NON-DETAINED

Benjamin Winograd
Immigrant & Refugee
Appellate Center, LLC
3602 Forest Drive
Alexandria, VA 22302
(703) 933-7689

Andrés López
The Lopez Law Firm, PLLC
5701 Executive Center Drive, Suite 102
Charlotte, NC 28212
(704) 568-9228

Blaine Bookey
Neela Chakravartula
Sayoni Maitra
Karen Musalo
Anne Peterson
Center for Gender & Refugee Studies
200 McAllister Street
San Francisco, CA 94102
(415) 565-4877

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS
FALLS CHURCH, VIRGINIA

In The Matter Of:	)	
A-B-,	)	**File No.: A**
In Removal Proceedings	)	

RESPONDENT'S BRIEF ON APPEAL

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INTRODUCTION

Respondent A-B- ("Ms. A-B-") fled El Salvador following fifteen years of extensive physical, sexual, and emotional violence at the hands of her now former husband, who vowed to kill her. Three years ago, the Board of Immigration Appeals ("Board") found that Ms. A-B- qualified for asylum and remanded solely for completion of background checks. The Immigration Judge ("IJ") disregarded the Board's instructions, waiting more than eight months to schedule a hearing and then certifying the case back to the Board without rendering a new decision. The Board itself took no action on Ms. A-B-'s case for nearly seven months, until the Attorney General ordered it to refer the case to him. The Attorney General then used Ms. A-B-'s case to overturn well-settled law recognizing that women fleeing domestic violence may establish eligibility for protection. In a decision timed to coincide with a speech delivered to immigration judges, the Attorney General vacated the Board's decision granting Ms. A-B- asylum without citing a single piece of evidence. *Matter of A-B-*, 27 I&N Dec. 316 (A.G. 2018). Although the Attorney General left intact general principles of asylum law that, fairly applied, would lead to only one conclusion—that Ms. A-B- merits protection—the IJ misinterpreted the decision to foreclose Ms. A-B-'s claim. Like the Attorney General, the IJ disregarded the voluminous evidentiary record, committed multiple legal errors in evaluating her claim, and demonstrated actual or at least perceived bias against her. Ms. A-B- comes now before the Board and respectfully requests that the Board again, once and for all, grant her the protection she deserves.

STATEMENT OF FACTS

Ms. A-B- was born in El Salvador in 1971. Exh. R1.B (*Translated Resp't Birth Certificate*) at 13-14.[1] In 1994 or 1995, Ms. A-B- met her future husband and abuser, B-L-, while living in Town, a town outside of San Salvador. Exh. R1.A (*Supp. Decl.*) at ¶ 14. She gave birth to the first of their three children in 1996, and the couple formally married in 1998. *Id.* at ¶¶ 16, 19; Exh. R1.B (*Translated Children Birth Certificates*) at 16-21; Exh. R1.B (*Translated Marriage Certificate*) at 36-37. For the next fifteen years, Ms. A-B-'s abuser beat her repeatedly, including while she was pregnant and in front of their children, raped her on countless occasions, and frequently threatened to kill her, causing her severe psychological harm. Exh. R1.A (*Supp. Decl.*) at ¶¶ 19, 21, 23-25, 27, 29, 31-33, 36-37, 42-44; Exh. R1.B (*Translated Sworn Witness Statements*) at 47-62; Exh. R1.F (*Supp. Psychological Evaluation*) at 83, 85-86, 93. He also "constantly" controlled and degraded her, calling her a "slut," "dog," or "bitch," and telling her that "a woman's place was in the home like a servant." Exh. R1.A (*Supp. Decl.*) at ¶¶ 17, 21-22.

Ms. A-B- sought government protection to no avail. She received two protection orders, but the police did nothing to enforce them. *Id.* at ¶¶ 25-28; Exh. R1.B (*Translated Protection Orders*) at 24-33. Instead, the police placed Ms. A-B- in danger, requiring her to hand deliver the order to her abuser, which he simply crumpled up. Exh. R1.A (*Supp. Decl.*) at ¶ 26. After Ms. A-B-'s abuser threatened her with a gun, police booked him into jail but released him after a few days with no consequences. *Id*. at ¶ 25. When he attacked her with a large knife, the police told her they could not help her, adding: "If you have any dignity, you will get out of here." *Id*. at ¶ 33. Over the years, Ms. A-B-'s neighbors also called the police several times to help her, but the majority of the time, there was no response. *Id.* at ¶ 24. On the rare occasions the police came,

[1] Exhibit R1 refers to supplemental documents filed by Ms. A-B- in 2018.

they told Ms. A-B- that they needed to see blood or catch her husband in the act, or said her husband could "do what he wants." *Id.*

In an attempt to escape her husband's violence, Ms. A-B- moved with her children to Town, a town about two hours from Town. *Id.* at ¶ 35; Tr. at 46. But her abuser tracked her down and continued to rape and threaten her over the next several years, telling her she "would always be his woman" and he would kill her if he saw her with another man. Exh. R1.A (*Supp. Decl.*) at ¶ 37. In November 2013, Ms. A-B- divorced her abuser, which only enraged him more. *Id.* at ¶¶ 38-39; Exh. R1.B (*Translated Divorce Paperwork*) at 38-46. Minutes after the divorce finalized, he threatened: "Just because we're divorced and you think you're free, you're wrong." Exh. R1.A (*Supp. Decl.*) at ¶ 39. As a condition of the divorce, he also demanded custody of their children to maintain control over her. *Id.* at ¶ 38.

A month after the divorce, Ms. A-B- encountered her abuser and his brother E-, a police officer, who said that she would always remain in her ex-husband's grip and threatened her life. *Id.* at ¶ 40; Tr. at 41-42. She received many threats following this incident by phone and through her children. Exh. R1.A (*Supp. Decl.*) at ¶ 43; Tr. at 45. When she reported the threats, the police merely told her to "change the 'chip'" in her phone. Exh. R1.A (*Supp. Decl.*) at ¶ 43; Tr. at 45. In June 2014, her abuser physically assaulted her, grabbing her hair and pushing her, and again threatened to kill her. Exh. R1.A (*Supp. Decl.*) at ¶ 44; Tr. at 44, 47. Fearing he would make good on his threats, Ms. A-B- fled El Salvador about a week later. Exh. R1.A (*Supp. Decl.*) at ¶ 44. Ms. A-B- believes her life would be in danger in El Salvador, and continues to suffer from severe psychological distress owing to the violence. *Id.* at ¶¶ 2, 50-51; Exh. R1.F (*Supp. Psychological Evaluation*) at 83, 85-86, 93.

PROCEDURAL HISTORY

Ms. A-B- applied for asylum, withholding of removal ("withholding"), and protection under the Convention Against Torture ("CAT"). Exh. 2.B (*Form I-589*). On December 1, 2015, the IJ issued a written decision denying Ms. A-B-'s applications. I.J. (2015) at 16.[2] Ms. A-B- appealed and, on December 8, 2016, a three-member panel of the Board unanimously reversed and found she "met her burden of proving her eligibility for asylum." BIA at 4. The Board remanded the record solely for the completion of background checks pursuant to 8 C.F.R. § 1003.1(d)(6) and for the entry of an order pursuant to 8 C.F.R. § 1003.47(h). BIA at 4.

Following remand, the IJ did not schedule a hearing to confirm whether the background checks had been completed. After six months elapsed with no action taken on her case, Ms. A-B- asked the IJ to schedule a master calendar hearing for the Department of Homeland Security ("DHS") to update the background checks. Resp't Mot. to Calendar for a Master Hearing (filed May 12, 2017). The IJ took nearly one month to adjudicate the motion and then scheduled her case for an individual hearing more than two months later. Hearing Notice (dated June 5, 2017).

At the outset of the hearing, DHS confirmed that the background checks were clear. Tr. 2 at 2.[3] The IJ then asked the DHS attorney whether she "intend[ed] to make the same concessions in this case that [DHS] made on appeal in the case of *Matter of A-R-C-G-*, [26 I&N Dec. 388 (BIA 2014)]," a case in which DHS conceded that "married women in Guatemala who are unable to leave their relationship" was a cognizable particular social group. *Id.* The DHS attorney replied that she would not so concede in light of *Velasquez v. Sessions*, 866 F.3d 188

[2] "I.J." refers to the IJ's October 10, 2018 decision, except where specified.
[3] "Tr. 2" refers to the official transcript of the August 18, 2017 hearing.

(4th Cir. 2017), an unrelated case decided the previous month. *Id*.[4] Without engaging in any further discussion of the facts or relevance of *Velasquez*, and without granting or denying Ms. A-B-'s application, the IJ announced that he was re-certifying the case to the Board for further consideration. *Id.* at 4. After a brief recess, the IJ provided the parties with a written order in which he "observe[d]" that *A-R-C-G-* "may not be legally valid" in light of the Fourth Circuit's recent decision in *Velasquez*. I.J. Certification Order (Aug. 18, 2017) ("I.J. Cert.") at 4. The IJ "certified and administratively returned" Ms. A-B-'s case to the Board for it to reconsider whether she was eligible for asylum. *Id*. The same day he issued the certification order, the IJ sent an e-mail to EOIR Director James McHenry with the subject line "Re: A-R-C-G," attaching both the certification order and underlying record. Resp't Mot. to Recuse (filed Aug. 30, 2018) ("Resp't Mot.") Tab G (*E-Mail from IJ Couch to McHenry*).

Despite the IJ's attempt to return Ms. A-B-'s case, the Board did not issue a filing receipt, notice of certification, or any other document evidencing that it had accepted jurisdiction over the case. Then, on March 7, 2018, the Attorney General directed the Board to refer her case to him pursuant to 8 C.F.R. § 1003.1(h)(1)(i). *Matter of A-B-*, 27 I&N Dec. 227, 227 (A.G. 2018). He invited the parties and interested *amici* to address "[w]hether, 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." *Id*.

[4] The applicant in *Velasquez* fled El Salvador after being threatened by the mother of her late husband, who wanted the applicant to relinquish custody over her minor child. 866 F.3d at 191-92. The applicant claimed that she was persecuted on account of her membership in a particular social group consisting of her nuclear family, but the Fourth Circuit rejected the claim, holding that substantial evidence supported the agency conclusion that her family membership was not a central reason for the persecution. *Id*. at 194-96. The Court also rejected the applicant's reliance on *A-R-C-G-*, noting that the validity of the social group in that case "is not at issue" and "does not bear on our nexus analysis." *Id*. at 195 n.5.

On March 16, 2018, DHS filed a motion requesting that the Attorney General, *inter alia*, suspend the briefing schedule to allow the Board to rule on the IJ's certification order and to clarify the question presented and specify any precedential Board decision whose validity he intended to consider. DHS Mot. on Certification (filed Mar. 16, 2018). On March 21, 2018, Ms. A-B- submitted a reply expressing non-opposition and specifically requesting that the Attorney General advise the parties if he was considering overruling *A-R-C-G-*. Resp't Resp. to DHS Mot. on Certification (filed Mar. 21, 2018).

On March 30, 2018, the Attorney General issued an order denying DHS's requests. *Matter of A-B-*, 27 I&N Dec. 247 (A.G. 2018). The Attorney General stated that there was no need to allow the Board to address the order because the case was "not properly pending before the Board." *Id*. at 248. The Attorney General stated that in light of the limited scope of the remand and DHS's confirmation that the background checks were clear, the IJ was obliged to issue an order granting or denying Ms. A-B-'s asylum application. *Id*. (citing 8 C.F.R. § 1003.47(h)). The Attorney General noted that the regulations only permit immigration judges to certify a case after a "decision" has been made and found that the IJ had failed to issue a "decision" that could be certified to the Board. *Id*. The Attorney General stated that because the IJ failed to issue a "decision" on remand, his attempt to certify the case back to the Board was "procedurally defective." *Id*. at 248-49.

The Attorney General next denied the parties' request to clarify the primary briefing question. *Id*. at 249-50. He stated that "several Federal Article III courts have recently questioned whether victims of private violence may qualify for asylum under [INA § 208(b)(1)(B)(i)] based on their claim that they were persecuted because of their membership in a particular social group," and that the briefs should address the question as presented. *Id*. at 249. He did not list

any precedential Board decisions that he wished to revisit.

On June 11, 2018, the Attorney General issued a decision overruling *A-R-C-G-*, even though both parties and eleven out of twelve amici urged him not to do so. *Matter of A-B-*, 27 I&N Dec. 316, 317, 346 (A.G. 2018). "Having overruled *A-R-C-G-*," the Attorney General reversed this Board's determination that Ms. A-B- qualified for asylum and remanded to the IJ for further proceedings. *Id.* at 340, 346. The Attorney General timed the issuance of his decision to coincide with a speech delivered to a group of immigration judges in which he stated that "the vast majority of the current asylum claims are not valid" and that his forthcoming decision in Ms. A-B-'s case would "restore[] sound principles of asylum." U.S. Dep't of Justice, *Attorney General Sessions Delivers Remarks to the Executive Office for Immigration Review Legal Training Program* (June 11, 2018).[5]

On remand, the IJ ordered the parties to file briefs "relevant to the disposition of this case in light of *Matter of A-B-*," but noting—before hearing from the parties—that Ms. A-B- purportedly waived her claim for CAT protection during her prior appeal to the Board. I.J. Scheduling Order (July 9, 2018). Ms. A-B- filed a legal brief and supplemental evidence, including evidence previously submitted to the Attorney General. *See* Resp't I.J. Eligibility Br. She also filed a motion to recuse the IJ, discussed in further detail *infra* Section II. On October 10, 2018, without holding an evidentiary hearing, the IJ denied Ms. A-B-'s recusal motion as well as her applications for asylum, withholding, and CAT relief. I.J. at 1, 19.

Ms. A-B- again appealed to the Board.

[5] Available at https://www. justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-executive-office-immigration-review-legal.

STATEMENT OF ISSUES

1. Whether the IJ erred in finding that Ms. A-B-'s proposed social groups are not cognizable under the INA and that Ms. A-B- is not a member of any of the proposed groups.

2. Whether the IJ erred in finding that neither Ms. A-B-'s social group membership nor her political opinion is at least "one central reason" for her persecution.

3. Whether the IJ erred in finding that Ms. A-B- did not demonstrate the Salvadoran government's inability or unwillingness to protect her.

4. Whether the IJ erred in finding that Ms. A-B- is not eligible for withholding.

5. Whether the IJ erred in finding that Ms. A-B- waived her claim for CAT protection or that, in the alternative, she is not eligible for such relief.

6. Whether the IJ's conduct rendered Ms. A-B-'s hearing fundamentally unfair and prejudiced her claim such that he violated her due process rights, requiring reversal.

7. Whether the IJ's conduct fell below the standards required of immigration judges, such that Ms. A-B- is entitled to review of her claims by a different immigration judge.

STANDARD OF REVIEW

The Board reviews an immigration judge's findings of fact under a clearly erroneous standard. *See* 8 C.F.R. § 1003.1(d)(3)(i). The Board reviews questions of law, discretion, and judgment under a de novo standard. *See* 8 C.F.R. § 1003.1(d)(3)(ii).

SUMMARY OF ARGUMENT

The IJ distorted the Attorney General's decision in *A-B-* to categorically foreclose asylum to Ms. A-B-. In so doing, he contravened a bedrock principle of asylum law that claims are to be assessed on a case-by-case basis, disregarding extensive documentary evidence establishing Ms. A-B-'s eligibility for asylum and the other humanitarian protections she seeks, including her credible testimony, statements of multiple expert witnesses, and voluminous country conditions documentation. He further made several legal errors with respect to each step in the analysis that independently require reversal. Had the IJ applied the correct legal standards and engaged in a

record-specific inquiry, he would have been compelled to find that Ms. A-B- belongs to a particular social group defined primarily by her gender, that her abuser brutalized her precisely because of her gender, and that the government of El Salvador has demonstrated its inability and unwillingness to protect her. Moreover, throughout these proceedings, Ms. A-B- has been denied due process and her right to a fair hearing and opportunity to present her claims. The Board should reverse and again grant Ms. A-B- asylum or, at a minimum, remand to a new immigration judge for a fair, individualized adjudication.

REQUEST FOR PANEL DECISION AND ORAL ARGUMENT

Ms. A-B- respectfully requests three-member review of her case. 8 C.F.R. § 1003.1(e)(6). This case raises questions of national import, potentially impacting all asylum seekers raising claims similar to those raised by Ms. A-B-. 8 C.F.R. § 1003.1(e)(6)(iv). Immigration judges have interpreted *A-B-* inconsistently and will continue to do so without clear guidance from the Board. 8 C.F.R. § 1003.1(e)(6)(i). Panel review would also be appropriate because Ms. A-B-'s case presents complex issues of fact and law, which recur in many cases involving gender-based violence. 8 C.F.R. § 1003.1(e)(6)(vii). Additionally, the IJ's decision is not in conformity with the law or applicable precedents, both due to its distorted interpretation of the Attorney General's *A-B-* decision, and for other legal and factual errors as discussed below, requiring reversal. 8 C.F.R. § 1003.1(e)(6)(iii), (v)-(vi). Finally, as stated in her Notice of Appeal, Ms. A-B- also requests to be heard in oral argument on the merits of this appeal. 8 C.F.R. § 1003.1(e)(7).

ARGUMENT

I. Ms. A-B- Has Established Eligibility for Asylum and Related Humanitarian Protection Based on Governing Law

Ms. A-B- overwhelmingly established her eligibility for protection through her credible testimony[6] and substantial supporting documentation. Properly read, *A-B-* neither forecloses Ms. A-B-'s claims for relief nor meaningfully alters substantive asylum standards. The Board should reject the IJ's flawed legal analysis and clearly erroneous factual findings and find once again she is entitled to asylum.

A. The IJ Erred in Finding Ms. A-B- Is Not a Member of a Cognizable Particular Social Group Defined Primarily by Her Gender

Ms. A-B- established the cognizability of each of her proposed social groups under the Board's current three-part test united by the common immutable characteristic of her gender: "Salvadoran women," "Salvadoran women in domestic relationships they are unable to leave," "Salvadoran women who are unable to leave their domestic relationships where they have children in common with their partners," and "Salvadoran women viewed as property by virtue of their status in a domestic relationship."[7]

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[6] The IJ assumed Ms. A-B- credible in his October 10, 2018 decision. I.J. at 6. The Board must likewise accept her testimony as credible (which is consistent with the Board's previous review of this case). INA § 208(b)(1)(B)(iii) ("[I]f no adverse credibility determination is explicitly made, the applicant . . . shall have a rebuttable presumption of credibility on appeal.").

[7] The Fourth Circuit has not squarely decided whether the Board's addition of requirements beyond immutability is a reasonable interpretation of the INA. *See Zelaya v. Holder*, 668 F.3d 159, 165-66 n.4 (4th Cir. 2012); *Martinez v. Holder*, 740 F.3d 902, 910 (4th Cir. 2014); *cf. Temu v. Holder*, 740 F.3d 887, 894 (4th Cir. 2014) (finding error in the Board's application of its social visibility criterion without ruling on the statutory authority for the criterion). Ms. A-B- submits that both social distinction and particularity are unreasonable interpretations of the asylum definition. *See, e.g., Cece v. Holder*, 733 F.3d 662, 668 n.1, 676-77 (7th Cir. 2013) (en banc). As explained herein, her proposed groups nevertheless meet the requirements of immutability, particularity, and social distinction.

1. The particular social group "Salvadoran women" is cognizable

The IJ held that "Salvadoran women" is not a cognizable social group out of his erroneous belief that social groups must be small to be cognizable. I.J. at 11. This is legal error. *See Alvarez Lagos v. Barr*, 927 F.3d 236, 253 (4th Cir. 2019) (acknowledging that "a putative particular social group need not be small" and that the agency committed legal error in so holding) (internal quotation marks omitted); *see id.* (quoting *Perdomo v. Holder*, 611 F.3d 662, 669 (9th Cir. 2010) (remanding for consideration of the group "women in Guatemala" because size alone cannot be a basis for rejecting a social group)). In Ms. A-B-'s own case, the Attorney General recognized that there is no outer size limit for viable groups, acknowledging that "the category of protected persons within a particular group may be large." *See A-B-*, 27 I&N Dec. at 338 (internal quotation marks and alterations omitted) (quoting *Cece v. Holder*, 733 F.3d 662, 673 (7th Cir. 2013) (en banc)). While the terms used to define the group cannot be so broad as to defeat the showings of social distinction and particularity, numerosity alone is an invalid reason to reject a group that meets these requirements—as Salvadoran women (or women in El Salvador) does.

At root of the IJ's rejection of the group based on size is the desire to avoid "potentially innumerable asylum claims." This is not a valid basis for denying protection. I.J. at 11; *see Cece*, 733 F.3d at 675 ("It 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."). Nor is it justified; establishing membership in a cognizable group is merely one step towards receiving asylum. The viability of large social groups is underscored by the Board's repeated invocation of the canon of *ejusdem generis* to guide interpretations of "particular social group," which posits that the phrase should be interpreted consistently with the other four grounds. *See, e.g.*, *Matter of*

Acosta, 19 I&N Dec. 211, 233 (BIA 1985); *Matter of M-E-V-G-*, 26 I&N Dec. 227, 230-31 (BIA 2014). Restricting group size would be inconsistent with the interpretation of other protected grounds, which encompass groups as large as all members of a racial or ethnic group.[8]

In rejecting "Salvadoran women," the IJ described group members as only sharing the characteristic of "their risk of being persecuted," and cited for support a Fourth Circuit disposition rejecting the wholly inapposite group of "Honduran women evading rape and extortion." I.J. at 11-12 (citing *Santos Mejia v. Sessions*, 717 F. App'x 257 (4th Cir. 2018) (per curiam)). By mischaracterizing Ms. A-B-'s proposed group, the IJ erred as a matter of law (*see infra* Section I.A.2.a).

Although correctly noting that the group is sufficiently immutable, the IJ also erroneously rejected the group for want of particularity and social distinction, ignoring uncontroverted evidence. *See M-E-V-G-*, 26 I&N Dec. at 242, 251 (requiring a fact-specific cognizability analysis).

To satisfy the particularity requirement, a group must be defined so as to provide "a clear benchmark for determining who falls within the group." *M-E-V-G-*, 26 I&N Dec. at 239. This requirement ensures that a group's definition does not "change[] dramatically based on who defines it." *Temu v. Holder*, 740 F.3d 887, 895 (4th Cir. 2014). In no way is Ms. A-B-'s group defined by subjective or vague terms. The words "Salvadoran" and "women" have commonly accepted definitions in El Salvador—indeed, the government classifies people as falling into or out of the group from the moment of their birth. *M-E-V-G-*, 26 I&N Dec. at 239 ("It is critical that the terms used to describe the group have commonly accepted definitions in the society of

[8] The IJ also implied that recognizing this group would mean recognizing that all Salvadoran men persecute Salvadoran women. I.J. at 11 n.10. It simply does not follow that if all Salvadoran women are members of a cognizable social group, all Salvadoran men are persecutors.

which the group is a part."); *see, e.g.*, Exh. R1. B (*Translated Resp't Birth Certificate*) at 13-14 (identifying Ms. A-B- as being born to a Salvadoran national and referring to her with the terms "feminine" and "daughter"). It is difficult to imagine a group with more discrete and definable boundaries than one where membership may be ascertained simply by looking at a government-issued ID card. Exh. 3.D (*National Identification Card*) at 19 (listing Ms. A-B- as a Salvadoran woman).

Social distinction requires "evidence showing 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). Evidence demonstrating social distinction may include documentation of high rates of violence or other differential or worse treatment of group members, enactment of particular laws aimed to protect group members or punish persecutors, and lack of effective enforcement of those laws. *See, e.g.*, *Temu*, 740 F.3d at 894 ("one highly relevant factor is if the applicant's group is singled out for greater persecution"); *M-E-V-G-*, 26 I&N Dec. at 244; *Henriquez-Rivas v. Holder*, 707 F.3d 1081, 1092 (9th Cir. 2013) (en banc). Ms. A-B- presented ample evidence, which the IJ ignored in his analysis of recognition of Salvadoran women, despite directly acknowledging its existence earlier in the opinion. I.J. at 11 (noting the widespread discrimination against women in El Salvador and the frequent targeting of women for violence); *see* Exh. R1.L (*2016 El Salvador Country Reports*) at 438 (noting the general acceptance of domestic violence in El Salvador); Exh. R1.BB (*A Peace Worse Than War*) at 897-901 (similar).[9] The IJ's reasoning that Salvadoran society is somehow *less* aware of

[9] The IJ's refusal to afford full weight to Professor Karen Musalo's article published in the Yale Journal of Law and Feminism, *El Salvador – A Peace Worse than War*, Exh. R1.BB, on the basis that the article constitutes "averments of counsel" is also error. I.J. at 6 n.5. The context is wholly distinguishable from the case cited by the IJ, *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980). In *Ramirez-Sanchez*, the respondent refused to testify as to his deportability to avoid

Salvadoran women because of the size of the group, I.J. at 11 ("[a] group consisting of every woman in El Salvador *a priori* fails to establish how its members can be 'distinct within society'"), is contradicted by the evidence and defies common sense. *See, e.g.*, Exh. R1.I (*Bautista Decl.*) at ¶ 53 (describing national efforts to improve the plight of Salvadoran women). Based on the strength of the record in this case, the Board should correct the IJ's legal errors and affirm the cognizability of the group "Salvadoran women" (or "women in El Salvador").

Although it remains an open question in the Fourth Circuit, numerous federal appellate courts have recognized that women (or females) may qualify as a particular social group on the basis of gender alone. *See, e.g.*, *Perdomo*, 611 F. 3d at 667 ("[W]omen in a particular country, regardless of ethnicity or clan membership, c[an] form a particular social group."); *Hassan v. Gonzales*, 484 F.3d 513, 518 (8th Cir. 2007) (finding "Somali females" to be a cognizable social group); *Mohammed v. Gonzales*, 400 F.3d 785, 797, 800 (9th Cir. 2005) (same); *Niang v. Gonzales*, 422 F.3d 1187, 1199 (10th Cir. 2005) (stating that members of either gender "certainly" qualify as a particular social group). Australia, Canada, and the United Kingdom have also recognized gender alone can serve as the basis for a particular social group. *See, e.g.*, *Minister for Immigration & Multicultural Affairs v. Khawar* (2002) 76 A.L.J.R. 667; *Higbogun v. Canada*, [2010] F.C. 445 (describing Gender Guidelines); *Islam v. Sec'y of State for the Home Dep't*, 2 All E.R. 546 (1999). Ms. A-B- asks the Board to follow suit and hold that Salvadoran women (or women in El Salvador) is a cognizable social group under the Act.

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incriminating himself. Counsel attempted to introduce through a legal brief evidence on the case before him regarding the coercive conditions of prior incriminating statements. *Id.* at 505-06. This is an inapt comparison to the introduction of Professor Musalo's extensively researched article concerning country conditions in El Salvador for women.

2. The particular social groups "Salvadoran women in domestic relationships they are unable to leave," "Salvadoran women who are unable to leave their domestic relationships where they have children in common with their partners," and "Salvadoran women viewed as property by virtue of their status in a domestic relationship" are also cognizable

a. The IJ erred by not independently assessing each proffered group

As a threshold matter, the IJ committed legal error by refusing to analyze Ms. A-B-'s alternative proposed groups separately and on the proffered terms, instead lumping them together into one conglomerate group which, he said, were "effectively defined to consist of women in El Salvador 'who are victims of domestic abuse because the inability to leave was created by harm or threatened harm.'" I.J. at 9 (internal quotation marks omitted) (quoting *A-B-*, 27 I&N Dec. at 335). The Fourth Circuit has repeatedly held that distortion of the group definition in this manner constitutes legal error. *See Temu*, 740 F.3d at 894 ("[T]he BIA applied an impermissible legal standard because it rejected groups that Mr. Temu never proposed."); *see also Alvarez Lagos*, 927 F.3d at 253; *Crespin-Valladares v. Holder*, 632 F.3d 117, 125 (4th Cir. 2011).[10] This error infects the rest of the IJ's flawed analysis, and this alone requires reversal.

b. The IJ erred in rejecting the groups as circular

The IJ committed multiple additional errors in his collective analysis of the alternative groups defined by Ms. A-B-'s gender and other immutable characteristics.[11] To begin, he impermissibly rejected her groups on circularity grounds by failing to analyze the evidence as required and instead rested his holding on the Attorney General's suggestion that the similar

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[10] Under Fourth Circuit law, the Attorney General's decision in *A-B-* suffers from this same fatal error by re-casting the *A-R-C-G-* group, "married women in Guatemala who are unable to leave their relationship," as "effectively" "women in Guatemala who are victims of domestic abuse." *A-B-*, 27 I&N Dec. at 335.

[11] The IJ adopted and incorporated by reference his 2015 analysis. I.J. at 9. That analysis was flawed as explained in prior briefing. *See* Resp't A.G. Opening Br. at 32-38.

group raised in *A-R-C-G-* may have been circular. I.J. at 9. The Board and Fourth Circuit have long held that social group cognizability must be assessed on the record in each case. *See, e.g.*, *Alvarez Lagos*, 927 F.3d at 253 (reversing where the IJ failed "to conduct the necessary case-specific analysis" on social group cognizability); *Acosta*, 19 I&N Dec. at 233. The IJ was not relieved of this responsibility because the Attorney General suggested that a different social group, from a different case, on a different record, may not have been cognizable.[12] *See Pirir-Boc v. Holder*, 750 F.3d 1077, 1084 (9th Cir. 2014) ("The BIA may not reject a group solely because it had previously found a similar group in a different society to lack [cognizability], especially where . . . it is presented with evidence showing that the proposed group may in fact be recognized by the relevant society."). The importance of the record-specific analysis is clear in Ms. A-B-'s case. Here, the evidence demonstrates that it was her abuser's refusal to acknowledge her right to leave him that created her inability to leave, not the feared persecution. Ms. A-B- fled with her children while her abuser was at work, physically moving two hours away and ultimately obtaining a divorce in her attempts to sever their relationship. Exh. R1.A (*Supp. Decl.*) at ¶¶ 35, 38. Despite these and other measures, her abuser continued to see her as being unable to leave the relationship of her own accord based on her own wishes. *Id.* at ¶ 36 (describing Ms. A-B-'s abuser raping her after she moved away and telling her no one would

[12] The IJ's circularity analysis suggests that he views *A-B-* as categorically foreclosing all social groups that resemble the *A-R-C-G-* group. However, as the government has recognized, *A-B-* does not stand for the proposition that such groups can never be cognizable; rather, the decision rejects the *A-R-C-G-* group for perceived errors in the Board's depth of analysis in that case. *See also* Def.'s Opp'n to Pl.'s Cross-Mot. Summ. J. and Reply in Support of its Mot. Summ. J. 26, October 10, 2018, *Grace v. Whitaker*, 344 F. Supp. 3d 96 (D.D.C. 2018) (disclaiming the existence of a general rule). To the extent that *A-B-* is read to create a general rule against such claims, it is clearly unlawful. *Grace v. Whitaker*, 344 F. Supp. 3d 96, 127 (D.D.C. 2018), *appeal docketed*, No. 19-5013 (D.C. Cir. argued Dec. 9, 2019).

help her because she was his wife); *id.* at ¶ 37 ("[h]e said that I would always be his woman because of our kids"); *id.* at ¶ 24 (describing how the police refused to help her, telling her that because her abuser was her husband "he can do what he wants"); *id.* at ¶¶ 19, 25, 42 (describing how various associates of her abuser intervened over the years to prevent Ms. A-B- from obtaining protection).

The evidence further established that her abuser's actions were rooted in deeply ingrained social and cultural norms in El Salvador that subordinate women to men, and lead men to believe that it is they who have the right to begin or end relationships. *See, e.g.*, Exh. R1.I (*Bautista Decl.*) at ¶ 25 ("Salvadorans are taught from early childhood that women are subordinate to men"); *id.* at ¶ 26 ("Children learn that a mother must obey the father of her children . . . . The inferior position of women is embedded in the cultural mindset of Salvadoran society[.]"); *id.* at ¶ 34 ("[I]t is socially acceptable for fathers to be absent from the home and have multiple sexual relationships . . . . On the other hand, women who violate gender roles, . . . or assert their independence are thought to deserve punishment."); Exh. R1.H (*Menjivar Decl.*) at ¶ 18 ("in practice [a married woman] is thought of as property of the husband"). Looking to the evidence of record, the "inability to leave" is simply not caused by the harm her abuser inflicted upon her and the IJ erred in his flawed analysis.

Even assuming *arguendo* that the groups are defined by the harm in part, the IJ committed legal error when he impermissibly required the groups to be defined completely independently of the harm suffered. I.J. at 9-10. *A-B-* does not purport to overrule settled Board precedent on circularity; indeed, it approvingly cites *M-E-V-G-* which reaffirms the settled

understanding prohibiting groups defined *exclusively* by the harm feared.[13] *A-B-*, 27 I&N Dec. at 334; *M-E-V-G-*, 26 I&N Dec. at 236 n.11 (affirming adherence to an understanding of circularity established in prior precedent); *Matter of A-M-E & J-G-U-*, 24 I&N Dec. 69, 74 (BIA 2007) (establishing that "a social group cannot be defined *exclusively* by the fact that its members have been subjected to harm") (emphasis added); *see also Zelaya v. Holder*, 668 F.3d 159 (4th Cir. 2012) (stating that groups must "not be defined exclusively by the fact that its members have been targeted for persecution"). The IJ legally erred in failing to apply a proper circularity analysis, under which Ms. A-B-'s groups are viable.

c. The IJ erred in otherwise finding the groups not cognizable

i. Ms. A-B-'s proposed groups are immutable

On the immutability of groups that include "inability to leave," or "viewed as property," the IJ first found in 2015 that Ms. A-B- was able to leave her abuser. I.J. (2015) at 9. The Board roundly rejected this finding in 2016, noting serious flaws in the IJ's analysis. BIA at 2-3. The Attorney General faulted the Board on this point for, in his view, improperly "substitut[ing] its view of the evidence for that of the [IJ]." *A-B-*, 27 I&N Dec. at 342. On remand, the IJ reaffirmed his earlier finding, that Ms. A-B- was able to leave her relationship, thus finding the relationship *not* immutable. I.J. at 10. The Board should again find clear error; as recounted in detail above, although she physically moved away, and legally terminated their marriage, Ms. A-B- was unable to leave the relationship, as he continued to refer to her as his and to abuse her as he had throughout their years together. The *A-B-* decision in no way undermines the Board's

[13] Reading *A-B-* as changing the circularity analysis to prohibit groups that incorporate any reference to the harm would be an unexplained departure from Board precedent and thus an impermissible statutory interpretation. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

ability to find clear error here. In fact, it is the only conclusion the Board could come to in properly applying the legal standard to the undisputed and supplemented record.

"Salvadoran women in domestic relationships they are unable to leave," and "Salvadoran women who are unable to leave their domestic relationships where they have children in common with their partners," are defined by the immutable characteristics of gender and nationality, and a relationship which is rendered immutable (and *not* circular as described above) because the women in them are unable to leave of their own accord. "Salvadoran women viewed as property by virtue of their status in a domestic relationship" is defined by the immutable characteristics of gender and nationality, plus the additional characteristic of being "viewed as property." This group is also immutable because it is defined by the enduring societal perception of a woman belonging to her husband because of their relationship and her subordinate position therein. *See* Exh. R1.H (*Menjivar Decl.*) at ¶ 43 (explaining that "[e]ven after having been away for some time and even if she has formally divorced her abuser, a woman who was once her abuser's partner is understood socially never having extinguished his right to exercise dominance over her"); Exh. R1.A (*Supp. Decl.*) at ¶ 39 (Ms. A-B-'s abuser telling her something like "Just because we're divorced and you think you're free, you're wrong"); *id.* at ¶ 40 (abuser's brother telling Ms. A-B- she would "always" be in a relationship with the father of her children); Tr. at 41 (abuser's brother referring to Ms. A-B- as his sister-in-law after the divorce).

The IJ found that Ms. A-B- was able to leave her relationship because she moved away from her abuser and obtained protection orders on two occasions and a paper divorce in 2013. I.J. at 10. However, the IJ ignored the fact that Ms. A-B- remained unable to change her relationship status despite these efforts because of her abuser's refusal to acknowledge her agency to change her relationship status. I.J. at 10. It defies logic that Ms. A-B- could have left a

relationship where her abuser continued to assault and rape her, and where he clearly believed she was unable to be free of him despite a divorce. Exh. R1.A (*Supp. Decl.*) at ¶ 39 (Ms. A-B-'s abuser describing how the divorce did not end his ability to control her); *id.* at ¶ 36 (abuser continuing to rape her and assault her after she moved out); *id.* at ¶ 42 (abuser's associates telling Ms. A-B- that her divorce did not free her from her husband); *id.* at ¶ 43 (describing death threats received after the divorce). Drawing on the supplemented record, the Board can and should again reject the IJ's erroneous immutability analysis.

ii. Ms. A-B-'s proposed groups are particular

The IJ further erred in his particularity analysis, which concluded that Ms. A-B-'s proposed group formulations including the "inability to leave" or being "viewed as property" are not particular because each references Ms. A-B-'s inability to leave her relationship in some way.[14] I.J. at 10. In so doing, the IJ held that the presence of that single characteristic, which he (incorrectly) considered as non-particular, irreparably destroys the particularity of the groups. This directly contradicts Fourth Circuit precedent. *See Temu*, 740 F.3d at 894-95 ("Nothing in the statute requires that if a group is defined by a collection of traits, that each individual trait must meet all the criteria for a 'particular social group.'. . . [I]n making asylum determinations, the BIA must consider an individual's proposed group as a whole.").

Properly considered, Ms. A-B-'s groups are particular. As discussed above in Section I.A.1, the terms "Salvadoran" and "women" have clearly defined meanings. Ms. A-B- submitted significant evidence showing that, in the context of Salvadoran society, "domestic relationships

[14] "Salvadoran women viewed as property by virtue of their status in a domestic relationship," literally does not include the "ability to leave" in the formulation, but the IJ reasoned that Ms. A-B-'s inability to leave "by implication includes her abuser's treatment of her as his property." I.J. at 10. As discussed herein, the groups are distinct from one another, even if related.

[women] are unable to leave" is a clearly defined and understood concept. *See, e.g.*, Exh. R1.H, (*Menjivar Decl.*) at ¶ 23; Exh. R1.BB (*A Peace Worse Than War*) at 914-17 (noting that the Salvadoran government has enacted laws tailored to address the plight of women in immutable relationships). Partnerships with children in common are easily identified, as evidenced by the fact that the Salvadoran government maintains birth certificate records identifying partners who have children together. *See, e.g.*, Exh. R1.B (*Translated Children Birth Certificates*) at 16-21. Ms. A-B- also submitted ample evidence documenting that the view of women as property is prevalent in El Salvador, establishing that her group including the "viewed as property" formulation is defined by terms widely understood in Salvadoran society. *See, e.g.*, Exh. R1.I (*Bautista Decl.*) at ¶ 34 (describing how women are viewed as property).

iii. Ms. A-B-'s proposed groups are socially distinct

The IJ's social distinction finding is equally flawed. His analysis contravened Fourth Circuit law in rejecting Ms. A-B-'s more narrowly drawn groups simply because the record established that a broader group of Salvadoran women are targeted. *See Temu*, 740 F.3d at 894 (rejecting the rationale that "any time a persecutor's net is too large, social visibility must be lacking"). Contrary to his suggestion, the evidence in Ms. A-B-'s case does not show that male abusers target the entire population indiscriminately. I.J. at 11. Rather, it shows that it is *women* who face entrenched discrimination and bias, and that it is *women* who are in immutable relationships who have a particular risk of harm. *See, e.g.*, Exh. R1.M (*CEDAW Concluding Observations*) at ¶ 22 (documenting "deeply rooted" stereotypes against women); Exh.R1.L (*2016 El Salvador Country Reports*) at 438 (documenting prevalence and acceptance of domestic violence). Under Board and Fourth Circuit precedent, this is persuasive—if not dispositive—evidence of social distinction. *Temu*, 740 F.3d at 894; *M-E-V-G-*, 27 I&N Dec. at 244.

Ms. A-B-'s evidence established that Salvadoran society is aware that some women are in relationships they are unable to leave. Exh. R1.N. (*Impunity and Multisided Violence*) at 477 (reviewing protective legislation). It further demonstrates that there exists societal awareness that these relationships are virtually impossible to sever when couples share children. *See, e.g.*, Exh. R1.I (*Bautista Decl.*) at ¶ 71. Finally, the record clearly established that the view of women as property is pervasive in El Salvador. *See, e.g.*, Exh. R1.H (*Menjivar Decl.*) at ¶ 20 (describing how even the woman's family members may enforce this view). As such, each of Ms. A-B-'s three proposed groups referencing her gender, nationality, and other immutable characteristics are socially distinct.

Ms. A-B- has thus established that these groups are legally cognizable, and that she is a member of each of them.

B. The IJ Erred in Finding a Protected Characteristic Was Not At Least One Central Reason for the Persecution Ms. A-B- Suffered

The IJ found that even if Ms. A-B- was a member of a cognizable group, she failed to establish that the harm she suffered was "on account of" her group membership. I.J. at 14. He also found that she failed to establish she was harmed on account of her political opinion. I.J. at 12-13. Based on bald speculation, the IJ mischaracterized Ms. A-B-'s abuser's behavior as alcohol-and-drug-fueled abuse stemming from his sexually deviant, violent, and jealous criminal nature. He reached this conclusion notwithstanding the extensive evidence that Ms. A-B-'s abuser targeted her precisely because of her gender and her opinions of how women should be treated, including her abuser's own words, expert testimony, and country conditions detailing the gendered dynamics of domestic violence and societal context of El Salvador. *See INS v. Elias-Zacarias*, 502 U.S. 478, 483 (1992) (motive must be supported by some evidence, direct or circumstantial). Such unsupported findings must be rejected by the Board.

1. Ms. A-B-'s abuser persecuted her because of her gender and status as a woman in their relationship in El Salvador

An applicant establishes nexus "when she demonstrates that her proposed protected status 'was or will be a central reason for [her] persecution.'" *Alvarez Lagos*, 927 F.3d 236 at 250 (quoting *Oliva v. Lynch*, 807 F.3d 53, 59 (4th Cir. 2015)). "The protected ground need not be the only reason—or even the dominant or primary reason—for the persecution." *Alvarez Lagos*, 927 F.3d at 250. Here, Ms. A-B- established that her abuser targeted her based on her social group membership—her gender, a woman in the context of Salvadoran society, combined with their relationship status, shared children, and his view of her as property as justification for his vicious abuse. In finding otherwise, the IJ erred in his factual findings and in his legal conclusions and application of the standard.

Direct evidence supports that what motivated Ms. A-B-'s abuser was her group membership. For example, Ms. A-B-'s abuser himself pointed to Ms. A-B-'s status as a woman in their relationship, stating that it would be ridiculous of her to try to stop him from raping her because she was his wife and because they had children in common. Exh. R1.A (*Supp. Decl.*) at ¶¶ 36-37; Tr. at 51. Also, as part of the abuse, he would constantly insult her, using gendered slurs like *puta* (slut or bitch), or *tonta* (stupid), or dog (*perra*). Exh. R1.A (*Supp. Decl.*) at ¶¶ 21-22. The IJ's failure to consider this *direct* evidence of motive is error that must be reversed. *See Alvarez Lagos*, 927 F.3d at 251 (finding error where the agency "'failed to appreciate, or even address, critical evidence in the record' bearing directly on the question of nexus") (quoting *Zavaleta-Policiano v. Sessions*, 873 F.3d 241, 248 (4th Cir. 2017)).

Circumstantial evidence further supports that gender motivated Ms. A-B-'s abuser.[15] Expert evidence established that that "gender is one—if not *the*—primary motivating factor for domestic violence" and that "gender inequality predicated on hierarchical and distinct gender roles" is a significant causal factor for domestic violence. Exh. R1.J (*Lemon Decl.*) at ¶¶ 16, 19. Country conditions evidence shows that gender inequality is a significant societal issue in El Salvador, and that the view of women as subordinate to men is widespread and entrenched in Salvadoran society. Exh. R1.I (*Bautista Decl.*) at ¶ 26 ("[t]he inferior position of women is embedded in the cultural mindset of Salvadoran society"); Exh. R1.L (*2016 El Salvador Country Reports*) at 441 ("women [in El Salvador] suffered from cultural, economic, and societal discrimination"). Finally, Ms. A-B-'s evidence documented the extremely high levels of violence against women in El Salvador, which results from the views of women as inferior. *See, e.g*, Exh. R1.H (*Menjivar Decl.*) at ¶¶ 12-13; Exh. R1.L (*2016 El Salvador Country Reports*) at 438-40

[15] The IJ attempted to discount Ms. A-B-'s evidence by stating that the country conditions evidence does not reference the specifics of her abuser's mistreatment, citing *Matter of L-A-C-*, 26 I&N Dec. 516, 524-25 (BIA 2015). I.J. at 8; *see also* Exh. R1.H-J (*Expert Declarations*); Exh. R1.K-T (*Documentary Evidence of Country Conditions*). It is well established that country conditions evidence is critical to an analysis of all the elements of asylum. *See, e.g.*, *M-E-V-G-*, 26 I&N Dec. at 244 (describing the importance of country conditions evidence to establishing the existence of political parties, religious groups, clan affiliations, and in the social group context, social distinction and particularity); *Mulyani v. Holder*, 771 F.3d 190, 199 (finding a State Department country report to be probative evidence of the Indonesian government's ability and willingness to fight religious persecution); INA § 208(b)(1)(B) (burden is on the applicant to establish she is a refugee). Although such evidence may sometimes include the specifics of an individual's mistreatment, the failure to do so does not reduce the weight of relevant, probative evidence. The IJ's reliance on *L-A-C-* is inapposite, because there the evidence was submitted for the express purpose of corroboration of individual facts. Ms. A-B- submitted ample corroborative evidence of the individual facts in her case, including Salvadoran legal documents, multiple affidavits attesting to the specifics of the abuse she suffered, and psychological evaluations documenting the harm, *see, e.g.*, Exh. R1.B (*Translated Complaint*) at 22-23; Exh. R1.B (*Translated Protection Orders*) at 24-33; Exh. R1.B (*Translated Sworn Witness Statements*) at 47-62; Exh. 3.G (*Psychological Evaluation*); Exh. R1.F (*Supp. Psychological Evaluation*), and submitted extensive country conditions evidence relevant to assessing the legal requirements of her claims.

("Violence against women, including domestic violence, was a widespread and serious problem.").

Moreover, the IJ erred in his nexus analysis by focusing on characteristics of *Ms. A-B-'s abuser* (*e.g.*, as "violent" or "jealous" or a substance abuser), rather than examining what protected characteristics of *Ms. A-B-* caused her to be targeted for that abuse, as case law establishes should be the focus of the analysis. *See, e.g., Elias-Zacarias*, 502 U.S. at 482 ("The ordinary meaning of the phrase 'persecution on account of . . . political opinion' in [INA § 101(a)(42)] is persecution on account of the *victim's* political opinion, not the persecutor's."); *W-G-R-*, 26 I&N Dec. at 223 ("[a]n applicant's burden includes demonstrating the existence of a cognizable particular social group, *his* membership in that particular social group, and a risk of persecution on account of *his* membership in the specified particular social group") (emphasis added); *Acosta,* 19 I&N Dec.at 235 (each of the five protected grounds "specifies a characteristic an individual possesses that causes [the victim] to be subject to persecution"). By basing the nexus determination on characteristics of Ms. A-B-'s abuser without considering why he specifically targeted her for abuse, the IJ erred as a matter of law.

Reliance on her abuser's characteristics to undermine the existence of nexus also fails on the facts. The IJ cast Ms. A-B-'s abuser's harm as criminal acts attributable to "his violent and jealous nature," mainly caused by substance abuse. I.J. at 14. In fact, Ms. A-B-'s expert evidence explains that the idea that substance abuse drives domestic violence is a "common misconception" that has been debunked for years. Exh. R1.J (*Lemon Decl.*) at ¶ 69. Rather, "numerous studies by academics, practitioners, and government agencies, including the U.S. Department of Health and Human Services, have concluded that alcohol and other substance

abuse is not the cause of domestic violence." *Id.* Further, "[r]esearch also shows that alcohol and most drugs do not produce the physiological effects that cause violent behavior." *Id.*

The IJ's additional finding that Ms. A-B-'s abuser raped her out of "deviant sexual desire" also finds no support in the record. I.J. at 14. To the contrary, Ms. A-B-'s expert explained that "[t]he goal of the male batterer is not the violence itself [*i.e.*, sexual desire], but to exercise power and control over [his female partner]." Exh. R1.L (*Lemon Decl.*) at ¶¶ 26-28.

The IJ further erred in relying on the fact that Ms. A-B-'s abuser also abused their children as evidence of a lack of nexus. I.J. at 14. Again, expert evidence shows that he abused their children as a way of targeting and controlling Ms. A-B- based on her gender. Exh. R1.J (*Lemon Decl.*) at ¶ 64 ("[B]atterers frequently use shared children as a method of controlling women. Once a woman has tried to leave the relationship, this does not change.").

The IJ attempted to explain away Ms. A-B-'s abuser's motivation as intended to "intimidate her to obtain some unclear result." I.J. at 14. But the evidence points in only one direction—his intentions were to force her to continue in a relationship with him and to submit to his will. Instead of engaging with the opinions submitted by qualified experts, the IJ relied on his own, unqualified, and unsupported conclusions. *See Hernandez-Avalos*, 784 F.3d 944, 953 (4th Cir. 2015) (finding error where an IJ relied on "his own, unsubstantiated personal knowledge" of country conditions to discredit petitioner's testimony); *see Alvarez Lagos*, 927 F.3d at 251.

Finally, by only focusing on possible unprotected motivations, the IJ erred by failing to apply the proper standard, which allows Ms. A-B- to establish nexus even if her abuser was motivated by reasons in addition to protected reasons, so long as a protected reason is "a central reason" for the harm. *See* INA § 208(b)(1)(B)(i); *Hernandez-Avalos*, 784 F.3d at 949-50 (acknowledging multiple central reasons may exist for persecution); *see also Madrigal v. Holder*,

716 F.3d 499, 506 (9th Cir. 2013) (unprotected and protected motives can exist alongside each other).

2. Ms. A-B-'s abuser persecuted her because of her political opinion, intimately tied to her status as a woman in society

The IJ rejected Ms. A-B-'s argument that she suffered and feared harm based on her actual and imputed feminist political opinion. He reasoned: "[o]ther than [her] refusal to have sex with [her abuser] and at times 'speaking her mind'" it was not clear how Ms. A-B- expressed her beliefs to her abuser, nor whether her beliefs motivated her abuser "to some extent." I.J. at 12. This erroneous finding must be reversed.

A political opinion may be demonstrated by "evidence of verbal *or openly expressive behavior* by the applicant in furtherance of a particular cause." *Saldarriaga v. Gonzales*, 402 F.3d 461, 466 (4th Cir. 2005) (emphasis added). Here, the timing of the abuse indicated it was in response to Ms. A-B-'s verbal and expressive behavior demonstrating her opinion, such as when her abuser became angry after she spoke her mind, telling him she did not like his friends sexually harassing her, or when he raped her after she refused to have sex with him. Exh. R1.A (*Supp. Decl.*) at ¶¶ 18, 29; *see Zavaleta-Policiano*, 873 F.3d at 249 (where gang threatened applicant's father that they would kill applicant if he refused to pay extortion demands, timing of gang's death threats to applicant immediately after father fled the country was key evidence of nexus).

As stated earlier, "[t]he protected ground need not be the only reason – or even the dominant or primary reason – for the persecution." *Alvarez Lagos*, 927 F.3d at 250. Rather, "[i]t is enough that the protected ground be "*at least one* central reason" for the persecution." *Id.* Under the correct standard, at least one central reason Ms. A-B-'s abuser harmed her was

because she expressed to him her rights as a woman to her bodily autonomy and her opinions as to how she should be treated.

C. The IJ Erred by Ignoring the Voluminous Evidence Establishing the Salvadoran Government Is Unable or Unwilling to Protect Ms. A-B-

The IJ erroneously concluded that the Salvadoran government was able *and* willing to protect Ms. A-B-.[16] I.J. at 15. The IJ rested this conclusion on the fact that Ms. A-B- received temporary protection orders in 2001 and 2008, treating the orders as dispositive proof of state protection. However, the relevant question is not simply whether the state has protective mechanisms, but whether they are *effective* in reducing the risk of harm. *See, e.g.*, *Hernandez-Avalos*, 784 F.3d at 953 (finding the state unable and unwilling to protect petitioner based on the ineffective police response); *Zavaleta-Policiano*, 873 F.3d at 250 (noting that police failure to take meaningful steps to protect petitioner after filing of a complaint was relevant to inability or unwillingness to protect). The Fourth Circuit recently reiterated that "empty or token 'assistance' cannot serve as the basis of a finding that a foreign government is willing and able to protect an asylum seeker." *Orellana v. Barr*, 925 F.3d 145, 153 (4th Cir. 2019). The IJ's determination stands in direct contravention of the Fourth Circuit's mandate for evaluating government

[16] *A-B-* applied the long-established "unable or unwilling" standard for state protection. *See, e.g.*, 27 I&N Dec. at 317, 319, 320, 330, 337, 338, 340. But as the Attorney General described the standard, he made passing reference to isolated cases from the Seventh and Eighth Circuits that appear to require applicants to show the government was "completely helpless" or "condoned" the persecution. *Id.* at 337. Under a proper reading, *A-B-* does not alter the long-settled standard. However, to the extent it is interpreted as imposing a heightened state protection requirement, such a change would violate decades of case law and the statute itself—which incorporates an understanding that "persecution" encompasses acts by a non-state actor against which the state is unable or unwilling to protect. *See* INA § 101(a)(42)(A); *Acosta*, 19 I&N Dec. at 222. The statute also clearly only requires a "well-founded" and not certain fear. INA § 101(a)(42)(A). Even if the Board applies a "condoned" or "completely helpless" standard, the evidence described in this section meets such a requirement.

assistance, and "disregarded important aspects of the applicant's claim." *Tassi v. Holder*, 660 F.3d 710, 719 (4th Cir. 2011).

Even if the issuance of these orders reflected some willingness by the Salvadoran judicial system to protect Ms. A-B-, the legally correct standard is disjunctive. *Hernandez-Avalos*, 784 F.3d at 952 ("[E]ven if the authorities in her neighborhood were willing to protect her . . . [the petitioner] testified that they would be unable to do so."). As long as Ms. A-B- demonstrates that the Salvadoran government is unable to protect her, she has met her burden. Nonetheless, as Ms. A-B-'s testimony and the voluminous country conditions evidence establish, the Salvadoran authorities repeatedly demonstrated both their inability and their unwillingness to provide Ms. A-B- with any meaningful protection from her abuser.

Ms. A-B- credibly testified that the protection orders she received were entirely ineffective, starting from the time of issuance when the police placed Ms. A-B- directly in harm's way by requiring her to serve the order on the exact person from whom she needed protection. Exh. R1.A (*Supp. Decl.*) at ¶ 26. When she asked the police to do it for her, they refused. *Id.* Unsurprisingly, when Ms. A-B- gave the order to her abuser, he simply "crumpled the paper up and threw it at [her]." *Id.* Her second protection order proved equally ineffective; the "police did nothing to enforce it when [her] husband violated the order." *Id.* at ¶ 28; *see* Exh. R1.H (*Menjivar Decl.*) at ¶ 31 (confirming that orders for protection are rarely enforced in El Salvador); Exh. R1.I (*Bautista Decl.*) at ¶ 58 (same). The police's utter failure to enforce the orders sent a clear message to her abuser that he could retaliate against her without consequence. *See* Exh. R1.H (*Menjivar Decl.*) at ¶ 32 ("[W]omen who pursue protective orders do so with the serious risk of angering her aggressor whom the police will not be able to stop from retaliating against her."); Exh. R1.I (*Bautista Decl.*) at ¶ 41 (noting the case of a woman who was killed by

her aggressor shortly after she received a protection order, which authorities failed to enforce); Exh. R1.N (*Impunity and Multisided Violence*) at 478 (describing how in El Salvador "the justice system itself becomes a source of impunity through using the laws to pursue mediation and issuing ineffective protective orders rather than punishing aggressors").

Ms. A-B- described other disturbing responses from police throughout the years of abuse, ranging from dismissive to insulting, which the IJ failed to consider. In some of these instances, the police responded in a cursory manner or told her outright that they could not assist her, without even attempting to investigate. *See* Exh. R1.A (*Supp. Decl.*) at ¶ 24 (describing how, when her neighbors would call the police, "most of the time the police would never come. Or even when they did come, they couldn't help [her] because they didn't catch [her abuser] in the act"); *id.* at ¶ 33 (recalling that the "police said they couldn't help [her] and said something like 'if you have any dignity, you will get out of here'"); *id.* at ¶ 43 (noting that when she reported death threats to the police, they told her to "change the 'chip'" in her phone to avoid getting calls). In other instances, the authorities displayed clear prejudice against Ms. A-B- and domestic violence survivors. *See id.* at ¶ 24 (recalling how the police would "say things like '[h]e's your husband, he can do what he wants'"). This general refusal of the police to intervene was exacerbated by the fact that her abuser's brother is a police officer who told Ms. A-B- he would prevent his colleagues from taking any action against her abuser. *Id.* at ¶ 21; *see also id.* at ¶ 25 (explaining how two men Ms. A-B- believes were affiliated with the police coerced her into dropping one police report against her husband). The IJ further ignored the testimony of two experts on country conditions in El Salvador who opined specifically on Ms. A-B-'s individual circumstances and concurred that she "lacked any reliable means of protection from the police or other authorities," and would not be able to turn to the government for protection or shelter. Exh.

R1.I (*Bautista Decl.*) at ¶¶ 69-70; *see also* Exh. R1.H (*Menjivar Decl.*) at ¶ 44 (providing expert opinion as to Ms. A-B-'s inability to "find protection or assistance upon returning to El Salvador").

Ms. A-B-'s experts coupled with other country conditions documentation established that her experiences with the authorities persist as the norm in El Salvador. *See* Exh. R1.H (*Menjivar Decl.*) at ¶ 24 ("Violent practices and the subjugation of women are so ingrained that governmental efforts are simply cosmetic and have not succeeded in significantly reducing abuse."); Exh. R1.L (*2016 El Salvador Country Reports*) at 439 ("Laws against domestic violence were not well enforced, and cases were not effectively prosecuted."); Exh. R1.M (*CEDAW Concluding Observations*) at ¶ 24 (expressing concern about "the increasing rates of femicide and the high rates of domestic and sexual violence against women," as well as the "limited enforcement of protection orders" and the "insufficient mechanisms for the protection . . . of women who are victims of gender-based violence"). Although the IJ acknowledged in the decision that the general country conditions evidence shows the ineffectiveness of the Salvadoran government's efforts to protect women, he erroneously failed to factor such evidence in his analysis. I.J. at 15.

The Salvadoran government's indifference to domestic violence reflects not only limited resources and weak institutions—*i.e.*, its inability to protect—but also the widespread misogynistic attitudes among law enforcement officials and the judicial system—*i.e.*, its unwillingness to protect. Exh. R1.I (*Bautista Decl.*) at ¶ 51 ("Like Salvadoran society as a whole, law enforcement officials, prosecutors, and judges discriminate against women, reduce the priority of women's claims and otherwise prevent women from accessing legal protections and justice."); Exh. R1.O (*Report of the Special Rapporteur*) at ¶ 59 ("The pervasiveness of

patriarchal attitudes in the law enforcement and justice system, coupled with a lack of resources and insufficient knowledge on existing applicable legislation has led to inadequate responses to cases of violence against women and the persisting social acceptance of such acts."). Ms. A-B-'s own experience, during which she suffered years of abuse with no effective recourse, as well as the extensive record documenting an almost total failure of the Salvadoran system to protect women from domestic violence, undeniably meet the unable or unwilling standard.

Therefore, the Board must find Ms. A-B- eligible for asylum and reverse the IJ's denial of her claim. In the alternative, the Board must at a minimum rectify the IJ's errors and remand for further consideration before a different immigration judge with instructions to apply the correct legal standards and consider all evidence.

D. The IJ Erred in Finding Ms. A-B- Is Not Entitled to Withholding of Removal

The same numerous errors of fact and law in the IJ's asylum analysis, explained *supra* in Sections I.A–I.C, mandate the same result for Ms. A-B-'s withholding claim. *See Le Fang Lin v. Mukasey*, 517 F.3d 685, 694 (4th Cir. 2008). Ms. A-B- is entitled to the presumption of eligibility for withholding since she has suffered past persecution because of her membership in the social groups articulated in Section I.A, *supra*, and because of her political opinion articulated in Section I.B.2, *supra*. This presumption has not been rebutted. Further, Ms. A-B-'s testimony and evidence meet the higher threshold establishing her eligibility for withholding, even absent any presumption.

Even if the Board finds that Ms. A-B-'s membership in a particular social group or her political opinion was not at least "one central reason" for the persecution she suffered, it should overturn its prior decision in *Matter of C-T-L-*, 25 I&N Dec. 341 (BIA 2010), which incorrectly held that the "one central reason" requirement also applies to applications for withholding of

removal. Based on the "unambiguously different" statutory language of the provisions governing asylum and withholding, at least one circuit has concluded that *C-T-L-* conflicts with Congress's clear intent to impose a lower nexus standard for withholding claims. *Barajas-Romero v. Lynch*, 846 F.3d 351, 357-60 (9th Cir. 2017); *see also Hercules-Torres v. Whitaker*, 756 F. App'x 233, 239 n.3 (4th Cir. 2018) (per curiam) (stating that "[t]he language of the asylum statute . . . differs from the language of the withholding of removal statute" by referring to "one central reason" rather than "a reason"). Consistent with the plain text of the withholding statute, the Board should hold that applicants for withholding need only demonstrate that a protected ground would be "a reason" for their persecution. *See Barajas-Romero*, 846 F.3d at 360.

E. The IJ Erred in Finding Ms. A-B- Is Not Entitled to CAT Protection

1. Ms. A-B-'s CAT claim is properly before the Board

The IJ erroneously concluded that Ms. A-B- abandoned her claim for CAT protection before the Board, invoking the wholly unrelated doctrine of administrative exhaustion, which arises in the context of federal appellate jurisdiction. I.J. at 16. The case law cited by the IJ relates exclusively to judicial review under INA § 242(d)(1) of claims not raised before the Board—not the agency's jurisdiction over claims *within* administrative proceedings. In fact, though the IJ found Ms. A-B-'s reference to her CAT claim insufficient in her briefing to the Board, one of the cases the IJ cited expressly found jurisdiction over a petitioner's CAT claim notwithstanding the fact that he did not address the claim in his brief to the Board. *See Lizama v. Holder*, 629 F.3d 440, 448-49 (4th Cir. 2011) (concluding the court has jurisdiction to review the petitioner's CAT claim because he raised the issue in his Notice of Appeal and the Board addressed the claim).

In the previous appeal, DHS did not argue that Ms. A-B- waived her CAT claim and submitted its own briefing on her CAT eligibility. DHS BIA Mot. Summ. Affirmance (filed Mar. 8, 2016) at 4. In addition, the Board indicated that it would have considered Ms. A-B-'s CAT claim had it not granted her appeal as to asylum. BIA at 4. When the Attorney General reopened the record, Ms. A-B- further argued her CAT eligibility in light of the existing record as well as new evidence, and DHS specifically reserved the opportunity to brief the issue on remand. Resp't A.G. Opening Br. at 50-53; DHS A.G. Opening Br. at 37 n.21; *see Matter of A-H-*, 23 I&N Dec. 774, 779 n.4 (A.G. 2005). The IJ stands alone and without legal authority in finding waiver.

Even if the Board finds that Ms. A-B- waived her CAT claim in her *prior* appeal—which she did not—the IJ had jurisdiction over the claim on remand from the Attorney General, and it is now properly before the Board. With respect to CAT protection, the Attorney General noted that, "[o]n remand, the [IJ] may consider any other issues remaining in the case." *A-B-*, 27 I&N Dec. at 325 n.4; *see also Matter of Patel*, 16 I&N Dec. 600, 601 (BIA 1978) (holding that the scope of remand is general unless explicitly limited); *Johnson v. Ashcroft*, 286 F.3d 696, 703 (3d Cir. 2002) (same). Furthermore, on a general remand, an immigration judge "has the authority to consider additional evidence if it is material [and] was not previously available." *Matter of M-D-*, 24 I&N Dec. 138, 141-42 (BIA 2007). As set forth in her opening brief on remand, Ms. A-B- presented previously unavailable evidence warranting a changed outcome in her CAT claim—including cumulative evidence of the failure of legislation on violence against women, the dramatic increase in femicides in recent years, and the particularly high impunity rates as of 2018 for crimes linked with law enforcement officials. *See* Resp't I.J. Eligibility Br. at 22-25. Because CAT protection is a mandatory, non-discretionary form of relief, the Board must consider "*all*

evidence relevant to the possibility of future torture" and reach the merits of Ms. A-B-'s CAT claim. 8 C.F.R. § 1208.16(c)(3) (emphasis added).

2. Ms. A-B- has established sufficient government involvement in her torture

Although the IJ held that Ms. A-B- waived CAT relief, he went on to deny her claim in the alternative, incorporating his CAT ruling from his 2015 decision and providing additional findings. I.J. at 16-18. The IJ did not doubt that the brutal physical, psychological, and sexual abuse Ms. A-B- experienced and continues to fear amounts to the requisite severity for torture. Rather, the IJ concluded that Ms. A-B- failed to establish that the harm was or would be committed "at the hands of, or with the consent, or acquiescence of the Salvadoran government." I.J. at 17. He held that Ms. A-B- failed to establish the police have refused and would refuse to protect her and that general country conditions demonstrating widespread impunity are not sufficiently individualized, and also specifically ruled that he did not consider the acts of Ms. A-B-'s brother-in-law to be representative of the Salvadoran government. *Id.* at 17-18. The IJ committed several reversible errors.

The IJ applied a legally incorrect standard to Ms. A-B-'s CAT claim by focusing on whether the Salvadoran government as a whole would sanction Ms. A-B-'s torture. Federal appellate courts have repeatedly held that acquiescence by "low-level officials, such as police officers" suffices, "even when those officials act in contravention of the nation's will." *Ramirez-Peyro v. Holder*, 574 F.3d 893, 900-01 (8th Cir. 2009); *see also, e.g.*, *Iruegas-Valdez v. Yates*, 846 F.3d 806, 812-13 (5th Cir. 2017). In fact, the regulations only require acquiescence by any *one* public official. 8 C.F.R. § 1208.18(a)(1) (setting forth standard as "*a* public official or other person acting in an official capacity") (emphasis added); *see also Madrigal*, 716 F.3d at 509

("[A]n applicant for CAT relief need not show that the entire foreign government would consent to or acquiesce in his torture. He need show only that 'a public official' would so acquiesce.").

The IJ's legal error infected his analysis of Ms. A-B-'s CAT claim, which was compounded by his refusal to engage with the record before him. The IJ ignored the uncontroverted facts of Ms. A-B-'s testimony documenting numerous instances of the police's refusal to help her—from failing to show up at all, to refusing to serve Ms. A-B-'s protection order on her abuser, to telling Ms. A-B- that her husband "can do what he wants." Exh. R1.A (*Supp. Decl.*) at ¶¶ 24-28, 33, 43. Ms. A-B-'s personal experiences comport with extensive evidence that the authorities in El Salvador ignore or even directly participate in violence against women. *See* Section I.C, *supra*. Yet, the IJ impermissibly dismissed general country conditions, which the Fourth Circuit has recognized "alone can play a decisive role in granting relief under the CAT." *Rodriguez-Arias v. Whitaker*, 915 F.3d 968, 974-75 (4th Cir. 2019) (internal quotation marks and citations omitted) (directing the Board to engage "seriously with the full panoply of the risk-of-torture evidence submitted" by the petitioner).

Moreover, the IJ erroneously determined that Ms. A-B- failed to establish her former brother-in-law was "a public official," ignoring Ms. A-B-'s credible testimony that he was a police officer. Exh. R1.A (*Supp. Decl.*) at ¶¶ 21, 39-40; Tr. at 40-42. The record makes clear that Ms. A-B-'s former brother-in-law would use his "official capacity" as a police officer to assist her abuser.[17] Ms. A-B-'s husband and brother-in-law specifically referred to the brother-in-law's

[17] On December 6, 2019, the Board issued a decision in *Matter of O-F-A-S-* holding that "conduct by an official who is not acting in an official capacity, also known as a 'rogue official,' is not covered by the [CAT]." 27 I&N Dec. 709, 713 (2019). The Board's interpretation conflicts with case law in at least two circuits, which have held that there is no exception for rogue officials. *See, e.g., Barajas-Romero*, 846 F.3d at 362-63 (finding the disjunctive language of the regulation "does not require that the public official be carrying out his official duties"); *Rodriguez-Molinero v. Lynch*, 808 F.3d 1134, 1138-39 (7th Cir. 2015) (holding that it is

ability to use his position to instruct other police officers to not protect her. Exh. R1.A (*Supp. Decl.*) at ¶¶ 21, 39; *O-F-A-S-*, 27 I&N Dec. at 715 ("An act that is motivated by personal objectives is under color of law when an official uses his official authority to fulfill his personal objectives.") (citing *Garcia v. Holder*, 756 F.3d 885, 891-92 (5th Cir. 2014)). Even though this fact alone satisfies Ms. A-B-'s burden of proof, as described above, her brother-in-law is only one of several police officers complicit in her torture, including while on duty.

3. Ms. A-B- has established the impossibility of internal relocation

The IJ erred in denying Ms. A-B-'s CAT claim due to her purported failure to demonstrate that she could not relocate within El Salvador. First, the IJ committed legal error by treating the possibility of internal relocation as dispositive of the likelihood she would face torture. The regulations instruct adjudicators to consider "all evidence relevant to the possibility of future torture" and list the possibility of internal relocation as only one of many factors, none of which is dispositive. 8 C.F.R. § 1208.16(c)(3); *Maldonado v. Lynch*, 786 F.3d 1155, 1163-64 (9th Cir. 2015) (en banc) (holding that applicants for CAT protection do not bear the burden to prove that internal relocation is impossible). Second, as a factual matter, the IJ wholly ignored the undisputed fact that Ms. A-B-'s husband found her when she tried to relocate and does not so much as pay lip service to the voluminous country conditions evidence detailing the insurmountable challenges to relocation that women in El Salvador face. Exh. R1.A (*Supp. Decl.*) at ¶¶ 35-37; Tr. at 46; Exh. R1.H (*Menjivar Decl.*) at ¶¶ 40-42; Exh. R1.I (*Bautista Decl.*)

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irrelevant for CAT purposes whether the complicit official is "rogue," *i.e.*, "not serving the interests of the [federal] government"). Notwithstanding, as described in this section, the facts of Ms. A-B-'s case can be distinguished from *O-F-A-S-*, and there is sufficient evidence for the Board to reverse the IJ's denial of CAT protection despite *O-F-A-S-*. In the alternative, the Board should at a minimum remand to a different IJ to provide Ms. A-B- the opportunity to tailor her arguments and record with an eye towards the intervening decision.

at ¶ 71 (noting that, because of El Salvador's size and the role of family and community networks, abusers are easily able to track down their partners, especially if they have children in common or contacts in the police force).

Applying the appropriate standard to the record in this case, the Board must reverse the IJ's findings and find her eligible for CAT protection. In the alternative, the Board should remand to a different immigration judge with instructions to apply the correct legal standard and consider all evidence.

II. The IJ's Conduct Denied Ms. A-B- Due Process Warranting Reversal or, At a Minimum, Requiring Remand to a New Immigration Judge Pursuant to *Matter of Y-S-L-C-*

Where an immigration judge's outcome-driven tactics result in a denial of due process, reversal is required. Here, the IJ's bias against Ms. A-B-, and domestic violence claims generally, led him to ignore evidence entirely or interpret it in the least favorable manner, and to flout the law and the Board's order and proper procedure, in order to ensure that Ms. A-B- would be denied asylum. Moreover, he refused to recuse himself despite his actual or apparent bias. Absent the IJ's actions, Ms. A-B- would have asylum today, and the Board, therefore, should reverse the IJ's decision and reaffirm its earlier finding that Ms. A-B- is eligible for asylum.

Even if the Board determines that reversal is not appropriate here, at a minimum, it must conclude that the IJ's conduct creates the appearance that he abandoned his role as a neutral fact-finder and denied Ms. A-B- a full and fair hearing and a reasonable opportunity to present evidence on her behalf. Pursuant to this Board's precedent, it must vacate the IJ's decision and remand these proceedings to a different immigration judge so that Ms. A-B- may have an individualized adjudication of her claim by a neutral fact-finder in the first instance. *See Matter of Y-S-L-C-*, 26 I&N Dec. 688 (BIA 2015).

A. Throughout These Proceedings Ms. A-B- Was Denied Due Process and a Fundamentally Fair Hearing Which Prejudiced Her Claim for Protection and Requires Reversal

It is well settled that the Fifth Amendment entitles immigrants to due process in deportation proceedings, including the right to a full and fair hearing. *See Landon v. Plasencia,* 459 U.S. 21 (1982); *Reno v. Flores*, 507 U.S. 292, 306 (1993); *Demore v. Kim*, 538 U.S. 510, 523 (2003); *United States v. Lopez-Collazo*, 824 F.3d 453, 460-61 (4th Cir. 2016). To demonstrate a violation of due process, a noncitizen must demonstrate the defect in question (1) resulted in the proceeding being fundamentally unfair and (2) "prejudiced the outcome of the case." *Anim v. Mukasey*, 535 F.3d 243, 256 (4th Cir. 2008). Neutrality of and lack of prejudgment by the adjudicator are axiomatic requirements of due process, and neither were present here. *Marshall v. Jerrico, Inc*., 446 U.S. 238, 242 (1980) ("No person [may] be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him."); *see also Elias v. Gonzales,* 490 F.3d 444, 451 (6th Cir. 2007); *Abulashvili v. Att'y Gen. of U.S*., 663 F.3d 197, 207 (3d Cir. 2011); *Islam v. Gonzales*, 469 F.3d 53, 55 (2d Cir. 2006); *Reyes-Melendez v. INS*, 342 F.3d 1001, 1008 (9th Cir. 2003).

1. The IJ exhibited personal bias against Ms. A-B-, prejudged her claim, and abused his discretion in refusing to recuse himself

This Board has held that an immigration judge is required to recuse from a proceeding if (1) the immigration judge has "a personal, rather than judicial, bias stemming from an 'extrajudicial' source which resulted in an opinion . . . on some basis other than what the IJ learned from his participation in the case," or (2) "'such pervasive bias and prejudice is shown by otherwise judicial conduct as would constitute bias against a party.'" *Matter of Exame,* 18 I&N Dec. 303, 306 (BIA 1982) (quoting *Davis v. Board of School Comm'rs*, 517 F.2d 1044,

1051 (5th Cir. 1975)). The IJ's conduct during Ms. A-B-'s proceedings specifically, and his track record generally demonstrate a "deep-seated . . . antagonism" toward domestic violence claims "that would make fair judgement impossible."[18] *United States v. Lentz*, 524 F.3d 501, 530 (4th Cir. 2008) (quoting *Liteky v. United States*, 510 U.S. 540, 555 (1994)).

Even assuming *arguendo* that the IJ was capable of fairly adjudicating Ms. A-B-'s claim, he nevertheless erred by failing to recuse himself where, as here, he *appeared* biased against her. *See Liteky*, 510 U.S. at 548 (holding that in considering recusal "what matters is not the reality of bias or prejudice but its appearance."); *see also In re Kensington Int'l Ltd*., 353 F.3d 211, 220 (3d Cir. 2003) ("The test for recusal under [28 U.S.C.] § 455(a) is whether a reasonable person, with knowledge of all the facts, would conclude that the judge's impartiality might reasonably be questioned."); *United States v. Martorano*, 620 F.2d 912, 919 (1st Cir. 1980) (test for recusal is whether the motion is "grounded on facts that would create a reasonable doubt concerning the judge's impartiality . . . in the mind of the reasonable man").

Based on the events that transpired following the last remand from the Board, any reasonable person could doubt the IJ's ability to impartially consider Ms. A-B-'s case following the remand from the Attorney General. Contrary to the Board's instructions, the IJ did not schedule a hearing at which DHS could update Ms. A-B-'s background checks. After six months elapsed with no action taken on her case, Ms. A-B- was forced to submit a written motion asking the IJ to schedule a master calendar hearing, and the IJ further delayed proceedings for an additional two months. Even if it was not the IJ's actual intent, a reasonable person could readily

[18] Even where the IJ attempts to express empathy for Ms. A-B- or demonstrate he is fairly evaluating her claim, he undermines those attempts with disparaging commentary about Ms. A-B- and her counsel. For example, the IJ's decision claims to give Ms. A-B- the benefit of the doubt regarding her credibility, while in the same breath calling into question the veracity of her supplemental declaration. *See* I.J. at 6.

conclude that the IJ deliberately postponed scheduling the master calendar hearing for as long as possible to preclude Ms. A-B- from being granted asylum.

Meanwhile, the IJ's conduct during the post-remand hearing could lead a reasonable person to conclude that he intended to certify Ms. A-B-'s case to the Board before the hearing even began. After DHS confirmed that Ms. A-B-'s background checks had cleared, Tr. 2 at 2, the IJ *sua sponte* asked whether DHS "intend[ed] to make the same concessions in this case that were made on appeal in the case of *Matter of A-R-C-G-*." *Id.* at 2. After DHS stated that it would not make the same concession in light of the Fourth Circuit's intervening decision in *Velasquez*, 866 F.3d 188, the IJ immediately stated that he intended to re-certify the case to the Board and, after a brief recess, provided a written order concluding that, in light of *Velasquez*, *A-R-C-G-* "may not be legally valid within this jurisdiction in a case involving a purely intra-familial dispute." *See id.* at 4; I.J. Cert. at 3-4.

As the Attorney General himself later recognized, the IJ was required under federal regulations to hold a further hearing if he believed that Ms. A-B- was no longer eligible for asylum under intervening case law, and to thereafter enter an order granting or denying the relief sought. *A-B-*, 27 I&N Dec. at 248 (citing 8 C.F.R. § 1003.47(h)). The IJ's failure to hold a further hearing—combined with his issuance of a pre-written order exceeding three pages single-spaced—could lead a reasonable person to conclude that he intended to certify Ms. A-B-'s case to the Board before the hearing even began. Moreover, the IJ's failure to issue an order actually denying Ms. A-B-'s asylum application could lead a reasonable person to conclude that the IJ did not himself believe that *Velasquez* threatened the validity of *A-R-C-G-*, and that he used *Velasquez* as a pretext to even further delay the point at which Ms. A-B- would be granted asylum. Such a belief would be particularly reasonable given that *Velasquez* has no bearing on

Ms. A-B-'s case; it did not involve a domestic violence asylum claim and the Fourth Circuit expressly noted that *A-R-C-G-* was not relevant to its analysis. 886 F.3d at 195 n.6. Under Fourth Circuit law, such misapplication of the existing law may alone amount to a due process violation. *Lopez-Collazo*, 824 F.3d at 467 (noting that a court may find misapplication of the law violated due process, where "'but for' the misapprehension of the law, defendant would not have been removed").

Ms. A-B- recognizes that the IJ stated during the post-remand hearing that his decision to certify the case back to the Board was "not anything personal against [her]." Tr. 2 at 6. Yet this statement is not sufficient to remove the appearance of bias or support a finding that recusal was unwarranted, particularly where, as here, the IJ's actions denote a vigorous campaign to achieve a particular outcome. *See* I.J. at 3 (citing Exh. R1.D (*Unofficial Transcript*) at 71-72). Here, underscoring the IJ's personal biases is the irregularity of his actions—the same day he issued the improper certification order, he sent an e-mail to EOIR Director James McHenry with the subject line "Re: A-R-C-G" attaching both the certification order and underlying record.[19] Resp't Mot. Tab G (*E-Mail from IJ Couch to McHenry*).[20] Even if the IJ did not intend to become an advocate for the government, "judicial conduct [is] improper . . . whenever a judge appears

[19] The IJ's certification order, in which he "declines to endorse the findings of the Board in this case," further demonstrates his contempt not only for Ms. A-B-, but for the law and procedure of this adjudicating body and the Executive Office for Immigration Review ("EOIR"). *See* I.J. Cert. at 2. Ms. A-B- anticipates that materials responsive to her Freedom of Information Act ("FOIA") requests will further confirm the IJ's activist, rather than impartial, role in this case. *See infra* note 20.

[20] To better understand the irregularities surrounding how Ms. A-B-'s case was treated and selected for Attorney General review, Ms. A-B- is pursuing her rights under the FOIA. *See A.B. v. U.S. Dep't of Justice*, 19-00598-CJN (D.D.C. filed Mar. 6, 2019). Although Ms. A-B- asked the Board for a lengthier extension to file this brief to allow for resolution of the pending FOIA litigation, as permitted under the regulations, the Board declined. Notice – Briefing Extension Request Granted (dated Nov. 15, 2019). She reserves the right to supplement her briefing should the production shed light on these claims.

biased, even if []he actually is not biased," and here, "by stepping into the role of the attorney for the government, the IJ gave the strong impression that []he was on the government's side." *Abulashvili*, 663 F.3d at 207-08 (quoting *In re Antar (SEC v. Antar)*, 71 F.3d 97, 101 (3d Cir.1995)).

The basis for Ms. A-B-'s recusal motion bore true in the IJ's adjudication of the merits of her claim. The IJ repeatedly discounted Ms. A-B-'s credible testimony and rejected reliable corroborating documents. For example, the IJ cast doubt on Ms. A-B-'s testimony without providing her an opportunity to testify and explain. *See* I.J. at 6, 8 & n.7, 9. The IJ's commentary throughout his decision expose as disingenuous his assertion that he "assumed" Ms. A-B- to be credible. *Id.* at 6. Instead, he repeatedly calls the veracity of her claims into question throughout, and further fails to credit the substance of her testimony. *See id., generally*.[21] If the IJ were in fact crediting Ms. A-B-'s testimony, further corroboration of her specific claim would not be necessary. *Cf. id.* at 8. And, as discussed at length in the previous section, the IJ erroneously discounted hundreds of pages of authenticated legal and identity documents issued by the Salvadoran government, qualified expert reports, and the voluminous documentation of country conditions. The IJ's conduct not only constitutes legal error but it reflects an impermissible bias against Ms. A-B- and her claim.

Indeed, the IJ's pattern of denying cases involving women fleeing domestic violence generally can only be characterized as a systematic predisposition against this group of asylum

[21] The extrajudicial bias the IJ brought with him to these proceedings, appears throughout the record. For example, in 2015, the IJ called into question the veracity of Ms. A-B-'s marriage, despite the presence in the record of an unimpeachable divorce decree because her "maiden name" was listed on her child's birth certificate. *See* I.J. (2015) at 6. This telegraphed not only the IJ's bias against these cases, but also his antiquated view, improperly brought to bear here, that if a married woman fails to adopt and use her husband's surname at all times the marriage is invalid.

seekers. *See* Resp't Mot. Tab A (Dep't of Justice FOIA response and spreadsheet data).[22] In many other cases like Ms. A-B-'s, the IJ has relied on speculation and conjecture to intentionally discount corroborating evidence contrary to law, failed to provide applicants an opportunity to explain perceived inconsistencies or omissions, and excluded consistent witness affidavits because they were "unsworn," "not prepared contemporaneously to the events in question," or "prepared by witnesses not subject to cross-examination." *See, e.g.*, Resp't Mot. Tabs R at 264, N at 186, P at 224, and Q at 244. The Board has repeatedly rejected this IJ's approach as legally erroneous, *see, e.g,* Resp't Mot. Tab R at 274 (citing *Tassi*, 660 F.3d at 721) ("[T]he rules of evidence do not strictly apply in immigration proceedings."), but the IJ nevertheless continued to ignore the law and the Board's instructions and deny cases on these rejected bases. *See* I.J. at 5, 6 & n.4-6, 8 & n.7-8 (citing I.J. (2015) at 4-7); *see also, e.g.*, Resp't Mot. Tabs R at 264, N at 186, P at 224, and Q at 244. This repeated conduct reveals bias in his concerted effort to find fault with these cases where there is none.

Moreover, rather than engage in a case-by-case individualized factual analysis, the IJ used near-identical language across claims in making factual findings that applicants did not establish nexus. In general, he attributed domestic violence to either the abuser's "violent and jealous nature," "violent and criminal tendencies," or substance abuse. I.J. at 14. Likewise, in Ms. A-B-'s case (*see supra* Section I.B.1), the IJ eschewed the "one central reason" analysis and ignored contrary expert evidence, instead engaging in his standard approach, that is, that the sole

[22] The undersigned counsel at the Center for Gender and Refugee Studies has also collected information on the IJ's post-*A-B-* decisions in domestic violence cases, and they show similar boilerplate prejudgment of claims. To understand the full scope of this pattern of bias, CGRS submitted a FOIA request to the Executive Office for Immigration Review for additional asylum decisions issued by this IJ. But, as of writing, this FOIA remains pending. FOIA Control No. 2019-49408.

motivation for the persecution was her abuser's "violent and jealous nature" and his "deviant sexual desire." I.J. at 14 (citing I.J. (2015) at 13). The consistent pattern across these cases, using boilerplate language, reflects prejudgment.

In *Floroiu v. Gonzales*, 481 F.3d 970, 974 (7th Cir. 2007), the court held that where an IJ's conduct "betray[s] a predisposition against the petitioner[]," the petitioner is denied due process. There the court inferred that the IJ was biased based on, among other things, "the flatly illogical conclusion[s] about asylum law that the IJ [drew]." *Id.* This case illustrates the point. The IJ bizarrely asserted that recognizing the group "Salvadoran women" as socially distinct would warrant a *per se* finding that all Salvadoran males are persecutors of others. *See* I.J. at 11 & n.10. Such a formulation would be akin to finding that recognizing Catholicism is a religion in a country would warrant a *per se* finding that all non-Catholics in that country are persecutors of others. This is not only a logical fallacy, but further demonstrates the lengths to which this IJ will go to deny these cases.

Under these circumstances, the IJ was required to recuse himself and his unjustifiable failure to do so further demonstrates his lack of impartiality. The multiple due process violations apparent from the record in this case cannot stand.

2. Absent the IJ's prejudicial conduct, Ms. A-B- would have asylum today

As a threshold matter, prejudice should be presumed because Ms. A-B- was denied her constitutionally mandated right to a neutral arbiter. *See Matter of Garcia-Flores*, 17 I&N Dec. 325, 329 (1980) ("Where compliance with the regulation is mandated by the Constitution, prejudice may be presumed."); *see also* U.S. Const. Am. V. Even if that were not the case, Ms. A-B- has satisfied the second requirement of the due process inquiry by showing that she was actually prejudiced because "but for the errors complained of, there was a reasonable

probability that [s]he would not have been" denied relief. *United States v. El Shami*, 434 F.3d 659, 665 (4th Cir. 2004) (citing *United States v. Wilson*, 316 F.3d 506, 511 (4th Cir. 2003)); *see also Lopez-Collazo*, 824 F.3d at 462. Additionally, the court must analyze the law which was current during the immigration proceeding. *United States v. Moreno-Tapia*, 848 F.3d 162, 171 (4th Cir. 2017) (citing *Lopez-Collazo*, 824 F.3d at 466). In this matter—where there is not merely a reasonable probability that Ms. A-B- would not have been ordered removed, but there is an absolute certainty—the prejudice to Ms. A-B- is as obvious as it is unconscionable.

The IJ's unauthorized actions precluded her from obtaining asylum relief, which this Board held she was entitled to so long as background checks cleared. *Anim*, 535 F.3d at 256 (establishing prejudice in the context of a due process violation requires "consideration of whether the defect, in retrospect in a specific case, was likely to impact the results of the proceedings") (internal quotation marks omitted). Her background checks *did* clear, *see* I.J. Cert. at 1, but nevertheless the IJ engaged in a pretextual and procedurally improper certification to the Board in order to facilitate denial of Ms. A-B-'s claim. Absent those actions, Ms. A-B- would have obtained asylum protection, she would be reunited with her children, and by now would be eligible for adjustment to lawful permanent residence status. *See* INA § 209. Instead, Ms. A-B- finds herself before the Board a second time, three years later. The clear prejudice here arose directly from the IJ adopting the role of the DHS and prosecuting Ms. A-B-, rather than fairly adjudicating her proceedings, while at once also denying her appellate review by rejecting the holdings of a higher authority. As such, the Board should vacate the IJ's order and grant her asylum claim.

B. Ms. A-B- Is Entitled to a New Hearing Pursuant to *Matter of Y-S-L-C-*

Even if, in spite of this record, the Board determines that Ms. A-B- did not establish either prong of the due process test, it must nevertheless remand this case for an individualized adjudication of her claims before a different immigration judge. *Y-S-L-C-*, 26 I&N Dec. 688. As a preliminary matter, the Board need not find that Ms. A-B- established prejudice in order to hold that she is entitled to remand for fair consideration of her claim before a neutral adjudicator. In *Y-S-L-C-*, the immigration judge interrupted when respondent's counsel asked respondent about his "psychological" trauma and then interjected to purportedly qualify the respondent as an expert witness on psychology. *Id.* at 689. The Board found it "difficult to view [the judge's conduct] as anything other than belittling to the respondent and insensitive to the difficult matters about which counsel was trying to question him." *Id.* at 691. Though the IJ here may have been more restrained in his on-record commentary, *Y-S-L-C-* does not require that an immigration judge verbally announce his partiality or prejudice against an applicant, but instead asks whether the conduct meets the standards expected of immigration judges. *Id.* Here the IJ engaged in a crusade against domestic violence cases, which intentionally ignored and mischaracterized Ms. A-B-'s evidence, facts, case law, procedures, and orders from the Board, and used procedurally improper back channels in order to achieve his goal of deportation. In so doing, the IJ failed to meet even the minimum standards expected of immigration judges and violated a bedrock statutory provision against the consideration of extra-record information. INA § 240(c)(1)(A).

Here, the IJ went out of his way to deny Ms. A-B- relief in a manner that impermissibly assumed the role of DHS in seeking her deportation. *See, e.g., Abulashvili,* 663 F.3d at 207 (holding that "IJs must assiduously refrain from becoming advocates for either party.") (internal

quotation marks and citation omitted). Each of his decisions, individually and taken as a whole, demonstrate that the IJ failed to evaluate Ms. A-B-'s claims fairly. His unprecedented and unlawful actions in this case following the reversal of his decision by the Board demonstrate both prejudgment and lack of impartiality.

Even if the Board disagrees that the IJ lacks impartiality, his unusual actions here, described at length above, at minimum created an *appearance* of bias that required his recusal—a responsibility from which he demurred. *See* I.J. at 2-5. Taken together, the IJ's actions cannot survive review and he should be reversed, or the case should be remanded to a different immigration judge. *See Ali v. Mukasey*, 529 F. 3d 478, 492-93 (2d Cir. 2008) (remanding with instructions to reassign the case where the IJ's conduct resulted in an appearance of bias or hostility that precluded the court's meaningful review); *Sukwanputra v. Gonzales*, 434 F.3d 627, 638 (9th Cir. 2013) (suggesting that the case should be reassigned to a different IJ on remand "to ensure fairness and the appearance of impartiality"); *Y-S-L-C-*, 26 I&N at 691–92.

CONCLUSION

For the foregoing reasons, the Board should reverse the IJ and uphold its previous finding that Ms. A-B- qualifies for asylum because she was subject to past persecution in the form of domestic violence on account of protected grounds from which she cannot expect protection of the Salvadoran government. The Board should also reverse the IJ and rule that Ms. A-B- is entitled to withholding and CAT protection. Alternatively, the Board should remand to a neutral adjudicator with instructions to apply the proper legal standards and fairly consider the evidence presented.

Dated: December 16, 2019

Respectfully submitted,

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Benjamin Winograd
Immigrant & Refugee
Appellate Center, LLC
3602 Forest Drive
Alexandria, VA 22302
(703) 933-7689

Andrés López
The Lopez Law Firm, PLLC
5701 Executive Center Drive, Suite 102
Charlotte, NC 28212
(704) 568-9228

Blaine Bookey
Neela Chakravartula
Sayoni Maitra
Karen Musalo
Anne Peterson
Center for Gender & Refugee Studies
200 McAllister Street
San Francisco, CA 94102
(415) 565-4877