

No. 21- [REDACTED]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

G [REDACTED] S [REDACTED] M [REDACTED],
[REDACTED]
[REDACTED]

Petitioners,

v.

U.S. ATTORNEY GENERAL

Respondent.

ON PETITION FOR REVIEW OF AN ORDER OF THE BOARD OF
IMMIGRATION APPEALS

**BRIEF OF *AMICUS CURIAE* THE HARVARD IMMIGRATION AND
REFUGEE CLINICAL PROGRAM IN SUPPORT OF
PETITIONERS**

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *Amicus* Harvard Immigration and Refugee Clinical Program (“HIRC”) certifies that no publicly-held entity owns an interest of ten percent or more in HIRC, and it does not have any members who have issued shares or debt securities to the public.

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INTEREST OF *AMICUS CURIAE*

The Harvard Immigration and Refugee Clinical Program (“HIRC”) submits this brief pursuant to Federal Rules of Appellate Procedure, Rule 29(a) and Circuit Rules 29-1 & 29-2.¹ HIRC has been a leader in the field of refugee and asylum law for over 30 years and has a direct interest and extensive expertise in the proper development and application of immigration and asylum law, so that claims for protection receive fair and full consideration under existing standards of law. HIRC attorneys are recognized experts in asylum law, including asylum cases involving gender. HIRC was central to the drafting of the historic U.S. Gender Asylum Guidelines, which were adopted by the federal government. Among HIRC’s clients are survivors of human rights abuses from all over the world, including women from Honduras, applying for refugee protection. Accordingly, HIRC has a direct interest in the outcome of this action and respectfully submits this brief in support of the Petitioner.

¹ Petitioner consents to this filing and Respondent has no objection to this filing. *Amicus* states that no counsel for the parties authored this brief in whole or in part, and no party, party’s counsel, or person or entity other than *amicus* and their counsel contributed money that was intended to fund the preparation or submission of this brief. Fed. R. App. P. 29(a)(4)(E).

RULE 29(a)(4)(E) CERTIFICATION

No person or entity other than counsel for *Amicus* authored or contributed funds intended for the preparation or submission of this brief.

/s/ Sabrineh Ardalan

Sabrineh Ardalan

STATEMENT OF THE ISSUES

HIRC adopts and incorporates by reference the statement of the issues set out in Petitioner's Opening Brief.

SUMMARY OF THE ARGUMENT

Petitioner [REDACTED] suffered through years of beatings, rapes, and credible death threats at the hands of her domestic partner [REDACTED]. According to [REDACTED] Ms. [REDACTED] belonged to him, and he had the right to dominate her and her children's lives. But both the Immigration Judge ("IJ") and Board of Immigration Appeals ("Board" or "BIA") dismissed the significance of that brutal persecution and erroneously relied on a misreading of the former Attorney General's decision in *Matter of A-B-*. The IJ and Board assumed, without basis, that [REDACTED] "domestic relationship" with and "proximity to" Ms. [REDACTED] precluded a finding that the persecution she suffered was on account of a protected ground.

U.S. law sets out discrete elements for determining who is a refugee, including whether an applicant for protection was persecuted in the past or has a well-founded fear of persecution "on account of" a protected ground. 8 U.S.C. § 1101(a)(42). This is referred to as the refugee definition's "nexus" element. The question of whether a proffered characteristic is protected is a separate inquiry from whether persecution was or would be "on account of" that ground. *See Matter of M-E-V-G-*, 26 I. & N. Dec. 227, 242 (BIA 2014).

As set forth below, The Board and IJ's shared error regarding nexus contravenes both plain statutory language and precedent, which require that adjudicators engage in a "mixed-motives" analysis when reviewing pertinent record evidence to evaluate nexus on a case-by-case basis. Furthermore, the baseless assertion that refugees are not protected from persecution that family members inflict or that occurs in the home flies in the face of decades of precedent recognizing the viability of gender-based asylum claims. Adjudicators have long recognized that domestic violence, like other gender-based harms including female genital cutting, so-called "honor killings," and homophobic violence, can constitute persecution on account of a protected ground. Such claims cannot be summarily set aside as having to do with "private criminal activity." Rather, they must be considered under the same standards for nexus to a protected ground as all other claims.

This case presents an opportunity for this Court to reaffirm a critical rule for asylum's nexus element that it, and all other circuit courts of appeals to have addressed the issue, have expressly adopted. Per the plain terms of the REAL ID Act of 2005, there can be multiple "central reason[s]" a refugee is persecuted—some protected, others not. Therefore, when considering persecution, adjudicators are duty-bound to consider whether a persecutor has or had "mixed motives" for inflicting the harm, and the notion that a petitioner's "domestic relationship" with, or "proximity" to, her persecutor can negate nexus is legally erroneous.

That clarification is necessary where, as here, Petitioner's proffered protected ground, membership in particular social group based on gender, was "at least one

central reason” she was persecuted. Accordingly, *amicus* urges this Court to grant the petition for review.

ARGUMENT

I. UNDER 8 U.S.C. § 1158, THERE CAN BE MULTIPLE CENTRAL REASONS FOR PERSECUTION, INCLUDING GENDER.

The Board and IJ’s shared baseless assertion regarding nexus in asylum claims is arbitrary because it has no home in the instruments establishing who qualifies as refugee, most significantly 8 U.S.C. § 1101(a)(42), which incorporates the refugee definition set out in the 1951 Refugee Convention and 1967 Protocol to the Convention,² as well as the REAL ID Act of 2005, codified at 8 U.S.C. § 1158(b)(1)(B)(i), which governs the “nexus,” or “on account of” linkage between the harm suffered or feared and a protected ground.

In the REAL ID Act of 2005, Congress articulated the standard for when persecution is “on account of” a protected ground.³ Specifically, an applicant must

² United Nations Convention Relating to the Status of Refugees, *opened for signature* July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 137; United Nations Protocol Relating to the Status of Refugees, *opened for signature* Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267.

³ Under the statute for withholding of removal, removal must be withheld for a noncitizen whose life or freedom is threatened “for *a reason* described” in the list of protected grounds. 8 U.S.C. § 1231(b)(3)(C) (emphasis added). The Sixth and Ninth Circuits have held that standard is less demanding than the “at least one central reason” standard for nexus in asylum claims. *See Guzman-Vazquez v. Barr*, 959 F.3d 253, 272 (6th Cir. 2020) (“[T]he statutory text is unambiguous [and]

prove that a protected ground was or will be “*at least one* central reason for persecuti[on].” 8 U.S.C. § 1158(b)(1)(B)(i) (emphasis added). The plain language of the statute thus codified existing case law and explicitly recognized that there can be multiple central reasons for persecution—some protected, others not.

This Court has confirmed that a protected ground “need not be the *only* motivation for persecution.” *Lingeswaran v. U.S. Att’y Gen.*, 969 F.3d 1278, 1287 (11th Cir. 2020) (emphasis in original) (citations omitted). Furthermore, an “applicant *is not required* to show that the protected reason was the primary or dominant reason they were persecuted.” *See id.* at 1294–95 (Wilson, J., concurring) (emphasis in original), *citing Diaz-Rivas v. U.S. Att’y Gen.*, 769 F. App’x 748, 754 (11th Cir. 2019) (Jordan, J., concurring in part and dissenting in part) (same); *see also Ndayshimye v. U.S. Att’y Gen.*, 557 F.3d 124, 129–30 (3d Cir. 2009) (discussing Congress’s “deliberate” decision to use “the phrase ‘one central reason’ rather than ‘*the* central reason’”).

The agency’s failure to conduct the requisite “mixed motives” analysis is thus reversible error. *See, e.g., Qu v. Holder*, 618 F.3d 602, 608 (6th Cir. 2010) (“[I]f there is a nexus between the persecution and the membership in a particular social

accounts for the government’s [contrary] arguments in this case about statutory interpretation, practical considerations, and legislative intent.”); *Barajas-Romero v. Lynch*, 846 F.3d 351, 360 (9th Cir. 2017) (similar).

group, the simultaneous existence of a personal dispute does not eliminate that nexus.”); *Cece v. Holder*, 733 F.3d 662, 672 (7th Cir. 2013) (en banc) (“The [BIA] and this Court have long recognized that persecution can exist in a mixed motive case in which the persecutor targets an individual for more than one reason and one of the reasons does not warrant protection under the Act.”); *Alvarez Lagos v. Barr*, 927 F.3d 236, 247 (4th Cir. 2019) (reversing the Board where it failed to properly conduct a mixed-motives analysis); *Bringas Rodriguez v. Sessions*, 850 F.3d 1051, 1062 (9th Cir. 2017) (en banc) (same); *Enamorado-Rodriguez v. Barr*, 941 F.3d 589, 596 (1st Cir. 2019) (same); *Berhe v. Barr*, 837 F. App’x 255, 258 (5th Cir. 2020) (same).

The mixed-motives analysis is vital to the correct application of the statutory nexus standard. For example, a protected characteristic may be “intertwined with,” or inextricably linked to, an unprotected reason—and in such cases, courts have recognized that nexus to a protected ground exists. *See, e.g., Al-Ghobani v. Holder*, 585 F.3d 980, 997 (6th Cir. 2009) (finding nexus to a protected ground where a persecutor’s “personal” motives “cannot be unraveled from his motives based on” a protected characteristic); *Salgado-Sosa v. Sessions*, 882 F.3d 451, 458 (4th Cir. 2018) (same). Alternatively, even if an adjudicator believes the record reflects a separate, parallel reason for the persecution, such as a persecutor’s access or “proximity” to his victim, unprotected and protected reasons for persecution can

exist alongside each other. *See, e.g., Diaz de Gomez v. Wilkinson*, 987 F.3d 359, 364–65 (4th Cir. 2021) (recognizing that petitioner’s family-based social group membership was “one central reason” for the persecution, even though there were also several other central reasons for the persecution unrelated to the protected ground, including her job as a teacher). Adjudicators are bound by the statute to consider whether one of these scenarios applies. *See, e.g., Enamorado Rodriguez*, 941 F.3d at 596; *Diaz-Rivas*, 769 F. App’x at 754.

Adjudicators err, where, as here, they engage in an “excessively narrow reading of the [nexus] requirement.” *Hernandez-Avalos v. Lynch*, 784 F.3d 944, 949 (4th Cir. 2015). A reading is “excessively narrow” when the adjudicator “draws a meaningless distinction under [the] facts” between the reasons the petitioner was, or would be, subjected to persecution. *Id.* at 949–50; *see also Oliva v. Lynch*, 807 F.3d 53, 60 (4th Cir. 2015) (explaining that the nexus requirement is analyzed “not by focusing myopically on a particular word or fact but rather by viewing the case holistically, with an eye to the full factual context”). The Board cannot focus on the “immediate trigger”—the persecution, *Oliva*, 807 F.3d at 60, “while failing to consider the ‘intertwined reasons’ for those threats.” *Cruz v. Sessions*, 853 F.3d 122, 129 (4th Cir. 2017).

That is precisely what occurred below: the IJ focused on an “immediate trigger,” [REDACTED] “close proximity to [Petitioner] and . . . [their] domestic

relationship.” AR 84–85 (IJ Dec.). The Board then compounded that legal error by vaguely and inchoately attributing [REDACTED] persecution of Petitioner to “general criminal activity.” *See* AR 04. Neither recognized that both the IJ’s findings of fact and credible record testimony demonstrated Ms. [REDACTED] gender was at least one central reason [REDACTED] persecuted her. *See* AR 82 (IJ Decision) (finding [REDACTED] “conducted his violent acts because of his chauvinistic way”); *see also* AR 178–79 (Tr.) (“He always thought that I was his property [H]e would say that I only belong to him.”); AR 230 (Tr. of [REDACTED]) (“[I]n Honduras there are a lot of chauvinistic machista men They mistreat the women, and the[y] believe [that] women [are] less than what they are.”); AR 240 (Tr. of Petitioner’s sister, [REDACTED]) (testifying that machista men in Honduras “feel more of a man because they have power over a woman”).

Crucially, nexus can be established either through direct evidence, such as Petitioner’s testimony, or through circumstantial evidence, such as country conditions reports. *See INS v. Elias-Zacarias*, 502 U.S. 478, 483–84 (1992). Although nexus was not at issue in *Alonzo-Rivera v. U.S. Atty. Gen.*, in that case this Court acknowledged “the culture of ‘machismo’ that pervades [Honduras]” and the resulting treatment of women “as the property of their fathers or intimate partners” and as “second-class citizens” by police, male family members, and domestic partners, and reversed the Board for failing to give “reasoned consideration” to

evidence of the foregoing. 649 F. App'x 983, 987, 991–92 (11th Cir. 2016). The conditions in Honduras that this Court recognized in *Alonzo-Rivera* correspond to those evidenced by Petitioner in this case. *See* Pet. Op. Br. 8–11.

In *Diaz-Rivas*, this Court construed a “central reason” to refer to an “essential” reason for persecution, *i.e.*, where the persecution would not have occurred but-for the protected characteristic.⁴ *See* 769 F. App'x at 754 (finding that an asylum applicant “must demonstrate that the persecutor would not have harmed the applicant if the protected trait did not exist”), *citing Matter of N-M-*, 25 I. & N. Dec. 526, 531 (BIA 2011). Applying that test to the case at bar, the result is clear: [REDACTED] would not have perpetrated vicious persecution against Ms. [REDACTED] had she not been a Honduran woman, her proffered particular social group.⁵

This case thus illustrates why the “mixed motives” and “intertwined reasons” analyses are vital to effectuate Congress’s purpose in passing the Refugee Act of

⁴ *But cf.* James C. Hathaway, *The Michigan Guidelines on Nexus to a Convention Ground*, 23 Mich. J. Int'l L. 207, 209 (2002) (“[T]he propensity of many courts uncritically to import causation standards from other bodies of law (in particular, the ‘but for’ test from tort law) should be rejected”); *see also* Michelle Foster, *Causation in Context: Interpreting the Nexus Clause in the Refugee Convention*, 23 Mich. J. Int'l L. 265, 283–85 (2002) (discussing the dangers of a “dominance” test).

⁵ While the Board did not address the cognizability of Petitioner’s particular social groups, *Amicus* agrees with Petitioner’s contention below that she demonstrated she was a member of a cognizable PSG. *See* AR 21–28 (Pet.’s BIA brief) (explaining why proffered PSGs are cognizable); *see also e.g., De Pena-Paniagua*,

1980. *See Matter of S-P-*, 21 I. & N. Dec. 486, 492 (BIA 1996) (“In enacting the Refugee Act of 1980 . . . Congress sought to bring the Act’s definition of ‘refugee’ into conformity with the United Nations Convention and Protocol Relating to the Status of Refugees and, in so doing, give ‘statutory meaning to our national commitment to human rights and humanitarian concerns.’ . . . Such an approach is designed to afford a generous standard for protection in cases of doubt.”). As the Board itself has emphasized, “[i]n adjudicating mixed motive cases, it is important to keep in mind the fundamental humanitarian concerns of asylum law.” *Id.*

II. *MATTER OF A-B-* DOES NOT AFFECT THE ABOVE ANALYSIS.

The IJ and the Board heavily relied on the erroneous idea that *Matter of A-B-*, 27 I. & N. Dec. 316 (A.G. 2018) established a heavy presumption that victims of gender-based persecution perpetrated by partners cannot establish nexus to a protected ground. The IJ and Board’s cursory explanations of their nexus determinations suggest they believed *A-B-* relieved them of their requirement to conduct a searching analysis of nexus. *See* AR 04, 85. But the opposite is true: in

957 F.3d at 95–96 (recognizing gender as an immutable characteristic and observing it is “difficult to imagine” a society in which women do not comprise a particular and socially distinct group); —, (Newark Immigration Court, Mar. 17, 2020) (unpublished), Add. 68, 78–80 (finding “Honduran women” cognizable and granting asylum); —, (Arlington Immigration Court, May 1, 2020) (unpublished), Add. 52, 60–66, (same); —, (Arlington Immigration Court, 2018) (unpublished), Add. 112, 117–23 (same). All unpublished agency opinions cited herein are included in the attached Addendum per Local Rule 36-2.

pertinent part *Matter of A-B-* stands for the narrow proposition that each asylum application requires a thorough analysis by the factfinder regarding nexus. *A-B-* does not and cannot create a categorical presumption against asylum claims based on domestic violence. *See A-B-*, 27 I. & N. at 340. Circuit courts interpreting *A-B-* confirm this reading. *See Grace v. Barr*, 965 F.3d 883, 906 (D.C. Cir. 2020) (“‘[T]he only general rule that *Matter of A-B-* articulates,’ [government] counsel explained, is that ‘[asylum officers] have to go through the steps for analyzing particular-social-group claims.’”); *accord De Pena-Paniagua v. Barr*, 957 F.3d 88, 94 (1st Cir. 2020); *Diaz-Reynoso v. Barr*, 968 F.3d 1070, 1080 (9th Cir. 2020).

Accordingly, after applying the correct legal standard in a case-by-case analysis, adjudicators have time and again recognized that membership in a gender-based social group, such as one defined by gender-plus-nationality (like “Honduran women,” proffered in this case) can be at least one central reason for persecution. *See, e.g., Alvarez Lagos*, 927 F.3d at 245, 247 (concluding that petitioner’s membership in the social group of “unmarried mothers in Honduras living under the control of gangs” was one central reason she was persecuted); *Y-J-H-A-*, (BIA Feb. 7, 2017) (unpublished), Add. 1, 4 (granting asylum and recognizing nexus to gender-based PSGs where Honduran refugee was sexually persecuted by her stepfather who viewed her as a “women under his complete authority” and the IJ misapprehended her argument in characterizing her claim as being solely a “victim[] of crime”); —,

(Newark Immigration Court, Mar. 17, 2020) (unpublished), Add. 68, 78 (granting asylum after finding “Honduran women” cognizable and nexus established); —, (Arlington Immigration Court, May 1, 2020), Add. 52, 60–66 (same); —, (Arlington Immigration Court, 2018) (unpublished) Add. 112, 121–22 (finding same); —, (Denver Immigration Court, Mar. 7, 2019) (unpublished), Add. 81, 86–88, 90–91 (granting asylum after finding “Mexican women” cognizable and nexus established where the persecuting domestic partner’s “actions were informed by Mexico’s traditional culture of machismo” and he “believed he could treat [the applicant] as subordinate and inferior” because of her gender); —, (Boston Immigration Court, June 18, 2019) (unpublished), Add. 97, 105–09 (granting asylum on account of being a “Guatemalan woman” where husband “believed that he was entitled to sex with her by virtue of her womanhood” and his reasons for persecuting her “are echoed in the record evidence, which,” as in this case, “evinced a culture of machismo . . . where men feel they can control women and oftentimes use violence as a means of exerting that control.”).

Quite simply, there cannot be a “domestic violence” exception to the standard “mixed motive” or “intertwined reason” nexus analysis, because the statute provides otherwise. 8 U.S.C. § 1158(b)(1)(B)(i) (protected ground need only be “one central reason” for persecution); *see also* —, (Buffalo Immigration Court July 6, 2020), Add. 7, 41–43 (concluding that being “a victim of domestic violence, i.e. crime, does

not defeat [a refugee's] claim where she was targeted due to her membership in a cognizable" PSG, namely her status as a "Peruvian woman"). Notably, the adjudicators in most asylum grants cited in the above paragraph characterized the persecution that the pertinent refugee fled as "domestic violence." *See Y-J-H-A-*, (BIA Feb. 7, 2017) (unpublished), Add. 1, 5 (ruling Honduran asylum seeker established nexus to a protected ground in a situation described as "domestic violence"); —, (Newark Immigration Court, Mar. 17, 2020) (unpublished), Add. 69, 78 (same); —, (Arlington Immigration Court, May 1, 2020), Add. 52, 63 (same). And likewise, adjudicators have repeatedly granted other gender-based asylum claims arising out of violence suffered or feared in the interfamilial or "private" context. *See also, e.g., Sarhan v. Holder*, 658 F.3d 649 (7th Cir. 2011) (so-called "honor killings"); *Matter of Kasinga*, 21 I. & N. Dec. 357 (BIA 1996) (en banc) (female genital cutting); U.S. Citizenship & Immigration Services, RAIO Combined Training Course, Guidance for Adjudicating Lesbian, Gay, Bisexual, Transgender, and Intersex (LGBTI) Refugee and Asylum Claims, 18 (Dec. 28, 2011), *available at* perma.cc/99V6-4KX4 ("In some situations, the persecutor may have been trying

to ‘cure’ the applicant of his or her sexual orientation or gender identity.”).

CONCLUSION

For these reasons, the Board erred when it failed to correctly analyze nexus to a protected ground. Amicus therefore urges that the Court grant the Petition for Review.

CERTIFICATE OF COMPLIANCE

This document complies with the type-volume limitation of Rules 29(a)(5) and 32(a)(7) of the Federal Rules of Appellate Procedure because, excluding the parts of the document exempted by the Federal Rule of Appellate Procedure 32(f), this document contains 3,072 words. This word count was calculated by Microsoft Word, the word processing system used to prepare this brief. This document complies with the typeface requirements of Rule 32(a)(5) because it has been prepared in Times New Roman, a proportionally spaced, 14-point font.

Dated: May 26, 2021

/s/ Sabrineh Ardalan
Sabrineh Ardalan

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CERTIFICATE OF SERVICE

I hereby certify that on May 26, 2021, I electronically filed the foregoing **BRIEF OF AMICUS CURIAE THE HARVARD IMMIGRATION & REFUGEE CLINICAL PROGRAM** with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit using the CM/ECF system, which will automatically send an email notification of such filing to the attorneys of record who are registered CM/ECF users.

Date: May 26, 2021

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