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

Amicus Invitation No. 16-01-11 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 (BIA) on December 10, 2015, 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 of the following issues for the BIA's consideration in the instant case:

- Where an asylum applicant has demonstrated persecution because of his or her membership in a social group comprised of the applicant's family, has he or she satisfied the nexus requirement without further analysis or does the family constitute a particular social group only if defining family members also targeted on account of another protected ground?
- The parties should address the circuit split on the issue. *Compare Hernandos-Avalos v. Lynch*, 784 F.3d 944 (4th Cir. 2015), and *Flores Rios v. Lynch*, 807 F.3d 1123 (9th

Cir. 2015), with *Ramirez-Mejia v. Lynch*, 794 F.3d 485 (5th Cir.), *Lin v. Holder*, 411 F. App'x 901 (7th Cir. 2011), and *Malonga v. Holder*, 621 F.3d 757 (8th Cir. 2010).

III. SUMMARY OF THE FACTS

Respondent is a citizen of Mexico. IJ at 1. He initially entered the United States in 1998. *Id.* at 3. Respondent has a wife and two children. Tr. at 25. Following his arrest for a DUI, Respondent voluntarily departed the United States in 2011. IJ at 1. Upon his return to Mexico, he went to his parents' home in Mexico City. *Id.* Respondent's father owns a store in Mexico City. *Id.* A local gang, La Familia Michoacana, had approached his father about selling drugs from the store. *Id.* His father refused. *Id.*

On another occasion, Respondent was walking with his cousin and nephew when he heard gunshots. IJ at 4. Due to the way the cousin and nephew responded, Respondent felt as if the shooting may have been directed toward them. *Id.* Following the shooting, men approached Respondent about selling drugs from his father's store because they liked the store. *Id.* When Respondent refused, they threatened Respondent and brandished guns. *Id.*

Following these threats, Respondent moved to Tijuana. *Id.* at 5. Shortly thereafter, Respondent illegally entered into the United States. *Id.* After Respondent moved back to the United States, Respondent's father began paying the gang rent. IJ at 5. Respondent believes he is unable to safely return to Mexico. *Id.*

IV. SUMMARY OF THE ARGUMENT

If an applicant for asylum defines the particular social group as his family, the BIA should also require a second protected ground to ensure the nexus requirement is present because the BIA is unable to otherwise objectively verify that persecution was "on account of" family membership.

In addition, BIA precedent requires that a social group be defined with particularity. However, in contemporary family law, the composition of every family is inherently mutable and open. The BIA thus cannot properly delineate the legal boundaries of what constitutes a "family." This disability is evidenced by the reasoning of the circuit courts that have found a family is a social group. Each of those circuits has constructed their definition differently. In particular, each circuit to consider the issue has included varying degrees of familial relations in its proposed definition.

IRLI concludes that the U.S. Court of Appeals for the Ninth and Fourth Circuits have erred in finding that a familial relationship is a social group for asylum purposes. The Ninth Circuit arbitrarily expanded its definition of family and deviated from prior precedent, while the Fourth Circuit failed to objectively verify the alien's account of persecution and ignored prior BIA case law that conflicts with its outcome.

The other circuits to have considered the issue have found the opposite. The U.S. Court of Appeals for the Fifth, Seventh, and Eighth Circuits have found that familial relationships lack the particularity that enables courts to properly verify that the alleged persecution occurred "on account of" a familial relationship. As a result, these courts have required that another protected ground must accompany the applicant who attempts to qualify for asylum based upon a familial relationship.

IRLI recommends that the BIA also find that a familial relationship alone does not qualify for asylum, and clarify that another protected ground must be established in addition to family membership to establish status as a refugee.

V. ARGUMENT

To qualify for asylum in the United States an alien must meet the definition of a "refugee." A "refugee" is "any person who is outside any country of such person's nationality . . . who is unable or unwilling to return . . . because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion . . . ." 8 U.S.C. § 1101(a)(42)(A). "Unless an applicant has been targeted on a protected basis, he or she cannot establish a claim for asylum. *See Al Fara v. Gonzales*, 404 F.3d 733, 740, 121 F. App'x. 478 (3d Cir. 2005) ("'[G]enerally harsh conditions shared by many other persons do not amount to persecution.' . . . [H]arm resulting from country-wide civil strife is not persecution 'on account of' an enumerated statutory factor." (quoting *Fatin v. INS*, 12 F.3d at 1240)); *Matter of N-M-A-*, 22 I. & N. Dec. 312, 323, 326 (B.I.A. 1998) (finding that an applicant who faced "a variety of dangers arising from the internal strife in Afghanistan" did not qualify for asylum)." *Matter of M-E-V-G-*, 26 I. & N. Dec. 227, 235 (B.I.A. 2014).

While the social group concept remains flexible, it is not all encompassing. Not every group of individuals qualifies as a social group for asylum purposes. Indeed, the Board has warned that "the social group concept would virtually swallow the entire refugee definition if common characteristics, coupled with a meaningful level of harm, were all that need be shown." *In Matter of R-A-*, 22 I. & N. Dec. 906, 919 (B.I.A. 1999; A.G. 2001). "The guidelines to the Protocol issued by the United Nations High Commissioner for Refugees ('UNHCR') clearly state that the particular social group category was not meant to be "a 'catch all' that applies to all persons fearing persecution." UNHCR, Guidelines on International Protection: "Membership of a Particular Social Group" Within the Context of Article 1A(2) of the 1951 Convention and/or its

1967 Protocol Relating to the Status of Refugees, at 2, U.N. Doc. HCR/GIP/02/02 (May 7, 2002), *available at* http://www.unhcr.org/3d58de2da.html ('UNHCR Guidelines')." *Matter of M-E-V-G-*, 26 I. & N. Dec. at 235.

In an effort to clarify and also narrow the scope of its application, the Board has provided guidance on the required elements of a "particular social group" designation. In *Matter of Acosta*, the Board adopted the *ejusdem generis* canon. 19 I. & N. Dec. 211, 232 (B.I.A. 1985) (providing the basic framework for analysis social groups). *Ejusdem generis* "holds that general words used in an enumeration with specific words should be construed in a manner consistent with the specific words." *Id.* (citing *Cleveland v. United States*, 329 U.S. 14 (1946)). In using the *ejusdem generis* doctrine to narrow the applicability of the "social group" protected ground, the Board explained:

> The shared characteristic might be an innate one such as sex, color, or kinship ties, or in some circumstances it might be a shared past experience such as former military leadership or land ownership. The particular kind of group characteristic that will qualify under this construction remains to be determined on a case-by-case basis. However, whatever the common characteristic that defines the group, it must be one that the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences. Only when this is the case does the mere fact of group membership become something comparable to the other four grounds of persecution under the Act, namely, something that either is beyond the power of an individual to change or that is so fundamental to his identity or conscience that it ought not be required to be changed. By construing "persecution on account of membership in a particular social group" in this manner, we preserve the concept that refuge is restricted to individuals who are either unable by their own actions, or as a matter of conscience should not be required, to avoid persecution.

However, the flexibility that *Acosta* brought to the asylum analysis resulted in "claims based on social group membership [that are] numerous and varied." *Matter of M-E-V-G-*, 26 I. & N. Dec. at 231 (discussing the evolution of the social group analysis). In particular, *Acosta* did not create a rigorous or consistent threshold for qualifying as a social group, in large part

because the core concept of an immutable common characteristic has turned out not to be self-defining. *See id.* (citing *Sepulveda v. Gonzalez*, 464 F.3d 770, 772 (7th Cir. 2006)).

After *Acosta*, the Board has found it necessary to clarify and narrow the definition by placing additional restrictions on the definition of a "social group." "The BIA may make adjustments to its definition of 'particular social group' . . . in response to the changing claims of applicants. *Orellana-Monson v. Holder*, 685 F.3d 511, 521 (5th Cir. 2012) (applying the particularity and social visibility elements to find that the group "men who were recruited by refused to join a gang" did not fulfill the elements of a social group) (citation omitted). A social group must not only share an "immutable characteristic," the group must also be defined with "particularity" and must have "social visibility." *Matter of M-E-V-G-*, 26 I. &N. Dec. at 231; *see also id.* at 237 ("An applicant for asylum or withholding of removal seeking relief based on 'membership in a particular social group' must establish that the group is (1) composed of members who share a common immutable characteristic, (2) defined with particularity, and (3) socially distinct within the society in question.").

"The 'particularity' requirement relates to the group's boundaries or, as earlier court decisions described it, the need to put 'outer limits' on the definition of a 'particular social group.' *See Castellano-Chacon v. INS*, 341 F.3d 533, 549 (6th Cir. 2003); *Sanchez-Trujillo v. INS*, 801 F.2d at 1576. The particular social group analysis does not occur in isolation, but rather in the context of the society out of which the claim for asylum arises. It considers whether those with a common immutable characteristic are set apart, or distinct in some significant way, from other persons within the relevant society. In other words, if the common immutable characteristic were known, those with the characteristic in the society in question would be meaningfully distinguished from those who do not have it. A viable particular social group

should be perceived within the given society as a sufficiently distinct group. The members of a particular social group will generally understand their own affiliation with the grouping, as will other people in the particular society." *Matter of M-E-V-G-*, 26 I. & N. Dec. at 238. "Particularity" requires commonality for entry into the group and that the shared trait remains constant. The commonality between members must not be too broad as to encompass a characteristic shared by a large segment of the society. It should be specific to the group.

"Social visibility determines "the extent to which members of a society perceive those with the characteristic of the members." *In re E-A-G-*, 24 I.& N. Dec. at 594. The characteristic must be "readily identifiable to those who would be included to persecute them." *Id.* (citing *Matter of A-T*, 24 I. & N. Dec 296, 303 (B.I.A. 2007)). The social visibility requirement does not require "ocular" visibility, but requires that the proposed social group is a discrete group recognized by society. *Matter of M-E-V-G-*, 26 I. & N. Dec. at 232-33. Social visibility depends not on the perceptions of the persecutors but on whether society perceives the individuals as social group. *Id.* at 242. "Social visibility" ensures that the "particularity" element that binds the group together internally is also capable of acknowledgement externally by society.

As will be shown below, familial relationships do not fit within 8 U.S.C. § 1101(a)(42)(A)'s "particular social group" category for three reasons: (1) the BIA cannot objectively verify the nexus for persecution on account of membership in a family; (2) the lack of a justiciable definition of the central term "family" in immigration and other fields of law forecloses articulation by the BIA of clear boundaries of who falls within such a group; and (3) even in circuits that have attempted to recognize the family as a social group, the courts have been unable to consistently apply their own judicially-created definitions. These inherent limitations provide a strong rationale for the BIA to reject the Ninth and Fourth Circuits'

approach, and instead require a different protected ground when considering familial relationships to ensure that any alleged persecution or well-founded fear of persecution is truly "*on account of* race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1101(a)(42)(A) (emphasis added).

A. A Familial Relationship Is Not A "Social Group" for Purposes of 8 U.S.C. § 1101(a)(42)(A) Because Any Alleged Persecution "on Account of" that Relationship Cannot Be Objectively Confirmed.

An asylum applicant bears the burden of proving that he or she is entitled to relief under 8 U.S.C. § 1101(a)(42)(A). *Matter of Acosta*, 19 I. & N. Dec. at 215. The burden of proof is by a preponderance of the evidence. *Id.* The alien must show that the persecution alleged was "because of" the protected status. *Al Najjar v. Ashcroft*, 257 F.3d 1262, 1292 (11th Cir. 2001) ("The significant fact about the instant record is that [respondent] has failed to demonstrate that if she is denied such a visa, it will be *because of* her Palestinian ancestry."). The United States Court of Appeals for the Eleventh Circuit has described the alien's burden as similar to a "but for" relationship between persecution and social group status. *Londono v. U.S. Att'y Gen.*, 206 Fed. App'x 897, 903 (11th Cir. 2006) ("That is, the asylum applicant would not have been spared persecution 'but for' her membership in a targeted family."). The link between the protected status and persecution must be manifest. *Gebremichael v. INS*, 10 F.3d 28, 36 (1st Cir. 1993).

"In determining whether a preponderance of the evidence supports an alien's allegations, it is necessary to assess the credibility and the probative force of the evidence put forward by the alien." *Matter of Acosta*, 19 I. & N. Dec. at 216 (citing *Saballo-Cortez v. INS*, 749 F. 2d 1354, 1357 (9th Cir. 1984)). An asylum applicant may assert subjective facts, like his own testimony or affidavit to bolster his claims, but he should also assert objective facts to corroborate that testimony. *Id.* at 216, 218 (finding the alien's testimony credible because it was substantiated by

"a letter from the present manager of COTAXI, stating that the respondent was a member of that organization for 3 years" and "several articles reporting that leftist guerrillas had threatened to kill American advisors and personnel in El Salvador, had launched an offensive in three of the provinces in the country, and had engaged in a campaign designed to sabotage the transportation industry and the country's economy.).

While some aliens have been able to articulate a well-founded fear of persecution "on account of" a familial relationship in the initial asylum application, in subsequent removal proceedings these applicants have proven largely incapable of verifying the allegations through objective sources. Beyond the alien's own affidavit and account of facts, there is typically little to no objective source of information, much less evidence, available to the IJ to validate the alien's claims. The facts of the instant case prove the point. As expected, Respondent testified regarding his familial relationship and fear of persecution. IJ at 8. The IJ did in fact find his testimony credible; however, nothing in the testimony objectively confirmed that the purported social group comprising of Respondent and his family members face persecution. The IJ did review the State Department Country Report for Mexico regarding country conditions, but the report could only demonstrate that in Mexico, the risk of a criminal kidnapping of a relative was significant for all socio-economic groups. IJ at 3. In other words, State Department country condition reports cannot establish that any given kidnapping or attempted kidnapping was on account of any given respondent's familial relationships.

The approach proposed by Respondent in this matter would thus be unworkable in practice. The better approach would be for the BIA to require a respondent to prove a different protected ground when considering familial relationships, to ensure that any persecution is truly

"*on account of* race, religion, nationality, membership in a particular social group, or political opinion," 8 U.S.C. § 1101(a)(42)(A) (emphasis added).

B. Familial Relationships Do Not Have the Required Particularity to Constitute a Social Group without Another Protected Ground.

As stated above, the BIA requires "that a group have particular and well-defined boundaries. . . ." *Matter of S-E-G-*, 24 I. & N. Dec. 579, 582 (B.I.A. 2008) (adding the elements of "particularity" and "social visibility" when defining a social group for asylum purposes); *see also Orellana-Monson v. Holder*, 685 F.3d at 521; *Rivera-Barrientos v. Holder*, 666 F. 3d 641, 649 (10th Cir. 2012) (adopting the Board's particularity and social visibility requirements to "limit[] its recognition of 'social groups' to those that can be defined with some specificity . . . [to prevent] inconsistent, arbitrary, and overbroad results); *Matter of M-E-V-G-*, 26 I. & N. Dec. 227, 238 (B.I.A. 2014) (stating a social group must have boundaries or "outer limits" as to define who falls within the group.) . To provide sufficient particularity, a proposed group must not be "too amorphous" in its composition of individuals. *Matter of S-E-G-*, 24 I. & N. Dec. at 584 (citation omitted). A social group definition must have a proper benchmark for determining what persons are included within the group. *Id.* Without such boundaries, any and all could join the social group and claim persecution or a well-founded fear of persecution on account of membership.

Familial relationships cannot provide a consistent justiciable benchmark and are too amorphous a category for 8 U.S.C. § 1101(a)(42)(A) purposes. *See Matter of S-E-G-*, 24 I. & N. Dec. 579, *14, *15 (B.I.A. 2008) (finding proposed group of "family members," "which could include fathers, mothers, siblings, uncles, aunts, nieces, nephews, grandparents, cousins, and others," too amorphous a category). Even within the same nation or culture, membership in a family can be defined in many different ways, *e.g.,* a nuclear family, immediate family, extended

family, clan, tribe, or other kinship group. There is no legal or scientific consensus as to the degree of consanguinity needed for a family to qualify as a particular social group. Thus, familial relationships lack the outer boundary necessary to support a social group analysis. Where no discernable boundary exists, the approach proposed by an applicant would entangle the Board in wasteful and futile genealogical disputes.

Highly relevant to the Board's deliberations is the inability of the circuit courts to agree on a uniform definition. Although some circuits have tried to define the term "family," the results have been neither uniform nor successful and do not provide the Board with controlling or even instructive precedent. For example, the First Circuit announced that "[t]here can, in fact, be no plainer example of a social group based on common, identifiable and immutable characteristics than that of the nuclear family." *Gebremichael*, 10 F.3d at 36. Other courts, on the other hand, have stretched the definition to include relations beyond those of parent-child or sibling, like the Fourth Circuit holding that "[t]he family unit —centered here around the relationship between an uncle and his nephew— possess boundaries . . . [and] qualified for asylum." *Crespin-Valladares v. Holder*, 632 F.3d 117, 125 (4th Cir. 2011). According to the Ninth Circuit, attenuated family relationships do not constitute a social group for asylum purposes. *Lin v. Ashcroft*, 377 F.3d 1014, 1029 (9th Cir. 2004) (refusing to find that a family *per se* qualifies as a social group for asylum purposes).

In addition to the lack of a standard definition, other complicating factors exist. For example, the amount of time elapsed since claimed members have communicated or lived with each other raises questions as to the immutability or nexus factors. Interrelationship strife such as one disowning a blood relation due to disagreements could also impact how a family is defined.

Beyond this minimal guidance, not much analysis has been provided on where a "family" social group will stop in terms of it qualifying as an immutable characteristic. Without another protected area to compliment family membership, the BIA cannot properly define the immutable characteristic tying family members together as a social group.

Even if the BIA were to allow a familial relationship to constitute a social group for asylum purposes and limit it only to the nuclear family, as in *Gebremichael*, 10 F.3d at 36, the boundaries are still messy and muddled. The concept of a nuclear family itself has become significantly mutable in many current societies as a matter of law. Whether an adult son or daughter qualifies as a nuclear family member; or continues to maintain his or her membership after he or she has married and established a next-generation nuclear family; or has moved out of geographic proximity; or merely ceased communications with other members or generations are all highly mutable factors. Both in the highly diverse countries of origin and the United States itself, a family can be defined differently for different purposes, such as housing and zoning ordinances, domestic abuse laws, or basic tenants of family law. Moreover the definition of family for legal purposes can greatly differ from a definition for social science purposes. *See*, *e.g*., C. Quince Hopkins, *Article: The Supreme Court's Family Law Doctrine Revisited: Insights from Social Science on Family Structures and Kinship Changes in the United States*, 13 CORNELL J. L. & PUB. POL'Y 431, 445 (2004) ("[C]ases addressing family-related Constitutional rights yields an image of American kinship that is significantly at odds with depictions in the social sciences' competing descriptions."). For example, Japanese-Americans culturally define family extremely broadly where one's sibling's in-laws are family. *Id.* at 486. Before recognizing a particular social group based even on a deceptively simple standard such as membership in a nuclear family, the Board would have to articulate adjudicative principles to

factor in kinship and family structure changes that may extend to individuals who are not blood related to him and to whom he has no legal obligation, and to do so for the staggeringly diverse array of national and sub-national societies of origin of contemporary asylum applicants.

The instant case demonstrates the inherent limitations to using familial relationships, even membership in a "nuclear" family, as a justiciable criterion for immigration judges to apply in determining what persons are included within the group. Respondent asserts fear of persecution on account of his extended familial relationships within a sub-region (Mexico City) of a very large country of origin. IJ at 3. The incidents that Respondent cites involve his father, cousin, and nephew. *Id.* However, Respondent is married and entered the United States with his wife in 1998. *Id*. The IJ decision suggests that since 1998, Respondent has not been a part of his father's "nuclear family." Respondent does not seem to rely on his father for any type of support. There is no evidence as to the level or character of communication between the claimed members, or the actual status of their relationship when Respondent was in the United States. In essence, the Respondent has left his father's family and begun his own with his wife and children. If Respondent's family can not only add members but also subtract them based upon passage of time and intervening life events, Respondent's family cannot qualify as a "social group" for asylum purposes. The limited record available to IRLI thus does not establish that Respondent's claimed social group meets the immutability, particularity, social visibility, or even nexus standards for establishing refugee status. We do not see how other, arbitrary variants of this particular claimed group could meet those standards as well. If the Board were to allow Respondent's family to expand and contract based upon evidence, time, and support, the "social group" protected group would swallow all other protected group to render them useless.

C. The Ninth and Fourth Circuits Erred in Finding Familial Relationships Qualify as a Social Group for Asylum Purposes.

A circuit split exists as to whether an individual can be granted asylum based on familial relationships. The Ninth and Fourth Circuits have concluded that a familial relationship is a social group while the Fifth, Seventh, and Eighth Circuits have determined that without another protected ground, an individual cannot be granted asylum due to family membership alone. *Compare Hernandos-Avalos v. Lynch*, 784 F.3d 944 (4th Cir. 2015), and *Flores Rios v. Lynch*, 807 F.3d 1123 (9th Cir. 2015), *with Ramierz-Mejia v. Lynch*, 794 F.3d 485 (5th Cir. 2015), *Lin v. Holder*, 411 F. App'x 901 (7th Cir. 2011), and *Malonga v. Holder*, 621 F.3d 757 (8th Cir. 2010). As will be shown below, the Ninth and Fourth Circuits have erred by allowing asylum claims based merely on familial relationships.

1. The Ninth Circuit Has Not Adhered to Their Own Precedent in Defining a Family as a Social Group.

In the years following the implementation of the Refugee Act of 1980, the Ninth Circuit has found that a nuclear family could qualify as a social group. But Ninth Circuit precedent has also explained that cousins, uncles, and relatives from the mother's side were not members of the nuclear family. *Jian Chen v. Ashcroft*, 289 F.3d 1113, 1116 (9th Cir. 2002) (determining that the Ninth Circuit defines the family in terms of the nuclear family and not other familial relations). "[A] prototypical example of a 'particular social group' would consist of the immediate members of a certain family . . . ." *Sanchez-Trujillo v. INS*, 801 F.2d 1571, 1576 (9th Cir. 1986).

However, recently in *Flores Rios*, 807 F.3d 1123, the Ninth Circuit deviated from its own precedent without explanation or analysis. By doing so, the circuit court arbitrarily expanded its definition of who may comprise the family social group. In *Flores Rios*, the respondent entered the United States in 2007. *Id.* at 1125. In 2009, respondent's father was killed outside of his

Evangelical church. *Id.* Respondent's cousin, who had witnessed the murder agreed to testify against the assailants but was also killed the day before the trial. *Id.* Following both deaths, respondent's sister began receiving threats. *Id.* Respondent claimed that these events gave him a well-founded fear of persecution based upon the social group comprising of his family. *Id.* Ultimately, the Ninth Circuit found that respondent's family was a social group and considered the events involving respondent's father, sister, and cousin in its asylum determination. *Id.* at 1127-28.

The Ninth Circuit considered events pertaining to the deaths not only of the respondent's father and sister, but also of his cousin, when determining that his family constituted a social group for asylum purposes. While the Ninth Circuit accepted the Board's standards for determining the existence of a particular social group (immutable characteristic, particularity, and social visibility), the court did not analyze the particularity element. *See generally id.* Instead, the Ninth Circuit relied on sister circuits to find that a family may constitute a social group. *Id.* at 1128. Its consideration of individuals outside of the nuclear family is contrary to how the court had previously defined the family. Without any discussion of why it was not applicable, the *Flores Rios* panel eschewed its own relevant precedent, which had limited the definition of family to immediate members. *Id.* at 1128. Also unexplained was the panel's citation to *Gebremichael*, an earlier Ninth Circuit decision which had defined familial relationships for 8 U.S.C. § 1101(a)(42)(A) purposes as including only those individuals who comprise the nuclear family. *See id.* at 1128 (citing *Gebremichael v. INS*, 10 F.3d at 36).

The *Flores Rios* decision further supports the conclusions that a familial relationship is not an immutable characteristic with definable and constant boundaries. The category is too amorphous and susceptible to change. *Flores Rios* unilaterally expanded the definition to fit the

case, rather than adjudicating the case by applying the standard. If *Flores Rios* had conformed to the Ninth Circuit's precedent definition of family, extended family members such as respondent's cousin would not have been included in any analysis of whether respondent faced persecution on account of his membership to his family.

Because the Ninth Circuit's approach is inconsistent and its standards unworkable, the Board should not adopt its reasoning as precedent in this matter.

2. The Fourth Circuit Erred in Finding Persecution "on Account of" a Familial Relationship by Not Objectively Verifying the Claim.

In *Hernandez-Avalos*, the Fourth Circuit also found that familial relationships qualify as a social group for 8 U.S.C. § 1101(a)(42)(A) purposes. 487 F.3d 944 (4th Cir. 2015). The respondent was the mother of a boy who was being recruited by a gang. *Id.* at 947- 948. When respondent told the gang members that her son would not join the gang, the gang members threatened to kill her. *Id.* at 947. The Fourth Circuit found that respondent was threatened because of her connection to her son and the maternal authority she had over him. *Id.* at 950.

The Fourth Circuit reasoning was flawed, because it failed to require that the immigration court objectively verify that any fear of persecution was suffered "on account of" the respondent's nuclear family relationship. While the immigration court accepted that respondent was a credible witness, fulfilling the subjective proof portion of the analysis, it did not objectively verify that any alleged fear of persecution was on account of her familial relationship with her son. *Id.* at 952-53. The Ninth Circuit merely assumed the truth of the Respondent's persecution claim being "on account of" her familial relationship because a U.S. State Department report that noted El Salvador has "a widespread gang influence and corruption" problem. *Id.*

As noted, a court must objectively verify that persecution is occurring due to a protected ground. Respondent must show the truth of his claims by a preponderance of the evidence. *Matter of Acosta*, 19 I. & N. Dec. at 215. While the State Department report informed the court on country conditions, it did not verify the respondent's asylum claim. Instead, the court assumed that because gangs are widespread within the country, the persecution by gang members that she alleged was due to "membership" in her extended family. However, this inference does not meet the burden of proof required for asylum cases.

A requirement by the Board of an additional statutory protected ground for 8 U.S.C. § 1101(a)(42)(A) purposes would prevent improper inferences like this.

D. The Fifth, Seventh, and Eighth Circuits Properly Found that Familial Relationships Cannot Be the Basis for an Asylum Claim.

In contrast to the Ninth and Fourth Circuits, three sister circuits have required a protected ground beyond a familial relationship for an asylum claim. While each case has factual differences, all revolve around events that harmed family members, which each applicant used to form the basis for an asylum claim. *Ramirez-Majia*, 794 F.3d at 487-88 (alien's subjective testimony consisted of accounts involving the alien's brother, parents, and sister-in-law); *Lin*, 411 F. App'x at 902 (factual basis for asylum rested on harm to the alien's father who was indebted to a creditor); *Malonga*, 621 F.3d at 760-63 (recollected events occurring during the civil war in Congo as well as alien's parents). But each court found that familial membership was not enough to establish a claim, and looked for another protected ground beyond family membership to qualify the applicant for relief.

Using family as the social group for an asylum claim faces challenges that cannot be overcome. As the Fifth Circuit found, and as argued above, a family may not meet the social group requirements of "particularity" and "social visibility." *See Ramirez-Mejia*, 794 F.3d at

492. The Fifth Circuit also determined that the applicant did not meet the evidentiary standard to establish a nexus between her family membership and persecution. *Id.* at 493 ("[T]he evidence that gang members sought information from Ramirez-Mejia about her brother, without more, does not support her claim that the gang intended to persecute her on account of her family."). The Fifth Circuit rejected the respondent's claim.

In *Lin v. Holder*, the Seventh Circuit found that an asylum application must be rooted in a protected ground other than a familial relationship. 411 F. App'x at 904 (citing the IJ's decision which, required persecution to be on account of a protected ground beyond the familial relationship). The court found that a family may be a social group, but that no evidence supported a finding that persecution was on account of family membership. *Id.* at 905. Once again, the court found evidentiary issues with attempting to establish persecution was because of familial relations. *Id.* at 904-05. The Seventh Circuit's determination that Lin had not provided proper evidence, and her application thus required either verification or corroboration, is consistent with the evidentiary issues any applicant may face.

Finally, in *Malonge v. Holder*, the applicant's father was shot and his wife and child had disappeared. 621 F.3d at 763. The Eight Circuit found that the information offered by the applicant did not support finding that persecution of the applicant would occur on account of his family. *Id.* at 767. The court found that the incidents concerning the applicant's family members would support the applicant's claim *if* they were tied to a protected ground. *Id.* Once again, the court seemed unsatisfied with the assertion that harm to a family member would mean harm for an applicant. The evidence proffered by the applicant did not automatically translate into persecution on account of family membership even when multiple family members were involved.

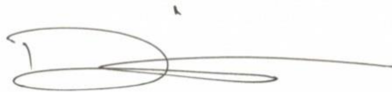
Family dynamics and composition are not easily definable even if recognized by the BIA. Attempting to define a class of individuals based on familial relationships would require the BIA to rely primarily on the applicant's subjective assessment of personal experiences, relationships, and cultural practices such as blood or "marriage." The BIA should also recognize that defining a family as a social group would require it to attempt to delineate the common outer boundaries of every family unit. Such boundaries are not easily identifiable by the BIA, and the BIA should decline the proposal, absent a concurrent claim in the asylum application of another protected status.

While the facts varied for each of the three circuits' cases, the reasoning for denying asylum based solely on membership to the family was consistent. Generalized harm normally cannot form the basis for an asylum claim because it is not particularized to the social group. *Molonga*, 521 F.3d at 766. None of the circuits could properly determine that persecution was "on account of" membership to the alien's family. Without another protected ground, a court would have difficulty verifying that events that transpired were "on account of" membership in the alien's family, rather than just a personal dispute or criminal matter. The family ties must motivate the persecution of the alien and not just be a personal dispute between the alien and alleged persecutor. *Lin*, 411 F. App'x at 908. Without a method of verifying the nexus was "on account of" membership, immigration judges would be forced to rely on subjective information relayed by the alien without independent corroboration from another source even when the subjective information is inconsistent or unreliable. In the interest of ensuring the consistent nationwide adjudication of asylum claims, the Board should find that another protected ground is required when the particular social group alleged is a familial relationship.

VI. CONCLUSION

The BIA should not accept the claim that a social group defined as a family fulfills the statutory requirements for establishing a nexus for asylum relief. A family does not have the required particularity to be considered a social group. Circuit definitions of family have not been uniform because a familial relationship presents a group too amorphous for the BIA to consider. Additionally, the BIA would be unable to objectively verify that persecution was "on account of" family membership. The BIA should follow the Fifth, Seventh, and Eighth Circuit's precedent and require a different protected ground when considering familial relationships, to ensure that any alleged persecution or well-founded fear of persecution is truly "*on account of* race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1101(a)(42)(A) (emphasis added).

Respectfully submitted,



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