evidence. *See* BIA Amicus Brief of American Immigration Lawyers Association and National Justice for Our Neighbors, Section I (2017). At a bare minimum, however, the government must show that the "evidence indicates" that the bar applies, as supported by agency precedent and guidance. *See* 8 C.F.R. § 1240.8(d) ("If the evidence indicates that one or more 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."); *A-H-*, 23 I. & N. at 785 (stating that Government must "offer sufficient prima facie evidence" that respondent incited, assisted, or otherwise participated in persecution of others on account of protected ground); Executive Office for Immigration Review ("EOIR") Benchbook, Persecutor Bar: Standard Language at 2 (2014) ("It is

[6] This is consistent with the position taken by DHS in its original supplemental brief. *See* DHS Original Supplemental Brief at 18.

therefore clear that the Government has the initial burden of introducing evidence that the respondent engaged in the persecution of others.").

In meeting its burden to demonstrate that, at a minimum, the "evidence indicates" the persecutor bar may apply, DHS must show, and adjudicators should make specific findings that: (1) there is an identifiable act(s) sufficiently severe to constitute persecution; (2) the applicant's conduct constitutes "genuine assistance in persecution" as opposed to "inconsequential association with persecutors"; (3) the applicant had the requisite scienter, i.e., a "level of culpable knowledge that the consequences of one's actions would assist in acts of persecution"; and (4) persecution was on account of the victim's protected characteristic. *Quitanilla v. Holder*, 758 F.3d 570, 577 (4th Cir. 2014) (requiring proof of assistance or participation and scienter); *see also Suzhen Meng v. Holder*, 770 F.3d 1071, 1074 (2d Cir. 2014) (requiring assistance or participation, nexus, and scienter) (citing *Balachova v. Mukasey*, 547 F.3d 374, 384-85 (2d Cir. 2008)); *Abdallahi v. Holder*, 690 F.3d 467, 476 (6th Cir. 2012) (requiring proof of assistance or participation and scienter); *Chen*, 513 F.3d at 1259 (requiring analysis of whether conduct was "active, direct and integral to the underlying persecution"); *Castañeda-Castillo v. Gonzales*, 488 F.3d 17, 21-22 (1st Cir. 2007) (en banc) (requiring proof of scienter); *Kumar v. Holder*, 728 F.3d 993, 998-99 (9th Cir. 2013) (requiring proof of "purposefully assist[ing] in the alleged persecution").

Concrete evidence indicating each of these four requirements must be presented before the burden shifts to the applicant; it should not, for example, be sufficient for DHS to simply state to the immigration judge that the individual was part of a group that might have engaged in persecutory conduct or happened to be in an area where persecution occurred. If any of these

elements are not met, then the persecutor bar does not apply and there is no need to consider duress. *See* DHS Original Supplemental Brief at 20 (Apr. 20, 2016).[7]

Once an adjudicator has made the necessary preliminary findings that persecution on account of a protected ground occurred and that the applicant knowingly assisted or participated in it, the applicant can prevail by countering by a preponderance of the evidence any of the initial findings. This includes an opportunity to present evidence of duress. If established, duress would negate the nexus to persecution and voluntariness, such that the statutory standard for the bar is not met. *See supra* Section I.

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[7] With regard to the nexus requirement, DHS at the initial step must show, at a minimum, that the protected ground was "one central reason" for the harm on the part of the coercers, other participants in persecution, or the organization or entity as a whole. 8 U.S.C. § 1158(b)(1)(B)(i). *Amici* recognize that morally culpable applicants may have a broader group's reasons imputed to them. For example, the bar can apply to a mercenary who joins a group that persecutes individuals on account of race, and who willingly and knowingly assists in such persecution for financial reasons. However, an applicant acting under duress does not share the broader group's intent in persecuting the victim and cannot have it imputed to her. (The victim of persecution could of course establish nexus if protected ground was "one central reason" on the part of any of the participants in persecution, the coercers, or the larger entity.)

Matter of Alvarado, 27 I. & N. Dec. 27 (BIA 2017), did not address duress and so of course does not foreclose consideration of duress as an essential part of the persecutor bar inquiry. Because conduct under duress is involuntary, it is distinguishable from conduct with voluntary personal motivation—and only the latter was at issue in *Alvarado*. *See Alvarado*, 27 I. & N. Dec. at 29 (concluding that "personal motivation is not relevant" to application of persecutor bar in a case involving a member of the Salvadoran military who voluntarily guarded a political prisoner being tortured). *Amici*, note, however, that in their view the Board's decision in *Alvarado* took an improperly broad view of the bar in stating simply that "the 'persecutor' whose intent we examine is the 'group threatening harm.'" *Id.* at 29. To the extent that this construction fails to acknowledge that in certain circumstances, such as duress or lack of knowledge, group motives cannot be imputed to the applicant, *amici* disagree. Absent imputation, persecution by the applicant would not be "on account of" protected ground; and due to duress, the actions would not be sufficiently voluntary to comprise persecution that the individual "ordered, incited, assisted, or otherwise participated in." 8 U.S.C. §§ 1158(b)(2)(A)(i), 1231(b)(3)(B)(i).

B. The Board Should Not Require Unique and Distinct Proof of Duress for Each Act of Persecution.

Applicants should not be forced to establish an entirely unique and distinct basis of duress for each act of persecution, nor should the Board refuse to analyze groupings of coerced actions together, *e.g.*, acts that occurred in quick succession at the direction of the same coercers. Such an interpretation would fail to recognize that duress can arise in continuing contexts.

A misguidedly rigid approach to assessment of each act in isolation would pose particular difficulty for applicants who faced an ongoing threat of harm over the course of multiple acts. Many refugees suffer from long-standing, continuing circumstances of abuse and coercion, which may result in post-traumatic stress disorder and other harms. *See, e.g.*, Brandon R. White, Comment, *Using Learned Helplessness to Understand the Effects of Posttraumatic Stress Disorder and Major Depressive Disorder on Refugees and Explain Why These Disorders Should Qualify as Extraordinary Circumstances Excusing Untimely Asylum Applications*, 64 Buffalo L. Rev. 413, 442 (2016) (explaining that PTSD often arises not from a "single discrete incident" but rather "as a result of prolonged and repeated actions, including exposure to multiple traumatic events and indirect trauma to family members"). Similarly, battered women and victims of domestic violence experiencing "learned helplessness" may fail to intervene to prevent their abusers from persecuting others. *Cf.* Lenore E.A. Walker, *Battered Women Syndrome and Self-Defense*, 6 Notre Dame J.L. Ethics & Pub. Pol'y 321, 324 (1992) (explaining how, in the context of self-defense, battered women often "anticipate [an abuser's] next moves from what they know from previous experience"). For example, a mother suffering from long-term, severe domestic violence may reasonably believe without a direct threat that attempting to prevent her daughter's female genital cutting would be both futile and perilous. *See* White, *supra*, at 456, 458 (explaining that "individuals exposed to adverse stimuli or other events they are unable to control may learn

that any response is futile," leading to a "pervasive sense of helplessness" that "can be likened to the concept of mental defeat") (emphasis added) (internal quotation marks and citations omitted). Such an individual must show, however, that circumstances of duress continued throughout all acts of persecution.

Relatedly, *amici* ask that the Board clarify that compulsory membership in a group or military is a relevant consideration regarding whether duress occurred. Individuals compelled to join a military, paramilitary, and other groups often face threats of death or bodily harm if they do not comply with orders. For example, child soldiers compelled to join the Lord's Resistance Army were "forced to participate in the beating and killing of other children—some even forced to engage in cannibalistic practices." Jennifer C. Everett, *The Battle Continues: Fighting for a More Child-Sensitive Approach to Asylum for Child Soldiers*, 21 Fla. J. Int'l L. 285, 292 (2009); *see also* Matthew Happold, *Excluding Children from Refugee Status: Child Soldiers and Article 1F of the Refugee Convention*, 17 Am. U. Int'l L. Rev. 1131, 1138-39 (2002) (discussing coercion and abuse of child soldiers in Sierra Leone); UNHCR Guidance Note on Refugee Claims Relating to Victims of Organized Gangs 2 (March 2010) (discussing forced recruitment of young people into gangs in Central America). Even though not determinative, the abusive and coercive circumstances in which individuals, and children in particular, are forced to join such groups should inform the overall inquiry.

C. The Board Should Not Adopt a Reporting Requirement.

The Board should not impose a requirement that an applicant disclose duress immediately or suffer an adverse credibility determination. A specific credibility requirement concerning duress is unnecessary given the broad authority adjudicators already have to determine credibility. *See* 8 U.S.C. § 1158(b)(1)(B)(iii). Indeed, adjudicators may already base their credibility

determination on, *inter alia*, "the consistency between the applicant's or witness's written and oral statements" as well as "any other relevant factor." *Id.*

If the Board nevertheless provides specific guidance on determining credibility in cases involving duress, it should instruct adjudicators to take into account the applicant's characteristics and context when assessing any delay in disclosure. The INA at 8 U.S.C. § 1158(b)(1)(B)(iii) *requires* that an adjudicator "consider[ ] the circumstances under which [prior] statements were made" and "consider[ ] the totality of the circumstances" and "all relevant factors" in making credibility determinations. Agency guidance also specifically directs adjudicators to consider the circumstances of applicants when assessing credibility under the statutory standard. *See, e.g.*, EOIR Operating Policies and Procedures Memorandum ("OPPM") 07-01, Guidelines for Immigration Court Cases Involving Unaccompanied Alien Children, at 4 (2007) (directing consideration of "the effect of age and development on a child's ability to participate in the proceedings; gender; mental health (including possible post-traumatic stress syndrome); [and] general cultural sensitivity issues").

A true "totality of circumstances" approach must account for the difficulty victims face in discussing the violence and duress they suffered, and especially in disclosing these acts to a stranger. Adjudicators must also consider that forced participation in persecution itself can be a form of abuse, giving rise to feelings of shame or fear, repressed memories, or continuing trauma that affects ability to disclose. *See, e.g.*, RAIO Directorate Training, Interviewing Survivors of Torture and Other Severe Trauma (2012); Jane Herlihy & Stuart Turner, *Should Discrepant Accounts Given by Asylum Seekers be Taken as Proof of Deceit?*, 16 Torture 81 (2006).

It is well documented, for example, that children who have suffered harm may repress the abuse or be afraid or embarrassed to discuss it. *See, e.g.*, D.M. Fergusson et al., *The Stability of*

Child Abuse Reports: A Longitudinal Study of Reporting Behaviour of Young Adults, 30 Psycholog. Med. 529 (2000); AOBTC Children Guidelines at 19 ("Child asylum applicants may be less forthcoming than adults and may hesitate to talk about past experiences in order not to relive their trauma."). Adults may also be reticent to discuss past traumatic harm. *See, e.g.*, Information Note on UNHCR's Guidelines on the Protection of Refugee Women (July 22, 1991) ("UNHCR Women Guidelines") ¶ 72 ("Questions may need to be asked in a number of different ways before victims of rape and other abuses feel able to tell their stories."); AOBTC Children Guidelines at 32 ("Trauma can be suffered by any applicant, regardless of age, and may have a significant impact on the ability of an applicant to present testimony."). Difficulties in disclosure arise particularly where persecution, including any coerced act, involved sexual violence. *See Paramasamy v. Ashcroft*, 295 F.3d 1047, 1053 (9th Cir. 2002) (recognizing that women often delay reporting sexual abuse and that failure to disclose at first opportunity does not necessarily reflect negatively on credibility, especially to a male interviewer). Cultural barriers may inhibit reporting as well. Angelica S. Reina, et al., *"He Said They'd Deport Me": Factors Influencing Domestic Violence Help-Seeking Practices Among Latina Immigrants*, J. of Interpersonal Violence, Vol. 29(4) 593, 602-604 (2014).

IV. Construing the Persecutor Bar to Exclude Duress and Applying a Flexible Test in Determining Duress Is Critical to Ensure Refugee Protection to Deserving Applicants in General, and in Particular in Cases Involving Children, Individuals with Intellectual Disabilities, and Survivors of Trauma.

The unique vulnerabilities of children, persons with intellectual disabilities, and survivors of trauma highlight why the bar cannot be applied in circumstances of duress and why a flexible test is necessary in determining whether an applicant acted under duress. The literature and caselaw on these vulnerable populations, discussed below, strongly support *amici*'s positions set forth in Sections I, II, and III. Although *amici* separately address children, individuals with

intellectual disabilities, and survivors of trauma, many vulnerable refugees share overlapping traits, compounding vulnerabilities and challenges. For example, child refugees often experience trauma, which may impede normal intellectual development within their age group. In order to avoid "treat[ing] entire classes of victims as persecutors," this Board should hold the persecutor bar does not apply to persons acting under duress and that the fact finder must consider the special circumstances of the applicant in evaluating duress. *See Negusie*, 555 U.S. at 535 (Stevens, J., concurring in part and dissenting in part).

A. Children

DHS's revised position would apply the persecutor bar in the most extreme circumstances, including to children forced to engage in persecution under duress. The scientific literature regarding the mental and cognitive development of children establishes the absurdity of this approach. Children perceive, process, and respond to duress and coercion differently than adults. *See, e.g.*, Shauna Carmichael, *The Persecutor Bar, Former Child Soldiers & Lessons from Research on Child Development*, 18 Scholar: St. Mary's L. Rev. & Soc. Just. 381, 436-41 (2016) (discussing studies of brain development through childhood and adolescence). Scientific evidence, in addition to common sense, underpins these differences. For example, the amygdala region of the brain, which is "geared to produc[e] prompt responses to environmental stimuli like perceived threats" develops faster than the frontal lobe, which "is critical to . . . anticipat[ing] consequences and control[ing] impulses." *Id.* at 436-37. As a result, "children and adolescents are less able to consistently inhibit reactive responses in favor of task-appropriate responses." *Id.* at 437.

Similarly, MRI scans have shown the immature development of the synaptic networks in juvenile brains, which further "impact[s] the ability to fully engage executive processes such as impulse control." *Id.* at 438; *see also* Laurence Steinberg & Elizabeth Scott, *Less Guilty by Reason of Adolescence*, 58 American Psychologist 1009, 1011 (Dec. 2003) (discussing empirical literature

on culpability of juveniles and noting that "because adolescents' decision-making capabilities are immature and their autonomy constrained, they are more vulnerable than are adults to the influence of coercive circumstances that mitigate culpability for all persons, such as provocation, duress, or threat"); Annette Ruth Appell, *The Pre-Political Child of Child-Centered Jurisprudence*, 46 Hous. L. Rev. 703, 709 (2009) ("Children are also unreliable decisionmakers who are unable to project into the future, are subject to peer pressure, and possess poor impulse control."); Daniel R. Weinberger, et al., Nat'l Campaign to Prevent Teen Pregnancy, *The Adolescent Brain: A Work in Progress*, at 4 (June 2005) ("[T]eenagers are not the same as adults in a variety of key areas such as the ability to make sound judgments when confronted by complex situations, the capacity to control impulses, and the ability to plan effectively . . . the prefrontal cortex that controls many higher order skills [is] not fully mature until the third decade of life.").

The abuse and exposure to violence and trauma endured by many juvenile refugees often exacerbates juveniles' cognitive immaturity. As the UNHCR notes, "[c]hildren are more likely to be distressed by hostile situations, to believe improbable threats, or to be emotionally affected by unfamiliar circumstances." UNHCR Child Guidelines ¶ 16. Since the relevant question in the duress analysis is whether the applicant reasonably believed she faced imminent harm that could only be avoided by engaging in a persecutory act, the cognitive maturity of the applicant with regard to impulse control, weighing consequences, and decision making is highly relevant:

> Children are often desired as recruits because they can be easily intimidated and indoctrinated. They lack the mental maturity and judgment to express consent or to fully understand the implications of their actions. In some cases, they are forced to consume alcohol and drug[s] and are pushed by their adult commanders into

> perpetrating atrocities, such as killing, torturing, and looting-sometimes against their own families and communities.[8]

These examples are not outliers or rare circumstances. For example, the UN Office of the Special Representative of the Secretary-General for Children Affected by Armed Conflict (UN SRCAAC), has "estimated that some 250,000 children are still involved in fighting and turned into killers." UN SRCAAC, Security Council Engagement on the Protection of Children in Armed Conflict at 6 (June 15, 2012). The experiences of children forcibly recruited into gangs are similar to those of child soldiers. *See, e.g.*, Melissa James, *Fleeing the Maras: Child Gang Members Seeking Refugee Status in the United States*, 25 Child. Legal Rts. J. 1, 1 (2005) ("[C]hild gang members and child soldiers often stem from the same set of social conditions and similar brutal recruitment strategies: heinous initiation practices, physical and sexual violence, drugs and killing.").

The lack of cognitive development and the special vulnerability of children to coercive forces drives the recognition under both international law and domestic law that "great care" should be taken before assigning individual culpability to a child for her conduct. *See, e.g.*, UNHCR Guidelines ¶ 28 ("Given the vulnerability of children, great care should be exercised in considering exclusion with respect to a minor and defences such as duress should in particular be examined."); *see also* UNHCR Child Guidelines at ¶ 63 ("In the case of a child, the exclusion analysis needs to take into account . . . the mental capacity of children and their ability to understand and consent to acts that they are requested or ordered to undertake."); *Roper v. Simmons*, 543 U.S. 551, 569-71 (2005) (recognizing the diminished culpability of juveniles

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[8] UN Office of the Special Representative of the Secretary-General for Children and Armed Conflict, Working Paper Number 3: *The Children and Justice During and in the Aftermath of Armed Conflict*, at 10 (Sept. 2011).

because of "a lack of maturity and an underdeveloped sense of responsibility" and a greater "vulnerab[ility] and susceptib[ility] to negative influences and outside pressures").

In the context of the persecutor bar, the specific characteristics of a child applicant, including her cognitive development and circumstances that may have resulted in a heightened sensitivity to coercion (i.e., past abuse), must be considered in determining whether she bears personal culpability or responsibility for her conduct. *See* AOBTC Children Guidelines at 8-9 ("[C]hildren's viewpoints should be considered in an age and maturity-appropriate manner."). These circumstances demonstrate the necessity of considering duress when applying the persecutor bar.

B. Individuals with Intellectual Disabilities

The vulnerabilities of individuals with intellectual disabilities further confirm that actions under duress do not fall within the bar.[9] Intellectually disabled individuals are uniquely vulnerable to coercion and bear diminished culpability for participation in persecutory acts. Failing to consider duress would unfairly exclude—and thus further endanger—already-vulnerable individuals who are victims, not persecutors.

Social science research demonstrates that individuals with intellectual disabilities suffer from a diminished capacity to resist coercion and manipulation, understand rules and societal expectations, engage in logical and moral reasoning and independent thinking to make rational choices, and control their actions. *See, e.g.*, Elizabeth Nevins-Saunders, *Not Guilty As Charged:*

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[9] The American Psychiatric Association ("APA"), for clinical diagnostic purposes, defines intellectual disability as denoting (1) "significantly subaverage intellectual functioning" coupled with (2) "deficits in adaptive functioning (the inability to learn basic skills and adjust behavior to changing circumstances)" (3) manifested by age eighteen. *See* Am. Psychiatric Ass'n, Diagnostic and Statistical Manual of Mental Disorders ("DSM-5") 33 (5th ed. 2013). The Supreme Court has adopted this definition in its Eighth Amendment jurisprudence. *See Hall v. Florida*, 134 S. Ct. 1986, 1994 (2014) (adopting definition of intellectual disability from DSM-5).

The Myth of Mens Rea for Defendants with Mental Retardation, 45 U.C. Davis L. Rev. 1419, 1440-49 (2012) (reviewing extensive scientific and social science research that "makes clear that people with [intellectual disability] lack many of the capacities" that underlie "an assumption of culpability" in criminal proceedings). Taken together, these facets of intellectual disability diminish or negate an intellectually disabled applicant's personal culpability for participation in persecutory acts in the asylum context.

First, research suggests that individuals with intellectual disabilities are disproportionately vulnerable to coercion. For example, the APA explains that they are generally gullible, naïve in social situations, and easily led by others, creating a high risk for "exploitation by others" and "unintentional criminal involvement." DSM-5 at 38; *see also* Morgan Cloud et. al., *Words Without Meaning: The Constitution, Confessions, and Mentally Retarded Suspects*, 69 U. Chi. L. Rev. 495, 512 (2002) (discussing vulnerability to coercion in police interrogation settings). In addition, intellectual disability "demonstrably impairs" a person's ability to assess whether a threat is "real or imminent." Steven J. Mulroy, *The Duress Defense's Uncharted Terrain: Applying It to Murder, Felony Murder, and the Mentally Retarded Defendant*, 43 San Diego L. Rev. 159, 198 (2006) (citations and internal quotations omitted); *see also* DSM-5 at 38 (explaining that persons with intellectual disabilities often lack of awareness of risk). And individuals with intellectual disabilities "are frequently trained to be—and rewarded for being—compliant with the wishes and demands of others, including those with malicious or criminal intent." Nevins-Saunders, *supra*, at 1446 (internal citations and quotation marks omitted). As a result, such individuals are "unusually susceptible" to coercion generally, and "to the perceived wishes of authority figures." *See* Cloud et. al., *supra*, at 511.

Second, overlapping deficits in logical and moral reasoning and independent thinking render intellectually disabled individuals generally unable to make "meaningful" or "reasoned" choices about "whether or not to engage in particular conduct or to violate a particular norm." Nevins-Saunders, *supra*, at 1444. When faced with a coercer's demand, intellectually disabled individuals are categorically less able to "conceive of and weigh alternative responses," think through "other safe, lawful alternative courses of action," and assess "whether there is a reasonable opportunity to avoid the harm without acceding to the coercer's demands." Mulroy, *supra*, at 196, 198 (citations and internal quotations omitted). Moreover, they suffer from a diminished capacity to recognize the relationship between cause and effect, including an understanding of "how their own actions could impact or harm other people" and whether "certain conduct is wrongful." Nevins-Saunders, *supra*, at 1443, 1445. With respect to independent thinking, intellectually disabled individuals tend to lack the "sense of agency and self-determination" that underlie non-disabled individuals' ability to make meaningful choices. Nevins-Saunders, *supra*, at 1445-46.

Additionally, intellectually disabled individuals tend to lack control over their own actions. The Supreme Court—citing the medical community's "informed assessments"—has found "abundant evidence that [persons with intellectual disabilities] often act on impulse rather than pursuant to a premeditated plan, and that in group settings they are followers rather than leaders." *Hall*, 134 S. Ct. at 1999. Indeed, neurological research links certain intellectual disabilities with reduced inhibitions and "diminished fear conditioning, which in turn could increase impulsivity and risk taking." Nevins-Saunders, *supra*, at 1448-49 (reviewing neurological studies demonstrating that persons with intellectual disability suffer from limited impulse control, limited ability to evaluate situations before acting, and limited self-restraint from aggressive behavior). The Court has thus found that an inability to control one's actions reduces personal culpability in

criminal proceedings. *See Hall*, 134 S. Ct. at 1999 (citing lack of behavioral control as factor leading to diminished culpability of capital defendants); *Graham v. Florida*, 130 S. Ct. 2011, 2026 (2010) (citing lack of behavioral control as factor leading to diminished culpability among juveniles).

Taken together, intellectually disabled individuals' diminished capacities may negate or diminish the requirements of intent or knowledge required for a finding of personal culpability sufficient to trigger the persecutor bar. *See* UNHCR Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees ¶ 64 (2003) (explaining that the requirement of personal culpability underlying the persecutor bar encompasses both intent—"the person meant to engage in the conduct at issue or to bring about a particular consequence, or was aware that that consequence would occur in the ordinary course of events"—and knowledge—"an awareness that certain circumstances exist or that a consequence would occur in the ordinary course of events"). Often, in circumstances of "mental handicap" or "insanity," an applicant may lack the mental capacity necessary to establish culpability for an excludable act. *Id.* ¶ 65.

C. Survivors of Trauma, Including Domestic Violence Survivors

Properly considering duress also ensures protection to survivors of trauma, whose psychological impairments resulting from past abuse may also negate or diminish personal culpability for alleged persecutory acts. Past trauma often leads to Posttraumatic Stress Disorder ("PTSD"), a "constellation of symptoms that may materialize as the result of [direct or indirect exposure to] a very stressful or traumatic event or series of events," including "death, serious injury, or sexual violation." *See* White, *supra*, at 413, 432-35 (summarizing causes and symptoms of PTSD relevant to refugee populations). Refugee are ten times more likely to suffer from post-

traumatic stress syndrome than the general population. *See* Bhugra, D., et al., *EPA Guidance mental health care of migrants*, 29 European Psychiatry 107, 110 (2014).

Among other symptoms, PTSD may produce "hyperarousal symptoms" including "aggressive [,] . . . reckless or self-destructive behavior and hypervigilance." White, *supra*, at 425 (citing DSM-5 at 272, 276). Indeed, traumatized refugees often manifest symptoms of PTSD through violent or disruptive behavior. *See* UNHCR Women Guidelines ¶ 99. UNHCR, recognizing this reality, explicitly considers past trauma suffered by an applicant when analyzing cases of duress. *See* UNHCR Child Guidelines, *supra*, ¶¶ 7, 16 (recognizing that trauma and persecution may have "hindered the applicant's development and his/her psychological maturity remains comparable to that of a child"). Such an approach recognizes that when an applicant suffers from PTSD, her psychological impairments—not any persecutory motive—best explain any participation in alleged persecutory acts. Because refugees suffer from a disproportionately high incidence of PTSD—over 30% of refugees appear to be affected, *see* White, *supra*, at 438-39—a duress exception to the persecutor bar properly treats a potentially large group of applicants as victims, not persecutors.

Victims of domestic violence may similarly bear diminished culpability for alleged persecutory acts. For example, in criminal cases where victims of domestic violence kill or assault their abuser, victims often invoke Battered Women's Syndrome ("BWS")—a series of conditions arising from "sustained physical and psychological abuse at the hands of an intimate partner"—as part of a defense strategy. *See* White, *supra*, at 449-453 (summarizing BWS and noting that "courts are familiar with, understand, and are receptive to this theory"); *see also United States v. Homick*, 964 F.2d 899, 905 (9th Cir. 1992) (describing BWS as a "species" of the duress defense). BWS helps to explain how past trauma may induce a victim to perceive a threat as imminent. *See*

United States v. Nwoye, 824 F.3d 1129, 1138 (D.C. Cir. 2016) (noting that evidence regarding BWS is generally admissible in criminal proceedings because it speaks to a victim's analysis of imminence of harm). In particular, victims of domestic violence may be "hypervigilant to cues of impending danger." *Id.* at 1137.

In addition, the theory of learned helplessness (which undergirds BWS) explains how trauma may impact a victim's understanding of whether a reasonable alternative exists in response to a threat. *See* White, *supra*, at 453-57 (summarizing theory of learned helplessness). Generally, battered women and men face significant impediments to leaving abusive relationships, including retaliatory escalation in violence against themselves or those close to them. *See Nwoye*, 824 F.3d at 1137-38. In addition, batterers often isolate their victims and exert financial control over them, rendering separation a significant burden. *Id.* at 1138. Under the theory of learned helplessness, a victim becomes convinced that there is nothing she can do to escape her situation without resorting to extreme measures. *See* White, *supra*, at 458 (noting that the theory of learned helplessness is "very well suited to describing the effects of trauma on refugees"). When victims resort to such measures, their acts stem from psychological impairments beyond their control, not from any persecutory motive. In such situations, victims of domestic violence and applicants suffering from learned helplessness will often lack personal culpability for alleged persecutory acts.

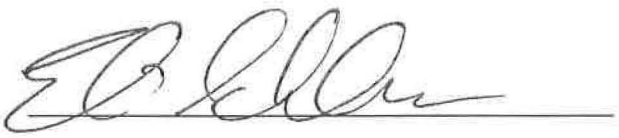
CONCLUSION

There can be no doubt that children, individuals with intellectual disabilities, and victims of trauma are particularly susceptible to duress. Given the vulnerability of these populations, an evaluation of whether an individual bears personal culpability for alleged persecutory acts must take into account whether the individual was coerced or forced to commit the act. The experiences of these groups demonstrate why the persecutor bar cannot be reasonably applied without a "duress

exception" and why in evaluating duress the adjudicator must consider the circumstances of the individual.

For the foregoing reasons, *amici* urge the Board to hold that an applicant who committed an act of persecution under duress is not barred from asylum or withholding of removal under the INA. *Amici* also urge the Board to adopt their proposed substantive test for evaluating duress and *amici*'s procedural recommendations.

Respectfully submitted,

By: 

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PROOF OF SERVICE

On July 7, 2017, I, Eli S. Schlam, delivered by courier three copies of the Brief for *Amici Curiae* Non-Profit Organizations and Law School Clinics to the following address:

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