No. 11-566-ag

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

FLORA GJURA,
PETITIONER,

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL,
RESPONDENT.

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

BRIEF AS *AMICI CURIAE*
CENTER FOR GENDER & REFUGEE STUDIES
AND NATIONAL IMMIGRANT JUSTICE CENTER
IN SUPPORT OF PETITIONER'S
PETITION FOR PANEL REHEARING
AND REHEARING EN BANC

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INTEREST OF *AMICI CURIAE*

Amici curiae the Center for Gender & Refugee Studies, at the University of California, Hastings College of the Law, and the National Immigrant Justice Center, are non-profit organizations that have expertise in gender-based violence and refugee and human rights law. *Amici* have particular interest in the instant case because the Court's holding that Ms. Gjura does not have a well-founded fear of persecution on account of her membership in a particular social group defined by her gender, nationality, and other immutable or fundamental characteristics, misapprehends the facts of the case and is at odds with the law of this Circuit and other Courts of Appeals as well as the Board of Immigration Appeals (BIA). The Panel's decision is flawed as a matter of law and of fact: it stands in tension with a growing body of precedent recognizing gender-defined social groups as cognizable, overlooks the gender-based nature of the feared harm of trafficking in analyzing nexus, and erroneously relies on general country conditions to the exclusion of evidence of actual government failures to protect in this case when considering whether Albania is unable or unwilling to control Ms. Gjura's persecutors. The issues involved have broad implications for the equitable and just administration of refugee law and protection of women. *Amici* thus offer this brief under Fed. R. App. P. 29.[1]

[1] *Amici* represent that Petitioner consents to the filing of this brief, while

ARGUMENT

I. The Panel's Particular Social Group Analysis Conflicts with BIA and Court of Appeals Precedent Recognizing Gender-Defined Groups.

A. The size of the proposed group is irrelevant to the social group analysis.

The Panel's decision conflicts with a growing body of BIA and Court of Appeals precedent recognizing gender-defined social groups as cognizable for purposes of asylum without concern for the size of the group. *See, e.g.*, *Sarhan v. Holder*, 658 F.3d 649 (7th Cir. 2011); *Bi Xia Qu v. Holder*, 618 F.3d 602 (6th Cir. 2010); *Ngengwe v. Mukasey*, 543 F.3d 1029 (8th Cir. 2008); *Hassan v. Gonzales*, 484 F.3d 513 (8th Cir. 2007); *Mohammed v. Gonzales*, 400 F.3d 785 (9th Cir. 2005); *Niang v. Gonzales*, 422 F.3d 1187 (10th Cir. 2005); *Lin v. Ashcroft*, 385 F.3d 748 (7th Cir. 2004); *Yadegar-Sargis v. INS*, 297 F.3d 596 (7th Cir. 2002); *Hernandez-Montiel v. INS*, 225 F.3d 1084 (9th Cir. 2000); *Fatin v. INS*, 12 F.3d 1233 (3d Cir. 1993); *Matter of Kasinga*, 21 I. & N. Dec. 357 (BIA 1996).

In rejecting Ms. Gjura's proposed social group – young, unmarried Albanian women – the Panel misapplied this Court's precedent, relying on a statement in *Gomez v. INS*, 947 F.2d 660, 664 (2d Cir. 1991), that "[p]ossession of broadly-based characteristics such as youth and gender will not by itself endow individuals with membership in a particular social group." The Panel's decision is in direct

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Respondent has taken no position on its filing, and that no person or entity other than *amici* authored or provided any funding related to its preparing or filing.

tension with this Court's clarification that "the best reading of *Gomez* is one that is consistent" with the Board's seminal decision in *Matter of Acosta*, 19 I. & N. 211 (BIA 1985), interpreting the term "particular social group" to include a group defined by immutable characteristics that members of the group could not change, or by characteristics that they should not be required to change because they are fundamental to their individual identities or consciences. *See Koudriachova v. Gonzales*, 490 F.3d 255, 262 (2d Cir. 2007). *Acosta* does not require that a group be narrowly defined to constitute a particular social group under 8 U.S.C. § 1101(a)(42)(A) and, indeed, itself identified sex among the characteristics that can define a group.[2]

Each of the five statutory grounds – race, religion, nationality, political opinion, or membership in a particular social group – represent categories which are susceptible of including large numbers of individuals. Thus, *Acosta*'s reliance on the principle of *ejusdem generis* affirms that the size of a group is not an obstacle to its cognizability. The fact that a statutory ground such as "particular social group" may be broad says little about the number of people who might ultimately qualify for asylum based on that ground. The refugee definition includes stringent

[2] The addition of social visibility and particularity to the *Acosta* test, *see Ucelo-Gomez v. Mukasey*, 509 F.3d 70, 73 (2d Cir. 2007), does not change the analysis that the size and breadth of a group alone does not preclude a group from qualifying, *see, e.g.*, *Perdomo v. Holder*, 611 F.3d 662, 669 (9th Cir. 2010).

requirements, including that the persecution be causally linked to the ground, which filter who can ultimately receive protection in the United States. The Board articulated this point in *Matter of H-*, 21 I. & N. Dec. 337, 343-44 (BIA 1996), observing: "[T]he fact that almost all Somalis can claim clan membership and that interclan conflict is prevalent should not create undue concern that virtually all Somalis would qualify for refugee status, as an applicant must establish he is being persecuted on account of that membership." *See also, e.g.*, *Niang*, 422 F.3d at 1199-1200; *Perdomo v. Holder*, 611 F.3d 662, 669 (9th Cir. 2010); *Benitez Ramos v. Holder*, 589 F.3d 426, 431 (7th Cir. 2009); *Malonga v. Mukasey*, 546 F.3d 546, 553-54 (8th Cir. 2008); *Karouni v. Gonzales*, 399 F.3d 1163, 1172 (9th Cir. 2005); *Cece v. Holder*, 668 F.3d 510, 515 (7th Cir. 2012) (Rovner, J., dissenting), *rehearing en banc granted, opinion vacated* (May 31, 2012).

B. The proposed social group is not circularly defined.

The Panel misapprehended the facts of the case when it rejected Ms. Gjura's social group – young, unmarried Albanian women – as circular. The proposed group – defined by gender, nationality, and marital status – does not reference the harm suffered or feared, and the case relied on by the Panel is inapposite. In *Rreshpja v. Gonzales*, 420 F.3d 551, 555 (6th Cir. 2005), the applicant's group included not only the characteristics of gender, nationality, and youth, but, unlike the instant case, included the characteristic of being "forced into prostitution"

which expressly defines the group by the harm itself.

C. The nexus analysis is distinct from the social group analysis.

The Panel committed further error by conflating the social group and nexus inquiries when it ruled that the proposed group is not cognizable because Ms. Gjura's traffickers may have had criminal incentives. A persecutor's motives are relevant to the separate and distinct "on account of" element, and are not determinative of the cognizability of a social group. The improper conflation of cognizability with nexus places this decision at odds with precedent from this Court and other Courts of Appeals. Furthermore, even if a persecutor is motivated in part by a non-protected ground, asylum is not foreclosed. *See, e.g.*, *Bi Xia Qu*, 618 F.3d at 608 (recognizing the persecutor targeted the applicant for a non-protected reason, "to secure the repayment of his loan from [her] father," but holding this did not diminish that also he did so for a protected reason, "because she was a woman whom he could force into marriage in a place where forced marriages are accepted"); *Castro v. Holder*, 597 F.3d 93, 104 (2d Cir. 2010).

II. The Panel's Nexus Analysis Overlooked the Gender-Based Nature of the Harm in this Case.

A. Gender is *a* central, if not *the* central, reason for sex trafficking in Albania.

The Panel erred in finding that Ms. Gjura failed to establish that the feared harm of trafficking is on account of her membership in a gender-defined social group.

Reasoning that "[t]he only evidence Gjura placed in the record to support her claim [that the Albanian mafia had attempted to kidnap and force her into prostitution] was her testimony that she did not recognize her would-be abductors, but assumed they were associated with the mafia," the Panel grossly misstated the record that includes Ms. Gjura's credible testimony,[3] corroborated by country conditions evidence, regarding the modus operandi of sex traffickers in Albania and the murder of her sister by traffickers. *See* Certified Administrative Record (hereafter "AR") testimony at 109-142 and country conditions at 190-231, 345-351.

The motivation for the forced trafficking of women for prostitution in Albania must be understood in the socio-cultural, legal, and political context in which it takes place. *See, e.g.*, *INS v. Elias-Zacarias*, 502 U.S. 478, 483 (1992); *Sarhan*, 658 F.3d at 656; *Al-Ghorbani v. Holder*, 585 F.3d 980, 998 (6th Cir. 2011); Asylum and Withholding Definitions, 65 Fed. Reg. 76,588, 76,593 (Dec. 7, 2000).

The Gender Alliance for Development Center explains that "[t]he trafficking of Albanian women and girls is linked to a cultural bias that considers women as human beings without rights and totally dependent on men." MILVA EKONOMI ET AL., GENDER ALLIANCE FOR DEVELOPMENT CENTER, CREATING ECONOMIC OPPORTUNITIES FOR WOMEN IN ALBANIA: A STRATEGY FOR THE PREVENTION OF HUMAN TRAFFICKING 18 (2006); *see also* AR 199, 220, 323. The record shows

[3] The Immigration Judge found Ms. Gjura's testimony credible. AR 98.

that traffickers of women in Albania operate with impunity, and often with the cooperation of a government that fails to safeguard the rights of women. *See* AR 163, 199, 201, 214, 221, 349. These are exactly the types of gender-related legal and social norms that are critical to the nexus analysis in this case.

The situation for Ms. Gjura is not unique; women worldwide are subjected to trafficking and forced prostitution because of their gender. *See* UNHCR Guidelines on International Protection: The application of Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees to victims of trafficking and persons at risk of being trafficked, HCR/GIP/06/07 ¶ 19 (2006). Certain subsets of women within a particular society, including single women like Ms. Gjura, are especially vulnerable to being trafficked. *See id*. at ¶ 38; Stephen Knight, *Asylum from Trafficking: A Failure of Protection*, 07-07 IMMIGR. BRIEFINGS 1, 4-7 (2007).

B. Whether other groups are also targeted does not answer whether nexus has been satisfied.

The Panel's reasoning that, because other groups of vulnerable individuals are also subject to sex trafficking in Albania, Ms. Gjura failed to establish nexus, is flawed. Persecutors often target multiple vulnerable groups. During the Holocaust the Nazis targeted not only Jews, but also homosexuals, Roma, and the disabled, among others. Yet, it would be absurd to suggest that the Jews did not suffer persecution on account of their religion, simply because other groups were targeted

because of their individual characteristics and vulnerability. The fact that traffickers in Albania prey upon other groups does not undermine the undisputed record evidence that Ms. Gjura was targeted because of her gender and other immutable or fundamental characteristics. The record should leave little doubt that the harm Ms. Gjura suffered and fears is "on account of" a protected ground.

III. The Panel's Unable or Unwilling Analysis Stands in Tension with Precedent of This and Other Circuits and the BIA.

The Panel further erred by focusing only on the U.S. Department of State report recognizing that the Albanian government is working to address sex trafficking to find that the government is able and willing to control Ms. Gjura's persecutors, to the exclusion of undisputed, credible evidence in the record of the government's actual failures to protect. Ms. Gjura testified that complaints were filed with the police on several occasions, including after the murder of her sister, to no avail, and on other occasions no complaint was filed for fear of futility. *See* AR 119, 121-23, 128. Where the police have failed to respond to a report or to respond effectively to complaints by an applicant or by individuals associated with the applicant who are victims of similar attacks, as was the case for Ms. Gjura and her sister, this Court and other Courts of Appeals and the BIA have found the applicant satisfied the unable or unwilling requirement. *See, e.g.*, *Aliyev v. Mukasey*, 549 F.3d 111, 119 (2d Cir. 2008); *Afriyie v. Holder*, 613 F.3d 924, 931 (9th Cir. 2010); *Faruk v. Ashcroft*, 378 F.3d 940, 944 (9th Cir. 2004); *Singh v. INS*, 94 F.3d 1353,

1360 (9th Cir. 1996); *Matter of O-Z- & I-Z-*, 22 I. & N. Dec. 23, 26 (BIA 1998). In such cases, general country conditions, while relevant to the unable/unwilling analysis, do not carry the same significance as in cases where the applicant did not report and they are needed to fill a "gap in proof about how the government would respond if asked." *Rahimzadeh v. Holder*, 613 F.3d 916, 922 (9th Cir. 2010).

Even if the record shows that some government actors have displayed some willingness, this sheds minimal light on the government's overall ability to protect. *See, e.g.*, *Garcia v. Att'y Gen.*, 665 F.3d 496, 503 (3d Cir. 2011). Each prong of the disjunctive test should be analyzed separately; here, the Panel ignored ample record evidence that any efforts taken by the government to date have been ineffective and were ineffective in this case. *See*, *e.g.*, AR 201, 214, 349. On this record, no reasonable factfinder could doubt that Ms. Gjura faces the same tragic fate suffered by her sister if returned to Albania. The consequences of the Panel's errors are severe and merit this Court's reconsideration.

CONCLUSION

For the foregoing reasons, *amici* respectfully request that the Court grant Ms. Gjura's Petition for Rehearing.

Respectfully submitted,

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Dated: November 5, 2012

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the typeface and type-style requirements of Fed. R. App. P. 32(a)(5)-(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point Times New Roman, and it complies with the type-volume limitation of Fed. R. App. P. 29(d) because this brief is one-half the maximum length of that allowed for the Petitioner excluding the material not counted under Fed. R. App. P. 32.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the CM/ECF system on November 5, 2012. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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