Center for Gender & Refugee Studies

Analysis of the State of the Law in the Ninth Circuit Following *K-E-S-G-* and *S-S-F-M-*

In 2025, the Board of Immigration Appeals ("BIA" or "Board") and the Attorney General ("AG") issued two precedential decisions in cases of asylum seekers fleeing gender-based violence: *Matter of K-E-S-G-*, 29 I&N Dec. 145 (BIA 2025), and *Matter of S-S-F-M-*, 29 I&N Dec. 207 (AG 2025). *S-S-F-M-* revived prior decisions in *Matter of A-B- I*, 27 I&N Dec. 316 (AG 2018), and *Matter of A-B- II*, 28 I&N Dec. 199 (AG 2021).

K-E-S-G-, *A-B- I*, and *A-B- II* present legal analyses that are, at times, in tension with prior BIA precedent and Ninth Circuit caselaw. This document describes these conflicts and offers suggestions as to how they should be resolved. Part I describes the general principles for resolution of inconsistencies between agency decisions and prior caselaw. Parts II and III then discuss *K-E-S-G-* and *A-B- I & II*, respectively, applying Part I's general principles to discern the current state of the law for gender-based asylum claims in the Ninth Circuit.

TABLE OF CONTENTS

PART I: General Principles for Addressing Inconsistencies Between Agency Decisions and Prior Caselaw

When the BIA and AG issue precedential decisions, they may conflict with prior agency or Ninth Circuit decisions on the same issue. Both the Executive Office for Immigration Review ("EOIR") and the judiciary have provided general instructions as to how such conflicts should be addressed.

I. Conflicts Between an Agency Decision and Prior Agency Caselaw

A published BIA decision will "serve as precedent[] in all proceedings involving the same issue or issues." 8 C.F.R. § 1003.1(g)(2). When the Board subsequently issues another published decision on the same topic, it should thus be assumed to be consistent with the prior precedent unless the Board specifically states its intention to overrule the prior case. *See, e.g.*, Sirce E. Owen, EOIR Acting Director, PM 25-34, *Conflicting Precedents of the Board of Immigration Appeals*, at 2 (July 3, 2025) (hereinafter "PM 25-34" or "EOIR Memo") ("[T]he Board cannot silently or without express acknowledgment overrule a prior precedent….").

An adjudicator presented with seemingly conflicting BIA precedents must thus engage in a careful analysis to determine whether there actually is a conflict. There may not be a conflict if:

- One conflicting statement is dicta, as BIA dicta is not binding. *See Route v. Garland*, 996 F.3d 968, 977 (9th Cir. 2021) (stating that the Board cannot "insert a broad range of unrelated or unreasoned policy decisions into published opinions for the purpose of making them binding in future unpublished cases[]" and holding that the Ninth Circuit dicta standard, *see infra* at page 3, also applies to Board decisions).

- The conflicting statements can be read in a manner that harmonizes the legal standards.

- Controlling caselaw from the Ninth Circuit definitively sides with one interpretation, resolving the conflict for cases arising within the Ninth Circuit, as discussed *infra*.

When there is an unavoidable conflict with prior precedent the agency recently issued the EOIR Memo guidance suggesting that the "first in time" rule may be relevant. *See* PM 25-34, at 1. This rule is applied in some circuits to resolve intra-circuit conflict and states that the decision issued earlier in time controls over subsequent decisions.[1] *See McMellon v. United States*, 387 F.3d 329,

[1] Though not acknowledged by the EOIR policy memo, the Ninth Circuit does not follow the first-in-time rule. Instead, "a panel faced with such a [intra-circuit] conflict must call for en banc

334 (4th Cir. 2004); *but see id.* at 353 (Niemeyer, J., dissenting in part) (calling into question the wisdom of the first-in-time rule). However, neither the circuits nor the BIA have conclusively addressed how adjudicators should handle intra-agency conflict. While the EOIR Memo does not mandate use of the first-in-time rule, it does highlight it as a workable standard for conflict resolution. The EOIR Memo also suggests that adjudicators could decide which decision to follow based on relevant factual distinctions between the conflicting caselaw and/or how applicable legal developments have supported or undermined the precedent.

II. Conflicts Between an Agency Decision and Prior Ninth Circuit Decisions

For cases arising in the Ninth Circuit, the IJ and BIA (collectively "the agency") must apply the law of the Ninth Circuit when deciding the case. The Ninth Circuit has repeatedly held that the Board "is bound by [the circuit's] prior decisions interpreting the Act." *Pitcherskaia v. INS*, 118 F.3d 641, 646 (9th Cir. 1997); *see Ladha v. INS*, 215 F.3d 889, 896 (9th Cir. 2000), *overruled on other grounds by Abebe v. Mukasey*, 554 F.3d 1203 (9th Cir. 2009) ("[T]he BIA must follow the decisions of our court."); *Fisher v. INS*, 79 F.3d 955, 961 (9th Cir. 1996) ("In interpreting the Act, the Board is bound by our earlier decisions."). And the Board itself has likewise clearly and repeatedly stated: "[w]e, as well as Immigration Judges, are bound to follow the precedent of this Board, the Attorney General, and the circuit court of appeals with jurisdiction over the geographic region where a case occurs." *Matter of Garcia*, 28 I&N Dec. 693, 695 (BIA 2023) (providing string cite with additional citations).

Until June 2024, there was one exception to this rule. The BIA could issue a published decision interpreting an ambiguous provision of the Immigration and Nationality Act ("INA") that conflicted with prior circuit law interpreting that same ambiguous statutory provision. *See Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982-83 (2005). In other words, under *Brand X*, the Board could effectively disregard and overwrite Ninth Circuit law with which it disagreed—a power that it used on several occasions. *See, e.g.*, *Garfias-Rodriguez v. Holder*, 702 F.3d 504 (9th Cir. 2012).

The *Brand X* doctrine was born directly from *Chevron, USA, Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984). *Brand X* acknowledged that its "principle follows from *Chevron* itself," referring to *Chevron*'s holding that Congress intended administrative agencies to have the primary power to interpret ambiguous statutes. *Brand X*, 545 U.S. at 982 ("*Chevron*'s premise is that it is for agencies, not courts, to fill statutory gaps.").

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review, which the court will normally grant unless the prior decisions can be distinguished." *Antonio v. Wards Cove Packing Co., Inc.*, 810 F.2d 1477, 1479 (9th Cir. 1987) (en banc).

However, the Supreme Court overruled *Chevron* in *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 395-96 (2024), effectively ending the *Brand X* doctrine. *Loper Bright* returns the primary authority for interpreting statutes to the judicial branch, making clear that a contrary agency interpretation cannot override a judicial decision. *See Loper Bright*, 603 U.S. at 400-402 (explaining that "an agency's interpretation of a statute cannot bind a court" now that *Chevron* has been struck down (citation modified)).

Since *Loper Bright*, courts have begun to explicitly recognize that *Brand X* necessarily falls alongside *Chevron*. *See Abdulla v. U.S. Att'y Gen.*, 153 F.4th 342, 352 (3d Cir. 2025); *Mazariegos-Rodas v. Garland*, 122 F.4th 655, 672 (6th Cir. 2025). While the Ninth Circuit has yet to directly state this proposition in a published decision, *Loper Bright* itself described *Brand X* as an especially problematic outgrowth of *Chevron* deference. *Loper Bright*, 603 U.S. at 399. A concurring opinion also specifically called out *Brand X* as a prime example of the problems caused by *Chevron*. *See id.* at 427-28 (Gorsuch, J., concurring). Given these statements, and the direct conflict between *Brand X* and *Loper Bright*'s views of agency power, there does not appear to be any good-faith argument to be made that *Brand X* survives *Loper Bright*. While the agency regularly invoked *Brand X* prior to 2024 to indicate its intention to overrule contrary circuit law, *see, e.g.*, *Matter of L-E-A- II*, 27 I&N Dec. 581, 592 (AG 2019), it has not done so in cases issued following *Loper Bright*, *see, e.g.*, *K-E-S-G-*, 29 I&N Dec. at 148-51; *S-S-F-M-*, 29 I&N Dec at 208-09; *Matter of R-E-R-M- & J-D-R-M-*, 29 I&N Dec. 202, 204 (AG 2025).

Thus, under *Loper Bright*, the Board's chosen statutory interpretation will prevail in circuits that have not yet spoken on the issue or in circuits that agree with its interpretation. However, if the Board's interpretation conflicts with the circuit court, the circuit court decision controls.

Notably, not all pronouncements by a court of appeals constitute binding law. For one, unpublished decisions are not binding authority in the Ninth Circuit (though they may be persuasive). *See, e.g.*, *Small v. Allianz Life Ins. Co.*, 122 F.4th 1182, 1195 (9th Cir. 2024). And the holdings of published decisions are binding law, but dicta statements are not. *See, e.g.*, *Cetacean Cmty v. Bush*, 386 F.3d 1169, 1173 (9th Cir. 2004).

When analyzing how agency decisions interact with Ninth Circuit precedent, distinguishing between dicta and holding is thus critical. In the Ninth Circuit, dicta are statements that are "unnecessary to the decision in the case." *Id.* However, the Ninth Circuit does not apply this principle strictly: if the panel "confronts an issue germane to the eventual resolution of the case, and resolves it after reasoned consideration in a published opinion, that ruling becomes the law of the circuit, regardless of whether doing so is necessary in some strict logical sense." *Id.* at 1173; *Barapind v. Enomoto*, 400 F.3d 744, 750-51 (2005) (en banc) (affirming this standard).

PART II: Status of *Matter of K-E-S-G-* For Cases Arising in the Ninth Circuit

I. Introduction to *K-E-S-G-*

On July 18, 2025, the BIA issued *Matter of K-E-S-G-*, 29 I&N Dec. 145 (BIA 2025). *K-E-S-G-* considered the case of a Salvadoran woman whose claims for asylum and withholding of removal were based on the social groups of "Salvadoran women" and "Salvadoran women viewed as property." 29 I&N Dec. at 145-46.

In the course of deciding Ms. K.E.S.G.'s case, the Board:

- Reaffirmed the three-part test for social group cognizability set out in *Matter of M-E-V-G-*, 26 I&N Dec. 227 (BIA 2014), and *Matter of W-G-R-*, 26 I&N Dec. 208 (BIA 2014). *K-E-S-G-*, 29 I&N Dec. at 147.

    - *K-E-S-G-* is focused on the particularity element of the three-part test. The decision repeats the familiar standard that particularity requires the group to "be discrete and have definable boundaries—it must not be amorphous, overbroad, diffuse, or subjective." 29 I&N Dec. at 147 (citation modified). The decision also confirms that particularity must be considered in the context of the society at issue. *Id.*

- Reaffirmed that "sex" is an immutable characteristic, satisfying the first element of the three-part test. *Id.* at 148.

- Stated that social groups defined as "sex" or "sex + nationality" are "overbroad and insufficiently particular." *Id*. at 151; *see id.* at 152 n.9 (noting that this holding would apply equally to a group of "men"). The Board relies on the following reasoning for this point:

    - It cannot categorically recognize a group defined as "sex" as cognizable because that would effectively "create another protected ground under the INA . . . [and i]t is not the role of the Board to add a specific protected ground that was not included by Congress and the drafters of the Convention and the Protocol." *Id.* at 151-52.

    - "Sex + nationality" groups "contain no narrowing features such as a specific age range or a specific position in the country's society or its economy. These proposed groups are too broad and diffuse, encompassing a diverse cross section

of society of widely varying ages, socioeconomic statuses, marital statuses, family backgrounds, and lifestyles." *Id.* at 151.

- The Ninth Circuit's decision in *Perdomo v. Holder*, 611 F.3d 662 (9th Cir. 2010), was decided under a "prior definition of a particular social group" and more recent Ninth Circuit caselaw has moved away from its holding. *K-E-S-G-*, 29 I&N Dec. at 148-49.

- The Second, Third, Fifth, Eighth, Tenth, and Eleventh Circuits have disagreed with *Perdomo* or its reasoning. *Id.* at 149-50.

- Found that Ms. K.E.S.G.'s social group of "Salvadoran women" was not cognizable. *Id.* at 152. Importantly, the Board did not find this group categorically foreclosed by its broader holding. *Id.* at 152-54 (reviewing particularity of the group on the record evidence and affirming IJ's analysis).

  - Instead, it rejected the group because (1) it covered a "large, diffuse, and disconnected" portion of the population; (2) it included women of varying ages, education, and socioeconomic statuses; (3) all segments of the population experience crime and gang violence; and (4) being vulnerable to crime does not constitute a social group. *Id.* at 153-54.

- Found that Ms. K.E.S.G.'s social group of "Salvadoran women viewed as property" is not cognizable. 29 I&N Dec. at 154. The Board did not find this group categorically foreclosed by its broader holding but concluded that the group (1) is not particular because it gives no clear benchmarks for what being "viewed as property" means; (2) is not socially distinct because generalized evidence of violence against women and sexism is not sufficient. *Id.* at 154-55.

II. Evaluating *K-E-S-G-* and Its Consistency with Prior Caselaw

K-E-S-G-'s holdings and reasoning break much new ground. While some of the decision's holdings are consistent with prior BIA and Ninth Circuit caselaw, others appear to conflict with longstanding precedent or be otherwise unsupported by the authorities cited by *K-E-S-G-*. This section reviews *K-E-S-G-*'s consistency with prior precedent, discusses its reasoning in more detail, and provides overall recommendations as to how *K-E-S-G-* should be reconciled with competing BIA and Ninth Circuit caselaw, respectively.

a. The Three-Part Social Group Test and "Sex" As an Immutable Characteristic

K-E-S-G-'s first two points—reaffirming the three-part test for social group cognizability and recognizing "sex" as an immutable characteristic—are consistent with current BIA and Ninth Circuit caselaw. 29 I&N Dec. at 147-48. The Ninth Circuit adopted the Board's three-part social group test articulated in *W-G-R-* and *M-E-V-G-* in *Reyes v. Lynch*, 842 F.3d 1125, 1135-37 (9th Cir. 2016). And the Ninth Circuit has also long held that "gender" is a "prototypical immutable characteristic." *Mohammed v. Gonzales*, 400 F.3d 785, 797 (9th Cir. 2005) (citing *Matter of Acosta*, 19 I&N Dec. 211, 233 (BIA 1985)).

b. Categorical Pronouncement on the Viability of a Particular Social Group

K-E-S-G-'s general statement that a "particular social group defined by the [noncitizen's] sex or sex and nationality, standing alone, is overbroad and insufficiently particular to be cognizable" could be read as creating a categorical rule that groups defined as "sex" or "sex + nationality" automatically fail.[2] 29 I&N Dec. at 151. If so, this would directly conflict with the longstanding principle—recognized by both the Board and the Ninth Circuit—that social group cognizability must be decided on a case-by-case basis. *See, e.g.*, *Acosta*, 19 I&N Dec. at 233; *Pirir-Boc v. Holder*, 750 F.3d 1077, 1084 (9th Cir. 2014); *Diaz-Reynoso v. Barr*, 968 F.3d 1070, 1086 (9th Cir. 2020).

K-E-S-G- does not acknowledge or discuss the requirement that social group cognizability be decided on a case-by-case basis anywhere in the decision. However, there are several signals that *K-E-S-G-*'s general statement, contained in part II.A.2 of the decision, should not be read as categorically as it may initially seem:

- *K-E-S-G-* explicitly affirms the three-part test for social group cognizability established in *M-E-V-G-* and *W-G-R-*. *K-E-S-G-*, 29 I&N Dec. at 147. And *M-E-V-G-* makes clear that, under its framework, "[s]ocial group determinations are made on a case-by-case basis." 26 I&N Dec. at 251. Reading *K-E-S-G-* to categorically bar "sex + nationality" groups would introduce a clear conflict with the very test the decision purports to apply.

- *K-E-S-G-* emphasizes that the particularity analysis requires a consideration of the relevant societal context. 29 I&N Dec. at 147 ("As part of the particularity requirement, societal considerations will necessarily play a factor in determining whether the group is discrete or amorphous."). Particularity thus requires reviewing the evidence submitted in a given case to determine whether the record establishes that the group is "discrete or

[2] The aspects of *K-E-S-G-* that discuss a social group of "sex" alone are likely dicta because Ms. K.E.S.G. did not proffer a social group of "women." *See Route*, 996 F.3d at 977.

amorphous" in the society in question. *Id.*; *see M-E-V-G-*, 26 I&N Dec. at 241. A categorical rule that all "sex + nationality" groups—arising in every society and supported by all possible forms of evidence—must fail is inconsistent with the terms of the particularity analysis set out in *K-E-S-G-* itself.

- *K-E-S-G-* does not treat its general statement as foreclosing Ms. K.E.S.G.'s own group of "Salvadoran women." Instead, the Board went on to review the evidence submitted and explained why that evidence did not establish particularity. *K-E-S-G-*, 29 I&N Dec. at 153-54. *K-E-S-G-* also states that its reasoning does not extend to cases that involve fear of female genital cutting ("FGC"), further suggesting that the general statement is not a categorical bar of any group defined as "sex + gender." *Id*. at 151 n.8.

- In justifying *K-E-S-G-*'s general statement, much of the Board's discussion focuses on why it cannot categorically *approve* a social group defined by "sex." *Id*. at 151 ("If we held that social groups defined solely by sex were cognizable, we would essentially create another protected ground…."). If *K-E-S-G-*'s general statement is read as the Board's explanation for why it would not categorically *recognize* these groups, that would not preclude individual applicants from showing cognizability on a case-by-case basis—which comports with the individualized analysis mandated by *M-E-V-G-*. 26 I&N Dec. at 251.

Notably, just six weeks after issuing *K-E-S-G-*, the AG issued two additional social group decisions, *S-S-F-M-*, 29 I&N Dec. at 207, and *R-E-R-M-*, 29 I&N Dec. at 202. Both decisions recognize that "what constitutes a cognizable social group" is best determined on a case-by-case basis, rather than via the issuance of categorical rules. *S-S-F-M-*, 29 I&N Dec. at 209-10; *R-E-R-M-*, 29 I&N Dec. at 204-05. In a subsequent decision, the Board did suggest that *K-E-S-G-* should be read to categorically foreclose "sex + nationality" social groups, but that characterization in a case that did not raise such a group cannot control over *K-E-S-G-*'s own reasoning. *See Matter of L-A-L-T-*, 29 I&N Dec. 269, 275 (BIA 2025).

Summary of Conflict: Categorical Rejection of a Social Group
If *K-E-S-G-* is read to establish a categorical holding against "sex" or "sex + nationality" social groups, it conflicts with the following BIA and Ninth Circuit cases holding that social group determinations must be made on a case-by-case basis: • ***Acosta***, 19 I&N Dec. at 233; ***Matter of C-A-***, 23 I&N Dec. 951, 955 (BIA 2006); ***M-E-V-G-***, 26 I&N Dec. at 251; ***S-S-F-M-***, 29 I&N Dec. at 209-10; ***R-E-R-M-***, 29 I&N Dec. at 204-05.   ○ This principle is a holding, rather than dicta, in the above-cited cases. The first three reaffirmed this principle in the course of establishing the framework for

social group analysis. For *S-S-F-M-* and *R-E-R-M-*, this principle was offered as a primary justification for overruling prior precedent that suggested social group cognizability could be resolved through rulemaking.

- ***Pirir-Boc***, 750 F.3d at 1084; ***Diaz-Reynoso***, 968 F.3d at 1086.
    - This principle is a holding, rather than dicta, in the above-cited cases. Both cases turned on whether the Board correctly performed the required evidence-based inquiry into the cognizability of the proposed groups. The principle outlined above was the primary basis for remand in both cases.

Because there is contrary Ninth Circuit precedent directly on point, which accords with the overwhelming weight of BIA precedent, these decisions must control over *K-E-S-G-*.

c. The Risk of Creating a Sixth Protected Ground

K-E-S-G- explains its reluctance to hold that "groups defined solely by sex [a]re cognizable" on the basis that doing so would effectively add a sixth protected ground to the statute. 29 I&N Dec. at 151-52. The Board is correct that it cannot issue decisions that would amend or alter the statute. However, recognizing that an individual applicant has established a cognizable social group is entirely consistent with the purpose of the "particular social group" ground. If *K-E-S-G-*'s logic were accepted, no social group could ever be recognized.

When initially construing the meaning of "particular social group," the Board looked at the first four protected grounds, observing that they each correspond to a specific immutable characteristic that the convention drafters sought to protect: racial identity, nationality, and religious or political beliefs. *Acosta*, 19 I&N Dec. at 233. But the drafters were concerned that limiting the protected grounds to these four characteristics would leave "a possible gap in the coverage" for people who experienced persecution due to other characteristics that were similarly deserving of protection. *Id*. at 232; *see Fatin v. INS*, 12 F.3d 1233, 1239 (3d Cir. 1993) (explaining that the drafters had observed people being persecuted for reasons other than their race, religion, nationality, or political opinion).

The answer to this concern was the "particular social group" ground, which was intended to have a "broader application" than the first four grounds, in the sense of not being limited to a single, named immutable characteristic. *Acosta*, 19 I&N Dec. at 232. As *Acosta* explained, the social group ground creates an avenue for asylum claims based on other, unenumerated immutable characteristics; whether the proposed characteristic was "comparable to the other four grounds of persecution" and thus worthy of recognition as a social group was to be determined on a case-by-case basis. *Id*. at 232-34. The Ninth Circuit has adopted *Acosta*'s approach to this "inherently flexible" protected ground. *Rios v. Lynch*, 807 F.3d 1123, 1124 (9th Cir. 2015).

If *K-E-S-G-* is read to suggest that it would be inappropriate to recognize Ms. K.E.S.G.'s own proposed group of "Salvadoran women" in a published decision, that would directly conflict with the undisputed purpose of the particular social group ground: recognizing, on a case-by-case basis, that unenumerated immutable characteristics can establish a particular social group. *Acosta*, 19 I&N Dec. 233. It would also conflict with the numerous published Board decisions that recognize the applicant established a cognizable group—none of which express any concerns that the ruling effectively created a sixth statutory ground. *Matter of H-L-S-A-*, 28 I&N Dec. 228, 237 (BIA 2021) (people who cooperate with law enforcement); *Matter of Toboso-Alfonso*, 20 I&N Dec. 819, 822-23 (BIA 1990) (recognizing gay men in Cuba as a social group); *Matter of V-T-S-*, 21 I&N Dec. 792, 798 (BIA 1997) (Filipinos of Chinese ancestry); *Matter of Fuentes*, 19 I&N Dec. 658, 662 (BIA 1988) (former members of the national police).

This further supports reading part II.A.2 of *K-E-S-G-* as explaining why the Board would not issue a decision categorically *approving* a "sex" or "sex + nationality" group in all cases, as discussed *supra* at page 6.

d. The Correct Focus of the Particularity Analysis

K-E-S-G- initially quotes the correct standard for the particularity test and at least ostensibly applies the standard to Ms. K.E.S.G.'s group of "Salvadoran women viewed as property." 29 I&N Dec. at 147, 154-55. However, *K-E-S-G-*'s general statement in part II.A.2 and its analysis of Ms. K.E.S.G.'s group "Salvadoran women" deviate from the actual particularity test. In these portions of the decision, *K-E-S-G-* does not evaluate whether the groups are particular based on the definitional clarity of the terms used. Instead, *K-E-S-G-* asks whether the groups are "overbroad," such that they encompass an internally diverse group of people.[3] 29 I&N Dec. at 151, 153. *K-E-S-G-* does not explain this internal discrepancy or acknowledge its inconsistency on this point with BIA and Ninth Circuit law.

[3] The common recitation of the particularity test includes the statement that a group cannot be "overbroad." *See, e.g.*, *M-E-V-G-*, 26 I&N Dec. at 239. *K-E-S-G-* appears to read "overbroad" as meaning that the group must be narrowly defined to the point of homogeneity. However, when read in context, "overbroad" does not refer to the *size* or homogeneity of the group, but rather the *terms* used to define the group. *M-E-V-G-*, 26 I&N Dec. at 239. If a group is defined by subjective terms, which are understood differently by different people, the definition is "overbroad" since it captures *multiple* meanings, rather than a single clear boundary. *See, e.g.*, *Nguyen v. Barr*, 983 F.3d 1099, 1103-04 (9th Cir. 2020) (finding the group "known drug users" is not particular because its membership "could vary broadly based on the amount and frequency of an individual's drug use. It could encompass first-time users, occasional users, habitual users, or rehabilitated individuals like Nguyen.").

BIA precedent. The BIA has repeatedly stated that the particularity element is focused on the definitional clarity of the group, beginning with the first BIA decision to discuss the particularity element at length, *Matter of A-M-E- & J-G-U-*, 24 I&N Dec. 69 (BIA 2007). *A-M-E- & J-G-U-* rejected a social group based on "wealth" or "affluence" because those terms "are too amorphous to provide an adequate benchmark for determining group membership. Depending on one's perspective, the wealthy may be limited to the very top echelon; but a more expansive view might include small business owners . . . ." *Id.* at 76. In its next decision discussing "particularity," the Board likewise affirmed that "the key question is whether the proposed description is sufficiently particular or is too amorphous to create a benchmark for determining group membership." *Matter of S-E-G-*, 24 I&N Dec. 579, 584 (BIA 2008) (citation modified). *W-G-R-* and *M-E-V-G-* further confirmed this standard, as described above.

The BIA thus views particularity as asking whether the group is defined by concrete terms, such that society generally agrees on the requirements for membership, or if it is instead demarcated by amorphous terms, such that membership changes depending on who is doing the assessing. *See W-G-R-*, 26 I&N Dec. at 221 ("The boundaries of a group are not sufficiently definable unless the members of society generally agree on who is included in the group.").

Ninth Circuit precedent. When the Ninth Circuit deferred to *M-E-V-G-* and *W-G-R-*, it did so with the understanding that particularity "require[s] that a particular social group have clear boundaries and that its characteristics have commonly accepted definitions." *Reyes*, 842 F.3d at 1135. The court went on to explicitly note that the particularity requirement "does not, on its face, impose a numerical limit on a proposed social group or disqualify groups that exceed specific breadth or size limitations." *Id. Reyes* comports with prior Ninth Circuit precedent affirming that particularity is "based on society's perception [of] whether a group has delimitable boundaries." *Henriquez-Rivas v. Holder*, 707 F.3d 1081, 1090 (9th Cir. 2013) (en banc).

Summary of Conflict: Focus of the Particularity Analysis
Portions of *K-E-S-G-* suggest that particularity is focused on the breadth of a group. 29 I&N Dec. at 151, 153. This conflicts with the following BIA and Ninth Circuit cases holding that the particularity analysis is focused on the definitional clarity of the terms used: • ***M-E-V-G-***, 26 I&N Dec. at 239; ***W-G-R-***, 26 I&N Dec. at 214; ***A-M-E- & J-G-U-***, 24 I&N Dec. at 76.   ○ This principle is a holding, rather than dicta, in *M-E-V-G-* and *W-G-R-* as the Board used those decisions to set out a comprehensive statement of the framework for analyzing social group cognizability. Their explanations of how the particularity element functions was thus essential to the decision. The same

is true for *A-M-E- & J-G-U-*, as the Board's particularity analysis was a primary reason for rejecting the group.

- ***Reyes***, 842 F.3d at 1135; ***Henriquez-Rivas***, 707 F.3d at 1090.
    - This principle is a holding, rather than dicta, in the above-cited cases. The validity of the Board's particularity and social distinction requirements were the primary question presented in both, and, in *Reyes*, the court deferred to the Board's particularity element based on an understanding that it focused on definitional clarity.

Because there is contrary Ninth Circuit precedent directly on point, which accords with the weight of BIA precedent, these decisions must control over *K-E-S-G-*. Additionally, the fact that *K-E-S-G-* is internally inconsistent on this point—since it correctly cites and applies the standard particularity test elsewhere the decision—suggests that *K-E-S-G-*'s particularity analysis is not well-reasoned.

e. Internal Diversity of a Group and Particularity

As a result of *K-E-S-G-*'s incorrect framing of the particularity analysis, the decision ultimately stands for the proposition that a cognizable social group cannot have encompass a "diverse cross section of society." 29 I&N Dec. at 151. In other words, a viable social group must have a high degree of internal homogeneity.

K-E-S-G- cites *Matter of J-G-D-F-* to support its position. 29 I&N Dec. at 153 (citing *J-G-D-F-*, 27 I&N Dec. 82 (BIA 2017)). But in *J-G-D-F-*, the respondent "did not clearly articulate a particular social group" and instead asserted a general fear of harm due to being "someone who has lived in the United States for a long period of time based on his clothing and accent." 27 I&N Dec. at 89. *J-G-D-F-* concluded that this collection of characteristics was not particular because it was "amorphous" and lacked "definable boundaries." *Id.* The Board did go on to note that "[a]s described, the proposed group could include persons of any age, sex, or background"; however, this is properly understood as referring to the fact that the defining characteristics of the group were so vague and limitless that the group's composition would change dramatically depending on who was doing the defining. *See supra* page 9. *K-E-S-G-* also cites *S-E-G-* for support. But *S-E-G-* explicitly states that while the size of a proposed social group may be relevant for "determining whether the group can be [] recognized" as a discrete class of persons (i.e., is socially distinct), the particularity analysis turns on the specificity with which the group is defined. *S-E-G-*, 24 I&N Dec. at 584.

K-E-S-G- also states that "Salvadoran women" failed in part because it was a "disconnected portion" of the population, apparently requiring some degree of cohesion or sense of

"togetherness." 29 I&N Dec. at 153. This reasoning conflates the two different avenues for establishing a cognizable group in the Ninth Circuit. In addition to the Board's "immutable characteristic" standard, the Ninth Circuit also allows applicants to establish a group based on its own "voluntary association" standard, a circuit-specific alternative to the *Acosta* immutable characteristic test. The voluntary association standard requires group members to be "closely affiliated with each other . . . [and] actuated by some common impulse or interest," but does not require an immutable characteristic. *See Hernandez-Montiel v. INS*, 225 F.3d 1084, 1092 (9th Cir. 2000) (quoting *Sanchez-Trujillo v. INS*, 801 F.2d 1571, 1576 (9th Cir. 2000), *overruled on other grounds by Thomas v. Gonzales*, 409 F.3d 1177 (9th Cir. 2005).

In addition to these shortcomings in its reasoning, this aspect of *K-E-S-G-* is in direct conflict with other BIA and Ninth Circuit precedent.

BIA precedent. In *C-A-*, the Board explicitly stated that it did not "require an element of 'cohesiveness' or homogeneity among group members" to establish a cognizable group. *C-A-*, 23 I&N Dec. at 957. *C-A-*'s holding was affirmed in *A-M-E- & J-G-U-*, 24 I&N Dec. at 74 (explaining that a social group does not need to have a "voluntary associational relationship, cohesiveness, or strict homogeneity among group members" (citation modified)). Consistent with this understanding, the Board has previously recognized social groups that would necessarily include people of "various age groups, socioeconomic status, levels of education, [and] religion[]…." *K-E-S-G-*, 29 I&N Dec. at 153; *see, e.g.*, *V-T-S-*, 21 I&N Dec. at 798 (finding the group "Filipinos of Chinese ancestry" to be cognizable); *Toboso-Alfonso* 20 I&N Dec. at 822-23 (finding that gay men in Cuba were a social group).

K-E-S-G- also conflicts with Board precedent making clear that the scope of the particular social group ground should be consistent with the other four protected grounds, under the doctrine of *ejusdem generis*. *Acosta*, 19 I&N Dec. at 233-34. The other protected grounds also cover broad groups of people that lack any "narrowing features" and represent a "diverse cross section of society." *Contra K-E-S-G-*, 29 I&N Dec. at 151. For example, people of a specific race will necessarily have varied ages and "position[s] in the country's society or its economy." *Id*. at 151. And people who share a nationality will likewise present a "diverse cross section of society of widely varying ages, socioeconomic statuses, marital statuses, family backgrounds, and lifestyles." *Id.* Thus, it is entirely consistent with the statute to allow a particular social group that encompasses a broad and diverse segment of a society.[4]

[4] It is possible that *K-E-S-G-*'s reluctance to recognize the sizeable group proposed by Ms. K.E.S.G. stems from a concern that once a group is recognized, all members would be able to get asylum in the United States. If true, this concern is misplaced. Being a member of a particular social group does not itself confer eligibility for asylum—in the same way that, e.g., having a racial identity does not necessarily mean that an applicant will get protection. Identifying a

Ninth Circuit precedent. The most notable conflict between *K-E-S-G-* and Ninth Circuit caselaw is *Perdomo*, 611 F.3d at 662. In *Perdomo*, the Ninth Circuit held that the Board could not reject the group "all women in Guatemala" on the basis that it was too large, disparate, or diverse to constitute a particular social group. *Id.* at 668-69. As discussed *infra* at page 14, *Perdomo* remains good law. And other Ninth Circuit cases have explicitly held that particularity does not require a showing of homogeneity.

In *Henriquez-Rivas*, the en banc Ninth Circuit overruled caselaw suggesting that the internal diversity of a group was an essential consideration for particularity. 707 F.3d at 1093-94. The court clarified that particularity does not require an "element of shared birth, racial or ethnic origin, or some other innate aspect of homogeneity…." *Id.* at 1093. It also explained that any caselaw suggesting that internal diversity was relevant to particularity appears to conflate the particularity and social distinction elements. The court explained that, at most, diverse membership might make it more difficult to establish that the group was perceived as a group by the relevant society—but that this is not a relevant question for particularity. *Id.* at 1090.

Likewise, in *Reyes v. Lynch*, in the course of deferring to the three-part cognizability test, the Ninth Circuit specifically found the particularity requirement to be reasonable because it "does not, on its face, impose a numerical limit on a proposed social group or disqualify groups that exceed specific breadth or size limitations." 842 F.3d at 1135. Finally, *K-E-S-G-*'s suggestion that a group must have some unspecified degree of "connection" to satisfy the *Acosta* test conflicts with Ninth Circuit law holding that a degree of close affiliation is *only* required if an applicant is arguing their social group under the voluntary association standard. *Hernandez-Montiel*, 225 F.3d at 1092-93.

Summary of Conflict: Internal Diversity
K-E-S-G-'s statement that "sex" and "sex + nationality" groups fail particularity because they are internally diverse conflicts with the following BIA and Ninth Circuit cases holding that internal diversity is not relevant to the particularity analysis: • ***C-A-*,** 23 I&N Dec. at 957; ***A-M-E- & J-G-U-***, 24 I&N Dec. at 74 (affirming *C-A-*'s holding).   o This aspect of *C-A-* is a holding, as it forms part of the reasoning by which the Board chose to adhere to the *Acosta* social group formulation over the Ninth Circuit's alternate "voluntary association" approach. • ***Perdomo*,** 611 F.3d at 668-69; ***Henriquez-Rivas***, 707 F.3d at 1093.

viable protected ground is the first of many steps to gaining protection. *See Toboso-Alfonso*, 20 I&N Dec. at 822.

- This principle is a holding, rather than dicta, in the above-cited cases. The sole issue presented in *Perdomo* was whether the Board correctly rejected the group "all women in Guatemala" due to its internal diversity. And *Henriquez-Rivas* overruled prior circuit caselaw specifically because it made internal diversity dispositive on particularity.

Because there is contrary Ninth Circuit precedent directly on point, which accords with BIA precedent, these decisions must control over *K-E-S-G-*. These decisions are also more consistent with *ejusdem generis*, since the other protected grounds encompass internally diverse groups. *See supra* at page 12.

f. The Ongoing Relevance of *Perdomo v. Holder*

K-E-S-G- discounts *Perdomo*'s holding on the basis that it was issued under "a prior definition of a particular social group." 29 I&N Dec. at 149. This refers to the fact that when *Perdomo* was decided, *M-E-V-G-* and *W-G-R-* had not yet been issued. *Id.*

That *Perdomo* predates *M-E-V-G-* and *W-G-R-* is not a valid basis for disregarding its holding. In 2010, when *Perdomo* was issued, the Board had already imposed the social distinction (then called "social visibility") and particularity requirements. *See, e.g.*, *C-A-*, 23 I&N Dec. at 957-60; *A-M-E- & J-G-U-*, 24 I&N Dec. at 74-76. And *M-E-V-G-* and *W-G-R-* are clear that they do not establish a "new or changed" interpretation of these elements. *W-G-R-*, 26 I&N Dec. at 212 n.2; *M-E-V-G-*, 26 I&N Dec. at 234 n.9. *Perdomo* itself cites *C-A-* and *A-M-E- & J-G-U-* and acknowledges that the Board requires groups to be both socially visible and particular. *Perdomo*, 611 F.3d at 666-67. And *Perdomo*'s core holding is that, under the Board's social group framework, it is error to reject a group on the basis that it is too large and diverse. *K-E-S-G-*'s suggestion that *Perdomo*'s reasoning does not survive the issuance of *M-E-V-G-* and *W-G-R-* is contradicted by the Ninth Circuit's obvious awareness and application of the particularity element.

K-E-S-G- also overlooks the fact that the Ninth Circuit itself continues to see *Perdomo* as good law, repeatedly citing the decision's discussion of the "women in Guatemala" social group without any suggestion that it has been overruled. *See, e.g.*, *Antonio v. Garland*, 58 F.4th 1067, 1077 (9th Cir. 2023); *Martinez-Mejia v. Barr*, 825 F. App'x 421, 423 (9th Cir. 2020); *Torres Valdivia v. Barr*, 777 F. App'x 251, 252 (9th Cir. 2019).

To support its claim that *Perdomo* is no longer good law, *K-E-S-G-* suggests that two subsequent decisions disavowed *Perdomo*'s holding. 29 I&N Dec. at 149. However, neither decision explicitly rejects *Perdomo*:

- In *Macedo Templos v. Wilkinson*, the court held that "wealthy business owners" lacked particularity "because it *could* include large swaths of people and various cross-sections of a community." 987 F.3d 877, 882 (9th Cir. 2021) (emphasis added). But this group is defined by terms that have long been recognized as amorphous. The definitions of "wealthy" and, to some extent, being a "business owner" are subjective. Because the group composition will change depending on who is doing the defining, the group "could" include large and shifting segments of society, defeating particularity. *Id.* And even if *Macedo Templos* is read to mean that clearly defined groups will fail particularity if they are large in size or internally diverse, that would run afoul of the en banc court's holding in *Henriquez-Rivas*. *See* 707 F.3d at 1094 (holding that "diversity of lifestyle and origin" among group members cannot be the "*sine qua non* of 'particularity'").

- In *Mendoza-Alvarez v. Holder*, the court rejected all of the petitioner's social groups—which focused on disability status, dependence on insulin, and mental illness—on the basis that their boundaries are amorphous, since they included people with a variety of different conditions and health needs. 714 F.3d 1161, 1164 (9th Cir. 2013). Notably, *Mendoza-Alvarez* was also decided under *S-E-G-*, but *K-E-S-G-* does not question its ongoing precedential value in the same way it does *Perdomo*. And as with *Macedo Templos*, to the extent that *Mendoza-Alvarez* is inconsistent with *Henriquez-Rivas*, the en banc holding must control.

PART III: Status of *Matter of A-B- I & II* for Cases Arising in the Ninth Circuit

I. Introduction to *Matter of A-B- I* & *Matter of A-B- II*

On June 11, 2018, the AG issued *A-B- I*, 27 I&N Dec. at 316.[5] *A-B- I* considered the case of a Salvadoran woman whose claims for asylum and withholding of removal were predicated on the social groups of "El Salvadoran women who are unable to leave their domestic relationships where they have children in common." *Id*. at 321.

In the course of deciding Ms. A.B.'s case, the AG:[6]

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[5] *A-B- I* and *A-B- II* were both vacated by *Matter of A-B- III*, 28 I&N Dec. 307 (AG 2021). However, both decisions were fully restored in September 2025 by *S-S-F-M-*, 29 I&N Dec. at 207.

[6] *A-B- I* is a sweeping decision with a significant volume of dicta. In addition to the points discussed here, the decision provides a lengthy history of the social group ground, 27 I&N Dec. at 327-31, as well as addressing the scope of the AG's certification power, *id.* at 323-25; the power of party stipulations, *id.* at 333-34; the severity of the harm required to establish persecution, *id.* at 337; the Board's clear error standard of review, *id.* at 340-41; credibility assessments, *id.* at 341-42; the need to delineate particular social groups before the IJ, *id.* at 344; internal relocation, *id.* at 344-45; and discretionary denials of asylum, *id.* at 345.

- Stated that "[g]enerally, claims by [noncitizens] pertaining to domestic violence or gang violence perpetrated by non-governmental actors will not qualify for asylum." *Id*. at 320.

- Vacated a prior BIA decision, *Matter of A-R-C-G-*, 26 I&N Dec. 388 (BIA 2014), because the parties stipulated to social group cognizability and nexus and the Board's analysis of these elements was thus too cursory to warrant being a published decision. *A-B- I*, 27 I&N Dec. at 331-33.

- Stated that if the Board had fully analyzed *A-R-C-G-*'s social group—"married women in Guatemala who are unable to leave their relationship"—it would likely have been rejected, for three reasons:

    - It is likely circularly defined by the persecution feared because the group is "effectively defined to consist of women in Guatemala who are victims of domestic abuse." *Id*. at 335.

    - It is likely insufficiently particular because it is a group defined by "vulnerability to private criminal activity." *Id*.

    - It is likely insufficiently socially distinct because Guatemalan society likely saw group members as individual victims, rather than a group. *Id*. at 336. *A-B- I* also suggests that it was inappropriate to rely on negative cultural stereotypes to make the social distinction showing. *Id*. at 336 n.9.

- Stated that if the Board had fully analyzed nexus in *A-R-C-G-* it would likely have found it not established, because there was no evidence the persecutor was "aware of, and hostile to" her social group. *Id*. at 338-39. *A-B- I* also stated that, in general, it may be hard to establish nexus for harm occurring within a personal relationship. *Id.*

- Suggested that the failure of state protection requires a showing that the government condoned the violence or was completely helpless to protect the victims, and that there may be many reasons why a crime goes unpunished. *Id*. at 337-38.

- Vacated the Board's decision granting Ms. A.B. asylum and remanded for further consideration of her asylum claim. *Id*. at 346. *A-B- I* held that the Board overstepped its clear error review when reversing the IJ to grant Ms. A.B. asylum.

    - Specifically, the AG held that the Board inappropriately concluded that Ms. A.B. was credible; that she was a member of her social group; had established nexus;

and shown that the Salvadoran government was unable/unwilling to protect her. *Id*. at 340-44.

On January 14, 2021, the Acting AG issued *A-B- II*, 28 I&N Dec. at 199. In this subsequent decision in Ms. A.B.'s case, the AG:[7]

- Stated that nexus imposes a two-part test, under which applicants must show that their protected ground was a but-for cause of the persecution *and* that it is at least one central reason. *Id*. at 208-11.

- Explained that the "condoned/completely helpless" standard for state protection is "interchangeable" with the longstanding "unable/unwilling" test, emphasizing that several courts of appeals have used that language previously. *Id*. at 201-02.

- Emphasized that the government response must be severely lacking in order to satisfy the state protection standard; the response must be so inadequate as to constitute a breach of the state's basic duty to protect its citizens. *Id*. at 204-05. *A-B- II* suggests that failures in particular cases or high levels of crime alone are not sufficient to make this showing. *Id*. at 203-05.

- Suggested that an applicant's failure to report to the authorities is excusable only in "narrow circumstances" and will generally make it hard for the applicant to show inability/unwillingness to protect. *Id*. at 205 n.3.

- Suggested that there is overlap between internal relocation and state protection, in the sense that an adjudicator could consider whether the applicant could relocate to receive state protection. *Id*. at 207.

II. Evaluating *A-B- I & II* and Their Consistency with Prior Caselaw

A-B- I & II's holdings and reasoning present several points of tension with prior BIA and Ninth Circuit caselaw. This section reviews *A-B- I & II*'s consistency with prior precedent, discusses the decisions' reasoning in more detail, and provides overall recommendations as to how they should be reconciled with competing BIA and Ninth Circuit caselaw, respectively.

[7] The Acting AG's decision was issued without briefing from the parties, and without any application of these general principles to resolve Ms. A.B.'s case. This suggests that the entire decision may constitute nonbinding dicta. *See Route*, 996 F.3d at 976-77.

a. The General Rule Against Gang and Domestic Violence Claims

A-B- I opens with the general statement that claims based on gang and domestic violence will generally not qualify for asylum. 27 I&N Dec. at 320. While this general statement is not limited on its face to claims based on particular social groups, many people fleeing gang and domestic violence will ultimately present their asylum claims under the social group ground. This statement can be read as an attempt to prejudge the validity of these claims. However, any application of this statement to categorically foreclose social groups in these kinds of cases contravenes the requirement that social group analyses be made on a case-by-case basis, *see supra* at page 6-7 (discussing BIA and Ninth Circuit caselaw requiring social group determinations be made on a case-by-case basis).

The Ninth Circuit has already weighed in on this aspect of *A-B- I*, making clear that it "plainly does not endorse any sort of categorical exception" for social groups in such cases. *Diaz-Reynoso*, 968 F.3d at 1079. "Despite the general and *descriptive* observations set forth in the opinion, the Attorney General's *prescriptive* instruction is clear: the BIA must conduct the proper particular social group analysis on a case-by-case basis." *Id.* at 1080. When the Board has read *A-B- I*'s general statement to be a categorical rule against certain groups, the Ninth Circuit has found that to be reversible error. *Id.* at 1087-88.

Summary of Conflict: Categorical Rejection of a Social Group

The Ninth Circuit has made clear that *A-B- I* does not establish a categorical rule against certain social groups, which comports with the following cases holding that social group determinations must be made on a case-by-case basis:

- ***Acosta***, 19 I&N Dec. at 233; ***C-A-***, 23 I&N Dec. at 955; ***M-E-V-G-***, 26 I&N Dec. at 251; ***S-S-F-M-***, 29 I&N Dec. at 209-10; ***R-E-R-M-***, 29 I&N Dec. at 204-05.
    - This principle is a holding, rather than dicta, in the above-cited cases. The first three reaffirmed this principle in the course of establishing the framework for social group analysis. For *S-S-F-M-* and *R-E-R-M-*, this principle was offered as a primary justification for overruling prior precedent that suggested social group cognizability could be resolved through rulemaking.

- ***Diaz-Reynoso***, 968 F.3d at 1086; ***Pirir-Boc***, 750 F.3d at 1084.
    - This principle is a holding, rather than dicta, in the above-cited cases. *Diaz-Reynoso* specifically addresses this aspect of *A-B- I*, and its analysis is a primary basis for remand. Similarly, *Pirir-Boc* remands because the Board failed to perform the required evidence-based inquiry into the cognizability of the gang-based social group in that case.

Because there is contrary Ninth Circuit precedent directly on point, which accords with the overwhelming weight of BIA precedent, *A-B- I* cannot be read to establish a categorical rule against certain social groups in the Ninth Circuit.

b. Circular Social Groups

A-B- I's statement that the group "married Guatemalan women who are unable to leave their relationship" is likely circular presents a conflict with the Board and Ninth Circuit's articulation of the circularity principle. 27 I&N Dec. at 334-35. One possible explanation for this tension between *A-B- I* and prior caselaw is that the AG redefines the social group at issue before assessing its circularity; he recasts the group as "victims of domestic abuse," *id*. at 335, a group that could, in fact, be circular under the correct standard.[8] Had the AG considered the actual *A-R-C-G-* social group and correctly applied the circularity principle, he may not have reached the same conclusion.

As the Board puts it, the circularity principle means that a particular social group cannot "be defined *exclusively* by the *claimed persecution*." *M-E-V-G-*, 26 I&N Dec. at 242 (emphasis added). As the italicized words show, the Board's understanding of circularity only prohibits groups defined *entirely* by the specific harm the applicant is claiming as the persecutory harm in their case. *See also W-G-R-*, 26 I&N Dec. at 218; *A-M-E- & J-G-U-*, 24 I&N Dec. at 74; *C-A-*, 23 I&N Dec. at 960. Under the BIA's standard, if a group includes additional immutable characteristics and/or references harm that is *not* the persecution in the applicant's legal theory, the group should not be considered circular.

The Ninth Circuit has taken the same approach, directly addressing this aspect of *A-B- I* and explaining that references to persecution in the group definition alongside *other* immutable characteristics are not enough to disqualify the group as circular. *Diaz-Reynoso*, 968 F.3d at 1080-87. In *Diaz-Reynoso*, the Ninth Circuit also held that determining whether the group definition actually references the persecution at issue requires a fact-specific inquiry—again underlining the importance of a case-by-case analysis of group cognizability. *Id.* at 1087-88 (finding agency erred in not considering whether the inability to leave a relationship was caused by physical violence, rather than other social factors); *see supra* at page 6-7 (discussing case-by-case analysis).

[8] If the applicant's asylum claim is based on the fact that their past experience of domestic abuse puts them at risk of *different* harm—i.e., if the domestic abuse referenced is not the persecution the applicant fears—this group should not be considered circular. *See, e.g.*, *Lukwago v. Ashcroft*, 329 F.3d 157, 178-79 (3d Cir. 2003) (explaining that a group based on former status as a child soldier was not necessarily circular because that status made the applicant vulnerable to future, different harm).

Summary of Conflict: Circularity

A-B- I's articulation of the circularity principle conflicts with the following BIA and Ninth Circuit caselaw holding that a circular social group is one that is (1) defined *exclusively*; (2) by the particular harm the applicant claims as persecution:
 	
• ***M-E-V-G-***, 26 I&N Dec. at 242; ***W-G-R-***, 26 I&N Dec. at 218; ***A-M-E- & J-G-U-***, 24 I&N Dec. at 74 (stating the principle); ***C-A-***, 23 I&N Dec. at 960 (stating the principle).
  ○ This principle is a holding, rather than dicta, in *M-E-V-G-* and *W-G-R-* because it forms part of the Board's justification for requiring social distinction be established by the perspective of society, rather than the persecutor. This clarification was a central reason the Board decided to publish *M-E-V-G-* and *W-G-R-* and forms a core part of the decision's overall holding.
 	
• ***Diaz-Reynoso***, 968 F.3d at 1086.
  ○ This principle is a holding, rather than dicta, in *Diaz-Reynoso*. The court's explanation of the circularity principle was critical to its ultimate decision to remand the petitioner's case to the Board.
 	
A-B- I must be read consistent with Ninth Circuit precedent that directly addresses its circularity analysis and concludes that a group is not circular simply because it references harm alongside other immutable characteristics. The Ninth Circuit's approach is also consistent with the Board's longstanding articulation of the circularity standard.

c. Particularity and Private Criminal Activity

A-B- I's brief discussion of particularity suggests, without elaboration, that this element requires something more than a consistent benchmark for determining group membership. *Id*. at 335. This aspect of the decision appears to conflict with the stated standard for assessing particularity, which both the Board and Ninth Circuit have said is focused on definition clarity. *See supra* at page 10.

A-B- I also contains dicta saying that "groups defined by their vulnerability to private criminal activity likely lack" particularity, offering example groups from gang-based asylum claims that the AG perceived as too diffuse to be particular. 27 I&N Dec. at 335 (Ms. A.B. did not present a gang claim nor was her group defined by vulnerability to crime.) In support of this point, *A-B- I* cites *Barrios v. Holder*, 581 F.3d 849, 855 (9th Cir. 2009). But the relevant aspect of *Barrios* directly imports its analysis from *Ramos-Lopez v. Holder*, 563 F.3d 855, 861-62 (9th Cir. 2009). And *Ramos-Lopez* rejected a group as not particular because it was internally diverse—a holding

that has since been abrogated by *Henriquez-Rivas*, 707 F.3d at 1093-94, as discussed above. *See supra* at page 13.

d. Establishing Social Distinction

A-B- I also briefly addresses social distinction, criticizing *A-R-C-G-* for failing to adequately explain how the record evidence established the distinction of Ms. A.R.C.G.'s group. 27 I&N Dec. at 336. The AG expresses doubt that the *A-R-C-G-* group would be distinct in Guatemala, because society is more likely to view a member as "a victim of a particular abuser in highly individualized circumstances" than as a member of a group. *Id.* This line of reasoning seemingly conflates the question of whether a specific person is identifiable as belonging to the social group with the question of whether the social group actually exists. But the Board has made clear that establishing that the group is socially distinct does not require showing that it is easy for specific members to be identified. *W-G-R-*, 26 I&N Dec. at 216-17.

In the course of this discussion, the AG suggests that evidence of negative cultural stereotypes, like the prevalence of *machismo* in Guatemala, are not relevant to the *particularity* analysis. 27 I&N Dec. at 336 n.9. Because this point comes in the midst of the AG's discussion of the social distinction element, it is unclear whether the AG is also suggesting that such evidence is not relevant to social distinction. *Id.* at 336. If so, this aspect of *A-B- I* conflicts with both BIA and Ninth Circuit caselaw. *M-E-V-G-* specifically identified evidence of "discriminatory laws and policies" as well as "historical animosities" against a group as important avenues for establishing social distinction. 26 I&N Dec. at 244. And the Ninth Circuit has often cited this standard as an acceptable avenue for establishing social distinction and found that cultural biases against the group are important evidence of social distinction. *See, e.g.*, *Diaz-Torres v. Barr*, 963 F.3d 976, 980-81 (9th Cir. 2020); *Pirir-Boc*, 750 F.3d at 1084; *Acevedo Granados v. Garland,* 992 F.3d 755, 763-64 (9th Cir. 2021) (finding BIA erred in ignoring evidence that "Salvadoran society stigmatizes those with mental illness as 'locos'" when evaluating social distinction). Resurrection of *A-B- I & II* cannot wipe out these intervening precedents further entrenching the court's understanding of the term.

e. Nexus for Harm Inflicted Within a Personal Relationship

A-B- I suggested that when an applicant experiences violence within a personal relationship, their social group "may well not be 'one central reason' for the abuse[,]" casting doubt on nexus in such scenarios. 27 I&N Dec. at 338-39. However, *A-B- I* also recognizes that nexus is a "classic factual question," *id.* at 343, affirming that this language cannot dictate the nexus outcome in all cases where the applicant has a personal relationship with the persecutor. And the statutory nexus standard explicitly approves the validity of mixed-motive asylum claims. INA § 208(b)(1)(B)(I). To the extent *A-B- I* suggests that nexus cannot be established in the context of personal

relationships simply because there may often be additional, non-protected motives, that would squarely conflict with the statute.

Elsewhere, the Board has recognized nexus in cases where persecution was inflicted because of or in the context of a personal relationship, with no suggestion that such cases face additional hurdles to showing nexus. *See Matter of Kasinga*, 21 I&N Dec. 357, 366-67 (BIA 1996) (en banc) (finding nexus established based on fear of persecution inflicted by fellow members of tribe); *Matter of S-A-*, 22 I&N Dec. 1328, 1336 (BIA 2000) (finding nexus established when father persecuted daughter). And in the Board's comprehensive assessment of the nexus standard following the REAL ID Act, it made no suggestion that acts of harm based on a personal relationship are generally unlikely to establish nexus—despite the fact that the respondents in that case claimed asylum based on a fear of harm from their relatives. *Matter of J-B-N- & S-M-*, 24 I&N Dec. 208, 215-16 (BIA 2007).

The Ninth Circuit has likewise repeatedly held that there "is no exception to the asylum statute for violence from family members…." *Faruk v. Ashcroft*, 378 F.3d 940, 943 (9th Cir. 2004); *Kaur v. Garland*, 2 F.4th 823, 835 (9th Cir. 2021) (nexus prima facie established when petitioner's status within her family was a central reason for her persecution); *Mohammed*, 400 F.3d at 798 n.19 (nexus established when persecution was inflicted by family members); *cf. Sagaydak v. Gonzales*, 405 F.3d 1035, 1044 (9th Cir. 2005) (acknowledging that personal retribution motive can coexist alongside political motive).

Summary of Conflict: Harm Within Relationships
A-B- I's suggestion that nexus is generally not present when persecution is inflicted within a personal relationship is generally inconsistent with the prior BIA caselaw analyzing nexus in such scenarios, *see supra*, and directly conflicts with the following Ninth Circuit cases: • ***Faruk*****,** 378 F.3d at 943; ***Kaur***, 2 F.4th at 834-35.   o This principle is a holding, rather than dicta, in these cases because the agency's discounting of harm because it was committed by family members was a key reason the court vacated and remanded. Because there is contrary Ninth Circuit precedent directly on point, which accords with the way the BIA has generally analyzed nexus in relevant cases, the Ninth Circuit's view must control over *A-B- I.*

f. Two-Part Nexus Framework

A-B- II establishes a two-part test for nexus, requiring the applicant to prove both (1) but-for causation; and (2) that the protected ground was at least one central reason for the harm. 28 I&N

Dec. at 208. *A-B- II* states that this two-part test was first established in *Matter of L-E-A- I*, 27 I&N Dec. 40 (BIA 2017). *A-B- II*, 28 I&N Dec. at 208-09.

A-B- II appears to overread *L-E-A- I* on this point. *L-E-A- I* simply applied the statutory nexus standard, which only requires applicants to establish that their protected ground was at least one central reason for the harm. 27 I&N Dec. at 45-47. Specifically, *L-E-A- I* states that if the *only* reason for an act of persecution is an unprotected motive (e.g., financial gain), then the protected ground will not be a central reason for the harm. *Id*. at 45. But that statement is a natural application of the statutory nexus standard. *L-E-A- I* does not import a but-for causation standard into its analysis, instead adhering to the statutory language which is focused only on identifying central versus incidental motives. *Id.* at 45-46; *see J-B-N- & S-M-*, 24 I&N Dec. at 212-14 (setting forth the Board's comprehensive assessment of the nexus standard following the REAL ID Act and not requiring but-for causation).

A-B- II's two-part test is partially consistent with Ninth Circuit caselaw, as the court has acknowledged that a but-for cause that plays a central role in persecution will satisfy nexus. *Rodriguez Tornes v. Garland*, 993 F.3d 743, 751-52 (9th Cir. 2021) (accepting this part of *A-B- II*'s analysis). However, since *A-B- II* presents its two-part test as the *only* way to establish nexus, it conflicts with *Manzano v. Garland*, 104 F.4th 1202 (9th Cir. 2024). In *Manzano*, the Ninth Circuit held that there are "at least two ways" to meet the statutory nexus standard. *Id.* at 1207. Establishing but-for causation is one way, but the court has long recognized that nexus can be established in the absence of but-for causation if the applicant can show that the protected ground "standing alone, would have led the persecutor to harm the applicant." *Id.* (citation modified).

Summary of Conflict: Nexus Framework

A-B- II's imposition of a two-part framework for the nexus analysis conflicts with the following BIA and Ninth Circuit cases, which do not require applicants to show but-for causation in order to establish nexus:

- ***L-E-A- I***, 27 I&N Dec. at 44-46; ***J-B-N- & S-M-***, 24 I&N Dec. at 212-14.
    - This principle is a holding, rather than dicta, in these cases. In both, nexus was the dispositive issue and the Board explained its general view of the nexus standard before applying its framework to the applicant.

- ***Manzano***, 104 F.4th at 1207-09.
    - This principle is a holding, rather than dicta, in *Manzano* because nexus was the sole issue addressed by the court. The court explained its view of the general nexus framework at length.

Because there the Ninth Circuit has directly rejected the idea that but-for causation must be established in every case, and because the Board's own precedents adhere to the statutory "one central reason" test without adding additional requirements, these cases control over *A-B- II*.

g. Condoned/Completely Helpless Standard for State Protection

The state protection requirement has long been understood as requiring that persecution be inflicted "either by the government of a country or by persons or an organization that the government was unable or unwilling to control." *Acosta*, 19 I&N Dec. at 222.

A-B- I & II introduce an alternative articulation of this element, stating that the applicant must establish that "the government condoned the private actions or at least demonstrated a complete helplessness to protect the victims." *A-B- I*, 27 I&N Dec. at 337. In *A-B- II*, the AG clarified that this alternative language should be interpreted as equivalent to the "unable/unwilling" standard, disclaiming any intention to heighten the standard for state protection. 28 I&N Dec. at 201. While other circuits have used the "condoned/completely helpless" language in the past, the Ninth Circuit has never done so.

Because *A-B- II* expressly states that the language does not change or heighten the longstanding "unable/unwilling" test, there does not appear to be a conflict with Ninth Circuit law.[9] However, some aspects of *A-B- II* can be read to suggest that the AG interprets the state protection standard differently than the Ninth Circuit. For example, the AG states that if a government takes action to punish wrongdoers, that may show that the government is able/willing to control the persecutor. 28 I&N Dec. at 205. The AG also suggests that a lacking response to the applicant's own requests for help is not necessarily dispositive on the state's inability/unwillingness to control. *Id.* In contrast, the Ninth Circuit has held that the failure of state protection may be established even when there has been some action taken against the persecutors. *Madrigal v. Holder*, 716 F.3d 499, 506-07 (9th Cir. 2013). The court has also found unwillingness to protect based solely on the lacking police response to an applicant's own reports. *Doe v. Holder*, 736 F.3d 871, 878-79 (9th Cir. 2013).

[9] *A-B- II* also suggests that the internal relocation analysis can be part of the assessment of a government's ability/willingness to protect the applicant. *A-B- II*, 28 I&N Dec. at 207. But the regulatory framework makes clear that internal relocation is an independent element of a claim, and that the burden is often on the government to establish the reasonableness of relocation, rather than on the applicant. 8 C.F.R. § 1208.13(b) (2020). Likewise, the Ninth Circuit regularly analyzes state protection and internal relocation as distinct elements of an asylum claim. *See, e.g.*, *Doe*, 736 F.3d at 879-80; *Rodriguez Tornes*, 993 F.3d at 754-55. The court has also emphasized that applicants do not need to show inability/unwillingness to protect on a countrywide basis, stating that "an asylum applicant may meet her burden with evidence that the government was unable or unwilling to control the persecution in the applicant's home city or area." *Mashiri v. Ashcroft*, 383 F.3d 1112, 1122 (9th Cir. 2004).

A-B- II does cite two Ninth Circuit cases in the course of its broader discussion of how the "condoned/completely helpless" language should be understood. It relies on *Nahrvani v. Gonzales*, 399 F.3d 1148 (9th Cir. 2005), for the idea that inability to eradicate private crime does not establish the failure of state protection. *A-B- II*, 28 I&N Dec. at 206. But *Nahrvani* does not stand for that proposition. Nor could it, given that the standard is not whether the state has fully eradicated the fear, but whether the individual's fear is well-founded. Instead, *Nahrvani* found that the petitioner's claim that the German police refused to investigate his reports was not sufficient because (1) he did not know the names of any suspects, so could not provide them to the police; and (2) his wife's testimony directly contradicted his claim, as she reported that the police did indeed investigate. *Nahrvani*, 399 F.3d at 1154.

A-B- II also cites *Velasquez-Gaspar v. Barr*, 976 F.3d 1062 (9th Cir. 2020), for the proposition that some amount of effort on the part of the government will foreclose a showing that they are unable/unwilling to control the persecutor. *A-B- II*, 28 I&N Dec. at 204. *Velasquez-Gaspar* holds that the petitioner in that case had not satisfied her burden to show that the Guatemalan government was unable/unwilling to protect women from violence. 976 F.3d at 1064. Importantly, the court's decision was made on the record in that case, and under a deferential standard of review to the agency's initial conclusion; that record-specific outcome does not stand for the proposition that any government efforts to protect its citizens will always preclude applicants from establishing the failure of state protection.

h. Failure to Report Persecution to Authorities

A-B- II suggests in a footnote that when an applicant has not reported persecution to the authorities in their country of origin, it will generally be difficult to establish that the government is unable or unwilling to protect them. 28 I&N Dec. at 205 n.3. *A-B- II* states that failure to report may be excused only in "narrow circumstances," such as a showing that the authorities would have been unable/unwilling to offer protection even if they had reported. *Id.*

This aspect of *A-B- II* is somewhat inconsistent with Board precedent recognizing that reporting persecution is not required if it would have been futile *or* dangerous for the applicant to do so. *S-A-*, 22 I&N Dec. at 1333. While *A-B- II* acknowledges that reporting is not required if the applicant can show it would have been futile do so, it does not acknowledge that danger to the applicant is another recognized basis for not reporting. Additionally, *S-A-* does not suggest that applicants who do not report will generally be unable to show the failure of state protection, creating further tension with *A-B- II*. *S-A-*, 22 I&N Dec. at 1335. *A-B- II* is also internally inconsistent on this point, as the decision elsewhere states that the treatment an individual applicant received is not dispositive on state protection, directing adjudicators to focus on the broader context rather than the applicant's own experiences. 28 I&N Dec. at 205.

The en banc Ninth Circuit has also affirmed that "a victim of abuse need not report it to government authorities to establish the government's inability or unwillingness to protect him." *Bringas-Rodriguez v. Sessions*, 850 F.3d 1051, 1064 (9th Cir. 2017) (en banc). The court adopted the same standard as the Board, explaining that reporting is not required if it would have been futile or dangerous for the applicant. *Id.* at 1065. *A-B- II* also stands in direct conflict with *Bringas-Rodriguez*'s core holding: an applicant who does not report their persecution to the police is not subject to a higher state protection standard as a result. 850 F.3d at 1069-70.

Summary of Conflict: State Protection Standard
A-B- II's statement that failure to report persecution is only justified if the applicant shows it would be futile to report, and its statement that applicants who do not report will generally be unable to establish he failure of state protection conflict with the following cases. Both cases clarify that reporting is not required if it would be futile *or* dangerous to do so and do not impose a higher standard on people who do not report: • ***S-A-***, 22 I&N Dec. at 1333-35. o This principle is a holding, rather than dicta, in *S-A-* because the state protection analysis was a necessary part of the Board's overall decision to grant Ms. S.A. asylum. • ***Bringas-Rodriguez*****,** 850 F.3d at 1065-71. o This principle is a holding, rather than dicta, in *Bringas-Rodriguez* because the en banc court convened to address the specific question of how the state protection analysis should proceed for applicants who do not report their persecution. Because there the Ninth Circuit has directly rejected the idea that applicants who do not report persecution are subject to a higher evidentiary burden, and because both the Ninth Circuit and longstanding Board precedent recognize that failure to report is excused upon a showing of futility or dangerousness, these decisions must control over *A-B- II*.

PART IV: Summary of Applicable Standards for Cases in the Ninth Circuit

For the reasons laid out above, the following standards apply to gender-based asylum claims in the Ninth Circuit (as well as asylum claims brought under other bases):

- Application of the three-part test for social group cognizability, as articulated in *M-E-V-G-* and *Reyes*.

- Recognition that sex is an immutable characteristic, as recognized by *Acosta* and *K-E-S-G-*.

- Acknowledgment that *K-E-S-G-*'s general statement about the viability of "sex" or "sex + nationality" groups cannot be a read as a categorical bar, pursuant to *Acosta* and *Pirir-Boc*.

- Acknowledgment that *A-B- I*'s statement that most domestic violence and gang claims will not qualify for asylum cannot be read as a categorical bar, pursuant to *Acosta* and *Diaz-Reynoso*.

- Application of a careful, case-by-case analysis of social group cognizability, considering whether particularity (and the other elements) is established on the record in each case.

    - When evaluating particularity, the question is whether the terms used to define the group are subjective/amorphous or if they provide a clear and consistent benchmark for determining group membership, as articulated in *M-E-V-G-* and *Reyes*.

- Adherence to *Perdomo*'s holding that the size and breadth of a group is not a basis for rejecting it as non-particular.

- Adherence to *Henriquez-Rivas*'s holding that "diversity of lifestyle and origin [are not] the *sine que non* of 'particularity' analysis," 707 F.3d at 1094.

- Application of the circularity principle to only reject groups defined exclusively by the persecution feared and only after conducting a case-by-case analysis as to whether the group actually references the persecutory harm, as articulated in *Diaz-Reynoso*.

- Adherence to *Manzano*'s holding that nexus does not always require a showing of but-for causation.

- Recognition that nexus can be established when harm is inflicted within a personal relationship and there is no differential analysis for harm inflicted by family members, pursuant to *Faruk.*

- Application of the longstanding "unable/unwilling" standard for the failure of state protection, as applied in Ninth Circuit precedents, since *A-B- II* acknowledges this standard was not changed.

- Recognition that a failure to report persecution can be explained by a showing that it would be futile or dangerous to do so, and that people who fail to report are not subject to a heightened evidentiary burden, pursuant to *S-A-* and *Bringas-Rodriguez*.

- Separate analysis of the state protection and internal relocation elements, which is mandated by regulation and affirmed by *Mashiri*, which clarifies that applicants need not establish a countrywide inability or unwillingness to control their persecutor.

PART V: Situating *K-E-S-G-* and *A-B- I & II* in the Broader Context of Gender-Based Asylum Claims

While *K-E-S-G-*, *A-B- I*, and *A-B- II* address some of the more common bases for asylum claims brought by people fleeing gender-based harms, there are a number of other formulations and approaches, some of which are described below. Importantly, none of these formulations are altered by *K-E-S-G-*, *A-B- I*, or *A-B- II*.

- **Political opinion claims.** The Ninth Circuit recognizes that feminism constitutes a qualifying political opinion and recognizes that domestic abuse inflicted on an applicant because she sought to occupy "an equal perch in the social hierarchy" was persecution on account of political opinion. *Rodriguez Tornes*, 993 F.3d at 753.

- **Per se political opinion claims.** The INA establishes a "per se" political opinion at INA § 101(a)(42)(B). Under this provision, anyone who is "forced to abort a pregnancy or to undergo involuntary sterilization, or who has been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program" has necessarily established persecution on account of their political opinion. *Id.* For women who have experienced forced abortions, miscarriages caused by violence, or otherwise meet this statutory standard, they may seek protection based on their per se political opinion.

- **Race claims.** In many cases, gender-based violence has been inflicted at least in part due to an applicant's racial identity or skin tone. *See, e.g.*, *Shoafera v. INS*, 228 F.3d 1070, 1074-75 (9th Cir. 2000). In these cases, applicants may establish either a standalone claim based on the "race" protected ground and/or seek protection based on a social group that references their racial identity, as discussed below.

- **Religion claims.** Similarly, in cases where an applicant's religion motivates gender-based violence, a standalone religion claim offers another basis for protection; religious beliefs may also support a social group claim, as discussed below. Religious persecution includes acts to prevent a person from worshipping as they wish, a form of persecution that may

be present in domestic violence contexts. *De Souza Silva v. Bondi*, 139 F.4th 1137, 1143-44 (9th Cir. 2025).

- **FGC claims.** *K-E-S-G-* explicitly notes that while it casts doubt on "sex + nationality" groups, its reasoning does not impact "the viability of [FGC] claims." 29 I&N Dec. at 151 n.8. Since 1996, the BIA has recognized that social groups based on resistance to FGC practices can be a viable basis for protection. *Kasinga*, 21 I&N Dec. at 365-66.

- **Particular social groups involving one additional characteristic.** *K-E-S-G-* also explicitly notes that its concerns about "sex + nationality" groups do not extend to groups that include additional modifiers, e.g., Guatemalan *Indigenous* women. 29 I&N Dec. at 153 n.10. Groups that reference sex and nationality but also include additional modifiers (e.g., referencing religious beliefs, racial identity, or other immutable characteristics) are thus unaffected by *K-E-S-G-*. *See, e.g.*, *Antonio v. Garland*, 58 F.4th at 1076-77 (suggesting that "women in Guatemala perceived to be lesbian" may be a cognizable group); *Akosung v. Barr*, 970 F.3d 1095, 1103-04 (9th Cir. 2020) ("women resistant to forced marriage proposals"); *Hernandez-Montiel*, 225 F.3d at 1094 ("gay men with female sexual identities in Mexico").

Finally, neither *K-E-S-G-*, *A-B- I*, nor *A-B- II* set out a categorical ban on groups framed as "gender + nationality" or groups that include an "unable to leave" modifier, *see supra* pages 6, 18. These groups remain viable so long as the individual applicant can show that the record in their case establishes the cognizability of the group. *See, e.g.*, *Diaz-Reynoso*, 968 F.3d at 1090 (remanding for further consideration of "Indigenous women in Guatemala who are unable to leave their relationship").