No. 24-1936

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

KARLA RUBENIA CRUZ DE SAENZ,
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 206-771-888

BRIEF OF *AMICI CURIAE* THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION, AMICA CENTER FOR IMMIGRANT RIGHTS, CENTER FOR GENDER & REFUGEE STUDIES, JUST NEIGHBORS, PISGAH LEGAL SERVICES, TAHIRIH JUSTICE CENTER, AND IMMIGRATION LAW CLINICS IN SUPPORT OF PETITIONER

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- 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. 24-1936 Caption: Karla Rubenia Cruz de Saenz v. Merrick Garland

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(name of party/amicus)

Immig Law Clinic Elon Law, Univ Balt Sch of Law Immig Clinic, UNC Immig Clinic, W&L Immig Clinic

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

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

University of Maryland, Elon University, University of Baltimore, University of North Carolina, Washington & Lee University

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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
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5. Is party a trade association? (amici curiae do not complete this question) ☐YES ☐NO
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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
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Signature: /s/ Sabrineh Ardalan Date: 12/23/2024

Counsel for: Amici curiae

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STATEMENT OF INTEREST OF *AMICI CURIAE*

Amici curiae[1] are organizations and law clinics which collectively represent hundreds of asylum seekers before the Department of Homeland Security, immigration courts, and the Board of Immigration Appeals ("BIA" or "Board") within this Circuit. *Amici* have a profound interest in ensuring that bona fide applicants for protection who are fleeing gender-based violence are not erroneously denied protection. A statement of interest for each organization can be found in the accompanying motion for leave to file this brief.

INTRODUCTION

For almost forty years, the Board and circuit courts have reaffirmed the cognizability of gender-based social groups. Indeed, sex was one of the first characteristics recognized by the Board as a basis for a particular social group ("PSG") in its seminal decision *Matter of Acosta*, 19 I. & N. Dec. 211 (BIA 1985). Since then, the Board and courts have continued to recognize social groups defined by gender even as the test for social group cognizability has changed over time. The Board thus erred in rejecting the social group of "Salvadoran women"

[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* or its counsel contributed money that was intended to fund preparing or submitting the brief. Petitioner and the Government have consented to the filing of this brief.

proposed by Ms. Cruz de Saenz on particularity grounds. The Board's conclusion is inconsistent with the agency's own decisions, this Court's precedent, and decisions from other jurisdictions.

The recognition that gender, or gender-plus-nationality,[2] can constitute a cognizable social group comports with the Immigration and Nationality Act ("INA"), accepted principles of statutory interpretation, and this Court's jurisprudence, including on particularity, as set forth 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 cognizability of groups comprised of gender-plus-nationality. This conclusion aligns with the purpose of the 1980 Refugee Act, which Congress passed to conform U.S. law to international treaty obligations, as well as guidance from the United Nations High Commissioner for Refugees ("UNHCR"), and the practice of other signatories to the 1951 Refugee Convention and its 1967 Protocol.

Recognizing a social group defined by gender-plus-nationality would resolve unnecessary complexity that currently hampers asylum seekers' access to critical protection and help to correct longstanding and often devastating legal errors based on the conflation of social group cognizability with the overall merits

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

of an asylum claim. For these reasons, this Court should correct the Board's error, vacate its decision, and remand.

ARGUMENT

I. GENDER IS SUFFICIENT TO ESTABLISH MEMBERSHIP IN A PARTICULAR SOCIAL GROUP UNDER THE INA.

Under the INA, an applicant for asylum must demonstrate "a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1101(a)(42)(A). The recognition that membership in a particular social group ground can be defined by gender, or gender-plus-nationality, under the statute dates to the Board's 1985 decision in *Acosta*. 19 I. & N. Dec. at 233. To reach that conclusion, the Board interpreted the meaning of social group by deploying 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." *Id.* Looking to the other four protected grounds for asylum—race, religion, nationality, and political opinion—the Board found each "describes . . . 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 this understanding, the Board interpreted social group to mean "a group of persons all of whom share a common, immutable

characteristic." *Id.* The Board then explained this "shared characteristic" could include "*sex*, color, or kinship ties." *Id.* (emphasis added).

Since *Acosta*, *the* agency has repeatedly recognized gender-based social groups as cognizable. *See, e.g*., *Matter of A-B-*, 28 I. & N. Dec. 307 (A.G. 2021) ("*A-B- III*") (reinstating *A-R-C-G-*); *Matter of A-R-C-G-*, 26 I. & N. Dec. 388, 392 (BIA 2014) (citing *Acosta*'s finding that "sex is an immutable characteristic"); *Matter of Kasinga*, 21 I. & N. Dec. 357, 377 (BIA 1996) (Rosenberg, J., concurring) ("Our recognition of a particular social group based upon tribal affiliation and gender is also in harmony with [federal gender asylum] guidelines . . . ." (citing Immigr. & Naturalization Serv., *Considerations for Asylum Officers Adjudicating Asylum Claims from Women* (May 26, 1995) ("INS Gender Guidelines") (applying *Acosta* as the framework for federal gender asylum guidelines, recognizing "sex" could be the shared characteristic that defines a cognizable group)); *see also* Appeal ID 5414722 (BIA May 1, 2023) (upholding "Somali women" as cognizable), Addendum ("Add.") 21;[3] C-E-R-G-, AXXX XXX 090 (BIA Mar. 8, 2017) (unpublished) (affirming "Mayan women" as cognizable), Add. 3.

[3] All unpublished decisions cited herein are included in the Addendum.

Time and again, the Board has also remanded for further consideration of groups identical or similar to the gender-plus-nationality group proffered by Petitioner. *See* Appeal ID 5381120 (BIA Dec. 22, 2023) (unpublished) (remanding for consideration of whether "Salvadoran women" is cognizable), Add. 105; Appeal ID 5362141 (BIA Nov. 30, 2023) (unpublished) (remanding for consideration of whether "women in El Salvador" is cognizable), Add. 102–03; Appeal ID 5243157 (BIA June 29, 2023) (unpublished) (same), Add. 83; Y-V-P-, AXXX XXX 977 (BIA Nov. 6, 2019) (unpublished) (same), Add. 116; M-D-A-, AXXX XXX 053 (BIA Feb. 14, 2019) (unpublished) (same, rejecting notion that a social group may be too large), Add. 114. *See also, e.g.*, Appeal ID 5294202 (BIA Oct. 12, 2023) (unpublished) ("Honduran women" remand), Add. 95–96; Appeal ID 5236578 (BIA June 30, 2023) (unpublished) (same, noting "the large size of a group is not dispositive of particularity"), Add. 87; Appeal ID 5315486 (BIA Nov. 13, 2023) (unpublished) ("Mexican women" remand), Add. 100; Appeal ID 5277334 (BIA Aug. 30, 2023) (unpublished) ("Guatemalan women" remand), Add. 93; Appeal ID 5221888 (BIA July 18, 2023) (unpublished) (same, rejecting notion that groups can be "too broad"), Add. 90; Appeal ID 5379735 (BIA Apr. 10, 2023) (unpublished) ("females" or "St. Lucian females" remand), Add. 74–75.

In a recent case, the Board remanded with specific instructions to the immigration judge ("IJ") to reconsider the cognizability of "Honduran women"

given this Court's precedent. *See* Appeal ID 5230728 (BIA Oct. 25, 2023) (unpublished), Add. 98–99 (citing *Alvarez Lagos v. Barr*, 927 F.3d 236, 253 (4th Cir. 2019) ("[T]he size and breadth of a group alone does not preclude a group from qualifying as [a particular] social group") (citations omitted)). The Board rejected the IJ's finding that the group was amorphous and too broad, noting that "[a] cursory statement that the proposed group is amorphous does not constitute sufficient finding and analysis to determine whether or not a group is or is not defined with particularity." *Id.* at 99. Remand is thus required, where, as here, the Board failed to engage with this Court's precedent on particularity. *See* C-V-M-M-, AXXX XXX 906 (BIA Jan. 25, 2024) (unpublished) (citing *Amaya*, remanding for consideration of whether "Honduran women" is a cognizable social group), Add. 122–23.

Numerous IJs have also granted asylum based on membership in gender-based groups, including Salvadoran women. *See, e.g.*, —, (Denver Immigr. Ct., Jan. 24, 2023) (unpublished) (finding "Salvadoran women" cognizable), Add. 68; —, (Seattle Immigr. Ct., Feb. 22, 2021) (unpublished) (recognizing cognizability of "women from El Salvador"), Add. 36; *see also* —, (Arlington Immigr. Ct., May 1, 2020) (unpublished) (finding "Honduran women" cognizable), Add. 22; —, (New Orleans Immigr. Ct., May 6, 2022) (unpublished) (same), Add. 57; —, (Newark Immigr. Ct., Mar. 13, 2020) (unpublished) (same), Add. 10–11.

It is critical to note that under the principle of *ejusdem generis*, the recognition that gender alone may define a particular social group does not automatically render women around the world—or within any specific country—entitled to asylum. As is true in cases based on other protected grounds, an applicant must demonstrate she meets *all* elements of the refugee definition. *See* 8 U.S.C. § 1101(a)(42); *see also Niang v. Gonzales*, 422 F.3d 1187, 1199–200 (10th Cir. 2005) ("[T]he focus with respect to [gender-based asylum] 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 . . . 'on account of' their membership." (emphasis added)).

For example, the mere fact that a Christian was harmed in the past does not mean it was on account of her religion or that all other Christians in her country would be eligible for asylum. The other elements of the refugee definition—i.e., the requirements that an applicant show harm that rises to the level of past persecution or a well-founded fear of future persecution, as well as nexus to a protected ground and state inability or unwillingness to control the persecutor—play an important limiting role, and do not change according to the protected ground underlying the claim. *See Garcia v. Garland*, 73 F.4th 219, 229 (4th Cir. 2023) (recognizing that "[t]he 'core' of an applicant's eligibility for [protection] is the 'nexus' between persecution and a protected status," and whether "the

persecution he fears would be inflicted by either the government or private actors that the government is 'unable or unwilling to control'" (citations omitted)). These requirements are the same for all claims, whether based on gender, religion, or any other protected ground. *See W.G.A. v. Sessions*, 900 F.3d 957, 964 n.4 (7th Cir. 2018) ("[A]s we have stated, rejecting a social group because it is too broad 'would be akin to saying that the victims of widespread governmental ethnic cleansing cannot receive asylum simply because there are too many of them.'" (citations omitted)).

II. RECOGNITION OF GENDER *PER SE* AS A COGNIZABLE PARTICULAR SOCIAL GROUP IS CONSISTENT WITH THIS COURT'S LAW.

Since *Acosta*, the Board has expanded its criteria for social group cognizability and applied a three-prong test, requiring groups 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). The gender-plus-nationality group proffered by Ms. Cruz de Saenz satisfies the additional requirements of particularity and social distinction, to which this Court has previously deferred. *See Oliva v. Lynch*, 807 F.3d 53, 61 (4th Cir. 2015). The Board thus erred in failing to consider this Court's precedent when it rejected Petitioner's proposed group of "Salvadoran women" as overbroad, because the group "could include women in El

Salvador of a wide range of ages, lifestyles, backgrounds, and other identifying factors." J.A. 4. In so doing, the agency failed to apply this Court's clear precedent in *Amaya*, 986 F.3d at 434, which explicitly rejected that reasoning in regard to particularity.

Moreover, post-*Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 244 (2024), this Court no longer owes deference to the Board's interpretation of particular social group[4] and can recognize the cognizability of Ms. Cruz de Saenz's gender-plus-nationality group under well-settled principles of statutory construction as set forth in *Acosta*. Regardless of whether this Court chooses to depart from the Board's interpretive framework in assessing the statutory meaning of social group in this case, the Board's denial of "Salvadoran women" as a cognizable group defies logic, both under its own test and under the statutory text.

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[4] *See* Pet'r's Br. at III.C. The Board's imposition of additional requirements on social group formulation post-*Acosta* has been controversial since the start with courts questioning the reasonableness of agency interpretation. *See, e.g.*, *Gatimi v. Holder*, 578 F.3d 611, 615–17 (7th Cir. 2009) (rejecting social visibility because "it makes no sense"); *W.G.A.*, 900 F.3d at 964 n.4 (noting "[w]hether the Board's particularity and social distinction requirements are entitled to *Chevron* deference remains an open question in this circuit" and recognizing petitioner's arguments regarding the unreasonableness of agency interpretation "have some force" including the argument that "social distinction and particularity create a conceptual trap that is difficult, if not impossible, to navigate. The applicant must identify a group that is broad enough that the society as a whole recognizes it, but not so broad that it fails particularity."); *Cantarero-Lagos v. Barr*, 924 F.3d 145, 154–55 (5th Cir. 2019) (Dennis, J., concurring) (criticizing the "ever-changing" "requirements" of the BIA's PSG jurisprudence).

A. This Court Has Recognized Gender as an Immutable Characteristic.

This Court has applied the immutability framework from *Acosta* to recognize gender as an immutable characteristic. *See Garcia*, 73 F.4th at 230–31 (considering cognizability of social group involving male gender); *see also Alvarez Lagos*, 927 F.3d at 252 (noting the IJ assumed the social group "unmarried mothers living under the control of gangs in Honduras" satisfied immutability requirement).

As this Court explained in *Garcia*, "at any given moment when being targeted by some persecutor, a person cannot change the fact that they are 'young' or 'male.'" 73 F.4th at 230. The Court invoked the Board's reasoning in *Kasinga*, recognizing that "'being a young woman' is a 'characteristic [that is] fundamental to [one's] individual identit[y]' that 'cannot be changed.'" *Id.* at 231. It also pointed to decisions of other courts, which found gender to be an immutable characteristic. *Id.* (citing *Cece v. Holder*, 733 F.3d 662, 672 (7th Cir. 2013) (en banc) (recognizing social group of "young women who are targeted for prostitution by traffickers in Albania")); *see infra* Section III.

Concluding that a gender-based social group is defined by the shared immutable characteristic of sex comports with this Court's application of *Acosta to* kinship-based claims. Like family membership, gender is a characteristic that unites an individual with a group of other individuals and that cannot or should not be required to change. *See Crespin-Valladares v. Holder*, 632 F.3d 117, 124 (4th

Cir. 2011) (citing *Acosta*'s recognition that "kinship ties [are] paradigmatically immutable" (quotation marks omitted)).

B. Gender *Per Se* Meets This Court's Criteria for Particularity under the Additional Requirements the Board Has Used to Define Social Group.

Gender *per se* meets the particularity requirement set forth by the Board in *M-E-V-G-* and adopted by this Court in *Amaya. See* 986 F.3d at 432–38. Particularity requires that a social group have "discrete" and "definable boundaries" so it is sufficiently clear who is in and out of the group. *Id.* at 427 (quoting *M-E-V-G-*, 26 I. & N. Dec. at 239); *see also Crespin-Valladares*, 632 F.3d at 125 (requiring a social group 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 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 (rejecting "amorphous characteristics").

Since *Amaya*, this Court has rejected Board decisions that fail to apply its test for particularity. *See, e.g.*, *Escobar Gomez v. Garland*, No. 20-1654, 2021 WL 5860746, at *3 (4th Cir. Dec. 10, 2021). There, this Court cited *Amaya* and stressed whether "the proposed social group may be divided into smaller subgroups is not

dispositive of a particularity finding." *Id*. The Court further explained a social group "need not be made up of homogenous members, nor does the existence of smaller parts within the whole automatically discount the existence of a particular social group . . . so long as boundaries drawn around the group are clear." *Id.*

The group "Salvadoran women" meets this Court's standard for particularity. First, the group undeniably has "discrete" and "definable boundaries." *Amaya*, 986 F.3d at 427. Salvadoran nationality and gender are listed as categories in multiple documents in the record, including answers to questions in the asylum application itself. *See* J.A. 289 (Form I-589). Ms. Cruz de Saenz's gender and her nationality are listed on her birth certificate and Salvadoran passport. *See* J.A. 223–224 (Birth Certificate) and J.A. 225 (Salvadoran passport). The term "women" also has a commonly understood dictionary definition.[5] Furthermore, just like the group of "Salvadoran gang members" at issue in *Amaya*, the group here includes only people of Salvadoran nationality, eliminating women from other countries. *See* 986 F.3d at 434.

Second, the group's definitional terms are not "amorphous," "diffuse, or subjective," *id.* at 427, unlike groups rejected by this Court that "carry multiple

[5] *Woman*, MERRIAM-WEBSTER ONLINE, https://www.merriam-webster.com/dictionary/woman (last updated Dec. 20, 2024) (defining woman as "an adult female person").

meanings" or call for subjective value judgments. *See, e.g.*, *Herrera-Martinez v. Garland*, 22 F.4th 173, 183–84 (4th Cir. 2022) (rejecting "prosecution witnesses" because it can "carry multiple meanings" including people who reported crimes, those who had knowledge of crimes, and those who testified); *Moreno-Osorio v. Garland*, 2 F.4th 245, 255–56 (4th Cir. 2021) (rejecting "returning migrants" because it is not clear "who is in and who is not" in the group which could include short-term vacationers). In *Lizama*, this Court rejected "young, Americanized, well-off Salvadoran male deportees with criminal histories who oppose gangs" because "wealth, Americanization, and opposition to gangs are all amorphous characteristics." 629 F.3d at 446–47. Critically, however, the Court did not find "male" and "Salvadoran" to be similarly amorphous. *See id.* "Salvadoran women" likewise does not contain adjectives or any other modifying characteristics that render it vague or difficult to define.

Third, "Salvadoran women" is not "overbroad." *Amaya*, 986 F.3d at 427. In *Alvarez Lagos*, 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 size "is not dispositive" when determining "particularity," *id.* at 253—reasoning this Court reaffirmed in *Amaya*. 986 F.3d at 433–34 n.6; *see also Escobar Gomez*, 2021 WL 5860746 at *5 (Wynn, J., concurring) (citing *Amaya*, 986 F.3d at 436) ("[T]he only question, in determining particularity, is

whether 'there are clear lines delineating the boundaries of the group[.]' . . . The size of the group, the difficulty of its application, and any gradations within the group are all irrelevant . . . .").

The Board's finding that "Salvadoran women" could include women of varying "ages, lifestyles backgrounds and other identifying factors," J.A. 4, does not implicate the particularity of the group. This Court has recognized the cognizability of other groups that also cover a wide range of "ages, lifestyles backgrounds and other identifying factors," such as groups defined by sexual orientation and groups defined by mental illness. *See, e.g.*, *Tairou v. Whitaker*, 909 F.3d 702, 706–07 (4th Cir. 2018) (recognizing cognizability of "homosexuals in Benin" and noting that "[the Government] concedes—as it must—that he has stated a valid particular social group"); *Temu v. Holder*, 740 F.3d 887, 891–97 (4th Cir. 2014) (holding "individuals with bipolar disorder who exhibit erratic behavior" was a cognizable social group, even though "mental illness can cover a broad range of severity").

As this Court explained in *Amaya*, "there are smaller parts to any whole" and it is "unreasonabl[e]" to reject a proposed group merely because it can be subdivided in "any number of ways – by 'age, sex, or background.'" 986 F.3d at 434 ("What matters is not whether the group can be subdivided based on some arbitrary characteristic but whether the group itself has clear boundaries."). The

Court also noted that Catholics "vary widely in the time they have been part of that faith as well as in their level of commitment and involvement," but emphasized that those gradations "have nothing to do with particularity." *Id*. at 435. As the Court has explained, nexus and credibility, in addition to the other elements of the refugee definition, serve as important limiting factors. *See id.*; *Escobar Gomez*, 2021 WL 5860746, at *3 ("Other statutory requirements, including nexus, operate to further limit the number of members within the groups who qualify for asylum, but do not bear on an assessment as to whether the proposed group provides a clear, objective benchmark for who is in the group.").

The expectations imposed by the Board on applicants with gender-based claims depart sharply from those placed on applicants advancing claims under the other four enumerated grounds. Imposing undue burdens on the formulation of gender-based claims—as the Board has done here—fails to comport with this Court's precedent and the principle of *ejusdem generis* that governs the interpretation of social group membership.

Here, 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" meets the Board's particularity requirement.

C. Gender *Per Se* Meets this Court's Criteria for Social Distinction under the Test the Board Has Used to Define PSG Membership.

The group "Salvadoran women" meets this Court's criteria for social distinction. A group is socially distinct where it is set apart and "perceived as a group by society." *Oliva*, 807 F.3d at 61 (quoting *M-E-V-G-*, 26 I. & N. Dec. at 240 and remanding for consideration of evidence of social distinction including evidence of "government-and community-driven programs" addressing the proffered group).

Here, the record reflects that women in El Salvador are "easily recognizable," and Salvadoran society understands women to constitute a distinct group. *See Garcia*, 73 F.4th at 231. The Salvadoran government has specifically established government agencies to address the status of women as a group. *See* J.A. 367 (U.S. Dep't of State, El Salvador 2013 Human Rights Report) (citing, *inter alia*, the Salvadoran Institute for the Development of Women). The record also reflects that women in El Salvador face disproportionate levels of violence.[6]

[6] "Salvadoran women" does not violate the "anti-circularity requirement" because the group is not defined in terms of the underlying harm, even if women are uniquely vulnerable to gender-based persecution. *Cf. Del Carmen Amaya-De Sicaran v. Barr*, 979 F.3d 210, 214 (4th Cir. 2020) (quoting *Matter of A-B-*, 27 I. &

J.A. 375–378 (addressing unique forms of violence faced disproportionately by women); *see Temu*, 740 F.3d at 893–94 (finding that a group is socially distinct where "it is singled out for worse treatment than other groups").

Indeed, failing to recognize the cognizability of gender *per se* would mean "turning a blind eye" to the violence Salvadoran women face because of their gender, a fact readily discernable from the evidence presented. *See Garcia*, 73 F.4th at 231 (noting that "the 18th Street Gang was clearly capable of discerning who was and was not a 'young male family member' of Emily when it singled out Garcia for its merciless attacks. And there is no reason we should not be able to make that distinction as well. To conclude otherwise would require turning a blind eye.").

D. While Deference to the Board's Three-Part Test is No Longer Required after *Loper Bright*, the Board's Decision Must Be Vacated Regardless of the Test Employed.

Although this Court has previously deferred to the Board's three-part social group test under *Chevron*, it need not continue to afford the Board's decisions deference post-*Loper Bright*, especially given that the Court has already called into

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N. Dec. 316, 334 (A.G. 2018), *vacated by A-B- III*). This Court's rejection of the social group "married El Salvadoran women in a controlling and abusive domestic relationship" in *Sicaran* is inapposite to the social group of "Salvadoran women." *Id.* at 218. Gender and nationality can be the basis for which an asylum seeker is persecuted, but they are not themselves forms of persecution.

question the Board's reasoning in *Amaya*. 986 F.3d at 432 (rejecting the Board's description of the particularity requirement in *Matter of W-G-R-*, 26 I. & N. Dec. 208 (BIA 2014) as unreasonable); *cf. Morales v. Garland*, 51 F.4th 553, 557 (4th Cir. 2022) (noting that "[t]his court, by now, has appealed to the definition in multiple decisions, without once finding it to be impermissible" (citing *Quintero v. Garland*, 998 F.3d 612, 632 (4th Cir. 2021) (finding this court to have "adopt[ed]" the Board's social group definition))).

This Court can find that a social group defined by gender *per se* or gender-plus-nationality is cognizable by applying the *ejusdem generis* canon of statutory construction and considering the meaning of social group within the context of the INA and the other four protected grounds, discussed *supra*. *See* Section I; Pet'r's Br. at I, I.A, III.C; *see also Acosta*, 19 I. & N. Dec. at 233. Furthermore, remand is appropriate where, as here, the Board failed to correctly apply its own test for social group cognizability and this Court's precedent, notwithstanding that this Court no longer owes deference to the agency. *See Mouns v. Garland*, 113 F.4th 399, 415 (4th Cir. 2024) (leaving "for another day" the propriety of the Attorney General's interpretation following *Loper Bright* in light of the agency's failure to apply the governing standard).

III. OTHER CIRCUIT COURTS RECOGNIZE GENDER *PER SE* AS A COGNIZABLE PARTICULAR SOCIAL GROUP.

Recognition of gender *per se* as a cognizable social group is consistent with decisions by sister circuits. As the First Circuit observed in *De Pena-Paniagua v. Barr*, it is probable that "women . . . form a 'particular' and 'well-defined' group of persons" in every country. 957 F.3d 88, 96 (1st Cir. 2020). Likewise, the Ninth Circuit has concluded 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 our law." *Mohammed v. Gonzales*, 400 F.3d 785, 797–98 (9th Cir. 2005) (recognizing a "group comprised of Somalian females" as cognizable); *see also Perdomo v. Holder*, 611 F.3d 662, 668–69 (9th Cir. 2010) (determining that "women in Guatemala" can be cognizable); *Rodriguez v. Garland*, No. 22-170, 2023 WL 2675064, at *1 n.1 (9th Cir. Mar. 29, 2023) ("[W]e have held that 'women in a particular country [. . .] could form a particular social group.'" (quoting *Perdomo*, 611 F.3d at 667)).

The Eighth and Tenth Circuits have also recognized that gender-plus-nationality or gender plus tribal membership may constitute cognizable social groups. In *Hassan v. Gonzales*, for example, the Eighth Circuit recognized the cognizability of "Somali females." 484 F.3d 513, 518 (8th Cir. 2007); *see Ngengwe v. Mukasey*, 543 F.3d 1029, 1034 (8th Cir. 2008) (holding that "Cameroonian

widows" is cognizable); *see also Niang*, 422 F.3d at 1199–200 (finding that "female members of a tribe" satisfied the social group requirements). The Second and Seventh Circuits have similarly recognized the potential cognizability of gender-based social groups. *See Paloka v. Holder*, 762 F.3d 191 (2d Cir. 2014) (recognizing the potential cognizability of "young Albanian women"); *Cece*, 733 F.3d at 676 (recognizing cognizability of "young women who are targeted for prostitution by traffickers in Albania" and noting the persuasiveness of the INS Gender Guidelines).

Furthermore, nearly three decades ago, then-Judge Alito of the Third Circuit, cited *Acosta* approvingly in *Fatin v. I.N.S.*, and concluded that "to the extent that the petitioner in this case suggests she would be persecuted . . . simply because she is a woman, she has [identified a cognizable social group]." 12 F.3d 1233, 1240 (3d Cir. 1993); *see also Estrada-Grajeda v. Att'y Gen. of United States*, 731 F. App'x 123, 126 (3d Cir. 2018) (affirming adoption of *Acosta*'s holding). While the Third Circuit has since rejected "Guatemalan women" as not cognizable, it did so for a reason never endorsed by this Court, namely that the group lacks particularity because not all Guatemalan women have "a well-founded fear of persecution based solely on their gender." *Chavez-Chilel v. Att'y Gen. United States*, 20 F.4th 138, 146 (3d Cir. 2021) (quoting *Safaie v. I.N.S.*, 25 F.3d 636, 640 (8th Cir. 1994)). That conclusion erroneously conflates two separate elements of the refugee definition—

particularity and well-founded fear—contrary to this Court's law. *Amaya*, 986 F.3d at 433 (emphasizing that particularity "serve[s] [a] distinct purpose[]" and must be considered "separately" since "conflation of the particularity requirement with [other elements] . . . creates an analytical muddle").[7]

Related to the Board's misplaced concern regarding the breadth of "Salvadoran women" social group, sister circuits have also rebuffed the assertion that large social groups cannot be cognizable. As the First Circuit in *De Pena-Paniagua* emphasized, "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; *see also, e.g.*, *Malonga v. Mukasey*, 546 F.3d 546, 553–54 (8th Cir. 2008) (rejecting denial of social group solely because ethnic group was part of large tribe).

In *Perdomo,* the Ninth Circuit similarly reasoned that "the size and breadth of a group alone does not preclude a group from qualifying," rejecting the Board's

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[7] *Compare Jaco v. Garland*, 24 F.4th 395, 407 (5th Cir. 2021) (rejecting "Honduran women unable to leave their domestic relationships" but recognizing that "women who have suffered from domestic violence are [not] categorically precluded from membership in a particular social group") *with* —, (New Orleans Immigr. Ct., May 6, 2022) (unpublished) (recognizing gender *per se* as a cognizable social group post-*Jaco*), Add. 57; *see also* D-M-R-, AXXX XXX 278 (BIA Nov. 15, 2024) (unpublished), Add. 126–27 (remanding PSG of Honduran women for further fact-finding and consideration post-*Jaco* and noting that the group did not appear to present the circularity concerns raised by the groups proffered in *Jaco* which were defined by the persecution suffered).

finding that "women in Guatemala" was overly broad. 611 F.3d at 668–69; *see also* *Antonio v. Garland*, 58 F.4th 1067, 1075–76 (9th Cir. 2023) (affirming reasoning in *Perdomo* that it is erroneous to reject a group because it "represent[s] too large a portion of a population"). As the Seventh Circuit explained in *Cece*, "[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." 733 F.3d at 674–75 (listing large social groups recognized by the Board as cognizable, including Chinese descendants in the Philippines); *N.L.A. v. Holder*, 744 F.3d 425, 439 (7th Cir. 2014) ("[D]enying legitimate asylum applications merely because the group of applicants might be too great is unreasoned and impermissible . . . .").

IV. OTHER SIGNATORIES TO THE REFUGEE CONVENTION AND INTERNATIONAL BODIES RECOGNIZE GENDER *PER SE* AS A COGNIZABLE SOCIAL GROUP.

One of Congress's primary purposes in passing the Refugee Act of 1980 was "to bring United States refugee law into conformance with the 1967 United Nations Protocol Relating to the Status of Refugees," which the United States signed and ratified. *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 436 (1987); *see also* Refugee Act of 1980, Pub. L. No. 96-212, § 101(a), 94 Stat. 102 (1980) (recognizing the "historic policy of the United States to respond to the urgent needs of persons subject to persecution in their homelands"). Thus, the meaning of social

group in the Refugee Convention, which the 1967 Protocol incorporates, is directly relevant to proper interpretation of the INA. *See* Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267.

The UNHCR, the agency which provides guidance regarding Refugee Convention implementation, has reaffirmed that gender alone may establish a cognizable social group. In its 2002 guidelines on gender-related persecution, UNHCR adopted *Acosta*'s *ejusdem generis* analysis and found "sex can properly be within the ambit of the social group category, with women being a clear example." UNHCR, Guidelines on International Protection: 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 ¶¶ 30–31 (May 7, 2002) (explaining that rejection of "women" as a social group because of size "has no basis in fact or reason, as the other grounds are not bound by this question of size"); *see also* UNHCR, Guidelines on International Protection: "Membership of a particular social group" 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/02/02 ¶ 15 (May 7, 2002) ("[W]omen may constitute a particular social group . . . based on the common characteristic of sex . . . ."). The UNHCR guidance is both a "useful interpretative aid," *M-E-V-G-*, 26 I. & N. Dec. at 248, and persuasive. *See Cardoza-Fonseca*, 480 U.S. at 439 n.22

(noting "the Handbook provides significant guidance"); *see also Quintero*, 998 F.3d at 625 n.12 ("[F]ederal courts, including this Court and the Supreme Court, have long relied on [UNHCR's] Handbook as a valuable interpretive aid.").

Other signatories to the Refugee Convention and its 1967 Protocol have long recognized that gender may define a social group. This recognition is directly relevant, because "the definition of 'refugee' that Congress adopted . . . is virtually identical to the one" in the Convention. *Cardoza-Fonseca*, 480 U.S. at 437; *see also Negusie v. Holder*, 555 U.S. 511, 537 (2009) (Stevens, J., concurring in part and dissenting in part) ("When we interpret treaties, we consider the interpretations of the courts of other nations . . . .").

The Supreme Court of Canada relied on *Acosta* in its seminal decision *Canada (Attorney General) v. Ward*, finding that particular social group "would embrace individuals fearing persecution on such bases as gender." [1993] 2 S.C.R. 689, 75, 79 (Can.). The United Kingdom House of Lords similarly recognized "women in Pakistan" as a social group, observing that its conclusion was "neither novel nor heterodox," but "simply a logical application of the seminal reasoning in *Acosta.*" *Islam v. Sec'y of State for the Home Dep't*, [1999] 2 AC 629, 644–45 (U.K.).

Tribunals in New Zealand and Australia have also concluded "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* [2008] NZRSAA 719 at [92] (N.Z.); *accord Minister for Immigr. & Multicultural Affairs v. Khawar* [2002] HCA 14 (Austl.) (recognizing "women in Pakistan" as cognizable).

More recently, countries in Europe have recognized Afghan women as eligible for refugee protection based on their gender and nationality under the Taliban regime, as has the European Court of Justice.[8]

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

Courts have long 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*, 924 F.3d at 154 (Dennis, J., concurring) (describing the task of "[d]efining a PSG [as] unspeakably complex"); *Rivera-Barrientos v. Holder*, 666 F.3d 641, 647 (10th Cir.

[8] *See, e.g.*, Emma Wilbur, *Denmark, Sweden Offer Protection to All Women, Girls from Afghanistan*, HUM. RTS. WATCH (Feb. 9, 2023, 3:00 AM), https://www.hrw.org/news/2023/02/09/denmark-sweden-offer-protection-all-women-girls-afghanistan. *See also All Afghan Women And Girls Are Granted Refugee Status*, FINNISH IMMIGR. SERV. (Feb. 15, 2023 2:23 PM), https://migri.fi/en/-/refugee-status-to-afghan-women-and-girls; Joined Cases C-608/22 and C-609/22, AH & FN v. Bundesamt für Fremdenwesen und Asyl, ECLI:EU:C:2024:828 (Oct. 4, 2024) (confirming gender and nationality alone can be sufficient grounds for a European Union member state to grant asylum).

2012) (recounting the "evolving boundaries of [the Board's] social group" case law). The Board's pronouncement that an applicant must "specifically delineate" all potential versions of "her proposed social group" before the IJ has only exacerbated these challenges. *See Matter of W-Y-C- & H-O-B-*, 27 I. & N. Dec. 189, 191–92 (BIA 2018). These challenges are particularly acute for the over 600,000 asylum applicants proceeding *pro se*.[9] Accompanying the complexity of social group determinations is a mounting workload for IJs tasked with adjudicating millions of cases pending in removal proceedings.[10] Straightforward rules for social group cognizability, including the recognition of groups defined by gender and nationality, are thus critical given the time pressures IJs face.

Currently, 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 intent of the Refugee Act. *See Oliva*, 807 F.3d at 60 (emphasizing the necessity of "viewing the case holistically" rather than "focusing myopically on a particular word or fact"). The Supreme Court has made clear that the Board's decisions "must be based on non-arbitrary, 'relevant

[9] Executive Office of Immigration Review, Workload and Adjudication Statistics, *Current Representation Rates* (Oct. 10, 2024), https://www.justice.gov/eoir/media/1344931/dl?inline.
[10] *See Immigration Court Backlog*, TRAC IMMIGR., https://trac.syr.edu/phptools/immigration/backlog/ (last visited Dec. 19, 2024).

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). Where the "right to remain" depends on "circumstances so fortuitous and capricious," the Board's inconsistency in recognizing the potential cognizability of "Salvadoran women" in one case while rejecting this group in another stands in irreconcilable tension with the core purpose of asylum law. *Id*. at 58 (quoting *Delgadillo v. Carmichael*, 332 U.S. 388, 391 (1947)); *compare* J.A. 4 *with* R-M-T-, AXXX XXX 377 (BIA Sept. 21, 2020) (unpublished) (remanding to consider whether "women in El Salvador" is cognizable), Add. 119–20. Such inconsistent adjudications fail to reflect the type 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 . . . .'" (quoting *Tassi v. Holder*, 660 F.3d 710, 719 (4th Cir. 2011))).

The ruling for which *amici* advocate here—the cognizability of gender *per se* social groups, such as Salvadoran women—would provide an administrable rule for gender-based asylum adjudications. Accepting gender *per se* as a cognizable social group would clarify the limited role of the protected ground within the context of the refugee definition and allow each element of the refugee definition to function properly and proportionally. Recognizing Salvadoran woman as a

social group would not render every woman in that country eligible for asylum. *See, e.g.*, *Niang*, 422 F.3d at 1199–200 (emphasizing role of nexus). Rather, as is true in cases based on other grounds encompassing large portions of a population, "[d]emonstrating that 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, find that "Salvadoran women" can be cognizable, and vacate the Board's decision in this case.

Dated: December 23, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

On December 23, 2024, I, Sabrineh Ardalan, served a copy of this Brief on Petitioner and Respondent through the Court's CM/ECF system.

Dated: December 23, 2024

Respectfully submitted,

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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(a)(5) and Rule 32(a)(7)(B), because it is 6,487 words excluding the items exempted by Rule 32(f).

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