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

Amicus Invitation No. 16-08-08	
In Removal Proceedings	Case No.: Redacted

REQUEST TO APPEAR AS AMICUS CURIAE AND SUPPLEMENTAL BRIEF OF THE FEDERATION FOR AMERICAN IMMIGRATION REFORM

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I. INTEREST OF AMICUS CURIAE

On behalf of the Federation for American Immigration Reform (FAIR), the Immigration Reform Law Institute (IRLI) respectfully responds to the request by the Board of Immigration Appeals (Board) on August 8, 2016, for supplemental briefing in this matter. FAIR is a nonprofit, public-interest, membership organization of concerned citizens and legal residents who share a common belief that our nation's immigration policies must be reformed to serve the national interest. Specifically, FAIR seeks to improve border security, stop illegal immigration, and promote immigration levels consistent with the national interest. The Board has solicited *amicus* briefs from FAIR for more than twenty years. *See, e.g.*, *In-re-Q- --M-T-*, 21 I. & N. Dec. 639 (B.I.A. 1996) (citing Timothy J. Cooney, Esquire, Washington, D.C., amicus curiae for FAIR and noting "The Board acknowledges with appreciation the brief submitted by amicus curiae.").

II. ISSUES PRESENTED

The *amicus* has provided supplemental briefing on the following issues for the Board's consideration in the instant case:

- 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).
- 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?

III. SUMMARY OF THE FACTS

Respondent is a dual national of Ethiopia and Eritrea. *Negusie v. Holder*, 555 U.S. 511, 514 (2009). While at a movie in Eritrea, state officials took custody of Respondent where he was conscripted into the military on two separate occasions. *Id.* When Respondent would not fight against Ethiopia, the government incarcerated him. *Id.* at 515. After he was released, he worked as a prison guard where prisoners were persecuted. *Id.* While working as a guard, Respondent carried a gun, kept prisoners from taking showers and getting fresh air, and made sure prisoners stayed in the sun as punishment. *Id.* At least once, a man died after being in the sun for an extended amount of time. *Id.* Respondent eventually escaped and hid aboard a ship headed for the United States. *Id.* He applied for asylum once reaching the United States. *Id.*

The immigration judge (IJ) found that Respondent had persecuted others while working as an armed guard and therefore was ineligible for asylum or withholding of removal. *Id.* The Board affirmed the IJ's findings that Respondent tortured others by leaving them out in the sun to die and that his motivations for doing so were irrelevant. *Id.* at 516. On review by the Fifth Circuit, the court agreed with the Board's finding that whether an alien was compelled to persecute another is immaterial for the persecutor bar to apply. *Id.* Respondent then appealed to the Supreme Court. *Id.*

The Court found that the lower courts improperly relied upon *Fedorenko v. United States*, 449 U.S. 490 (1981), because *Fedorenko* addressed a different statute which had no binding effect on an interpretation of the Immigration and Nationality Act (INA). *Id.* at 518-20. The Supreme Court ultimately remanded the case back to the Board to determine if the asylum sections of the INA contained a duress exception. *Id.* at 523-24.

IV. SUMMARY OF THE ARGUMENT

While Respondent advocates for a duress exception to the persecutor bar, the statutory scheme of the INA cannot support the creation of an implicit involuntariness or duress exception. Because other sections of the INA include exceptions, even exceptions that specifically address involuntary actions, Congress knew how to create an involuntary or duress exception to the persecutor bar. However, language in the provision does not support an exception. Neither the legislative history of the INA nor judicial interpretations of the statute and regulation imply a duress exception.

If, nonetheless, the Board does find that a duress exception exists, the alien should have to prove, under the preponderance of the evidence standard, that their persecutory actions were done under duress. Additionally, any duress exception should be narrowly tailored to serve the purposes of immigration law.

V. ARGUMENT

According to the Immigration and Nationality Act (INA), an alien is barred from seeking asylum or withholding of removal if he or she "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." 8 U.S.C. §§ 1101(a)(42), 1158 (b)(2)(A)(i). In *Negusie v. Holder*, the Supreme Court overruled the Board's "construction of the persecutor bar as not requiring any motivation or intent on alien's part . . .[because] it was based on legal error." *See* 555 U.S. at 511 (finding that the Board erred in interpreting the Displaced Persons Act (DPA) as binding precedent on the INA). The Court remanded the case to the Board to determine whether or not an involuntariness or duress exception to the persecutor bar exists.

A. The Board Should Find That the Text Of 8 U.S.C. §§ 1101(a)(42), 1158(b)(2)(A)(i), Does Not Include An Involuntariness Or Duress Exception To The Persecutor Bar Because No Textual or Contextual Information Imply That One Exists.

In *Negusie*, the Supreme Court held that the Immigration and Nationality Act's persecutor bar "was ambiguous as to whether coercion or distress was relevant in determining if [an] alien had participated in persecution." Because the Court held the provision of the INA found in § 1158(b)(2)(A)(i) is inconclusive as to whether an involuntariness or duress exception exists, the Board should look at congressional intent. *See Middlesex Cty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 13 (1981) (using statutory construction cannons to determine if Congress created a private right of action). The Board should determine that the persecutor bar is a mandatory bar that prevents former persecutors from being granted asylum in the United States, and for which there is not an involuntariness or duress exception based on statutory construction, congressional intent, and administrative interpretation.

1. The statutory construction of the INA supports finding that the persecutor bar does not contain an implicit duress exception.

When looking at the statutory construction of the INA, the Board should examine "the language and design of the statute as a whole." *See Matter of M-H-Z-*, 26 I. & N. Dec. 757 (BIA 2016) (finding that when interpreting an ambiguous provision of a statute, courts should look at the entire statute). According to the Supreme Court, "It is a 'fundamental canon of statutory construction that words of a statute must be read in their context and with a view to their place in the overall statutory scheme.'" *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132-33 (2000) (quoting *Davis v. Michigan Dep't. of Treasury*, 489 U.S. 803, 809 (1989)).

By examining the INA's structure and the text of the relevant provisions which discuss the persecutor bar to asylum, Congress did not intent to include a duress exception. "[W]here

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 purposefully in the disparate inclusion or exclusion." *Matter of M-H-Z-*, 26 I. & N. Dec. at 761 (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)); *see also Annachamy v. Holder*, 733 F.3d 254, 261 (9th Cir. 2013) *overruled on other grounds Abdisalan v. Holder*, 774 F.3d 517 (9th Cir. 2014) (finding that no implied duress exception existed for the terrorist bar). The Supreme Court upheld this reasoning in finding that "[C]ongress generally acts intentionally when it uses particular language in one section of a statute but omits it in another." *See Dep't of Homeland Sec. v. Maclean*, 135 S. Ct. 913, 919 (2015).

Congress explicitly created exceptions to multiple provisions of the INA. For example, in 8 U.S.C. § 1182(a)(2)(A)(ii), Congress provided an exception to the provision that bars aliens who have been convicted of certain crimes from admission into the United States. *See* 8 U.S.C. §§ 1182(a)(2)(A)(i-ii) (creating exceptions to the inadmissibility bar for crimes that occurred when the applicant was a minor or when the punishment for the conviction is less than a year and the applicant served 6 months or less in confinement). Congress also provided an exception to the provision that barred the entrance of aliens who are affiliated or involved in terrorist activities. *See* 8 U.S.C. §§ 1182(a)(3)(B)(i-ii) (creating an exception to the terrorist bar for spouses and children of people affiliated or involved with terrorism in a very limited number of cases"). Another example of an explicit exception provided by Congress in the INA is found in 8 U.S.C. § 1182(a)(3)(D)(ii). The provision provided an involuntariness exception to the bar against aliens for involvement in a totalitarian party. *See* 8 U.S.C. §§ 1182(a)(3)(D)(i-ii) (creating and exception for involuntary membership).

Congress has explicitly provided exceptions to multiple bars to admission within the INA. From the language of § 1182(a)(3)(D)(i-ii), it is evident that Congress knew how to create an explicit involuntary exception for certain types of criminal activity. The inclusion of an explicit involuntary exception in another section of the INA likely means that Congress did not intend for there to be an implicit exception under the persecutor bar provision. Additionally, the Board has rejected finding an implicit duress bar for other sections of the INA. *Matter of M-H-Z-*, 26 I. & N. Dec. at 764 (holding that there is not an implicit duress exception to the material support bar). By creating exceptions, specifically involuntary exceptions, the persecutor bar cannot be interpreted as including an implicit duress exception because it cannot be supported by the statutory scheme of the INA.

The Courts of Appeals have also had the opportunity to evaluate different types of conduct to determine if an applicant's behavior falls within the persecutor bar. A variety of actions and even inaction have been interpreted by the Courts of Appeals to constitute persecution under the persecutor bar. *See Miranda Alvardo v. Gonzalez*, 449 F.3d 915, 927 (9th Cir. 2006) (providing translator services to detainees who were tortured constituted assistance in persecution); *Ntamack v. Holder*, 372 Fed. App'x 407, 411-12 (4th Cir. 2010) ("An alien's physical presence can provide assistance in persecution when that presence impedes the movement of those persecuted or otherwise subjects them to an increased risk of harm."); *Singh v. Gonzales*, 417 F.3d 736, 740 (7th Cir. 2005) (transporting individuals where the respondent suspected they would receive unjustified physical abuse constituted assistance in persecution). While there is no exclusive definition of "assisted, or otherwise participated in[,]" the scope of conduct found to "assist[] or otherwise participate[] in" persecution indicates that the construction of the statute provides for a very broad interpretation and application of the

persecutor bar. *See* sec. D.4 (discussing how the language of the persecutor bar is to be interpreted broadly by an adjudicator).

2. The Board should also examine legislative purpose and history to determine whether Congress intended to create a duress exception to the persecutor bar.

To determine congressional intent, the Board should consider the legislative purpose and history of the INA. There is no legislative history to support the argument that Congress intended to make an exception to the persecutor bar. In passing the INA, Congress' purpose was "to exclude from admission into the United States *aliens* who have *persecuted any person* on the basis of race, religion, national origin, or political opinion…." *See* H.R. Rep. No. 1452, 95th Cong. (2nd Sess. 1978) (emphasis added). If the purpose of Congress was to exclude "aliens who have persecuted any person," then Congress likely intended for the persecutor bar to exclude everyone who persecuted others; not just aliens who voluntarily persecuted others. *See id.* at *1. Therefore, the Board should hold that there is not an involuntariness or duress exception to the persecutor bar, because the legislative purpose and history of the INA demonstrate that Congress did not intend for there to be one.

Respondent claims that the absence of a duress exception violates the United States' international agreements. However, according to House Report 1452, the Immigration and Nationality Act "would be consistent with the principles enumerated in, and the spirit of, those agreements." *See* H.R. Rep. 1452 at *3. Based on the official report, Congress meant to be consistent with the principles in international agreements; however, that does not mean that the entire texts of the agreements had to be adopted. "[P]rovisions of the Act should generally be read consistently with international obligations to the extent they are not in conflict . . . ." *Matter of M-H-Z,* 26 I. & N. Dec. at 763.

The language of the persecutor bar in the INA was incorporated from the language of the persecutor bar in the Displaced Persons Act of 1948 (DPA). *See* Negusie, 555 U.S. at 546-47 (Thomas, J., dissenting). According to the DPA, which adopted the definition of a displaced person or refugee from the International Refugee Organization, a refugee or displaced person was someone who did not "assis[t] the enemy in persecuting civil populations…." *See* ch. 647, 62 Stat. 1009 (1948); *see also* International Refugee Organization Constitution. The DPA was amended in 1950 to include "No visas shall be issued…to any person who advocated or assisted in the persecution of any person because of race, religion, or national origin…." *See* ch. 262 § 13, 64 Stat. 219, 227. In 1980, Congress enacted the INA's persecutor bar with similar language, which barred asylum for any alien "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." § 201(a), 94 Stat. 102-03 (re-enacted 1996).

The Supreme Court has never found that the DPA is in conflict with international obligations that the United States has with other countries. The INA's persecutor bar adopted verbatim certain phrasing that is included in the DPA. The Supreme Court has held that the DPA, which does not have a duress exception. Because the DPA does not conflict with our international agreements, it would be arbitrary for the Board should find that the same language used in the INA does conflict with those same international agreements.

B. The Board Should Defer to Administrative Interpretation Of § 1158(b)(2)(A)(i) To Find That There Is No Exception To The Persecutor Bar.

The Supreme Court, in *Negusie*, remanded the case back to the Board because the statute had not yet been interpreted by the agency charged with its enforcement. 555 U.S. at 523. According to the regulations interpreting the persecutor bar, if an alien "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," his or her application for asylum *must* be denied. *See* 8 C.F.R. § 208.13(c) (emphasis added). A regulation interpreting the persecutor bar includes the phases "an applicant *shall not* qualify for asylum…" and "[a]n immigration judge or asylum officer *shall* not grant asylum…." *See* 8 C.F.R. §§ 208.13(c)(1),(2)(i) (emphasis added). Judicial precedent has long established that the word "shall" implies an obligation rather than a discretionary decision. *See Kingdomware Techs., Inc. v. United States*, 136 S. Ct. 1969, 1977 (2016) (holding that "'shall' imposes a mandatory duty"); *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998) (holding that "'shall'…creates an obligation…"); *United States v. Thoman*, 156 U.S. 353, 359-60 (1895) (finding that 'shall' indicates a command).

By using the word "shall" in the current regulation with interprets the persecutor bar, the agency established a mandatory bar prohibiting the granting of asylum to applicants who "ordered, incited, assisted, or otherwise participated in the persecution of any person…." *See Kingdomware Techs., Inc.*, 136 S. Ct. at 1977. The statute has been interpreted and the language of the regulation leaves no discretion to the immigration judge or asylum officers, who have a mandatory duty to deny the application for asylum. *See id*. Therefore, because the regulation states that "an applicant shall not qualify for asylum," and "an immigration judge or asylum officer shall not grant asylum" to an alien that has "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," the Board should find there is not an exception to the persecutor bar of the INA based upon the agency's current interpretation of the statutory language.

For the above reasons, the Board should find that there is not an involuntariness or duress exception to the persecutor bar contained in 8 U.S.C. §§ 1101(a)(42), 1158(b)(2)(A)(i) of the INA.

C. The Board Should Weigh Certain Immigration Specific Considerations When Determining How A Duress Exception Should Function.

The INA's statutory scheme does not include any express, written exceptions. While the Government advocates for an application of the typical elements of duress, there are certain immigration considerations that *Negusie* did not properly address. Not all conduct committed can be excused citing duress as the justification. As Justice Scalia noted in his concurrence, the duress exception in criminal law "has always been[] a subject of intense debate" and this debate will spill over into the use of duress in immigration law for asylum application. *Negusie*, 555 U.S. at 526 (Scalia, J., concurring). Certain hard limits must be placed on the exception to ensure it is properly applied to asylum cases involving persecution.

1. No exception should be given to an applicant whose duress resulted in the death of another person.

In his concurring opinion, Justice Scalia reminded the Supreme Court of the common law application of duress. *Neguise*, 555 U.S. at 526 (Scalia J., concurring). At common law, duress was not accepted as a justification for murdering another person. *Id.* (citing 2 W. LaFave, Substantive Criminal Law § 9.7(b), 74 – 75 (2d ed. 2003)). Proponents for the duress exception urge the Board to adopt the Model Penal Code's interpretation of duress, which allows the exception to mitigate murder. *Amicus* FAIR believes that the Board should apply the common law limitations of duress in cases where it is being alleged.

In *Dixon*, the Supreme Court considered whether to follow the MPC's version of the duress exception, but found that without overwhelming consensus from the circuits, the Court

would follow the common law duress definition. 548 U.S. at 15-16. The Court noted that Congress was aware of the MPC interpretation at the time of passing the statute at issue and that no evidence supported adopting the MPC standard. *Id.* at 16.

The majority of states do not follow the MPC definition of duress that allows for duress to mitigate murder. Paul H. Robinson et. al., *The American Criminal Code: General Defenses*, 7 J. Legal Analysis 37, 88 (2015) (Twenty-nine jurisdictions find that duress is not applicable to homicide crimes). Even in jurisdictions where duress is not precluded as a defense, the more serious the crime, the less likely the duress exception will apply to the conduct. *Id.* Therefore, the common law definition of duress, which does not allow for application in murder cases creates a bright-line rule which would simplify application of the duress exception. Because there is no evidence that Congress intended to adopt the MPC version of duress and there is not an overwhelming consensus that it is the proper application, the Board should adopt the common law definition of duress.

2. The duress exception should not include economic or property duress.

Different types of duress can exist, depending upon which area of law is being analyzed by a court. Physical duress can be defined as "a threat of harm made to compel a person to do something against his or her will or judgment." Black's Law Dictionary (10th ed. 2014). Economic duress is the "unlawful coercion to perform by threatening financial injury at a time when one cannot exercise free will." *Id.* Finally, goods duress is seizing another's property to extort some action or condition. *Id.*

While each type of duress may have an appropriate application in other areas of law, the persecutor bar should only recognize personal duress as acceptable for the exception to apply. Economic duress, or the fear of unemployment, or restriction of government benefits cannot

suffice as a justification for the persecution of others. *Singh*, 417 F.3d at 740 ("Nevertheless, during his lengthy term of employment, he refused to quit . . . due to his need for a steady paycheck and his apparent desire to avoid searching for work."); *see also Suzhen Meng*, 770 F.3d at 1073 (denying asylum to a public security guard who reported pregnant women to the government for 22 years).

To find that economic or property duress would give rise to an application of the duress bar would cause disparity between the threshold necessary to prove persecution for the initial asylum determination, versus the duress necessary for the exception to apply. When determining if an asylum applicant meets the definition of refugee found in INA § 101(a)(42)(A), the persecution the applicant has suffered must have caused serious harm due to race religion, political opinion, etc. *Matter of Maccaud*, 14 I. & N. Dec. 429, 434 (BIA 1973) (defining persecution as "the infliction of suffering or harm upon those who differ (in race, religion, or political opinion) in a way regarded as offensive") (citing *Kovac v. I.N.S.*, 407 F.2d 102, 107 (9th Cir. 1969)). Threats to one's livelihood or property, while certainly unsettling, do not excuse persecutory conduct that threats life or causes suffering. The consequences of economic and property duress fail to rise to a level of threats that would excuse persecutory actions. *See* Nicole Lerescu, *Barring Too Much: An Argument in Favor of Interpreting the Immigration and Nationality Act Section 101(A)(42) to Include a Duress Exception*, 60 VAND. L. REV. 1875, 1902 (2007). The jobs and property of even "passive" persecutors should never be valued above the innocent lives of the persecuted.

3. A duress exception should never extend beyond passive actions that do not directly contribute to persecution.

Before and after *Negusie*, several circuits have had the opportunity to interpret the persecutor bar. Some circuits have determined that regardless of the justification, no exceptions

exist in the language of the INA. *Bah v. Ashcroft*, 341 F.3d 348, 351 (5th Cir. 2003) (determining that the syntax of the statute does not suggest that an applicant's motives behind the persecutory actions are relevant). However, other circuits have determined that certain considerations play into the determination that the persecution bar applies to an applicant's case.

One factor that reappears in the persecutor analysis is determining *how* involved the applicant was in the persecutory actions. *See e.g., Suzhen Meng v. Holder*, 770 F.3d 1071 (2d Cir. 2014) (citing *Zhang Jian Xie v. U.S. Att'y Gen.*, 500 F.3d 136, 143 (2d Cir. 2006) (finding that guarding pregnant women who are scheduled for a forced abortion was active persecutory conduct)). When determining whether the persecutor bar applies, direct participation that is seen as integral and more than just an association to a persecutory group is often required. *See Kumar v. Holder*, 728 F.3d 993 (9th Cir. 2013) (determining that the Board should consider whether acting as a guard at a prison was integral to the persecution occurring inside); *Chen v. U.S. Att'y Gen.*, 513 F.3d 1255 (11th Cir. 2008) (determining that continuing duties, including watching over detained pregnant women before their forced abortions, were central to the relevant persecutory act).

Because several circuits consider the extent to which the applicant was involved in the persecution when the persecutor bar applies, this consideration should be extended to any application of the duress exception. The Board must distinguish "genuine assistance" from passive inaction. *See Singh v. Gonzales*, 417 F.3d 736, 739 (7th Cir. 2005) (determining that transporting individuals who are to be persecuted and assisting in raids of homes over an almost 20 year period constituted persecution, although respondent never harmed anyone himself).

"In all cases[,] it is important to identify the persecutory act and determine the applicant's relationship to that act." Martine Forneret, *Pulling the Trigger: An Analysis of Circuit Court*

Review of the "Persecution Bar", 113 COLUM. L. REV. 1007, 1019 (2013). Allowing only those who can establish, by preponderance of the evidence that their coerced participation never amounted to more than a passive awareness of persecution by the persecutor will permit the Board to honor and observe the essential human rights purposes of U.S. asylum and refugee statutes. *Infra* sec. D.

4. Any duress exception adopted by the Board should be applied narrowly.

As noted above, the text of the INA does not contain any language pertaining to a duress exception to the persecutor bar. If the Board determines that the text of the INA can support a duress exception, the exception should be applied narrowly "such that only the most compelling circumstances warrant excusing past persecution." *See supra* Lerescu, at 1901. The Government stated within its brief that a duress exception should be limited, but does not provide the Board with information necessary to support this assertion, or how the exception should be limited. Gov't Br. 11. The Attorney General has determined that the persecutor bar's language, to "order[], incite[], assist[], or otherwise participate[] in[,]" should be applied broadly to a potential persecutor's conduct who is seeking asylum in the United States. *See Matter of A-H-*, 23 I & N Dec. 774, 785 (AG 2005) (determining that a leader who was not present in the in country but still provided support to a terror group was not eligible for asylum). As the Attorney General has suggested, the persecutor bar should be interpreted broadly, which would narrow a duress exception.

A narrow application would also overcome the difficulty of disproving claims based solely upon the persecutor's personal account of the events. Many times asylum claims are based almost solely on the applicant's testimony and the immigration judge must determine if that testimony is credible. A narrow exception would create a consistent interpretation of the

exception to ensure that it is not abused or overused, just as the word exception suggests. "Creating a generally applicable rule and allowing the judge wide discretion to consider the facts of each case and whether the facts fulfilled the duress exception's requirements would only result in imbalanced applicant of the law." Tasta Wiesman, *Denying Relief to the Persecutor: An Argument in Favor of Adopting the Dissenting Opinion of Negusie v. Holder*, 44 J. MARSHALL L. REV. 559, 577 (2011).

In addition to a consistent application, a narrow exception would also continue to serve the primary objective of asylum: protecting the primary victim, one who has not engaged in persecution of others "on account of their race, religion, nationality, membership in a particular social group, or political opinion." A liberally-construed duress exception would give certain persecutors the same benefits and privileges as asylees who have not persecuted anyone in the past. To ensure that victims are properly protected in the country in which they seek asylum, the unquestionable, ultimate goal of human rights law, the Board should restrict the use of a duress exception.

D. The Asylum Applicant Should Prove By A Preponderance Of The Evidence That The Duress Exception Applies.

If the Board determines that an implicit involuntariness or duress exception exists, the language of 8 U.S.C. § 1158(b)(2) does not provide any guidance on how an exception to the persecution bar should be applied. The Board must determine what the burden of proof is for the duress exception to apply and which party bears that burden. To determine the proper burden of proof for an individual seeking an exception to the persecutor bar, the Board should examine what burdens are placed on the alien during the asylum process and how the burden can shift to and from the alien.

When an alien first applies for asylum, the applicant bears the burden of proof to show he or she is being persecuted due to race, religion, nationality, membership in a particular social group, or political opinion. INA § 1158(b)(1)(A); 8 C.F.R. § 208.16(b). If the alien's claim is based upon past persecution, the presumption for asylum shifts to the government to show by a preponderance of the evidence that applicant should not receive asylum under specific circumstances. 8 C.F.R. § 208.16(b)(1)(i). If the asylum claim is based upon future persecution, the burden falls on the alien to establish that persecution is more likely that not to occur if the alien were to return to their country of origin. 8 C.F.R. § 208.16(b)(1)(ii) &(iii).

The immigration judge or asylum officer uses his or her discretion to determine if asylum should be granted. 8 C.F.R. §§ 1208.14(a),(b). During the vetting process, if the asylum officer or immigration judge determines that the applicant "ordered, incited, assisted, or otherwise participated in the persecution of any person . . ." asylum *shall* not be granted. 8 C.F.R. § 208.13(c)(i)(2)(E). If the applicant wishes to controvert the asylum officer or immigration judge's determination pertaining to the persecutor bar, the applicant must do so "by the preponderance of the evidence that he or she did not so act." *Id.* at (c)(ii); *see also* IRA J. KURZBAN, KURZBAN'S IMMIGRATION LAW SOURCEBOOK 598 (14th ed. 2014).

The INA sections relating to asylum as well as the agency's regulations provide contextual clues that the preponderance of the evidence standard is appropriate and that the applicant bears the burden of establishing that the duress exception applies. Once the government has established that the persecutor bar applies, it falls on the applicant to refute this finding. This basic burden shifting structure should also apply to the duress exception so that if the government has established that the persecutor bar applies, the applicant bears the burden of proving that the duress exception applies to his or her persecutory conduct. Using the burden

shifting framework already found in the INA, the Board would keep the scope of any new duress exception consistent with the statutory scheme.

Additionally, if an applicant is seeking to refute the government's finding that he or she has participated in the persecution of others, the applicant must do so under the preponderance of evidence standard. 8 C.F.R. § 208.13(c)(ii). Because a preponderance of evidence standard is the only standard used in the INA's sections which discuss asylum, the Board should adopt the preponderance of evidence standard for the duress exception. From the text of the regulation, once the government has established that the persecutor bar applies, the agency wanted to place the burden on the applicant to show that he or she had not persecuted others.

The preponderance of the evidence standard used in 8 C.F.R. § 208.13(c)(2)(E) is the most appropriate standard for determining if an alien qualifies for the duress exception to the persecutor bar not only because it is used in the regulation; but because other standards of proofs are less appropriate. Immigration proceedings are civil in nature, not criminal. *Fong Yue Ting v. United States*, 149 U.S. 698 (1893). Therefore, a "beyond a reasonable doubt" standard, which is used in the criminal context would be inappropriate for an immigration proceeding. Additionally, the clear and convincing evidence ("C&CE") standard is occasionally used in the immigration context. *See e.g.*, 8 C.F.R. § 240(c)(2) (an alien in removal proceedings must show by C&CE that they are lawfully present pursuant to a prior admission). However, the C&CE standard is not used in §§ 1153 or 1231. Without any textual evidence that a C&CE standard should be used in an asylum determination, an argument in favor of this standard has little support.

Beyond the INA, the Supreme Court has placed the burden on a criminal defendant to establish by the preponderance of the evidence that a crime was committed under duress. *Dixon*

v. United States, 548 U.S. 1 (2006). At common law, the burden was placed on the defendant to prove affirmative defenses. *Id.* at 8 (finding that the preponderance of the evidence standard was appropriate standard for determining whether the defendant acted under duress).

Unless a court can determine from the statutory language or some type of congressional intent what the standard should be, the common law principle of placing the preponderance of the evidence burden on the defendant is the proper approach. *Dixon*, 548 U.S. at 17. While *Dixon* specifically addressed a federal criminal statute, it supported using the preponderance of the evidence standard. The statutory language of the INA can be used to support using the preponderance of the evidence standard because the standard is used elsewhere in the asylum sections of the INA. The Supreme Court in *Dixon* also found that if congressional intent or other relevant factors cannot be used to deduce the appropriate burden, using the common law duress standard is presumed to be the appropriate standard. If the Board does not find the use of the preponderance of the evidence standard in other sections of the INA persuasive, the Board should follow the common law standard used for duress cases.

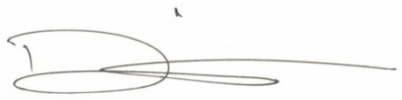
Using the preponderance of the evidence standard would thus keep the INA's newly determined duress exception consistent with common law principles of duress, as well as consistent with the burden Congress placed upon the applicant to disprove that the persecutor bar applied. To retain consistency between the language of the INA as well as common law principles of duress, the Board should adopt the preponderance of the evidence standard for determining if the duress exception should apply to a case.

VI. CONCLUSION

The language of §§1158 and 1231 do not include a duress exception. *Amicus* FAIR respectfully urges the Board to not read an implied exception into the statute. The neither the

construction nor the history of the INA can support a duress exception. If the Board does find a duress exception exists, the Board should narrow the scope of the exception to not only protect persecuted individuals but also to ensure that the exception fits the needs of the immigration field.

Respectfully submitted,



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