

UNITED STATES DEPARTMENT OF JUSTICE OFFICE OF THE ATTORNEY GENERAL

In the Matter of:)
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A-B-)
) File No.: _____
In Removal Proceedings)
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BRIEF OF *AMICI CURIAE* THE HARVARD IMMIGRATION AND REFUGEE CLINICAL
PROGRAM, THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION,
HUMAN RIGHTS FIRST, AND KIDS IN NEED OF DEFENSE

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INTEREST OF *AMICI CURIAE*

The Harvard Immigration and Refugee Clinical Program (“HIRC”) at Harvard Law School has been a leader in the field of refugee and asylum law for over 30 years. The Clinic has an interest in the appropriate application and development of U.S. asylum and immigration law, so that claims for asylum protection and other immigration relief receive fair and full consideration under existing standards of law.

HIRC has worked with thousands of immigrants and refugees from around the world since its founding in 1984. It combines representation of individual applicants for asylum and related relief with the development of theories, policy, and national advocacy.

HIRC has been engaged by the Justice Department in the training of immigration judges, asylum officers, and supervisors on issues related to asylum law. HIRC was central to the drafting of the historic U.S. Gender Asylum Guidelines, which were adopted by the federal government, and has played a key role in promoting appropriate and fair treatment of women in interpretation of U.S. asylum law. In addition HIRC has represented hundreds of women applying for asylum protection, and has filed briefs as *amicus curiae* in many cases before the U.S. Supreme Court, the federal Courts of Appeals, the Board of Immigration Appeals (“Board”), and various international tribunals.

The American Immigration Lawyers Association (“AILA”) is a national association with more than 15,000 members throughout the United States, including lawyers and law school professors who practice and teach in the field of immigration and nationality law. AILA seeks to advance the administration of law pertaining to immigration, nationality, and naturalization; to cultivate the jurisprudence of the immigration laws; and to facilitate the administration of justice and elevate the standard of integrity, honor, and courtesy of those appearing in a representative capacity in immigration and naturalization matters. AILA’s members practice regularly before the Department of Homeland Security (“DHS”), immigration courts, and the Board of Immigration Appeals, as well as before the United States District Courts, Courts of Appeals, and the Supreme Court of the United States.

Since 1978, Human Rights First has worked to protect and promote fundamental human rights and to ensure protection of the rights of refugees, including the right to seek and enjoy asylum. Human Rights First grounds its refugee protection work in the standards set forth in the 1951 Convention Relating to the Status of Refugees, the 1967 Protocol Relating to the Status of Refugees, the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, and other international human rights instruments, and advocates adherence to these standards in U.S. law and policy. Human Rights First also

operates one of the largest pro bono asylum representation programs in the country. Through the assistance of volunteer attorneys, Human Rights First provides legal representation without charge to hundreds of asylum applicants unable to afford counsel, many of whom stand to be affected by the outcome of this case.

Kids In Need of Defense (“KIND”) is a national non-profit organization whose ten field offices provide free legal services to immigrant children who reach the United States unaccompanied by a parent or legal guardian, and face removal proceedings in Immigration Court. Since 2009, KIND has received referrals for over 15,800 children from 70 countries, and has partnered with pro bono counsel at over 500 law firms, corporations, law schools, and bar associations. KIND also advocates for changes in law, policy, and practice to enhance protections for unaccompanied children. Many children served through KIND have endured serious harm, including through domestic violence and its consequences, and many request and receive protection under United States law. KIND has a compelling interest in ensuring their access to the full measure of protection that the law affords.

INTRODUCTION AND SUMMARY OF ARGUMENT

In his Interim Decision of March 7, 2018, the Attorney General sought argument on the following question: “Whether, and under what circumstances, being a victim of private criminal activity constitutes a cognizable ‘particular

social group’ for purposes of an application for asylum or withholding of removal.” 27 I. & N. Dec. 227 (A.G. 2018). Embedded in this question is the proper interpretation of “particular social group” under the Immigration and Nationality Act (“INA”).

The Board of Immigration Appeals answered that question over 30 years ago in its seminal decision in *Matter of Acosta*. There, the Board determined that a particular social group may be comprised of individuals sharing a common immutable characteristic, including gender. *See* 19 I. & N. Dec. 211, 233 (BIA 1985). *Acosta*’s holding is faithful to the INA as illuminated through the *ejusdem generis* canon. It has been accepted by U.S. Courts of Appeals and adopted by other state signatories to the United Nations Convention relating to the Status of Refugees. *Acosta*’s reasoning has also been endorsed by the United Nations High Commissioner for Refugees (“UNHCR”) and scholars in the field.

Despite the widespread acceptance of *Acosta* in the U.S. and the world, gender alone as a defining characteristic of a particular social group has been met with misplaced criticism that the category is overbroad. But other status categories in the refugee definition—namely, race, nationality, and religion—are equally broad. Because, under the *ejusdem generis* canon, particular social group is to be interpreted consistently with those categories, it makes no sense to shun gender as a qualifying characteristic because it sweeps too broadly when other categories that

indisputably fit the refugee definition have the same expansive reach. These unfounded “floodgates” concerns also fail to account for the fact that particular social group is only one element of the refugee definition. As with claims involving race, religion, or nationality, a woman claiming refugee status based on gender is required to satisfy *all* elements of that definition. Among other requirements, she must show that she suffered past persecution, or has a well-founded fear future of persecution, *because she is a woman*.

As the many national and international bodies that have embraced *Acosta* have recognized, such persecution is an indisputable reality for many women and girls in societies around the world (including El Salvador, the homeland of the applicant here). If he reaches the merits of this case,¹ the Attorney General should take the opportunity to recognize that undeniable truth and to acknowledge what the world has come to understand: Gender alone may define a particular social group under the refugee definition.

¹ *Amici* share respondent and other *amici*'s concern about the limitations of the procedural posture of this case, the deficiencies in the question presented, and the danger that issuing an adverse decision on the merits will violate respondent's due process rights. Respondent's Br. 16-21; National Immigrant Law Center Br. 4-16, 19-25. *Amici* accordingly urge the Attorney General to heed respondent's request that he not take action in this case. Despite these concerns, *amici* provide their view on the proper interpretation of particular social group to aid the Attorney General should he decide to consider the merits of these issues.

ARGUMENT

MEMBERSHIP IN A PARTICULAR SOCIAL GROUP MAY BE SHOWN BY GENDER ALONE

A. The Conclusion That Gender Is Sufficient To Establish Membership In A Particular Social Group Is Faithful To The INA, As Recognized In *Acosta*

The INA defines the term “refugee.” 8 U.S.C. § 1101(a)(42). Pursuant to the statute, in order to qualify as a refugee, an applicant must demonstrate “a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.” *Id.* § 1101(a)(42)(A).

According to the Board’s own analysis, the meaning of particular social group is discerned by resort to commonly used canons of statutory construction—specifically *ejusdem generis*. That doctrine, the Board explained in *Acosta*, “holds that general words used in an enumeration with specific words should be construed in a manner consistent with the specific words.” *Acosta*, 19 I. & N. Dec. at 233. Looking to the surrounding words in the list of grounds for persecution, the Board found that each “describes persecution aimed at an immutable characteristic . . . that either is beyond the power of an individual to change or is so fundamental to individual identity or conscience that it ought not be required to be changed.” *Id.* Based on that understanding, the Board determined that “membership in a particular social group” should be read to encompass “persecution that is directed

toward an individual who is a member of a group of persons all of whom share *a common, immutable characteristic.*” *Id.* (emphasis added).

Gender is an immutable characteristic. Like race or religion, gender is entrenched, innate, and central to identity. Indeed, the Board recognized that fact in *Acosta*, listing gender among those traits that would satisfy its definition of particular social group. “The shared characteristic” that could identify a persecuted group for purposes of establishing refugee status, the Board declared, “might be sex, color, or kinship ties.” *Id.*

B. *Acosta’s* Framework And Conclusion That Gender May Define A Particular Social Group Has Been Accepted By Courts And International Bodies

1. Acosta forms the basis of established precedent in U.S. Circuit Courts of Appeals

Acosta’s framework has been accepted by numerous federal courts of appeals. In 1993, the Third Circuit, per then-Judge Alito, cited *Acosta* approvingly in *Fatin v. INS*, 12 F.3d 1233, 1240 (3d Cir.). Because *Acosta* “specifically mentioned ‘sex’ as an innate characteristic that could link the members of a ‘particular social group,’” Judge Alito found that *Fatin* had satisfied that requirement “to the extent that . . . [she] suggest[ed] that she would be persecuted . . . simply because she is a woman.” *Id.* Similarly, in *Niang v. Gonzales*, the Tenth Circuit “[a]ppl[ied] the *Acosta* definition” to find that “the female members of a tribe” qualified as a particular social group, observing that

“[b]oth gender and tribal membership are immutable characteristics.” 422 F.3d 1187, 1199 (10th Cir. 2005).

Also reasoning from *Acosta*, the Ninth Circuit observed in *Mohammed v. Gonzales* that “the recognition that girls or women of a particular clan or nationality (or even in some circumstances females in general) may constitute a social group is simply a logical application . . . [of the conclusion that] a ‘particular social group’ is one united by . . . an innate characteristic.” 400 F.3d 785, 797 (9th Cir. 2005); accord *Perdomo v. Holder*, 611 F.3d 662, 669 (9th Cir. 2010) (remanding BIA’s decision that “women in Guatemala” could not constitute particular social group because it was “inconsistent with . . . *Acosta*”). Likewise, in *Cece v. Holder*, the Seventh Circuit found that, “in light of . . . *Acosta*,” the applicant “established that she belongs to a cognizable social group” consisting of “young woman living alone in Albania” because “the attributes are immutable or fundamental.” 733 F.3d 662, 677 (7th Cir. 2013). And, in *Hassan v. Gonzales*, the Eighth Circuit recognized the particular social group “Somali women” based on the applicant’s “possession of the immutable trait of being female.” 484 F.3d 513, 513 (8th Cir. 2007); see also *Ahmed v. Holder*, 611 F.3d 90, 96 (1st Cir. 2010) (“Gender—a common, immutable characteristic—can be a component of a viable ‘social group’ definition.”).

2. *Other state signatories to the U.N. Convention have also adopted Acosta's framework*

The INA follows the articulation of the five enumerated grounds for persecution found in the 1951 United Nations Convention relating to the Status of Refugees. *See* Convention relating to the Status of Refugees, adopted Jul. 28, 1951, entered into force Apr. 22, 1954, 189 UNTS 137; *see also* *INS v. Cardoza-Fonseca*, 480 U.S. 421, 437 (1987) (noting that “one of Congress’ primary purposes [in passing the Refugee Act of 1980] was to bring United States refugee law into conformance with the [1967 Protocol relating to the Status of Refugees]” (internal quotation marks omitted)).² Given that “the definition of ‘refugee’ that Congress adopted is virtually identical to the one prescribed by Article 1(2) of the Convention,” *Cardoza-Fonseca*, 480 U.S. at 437, the views of other state signatories to the Convention are relevant to the proper interpretation of the INA. *See* *Negusie v. Holder*, 555 U.S. 511, 537 (2009) (“When we interpret treaties, we consider the interpretations of the courts of other nations, and we should do the same when Congress asks us to interpret a statute in light of a treaty’s language.”) (Stevens, J., concurring and dissenting).

² The 1967 Protocol relating to the Status of Refugees removed certain temporal and geographical limitations in the 1951 Convention. *See* Protocol relating to the Status of Refugees, adopted Jan. 31, 1967, entered into force Oct. 4, 1967, 606 UNTS 267. The United States is a signatory to the 1967 Protocol, but not the 1951 Treaty.

Among other signatories, the *Acosta* framework and the consequent conclusion that gender may establish membership in a particular social group is well established in law. Eight years after the Board decided *Acosta*, the Supreme Court of Canada cited the decision in *Canada (Attorney General) v. Ward*, finding that particular social group “would embrace individuals fearing persecution on such bases as gender,” an “immutable characteristic.” [1993] 2 S.C.R. 689, 75, 79 (Can., S.C.C.). Following *Ward*, the Canadian courts have recognized particular social groups comprised of “Haitian women,” *Josile v. Canada (Minister of Citizenship & Immigration)*, [2011] 382 FTR 188 (Can. FC, Jan. 17, 2011), at [10], [28]-[30], and “women in the [Democratic Republic of the Congo],” *Kn v. Canada (Minister of Citizenship & Immigration)*, (2011) 391 FTR 108 (Can. FC, June 13, 2011), at [30], among others similar categories. See JAMES C. HATHAWAY & MICHELLE FOSTER, *THE LAW OF REFUGEE STATUS* § 5.9.1 (2d ed. 2014) (collecting these and other cases).

In 1999, the United Kingdom House of Lords relied on the Board’s decision to recognize “women in Pakistan” as a particular social group, observing that its conclusion was “neither novel nor heterodox,” but “simply logical application of the seminal reasoning in *Acosta*.” *Islam & Shah v. Sec’y of State Home Dep’t*, [1999] 2 AC 629, 644-45 (U.K.). In 2006, the House of Lords affirmed its conclusion that gender alone may fall within the definition of a particular social

group when considering the case of a woman fleeing the threat of female genital mutilation (“FGM”). “[W]omen in Sierra Leone,” Lord Cornhill wrote, “are a group of persons sharing a common characteristic which, without a fundamental change in social mores is unchangeable, namely a position of social inferiority compared with men.” *Fornah (FC) v. Sec’y of State for Home Dep’t*, [2006] UKHL 46, para. 31. Baroness Hale opined that the question whether the applicant had established her membership in a particular social group was “blindingly obvious,” *id.* para. 83, and observed that “the world has woken up to the fact that women as a sex may be persecuted in ways which are different from the ways in which men are persecuted and that they may be persecuted because of the inferior status accorded to their gender in their home society,” *id.* para. 86.

Echoing that sentiment (and relying on *Fornah*), the tribunals of New Zealand have noted that “it is indisputable that sex and gender can be the defining characteristic of a social group and that ‘women’ may be a particular social group.” *Refugee Appeal No. 76044* para. 92 (NZ RSAA, 2008); *see also Minister for Immigration & Multicultural Affairs v. Khawar* (2002) 76 A.L.J.R. 667 (Aust.) (tribunal could find that “women in Pakistan” constitute particular social group).

3. *Guidelines issued by the UNHCR and parties to the U.N. Convention acknowledge that gender may establish membership in a particular social group*

Further support for the view that gender alone may establish membership in a particular social group comes from the United Nations High Commissioner for Refugees (“UNHCR”). As part of its supervisory responsibilities, the UNHCR provides interpretive guidance on the provisions of the 1951 Convention and 1967 Protocol relating to the Status of Refugees. U.S. courts have recognized that materials issued by the UNHCR constitute “persuasive authority in interpreting the scope of refugee status under domestic asylum law.” *Miguel-Miguel v. Gonzales*, 500 F.3d 941, 949 (9th Cir. 2007); *see also Cardoza-Fonseca*, 480 U.S. at 439 n.22 (noting that UNHCR material “provides significant guidance” in the interpretation of the Convention, upon which U.S. asylum law is based); *Mohammed*, 400 F.3d at 798 (UNHCR “provides significant guidance for issues of refugee law”).

In 2002, the UNHCR issued guidelines on “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 (May 7, 2002) (“UNHCR Gender-Related Persecution Guidelines”). Following *Acosta’s ejusdem generis* analysis, the UNHCR explained:

[A] particular social group is a group of persons who share a common characteristic other than their risk of being persecuted, or who are perceived as a group by society. The characteristic will often be one which is innate, unchangeable, or which is

otherwise fundamental to identity, conscience or the exercise of one's human rights.

Id.

“It follows,” the UNHCR continued, “that sex can properly be within the ambit of the social group category, with women being a clear example of a social subset defined by innate and immutable characteristics.” *Id.* The “characteristics” of women “also identify them as a group in society, subjecting them to different treatment and standards in some countries.” *Id.* In other guidelines specifically considering membership in a particular social group, the UNHCR explained 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.” 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 4 (May 7, 2002); *see also Mohammed*, 400 F.3d at 798 (quoting guidelines).

Even before the UNHCR issued these interpretive aids, several signatories to the U.N. Convention and Protocol produced their own guidelines on gender-related claims. In 1995, the United States issued guidelines regarding “asylum claims by women.” *See generally* Memorandum from Phyllis Coven, INS Office of International Affairs, to All INS Asylum Officers and HQASM Coordinators 9

(May 26, 1995). Citing *Fatin*, in which the “court regarded gender, either alone or as part of a combination, as a characteristic that could define a particular social group within the meaning of the INA,” the U.S. guidelines described that decision as consistent “with the statement of the Board in *Acosta* that ‘sex’ might be the sort of shared characteristic that could define a particular social group.” *Id.* (citing *Fatin*, 12 F.3d at 1240); *see also In re Matter of Fauyiza Kasinga*, 21 I. & N. Dec. 357, 377 (BIA 1996) (Rosenberg, concurring) (“Our recognition of a particular social group based upon tribal affiliation and gender is also in harmony with the guidelines for adjudicating women’s asylum claims issued by [INS].”).

Canada issued gender-related guidelines in 1993. *See Immigration & Refugee Board of Canada, Women Refugee Claimants Fearing Gender-Related Persecution: Guidelines Issued by the Chairperson Pursuant to Section 65(3) of the Immigration Act* (Mar. 9, 1993). The Canadian guidelines (subsequently updated) explain that gender is the type of innate characteristic that may define a particular social group. *See Immigration & Refugee Board of Canada, Women Refugee Claimants Fearing Gender-Related Persecution: Guidelines Issued by the Chairperson Pursuant to Section 65(3) of the Immigration Act* (Nov. 13, 1996). Australia was also among the first to issue gender guidelines, producing a version in 1996 that included the statement: “[G]ender . . . may be a significant factor in recognising a particular social group. . . . [W]hilst being a broad category, women

nonetheless have both immutable characteristics and shared common social characteristics which may make them cognizable as a group and which may attract persecution.” *Australian Department of Immigration and Multicultural Affairs, Refugee and Humanitarian Visa Applicants: Guidelines on Gender Issues for Decision Makers* § 4.33 (July 1996). The United Kingdom followed in 2000, issuing guidelines providing that “[p]articular social groups can be identified by reference to innate or unchangeable characteristics or characteristics that a woman should not be expected to change,” including “gender.” *Immigration Appellate Authority of the United Kingdom, Asylum Gender Guidelines* 41 (Nov. 2000).³

C. Gender Meets The Criteria The Board Has Added To Define A Particular Social Group Since *Acosta*

Despite the fact that courts in countries around the world have aligned themselves with *Acosta*, in recent years, the Board has “expanded the [particular social group] analysis beyond the *Acosta* test,” identifying additional criteria required to establish a cognizable group. *Matter of M-E-V-G-*, 26 I. & N. Dec. 227, 232 (BIA 2014). Specifically, the Board has opined that the group must be “particular” and “socially distinct.” *Id.* at 228. With respect to particularity, the Board has stressed that the group “must be defined by characteristics that provide a

³ Scholars agree that gender can be the basis for membership in a particular social group. *See, e.g.*, DEBORAH ANKER, LAW OF ASYLUM IN THE UNITED STATES § 5.45 (2017 ed.); HATHAWAY & FOSTER, *supra*, § 5.9.1; Michelle Foster, *Why Are We Not There Yet: The Particular Challenge of Particular Social Group*, GENDER AND REFUGEE LAW 35 (2014).

clear benchmark for determining who falls within [it].” *Id.* at 229. With respect to social distinction, the Board has held that the applicant must offer evidence that “society in general perceives, considers, or recognizes persons sharing the particular characteristic to be a group.” *Matter of W-G-R-*, 26 I. & N. Dec. 208, 217 (BIA 2014).⁴

It should be obvious that women as a group meet the Board’s new requirements. There are clear “benchmarks” determining who is a woman and who is not. Indeed, in most countries, the sex of a newborn is listed on a birth certificate. And censuses and other calculations of a country’s population often segregate men and women, providing population estimates for both categories. *See, e.g., U.S. Census, Quick Facts, available at <https://www.census.gov/quickfacts/fact/table/US/PST045217>.*

For those reasons, women as a group are not “amorphous, overbroad, diffuse, or subjective.” *Matter of M-E-V-G-*, 26 I. & N. Dec. at 239. They are also clearly identifiable in society, both by perception and by sight (although the latter is not necessary for purposes of the social group definition), *id.* at 240, and are

⁴ Courts have criticized the particularity and social distinction requirements. *See, e.g., Valdiviezo-Galdamez v. Attorney Gen.*, 663 F.3d 582, 607 (3d Cir. 2011); *Gatimi v. Holder*, 578 F.3d 611, 615-16 (7th Cir. 2009). *Amici* agree that those requirements are misguided insofar as they are inconsistent with the text of the INA as illuminated by *ejusdem generis*, and with the interpretation of the Convention and Protocol by sister signatories. *See* Respondent’s Br. 38-39. As described above, however, the requirements of particularity and distinction do not foreclose particular social groups defined by gender alone.

considered to be a group, *Matter of W-G-R-*, 26 I. & N. at 217. Moreover, the Board has observed that a country’s “culture of machismo and family violence,” as well as its failure to enforce laws designed to protect women, can be evidence of “social distinction.” *Matter of A-R-C-G*, 26 I. & N. Dec. 388, 394 (BIA 2014). That view is in line with court decisions and guidelines recognizing the uniquely vulnerable position women occupy in cultures that turn a blind eye to gender-based violence. *See Fornah*, [2006] UKHL 46, para. 31 (“[W]omen . . . are a group of persons sharing a common characteristic . . . namely, a position of social inferiority compared with men.”); UNHCR Gender-Related Persecution Guidelines (stating that women’s characteristics “identify them as a group in society, subjecting them to different treatment and standards in some countries”).

Based on the Board’s precedent, therefore, it is apparent that women as a group satisfy the particularity and social distinction criteria, whether or not those requirements have any basis in the refugee definition.⁵

⁵ In its brief in this matter, DHS offers no rebuttal to the arguments outlined herein that gender alone may define a particular social group. DHS nonetheless contends that “examination of . . . foundational issues,” such as the intent of the drafters of the Refugee Act of 1980, the 1951 U.N. Convention, and the 1967 Protocol, “is an exercise probably best left to rulemaking.” DHS Br. 21 n.13. As is clear from the authorities cited above, whether gender alone can establish membership in a particular social group under the refugee definition is question of law, not policy.

D. The Size And Internal Diversity Of A Particular Social Group Defined By Gender Poses No Barrier To Recognition

Over the years, perhaps driven by a misguided belief that gender alone cannot define a particular social group because it sweeps too broadly, asylum applicants have proposed particular social groups that are “overly complicated and unnecessarily detailed.” HATHAWAY & FOSTER, *supra*, § 5.9.1. Typically, these groups improperly “import[] other elements of the [refugee] definition, such as . . . well-founded fear . . . nature of the harm feared . . . and inability or unwillingness of the state to protect.” *Id.*⁶

Efforts to narrow particular social groups beyond gender are unnecessary. Like gender, “race, nationality, religion, and even political opinion are . . . traits which are shared by large numbers of people.” *Id.* Yet claims based on these characteristics are not viewed with skepticism simply because the categories are expansive. For example, when a Christian applicant for asylum cites religion as a

⁶ For example, in *In re Fauziya Kasinga*, a decision notable for its correct result—a grant of asylum for a woman fleeing the threat of FGM—the Board defined the particular social group of which the applicant was part as “young women of the Tchamba-Kunsuntu Tribe who have not had FGM, as practiced by that tribe, and who oppose the practice.” 21 I. & N. Dec. 357, 365 (BIA 1996). Rather than layering qualifiers on her particular social group (and considering her political opinion simultaneously), the Board should have analyzed the fact that the applicant had not had FGM in the context of her well-founded fear of persecution and/or whether she would be persecuted “on account of” her status. See HATHAWAY & FOSTER, *supra*, § 5.9.1; see also *Kasinga*, 21 I. & N. Dec. at 375-76 (Rosenberg, concurring) (noting that applicant’s opposition to FGM was not relevant to her particular social group).

protected ground, the claim is not rejected at the outset because there are over two billion adherents to Christianity in the world. Similarly, political opinion-based claims are not turned away because a large number of a country's citizens oppose its repressive government.

Gender-based claims are no different. “Neither [particular social group] nor any [other] ground performs the function of the entire refugee definition.” ANKER, *supra*, § 5:45. Rather, “[particular social group] is only one element of eligibility [for refugee status],” and each of the other elements—including nexus, well-founded fear, and failure of state protection—has an equally critical role to play in determining whether an applicant qualifies for asylum. *Id.* No matter what protected ground is alleged—race, religion, particular social group or any other—“legitimate concerns about particularizing or individualizing a claim appropriately should be addressed through other definitional criteria.” *Id.* As the Tenth Circuit has explained:

There may be understandable concern in using gender as a group-defining characteristic. One may be reluctant to permit, for example, half a nation's residents to obtain asylum on the ground that women are persecuted there. But the focus with respect to such claims 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 that one could say that they are persecuted “on account of” their membership.

Niang, 422 F.3d at 1199-1200.

Apart from being unnecessary, efforts to narrow gender-based particular social groups have pernicious effects. First, overly detailed groups often “fall foul of the established principle that it is impermissible to define the group solely by reference to the threat of persecution.” HATHAWAY & FOSTER, *supra*, § 5.9.1 (quotation marks omitted). As Baroness Hale put it in the House of Lords’ decision in *Fornah*, this phenomenon “is a particularly cruel version of Catch 22: If not all the group are at risk, then the persecution cannot be caused by their membership of the group; if the group is reduced to those who are at risk, it is then defined by the persecution alone.” [2006] UKHL 46, para. 113; *see, e.g., Escobar-Batres v. Holder*, 385 F. App’x 445 (6th Cir. 2010) (“Escobar’s proposed social group is simply too broad, as it consists of any female teenage citizen who refuses to join the *Maras* Although Escobar attempts to narrow her proposed group by emphasizing that its members are harassed, beaten, tortured, and even killed for not joining the *Maras*, . . . a social group may not be circularly defined by the fact that it suffers persecution.” (internal quotation marks omitted)).⁷

⁷ Not all particular social groups narrowed beyond gender suffer from these flaws. For example, in *Matter of A-R-C-G-*, the Board recognized the particular social group “married women in Guatemala who are unable to leave their relationship.” 26 I. & N. Dec. 388 (BIA 2014). The Board followed *Acosta* in recognizing that the group was defined by immutable characteristics, citing gender, nationality, and relationship status. *Id.* at 388-89. Even though it was unnecessary to cabin the particular social group beyond gender, the group the Board recognized did not improperly subsume other elements of the refugee definition.

Second, the practice of defining and limiting particular social groups leads to the constant relitigation of claims and a lack of meaningful guidance from which applicants can establish their entitlement to protection. Rather than prolonging this chaotic approach, the Attorney General should take this opportunity to state clearly that gender is sufficient to define a particular social group. Such a statement would recognize an unfortunate but unavoidable truth: Women are vulnerable to persecution “in ways which are different from the ways in which men are persecuted[,] and . . . [are] persecuted because of the inferior status accorded to [their] gender” in societies around the world. *Fornah*, [2006] UKHL 46, para. 86.

CONCLUSION

Should he reach the merits of this case, the Attorney General should affirm the continuing validity of *Acosta*, recognize that gender is sufficient to establish membership in a particular social group, and hold that respondent qualifies for asylum and withholding of removal.

Like *Acosta*, *A-R-C-G-* has been cited approvingly in numerous courts of appeals since it was decided in 2014. *See, e.g., Peres-Rabanales v. Sessions*, 881 F.3d 61 (1st Cir. 2018); *Guzman-Alvarez v. Sessions*, 701 F. App’x 54 (2d Cir. 2017); *Gaitan-Bernal v. Sessions*, 695 F. App’x 224 (9th Cir. 2017); *Marikasi v. Lynch*, 840 F.3d 281 (6th Cir. 2016). Moreover, DHS has taken the position that similar particular social groups are cognizable since at least 2004. *See* DHS Position on Respondent’s Eligibility for Relief, *Matter of R-A-*, at 26-28 (2004); DHS Supplemental Brief, *Matter of L-R-*, at 14-15 (2009).

In light of *A-R-C-G-*’s fidelity to *Acosta*, its acceptance in the courts, and DHS’s longstanding support for the position the Board adopted, *amici* join respondent in urging the Attorney General to affirm the holding in *A-R-C-G-*.

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CERTIFICATE OF COMPLIANCE

This brief complies with the instructions in the Attorney General's referral order dated March 7, 2018, because the brief contains 5,214 words, excluding the cover page, Table of Contents, Table of Authorities, signature block, Certificate of Compliance, and Certificate of Service.

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CERTIFICATE OF FILING

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On April 27, 2018, I, Steven H. Schulman, hereby certify that I mailed a copy of this brief to the U.S. Department of Homeland Security, Office of the Chief Counsel at 5701 Executive Center Drive, Suite 300, Charlotte, NC, 28212, by U.S. Postal Service.

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