No. 23-9609

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

O.C.V., et al.,
Petitioners,

v.

MERRICK GARLAND, Attorney General,
Respondent.

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

BRIEF OF *AMICI CURIAE* FORMER IMMIGRATION JUDGES AND FORMER MEMBERS OF THE BOARD OF IMMIGRATION APPEALS IN SUPPORT OF PETITIONERS

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STATEMENT OF IDENTIFICATION

Amici are former immigration judges (IJs) and former members of the Board of Immigration Appeals (BIA).[1] *Amici* have an interest in this case based on their substantial years of service administering the immigration laws of the United States. Collectively, *amici* presided over thousands of immigration proceedings, including thousands of asylum cases. From this experience, *amici* are well-positioned to inform this Court about the practical considerations involved in family-based social group asylum claims. The BIA's ruling will lead to a significant change in how these claims are adjudicated. This brief seeks to explain how this change will undermine the uniformity and consistency of immigration proceedings nationwide.

Amici files this brief pursuant to Rule 29(a) of the Federal Rules of Appellate Procedure. Petitioners have consented to the filing of this brief. The government takes no position on the filing of this brief.

Amici's names, former positions, and years of service are:

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[1] No party's counsel authored this brief in whole or in part. No party or its counsel contributed financial support intended to fund the preparation or submission of this brief. No individual or organization contributed financial support intended to fund the preparation or submission of this brief.

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- Hon. Jeffrey S. Chase, Immigration Judge, New York, 1995-2007
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- Hon. Joan V. Churchill, Immigration Judge, Washington, D.C./ Arlington, VA, 1980-2005
- Hon. Bruce J. Einhorn, Immigration Judge, Los Angeles, 1990-2007
- Hon. Cecelia M. Espenoza, Appellate Immigration Judge, Board of Immigration Appeals, 2000-2003
- Hon. Noel A. Ferris, Immigration Judge, New York, 1994-2013
- Hon. James R. Fujimoto, Immigration Judge, Chicago, 1990-2019
- Hon. Annie S. Garcy, Immigration Judge, Newark, NJ, and Philadelphia, 1990-2023
- Hon. Alberto E. Gonzalez, Immigration Judge, San Francisco, 1995-2005
- Hon. John F. Gossart, Jr., Immigration Judge, Baltimore, 1982-2013
- Hon. Paul Grussendorf, Immigration Judge, Philadelphia and San Francisco, 1997-2004
- Hon. Miriam Hayward, Immigration Judge, San Francisco, 1997-2018
- Hon Sandy Hom, Immigration Judge, New York, 1993-2018

- Hon. Charles M. Honeyman, Immigration Judge, New York and Philadelphia, 1995-2020
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- Hon. Elizabeth A. Lamb, Immigration Judge, New York, 1995-2018
- Hon. Donn L. Livingston, Immigration Judge, Denver, New York, 1995-2018
- Hon. Dana Leigh Marks, Immigration Judge, San Francisco, 1987-2021
- Hon. Margaret McManus, Immigration Judge, New York, 1991-2018
- Hon. Steven Morley, Immigration Judge, Philadelphia, 2010-2022
- Hon. Charles Pazar, Immigration Judge, Memphis, 1998-2017
- Hon. Laura L. Ramirez, Immigration Judge, San Francisco, 1997-2018
- Hon. John W. Richardson, Immigration Judge, Phoenix, 1990-2018

- Hon. Lory D. Rosenberg, Appellate Immigration Judge, Board of Immigration Appeals, 1995-2002
- Hon. Susan G. Roy, Immigration Judge, Newark, 2008-2010
- Hon. Paul W. Schmidt, Chairperson and Appellate Immigration Judge, Board of Immigration Appeals, 1995-2003; Immigration Judge, Arlington, VA, 2003-2016
- Hon. Patricia M. B. Sheppard, Immigration Judge, Boston, 1993-2006
- Hon. Ilyce S. Shugall, Immigration Judge, San Francisco, 2017-2019
- Hon. Helen Sichel, Immigration Judge, New York, 1997-2020
- Hon. Tuê Phan-Quang, Immigration Judge, San Francisco, 1995-2012
- Hon. Robert D. Vinikoor, Immigration Judge, Chicago, 1984-2017
- Hon. Polly A. Webber, Immigration Judge, San Francisco, 1995-2016
- Hon. Mimi Yam, Immigration Judge, San Francisco, Houston, 1995-2016

INTRODUCTION

Requiring immigration judges to determine whether the "dominant" intent of a persecutor was personal animus against a family group will be difficult to implement and will result in inconsistent, convoluted, and non-uniform decisions. This Court should grant the petition and reverse the BIA's misguided creation of such a test. Section I of this brief discusses the history of the nexus standard in family-based asylum cases and how the BIA's decision in *Matter of M-R-M-S-* represents a significant change in how family-based asylum cases have been adjudicated. In Sections II–III, *amici* draw on their experience and explain the practical effects of requiring a "dominance" test for family-based asylum claims.

ARGUMENT

I. The BIA's holding in *Matter of M-R-M-S-* represents a significant change in the nexus standard in family-based asylum cases.

Under the Immigration and Nationality Act (INA), a noncitizen who seeks asylum in the United States due to persecution in their country of origin must show that they are a "refugee" who is "unable or unwilling" to return to their native country "because of persecution or a well-founded fear of persecution *on account of* race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1101(a)(42) (emphasis added). To obtain relief based on "membership in a particular

social group," an applicant must establish that the group is "(1) composed of members who share a common immutable characteristic, (2) defined with particularity, and (3) socially distinct within the society in question." *Matter of M-E-V-G-*, 26 I & N Dec. 227, 237 (BIA 2014); *see Orellana-Recinos v. Garland*, 993 F.3d 851, 855 (10th Cir. 2021). The BIA has confirmed that "family ties may meet the requirements of a particular social group depending on the facts and circumstances in the case." *Matter of L-E-A-*, 27 I. & N. Dec. 40, 42 (BIA 2017) (*L-E-A- I*) (subsequent history omitted).

Asylum cases, including those where the particular social group is based on family group, often feature multiple, overlapping reasons for the inflicted harm. In 2005, the REAL ID Act created a standard for determining whether persecution under § 1101(a)(42) is "on account of" a protected category when that persecution occurs based on mixed motives: "[a]n asylum 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." 8 U.S.C. § 1158(b)(1)(B)(i) (emphasis added). The "one central reason" test recognizes that persecution may be attributable to a number of underlying reasons. *See Dallakoti v. Holder*, 619 F.3d 1264, 1268 (10th Cir. 2010) (considering a "mixed-motive" claim). Showing that membership in a protected category was central and

important to the harm an applicant endured allows for the grant of asylum if other requirements are met.

The BIA first interpreted § 1158(b)(1)(B)(i) of the REAL ID Act in *Matter of J-B-N- and S-M-*, 24 I. & N. Dec. 208, 213 (BIA 2007). The BIA concluded that the "one central reason" standard requires asylum applicants to show a "nexus" between their persecution and their articulated protected ground:

> [T]he protected ground cannot play a minor role in the alien's past mistreatment or fears of future mistreatment. That is, it cannot be incidental, tangential, superficial, or subordinate to another reason for harm. Rather, it must be a central reason for persecuting the respondent.

Id. at 214. Despite stating that a central reason must not be "subordinate" to another reason for harm, the BIA also made clear that a central reason does not need to be "dominant," because "classifying one motive as 'dominant' or 'central'… renders all other motives, regardless of their significance to the case, secondary and therefore ultimately irrelevant." *Id.* at 212. Doing so would be contrary to the language chosen by Congress, which specifically required applicants to prove *a* central reason rather than *the* central reason for harm. *Id.*

Courts have noted the discrepancy between the BIA's rejection in *Matter of J-B-N-* of a "dominance" test while also requiring that a central

reason not be "subordinate" to another. *See, e.g.*, *Ndayshimiye v. Att'y Gen. of U.S.*, 557 F.3d 124, 130 (3d Cir. 2009) (rejecting a "subordinance" test as a mirror image of an unacceptable "dominance" test). Perhaps because of this recognition, in later citations of *Matter of J-B-N-*, the BIA omitted the word "subordinate" from its recitation of the test. *See, e.g.*, *L-E-A- I*, 27 I. & N. Dec. at 44 ("The protected trait, in this case membership in the respondent's father's family, 'cannot play a minor role'—that is, 'it cannot be incidental [or] tangential … to another reason for harm'") (quoting *Matter of J-B-N-*, 24 I. & N. Dec. at 214). The BIA presumably elided over the word "subordinate" because of its clear conflict with its statement that a dominance test is not appropriate. As the BIA said in *J-B-N-*, requiring applicants to prove a protected trait's dominance would frustrate the purpose of a mixed motive standard, which is to take into account all the circumstances leading to harm. *See* 24 I. & N. Dec. at 212.

Below, in *Matter of M-R-M-S-*, the BIA deviated from its prior holdings by not only requiring family-based asylum applicants to prove that their family status was the dominant reason for their persecution, but also by promulgating an entirely new "animus" requirement for asylum applicants. 28 I. & N. Dec. 757, 759 (BIA 2023). The BIA held that persecution against a family group is incidental or subordinate when there is an underlying

motivation for targeting the family. *Id. at 762*. In other words, "an applicant must demonstrate that the persecutor's motive for the harm is a desire to overcome the protected characteristic of the family or otherwise based on animus against the family." *Id.* at 760. Without a showing of animus, family-based claims of persecution may be considered subordinate to another goal, such as financial benefit, and will not qualify as "one central reason for harm." *Id.* at 762. That heightened nexus hurdle seems to be unique to applicants whose particular social group is based on family ties and does not extend to other circumstances.

In short, asylum applicants whose particular social group is based on family ties must now prove that animosity towards the family, specifically, is the dominant reason for persecution, overriding any other underlying motivation for persecution. *See Matter of M-R-M-S-*, 28 I. & N. Dec. at 762. Despite the BIA's previous resistance to a dominance test on practical and statutory grounds, the BIA has now installed a de facto dominance test that only applies to family-based asylum claims. That standard is unworkable, and it places IJs administering asylum laws in a fraught position.

II. Requiring IJs to determine a persecutor's subjective, dominant intent sets judges on a wild goose chase that will damage uniformity and efficiency.

IJs presiding over asylum cases are faced with a comprehensive and complex inquiry. The new test articulated in *Matter of M-R-M-S* will make family-based adjudications less consistent in a number of ways.

IJs have the difficult task of probing the justifications for actions taken by persons who cannot be called into court. Persecutors seldom have a motive that is pure, singular, and clearly stated. *See Singh v. Mukasey*, 543 F.3d 1, 5 (1st Cir. 2008) ("In many cases … persecutors may have more than one motivation"); *Cruz v. Sessions*, 853 F.3d 122, 128 (4th Cir. 2017), *as amended* (Mar. 14, 2017) ("[M]ore than one central reason may, and often does, motivate a persecutor's actions."). Frequently, persecutors are not even known by name. *See Arita-Deras v. Wilkinson*, 990 F.3d 350, 358 (4th Cir. 2021); *see also Belkaniya v. Garland*, 2023 WL 5273784, at *2 (2d Cir. Aug. 16, 2023) (recognizing that the Second Circuit has "accepted testimony … as sufficiently detailed to make out a claim of past persecution without requiring the petitioner to identify their assailants"). Information about their mental state is difficult to obtain, to say the least, and judges must engage in a highly fact-intensive and contextual inquiry into the body of evidence to determine what reasoning influenced a persecutor's actions. *See*

Andrew Tae-Hyun Kim, *Rethinking Review Standards in Asylum,* 55 WILLIAM & MARY L. REV. 581, 584 (Nov. 2013).

Barriers in conducting this inquiry are common. In *amici's* experience, asylum-seekers frequently find it difficult to articulate exactly what happened to them and why; the circumstances they face are traumatic and complex, resisting simple narratives. Asylum applicants do not have the time or ability to gather evidence of their persecutor's motives before fleeing their home countries; indeed, persecutors may not tell their victims their reasons for persecution and may actually try to hide their motivation. Anjum Gupta, *Dead Silent: Heuristics, Silent Motives, and Asylum*, 48 COLUM. RTS. L. REV. 1, 25–26 (2016).

Because of these difficulties, judges must take the totality of the circumstances into account as they attempt to determine the likely reasons for a remote persecutor's actions. *See Korablina v. INS,* 158 F.3d 1038, 1044 (9th Cir. 1998). They must also attempt to do so impartially and consistently across their large caseload. Achieving consistency is a difficult balance that *amici* have experienced first-hand for combined decades. It is no easy task.

The nexus test aids IJs in this inquiry; instead of requiring judges to *rank* the possible motivations of an out-of-court actor, an immigration judge may stop at acknowledging that a protected ground was clearly *a central*

reason for the persecution, even when other motivations exist. In other words, a central reason is something that is *not* insignificant or tangential. *In re J-B-N & S-M*, 24 I. & N. Dec. 208, 214 (BIA 2007). There can be many such motivations in a single case, and those motivations frequently coincide, overlap, and influence each other. *See Alvarez Lagos v. Barr*, 927 F.3d 236, 250 (4th Cir. 2019) (noting that a central reason that is "intertwined" with others may still establish persecution). When analyzed under the proper "one central reason" standard, what might have seemed like a personal grudge can be understood as protected-ground persecution because of cultural or historical factors. Judges must approach these inquiries with a deep level of context and a broad view of the circumstances facing asylum applicants. Frequently, because subjective *intent* is difficult to discern, the *outcome* of harm against a certain applicant becomes much more instructive as to the type of persecution suffered. *See In Re Kasinga*, 21 I. & N. Dec. 357, 365 (BIA 1996) ("[S]ubjective 'punitive' or 'malignant' intent is not required for harm to constitute persecution.").

In the face of these practical difficulties, *Matter of M-R-M-S-* now requires IJs to ignore the broader context and determine, case by case, when family status is not only an influential, central reason for persecution—but *the* dominant motive for a persecutor's actions. *See* 28 I. & N. Dec. at 762.

Further, the motive must be rooted in subjective malice. *Id.* This is not a tenable standard. It is one thing for immigration judges to determine if a potential reason is *incidental or superficial*—when the logical chain connecting a certain harm to a protected ground is clearly thin or shaky. That standard fits within the "one central reason" requirement; it is possible and consistent for judges to ask if a protected ground was unimportant to the infliction or severity of harm. *See, e.g.*, *Ndayshimiye*, 557 F.3d at 130 (rejecting the "subordinance" requirement while upholding the BIA's standard that a motivation not be "incidental or tangential" to persecution). But *Matter of M-R-M-S-* goes further by asking IJs to weigh various possible subjective intentions and determine which is the most important. *See* 28 I. & N. Dec. at 762.[2]

Under this standard, the IJ's fact-intensive task will become highly theoretical and involve significant guesswork as the IJ decides if a persecutor who targets a family did so *mostly* based on animus or *mostly* for some other, underlying reason. These subjective inquiries are malleable and inconsistent.

[2] Indeed, the standard also seems to be in tension with some courts' holdings that personal grudges cannot supply the basis for asylum claims. *See, e.g.*, *Owusu v. Garland*, 91 F.4th 460, 463 (6th Cir. 2024); *Rodriguez Morales v. Garland*, 2022 WL 2517442, at *1 (8th Cir. July 7, 2022). The line between requiring an applicant to prove subjective malice but disallowing claims based on personal grudges is a fine one.

A judge's personal biases or beliefs are more likely to have influence on their determination of "dominant animus" as opposed to the more detached determination of whether a protected ground was a central reason for harm. *See* Gupta, *supra*, at 3 (arguing that when immigration judges must fill in unknown motives in asylum nexus cases, they use heuristics and other mental shortcuts that allow for biases to have a significant impact on their nexus analysis).

Further, in many cases, these motivations naturally overlap and reinforce each other. *See, e.g.*, *Hernandez-Avalos v. Lynch,* 784 F.3d 944, 950 (4th Cir. 2015) (noting that differentiating between a mother's familial relationship to her son and her control over his activities "draws a meaningless distinction under these facts"). An attempt to gain some benefit from a family can quickly lead to personal animus if a family resists. And personal animus against a family may lead a persecutor to target their assets or advantages in order to take revenge. The result of this new test will be inconsistent guesswork. IJs who have done their best to gather and evaluate elusive facts must then attempt to rank one equally plausible motive against another. They must do so without ever speaking to the person whose intentions they are discerning. The same case, set in front of multiple judges,

may result in different outcomes due to the subjective discernment required by *Matter of M-R-M-S-*.

This difficult task will also compound the high case backlog facing immigration judges. *See* Brief for Former Immigration Judges and Former Members of the Board of Immigration Appeals as *Amici Curiae* Supporting Neither Party, *Santos-Zacaria v. Garland*, No. 21-1436, 598 U.S. 411 (2023). In 2022, it was estimated that over 1,500,000 people were waiting for asylum hearings in the United States. Syracuse University, *TRAC Immigration, A Sober Assessment of the Growing U.S. Asylum Backlog* (Dec. 22, 2022), available at https://trac.syr.edu/reports/705/ (last accessed April 29, 2024). If IJs are forced to spend time discerning intent as well as outcome in asylum cases, dispositions will take longer, and the backlog may worsen.

Ultimately, *Matter of M-R-M-S* undermines the purpose of the nexus test, which is to show that a protected ground was at least a significant factor in the persecution. The dominance requirement essentially abrogates the viability of a mixed motive case. Genuine and qualified asylum seekers could erroneously lose out if a judge balances the scale to find the non-qualifying motive the dominant one, yet this is not what the law desires. The BIA has gone beyond the concept of nexus to install a dominance test for family-based asylum applicants, which burdens the task of immigration judges and

asks them to reach to assign subjective motives to distant actors who cannot explain their actions. The rule is simply not workable.

III. *Matter of M-R-M-S-* reduces fairness by requiring a different standard for family-group applicants and misunderstands the nature of asylum claims.

Matter of M-R-M-S- sets a new standard solely for applicants applying for asylum based on family group. This new standard is illogical as it applies to the practical realities of family-group claims, and it creates a requirement that is severely heightened for family-group applicants.

First, this distinction is not supported by the text of the relevant statute. Neither 8 U.S.C. § 1101(a)(42) nor § 1158(b)(1)(B)(i) makes any distinction as to social group as opposed to any other protected ground, and it makes no distinction as to family groups as opposed to any other social group. *Matter of M-R-M-S-*'s standard will overburden family-group asylum applicants and lead to inconsistent and unfair results.

Second, *Matter of M-R-M-S-*'s requirement that family-group applicants prove that a persecutor acted out of personal animus for the family—and that personal animus was the dominant reason for persecution—fundamentally misunderstands the nature of family-group persecution. In *amici*'s experience, there are frequently underlying reasons that a persecutor will target a certain family for harassment or assault. Pure,

unfounded family animosity is rare and not connected to the material realities of most asylum situations. Instead, family-group persecution often stems from an underlying motive to obtain property, usurp social or political power, or enact collective punishment. *See, e.g., Hernandez-Avalos v. Lynch,* 784 F.3d at 950. These underlying motives do not invalidate the existence of family persecution; instead, they *explain* the persecution an individual faces because of his family affiliation and inform a judge's analysis. As an inborn characteristic that cannot be changed, family remains a protected ground. *L-E-A- I*, 27 I. & N. Dec. at 42.

We point to an example of the proper application of the nexus standard. As noted by commentators, in one of the BIA's seminal asylum decisions, *Matter of Kasinga*, 21 I. & N. Dec. 357 (BIA 1996), the persecutor may have engaged in the genital mutilation of the asylum applicant based not on personal animus toward women, but based on a desire to uphold a flawed community moral standard. *See* National Immigration Project, "Practice Advisory: Navigating Family-Based Claims Following *Matter of M-R-M-S-*" (Dec. 21, 2023) at 3.

Family status claims should be no different. Surely, a persecutor who conducts a targeted campaign to harass, assault, and kill members of a family in order to gain property or obtain power does so with a personal benefit in

mind. Yet members of that family still face persecution on the basis of their family association. *Hernandez-Avalos,* 784 F.3d at 950. *Matter of M-R-M-S-*'s standard pretends that interrogating the reason for the persecution of someone's family suddenly means there is no family persecution in the first place. This places immigration judges in a difficult position: they must apply a different logic to family-based claims as opposed to all other asylum claims.

The BIA itself has inadvertently recognized the paradox of its position in the first case where it emphasized personal animosity in family-group persecution. In *L-E-A- I*, the BIA cited the Romanov family of Czar Nicholas II and Czarina Alexandra as the epitome of true family persecution, where "a persecutor is seeking to harm the family members because of an animus against the family itself." 27 I. & N. Dec. 40 at 44. Yet applying the reasoning in *Matter of M-R-M-S-* to those facts, the Romanov family could be denied asylum based on family status: the Romanovs were arguably not killed simply because someone had a personal grudge against them, but as a symbolic act of anti-monarchic violence. *See* Erin Blakemore, *Why Czar Nicholas II and the Romanovs Were Murdered*, HISTORY.COM (Mar. 8, 2024). Because the dominant underlying reason for the assassination of the Romanovs was symbolic and political, not to specifically hurt the Romanov family, it is possible to reason using the logic of *Matter of M-R-M-S-* that the

Romanovs were not targeted for their family membership. This is, of course, patently illogical and divorced from the reality of family-based persecution.

The inherent overlap of an underlying motivation combined with the resulting persecution of a protected group is understood inherently in other contexts, yet *Matter of M-R-M-S-* now requires judges to separate them purely for family groups. As a result, family-group asylum applicants will face an unduly heightened standard for obtaining asylum. They must go above and beyond other asylum-seekers by minimizing the natural motivations leading to persecution and attempting to prove that dissociated animus was the dominant factor leading to harm. *See* National Immigration Project, *supra*, at 2 ("The BIA seems to be creating a heightened standard in family-based cases … when such a standard does not exist for other protected characteristics."). In *amici's* experience, this standard is not necessary for the distribution of justice and misunderstands the central issues typically arising in asylum cases in general.

As a result of this decision, IJs will struggle to separate the persecution of families with the natural underlying reasons for that persecution. Ultimately, asylum cases for vulnerable people will become less fair, less consistent, and less protective of people who have faced genuine harm and seek necessary protection.

CONCLUSION

For all of the foregoing reasons, this Court should grant the petition and reverse and remand to the BIA.

Dated: April 29, 2024

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 3,990 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f) and Tenth Circuit Rule 32(B). This word count was calculated by Microsoft Word, the word processing system used to prepare this brief.

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CERTIFICATE OF SERVICE

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