No. 20-2193

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

[redacted],
Petitioner,
v.
MERRICK GARLAND,
UNITED STATES ATTORNEY GENERAL,
Respondent.

On Petition for Review of an Order of the Board of Immigration Appeals
Agency Case No. A [redacted]

BRIEF OF *AMICI CURIAE* THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION, ASYLUM SEEKER ADVOCACY PROJECT, ASYLUMWORKS, CAPITAL AREA IMMIGRANTS' RIGHTS COALITION, CHARLOTTE CENTER FOR LEGAL ADVOCACY, JUST NEIGHBORS, PISGAH LEGAL SERVICES, TAHIRIH JUSTICE CENTER, AND IMMIGRATION LAW CLINICS IN SUPPORT OF PETITIONER

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

DISCLOSURE STATEMENT

- In civil, agency, bankruptcy, and mandamus cases, a disclosure statement must be filed by **all** parties, with the following exceptions: (1) the United States is not required to file a disclosure statement; (2) an indigent party is not required to file a disclosure statement; and (3) a state or local government is not required to file a disclosure statement in pro se cases. (All parties to the action in the district court are considered parties to a mandamus case.)
- In criminal and post-conviction cases, a corporate defendant must file a disclosure statement.
- In criminal cases, the United States must file a disclosure statement if there was an organizational victim of the alleged criminal activity. (See question 7.)
- Any corporate amicus curiae must file a disclosure statement.
- Counsel has a continuing duty to update the disclosure statement.

No. 20-2193 Caption: [redacted]v. Garland

Pursuant to FRAP 26.1 and Local Rule 26.1,

AILA, ASAP, AsylumWorks, CAIR, CCLA, Immigr. Clinic Elon, Just Neighbors, Pisgah, U.Balt. Immigr.
(name of party/amicus)

Clinic, Tahirih, UDC Immigr. Clinic, UNC Immigr. Clinic, W&L Immigr Clinic, U. MD Immigr. Clinic

who is amici, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation? ☐YES ☑NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐YES ☐NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐YES ☑NO
If yes, the debtor, the trustee, or the appellant (if neither the debtor nor the trustee is a party) must list (1) the members of any creditors' committee, (2) each debtor (if not in the caption), and (3) if a debtor is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of the debtor.

7. Is this a criminal case in which there was an organizational victim? ☐YES ☑NO
If yes, the United States, absent good cause shown, must list (1) each organizational victim of the criminal activity and (2) if an organizational victim is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of victim, to the extent that information can be obtained through due diligence.

Signature: /s/ Charles S. Ellison Date: 04/02/2021

Counsel for: Amici Curiae

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STATEMENT OF INTEREST OF AMICI CURIAE[1]

Amici curiae, the American Immigration Lawyers Association, Asylum Seeker Advocacy Project, AsylumWorks, Capital Area Immigrants' Rights Coalition, Charlotte Center for Legal Advocacy, Humanitarian Immigration Law Clinic of Elon University School of Law, Immigration Clinic of the University of Maryland Carey School of Law, Just Neighbors, Pisgah Legal Services, University of Baltimore School of Law Immigrant Rights Clinic, Tahirih Justice Center, University of the District of Columbia David A. Clarke School of Law's Immigration and Human Rights Clinic, University of North Carolina School of Law's Immigration Clinic, and Washington and Lee School of Law Immigrant Rights Clinic are organizations and law clinics whose members, employees, and law students represent hundreds of immigrants seeking asylum before the Department of Homeland Security, immigration courts, and the Board of Immigration Appeals ("BIA" or "Board") within the Fourth Circuit. Gender alone or in conjunction with nationality may constitute "a *particular social group*" under 8 U.S.C. § 1101(a)(42). Amici have a profound interest in ensuring that bona fide

[1] This brief, proffered pursuant to Federal Rule of Appellate Procedure 29(a), was authored solely by counsel indicated on the cover page. No party, party's counsel, or any person other than amici curiae, its members, or its counsel contributed money that was intended to fund preparing or submitting the brief. Petitioner has consented to the filing of this brief, and the Government does not oppose this filing.

applicants for protection who are fleeing gender-based violence are not errantly denied asylum or withholding of removal, including many with gender-based claims. Given the importance of this issue, amici seek to offer their expertise in this case to ensure that that the particular social group test is properly construed and fairly applied. A statement of interest for each organization can be found in the accompanying motion for leave to file this amici curiae brief.

INTRODUCTION

The Board of Immigration Appeals erred in rejecting [redacted] ("Petitioner") proposed particular social group ("PSG") of "Salvadoran women" on particularity grounds. AR 3–4. That conclusion is inconsistent with Fourth Circuit precedent, case law from other circuits, and the agency's own decisions.

The Board, in *Matter of Acosta*, explicitly recognized "sex" as a quintessential example of a shared characteristic that can define a cognizable social group. 19 I&N Dec. 211, 233 (BIA 1985). This conclusion comports with the Immigration and Nationality Act ("INA") and the Fourth Circuit's jurisprudence on particularity, as explained most recently in *Amaya v. Rosen*. 986 F.3d 424 (4th Cir. 2021). Other circuit courts, the Attorney General, and the Board itself, have repeatedly affirmed the potential cognizability of groups comprised of gender alone[2] or gender with nationality.

Gender *per se* also satisfies the additional requirements of immutability and social distinction. Indeed, numerous decisions by the Board and sister circuits have recognized that such groups can satisfy both requirements. This conclusion is

[2] In this brief, we may refer to "gender with nationality" as "gender alone" or "gender *per se*."

consistent with the purpose of the Refugee Act, which was passed to bring United States refugee law into conformance with its international treaty obligations. Additionally, recognizing gender *per se* as a PSG would promote fairness to applicants and administrability to the agency and courts.

For these reasons,[3] this Court should correct the Board's error and vacate its decision.

ARGUMENT

I. RECOGNIZING GENDER *PER SE* AS A PARTICULAR SOCIAL GROUP IS FAITHFUL TO THE REFUGEE ACT AS CONSTRUED BY LONGSTANDING AGENCY PRECEDENT.

The Board's seminal 1985 decision *Matter of Acosta* recognized that gender alone is sufficient to establish membership in a cognizable social group. 19 I&N Dec. at 233. The Board deployed the *ejusdem generis* canon of statutory construction, which holds that "general words used in an enumeration with specific words should be construed in a manner consistent with the specific words," in order to clarify the meaning of "a particular social group." *Id.* (internal quotations omitted). Applying this principle to the other four protected grounds for asylum – race, religion, nationality, and political opinion – the Board found that each

[3] Amici support Petitioner's arguments with respect to other social group claims, *see* Pet'r Opening Br. at 11-22, but focus our arguments on the fundamental social group of Salvadoran women.

"describes . . . an immutable characteristic." *Id.* The Board thus interpreted "particular social group to mean . . . a group of persons all of whom share a common, immutable characteristic." *Id.* (internal quotations omitted). The Board further explained that this "shared characteristic" might be "*sex*, color, or kinship ties." *Id.* (emphasis added). It then applied these principles to recognize a gender-based social group in *Matter of Kasinga*, 21 I&N Dec. 357, 365 (BIA 1996), holding that the group "young women of the Tchamba-Kunsuntu Tribe who have not had FGM, as practiced by that tribe, and who oppose the practice," meets the test of *Acosta*.

Acosta then served as the framework for federal guidelines on "asylum claims from women" issued in 1995. *See generally* Memorandum from Phyllis Coven, INA Office of International Affairs, to All INA Asylum Officers and HQASM Coordinators, *Consideration for Asylum Officers Adjudicating Asylum Claims from Women* 9 (May 26, 1995). These guidelines pointed to the Board's statement in *Acosta* that "sex" could be the shared characteristic that defines a cognizable group and provided the corresponding example from the Third Circuit recognizing "Iranian women" as a particular social group. *Id.* (citing *Fatin v. INS*, 12 F.3d 1233, 1240 (3d Cir. 1993)).

This Court has used *Acosta*'s framework to recognize social groups based on the shared characteristics identified by the Board. *See Lopez-Soto v. Ashcroft*, 383

F.3d 228, 235 (4th Cir. 2004) (citing *Acosta* to note that "kinship ties qualify as a particular social group") (internal quotations omitted). Recognizing "Salvadoran women" as a social group, defined by the shared characteristic of sex, follows this Court's application of *Acosta* to kinship-based claims.

II. GENDER *PER SE* AS A COGNIZABLE PARTICULAR SOCIAL GROUP IS CONSISTENT WITH FOURTH CIRCUIT CASE LAW.

Since *Acosta*, the Board has expanded the social group requirement into a three-prong test: the group must be (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). Most circuits, including this Court, have deferred to the three-part test. *See Oliva v. Lynch*, 807 F.3d 53, 61 (4th Cir. 2015).[4] The Board

[4] While *amici* do not endorse this three-part test, we acknowledge this is the current rule in the Fourth Circuit. We also note that on February 2, 2021, the Biden Administration issued an Executive Order requiring the Attorney General and the Secretary of Homeland Security to: (i) within 180 days, "conduct a comprehensive examination of current rules, regulations, precedential decisions, and internal guidelines governing the adjudication of asylum claims . . . to evaluate whether the United States provides protection for those fleeing domestic or gang violence in a manner consistent with international standards"; and (ii) within 270 days, "promulgate joint regulations, consistent with applicable law, addressing the circumstances in which a person should be considered a member of a 'particular social group.'" Creating a Comprehensive Regional Framework To Address the Causes of Migration, to Manage Migration Throughout North and Central America, and to Provide Safe and Orderly Processing of Asylum Seekers at the United States Border, 86 Fed. Reg. 8267, 8271 (Feb. 2, 2021).

declined to accept Petitioner's proposed group here because "Salvadoran women" contains "no narrowing features" such as an age range or specific societal or economic position. AR 4. This Court has explicitly rejected the reasoning employed by the Board.

A. Gender *Per Se* Meets This Court's Criteria for Particularity.

Just three months ago, this Court reviewed the standard for "particularity" in *Amaya*, 986 F.3d at 432–38. Particularity, as explained in *Amaya* and consistent with this Court's precedent, requires that a particular social group have "discrete" and "definable boundaries" so that it is sufficiently clear who is in and out of the group. 986 F.3d at 427. *See also Crespin-Valladares v. Holder*, 632 F.3d 117, 125 (4th Cir. 2011) (requiring a PSG to have "well-defined boundaries" such that it constitutes a "discrete class of persons"); *Lizama v. Holder*, 629 F.3d 440, 447 (4th Cir. 2011) (stating that a cognizable group must have an "adequate benchmark" for determining membership). Such groups "must not be amorphous, overbroad, diffuse, or subjective." *Amaya*, 986 F.3d at 427; *Lizama*, 629 F.3d at 447 (stating that "amorphous characteristics" cannot "provide an adequate benchmark"). The purpose of the particularity requirement is "to avoid indeterminacy." *Amaya*, 986 F.3d at 429; *Zelaya v. Holder*, 668 F.3d 159, 165 (4th Cir. 2012). The Court warned against conflating "particularity" with "social distinction." *Amaya*, 986 F.3d. at 432. The latter asks whether the "home society actually does recognize

[the proposed] group as being a 'distinct' and identifiable group." *Id.* at 433. In contrast, particularity is a "definitional inquiry" – "[i]ts analysis involves a careful review of the proposed PSG's language to evaluate whether its boundaries are clear." *Id.* at 434. As such, it should not depend on "evidence" or "society's perceptions." *Id.* Furthermore, it does not matter if the group can be subdivided into further groups. *Id.* What matters is "whether the group itself has clear boundaries." *Id.*; *Alvarez Lagos v. Barr*, 927 F.3d 236, 253 (4th Cir. 2019) ("[T]he key question is whether the proposed description is sufficiently particular or is too amorphous to create a benchmark for determining group membership.").

In *Amaya*, the Court held that the proposed group "former Salvadoran MS-13 members" is a cognizable social group. *Id.* at 438. The group contains several "self-limiting features." *Id.* at 434. First, the group refers to a "single notorious gang," leaving "no ambiguity as to how a 'gang' might be defined." *Id.* Second, the group only includes people of Salvadoran nationality, eliminating people with MS-13 affiliation from other countries. *Id.* Third, the group does not include those who never joined the MS-13 gang. *Id.* The Court rejected the government's argument that the words "former" and "member" are amorphous. *Id.* at 434–35. A former member of a group can be clearly defined as someone who: (1) "joined the group" and (2) "is no longer in the group." *Id.* at 435. The Court also rejected the government's argument that the proposed group is difficult to apply because it is

not clear when Amaya officially left the gang. *Id.* at 435–36. The Court argued that a group "can be clearly defined and still have difficult applications." *Id.* at 435. For instance, a tennis court has clear lines that indicate when a ball is in or out, but sometimes it is difficult to determine where exactly the ball landed. *Id.*

The group "Salvadoran women" meets this Court's standard for particularity. First, the group has "discrete" and "definable boundaries." *Id.* at 427. "Salvadoran" nationality and "women" are easy to define. Gender and nationality can be evidenced by multiple documents, including asylum application forms. *See* AR 475, 485, 538 (Form I-589, passport, and Credible Fear Worksheet). Indeed, the Board agreed the term "women" has a "commonly understood definition." AR 4. Furthermore, just like "Salvadoran gang members," the group includes only people of Salvadoran nationality, eliminating women from other countries. *See Amaya*, 986 F.3d at 434.

Second, the group is not "amorphous, . . . diffuse, or subjective." *Id.* at 427. Gender *per se* is unlike other groups that have been rejected because their definitional terms are amorphous. *See, e.g., Lizama*, 629 F.3d at 446–47 (rejecting "young, Americanized, well-off Salvadoran male deportees with criminal histories who oppose gangs" because "wealth, Americanization, and opposition to gangs are all amorphous characteristics" that lack adequate benchmarks or concrete traits); *In re A-M-E & J-G-U-*, 24 I&N Dec. 69, 76 (BIA 2007) (holding that "wealthy

Guatemalans" is not a PSG because "[t]he characteristic of wealth or affluence is simply too subjective, inchoate, and variable"). Unlike these groups, "Salvadoran women" does not possess adjectives that call for subjective value judgments.

Third, "Salvadoran women" is not "overbroad." *Amaya*, 986 F.3d at 427. In *Alvarez Lagos v. Barr*, this Court remanded to the Board to reconsider the group "unmarried mothers living under the control of gangs in Honduras." 927 F.3d at 255. The Court stated that size "is not dispositive" when determining "particularity." *Id.* at 253. It emphasized "the fact that persecutors torture a wide swath of victims [does not mean] that none of those victims are members of socially distinct groups." *Id.* at 254 (internal quotations omitted). *Amaya* builds upon *Alvarez Lagos* by affirming that size is not dispositive and large cross-sections of a country's population can be part of a PSG as long as the group's definition is clear. *Amaya*, 986 F.3d at 434. Other circuit courts have also rebuffed the assertion that sizable social groups cannot be cognizable. *See De Pena-Paniagua v. Barr*, 957 F.3d 88, 96 (1st Cir. 2020) (stating that "it is not clear why a larger group defined as 'women,' . . . fails either the 'particularity' or 'social distinction' requirement"); *N.L.A. v. Holder*, 744 F.3d 425, 438 (7th Cir. 2014); *Cece v. Holder*, 733 F.3d 662, 674–75 (7th Cir. 2013) (stating that "[i]t would be antithetical to asylum law to deny refuge to a group of persecuted individuals who have valid claims merely because too many have valid claims" and listing

examples of large PSGs recognized by the Board, such as "homosexuals in Cuba" and Chinese descendants in the Philippines); *Perdomo v. Holder*, 611 F.3d 662, 669 (9th Cir. 2010); *Malonga v. Mukasey*, 546 F.3d 546, 553–54 (8th Cir. 2008) (rejecting the denial of PSG solely on the basis that the ethnic group was part of a tribe comprising of forty-eight percent of Congo).

Likewise, the fact that members of a particular social group are otherwise internally diverse is irrelevant if the group possesses definitional clarity. In *Temu v. Holder*, this Court held that "individuals with bipolar disorder who exhibit erratic behavior" was a cognizable PSG. 740 F.3d 887, 891–97 (4th Cir. 2014). Even though "mental illness can cover a broad range of severity," the Court determined that the proposed group contained sufficient self-limiting features: "a specific mental illness so severe that individuals are visibly, identifiably disturbed." *Id.* at 895. As the *Amaya* Court explained, it is "unreasonabl[e]" to reject a proposed group just because it can be subdivided in "any number of ways – by 'age, sex, or background.'" 986 F.3d at 434 ("[w]hat matters is not whether the group can be subdivided based on some arbitrary characteristic but whether the group itself has clear boundaries."). Internal diversity simply means "that there are smaller parts to any whole." *Id.*; *Cece*, 733 F.3d at 673 (stating that "[t]he breadth of the social group says nothing about the requirements for asylum"); *Perdomo*, 611 F.3d at 668 (rejecting the Board's reasoning that "all women in Guatemala" is "overly broad

and internally diverse"). Yet this is precisely why the Board rejected "Salvadoran women" as a particular social group. AR 4.

The group "Salvadoran women" is consistent with this Court's understanding of particularity. As in *Amaya*, the Board erred in its *application* of the social group requirements and should be reversed. 986 F.3d at 437 ("[I]t [is] unreasonable for the BIA to reiterate its three-part test for a PSG and then apply its particularity requirement in a way that disregards and distorts its own test."). Under the proper application of this Court's standard, "Salvadoran women" satisfies the Board's requirement for particularity.

B. The Conclusion that Gender Alone Satisfies Particularity is Supported by This Court's Recognition of Analogous Particular Social Groups.

This Court has long accepted gender-related groups that involve women fleeing FGM. It has recognized that "[f]orced female genital mutilation involves the infliction of grave harm constituting persecution on account of membership in a particular social group" notwithstanding the large and internally diverse nature of those groups. *Kourouma v. Holder*, 588 F.3d 234, 244 (4th Cir. 2009); *Haoua v. Gonzalez*, 472 F.3d 227, 232 (4th Cir. 2007).

Like gender, groups defined by sexual orientation—which are cognizable in this Court—also clearly demarcate the group's boundaries while covering a wide range of diverse people. In *Tairou v. Whitaker*, the IJ, the Court, and the

Government acknowledged that "homosexuals in Benin" is a cognizable PSG. 909 F.3d 702, 706–07 (4th Cir. 2018). *See also Ramos-Gonzalez v. Holder*, 453 Fed. Appx. 417, 419 (4th Cir. 2011) (accepting "Nicaraguan homosexuals" as a PSG). If sexual orientation and sexual identity can be the basis for establishing a particular social group, there is no reason why gender *per se* should be excluded. Both have clear definitions that determine who is in and out of the group. Both are comprised of individuals of diverse ages and societal backgrounds. Sexual identity can even be more fluid than gender, but this Court has not hesitated to find that such groups are clearly defined. *See id.*; *Matter of Toboso-Alfonso,* 20 I&N Dec. 819 (BIA 1990) (recognizing homosexuals as a protected class). While gender *per se* groups might encompass a larger number of people, the size of a group alone cannot be disqualifying.

The Fourth Circuit has repeatedly accepted nuclear family as a PSG, which can be more universal and internally varied than gender *per se*. This Court has explained that "family provides a prototypical example of a particular social group" because it "possesses boundaries that are . . . 'particular and well-defined.'" *Crespin-Valladares*, 632 F.3d at 125; *Diaz de Gomez v. Wilkinson*, 987 F.3d 359, 363 (4th Cir. 2021); *Hernandez Cartagena v. Barr*, 977 F.3d 316, 320 (4th Cir. 2020) (noting this Court has "repeatedly held a nuclear family" is cognizable) (internal quotation omitted); *Cedillos-Cedillos v. Barr*, 962 F.3d 817, 824 (4th Cir.

2020); *Lopez-Soto*, 383 F.3d at 235 (recognizing for the first time in 2004 that "nuclear family" is cognizable). Though every person in this world is part of a nuclear family, this Court has easily recognized this group's cognizability. "Salvadoran women" must not be rejected simply because it covers a large cross-section of El Salvador.

This Court has also noted that clan membership—which can be both large and internally diverse—may constitute a particular social group. *See Crespin-Valladares*, 632 F.3d at 124-25 (noting that "clan membership" is a cognizable social group because it is "inextricably linked to family ties") (citing *Matter of H-*, 21 I&N Dec. 337, 342 (BIA 1996)); *Matter of H-*, 21 I&N Dec. at 343 (accepting the proposed group "Marehan subclan" of Somalia, which is identifiable "based upon linguistic commonalities"); *see also Matter of V-T-S-*, 21 I&N Dec. 792, 798 (BIA 1997) (recognizing Filipino of Chinese ancestry as a PSG).

Thus, "Salvadoran women" are a cognizable particular social group notwithstanding its breadth and internal diversity.

C. The Group "Salvadoran Women" Also Satisfies the Remaining Particular Social Group Requirements.

In addition to being particular, the group Salvadoran Women is immutable and socially distinct. *Matter of M-E-V-G-*, 26 I&N Dec. at 237. The IJ in this case recognized gender as an immutable characteristic, *see* AR 69, and the Board did

not disturb that conclusion, AR 3–4. Moreover, many Courts since *Acosta* have held that these characteristics are immutable whether considering gender-alone or in conjunction with nationality. *See infra* Section III.

These immutable characteristics likewise render the group's members socially distinct as they are "set apart" and "perceived as a group by society" by virtue of those characteristics. *Matter of W-G-R-*, 26 I&N Dec. 208, 238 (BIA 2014). In addition to Salvadoran laws, evidence of cultural norms establish that women in El Salvador are recognized as a group and are uniquely vulnerable to persecution. AR 296–97, 361, 364. Indeed, "El Salvador . . . has one of Latin America's highest rates of gender-based violence" with about "two thirds of Salvadoran women experienc[ing] some form of gender violence during their lives."[5] El Salvador has also had the tragic distinction of possessing one of the highest female murder rates in the world[6] notwithstanding a collection of laws designed to protect women's rights and deter violence against them.[7] Rather, abuse

[5] Anna-Cat Brigida, '*No Democracy Without Women': Priced Out of Politics in El Salvador*, REUTERS, Nov. 23, 2020, https://www.reuters.com/article/us-elsalvador-women-politics/no-democracy-without-women-priced-out-of-politics-in-el-salvador-idUSKBN28317Z.

[6] Mimi Yagoub, *Why Does Latin America Have the World's Highest Female Murder Rates?*, INSIGHT CRIME, Feb. 11, 2016, https://insightcrime.org/news/analysis/why-does-latin-america-have-the-world-s-highest-female-murder-rates/.

[7] Vicki Colbert, *Improving Women's Rights in El Salvador*, BORGEN PROJECT, Nov. 17, 2020, https://borgenproject.org/womens-rights-in-el-salvador/.

of women persists and near total impunity is the norm.[8] Consequently, the group "Salvadoran Women" is socially distinct.[9] *See De Pena-Paniagua*, 957 F.3d at 96 ("[I]t is difficult to think of a country in which women are not viewed as [socially] 'distinct.'"); *Temu*, 740 F.3d at 893 (holding that a group possesses social distinction where "it is singled out for worse treatment than other groups"); *Henriquez-Rivas v. Holder*, 707 F.3d 1081, 1092 (9th Cir. 2013) (holding that legislation addressing a group constitutes some of the best "evidence that a society recognizes a particular class of individuals"); *see also* Pet'r Opening Br. at 14–19 (explaining that the group "Salvadoran women" meets all three prongs of the particular social group test).

Additionally, gender *per se* groups do not violate the longstanding "anti-circularity requirement" because they are not defined in terms of the underlying harm. *See Del Carmen Amaya-De Sicaran v. Barr*, 979 F.3d 210, 214 (4th Cir. 2020) (quoting *Matter of A-B-*, 27 I&N Dec. 316, 334 (A.G. 2018)). In *Sicaran*, this Court rejected the social group "married El Salvadoran women in a controlling and abusive domestic relationship" because "the abuse" Sicaran sought "to escape via asylum protection define[d] her claimed group." *Id.* at 218. The same problem

[8] *Id.* (UNHCR has estimated that El Salvador's impunity rate was as high as 77%).
[9] Relatedly, Petitioner's other group (i.e. Salvadoran women who refuse to be a jiana) is also socially distinct. *See* Karen Musalo, *El Salvador—A Peace Worse than War*, 30 YALE J.L. & FEMINISM 3, 46 (2018) (identifying "jainas" as a term used to refer to Salvadoran gang members' girlfriends).

does not afflict gender *per se* groups. While gender and nationality can be the basis on which an asylum seeker is persecuted, they are not themselves forms of persecution.

III. OTHER CIRCUIT COURTS AND THE AGENCY HAVE RECOGNIZED GENDER *PER SE* MAY CONSTITUTE A COGNIZABLE PARTICULAR SOCIAL GROUP.

Many sister circuit courts have explicitly stated that gender coupled with nationality can form the basis of a cognizable social group. Nearly three decades ago, then Judge Alito sitting on the Third Circuit, wrote that because *Acosta* "specifically mentioned 'sex' as" the sort of innate characteristic "that could link the members of a 'particular social group,'" the petitioner in that case had established her membership in a valid group and would be eligible for protection "to the extent that . . . she would be persecuted . . . simply because she is a woman." *Fatin*, 12 F.3d at 1240. Since that time, numerous other circuit courts have followed suit.

The Ninth Circuit has recognized that the "group comprised of Somalian females" could constitute a cognizable social group, *Mohammed v. Gonzales*, 400 F.3d 785, 798 (9th Cir. 2005), and it has reaffirmed that holding several times. In *Perdomo*, the Court rejected the Board's finding that "all women in Guatemala" is overly broad and thus not cognizable. 611 F.3d at 668. Instead, the Court remanded to the Board, reasoning that "the size and breadth of a group alone does not

preclude a group from qualifying." *Id.* at 669. Similarly, in *Diaz-Reynoso v. Barr*, the Court held that the social group "indigenous women in Guatemala who are unable to leave their relationship" was not impermissibly circular and remanded for the BIA consider the cognizability of the group. 968 F.3d 1070, 1074, 1080–82 (9th Cir. 2020); *see also Ticas-Guillen v. Whitaker*, 744 Fed.Appx. 410, 410 (9th Cir. 2018) (rejecting the IJ and BIA's decision that "women in El Salvador" is too broad, and remanding in light of Ninth Circuit precedent); *Silvestre-Mendoza v. Sessions*, 729 Fed.Appx. 597, 598–99 (9th Cir. 2018) (remanding for the BIA to consider in the first instance whether "Guatemalan women" constitutes a PSG).

Likewise, in *De Pena-Paniagua*, the First Circuit stated that "it is not clear why a large group defined as 'women,' or 'women in country X' – without reference to additional limiting terms – fails either the 'particularity' or 'social distinction' requirement." 957 F.3d at 96. According to the court, it is probable that in every country "women . . . form a 'particular' and 'well-defined' group of persons." *Id*.

The Eighth Circuit has also recognized that gender plus nationality may constitute a valid social group. *Hassan v. Gonzalez*, 484 F.3d 513, 518 (8th Cir. 2007) (recognizing the group of "Somali females"); *see also Ngengwe v. Mukasey*, 543 F.3d 1029 (8th Cir. 2008) (holding the group "Cameroonian windows" to be a valid social group); *Safaie v. I.N.S.*, 25 F.3d 636, 640 (8th Cir. 1994) ("Iranian

women who advocate women's rights or who oppose Iranian customs relating to dress and behavior").

Finally, the Tenth Circuit in *Niang v. Gonzales*, has held that "female members of a tribe" satisfied the social group requirements. 422 F.3d 1187, 1199–1200 (10th Cir. 2005). The Court reasoned that "[b]oth gender and tribal membership are immutable characteristics," and observed that *Acosta* "identified *sex* . . . as [a] characteristic[] that can define a social group." *Id.* at 1199. The Court also implicitly rejected any floodgates objection to the group, emphasizing the limiting nature of the nexus requirement. *Id.* The Court explained that "the focus with respect to [gender-based groups] . . . should be not on whether either gender constitutes a social group (which both certainly do) but on whether the members of that group are sufficiently likely to be persecuted . . . '*on account of'* their membership." *Id.* at 1199–2000 (emphasis added).

The Attorney General, along with the Board in many unpublished decisions, has also recognized the potential cognizability of gender-alone social groups. *See, e.g.*, *Matter of A-C-A-A-*, 28 I&N Dec. 84, 91 (A.G. 2020) (remanding for the Board to consider the PSG of "Salvadoran females"); *S-D-C-A-*, AXXX XXX 373 (BIA Oct. 15, 2020) (unpublished) (remanding to consider whether "Mexican women" is a cognizable PSG), Addendum ("Add.") 2–3; *R-M-T-*, AXXX XXX 377 (BIA Sept. 21, 2020) (remanding to consider whether "women in El Salvador"

is cognizable), Add. 5–6; *A-R-C-*, AXXX XXX 103 (BIA Mar. 10, 2020) (unpublished) (remanding to consider "women in Guatemala"), Add. 12–14; *Y-V-P-*, AXXX XXX 977 (BIA Nov. 6, 2019) (unpublished) (granting DHS's request for remand to consider "women in El Salvador"), Add. 16–17.

Numerous Immigration Courts have granted asylum based on membership in gender-based groups. *See, e.g.*, —, (Arlington Immigration Court, May 1, 2020) (unpublished) (finding "Honduran women" cognizable and granting asylum), Add. 26–29; —, (Newark Immigration Court, Mar. 13, 2020) (unpublished) (same), Add. 41–43; —, (Boston Immigration Court, June 18, 2019) (unpublished) (recognizing "Guatemalan women" as a cognizable social group and granting asylum), Add. 54–57; *C-*, (Philadelphia Immigration Court, May 15, 2019) (unpublished) (same), Add. 73–77; —, (Denver Immigration Court, Mar. 7, 2019) (unpublished) (finding "Mexican women" cognizable and granting asylum), Add. 86–88; —, (San Francisco Immigration Court, Sept. 13, 2018) (unpublished) (concluding that "Mexican females" are a cognizable social group), Add. 104–06; —, (Arlington Immigration Court, 2018) (unpublished) (finding the particular social group of "women in Honduras" cognizable and granting asylum), Add. 125–29.[10]

[10] All unpublished decisions cited herein have been included in the Addendum.

As such, the Board here erred in categorically rejecting "Salvadoran women" without conducting a case-specific analysis. *Alvarez Lagos*, 927 F.3d at 253 (stating that the PSG determination must be made on a "case-by-case basis"); *see also Diaz-Reynoso*, 968 F.3d at 1079–80 (holding that *Matter of A-B-* did not create a general rule against claims involving gender-based violence, and emphasizing the need for a case-by-case approach); *Juan Antonio v. Barr*, 959 F.3d 778, 790 n.3 (6th Cir. 2020) (same).

IV. THE CONCLUSION THAT GENDER ALONE CONSTITUTES A PARTICULAR SOCIAL GROUP IS CONSISTENT WITH THE PURPOSE OF THE REFUGEE ACT AND INTERNATIONAL TREATIES.

When enacting the Refugee Act of 1980, Congress recognized it was the "historic policy of the United States to respond to the urgent needs of persons subject to persecution in their homelands." Pub. L. No. 96-212, § 101(a), 94 Stat. 102, 102 (1980). It created the law to "provide a permanent and systematic procedure for the admission . . . of refugees of special humanitarian concern." *Id.* at § 101(b). One of Congress' primary purposes in passing the Refugee Act was "to bring United States refugee law into conformance with the 1967 United Nations Protocol Relating to the Status of Refugees," to which the United States is a signatory. *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 436 (1987). Thus, the

meaning of particular social group in the United Nations'1967 Protocol is directly relevant to a proper interpretation of the Refugee Act.

The United Nations High Commissioner for Refugees ("UNHCR") has provided interpretive guidance supporting the view that gender alone may establish a cognizable particular social group. In its 2002 guideline on gender-related persecution, UNHCR adopted *Acosta*'s *ejusdem generis* analysis and found that "sex can properly be within the ambit of the social group category, with women being a clear example." UNHCR, *Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees,* U.N. Doc. HCR/GIP/02/01 at para. 30 (May 7, 2002). It added that rejecting "women" as a particular social group because of size "has no basis in fact or reason, as the other grounds are not bound by this question of size." *Id.* at para. 31. UNHCR further asserted that "women may constitute a particular social group under certain circumstances based on the common characteristic of sex, whether or not they associate with one another based on that shared characteristic." UNHCR, *Guidelines on International Protection: Membership of a Particular Social Group within the context of Article 1(A)(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, U.N. Doc. HCR/GIP/02/02 at para.15 (May 7, 2002).

The Supreme Court has recognized that UNHCR guidelines "provide[] significant guidance in construing the Protocol, to which Congress sought to conform." *Cardoza-Fonseca*, 480 U.S. at 439 n.22. The Fourth Circuit has followed suit. *M.A. v. INS*, 858 F.2d 210, 214 (4th Cir. 1988) ("[W]e follow the lead of the other courts in recognizing that the [UNHCR] *Handbook* provides significant guidance in interpreting the Refugee Act.").

Similarly, interpretations provided by other signatories to the Refugee Convention confirm that gender may form a cognizable social group. *Negusie v. Holder*, 555 U.S. 511, 537 (2009) ("When we interpret treaties, we consider the interpretations of the courts of other nations.") (Stevens, J., concurring in part and dissenting in part); *Canada v. Ward*, [1993] 2 S.C.R. 689, 75, 79 (Can., S.C.C.) (The Canadian Supreme Court has held the term social group includes "individuals fearing persecution on such bases as gender"); *Islam & Shah v. Sec'y of State Home Dep't*, [1999] 2 AC 629, 644–45 (U.K.) (The U.K.'s House of Lords recognizing "women in Pakistan"); *Refugee Appeal No. 76044* para. 92 (NZ RSAA, 2008) (New Zealand tribunal holding that "it is indisputable that sex and gender can be the defining characteristics of a social group"); *Minister for Immigration & Multicultural Affairs v. Khawar* (2002) 76 A.L.J.R. 667 (Aust.) (Australian tribunal recognizing "women in Pakistan").

V. RECOGNIZING GENDER *PER SE* SOCIAL GROUPS PROMOTES FAIRNESS, CONSISTENCY, AND ADMINISTRABILITY.

Courts have recognized the labyrinthine nature of the Board's analysis in relation to the "enigmatic and difficult-to-define term" particular social group. *Rios v. Lynch*, 807 F.3d 1123, 1126 (9th Cir. 2015); *Cantarero-Lagos v. Barr*, 924 F.3d 145, 154 (5th Cir. 2019) (describing the task of "[d]efining a PSG [as] unspeakably complex and the requirements [as] ever-changing") (Dennis J. concurring); *Rivera-Barrientos v. Holder*, 666 F.3d 641, 647 (10th Cir. 2012) (recounting the "evolving boundaries of the [Board's] social group" case law). These challenges have only been exacerbated by the Agency's more recent pronouncements that an applicant "specifically delineate" all potential versions of "her proposed social group" before the IJ. *See Matter of W-Y-C- & H-O-B-*, 27 I&N Dec. 189, 191–92 (BIA 2018) (refusing to consider "a new social group [advanced on appeal] that is substantially different from the one delineated below"); *Matter of L-E-A-*, 27 I&N Dec. 581, 594 (A.G. 2019) (holding that "adjudicators must be careful to focus on the particular social group *as it is defined* by the applicant and ask whether *that group*" satisfies the social group test) (emphasis in original). For the 20% of asylum applicants who

proceeded *pro se* in immigration court in 2020, they must navigate the Board's procedural and substantive restrictions to social group standards on their own.[11]

Accompanying this growing complexity of social group law is a mounting workload for adjudicators. IJs are now required to comply with production quotas that demand IJs to complete a minimum of 700 final decisions a year[12] in an effort to process the 1,299,239 cases pending in removal proceedings.[13] Adjudicators are understandably pressed for time in rendering these critically important decisions. And that task is made no easier for IJs evaluating the claims of *pro se* applicants. *See Matter of S-M-J-*, 21 I&N Dec. 722, 723–24 (BIA 1997) (recognizing the responsibility of IJs to ensure that refugee protection is provided when warranted).

The culmination of this byzantine area of law applied in the context of a demanding workload is a scenario where increasingly only applicants fortuitous enough to advance the magic language the agency is prepared to accept on a given day may win asylum. However, such an outcome is incongruent with the purpose

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[11] *See Asylum Decisions*, TRAC IMMIGRATION, https://trac.syr.edu/phptools/immigration/asylum/.

[12] *See* Joel Rose, *Justice Department Rolls Out Quotas For Immigration Judges*, NPR, Apr. 3, 2018, https://www.npr.org/2018/04/ 03/599158232/justice-department-rolls-out-quotas-for-immigration-judges ("To get a 'satisfactory' rating on their performance evaluations, judges will be required to clear at least 700 cases a year and to have fewer than 15 percent of their decisions overturned on appeal.")

[13] *See Backlog of Pending Cases in Immigration Courts as of February 2021*, TRAC IMMIGRATION, https://trac.syr.edu/phptools/immigration/court_backlog/apprep_backlog.php.

and intent of the Refugee Act. *See Oliva*, 807 F.3d at 60 (instructing the agency to cease conducting its analysis by "focusing myopically on a particular word or fact but rather by viewing the case holistically"); *Cece*, 733 F.3d at 671, 673, 675 (7th Cir. 2013) (holding that adjudicators must not "tease out one component of a group[]" to "defeat the definition" and noting generally that efforts to narrow protection are "antithetical to asylum law").[14]

The ruling for which *amici* advocate here—the cognizability of gender *per se* social groups, such as Salvadoran women—would provide a straightforward and administrable rule that would obviate the arbitrariness caused by a language-game approach to gender-based asylum adjudications. Currently, asylum applicants—with and without counsel—must contrive formulations that fit within the Board's baseless and erratic demand that additional qualifiers be added to gender-based groups. *See, e.g.*, *I-R-G-*, AXXX XXX 231 (BIA Aug. 19, 2020) (unpublished)

[14] In *Cece v. Holder*, the applicant's proposed group definition underwent several iterations. *See id*. 670–71. The first proposed PSG was "young Orthodox woman living alone in Albania," but the IJ revised it to "young women who are targeted for prostitution by traffickers in Albania" or "women in danger of being trafficked as prostitutes." *Id*. at 670. When the case was remanded from the Board, the IJ revised the PSG again and found that the applicant's PSG characteristics were "a young woman from a minority religion who has lived by herself most of the time in Albania, and thus is vulnerable, particularly vulnerable to traffickers for this reason." *Id*. at 671. The Seventh Circuit ultimately concluded that the applicant had established a cognizable PSG, explaining that "in one form or another, both Cece and the [IJ] articulated the parameters of the relevant social group." *Id*. at 670. However, what mattered was not the precise language selected, but the substance of the group. *See id.*

(remanding for IJ to consider the PSG of "women who resist and oppose organized criminal activity by the father of their children"), Add. 8–9; —, (Charlotte Immigration Court, July 12, 2018) (recognizing the group of "single Salvadoran mothers who lack male protection"), Add. 137–39. While a *pro se* applicant can articulate experiencing harm on account of being a Salvadoran woman, she is far less likely to put forth the social group of single Salvadoran mothers who lack male protection.

The Supreme Court has made clear that the Board's decisions "must be based on non-arbitrary, 'relevant factors'" which means "that the BIA's approach must be tied . . . to the purposes of the immigration laws." *Judulang v. Holder*, 565 U.S. 42, 55 (2011). However, where the "right to remain here depend[s] on circumstances so fortuitous and capricious," *id.* at 58, as whether a putative refugee uses the magic social group language, such a scheme stands in irreconcilable tension with the core purpose of asylum law. The Board's decision here rejected "Salvadoran Women" as a group just days after it remanded another case to consider the group "Women in El Salvador." *Compare* AR 3–4 (where the BIA held on October 5, 2020 that the Petitioner's group, "Salvadoran women," is not cognizable) *with R-M-T-*, AXXX XXX 377 (BIA Sept. 21, 2020) (unpublished) (where, just two week earlier, the Board remanded to consider whether "women in El Salvador" is cognizable), Add. 4–6. This inconsistent adjudication fails to

reflect the sort of reasoned decision-making this Court demands from the agency. *See e.g.*, *Cordova v. Holder*, 759 F.3d 332, 337 (4th Cir. 2014) ("The BIA abuses its discretion if it fails 'to offer a reasoned explanation for its decision.'").

Accepting gender *per se* as a cognizable particular social group would allow all of the elements of the refugee definition to function properly and proportionally. The Board's focus on restricting claims based on membership in a particular social group ignores the role of the other eligibility requirements. Applicants must not only show their membership in a particular social group, but must also demonstrate that the harm suffered or feared rises to the level of persecution, is on account of a protected ground, and the government is unable or unwilling to control the persecutors. Recognizing Salvadoran woman as a particular social group does not render every women in that country eligible for asylum. As is true in cases based on other protected grounds (such as race or religion), "[d]emonstrating . . . an asylum applicant belongs to a cognizable social group is only the first step in determining asylum." *See Cece*, 733 F.3d at 673.

CONCLUSION

The Board erred when it categorically rejected the social group of Salvadoran women. This Court should correct that error and vacate the Board's decision.

Dated: April 2, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

On April 2, 2021, I, Charles Shane Ellison, served a copy of this Brief on Petitioner and Respondent through the Court's CM/ECF system.

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure the undersigned counsel certifies that this brief:

(i) complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared using Microsoft Office Word and is set in 14-point Times New Roman font, and

(ii) complies with the length requirement of Rule 29(b)(5) and Rule 32(a)(7)(B), because it is 6,481 words excluding the items exempted by Rule 32(f).

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