



HARVARD IMMIGRATION AND REFUGEE CLINICAL
PROGRAM *of* HARVARD LAW SCHOOL

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January 7, 2020

Board of Immigration Appeals
Clerk's Office
5107 Leesburg Pike
Suite 2000
Falls Church, VA 22041

RE: A [REDACTED] E [REDACTED]
A [REDACTED]

REMOVAL PROCEEDINGS


REQUEST TO APPEAR AS AMICUS AND SUBMISSION OF AMICUS BRIEF

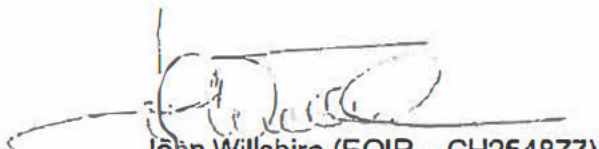
Dear Sir/Madam;

Attached please find for a Request to Appear as Amicus, HIRC's Amicus Curiae Brief, the underlying Immigration Judge's Order and Certificate of Service.

Thank you for your time and consideration in this matter.

Sincerely,


Nancy Kelly (EOIR - UK977424)
Counsel for Respondent


John Willshire (EOIR - CH254877)
Counsel for Respondent

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

IN THE MATTER OF:

A [REDACTED] E [REDACTED]

Respondent

IN REMOVAL PROCEEDINGS

A [REDACTED] [REDACTED]

REQUEST TO APPEAR AS AMICUS CURIAE

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

IN THE MATTER OF:

A [REDACTED] B [REDACTED]
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IN REMOVAL PROCEEDINGS

[REDACTED]

REQUEST TO APPEAR AS AMICUS CURIAE

Pursuant to 8 C.F.R. Section 1229.1(d), the Harvard Immigrant and Refugee Clinical Program at Harvard Law School ("HIRC"), hereby requests leave to appear as *amicus curiae* in the above-captioned matter. The brief that proposed *amicus* wishes to file in support of Respondent's appeal of the decision of the Immigration Judge denying her application for asylum, withholding of removal and protection under the Convention Against Torture is also being submitted at this time. In support of its motion, proposed *amicus* states as follows:

1. HIRC first became aware of the present matter in mid-December, 2019. Since learning of this case, HIRC has been working diligently to obtain the relevant materials and to prepare the attached brief.

2. HIRC respectfully submits that allowing HIRC to file the proposed *amicus* brief would serve the purposes of 8 C.F.R. Section 1229.1(d). As explained below, the issues in this case are within proposed *amicus*'s area of expertise—specifically, the

proper interpretation of the asylum statute and the protection it affords to women persecuted on account of their gender.

3. The proposed brief is not duplicative of briefing filed by any party, and presents arguments central to this case. Specifically, the proposed *amicus* brief addresses the Board of Immigration Appeals' ("Board") seminal decision in *Matter of Acosta*, 19 I. & N. Dec. 211, 233 (BIA 1985), including its conclusion that gender may define a particular social group. It further describes how *Acosta's* framework has been accepted by U.S. courts and international bodies, and was reaffirmed in *Matter of A-B-*, 27 I. & N. Dec. 316, 328 (A.G. 2018). Because gender *per se* may define a particular social group, the brief argues that the Immigration Judge wrongly found that the Respondent's proposed particular social group of "Salvadoran women" was not legally cognizable

4. HIRC is well equipped to make these arguments, having been a leader in the field of refugee and asylum law for over 35 years. HIRC has an interest in the appropriate application and development of U.S. asylum and immigration law, so that claims for asylum protection and other immigration relief receive fair and full consideration under existing standards of law.

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

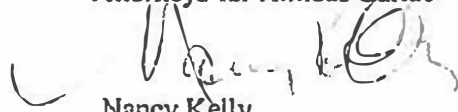
6. HIRC attorneys are recognized experts in asylum law, including asylum cases involving gender. HIRC has been engaged by the Justice Department in the training of immigration judges, and by the Asylum Office of U.S.C.I.S. in the training of asylum officers and supervisors on issues related to asylum law. HIRC was central to the drafting of the historic U.S. Gender Asylum Guidelines, which were adopted by the federal government, and has played a key role in promoting appropriate and fair treatment of women in the interpretation of U.S. asylum law. In addition, HIRC has represented hundreds of women applying for asylum protection, and has filed briefs as *amicus curiae* in many cases before the U.S. Supreme Court, federal courts of appeal, the Board of Immigration Appeals, and various international tribunals. This includes filing *amicus curiae* briefs in *Fatin v. I.N.S.*, 12 F.3d 1233 (3d Cir. 1993); *Angoucheva v. I.N.S.*, 106 F.3d 781 (7th Cir. 1997); *In re R-A-*, 22 I. & N. Dec. 906 (B.I.A. 2001); *Matter of R-A-*, 24 I. & N. Dec. 629 (B.I.A. 2008); *Matter of A-R-C-G-*, 26 I. & N. Dec. 388 (B.I.A. 2014); *Hernandez Lopez v. Sessions*, Nos. 17-9517 & 17-9531 (10th Cir. 2018); and *Matter of A-B-*, 27 I. & N. Dec. 316 (A.G. 2018).

WHEREFORE, the HIRC respectfully requests that the Board grant HIRC leave to appear as *amicus curiae* in the above-captioned matter to allow for the submission of HIRC's *Amicus Brief* accompanying this motion.

Dated: January 7, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Nancy Kelly, hereby certify on January 7, 2020 I served copies of the foregoing Request to

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UNITED STATES DEPARTMENT OF JUSTICE
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**BRIEF OF AMICUS CURIAE HARVARD
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INTEREST OF AMICUS CURIAE

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

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HIRC attorneys are recognized experts in asylum law, including asylum cases involving gender. HIRC has been engaged by the Justice Department in the training of immigration judges, asylum officers, and supervisors on issues related to asylum law. HIRC was central to the drafting of the historic U.S. Gender Asylum Guidelines, which were adopted by the federal government in 1995, and has played a key role in promoting appropriate and fair treatment of women in interpretation of U.S. asylum law. In addition HIRC has represented hundreds of women applying for asylum protection.

HIRC has filed briefs as *amicus curiae* in many cases before the U.S. Supreme Court, the federal courts of appeals, the Board of Immigration Appeals, and various international tribunals. *Amicus* regards the issues in this case as especially important. It is concerned that the protective function of U.S. refugee law (as well as the United States’ treaty obligations) will be undermined by an erroneous interpretation of the “particular social group” ground of 8 U.S.C. § 1101(a)(42)(A) that fails to take into account the vulnerabilities women face because they are women. The source of *amicus*’ authority to file is the motion for leave to which this brief is

attached.

INTRODUCTION

This case comes before the Board of Immigration Appeals as an appeal of a decision of the Immigration Judge (“IJ”) denying the Respondent’s applications for asylum, withholding of removal and relief under the Convention Against Torture. The case was remanded to the Immigration Judge after the Attorney General certified the case to himself, issued the decision in *Matter of A. B.*, 27 I&N Dec. 316, 320 (A.G. 2018) and ordered further proceedings consistent with his opinion. *See Id.* On remand, the IJ found that none of Respondent’s proposed particular social groups—“El Salvadoran women who are unable to leave their domestic relationships where they have children in common” with their partners, “Salvadoran women in domestic relationships they are unable to leave,” “Salvadoran women viewed as property by virtue of their status in a domestic relationship,” and “Salvadoran women,” — were cognizable in light of the Attorney General’s decision in this case.

Through this brief, HIRC, as *amicus curiae*, addresses the cognizability of the particular social group “Salvadoran women.”¹ The IJ found that, although gender is an immutable characteristic, the group “Salvadoran women” failed to establish the requisite particularity and social distinction requirements:

Despite the inherent immutable characteristic of female gender, this group encompasses more than half of the entire population of El Salvador. . . . The Court finds that this group clearly lacks particularity as it does not “provide an adequate benchmark for determining group membership,” and without some qualification, is too broad and amorphous to have well-defined boundaries. . . .

Without some outside limit to make it sufficiently precise, a group that includes such a large swath of El Salvador’s citizenry would result in potentially innumerable asylum claims from applicants who do not “share a narrowing characteristic other

¹ While this Brief focuses on the particular social group of “Salvadoran women,” it is the position of the *amicus* that a particular social group articulated as “women in El Salvador” would also be cognizable as this group also fulfills the relevant requirements articulated by the Board and by the Attorney General in *Matter of A-B*, including immutability, particularity, and the perception of the group as a group within the society in question.

than their risk of being persecuted.” . . . A group consisting of every woman in El Salvador a priori fails to establish how its members can be “distinct within society”.

IJ Dec. at 11. (citations omitted).

The Immigration Judge’s decision reflects a misunderstanding of *Matter of A-B-*, as well as longstanding Board, courts of appeals, and international precedent regarding the proper application of the particular social group category within the refugee definition.

ARGUMENT

I. A FINDING THAT MEMBERSHIP IN A COGNIZABLE PARTICULAR SOCIAL GROUP MAY BE SHOWN BASED ON GENDER ALONE IS COMPATIBLE WITH *MATTER OF A-B-*.

In *Matter of A-B-*, the Attorney General did not address the viability of the particular social group “Salvadoran women;” nor did he overrule the Board’s seminal decision in *Matter of Acosta*, in which the Board determined that a particular social group may be composed of individuals sharing a common immutable characteristic, including gender. *See Matter of Acosta*, 19 I&N Dec. 211, 233 (BIA 1985). Rather, the Attorney General favorably cited the Board’s decision in *Acosta* numerous times throughout the decision, endorsing the importance of the ‘immutable characteristic’ standard. *See e.g. Matter of A-B-*, 19 I&N Dec. at 318, 326, 327, 331. In addition to *Acosta*, the Attorney General embraced the Board’s decision in *Matter of M-E-Y-G-*, 26 I&N Dec. 227 (BIA 2014), in which the Board articulated additional requirements of particularity and social distinction. Under the Attorney General’s analysis, therefore, to establish membership in a particular social group for asylum purposes, an individual must “establish that

the group is (1) composed of members who share a common immutable characteristic, (2) defined with particularity, and (3) socially distinct within the society in question.” *Matter of A-B-*, 19 I&N at 330 (quoting *M-E-V-G-*, 26 I&N Dec. at 234, 237); *see also Matter of W-G-R-*, 26 I&N Dec. 208, 212 (BIA 2014). With respect to particularity, the Board has stressed that the group “must be defined by characteristics that provide a clear benchmark for determining who falls within [it].” *Matter of M-E-V-G-*, 26 I&N Dec. at 229. With respect to social distinction, the Board has held that the applicant must offer evidence that “society in general perceives, considers, or recognizes persons sharing the particular characteristic to be a group.” *Matter of W-G-R-*, 26 I&N Dec. at 217. As set forth below, gender as a particular can satisfy all three criteria.

A. Gender Is An Immutable Characteristic.

To be cognizable, a particular social group must consist of persons who “share a common, immutable characteristic,” which “might be an innate one such as sex, color, or kinship ties” or “a shared past experience such as former military leadership or land ownership.” *Fatin v. INS*, 12 F.3d 1233, 1239-40 (3d Cir. 1993) (quoting *Matter of Acosta*, 19 I&N Dec. 211, 233 (BIA 1985); *see also Escobar v. Gonzalez*, 417 F.3d 363, 367 (3d Cir. 2005). According to the Board’s longstanding analysis, the meaning of particular social group is discerned by resort to commonly used canons of statutory construction—specifically *ejusdem generis*. That doctrine, the Board explained in *Acosta* (and has repeated frequently), “holds that general words used in an enumeration with specific words should be construed in a manner consistent with the specific

words.” 19 I.&N. Dec. at 233. Looking to the surrounding words in the list of grounds for persecution, the Board found that each “describes persecution aimed at an immutable characteristic . . . that either is beyond the power of an individual to change or is so fundamental to individual identity or conscience that it ought not to be required to be changed.” *Id.* Based on that understanding, the Board determined that “membership in a particular social group” should be read to encompass “persecution that is directed toward an individual who is a member of a group of persons all of whom share a common, immutable characteristic.” *Id.* (emphasis added).

As the Immigration Judge found, gender is clearly an immutable characteristic. *See* I.J. Dec. at 11. Like race or religion, gender is entrenched, central to identity, and something a person cannot or should not be required to change. Gender is also a universal fact of life, listed on birth certificates, marriage certificates, and death certificates the world over. Indeed, the Board recognized the obvious fact that gender is common and immutable in *Acosta*, including “sex” among a short list of exemplary characteristics or traits that would satisfy its definition of particular social group. “The shared characteristic” that could identify a particular social group for purposes of establishing refugee status, the Board declared, “might be sex, color, or kinship ties.” *Id.* Salvadoran women share characteristics that courts have long deemed immutable – gender and nationality. *See, e.g., Fatim v. INS*, 12 F.3d at 1240 (noting that *Acosta* Specifically identified “sex” as an innate trait that can define a particular social group and recognizing “Iranian women” as a valid particular social group); *Cece v. Holder*, 733 F.3d 662, 673 (7th Cir. 2013) (finding that gender and nationality are inalterable traits). The Immigration Judge’s

finding in this regard was correct.

B. The Particular Social Group ‘Salvadoran Women’ Meets The Particularity And Social Distinction Requirements Articulated by The Attorney General and The Board of Immigration Appeals.

With respect to particularity, the Board has stressed that the group “must be defined by characteristics that provide a clear benchmark for determining who falls within [it].” *Matter of M-E-V-G-*, 26 I&N Dec. at 229. The group must be “discrete and have definable boundaries—it must not be amorphous, overbroad, diffuse or subjective.” *Id.* at 239. In El Salvador, as in virtually every society, women are recognized as a discrete class of persons. *See id.* at 249. There are clear and well established benchmarks for determining who is a woman and who is not, and gender is a defining characteristic used routinely to identify individuals, as, for example, on birth certificates. Gender is not “broad to the point of indeterminacy,” but discrete and discernable within the society in question. *Cf. Perez-Rabanales v. Sessions*, 881 F.3d 61, 66 (1st Cir. 2018). Although the category covers a large group of persons, “Salvadoran women” has well defined boundaries and therefore meets the particularity requirement established by the Board. *See Matter of S-E-G-*, 24 I&N Dec. 579, 585-86 (BIA 2008).

The IJ’s finding that the group defined as “Salvadoran women” lacks the requisite particularity was based upon a flawed understanding that a particular group could not be comprised of a large portion of the population, and that “without some qualification, is too broad and amorphous to have well-defined boundaries.” IJ Dec. at 11. Efforts to narrow particular social groups beyond gender are unnecessary. Like gender, “race, nationality, religion, and even political opinion are . . . traits which are shared by large numbers of people.” James C. Hathaway & Michelle Foster, *The Law of Refugee Status* § 5.9.1 (2d ed. 2014). Yet claims based on these

characteristics ought not to be viewed with skepticism simply because the categories are expansive. For example, when a Christian applicant for asylum cites religion as a protected ground, the claim is not rejected at the outset because there are over two billion adherents to Christianity in the world.

Gender-based claims are no different. “Neither PSG nor any [other] ground performs the function of the entire refugee definition.” Anker, Deborah, *The Law of Asylum in the United States*, § 5:45. Rather, “[Particular social group] is only one element of eligibility [for refugee status],” and each of the other elements has an equally critical role to play in determining whether an applicant’s claim will succeed. *Id.* No matter what protective ground is alleged—race, religion, particular social group or any other—“legitimate concerns about particularizing or individualizing a claim appropriately should be addressed through other definitional criteria.” *Id.* Recognizing that gender alone may define a particular social group does not mean that all women around the globe are entitled to asylum. *Cf.* DHS Position on Respondent’s Eligibility for Relief, *Matter of R-A-*, No. A-73753922 at 13 n.10 (2004) (noting that recognition of particular social groups defined by women unable to leave their relationships did not lead to “a notable increase in claims”). The other elements of the refugee definition—*i.e.*, the requirement that an applicant show past persecution or a well-founded fear of future persecution, as well as a nexus to her protected status—play an important limiting role in gender-based asylum cases, as they do in cases where persecution is based on other immutable characteristics such as race or religion. As the Tenth Circuit has explained, “the focus with respect to [gender-based] claims should be not on whether either gender constitutes a social group (which both certainly do) but on whether the members of that group are sufficiently likely to be persecuted that one could say that they are persecuted ‘on account of’ their membership.” *Niang v. Gonzales* 422 F.3d 1187, 1199–1200

(10th Cir. 2005).

With respect to social distinction, the Board has found that the group must be perceived as a distinct group by society, regardless of whether members of the group are identifiable by sight. *Matter of W-G-R-*, 26 I&N Dec. at 216-17. To demonstrate social distinction, an applicant must provide evidence that society in general perceives, considers, or recognizes persons sharing the particular characteristic to be a group. *Id.* at 217.

Salvadoran society perceives women as a socially distinct group, as demonstrated by the substantial evidence in the record documenting how women are treated because of their gender:

The respondent's evidence amply demonstrated the discrimination women face in Salvadoran society, and are commonly subjected to domestic abuse, criminal violence, and femicide. E.g. Exhibit R1, tab I at 1994-99; tab N at 475-77; tab Z at 841; Tab DD at 1021-22. The evidence also supports the unfortunate conclusion that such maltreatment afflicts most of the females in El Salvador, without distinction as to age, ethnicity, religion, or marital status.

I.J. Dec. at 11.

Salvadoran laws and government agencies are directed at addressing the needs of women *as a class*, however unsuccessfully. The law prohibits domestic violence, although those laws "remain poorly enforced, and violence against women, including domestic violence, remained a widespread and serious problem." El Salvador, Country Reports on Human Rights Practices for 2018, United States Department of State. Salvadoran law also forbids, though ineffectively, sexual harassment and discrimination against women in employment. *Id.* Nongovernmental organizations, including the Salvadoran Organization of Women for Peace (ORUMSA) and the World Health Organization, track crimes of violence against women and the lack of effectiveness of the government in providing protection to women. *Id.*

In post *A-B-* decisions, both Board members and Immigration Judges have recognized that

gender and nationality can form the basis of a cognizable particular social group. In at least one case decided after the Attorney General's decision in *A-B*, a Board member has upheld a decision of an immigration judge finding "Salvadoran females" to be a particular social group. *See Matter of A-C-A-A-* (BIA Nov. 6, 2019) (unpublished) Add. 4. In another case, a Board member reversed an immigration judge's holding that "young women in Honduras . . . lacked particularity solely because it was too large of a group." *Matter of H-A-C-S-* (BIA May 22, 2018) (unpublished) Add. 138, at 2-3. A number of Board members have remanded cases for consideration of gender-defined particular social groups by the Immigration Judge in the first instance, *See Matter of Y-V-P-*, (AXX-XXX-977) (BIA Nov. 6, 2019) (unpublished) Add. 1 ("women in El Salvador"); *Matter of T-S-M-*, (AXXX-XXX-911) (BIA Apr. 16, 2019) (unpublished) Add. 96 ("Guatemalan women"); *Matter of Y-M-L-*, (AXXX-XXX-294) (BIA Sep. 10, 2019) (unpublished) Add. 7 ("Guatemalan women"); *Matter of M-D-A-*, (AXXX-XXX-053) (BIA Feb. 14, 2019) (unpublished) Add. 99 ("women in El Salvador"); *Matter of X-Q-C-D-*, (AXXX-XXX-474) (BIA Dec. 11, 2018) (unpublished) Add. 111 ("women in Mexico"); *Matter of S-R-P-O-*, (AXXX-XXX-056) (BIA Dec. 20, 2018) (unpublished) Add. 103 ("Mexican women").

Similarly, a number of Immigration Judges have granted asylum based a particular social groups defined by gender and nationality. In one case, Immigration Judge Paul Gagnon of the Boston Immigration Court granted asylum to an applicant based on her membership in the particular social group "Guatemalan women." *T-A-C-*, (AXXX XXX 330) (Boston Imam. Ct., June 18, 2019) (unpublished). Add. 26. Judge Gagnon examined each of the three requirements

in turn and found that the combination of gender and nationality met the requirements of immutability, particularity and social distinction. With regard to immutability, Judge Gagnon found gender and nationality to be "prototypical examples of immutable characteristics. Add. 26, *id.* at 9. With regard to particularity, he noted that the combination of gender and nationality established clear boundaries and presented an adequate benchmark for determining who is a member of the group. Add. 26, *id.* at 10. In evaluating social distinction, the Judge reviewed the evidence submitted of distinct harms faced by women in Guatemala and laws and policies put in place to attempt to address that violence, and determined that women are seen as a distinct group within Guatemalan society. Add. 26, *id.* at 12. Addressing the significance of the proposed particular social group, Judge Gagnon wrote:

The Court further notes that none of the other protected grounds contained in the INA § 101(a) (42) are limited by size or prohibit diverse membership. For example, a nation may host millions of members of a particular religion, yet these individuals are not precluded from asylum if persecuted. Similarly, religious groups are composed of individuals with a wide variety of characteristics and experiences. Each protected ground is bound by an immutable characteristic. Thus, it follows that a proposed social group that establishes clear boundaries by way of its immutable characteristics is cognizable under the Act, regardless of size.

Add. 26, *id.* at 10.

In another case, Assistant Chief Immigration Judge Deepali Nadkarni found that "women in Honduras" met all three criteria for defining a particular social group. *See —*, (Arlington Immigration Court, 2018) (unpublished) Add. 141, at 6-10. Judge Nadkarni noted that gender is immutable, as required under *Acosta*, and is particular because it has definable boundaries recognizable by Honduran society. Add. 141, *id.* She further found that reports by the State Department and United Nations bodies showing marginalization, discrimination, and pervasive violence against women, as well as impunity for

perpetrators, demonstrated that women are “set apart, or distinct, from other persons within [Honduras] in some significant way,” thus satisfying the social distinction requirement. Add. 141 (quoting *Matter of M-E-V-G-*, 26 I.&N. at 238-39). Employing similar reasoning, another immigration judge concluded that “Mexican females” are a cognizable social group. *See* — (San Francisco Immigration Court Sep. 13, 2018) (unpublished) Add. 116, at 10. *See also* — (Hartford Immigration Court, July 17, 2019) (unpublished) Add. 10 (recognizing the social group of “Guatemalan women who defy gender norms” and granting asylum), *Y-G-L-C-*, AXXX-XXX-392 (Philadelphia Immigration Court, June 6, 2019) (unpublished) Add. 41 (finding “Honduran women” constitutes a cognizable particular social group and granting asylum), *C-*, (Philadelphia Immigration Court, May 15, 2019) (unpublished) Add. 76 (recognizing “Guatemalan women” as a valid particular social group and granting asylum).

II. *ACOSTA* HAS BEEN ACCEPTED BY COURTS, U.S. AGENCIES, AND INTERNATIONAL BODIES.

A. *Acosta* Forms The Basis Of Established Precedent In Nearly Every Circuit And Was Used In Guidelines Developed By The U.S. Government For Adjudicating Asylum Claims.

Acosta's framework—reaffirmed in *Matter of A-B*—has been accepted by federal courts of appeals across the country. *See, e.g., Martinez v. Holder*, 740 F.3d 902, 910-11 (4th Cir. 2014) (recognizing the immutable or fundamental test set forth in *Acosta*). In 1993, then-Judge Alito of the Third Circuit cited *Acosta* approvingly in *Fatin*, 12 F.3d at 1240. Because *Acosta* “specifically mentioned ‘sex’ as an innate characteristic that could link the members of a ‘particular social group,’” Judge Alito found that *Fatin* had satisfied that requirement “to the extent that . . . [she] suggest[ed] that she would be persecuted . . . simply because she is a woman.” *Id.* Similarly, in *Niang v. Gonzales*, the Tenth Circuit “[applied] the *Acosta* definition” to find that “the female members of a tribe” qualified as a particular social group,

observing that “[b]oth gender and tribal membership are immutable characteristics.” 422 F.3d at 1199; *see also* *Ngengwe v. Mukasey*, 543 F.3d 1029, 1034 (8th Cir. 2008) (“Cameroonian widows” is a cognizable particular social group).

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

Acosta also forms the basis of guidelines the federal government issued in 1995 regarding “asylum claims by women.” *See generally* Memorandum from Phyllis Coven, INS Office of International Affairs, to All INS Asylum Officers and HQASM Coordinators 9 (May 26, 1995). Citing *Fatin*, in which the “court regarded gender, *either alone or as part of a combination*, as a characteristic that could define a particular social group within the meaning of the INA,” these U.S. Guidelines described that decision as consistent “with the statement of the Board in *Acosta* that

'sex' might be the sort of shared characteristic that could define a particular social group." *Id.* (emphasis added) (citing *Fatin*, 12 F.3d at 1240); see also *In re Matter of Fauyiza Kasinga*, 21 I&N Dec. 357, 377 (BIA 1996) (Rosenberg, concurring) ("Our recognition of a particular social group based upon tribal affiliation and gender is also in harmony with the guidelines for adjudicating women's asylum claims issued by [INS].").

B. Other State Signatories To The U.S. Convention Have Also Adopted *Acosta's* Framework.

The INA follows the articulation of the five enumerated grounds found in the 1951 United Nations Convention relating to the Status of Refugees. See Convention relating to the Status of Refugees, adopted Jul. 28, 1951, entered into force Apr. 22, 1954, 189 U.N.T.S. 137; see also *INS v. Cardoza-Fonseca*, 480 U.S. 421, 437 (1987) (noting that "one of Congress' primary purposes [in passing the Refugee Act] was to bring United States refugee law into conformance with the 1967 United Nations Protocol relating to the Status of Refugees." (internal quotation marks omitted)). Given that "the definition of 'refugee' that Congress adopted is virtually identical to the one prescribed by Article 1(2) of the Convention," *Cardoza-Fonseca*, 480 U.S. at 437, the views of other state signatories to the Convention are relevant to the proper interpretation of the INA. See *Negusie v. Holder*, 555 U.S. 511, 537 (2009) ("When we interpret treaties, we consider the interpretations of the courts of other nations, and we should do the same when Congress asks us to interpret a statute in light of a treaty's language.") (Stevens, J., concurring in part and dissenting in part).

Among other Convention signatories, the *Acosta* framework and the consequent conclusion that gender may define a particular social group is well established. Eight years after the Board decided *Acosta*, the Supreme Court of Canada relied upon it in the seminal decision *Canada (Attorney General) v. Ward*, finding that particular social group "would embrace

individuals fearing persecution on such bases as gender,” an “immutable characteristic.” [1993] 2 S.C.R. 689, 75, 79 (Can., S.C.C.). Following *Ward*, the Canadian courts have recognized particular social groups composed of “Haitian women,” *Josile v. Canada (Minister of Citizenship & Immigration)*, [2011] 382 FTR 188 (Can. FC, Jan. 17, 2011), at [10], [28]-[30], and “women in the [Democratic Republic of the Congo],” *Kn v. Canada (Minister of Citizenship & Immigration)*, (2011) 391 FTR 108 (Can. FC, June 13, 2011), at [30], among others similar formulations. See Hathaway & Foster, *supra*, § 5.9.1 (collecting these and other cases).

In 1999, the United Kingdom House of Lords similarly relied on the Board’s *Acosta* decision to recognize “women in Pakistan” as a particular social group, observing that its conclusion was “neither novel nor heterodox,” but “simply logical application of the seminal reasoning in *Acosta*.” *Islam & Shah v. Sec’y of State Home Dep’t*, [1999] 2 AC 629, 644-45 (U.K.). In 2006, the House of Lords affirmed its conclusion that gender alone may fall within the definition of a particular social group when considering the case of a woman fleeing the threat of female genital mutilation. “[W]omen in Sierra Leone,” Lord Cornhill wrote, “are a group of persons sharing a common characteristic which, without a fundamental change in social mores is unchangeable, namely a position of social inferiority compared with men.” *Fornah (FC) v. Sec’y of State for Home Dep’t*, [2006] UKHL 46, para. 31. Baroness Hale opined that the question whether the applicant had established her membership in a particular social group was “blindingly obvious,” and observed that “the world has woken up to the fact that women as a sex may be persecuted in ways which are different from the ways in which men are persecuted and that they may be persecuted because of the inferior status accorded to their gender in their home society.” *Id.* paras. 83-86.

Echoing that sentiment (and relying on *Fornah*), the tribunals of New Zealand and Australia

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

C. Guidelines Issued By The UNHCR And Parties To The U.N. Convention Acknowledge That Gender May Establish Membership In A Particular Social Group.

Further support for the view that gender alone may establish membership in a particular social group comes from the United Nations High Commissioner for Refugees. As part of its supervisory responsibilities, the United Nations High Commission for Refugees (UNHCR) provides interpretive guidance on the provisions of the 1951 Convention and 1967 Protocol relating to the Status of Refugees. U.S. courts have recognized that materials issued by the UNHCR constitute “persuasive authority in interpreting the scope of refugee status under domestic asylum law.” *Miguel-Miguel v. Gonzales*, 500 F.3d 941, 949 (9th Cir. 2007); *see also Cardoza-Fonseca*, 480 U.S. at 439 n.22 (noting that UNHCR material “provides significant guidance” in the interpretation of the Convention, upon which U.S. asylum law is based); *Mohammed*, 400 F.3d at 798 (UNHCR “provides significant guidance for issues of refugee law”). Most recently, the Federal District Court for the District of Columbia emphasized “the language in the [Refugee] Act should be read consistently with the United Nations’ interpretations of the refugee standards.” *Grace v. Whitaker*, 344 F. Supp.3d 96, 124 (D.D.C. 2018).

In 2002, the UNHCR issued Guidelines on “Gender-Related Persecution within the

context of Article 1A (2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees.” U.N. Doc. HCR/GIP/02/01 (May 7, 2002) (“UNHCR Gender-Related Persecution Guidelines”). Following *Acosta’s ejusdem generis* analysis, the UNHCR explained:

[A] particular social group is a group of persons who share a common characteristic . . . [that] will often be one which is innate, unchangeable, or which is otherwise fundamental to identity, conscience or the exercise of one’s human rights.

Id.

“It follows,” the UNHCR continued, “that sex can properly be within the ambit of the social group category, with women being a clear example of a social subset defined by innate and immutable characteristics.” *Id.* The “characteristics” of women “also identify them as a group in society, subjecting them to different treatment and standards in some countries.” *Id.* In Guidelines specifically considering membership in a particular social group, the UNHCR explained that “women may constitute a particular social group under certain circumstances based on the common characteristic of sex, whether or not they associate with one another based on that shared characteristic.” Guidelines on International Protection: Membership of a Particular Social Group within the context of Article 1(A)(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, U.N. Doc. HCR/GIP/02/02 at 4 (May 7, 2002); *see also Mohammed*, 400 F.3d at 798 (quoting UNHCR Guidelines).

Even before the UNHCR issued these interpretive aids, several signatories to the U.N. Convention and Protocol produced their own guidelines on gender-related claims (including the United States, as described above). Canada issued gender-related guidelines in 1993. *See Immigration & Refugee Board of Canada, Women Refugee Claimants Fearing Gender-Related Persecution: Guidelines Issued by the Chairperson Pursuant to Section 65(3) of the Immigration Act* (Mar. 9, 1993). The Canadian Guidelines (subsequently updated) explain that gender is the

type of innate characteristic that may define a particular social group. See *Immigration & Refugee Board of Canada, Women Refugee Claimants Fearing Gender-Related Persecution: Guidelines Issued by the Chairperson Pursuant to Section 65(3) of the Immigration Act* (Nov. 13, 1996). Australia was also among the first to issue gender guidelines, producing a version in 1996 that included the statement: “[G]ender . . . may be a significant factor in recognising a particular social group [W]hilst being a broad category, women nonetheless have both immutable characteristics and shared common social characteristics which may make them cognizable as a group and which may attract persecution.” *Australian Department of Immigration and Multicultural Affairs, Refugee and Humanitarian Visa Applicants: Guidelines on Gender Issues for Decision Makers* § 4.33 (July 1996). The United Kingdom followed in 2000, issuing guidelines providing that “[p]articular social groups can be identified by reference to innate or unchangeable characteristics or characteristics that a woman should not be expected to change,” including “gender.” *Immigration Appellate Authority of the United Kingdom, Asylum Gender Guidelines* 41 (Nov. 2000).³

The Board should take this opportunity to recognize an unfortunate but unavoidable truth: Women are vulnerable to persecution “in ways which are different from the ways in which men are persecuted[,] and . . . [are] persecuted because of the inferior status accorded to [their] gender” in societies around the world. *Fornah*, [2006] UKHL 46, para. 86.

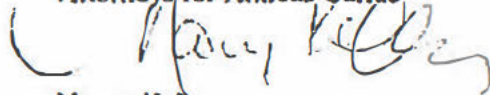
CONCLUSION

The Board should reverse the decision of the Immigration Judge and find that Ms. A-B- is eligible for asylum based on her membership in the particular social group of “Salvadoran women”

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Respectfully submitted,

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