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November 26, 2018

United States Department of Justice
Office of the Attorney General, Room 5114
950 Pennsylvania Avenue, NW
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VIA USPS Priority Mail Delivery and Email Correspondence

RE: *Matter of Daniel Girmai NEGUSIE*

To the Office of the Attorney General:

The American Immigration Lawyers Association et al. ("Amici") hereby re-submit their July 10, 2017 substituted brief in the above-captioned case, as filed before the Board of Immigration Appeals pursuant to 8 C.F.R. § 1292.1(d). Although Amici take the position that this brief is already in the record of proceedings before the Attorney General and should thus be considered, Amici re-submit three copies of their brief in an abundance of caution. In the attached, Amici directly address the issue of the standards (including relevant burdens of proof) to determine if an applicant for asylum is subject to the persecutor bar and, if so, what ought to be the standards for qualifying for a duress defense. *Matter of Negusie*, 27 I&N Dec. 481 (A.G. 2018).

Additionally, although arguments challenging Acting AG Whitaker's authority to adjudicate this matter are beyond the scope of the instant brief, Amici hereby adopt and incorporate the arguments made in the amicus brief filed by the American Immigration Council et al.

Sincerely,

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PROOF OF SERVICE

I, Charles Shane Ellison, hereby certify that on November 26, 2018, I emailed the attached brief and cover letter to AGCertification@usdoj.gov; and mailed three copies of the same via *Priority Mail Delivery* to:

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

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

REQUEST TO APPEAR AS *AMICI CURIAE*

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

Proposed *amici curiae*, along with *amici* the National Immigrant Justice Center ("NIJC") and the Advocates For Human Rights, previously submitted an amicus brief to the Board on November 7, 2016. On April 26, 2017, the Department of Homeland Security ("DHS") filed a substituted supplemental brief withdrawing from the position adopted in DHS's April 20, 2016, supplemental brief. The attached proposed Supplemental Brief of *amici curiae* is a revised version of its earlier brief, drafted in light of DHS's changed position and the Board's recent decisions in *Matter of J.M. Alvarado*, 27 I&N Dec. 27 (BIA May 5, 2017), and *M-B-C-*, 27 I&N Dec. 31, 38 (BIA May 18, 2017). *Amici* also fully join in the views expressed in the amicus brief of the NIJC and the Advocates for Human Rights, but write separately to address the substantive elements of assistance in persecution and the necessary procedural safeguards related to determining if the persecutor bar applies at all, separate and distinct from duress as discussed by NIJC and the Advocates for Human Rights.

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

[1] The Board extended the deadline for Respondent to submit a supplemental brief to June 28, 2017.

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

Proposed *amicus curiae* **National Justice for Our Neighbors** ("JFON") was established by the United Methodist Committee On Relief in 1999 to serve its longstanding commitment and ministry to refugees and immigrants in the United States. JFON's goal is to provide hospitality and compassion to low-income immigrants through immigration legal services, advocacy, and education. JFON employs a small staff at its headquarters in Springfield, Virginia, which supports 15 sites nationwide. Those 16 sites collectively operate in 12 states and Washington, D.C., and include 40+ clinics. Last year, JFON served clients in more than 10,500 cases. JFON advocates for interpretations of federal immigration law that protect vulnerable asylum-seekers.

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

Dated: July 10, 2017

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

PROPOSED BRIEF OF *AMICI CURIAE* AMERICAN IMMIGRATION LAWYERS ASSOCIATION AND NATIONAL JUSTICE FOR OUR NEIGHBORS

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STATEMENT OF INTERESTS OF *AMICI CURIAE*

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

STATEMENT OF ISSUES

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

SUMMARY OF ARGUMENT

Amici respectfully submit that any permissible analysis of a duress defense to the persecutor bar should begin with a full evaluation by the fact-finder regarding whether the persecutor bar comes into play at all. Additionally, that analysis must be grounded in protections commensurate with those the statute and case law contemplate in the context of a full hearing on an application for withholding and asylum, which would start with a determination regarding eligibility for relief.

This first step cannot be overlooked. Before a fact-finder makes any determination regarding the applicability of the persecutor bar (or the duress defense), she must make a threshold determination as to whether the applicant is eligible for asylum, withholding of removal, or other relief. The statutory text and overall structure of INA § 208(b)(1)–(2) and § 241(b)(3) (A)–(B)—which both first define eligibility and then style the persecutor bar as an exception to eligibility—support this sequenced analysis.

Then, before an IJ can determine the bar *may apply*, she must at a minimum find: (1) an identifiable act sufficiently severe to constitute persecution; (2) a nexus between that identified act of persecution and a protected characteristic of the victim; (3) the applicant's conduct constituted genuine assistance or participation in that identified act of persecution and involved more than mere membership in a group that engages in persecution; and (4) the applicant had the requisite scienter or culpable knowledge. The initial showing is DHS's burden.

Only where the record contains a preponderance of evidence to support the above four-part substantive findings does the statute and case law allow that an IJ can determine the persecutor bar *may apply*. After this, the applicant must have fair notice and opportunity to show that DHS has not met its burden on one or more of those findings. If the applicant cannot rebut at least one of the findings related to assistance or participation in persecution, then the burden shifts to the applicant to establish a duress defense by a preponderance of the evidence. If the applicant cannot meet that burden, then and only then can the IJ *actually* determine that the bar applies.

Amici endorse the arguments raised in the briefs by *Amici Curiae* NIJC and the Advocates for Human Rights, *Amici Curiae* International Law Scholars, and *Amici Curiae* Non-Profit Organizations & Law School Clinics in support of a duress defense and the contours of that defense.

ARGUMENT

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

DHS's initial supplemental briefing correctly asked the Board to require Immigration Judges ("IJ") to make certain preliminary findings before reaching the question of duress, including findings that specific acts of persecution occurred. *See DHS Supplemental Brief*, April 20, 2016, at 18, 21. For without an identified act of persecution there is no lawful occasion to reach questions of assistance or participation, let alone defenses such as duress. While DHS has withdrawn from its earlier position related to duress, DHS still implicitly concedes that clarity is needed related to the "legal framework" for applying the persecutor bar. *See DHS Substituted Supplemental Brief*, April 26, 2017, at 18 (citing *Matter of A-G-G-*, 25 I&N Dec. 486, 501-03 (BIA 2011), as the "ostensible legal framework" for a persecutor bar analysis, but questioning how it would work in practice). *Amici* continue to contend that far more specific substantive and procedural guidance is essential and argue that initial findings related to specific acts of persecution are a necessary "procedural safeguard" in the overall application of the persecutor bar. *See e.g.*, *Matter of Y-L-*, 24 I&N Dec. 151, 155 (BIA 2007) (discussing safeguards in the frivolous asylum bar context).

Specifically, there are two key components relating to the persecutor bar analysis in need of further elaboration: (1) the substantive elements of assistance or participation in persecution; and (2) the procedural framework related to applying the bar. *Amici* address each component in

turn below.[2] The Board's guidance with respect to both components must be crafted in light of the gravest consequences application of the persecutor bar carries for persons otherwise eligible for protection.

A. Both The Substantive Elements And Procedural Framework For Making Persecutor Bar Determinations Must Be Considered Within The Context Of The Bar's Gravest Consequences.

In *Negusie v. Holder*, 129 S.Ct. 1159 (2009), the Supreme Court called for the Board to explain the persecutor bar and any duress defense in the course of a more comprehensive explanation of the term "persecution" that anchors the refugee definition in the withholding of removal and asylum provisions of the Immigration and Nationality Act (INA). *Id.* at 1168. A single definition of "persecution" applies both in the context of eligibility for withholding of removal (the core duty of non-refoulment)[3] and in defining the persecutor bar to withholding, asylum, and others forms of relief.[4] *See Matter of Rodriguez-Majano*, 19 I&N Dec. 811, 816 (BIA 1988) ("As the concept of what constitutes persecution [in the context of relief] expands, the group which is barred from seeking haven in this country [due to the persecutor bar] also expands..."), *overruled on other grounds by Neguise*, 126 S.Ct. at 1167).

Amici believe that after *Negusie*, and in the absence of formal rulemaking, it is imperative for the Board to explain the persecutor bar, its sequential application, and the standards for any exceptions—including duress—in a comprehensive way applicable to a "wide range of potential conduct." *Neguise*, 126 S.Ct. at 1168. The Board must employ traditional tools of statutory

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[2] *See infra* pp 6-12 in regards to the substantive elements of assistance or participation in persecution, and pp 12-26 relating to the proposed procedural framework for applying the bar.

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

[4] *See e.g.*, 8 U.S.C. § 1231(b)(3)(B)(i) (withholding); 8 U.S.C. § 1158(b)(2)(A)(i) (asylum); 8 U.S.C. § 1229b(c)(5) (LPR and non-LPR cancellation of removal); 8 U.S.C. § 1254a(c)(2)(b)(ii) (temporary protected status); 8 U.S.C. § 1182(a)(3)(E) (grounds of inadmissibility); 8 C.F.R. § 1240.66(a) (NACARA).

construction and consider how the persecutor bar fits within the larger structure of the Act, in order to identify a "symmetrical and coherent regulatory scheme" for applying the bar across the contexts of withholding, asylum, and other forms of relief. *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132-33 (2000); *Matter of C-T-L-*, 25 I&N Dec. 341, 347-48 (BIA 2010) (citing *FDA v. Brown & Williamson* for proposition that where key language Congress used to define persecution in the withholding and asylum statutes presumably has the same meaning, adopting different standards for the two forms of relief would be "unharmonious and asymmetrical."). *Amici* urge the Board to provide IJs with a substantive and procedural framework in relation to the persecutor bar no less protective than those it has provided in past precedents involving similar bars. *See e.g.*, *Matter of Y-L-*, 24 I&N Dec. 151 (BIA 2007) (in relation to a frivolous asylum bar); *Matter of A-G-G-*, 25 I&N Dec. 486 (BIA 2011) (in relation to the firm resettlement bar).

Amici contend that any framework responsive to the Supreme Court's call that is permissibly grounded in the Act as a whole must elaborate the persecutor bar in the paradigmatic context of an application for withholding of removal, where the consequences of the bar's application are most grave. *See Gao v. U.S. Atty. Gen.*, 500 F.3d 93, 98 (2d Cir. 2007) ("In evaluating a persecutor bar claim, it must be remembered that this provision authorizes the deportation of individuals who have established that they would likely be persecuted … [so] courts must be cautious before permitting generalities or attenuated links to constitute 'assistance.'")

In the absence of systematic agency rules, courts have adopted standards that in the aggregate create a set of minimal procedural and substantive requirements that *amici* contend provide a floor for the guidance the Board should provide now. These procedural and substantive protections point to a coherent framework for applying the persecutor bar that accounts for the gravest consequences it carries—denial of protection even to refugees who face certain

persecution—and that also aligns with the Board's elaboration of other statutory bars carrying less grave consequences. *See e.g.*, *Matter of Y-L-*, 24 I&N Dec. at 155, 158 (holding that because a "frivolousness finding... forever bars an alien from any benefit under the Act..., the *preponderance of the evidence* must support an Immigration Judge's finding") (emphasis added); *Matter of A-G-G-*, 25 I&N Dec. 486, 501-03 (BIA 2011) (setting forth a four-step analysis for the BIA's "framework for making firm resettlement" bar determinations, in which DHS bears the initial burden of proof). Finally, *amici* argue that the generic procedural regulation (i.e., 8 C.F.R. § 1240.8(d)), if applied in this context at all,[5] must be read and understood consistent with the minimal procedural and substantive protections this framework provides, not in a way that is inconsistent or evasive of those protections Congress intended.

B. Before An IJ Can Determine The Bar May Apply, She Must Make Four Substantive Preliminary Findings Regarding Whether The Applicant Assisted Or Participated In Persecution.

The INA bars withholding of removal and asylum for those who "the Attorney General decide[s]" or "determines" have "*assisted*, or otherwise *participated* in the *persecution* of an individual *because of* the individual's race, religion, nationality, membership in a particular social group, or political opinion." 8 U. S. C. §§ 1231(b)(3)(B)(i); 1158(b)(2)(A)(i) (emphasis added). Before reaching the levels of inquiry and burdens of proof in administering the persecutor bar analysis, it is important to first examine what constitutes *assistance* or *participation* in persecution.

In determining whether the persecutor bar may apply, an IJ must specifically find: (1) an identifiable act sufficiently severe to constitute persecution; (2) that there is a nexus between the identified act of persecution and a protected characteristic of the victim; (3) that the applicant's conduct constituted genuine assistance or participation in that identified act of persecution and

[5] *See infra* note 14.

involved more than mere membership in a group that engages in persecution generally; and (4) that the applicant had the requisite scienter or culpable knowledge.[6]

1. An Act Sufficiently Severe To Constitute Persecution

A determination that persecution occurred necessarily involves factual findings related to the severity of harm. *See Lim v. INS*, 224 F.3d 929, 936 (9th Cir. 2000) ("We have defined persecution as an 'extreme concept' that includes the 'infliction of suffering or harm.'") (internal citations omitted); *Butt v. Keisler*, 506 F.3d 86, 90 (1st Cir. 2007) (explaining that the harm must have reached a "fairly high threshold of seriousness, as well as some regularity and frequency") (citations and internal quotations marks omitted); *see also Matter of Rodriguez-Majano*, 19 I&N Dec. 811, 816 (BIA 1988) (noting that "the concept of what constitutes persecution" in the context of relief is coextensive with the concept of what constitutes persecution in the context of the persecutor bar), *overruled on other grounds by Neguise*, 126 S.Ct. at 1167). Absent a showing of sufficiently severe harm, there is no need to conduct further analysis related to the persecutor bar.

2. Nexus To A Protected Characteristic Of The Victim

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

[6] As discussed in greater detail below, this four-pronged inquiry is consistent with the tests laid out by the BIA and many of the federal appellate courts that have addressed this issue. *See Matter of J.M. Alvarado*, 27 I&N Dec. 27, 28 (BIA 2017); *Matter of Rodriguez-Majano*, 19 I&N Dec. 811, 815-16 (BIA 1988); *Suzhen Meng v. Holder*, 770 F.3d 1071, 1074 (2d Cir. 2014); *Quitanilla v. Holder*, 758 F.3d 570, 577 (4th Cir. 2014).

(same); 8 C.F.R. § 1208.13(c)(2)(i)(E) (the persecutor bar applies to anyone who assisted or participated "in the persecution of any person *on account of*" a protected characteristic) (emphasis added); *see also Meng v. Holder*, 770 F.3d 1071, 1074 (2d Cir. 2014) ("a nexus must be shown between the persecution and the victim's race, religion, nationality, membership in a particular social group, or political opinion") (internal citations and quotation marks omitted); *Matter of Rodriguez-Majano*, 19 I&N Dec. 811, 815-16 (BIA 1988) (explaining that harm is not persecution unless it is "directed at someone on account of one of the five categories enumerated in section [1101(a)(42)(A)]"), *overruled on other grounds by Neguise*, 126 S.Ct. at 1167); *Matter of J.M. Alvarado*, 27 I&N Dec. 27, 29-30 (BIA 2017) (positively citing *Rodriguez-Majano* for the proposition that when "analyzing a claim of persecution..., one must examine the motivation" of "those who committed the underlying persecutory acts" to determine if such acts were committed on account of a protected characteristic).

If the record fails to establish a nexus between the sufficiently severe harm identified in step one above and a protected characteristic, then an applicant may not be found to have assisted or participated in persecution because there is no underlying act of persecution. *Xu Sheng Gao v. U.S. Attorney Gen.*, 500 F.3d 93, 100 (2d Cir. 2007) ("Before we can determine whether [the applicant's] conduct contributed directly to persecution..., the record must first reveal an *identifiable act of persecution* in which [the applicant] allegedly assisted.")

3. Genuine Assistance Or Participation By The Applicant

Once it has been determined that an identifiable act of persecution has occurred—which necessarily involves harm sufficiently severe to constitute persecution that was inflicted on account of a protected characteristic—the analysis may then proceed to consider whether the applicant genuinely assisted or participated in that act of persecution. *See Gao*, 500 F.3d 93 at

100; 8 U.S.C. §§ 1231(b)(3)(B)(i), 1158(b)(1)(B)(i), 1101(a)(42)(A); 8 C.F.R. § 1208.13(c)(2)(i)(E).

There is substantial support for the principle that the applicant's "assistance" or "participation" must be active, purposeful, and otherwise material to the persecutory act, and ***not*** tangential, indirect, or otherwise inconsequential. *See e.g., Kumar v. Holder*, 728 F.3d 993, 998-99 (9th Cir. 2013) (holding that the applicant's action must constitute "personal involvement and purposeful assistance" and that to determine "personal involvement," IJs should assess whether (1) the "involvement was active or passive" and (2) the applicant's acts were "material to the persecutory end."); *Chen v. U.S. Attorney Gen.*, 513 F.3d 1255, 1259 (11th Cir. 2008) (holding that the key inquiry is "whether the applicant's personal conduct was merely indirect, peripheral and inconsequential association or was active, direct and integral to the underlying persecution"); *Gao*, 500 F.3d at 99 ("Where the conduct was active and had direct consequences for the victims, we concluded that it was 'assistance in persecution.' Where the conduct was tangential to the acts of oppression and passive in nature, however, we declined to hold that it amounted to such assistance.") (internal quotations omitted); *Miranda Alvarado v. Gonzales*, 449 F.3d 915, 928 (9th Cir. 2006) (noting that key questions are "How instrumental to the persecutory end were those acts? Did the acts further the persecution, or were they tangential to it?"); *Rodriguez-Majano*, 19 I&N Dec at 815 (concluding that an applicant is subject to the persecutor bar only if his or her "action or inaction furthers [the] persecution in some way.").

Moreover, group membership alone cannot constitute genuine assistance or participation in a persecutory act. *See Diaz-Zanatta v. Holder*, 558 F.3d 450, 455 (6th Cir. 2009) (noting that "a distinction must be made between genuine assistance in persecution and inconsequential association with the persecutors"); *Gao*, 500 F.3d at 99 ("the mere fact that Gao may be associated

with an enterprise that engages in persecution is insufficient by itself to trigger the effects of the persecutor bar"); *Miranda Alvarado*, 449 F.3d at 927, 929 (noting that "mere acquiescence," membership in an organization, or simply being a bystander to persecutory conduct are insufficient to trigger the persecutor bar); *Singh*, 417 F.3d at 739–40 (finding that "simply being a member of a local [] police department during the pertinent period of persecution is not enough to trigger the statutory prohibitions on asylum"); *Xie v. INS*, 434 F.3d 136, 143 (2d Cir. 2006) ("[T]he mere fact that [the alien] may be associated with an enterprise that engages in persecution is insufficient by itself to trigger the effects of the persecutor bar") (emphasis added); *see Hernandez v. Reno*, 258 F.3d 806, 812, 814 (8th Cir. 2001) (explaining that evidence of an identifiable act of persecution—not just "any involvement with a persecutory group"—must be coupled with "evidence than an applicant ... *has assisted or participated* in [that] persecution" for the bar to apply); *Rodriguez-Majano*, 19 I&N Dec at 814-15 (stating that "mere membership in an organization, even one which engages in persecution, is not sufficient to bar one from relief"); 2017 BIA Amici Br. Int'l Law Scholars at 21-24 (explaining that international law supports the proposition that membership in a persecutory group alone is insufficient to trigger application of the persecutor bar).[7]

4. Scienter Or Culpable Knowledge

In addition, to constitute meaningful assistance or participation, the IJ must also find that the applicant possessed the requisite level of knowledge that the consequences of the applicant's actions would assist in persecution to render the applicant culpable for those actions. *See Meng*, 770 F.3d at 1074 (requiring "sufficient knowledge" that one's actions may assist in the persecution

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

in order to be found culpable); *Quitanilla v. Holder*, 758 F.3d 570, 577 (4th Cir. 2014) (the applicant must "have acted with scienter," or with "some level of prior or contemporaneous knowledge that the persecution was being conducted."); *Haddam v. Holder*, 547 F. App'x 306, 312 (4th Cir. 2013) (requiring examination of the "intent, knowledge, and the timing" of the applicant's alleged assistance); *Castañeda-Castillo v. Gonzales*, 488 F.3d 17, 20 (1st Cir. 2007) (noting that "the term 'persecution' strongly implies both scienter and illicit motivation"); *Matter of J.M. Alvarado*, 27 I&N Dec. 27, 28 (BIA 2017) (adopting the First Circuit's requirement that the applicant have "prior or contemporaneous knowledge" of the "persecutor acts" to apply the persecutor bar).

While the Board recently took the position that one assisting in persecution is not required to share a "persecutory motive" with those engaging in the underlying persecutory act,[8] this point is unrelated to the requirement of culpable knowledge, which the Board clearly adopted in its persecutor bar analysis in that case. *Matter of J.M. Alvarado*, 27 I&N Dec. at 28-29 (citing *Castaneda-Castillo v. Gonzales*, 488 F.3d at 17, 20, 24 (1st Cir. 2007), for the proposition that "prior or contemporaneous knowledge" of the "persecutory acts" in which the applicant is alleged to have assisted is required to apply the bar).

* * *

Each substantive element of the above four-part test for determining whether one has assisted or participated in persecution were present in the Board's recent persecutor bar analysis in *Matter of J. M. Alvarado*. In *Alvarado*, the Board ruled the record established that the applicant—who had served in the Salvadoran National Guard during the civil war—had "detained

[8] *Amici*, in describing here the Board's analysis in *Alvarado* related to nexus, do not endorse the Board's specific reasoning related to a shared "persecutor motive." *See* 2017 Br. of *Amici Curiae* Non-Profit Organizations & Law School Clinics.

an individual whom he delivered to his superiors;" that he stood guard while "they interrogated this detainee," that he both "*knew* that his superiors *severely mistreated* the detainee by ... *placing needles under his fingernails*" and "that [such] *acts were based on* the victim's *political opinion*." *See id.* at 28 (emphasis added). The Board underscored that the applicant did "not contest that he '*assisted*' his superiors action;" he did not contest that "their acts were committed *on account of* the victim's *political opinion*;" nor did he deny that he had "'*prior or contemporaneous knowledge*' of his superior's *persecutory acts*." *Id.* As such, the Board found that the record established (1) an identifiable act of persecution occurred—involving sufficiently severe harm (2) on account of a protected characteristic—and that the applicant had (3) genuinely assisted in that act by detaining the victim and standing guard throughout his persecution with (4) culpable knowledge that persecution on account of the victim's political opinion was occurring. *Id.* After the Board recognized these preliminary findings had been established and that the applicant did not contest them, it stated that the burden was on the applicant to "disprove that he engaged in persecution." *Id.* at FN 2 (citing *Castaneda-Castillo v. Gonzales*, 488 F.3d at 21 and 8 C.F.R. § 1240.(8)(d) for the proposition that "once DHS introduces evidence of an alien's association with persecution, the [applicant] has the burden to disprove that he engaged in persecution.")

II. AFTER THE ABOVE FOUR SUBSTANTIVE FINDINGS HAVE BEEN MADE, THE APPLICANT MUST BE PUT ON NOTICE AND GIVEN AN OPPORTUNITY TO REBUT THOSE FINDINGS OR OTHERWISE ESTABLISH A DURESS DEFENSE BEFORE THE BAR IS ACTUALLY APPLIED.

Only when DHS has introduced evidence sufficient to allow the IJ to make the above four-part, preliminary findings by a preponderance of the evidence can the IJ determine that the bar *may apply*. Yet, before the bar may *actually* be applied, the applicant must be put on notice that the IJ has made these specific findings, and she must be given an opportunity to produce countervailing evidence related to one of those four findings, or otherwise establish a duress

exception. *See e.g.*, *Matter of Y-L-*, 24 I&N Dec. at 155-60 ("Given the serious consequences of a frivolous finding," minimum "procedural safeguards" require (1) "specific finding[s]" by the IJ—that "tak[e] into account" the applicant's response—in relation to the substantive elements of a frivolous finding, (2) established by "a preponderance of the evidence" in the record, (3) made only after notice has been given, and (4) the applicant has had a sufficient and ample opportunity to respond.); *Matter of A-G-G-*, 25 I&N Dec. 486, 501-03 (BIA 2011) (setting forth a four-part "framework for making firm resettlement" determinations where "DHS bears the initial burden of establishing that [the] evidence indicates that a mandatory bar to relief applies," after which, the applicant must be given an opportunity to "rebut the DHS's ... evidence," or otherwise establish an exception applies).

In the normal course of most proceedings where the persecutor bar emerges, DHS will inform the applicant well in advance of the merits hearing that DHS intends to raise the persecutor bar with respect to specified acts. This would afford the applicant the opportunity to present evidence at the merits hearing to rebut the persecution claim (and/or establish a defense such as duress). But, if DHS does not provide such advance notice—and the persecutor bar is raised for the first time at the applicant's merits hearing—the applicant should be allowed to seek a continuance to develop appropriate evidence in response. *See e.g.*, *Matter of Y-L-*, 24 I&N Dec. at 159-160.

A. The Framework For Applying The Persecutor Bar Should Be More Protective—Not Less—Than The Procedures The Board Has Previously Required For Separate Bars Carrying Less Grave Consequences.

The threshold inquiry—prior to assessing the applicability of a duress defense—is whether an applicant eligible for relief is subject to the persecutor bar in light of the minimum required procedural safeguards. However, the exact contours of those procedural safeguards have not yet been settled and would benefit from the Board's guidance.

Amici respectfully submit that the Board should clarify the process for applying the persecutor bar as follows. First, the IJ should determine whether the applicant is eligible for asylum or withholding of removal. *See* INA §§ 208(b)(1)–(2); 241(b)(3) (A)–(B) (The statutory text and overall structure support a sequenced analysis that first defines eligibility before proceeding to the exceptions to eligibility). Second, if the applicant is otherwise eligible for protection, the IJ should determine whether DHS has submitted sufficient evidence to sustain the above four-part findings by a preponderance of the evidence such that the persecutor bar *may apply*. *See Matter of Y-L-*, 24 I&N Dec. at 155-60 (discussing burdens and quantum of proof); *Alvarado*, 27 I&N Dec. at 28 (discussing the four elements of assistance in persecution). Third, the applicant should be given fair notice and ample opportunity to demonstrate that the government has not in fact met its burden in relation to one or more the above four-part findings of assistance or participation in persecution. *See id.* If the applicant cannot rebut at least one of the preliminary findings, then the burden shifts to the applicant to establish a duress defense by a preponderance of the evidence. *See Matter of Y-L-*, 24 I&N Dec. at 155-60; *Alvarado*, 27 I&N Dec. at 28, FN 2 (citing *Castaneda-Castillo v. Gonzales*, 488 F.3d at 21 and 8 C.F.R. 1240.(8)(d)). Finally, only after it is determined that the applicant failed to establish a duress defense would the IJ *actually apply* the persecutor bar. *See Matter of A-G-G-*, 25 I&N Dec. at 503; *Matter of Y-L-*, 24 I&N Dec. at 155-60.

These minimum procedural safeguards for applying the persecutor bar are naturally extrapolated from the frameworks the BIA has required in the firm resettlement and frivolous asylum bar contexts. *See Matter of A-G-G-*, 25 I&N Dec. at 501; *Matter of Y-L-*, 24 I&N Dec. at 155-60. *Amici* contend that given the relative gravity of these three bars—the persecutor bar being by far the most serious—the BIA cannot adopt in the persecutor bar context a set of procedures

less protective than those it has adopted in the frivolous asylum bar context. *See Matter of Khan*, 26 I&N Dec. 797, 804 (BIA 2016) (noting the importance of adopting a standard that would result in a "harmonious [and symmetrical] statutory scheme") (citing *Food and Drug Admin. V. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (explaining that in determining the meaning of a statute, a court must "interpret the statute 'as a symmetrical and coherent regulatory scheme' … and 'fit, if possible, all parts into an harmonious whole'").

While the firm resettlement bar renders an applicant ineligible for asylum, it is not a bar to withholding. *Compare* 8 U.S.C. § 1158(b)(2)(A)(containing a firm resettlement bar to asylum) *with* 8 U.S.C. § 1231(b)(3)(B) (omitting any firm resettlement bar for withholding). Similarly, the frivolous asylum bar—though carrying even more serious and far-reaching consequences than the firm resettlement bar by rendering an applicant permanently ineligible for asylum and other relief under the Act—does not bar eligibility for withholding. *See Matter of Y-L-*, 24 I&N Dec. at 154-155 (holding that the frivolous asylum bar makes one "permanently ineligible for any benefits under [the INA]," but it "shall not preclude [an applicant] from seeking withholding of removal"). Of the three bars, it is only the persecutor bar that results in permanent ineligibility for both asylum *and* withholding. *See Negusie v. Holder*, 555 U.S. 513. It makes no sense to think Congress would intend to bar mandatory protection even to refugees who face a certainty of persecution on the basis of *less* evidence and with *fewer* procedural safeguards than it requires in order to bar discretionary asylum relief to refugees who face only a reasonable possibility of persecution.

In *A-G-G-*, the Board identified a four-part framework for applying the firm resettlement bar that is important to the task here of identifying congressional intent with respect to the application of the persecutor bar. *See Matter of A-G-G-*, 25 I&N Dec. at 501. First, the Board held that "*DHS bears the initial burden*" to present prima facie evidence of an offer of firm

resettlement. *See id.* at 496, 501 (emphasis added). To meet its burden, the Board explained that DHS must "secure and produce" direct evidence—or, when unavailable, indirect evidence that "has a sufficient level of clarity and force"—to "*establish* that [the applicant] is able to permanently reside in the country." *See* 501-02. (emphasis added). The "inquiry ends if DHS fails" to meet its burden "*or the record does not otherwise establish* the existence of an offer of firm resettlement." *See id.* at 503 (emphasis added). However, if DHS has presented sufficient evidence of firm resettlement, then at the second step, the applicant must be given the *opportunity to rebut* DHS's evidence by showing that "an offer has not, in fact, been made" or that the applicant's circumstances would render her ineligible for such an offer. *Id.* at 503. Third, the IJ must weigh "the totality of the evidence" and determine whether the applicant has "rebutted ... DHS's evidence." *See id.* Finally, if the adjudicator determines that the applicant was firmly resettled, the *burden shifts* to the applicant to establish by a preponderance of the evidence an exception applies.[9] *See id.* It is only after each of these steps has been analyzed that the IJ may *actually apply* the bar. *See id.*

Similarly, in the frivolous asylum bar context, the Board in *Y-L-* recognized four "procedural safeguards" necessary "[g]iven the serious consequences of a frivolous finding." *Matter of Y-L-*, 24 I&N Dec. at 155. Among those procedural safeguards are: (1) *notice* to the applicant that filing a frivolous application will result in "permanent ineligibility for any benefits under the [INA] except for withholding of removal," (2) "*specific findings*" related to the substantive elements of a frivolousness (i.e., deliberate fabrication of material elements of an

[9] Two exceptions are provided in the regulations to the firm resettlement bar. If the applicant can establish that "his ... entry into that country was a necessary consequence of his ... flight from persecution, that he ... remained in that country only as long as was necessary to arrange onward travel, and that he ... did not establish significant ties to that country," then the bar will not apply. 8 C.F.R. § 208.15(a). Alternatively, if "the conditions of his ... residence ... were so substantially and consciously restricted by the authority of the country of refuge that he ... was not in fact resettled," then the bar does not apply. 8 C.F.R. § 208.15(b).

asylum claim), (3) "sufficient [and ample] *opportunity*" to respond to the allegations of "any deliberate, material fabrications upon which the IJ may base a finding of frivolousness," and (4) the requirement that "the ultimate *burden of proof* [be] *on the Government*" and that the IJ "provide cogent and convincing reasons for finding by a *preponderance of the evidence*" the above substantive elements of a frivolousness only "[a]fter taking into account the respondent's explanations." *See id.* at 155-60.

Because the frameworks of *A-G-G-* and *Y-L-* were crafted in contexts less serious than that of the persecutor bar,[10] those decisions simply provide a floor for the minimum procedural safeguards required in the persecutor bar context. Both *A-G-G-* and *Y-L-* place the initial burden of proof squarely on the government. *Matter of A-G-G-*, 25 I&N Dec. at 496 ("DHS bears the initial burden"); *Matter of Y-L-*, 24 I&N Dec. at 158 ("the ultimate burden of proof [is] on the Government"). And, while *A-G-G-* states that the government's burden is to produce *prima facie* evidence, *id.* at 501, the more serious frivolousness bar requires "cogent and convincing reasons for finding by a *preponderance of the evidence*." *Id.* at 158. Similarly, both decisions require some form of notice and opportunity to respond. *Matter of A-G-G-*, 25 I&N Dec. at 503; *Matter of Y-L-*, 24 I&N Dec. at 155-56, 159-60. Lastly, the decisions require that the IJ consider the applicant's response, and the availability of any exception, before determining whether the bars *actually* apply. *See Matter of A-G-G-*, 25 I&N Dec. at 503 ("the [IJ] will consider the totality of the evidence presented by the parties to determine whether an [applicant] has rebutted DHS's evidence" before "finding the [applicant] firmly resettled," but will only apply the bar if the applicant fails to meet her burden on any exception to the firm resettlement bar); *Matter of Y-L-*,

[10] As stated above, unlike the firm resentment bar and the frivolous asylum bar, the persecutor bar renders one ineligible for withholding of removal. *See supra* pp. 15.

24 I&N Dec. at 157 ("plausible explanations offer by the response must be considered in the ultimate determination whether the preponderance of the evidence supports a frivolousness finding").

As explained above, given that the persecutor bar—as a mandatory ground of denial for even withholding—carries consequences more grave than those in *A-G-G-* and *Y-L-*, the minimum procedural safeguards in the persecutor bar context must at least meet, if not exceed, those provided in *A-G-G-* and *Y-L-* in order to provide "a symmetrical and coherent regulatory scheme." *See Matter of Ordaz-Gonzalez*, 26 I&N Dec. 637, 643 (BIA 2015) (citing *Food and Drug Admin. V. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000)).

As such, in the present context, (1) DHS must bear the initial burden of proof related to the substantive components of assistance in persecution; (2) that evidence must be sufficient to sustain the IJ's specific findings by a preponderance of the evidence; and (3) the bar cannot be applied until after there has been notice to the applicant, a fair opportunity to respond, and due consideration of any exception to the bar. Each of these procedural safeguards are discussed below.

1. DHS Must Bear The Initial Burden Of Proof.

The statute, case law, and international law confirm that DHS bears the initial burden of introducing sufficient evidence—in relation to the above four specific substantive findings—such that the IJ *may apply* the persecutor bar. Indeed, more than three decades ago, the Board held that while the persecutor bar is referenced within 101(a)(42)(A)'s refugee definition, an applicant does not bear the initial burden of proving she did not engage in persecution to establish she is a refugee. *See Matter of Acosta*, 19 I&N Dec. 211, 219 FN 4 (BIA 1985), *overruled on other grounds by Matter of Mogharrabi*, 19 I&N Dec. 439 (BIA 1987). The Board in *Acosta* reasoned that:

> "While the language of section 101(a)(42)(A) excludes from the definition of a refugee any person who 'ordered, incited, assisted, or otherwise

> participated in the persecution of any person,' *we do not construe this language as establishing a fifth statutory element an alien must initially prove before he qualifies as a refugee.* This provision is one of exclusion, not one of inclusion..." *Id.* (emphasis added).

Although the plain language of the statute assigns an applicant for asylum or withholding the burden of establishing eligibility for relief, Congress has been equally clear that this burden does not extend to the persecutor bar. *See* 8 U.S.C. §§ 1229a(c)(4)(a), 1231(b)(3)(B), 1158(b)(1)(B). The REAL ID Act of 2005, Pub. L. 109-13, reinforced *Acosta's* assignment of the applicant's burden of proof, confirming that the applicant does not bear any statutory burden to prove that the persecutor bar does not apply. Section 1231(b)(3)(C), as amended by REAL ID, provides that, in determining whether an applicant has demonstrated eligibility for withholding of removal, "the trier of fact shall determine whether the [applicant] has sustained [her] burden of proof ... in the manner described in clause (ii) and (iii) of section [1158(b)(1)(B)]," which describes in detail burdens of proof relevant to asylum. In turn, section 1158(b)(1)(B)(i), also amended by REAL ID, states that "the burden of proof is on the applicant to establish that the applicant is a refugee within the meaning of 101(a)(42)(A)." To meet that burden, section 1158(b)(1)(B)(i) provides only that "the applicant must establish that race, religion, nationality, membership in a particular social group, or political opinion was or will be at least one central reason for persecuting the applicant." *Id.* Consistent with *Acosta*, this "burden of proof" section makes no reference at all to any affirmative duty on the applicant to prove that the persecutor bar does not apply. *Id.*; *Matter of Acosta*, 19 I&N Dec. 211, 219 FN 4 (BIA 1985) ("While the language of section 101(a)(42)(A) excludes" persecutors "*we do not construe this language as establishing* ...[an additional] *statutory element an alien must initially prove.*") (emphasis added).

Several decisions by the U.S. Court of Appeals and the BIA confirm that Congress has placed the initial burden related to the persecutor bar for an asylum or withholding applicant squarely upon the government. *See Gao,* 500 F.3d at 103 (noting that "the government [must] satisf[y] its initial burden of demonstrating that the persecutor bar applies"); *Castañeda–Castillo v. Gonzales,* 488 F.3d 17, 21 (1st Cir. 2007) ("[O]nce the government introduced evidence of the applicant's association with persecution, it then became Castañeda's burden..."); *see Alvarado,* 27 I&N Dec. at 28, FN 2 (citing *Castañeda* for the proposition that it is up to "DHS [to] introduce[] evidence of" the applicant's involvement "with persecution");[11] *see also Matter of A-G-G-*, 25 I&N Dec. at 501 (holding that "DHS bears the initial burden of establishing that [the] evidence indicates that a mandatory bar to relief applies" in the firm resettlement context);[12] *Matter of Y-L-*, 24 I&N Dec. at 160 (holding in the context of the frivolous asylum bar that "the ultimate *burden of proof* [is] *on the Government*") (emphasis added).

Additionally, international law supports putting the burden of proof squarely on the government in the persecutor bar context. *See* 2017 BIA Amici Br. Int'l Law Scholars at 21-24; 2003 Background Note on Art 1F, paras 105-106, http://www.refworld.org/docid/3f5857d24.html (Stating that while "the burden of proof is shared between the applicant and the State (reflecting the vulnerability of the individual in this context)...., several jurisdictions have explicitly

[11] *Alvarado*, 27 I&N Dec. 27, citing 8 C.F.R. § 1240.66, states that that an applicant for NACARA relief must show that he has not assisted or participated in persecution. But *Alvarado* also adopts *Castañeda–Castillo*, which correctly placed an initial burden on the government. *See Castañeda–Castillo v. Gonzales*, 488 F.3d at 21. For the reasons discussed in this brief, *Amici* contend that the withholding and asylum statutes—when considered in light of the Act as a whole, the frameworks of *Matter of A-G-G-* and *Matter of Y-L-*, and considered in context with other sources of congressional intent and international law—are not consistent with *Alvarado's* burden allocation in the NACARA context.

[12] Even in its supplemental filing, DHS implicitly acknowledges that it bears the initial burden. *See DHS Substituted Supplemental Brief*, April 26, 2017, at 18 (citing *Matter of A-G-G-*, 25 I&N Dec. 486, 501-03 (BIA 2011), as the "ostensible legal framework" for a persecutor bar analysis).

recognized... [that] the burden shifts to the State to justify exclusion under Article 1F."); *see also* 1997 Note at para 4, http://www.unhcr.org/en-us/excom/standcom/3ae68cf68/note-exclusion-clauses.html ("Under the 1951 Convention, responsibility for establishing exclusion lies with States.").

Accordingly, because of the textual structure of the bar as construed by the U.S. Court of Appeals, and because of the Board's existing procedural frameworks in analogous contexts, DHS must bear the initial burden of proof in relation to the persecutor bar. *See Negusie*, 555 U.S. at 519 (noting that when interpreting a statute, the court must "look not only to the particular language, but to the design of the statute as a whole and to its object and policy").

2. Nothing Less Than A Preponderance Of The Evidence Can Justify Application Of The Persecutor Bar.

To *actually* apply the persecutor bar to an applicant otherwise eligible for withholding or asylum, the INA requires the Attorney General to "***decide*** that ... [the applicant] assisted or otherwise participated in ... persecution." 8 U.S.C. § 1231(b)(3)(B)(i) (emphasis added); *see also* 8 U.S.C. § 1158(b)(1)(B)(i) (explaining that an applicant is not eligible for asylum if the Attorney General "***determines*** that ... the alien ... assisted or otherwise participated in ... persecution") (emphasis added). A preponderance of the evidence is required to make such a determination; a *mere possibility* that an applicant assisted in persecution would not be sufficient to apply the bar consistent with the statute. *See id.*

In the withholding and asylum context, facts established for purposes of eligibility are found using a preponderance of the evidence standard. *Matter of Acosta*, 19 I&N Dec. 211, 214-216 (BIA 1985) ("It is the general rule" that the truth of allegations is established "by a preponderance of the evidence"); *see e.g.*, *Matter of C-A-L-*, 21 I&N Dec. 754, 759 (BIA 1997) (holding that "internal resettlement [ground for denial] should be applied only if" the IJ or BIA

can make that finding by "a *preponderance of the evidence*") (emphasis added). Facts material to the frivolousness bar to relief are likewise held to the preponderance standard. *See e.g.*, *Matter of Y-L-*, 24 I&N Dec. at 157-58 (holding that the IJ "must provide cogent and convincing reasons for finding by a preponderance of the evidence" the substantive elements of a frivolous finding). As such, the same preponderance standard should be required for application of the persecutor bar.

That interpretation—that the persecutor bar cannot be applied with any quantum of proof less than a preponderance of the evidence—is confirmed when the persecutor bar is read within the larger context of the other bars to asylum and withholding. Indeed, the language of the persecutor bar—which requires the Attorney General to "***decide***" or "***determine***" that the applicant assisted or participated in persecution—stands in contrast with the "danger to U.S. security" and "serious nonpolitical crime" bars, which merely requires the Attorney General to determine that "there are *reasonable grounds* for regarding" or "serious *reasons for believing*" that the applicant's conduct justifies application of those bars. *Compare* 8 U.S.C. §§ 1231(b)(3)(B)(i) and 1158(b)(2)(A)(i) *with* 1231(b)(3)(B)(iii)-(iv) and 1158(b)(2)(A)(iii)-(iv) (emphasis added). The "*reasonable grounds*" standard is one "substantially less stringent ... than 'preponderance of the evidence,'" and is roughly equivalent to the "probable cause" standard. *See* Deborah Anker, *Law of Asylum in The U.S.*, 2015, at § 6:23 (citing *Matter of A-H-*, 23 I&N Dec. 774, 786 (A.G. 2005); *Matter of U-H-*, 23 I&N Dec. 355, 356 (BIA 2002) (finding that probable cause existed where an applicant was merely a member and supporter of a group designated as a terrorist organization); *see also Matter of R-S-H-*, 23 I&N Dec. 629, 640 (BIA 2003);[13] *Cf. Rodriguez-Majano*, 19 I&N

[13] To the extent that the Board looked to *Matter of R-S-H-* in *Alvarado*, as guidance in construing 1240.8(d) in the persecutor bar context, such reliance was misplaced given the disparate statutory language of the "danger to security" bar at issue in *R-S-H-*, and the persecutor bar at issue in *Alvarado*. *See Alvarado*, 27 I&N Dec. at 28, FN 2.

Dec at 814-15 (stating that "mere membership in an organization, even one which engages in persecution, is not sufficient to" apply the persecutor bar). In contrast, the persecutor bar requires the Attorney General to actually *determine* that the applicant assisted or otherwise participated in persecution. *See McMullen v. INS*, 788 F.2d 591, 598, FN 2 (9th Cir. 1986) (noting that "[a] finding that there are 'serious reasons' to believe the alien committed a serious nonpolitical crime is far less stringent than a determination that the alien *actually* 'ordered, incited, assisted, or otherwise participated in ... persecution,'" and suggesting, but not deciding, that the persecutor bar could require a "clear and convincing" standard) (emphasis added), overruled in part on other grounds by, *Barapind v. Enomoto*, 400 F.3d 744, 751 (9th Cir. 2005).

Had Congress intended for the persecutor bar to apply when there were merely "*reasonable grounds*" to believe the applicant assisted or participated in persecution, or *may have* assisted or participated in persecution, it could have used that language. *Compare* 8 U.S.C. § 1158(b)(2)(A)(i) *with* 8 U.S.C. § 1158(b)(2)(A)(iv). That it did not use the "reasonable grounds" language must be given effect. *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 432 (1987) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)). As such, it would be legal error and irreconcilable with the statute to hold that the persecutor bar could be applied on a lower standard, such as the "reasonable grounds for regarding" standard.

Rather, a preponderance of the evidence standard in the persecutor bar setting is required both by the plain language of the statute as well as the grave consequences the bar carries. *See Matter of Y-L-*, 24 I&N Dec. at 157-58 ("Because of the severe consequences that flow from a frivolousness finding, the preponderance of the evidence must support an Immigration Judge's

finding."). As stated above, because a finding that an applicant has assisted in persecution constitutes a bar to even withholding of removal, the Board cannot adopt a standard of proof here less than that standard adopted in *Y-L-*, where the consequences there did not include a bar to withholding.

Lastly, a preponderance of the evidence standard in the persecutor bar context is consistent with international law standards as persuasively argued by other *amici*. *See* 2017 BIA Amici Br. Int'l Law Scholars at 21-24; *Al-Sirri v. Sec'y of State for the Home Dep't; DD (Afghanistan) v. Sec'y of State for the Home Dep't* [2012] UKSC 54 ¶ 16 (UK Sup. Ct. Nov. 12, 2012) (citing Grahl-Madsen, at 283) (emphasizing that article 1F "should be interpreted restrictively and applied with caution" and that "[t]here should be a *high threshold* 'defined in terms of the gravity of the act in question, the manner in which the act is organized, its international impact and long-term objectives, and the implications for international peace and security'"); *see also AS (s.55 "exclusion" certificate – process) Sri Lanka* [2013 UKUT 00571 (IAC) [43] (quoting *Al-Sirri* and noting that "although a domestic standard of proof could not be imported into the Refugee Convention . . . '[t]he reality is that there are unlikely to be sufficiently serious reasons for considering the applicant to be guilty unless the decision-maker can be satisfied *on the balance of probabilities* that he is.'") (emphasis added).

3. If DHS Meets Its Burden, The Applicant Must Have Notice And An Opportunity To Respond.

After DHS meets its initial burden of proof in relation to the persecutor bar, the applicant must be informed of that and provided a sufficient opportunity to rebut DHS's evidence. *See e.g.*, *Matter of Y-L-*, 24 I&N Dec. at 159-160 (In applying similar safeguards, the BIA has held that "[i]n some cases the Government may raise the issue.... [i]n other situations, the Immigration Judge may raise the issue and afford the respondent an opportunity to respond," but the bar may

not be applied unless the applicant "has had sufficient opportunity to" respond). Courts have also generally relied on 8 C.F.R. § 1240.8(d) to hold that the applicant must be given notice and an opportunity to respond. *See Gao,* 500 F.3d at 103; *Castañeda–Castillo v. Gonzales,* 488 F.3d 17, 21 (1st Cir. 2007); 8 C.F.R. § 1240.8(d) (providing that "[i]f the evidence indicates that one or more of the grounds for mandatory denial of the application for relief may apply, the alien shall have the burden of proving by a preponderance of the evidence that such grounds do not apply").

While there is variance in how the courts understand 8 C.F.R. § 1240.8(d) in relation to the persecutor bar, there is general agreement that once DHS has met its burden, the burden shifts to the applicant to show the bar does not apply. *See Gao,* 500 F.3d at 103 ("[O]nce the government has satisfied its initial burden of demonstrating that the persecutor bar applies, the burden would then shift to the applicant to disprove knowledge."); *Pastora v. Holder*, 737 F.3d 902, 906-07 (4th Cir. 2013) (Because the "totality of the specific evidence ... was sufficient to indicate that the persecutor bar applied," the burden shifted to the applicant to prove "he did not assist or otherwise participate in persecution"); *Castañeda–Castillo v. Gonzales,* 488 F.3d 17, 21 (1st Cir. 2007) ("[O]nce the government introduced evidence of the applicant's association with persecution, it then became Castañeda's burden to disprove that he was engaged in persecution."); *Hernandez*, 258 F.3d at 812, 814 (explaining that once there is "evidence that an applicant ... *has assisted or participated* in persecution," the applicant must demonstrate "that he has not been involved in such conduct.") (emphasis added); *see Alvarado*, 27 I&N Dec. at 28, FN 2 (stating "that once the DHS introduces evidence of" the applicant's involvement "with persecution," the burden shifts to the applicant).

This interpretation is also consistent with the required procedural safeguards established in *Y-L-*. As stated above, the Board in *Y-L-* held that a frivolousness finding may only be made if

the IJ or BIA is "satisfied that the applicant, during the course of the proceedings, has had *sufficient opportunity* to account for any discrepancies or implausible aspects of the claim." *Id.* at 159 (emphasis added). The Board explained that "[i]n order to afford a sufficient opportunity," an IJ should "bring this concern to the attention of the applicant prior to the conclusion of the proceedings." *Id.* Additionally, the Board required that "plausible explanations offered by the respondent ... be considered in the ultimate determination whether the preponderance of the evidence supports a frivolousness finding." *Id.* 157. Given the disparate gravity of a frivolousness finding (that does not bar eligibility to withholding), and the persecutor bar (which does), the Board cannot reasonably adopt procedural safeguards here less protective than those provided by *Y-L-*.

Rather, the procedural safeguards adopted by the Board here must be adequate to ensure that bona fide refugees—and most especially uniquely vulnerable applicants, such as children, victims of domestic violence, and individuals with intellectual disabilities—are not unjustly subject to the persecutor bar. *See* 2017 Br. of *Amici Curiae* Non-Profit Organizations & Law School Clinics.

B. The Generic Regulation 1240.8(d) Cannot Be Read To Sidestep The Protections Of The Withholding and Asylum Statutes Based Upon Speculation That An Applicant May Have Assisted Or Participated in Persecution.

Any permissible understanding of 8 C.F.R. § 1240.8(d) in the context of the persecutor bar must be consistent with the statutory language of 8 U.S.C. §§ 1231(b)(3)(B)(i) and 1158(b)(1)(B)(i), which require the attorney general to *decide* or *determine* that the applicant assisted or otherwise participated in persecution. Mere evidence that an applicant *may have* assisted or participated in persecution is not sufficient to apply the bar consistent with the statute.

The Second, Sixth, Seventh and Ninth Circuits have explicitly rejected arguments that evidence of *possible* assistance in persecution is sufficient to apply the bar, and the Fourth Circuit has openly questioned such arguments. *See Pastora v. Holder*, 737 F.3d 902, 906, FN 5 (4th Cir.

2013) (holding that the "specific evidence in [that] case was sufficient to indicate the persecutor bar *applied*," and noting that 8 C.F.R. § 1240.8(d)'s language "may apply" could well be "in tension with the language of the statute" and that the Sixth, Second, and Seventh Circuits appear "to have read the word 'may' out of the regulation") (emphasis added); *Diaz–Zanatta v. Holder*, 558 F.3d 450, 455 (6th Cir. 2009) (holding that "the record must reveal that the [applicant] *actually* assisted or otherwise participated in the persecution of another") (emphasis in original); *Gao v. U.S. Attorney Gen.*, 500 F.3d 93, 100 (2d Cir. 2007) (finding the evidence in that case insufficient "to trigger the persecutor bar without evidence indicating that Gao *actually* assisted in an identified act of persecution") (emphasis in original); *Singh v. Gonzales*, 417 F.3d 736, 740 (7th Cir. 2005) ("for the statutory bars contained in ... [the withholding and asylum statutes] to apply, the record must reveal that the alien *actually* assisted or otherwise participated in the persecution") (emphasis in original); *Budiono v. Lynch*, 837 F.3d 1042, 1048 (9th Cir. 2016) (explaining that in *Kumar v. Holder*, 728 F.3d 993 (9th Cir. 2013), the Court was "[f]aced with ... evidentiary gaps," and "did not hold—as the government would have us do here—that the persecutor bar should apply because the applicant failed" to rebut "the circumstantial evidence suggesting that he *might have* assisted in persecution) (emphasis added); *but see Matter of M-B-C-*, 27 I&N Dec. 31, 38 (BIA 2017) (finding that the "evidence presented [was] sufficient to indicate that the respondent *may have* assisted or otherwise participated in persecution and that his incredible testimony [was] insufficient" to prove otherwise).

In *Diaz–Zanatta*, the government argued that evidence that (1) "Diaz-Zanatta collected intelligence information and provided that information to her supervisors" in the Peruvian military, and (2) that "elements of the Peruvian military ... engaged in persecution," was sufficient to *indicate* that she *may have* assisted or participated in persecution such that the bar applied. *Diaz–*

Zanatta, 558 F.3d at 458. However, the Sixth Circuit explicitly rejected the government's argument explaining that absent "evidence linking Diaz-Zanatta's information gathering to persecution," it could not find "that she '*actually* assisted or otherwise participated in ... persecution.'" *See id.* at 458. (emphasis in original). The Court reasoned that "mere employment in the Peruvian military intelligence community does not permit the conclusion that ... she assisted or otherwise participated in any persecution." *Id.* at 459. The Court stated that "under [the IJ's] reasoning, if [the applicant] had collected intelligence solely on teachers in Peru, and no one but lumberjacks had been persecuted by the military, [the applicant] would nonetheless have assisted or participated in persecution." *Id.* Rejecting this flawed analysis, the Court held that "the record [must] demonstrate[] some *actual* connection between ... [the applicant's] actions and the persecutions in which she is alleged to have assisted" and "the IJ must determine from the evidence in the record that ... [the applicant] knew that the information she supplied ... was being used to persecute." *Id.* at 459-60 (emphasis added).

Similarly, the Second Circuit rejected an almost identical version of the argument advanced by the government in *Diaz–Zanatta* cautioning against "permitting generalities or attenuated links to constitute 'assistance.'" *See Gao v. U.S. Attorney Gen.*, 500 F.3d 93, 98 (2d Cir. 2007). The Court in *Gao* likewise held that "the record in this case does not disclose any *actual* act of persecution in which Gao allegedly assisted." *See id.* (emphasis added). As such, the Court rebuffed the government's argument that evidence that Gao was an administrator within the Culture Management Bureau (an agency providing information to the Chinese government that "*could*" lead to the arrest of individuals for political reasons) was sufficient to find that the persecutor bar *may apply*. *Id.* at 95-100 (emphasis added). The Court states that "the mere fact that Gao *may be* associated with an enterprise that engages in persecution is insufficient by itself

to trigger the effects of the persecutor bar." *Id.* at 99 (emphasis added). Rather, the Court states that "[b]efore we can *determine* whether Gao's conduct 'contributed directly' to persecution..., the record must first reveal an identifiable act of persecution," *id.* at 100-101 (emphasis added), in which "Gao *actually* assisted." *Id.* (emphasis in original). Thus the court concludes that "the act of issuing a report that *could potentially* be used to arrest an individual is insufficient to constitute a 'direct link' to persecution." *Id.* at 102 (emphasis added).

The holdings of *Diaz-Zanatta* and *Gao* confirm that the plain text of the persecutor bar stands in an irreconcilable tension with the recent holding of the Board in *Matter of M-B-C-*, 27 I&N Dec. 31, 38 (BIA 2017). There the Board found that the "evidence ...indicate[d] that the respondent *may have* assisted or otherwise participated in persecution," coupled with his testimony found to be not credible, was sufficient to apply the bar. *Id.* The evidence the Board relied upon showed that the respondent served in the military during the Bosnian War throughout a time and in a location where persecution on account of religion was occurring. *Id.* at 34. However, there was no evidence that the respondent was personally involved in the persecution. *Id.* Without any analysis of congressional intent, the Board read 8 C.F.R. § 1240.8(d) to mean that even "a showing less than the preponderance of the evidence standard" is sufficient to determine that the *bar* "may apply." *Id.* at 37. Then, taking that flawed analysis one step further, the Board concludes that "the evidence presented [was] sufficient to indicates that the *respondent may have assisted or otherwise participated* in ... persecution," which permitted the IJ to switch the burden, and actually apply the bar. *Id.* at 38 (emphasis added). At no point does the BIA claim to have *determined* the applicant *assisted or participated in persecution*; a simple possibility of that fact was found sufficient to apply the bar. *See id.*

The problem, however, with *M-B-C-* is that its decontextualized reading of 8 C.F.R. § 1240.8(d) nullifies the statutes' mandate that the Attorney General *decide* or *determine* that the applicant assisted or otherwise participated in persecution. *See* 8 U.S.C. §§ 1231(b)(3)(B)(i) and 1158(b)(1)(B)(i). Under the interpretation offered by *M-B-C-*, the IJ need no longer *determine* the applicant assisted in persecution; under *M-B-C-* it is sufficient for the IJ to simply find that the applicant *might have* assisted in persecution to apply the bar. However, that result cannot be squared with the statute and thus must be rejected.[14] Additionally, that result cannot be squared with numerous decisions from both the Board and courts of appeals holding that evidence consisting of membership in a group which engages in persecution alone is not sufficient to apply the bar. *See supra* at pages 9-10.

Amici maintain that any interpretation of 8 C.F.R. § 1240.8(d) in the context of the persecutor bar that would allow for a person facing a clear probability of persecution in her home country to be returned to that country on mere speculation that the bar *might apply* would be

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[14] To *amici's* knowledge, the Board has never explicitly decided whether the generic burden-shifting scheme of 8 C.F.R. § 1240.8(d) must be applied to the persecutor bar, it has simply assumed this. Thus, it is an open question for the Board to address.

The regulations related to the grounds of mandatory denial specific to asylum applications filed after April 1, 1997, including the persecutor bar, are silent on burdens of proof. *Compare* 8 C.F.R. § 1208.13(c)(1) (making no reference to burdens of proof related to grounds of denial for applications filed after April 1, 1997) *with* 8 C.F.R. § 1208.13(c)(2) (stating for applications filed before April 1, 1997, that "[i]f the evidence indicates that one of the above grounds [of denial] *apply* to the applicant," not *may apply*, then she "shall have the burden"). While the Board and a number of courts have assumed the generic regulatory provision of 8 C.F.R. § 1240.8(d) apply to applications filed after April, 1, 1997, other courts have at least questioned whether the "may apply" language of the regulation is consistent with the statute. *See Pastora v. Holder*, 737 F.3d 902, 906, FN 5 (4th Cir. 2013) (citing *Diaz–Zanatta v. Holder*, 558 F.3d 450, 455 (6th Cir. 2009); *Gao*, 500 F.3d at 103; *Singh v. Gonzales*, 417 F.3d 736, 740 (7th Cir. 2005).

Moreover, the fact that the text of the generic regulation only applies to "relief," and withholding of removal is not "relief," casts doubt on the applicability of 1240.8(d) to withholding of removal. *See Ramirez-Mejia v. Lynch*, 794 F.3d 485, 489 (5th Cir. 2015) (recognizing that withholding of removal is a form of protection, not "relief"); 64 Fed. Reg. 8478 (providing that individuals with a reasonable fear who would otherwise be subject to 8 U.S.C. § 1231(a)(5)'s bar to "all relief under [the] Act," are still entitled to seek withholding of removal).

Instead, the regulation specific to withholding states that "[i]f the evidence indicates the *applicability* of one or more of the grounds for denial," not simply that a bar *may apply*, then "the applicant shall have the burden" to prove otherwise. *See* 8 C.F.R. § 1208.16(d)(2) (emphasis added).

inconsistent with the statute and our international law obligations. *See Pastora v. Holder*, 737 F.3d 902, 906, FN 5 (4th Cir. 2013); *Diaz–Zanatta v. Holder,* 558 F.3d 450, 455 (6th Cir. 2009); *Gao v. U.S. Attorney Gen.*, 500 F.3d 93, 100 (2d Cir. 2007); *Singh v. Gonzales,* 417 F.3d 736, 740 (7th Cir. 2005); *see also* BIA Amici Br. Int'l Law Scholars at p. 14.[15]

III. CONCLUSION

In sum, in cases involving the persecutor bar, *amici* submit that Congress intended the inquiry should proceed as follows: (1) the IJ should first determine whether the applicant has established eligibility for asylum or withholding of removal; (2) the IJ should then decide whether DHS has submitted sufficient evidence to sustain by a preponderance of the evidence the above four substantive elements related to assistance or participation in persecution such that the bar *may apply* to the applicant; (3) then the applicant must be given fair notice and opportunity to demonstrate that DHS has not in fact met its burden related to the above four-part test for assistance or participation in persecution, or else the burden shifts to the applicant to demonstrate by a preponderance of the evidence that such assistance was the result of duress; and (4) then the IJ can determine whether the bar should *actually* apply to the applicant.

This structured and sequenced inquiry ensures a consistent and fair evaluation of the evidence with appropriate burdens of proof, and sufficient procedural safeguards consistent with the statute and due process. It will also avoid a scenario where an applicant is forced to prove a negative or otherwise explain in the first instance (*i.e.*, before the IJ has made an initial

[15] In *Matter of A-H-*, the Attorney General provided some support in dicta for a *prima facie* burden in the persecutor bar context; however, the AG ultimately resolved the question on other grounds. *See Matter of A-H-*, 23 I&N Dec. 774, 786 (A.G. 2005) (explaining in dicta that "[a]ssuming INS ... offer[ed] sufficient *prima facie evidence* to indicate that respondent '...assisted, or otherwise participated in' the persecution of persons ..., the burden fell on respondent to disprove that he did so by a preponderance of the evidence.") (emphasis added).

determination that the persecutor bar may apply) why his or her conduct should be excused due to duress.

Dated: July 10, 2017

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PROOF OF SERVICE

I, Charles Shane Ellison, certify that on July 10, 2017, I caused three copies of the foregoing request to file amicus brief and proposed brief to be delivered to the Board of Immigration Appeals at the following address:

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