No. 21-60314

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

DANIEL GIRMAI NEGUSIE,
Petitioner,

v.

MERRICK GARLAND,
U.S. ATTORNEY GENERAL,
Respondent.

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

BRIEF OF *AMICUS CURIAE* AMERICAN IMMIGRATION LAWYERS ASSOCIATION FOR PETITIONER

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CERTIFICATE OF INTERESTED PARTIES

(1) Case number 20-60314, *Negusie v. Garland*;

(2) The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of the Court may evaluate possible disqualification or recusal.

(3) The membership-based, immigration legal service organization American Immigration Lawyers Association (AILA) has an interest in the outcome of the case as *amicus curiae*. Amicus AILA does not have a parent corporation nor is it owned in whole or in part by any publicly held corporation.

(4) Attorneys and law firms / institutions representing the *amicus* are:
- Elissa Steglich, University of Texas School of Law
- Benjamin Casper Sanchez, James H. Binger Center for New Americans, University of Minnesota Law School
- Charles Shane Ellison, Immigrant Rights Clinic, Duke University School of Law

(5) The following (parties and counsel) have an interest in the outcome of the case:
- Daniel Girmai Negusie
- Hiroko Kusuda, Loyola University New Orleans College of Law, Law Clinic and Center for Social Justice
- John Etter

- Merrick B. Garland, U.S. Attorney General

- Paul Franklin Stone
- Office of Immigration Litigation, U.S. Department of Justice

DATED: August 3, 2021

/s/ Elissa Steglich
Attorney of Record for Amicus Curiae

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STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae American Immigration Lawyers Association ("AILA") has subject-matter expertise in the areas of immigration law surrounding asylum. AILA members 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"). AILA members also regularly conduct trainings for attorneys representing asylum-seekers, author practice advisories, and speak nationally regarding asylum-related matters.

AILA submitted amicus briefs in this case when it was before the U.S. Supreme Court in *Negusie v. Holder*, 555 U.S. 511 (2009), on remand to the Board of Immigration Appeals in *Matter of Negusie*, 27 I&N Dec. 347 (BIA 2018), and most recently before the Attorney General in *Matter of Negusie*, 28 I&N Dec. 120 (A.G. 2020). Informed by its extensive experience representing and advocating on behalf of individuals seeking withholding of removal and asylum, AILA respectfully submits this brief to provide the Court perspective on the issues presented.

[1] No party's counsel has authored this brief either in whole or in part; no party or its counsel contributed money that was intended to fund the preparation or submission of the brief; and no person other than the *amicus curiae* or its members has contributed money intended to fund the preparation or submission of the brief. Fed. R. App. P. 29(a)(4)(E). Moreover, Petitioner and Respondent consent to the filing of this brief. Fed. R. App. P. 20(a)(2).

INTRODUCTION AND SUMMARY OF ARGUMENT

In *Matter of Negusie*, 28 I&N Dec. 120 (A.G. 2020), in addition to rejecting a duress exception, the Attorney General disregarded the statutory and regulatory frameworks—along with decades of agency and court precedent—to hold that (1) the U.S. Department of Homeland Security ("DHS") bears no burden in relation to the persecutor bar, (2) the bar can be applied where "the evidence . . . raise[s] the *possibility*" of participation in persecution and the applicant cannot prove "by a preponderance of the evidence that [the bar] does not" apply, and (3) a "particularized showing" of each element of the persecutor bar is not required to demonstrate the bar's "*potential* applicability." *Id.* at 152-155 (emphasis added).

In contrast, *amicus curiae* respectfully contends that before an Immigration Judge ("IJ") can determine the bar applies, there must be a particularized showing that: (1) an identifiable act of harm occurred that is sufficiently severe to constitute persecution; (2) a nexus exists 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. This initial particularized showing is DHS's burden.

Only where the record contains a preponderance of evidence to support the above four findings does the statute and regulations allow an IJ to determine the persecutor bar applies. 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 exception by a preponderance of the evidence. If the applicant cannot meet that burden, then and only then can the IJ *actually* bar the applicant from asylum and withholding.

Amicus endorses the arguments raised in the briefs by *Amici Curiae* United Nations High Commissioner for Refugees (UNHCR), International Refugee Law Scholars, Non-Profit Organizations & Law School Clinics, and Retired Immigration Judges and Former Board of Immigration Appeals Members, in support of a duress exception and the contours of that exception.

ARGUMENT

I. PRIOR TO ASSESSING THE APPLICABILITY OF A DURESS EXCEPTION, IMMIGRATION JUDGES MUST FIRST ASSESS WHETHER THE RECORD CONTAINS SUFFICIENT EVIDENCE TO SUPPORT PARTICULARIZED FINDINGS ON ALL FOUR ELEMENTS OF THE PERSECUTOR BAR.

Absent sufficient evidence in the record to support particularized findings on all four elements of the persecutor bar, the bar cannot apply. The Immigration and

Nationality Act ("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).

That is, the statute requires an IJ to specifically find: (1) an identifiable act of harm sufficiently severe to constitute persecution; (2) that there is a nexus between that 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 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. This particularized showing is derived from the statute, as recognized by myriad decisions from the Board of Immigration Appeals ("BIA") and the U.S. courts of appeals. *See e.g.*, *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); *see* Charles Shane Ellison, *Defending Refugees: A Case for Protective Procedural Safeguards in the Persecutor Bar Analysis*, 33 GEO. IMMIGR. L.J. 213, 240-48 (2019) ("*Defending Refugees*").

A. Harm 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); *Butt v. Keisler*, 506 F.3d 86, 90 (1st Cir. 2007) (explaining that the harm must have reached a "fairly high threshold of seriousness") (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*, 555 U.S. at 522. Without a showing of sufficiently severe harm, the persecutor bar cannot possibly apply.

B. Nexus To A Protected Characteristic

Likewise, 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) (same); 8 U.S.C. § 1101(a)(42)(A) (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" protected ground) (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*, 555 U.S. at 522); *Matter of J.M. Alvarado*, 27 I&N Dec. 27, 29-30 (BIA 2017) (same).

If the record fails to establish a nexus between the sufficiently severe harm identified in step one above and the victim's protected characteristic, then there is no possibility that an applicant might 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.").

C. Genuine Assistance Or Participation

Once it has been determined that an identifiable act of persecution has occurred, the analysis then proceeds 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).

An applicant's "assistance" or "participation" must be active, purposeful, and material to the persecutory act, and *not* tangential, indirect, or otherwise inconsequential. *See e.g., U.S. v. Vasquez*, 1 F.4th 355, 361 (5th Cir. 2021) (noting 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") (citing *Chen v. U.S. Attorney Gen*., 513 F.3d 1255, 1259 (11th Cir. 2008)); *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."); *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" to apply 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 v. Gonzales*, 417 F.3d 736, 739-740 (7th Cir. 2005) (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"); *see Hernandez v. Reno*, 258 F.3d 806, 812, 814 (8th Cir. 2001) (same); *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").[2]

[2] *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"

D. 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); *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."); *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).

* * *

If the record fails to demonstrate any of the above necessary components of the persecutor bar, then consistent with the "plain language of the statute," the Attorney General ("AG") cannot *determine* that the persecutor bar applies. 8 U. S. C. §§ 1231(b)(3)(B)(i); 1158(b)(2)(A)(i); *Ali v. Lynch*, 814 F.3d 306, 310 (5th Cir.

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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").

2016) (citing *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984)). A particularized finding on each element is required; the AG's pronouncements to the contrary in *Matter of Negusie* simply cannot be reconciled with the statute. *Cf.* 28 I&N Dec. at 154, n 27.

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 EXCEPTION BEFORE THE BAR IS ACTUALLY APPLIED.

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

A. The Framework For Applying The Persecutor Bar Must Be More Protective—Not Less—Than The Procedures Imposed By Separate Statutory Bars Carrying Less Grave Consequences.

The minimum procedural safeguards for applying the persecutor bar are revealed through analysis of the frameworks the BIA has required in the firm

resettlement bar and frivolous asylum bar contexts. *See Matter of A-G-G-*, 25 I&N Dec. 486, 501 (BIA 2011); *Matter of Y-L-*, 24 I&N Dec. 151, 155-60 (BIA 2007). Given the relative gravity of these three bars—the persecutor bar being by far the most serious—the agency cannot reasonably 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'"); *accord Kisor v. Wilkie*, 139 S.Ct. 2400, 2414 (2019).

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.

Therefore, *A-G-G-* and *Y-L-* 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 (emphasis added). 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 his burden on any exception to the firm resettlement

bar); *Matter of Y-L-*, 24 I&N Dec. at 157 ("plausible explanations offered by the [applicant] must be considered in the ultimate determination whether the preponderance of the evidence supports a frivolousness finding"); *Defending Refugees*, *supra* at 248-58.

It makes no sense to think Congress would intend to bar mandatory withholding 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. As such, (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 8 U.S.C. § 1101(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 n.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 [1101(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 [applicant] 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 protection, 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 [the applicant's] 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 [1101(a)(42)(A)]."

To meet that burden, section 1158(b)(1)(B)(i) clearly provides 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 a negative: i.e., that the persecutor bar *does not apply*. *Id.*; *Matter of Acosta*, 19 I&N Dec. 211, 219 n.4 (BIA 1985).[3]

Several decisions by the U.S. courts of appeals and the BIA confirm that Congress has placed the initial burden related to the persecutor bar for an asylum or

[3] In this case, the AG only partially quotes from 1158(b)(1)(B)(i), omitting the sentence that states explicitly what an applicant must show to establish she is a refugee within the meaning of section 1101(a)(42)(A). *See* 28 I&N Dec. at 153. As noted above, the statue's burden of proof provision does not require an applicant to prove the persecutor bar does not apply. Additionally, the AG's passing reference to the generic burden of proof provision of 8 U.S.C. § 1229a(c)(4)(A) is unavailing. *Cf. Pereida v. Wilkinson*, 141 S.Ct. 754, 760 (2021). The more specific burden of proof provisions related to asylum and withholding—which differ markedly from the language of the generic provision within section 1229a(c)(4)(A)—must be given effect. *Yates v. United States*, 135 S. Ct. 1074, 1085 (2015) (plurality opinion) ("We resist a reading of [a statutory provision] that would render superfluous an entire provision passed in proximity as part of the same Act.").

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");[4] *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); *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* 2003 UNHCR Background

[4] While *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, that regulation does not apply in the asylum or withholding context. Moreover, *Alvarado* adopts *Castañeda–Castillo,* which correctly placed an initial burden on the government in the asylum and withholding contexts. *See* 488 F.3d at 21. *Amicus* contends that the withholding and asylum statutes—when considered in light of the Act as a whole, the frameworks of *A-G-G- and Y-L-*, and considered in context with other sources of congressional intent and international law—require DHS to bear the initial burden. *Alvarado's* burden allocation in the NACARA context is inapposite.

Note on Art 1F, paras 105-106, http://www.refworld.org/docid/3f5857d24.html; 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."); Oxford Handbook of International Refugee Law, *Gilbert & Bentajou*, Cha. 39, at 719 (2021) ("[T]he burden is on the State to present evidence to exclude someone who would otherwise qualify as a refugee").

2. Nothing Less Than A Preponderance Of The Evidence Can Lawfully Trigger 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 frivolous asylum 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 must 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 alongside the neighboring bars to asylum and withholding. *See* 8 U.S.C. §§ 1231(b)(3)(B) and 1158(b)(2)(A); *McMullen v. INS*, 788 F.2d 591, 598 n.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 such 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)).

Lastly, a preponderance of the evidence standard in the persecutor bar context is consistent with international law standards. *See 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) (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 v. Secretary of State for the Home Department* [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).

While there is variance in how the courts have understood the procedural safeguards 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"); *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).

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." 24 I&N Dec. 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.* at 159-60. 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.* at 157. Given the disparate gravity of a frivolousness finding (that does not bar eligibility to withholding), and the persecutor bar (which does), the Agency cannot reasonably adopt procedural safeguards here less protective than those provided by *Y-L-*.

B. The Generic Burden Regulation, 8 CFR § 1240.8(d), Cannot Override the Statutory Protections Congress Provided By Barring Withholding and Asylum Based Upon Mere Speculation That An Applicant *May Have* Assisted or Participated in Persecution.

The statutory language of 8 U.S.C. §§ 1231(b)(3)(B)(i) and 1158(b)(1)(B)(i) plainly requires 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. *See Defending Refugees*, *supra* at 231-238.

The Second, Sixth, Seventh and Ninth Circuits have explicitly rejected arguments that evidence of *possible* assistance in persecution is sufficient to apply the bar consistent with the statute, and the Fourth Circuit has openly questioned such arguments. *See Pastora v. Holder*, 737 F.3d 902, 906 n.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*, 417 F.3d at 740 ("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 *Matter of Negusie*, the AG adopted a decontextualized and incorrect reading of 8 C.F.R. § 1240.8(d) that is irreconcilable with the statute's 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 in *Negusie*, the IJ need no longer *determine* that the applicant assisted in persecution; rather, it is sufficient for the IJ to simply find that

the applicant *might have possibly* assisted in persecution to apply the bar. However, that result cannot be squared with the statute and thus must be rejected.

Moreover, the AG does not even analyze the regulations specific to withholding and asylum. *See* 8 C.F.R. § 1208.13(c)(1); 8 C.F.R. § 1208.16(d)(2). Those more specific regulations do not contemplate application of the bar merely where the evidence indicates that a bar *may apply*. *Compare* 8 C.F.R. § 1208.13(c)(1) (stating "[f]or applications filed after April 1, 1997, an applicant shall not qualify for *asylum* if [the persecutor bar] *applies* to the applicant") (emphasis added) *with* 8 C.F.R. § 1240.8(d) (using the "*may apply*" language in regards to generic "application[s] for relief"). While the AG appears to have simply assumed that generic regulatory provision of 8 C.F.R. § 1240.8(d) governs asylum and withholding claims, several courts have either cast doubt upon or explicitly rejected this approach. *See Pastora v. Holder*, 737 F.3d 902, 906 n.5 (4th Cir. 2013) (citing *Diaz–Zanatta v. Holder,* 558 F.3d 450, 455 (6th Cir. 2009)); *Gao,* 500 F.3d at 103; *Singh*, 417 F.3d at 740.

Additionally, the text of the generic-relief regulation only applies to "application[s] for relief," and this Court has held unequivocally that withholding of removal is not "relief." *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 contemplates application of the persecutor bar only where "the evidence indicates the *applicability* of . . . [that] ground[] for denial." *See* 8 C.F.R. § 1208.16(d)(2) (emphasis added).

The "generic-relief regulation was only intended to apply to applications for relief that do not otherwise have a more specific regulatory regime." *See Defending Refugees*, *supra* at 235. Superimposing "the generic-relief regulation (which uses the words "may apply") onto the asylum/with-holding-specific regulations (which do not use the words "may apply") render[s] superfluous the precise language selected in the more specific asylum/withholding regulations." *Id.* As such, the AG's use and interpretation of section 1240.8(d) here is simply wrong.[5] *Black & Decker Corp. v. Comm'r of Internal Revenue*, 986 F.2d 60, 65 (4th Cir. 1993) ("Regulations, like statutes, are interpreted according to canons of construction. Chief among these" is the rule against superfluousness.); *Kisor v. Wilkie*, 139 S.Ct. 2400, 2414 (2019) ("First and foremost, a court should not afford *Auer* deference unless the regulation is genuinely ambiguous.")

[5] The recent decision *Matter of O-R-E-*, 28 I&N Dec. 330, 345 (BIA 2021), suffers from the same flaw.

Matter of Negusie allows for a person facing a clear probability of persecution in the applicant's home country to be returned to that country on mere speculation that the persecutor bar *might possibly apply*. That result is utterly inconsistent with the statute, the relevant regulations, and our international legal obligations.

III. CONCLUSION

In sum, in cases involving the persecutor bar, *amicus* submits 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 applies 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 applicant should *actually* be barred from asylum and withholding protection.

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

Dated: August 3, 2021

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CERTIFICATE OF SERVICE

I hereby certify that on August 3, 2021, I electronically filed the foregoing, Brief of *Amicus Curiae* in Support of Petitioner, with the Clerk of the Court for the U.S. Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system. I further certify that the following counsel of record for Petitioner and Respondent in this case are registered CM/ECF users and will therefore be served by the appellate CM/ECF system:

DATED: August 3, 2021

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CERTIFICATE OF COMPLIANCE

This brief complies with Federal Rule of Appellate Procedure 29(a)(5) and 32(a)(7)(B) as it contains 6,315 words, excluding those parts exempted by Federal Rule of Appellate Procedure 32(f). Additionally, this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface in Microsoft Word, using Times New Roman in 14-point font.

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